

By: Smithee

H.B. No. 39

A BILL TO BE ENTITLED

AN ACT

relating to guardianships for incapacitated persons.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 1001.001(b), Estates Code, is amended to read as follows:

(b) In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including allowing the incapacitated person to make personal decisions regarding the person's residence.

SECTION 2. Chapter 1002, Estates Code, is amended by adding Sections 1002.0015 and 1002.031 to read as follows:

Sec. 1002.0015. ALTERNATIVES TO GUARDIANSHIP.

"Alternatives to guardianship" includes the:

(1) execution of a medical power of attorney under Chapter 166, Health and Safety Code;

(2) appointment of an attorney in fact or agent under a durable power of attorney as provided by Subtitle P, Title 2;

(3) execution of a declaration for mental health treatment under Chapter 137, Civil Practices and Remedies Code;

(4) appointment of a representative payee to manage public benefits;

(5) establishment of a joint bank account;

- 1 (6) creation of a management trust under Chapter 1301;
- 2 (7) creation of a special needs trust;
- 3 (8) designation of a guardian before the need arises
- 4 under Subchapter E, Chapter 1104; and
- 5 (9) establishment of alternate forms of
- 6 decision-making based on person-centered planning.

7 Sec. 1002.031. SUPPORTS AND SERVICES. "Supports and

8 services" means available formal and informal resources and

9 assistance that enable an individual to:

- 10 (1) meet the individual's needs for food, clothing, or
- 11 shelter;
- 12 (2) care for the individual's physical or mental
- 13 health;
- 14 (3) manage the individual's financial affairs; or
- 15 (4) make personal decisions regarding residence,
- 16 voting, operating a motor vehicle, and marriage.

17 SECTION 3. Section [1002.015](#), Estates Code, is amended to

18 read as follows:

19 Sec. 1002.015. GUARDIANSHIP PROCEEDING. The term

20 "guardianship proceeding" means a matter or proceeding related to a

21 guardianship or any other matter covered by this title, including:

- 22 (1) the appointment of a guardian of a minor or other
- 23 incapacitated person, including an incapacitated adult for whom
- 24 another court obtained continuing, exclusive jurisdiction in a suit
- 25 affecting the parent-child relationship when the person was a
- 26 child;
- 27 (2) an application, petition, or motion regarding

1 guardianship or a substitute for [~~an alternative to~~] guardianship
2 under this title;

3 (3) a mental health action; and

4 (4) an application, petition, or motion regarding a
5 trust created under Chapter 1301.

6 SECTION 4. Section 1054.004, Estates Code, is amended by
7 amending Subsection (a) and adding Subsections (c) and (d) to read
8 as follows:

9 (a) An attorney ad litem appointed under Section 1054.001
10 shall interview the proposed ward within a reasonable time before
11 the hearing in the proceeding for the appointment of a
12 guardian. To the greatest extent possible, the attorney shall
13 discuss with the proposed ward:

14 (1) the law and facts of the case;

15 (2) the proposed ward's legal options regarding
16 disposition of the case; [~~and~~]

17 (3) the grounds on which guardianship is sought; and

18 (4) whether alternatives to guardianship would meet
19 the needs of the proposed ward and avoid the need for the
20 appointment of a guardian.

21 (c) Before the hearing, the attorney ad litem shall
22 investigate whether:

23 (1) a guardianship is necessary for the proposed ward;
24 and

25 (2) if the attorney ad litem determines that a
26 guardianship is necessary, specific powers or duties of the
27 guardian should be limited if the proposed ward receives supports

1 and services.

2 (d) If the attorney ad litem determines that a guardianship
3 is necessary, the attorney must certify to the court that the
4 guardianship is necessary and reasonable efforts have been made to
5 explore alternatives to guardianship and supports and services
6 available to the proposed ward that would avoid the need for the
7 appointment of a guardian.

8 SECTION 5. Section 1054.054, Estates Code, is amended by
9 adding Subsections (c) and (d) to read as follows:

10 (c) The guardian ad litem shall:

11 (1) investigate whether a guardianship is necessary
12 for the proposed ward; and

13 (2) evaluate alternatives to guardianship and
14 supports and services available to the proposed ward that would
15 avoid the need for appointment of a guardian.

16 (d) The information gathered by the guardian ad litem under
17 Subsection (c) is subject to examination by the court.

18 SECTION 6. Sections 1054.201(a) and (b), Estates Code, are
19 amended to read as follows:

20 (a) An attorney for an applicant for guardianship and a [A]
21 court-appointed attorney in a guardianship proceeding, including
22 an attorney ad litem, must be certified by the State Bar of Texas,
23 or a person or other entity designated by the state bar, as having
24 successfully completed a course of study in guardianship law and
25 procedure sponsored by the state bar or the state bar's designee.

26 (b) The State Bar of Texas shall require four [~~three~~] hours
27 of credit for certification under this subchapter, including one

1 hour on alternatives to guardianship and supports and services
2 available to proposed wards.

3 SECTION 7. Section 1101.001(b), Estates Code, is amended to
4 read as follows:

5 (b) The application must be sworn to by the applicant and
6 state:

7 (1) the proposed ward's name, sex, date of birth, and
8 address;

9 (2) the name, relationship, and address of the person
10 the applicant seeks to have appointed as guardian;

11 (3) whether guardianship of the person or estate, or
12 both, is sought;

13 (3-a) whether alternatives to guardianship and
14 available supports and services to avoid guardianship were
15 considered;

16 (3-b) whether any alternatives to guardianship and
17 supports and services available to the proposed ward considered are
18 feasible and would avoid the need for a guardianship;

19 (4) the nature and degree of the alleged incapacity,
20 the specific areas of protection and assistance requested, and the
21 limitation or termination of rights requested to be included in the
22 court's order of appointment, including a termination of:

23 (A) the right of a proposed ward who is 18 years
24 of age or older to vote in a public election; ~~and~~

25 (B) the proposed ward's eligibility to hold or
26 obtain a license to operate a motor vehicle under Chapter 521,
27 Transportation Code; and

1 (C) the right of a proposed ward to make personal
2 decisions regarding residence;

3 (5) the facts requiring the appointment of a guardian;

4 (6) the interest of the applicant in the appointment
5 of a guardian;

6 (7) the nature and description of any kind of
7 guardianship existing for the proposed ward in any other state;

8 (8) the name and address of any person or institution
9 having the care and custody of the proposed ward;

10 (9) the approximate value and description of the
11 proposed ward's property, including any compensation, pension,
12 insurance, or allowance to which the proposed ward may be entitled;

13 (10) the name and address of any person whom the
14 applicant knows to hold a power of attorney signed by the proposed
15 ward and a description of the type of power of attorney;

16 (11) for a proposed ward who is a minor, the following
17 information if known by the applicant:

18 (A) the name of each of the proposed ward's
19 parents and either the parent's address or that the parent is
20 deceased;

21 (B) the name and age of each of the proposed
22 ward's siblings, if any, and either the sibling's address or that
23 the sibling is deceased; and

24 (C) if each of the proposed ward's parents and
25 adult siblings are deceased, the names and addresses of the
26 proposed ward's other living relatives who are related to the
27 proposed ward within the third degree by consanguinity and who are

1 adults;

2 (12) for a proposed ward who is a minor, whether the
3 minor was the subject of a legal or conservatorship proceeding in
4 the preceding two years and, if so:

5 (A) the court involved;

6 (B) the nature of the proceeding; and

7 (C) any final disposition of the proceeding;

8 (13) for a proposed ward who is an adult, the following
9 information if known by the applicant:

10 (A) the name of the proposed ward's spouse, if
11 any, and either the spouse's address or that the spouse is deceased;

12 (B) the name of each of the proposed ward's
13 parents and either the parent's address or that the parent is
14 deceased;

15 (C) the name and age of each of the proposed
16 ward's siblings, if any, and either the sibling's address or that
17 the sibling is deceased;

18 (D) the name and age of each of the proposed
19 ward's children, if any, and either the child's address or that the
20 child is deceased; and

21 (E) if there is no living spouse, parent, adult
22 sibling, or adult child of the proposed ward, the names and
23 addresses of the proposed ward's other living relatives who are
24 related to the proposed ward within the third degree by
25 consanguinity and who are adults;

26 (14) facts showing that the court has venue of the
27 proceeding; and

1 (15) if applicable, that the person whom the applicant
2 seeks to have appointed as a guardian is a private professional
3 guardian who is certified under Subchapter C, Chapter 155,
4 Government Code, and has complied with the requirements of
5 Subchapter G, Chapter 1104.

6 SECTION 8. Section 1101.101, Estates Code, is amended by
7 amending Subsection (a) and adding Subsection (c) to read as
8 follows:

9 (a) Before appointing a guardian for a proposed ward, the
10 court must:

11 (1) find by clear and convincing evidence that:

12 (A) the proposed ward is an incapacitated person;

13 (B) it is in the proposed ward's best interest to
14 have the court appoint a person as the proposed ward's guardian;
15 ~~and~~

16 (C) the proposed ward's rights or property will
17 be protected by the appointment of a guardian;

18 (D) alternatives to guardianship that would
19 avoid the need for the appointment of a guardian have been
20 considered and determined not to be feasible; and

21 (E) supports and services available to the
22 proposed ward that would avoid the need for the appointment of a
23 guardian have been considered and determined not to be feasible;

24 and

25 (2) find by a preponderance of the evidence that:

26 (A) the court has venue of the case;

27 (B) the person to be appointed guardian is

1 eligible to act as guardian and is entitled to appointment, or, if
2 no eligible person entitled to appointment applies, the person
3 appointed is a proper person to act as guardian;

4 (C) if a guardian is appointed for a minor, the
5 guardianship is not created for the primary purpose of enabling the
6 minor to establish residency for enrollment in a school or school
7 district for which the minor is not otherwise eligible for
8 enrollment; and

9 (D) the proposed ward:

10 (i) is totally without capacity as provided
11 by this title to care for himself or herself and to manage his or her
12 property; or

13 (ii) lacks the capacity to do some, but not
14 all, of the tasks necessary to care for himself or herself or to
15 manage his or her property.

16 (c) A finding under Subsection (a)(2)(D)(ii) must
17 specifically state whether the proposed ward lacks the capacity,
18 with or without supports and services, to make personal decisions
19 regarding residence, voting, operating a motor vehicle, and
20 marriage.

21 SECTION 9. Section 1101.103(b), Estates Code, is amended to
22 read as follows:

23 (b) The letter or certificate must:

24 (1) describe the nature, degree, and severity of the
25 proposed ward's incapacity, including any functional deficits
26 regarding the proposed ward's ability to:

27 (A) handle business and managerial matters;

- 1 (B) manage financial matters;
- 2 (C) operate a motor vehicle;
- 3 (D) make personal decisions regarding residence,
- 4 voting, and marriage; and

- 5 (E) consent to medical, dental, psychological,
- 6 or psychiatric treatment;

7 (2) in providing a description under Subdivision (1)
8 regarding the proposed ward's ability to operate a motor vehicle
9 and make personal decisions regarding voting, state whether in the
10 physician's opinion the proposed ward:

- 11 (A) has the mental capacity to vote in a public
- 12 election; and

- 13 (B) has the ability to safely operate a motor
- 14 vehicle;

15 (3) provide an evaluation of the proposed ward's
16 physical condition and mental functioning [~~function~~] and summarize
17 the proposed ward's medical history if reasonably available;

18 (3-a) in providing an evaluation under Subdivision
19 (3), state whether improvement in the proposed ward's physical
20 condition and mental functioning is possible and, if so, state the
21 period after which the proposed ward should be reevaluated to
22 determine whether a guardianship continues to be necessary;

23 (4) state how or in what manner the proposed ward's
24 ability to make or communicate responsible decisions concerning
25 himself or herself is affected by the proposed ward's physical or
26 mental health, including the proposed ward's ability to:

- 27 (A) understand or communicate;

- 1 (B) recognize familiar objects and individuals;
- 2 (C) solve problems [~~perform simple~~
3 ~~calculations~~];
- 4 (D) reason logically; and
- 5 (E) administer to daily life activities with and
6 without supports and services;
- 7 (5) state whether any current medication affects the
8 proposed ward's demeanor or the proposed ward's ability to
9 participate fully in a court proceeding;
- 10 (6) describe the precise physical and mental
11 conditions underlying a diagnosis of a mental disability, and state
12 whether the proposed ward would benefit from supports and services
13 that would allow the individual to live in the least restrictive
14 setting;
- 15 (6-a) state whether a guardianship is necessary for
16 the proposed ward and, if so, whether specific powers or duties of
17 the guardian should be limited if the proposed ward receives
18 supports and services; and
- 19 (7) include any other information required by the
20 court.

21 SECTION 10. Sections 1101.151(a) and (b), Estates Code, are
22 amended to read as follows:

23 (a) If it is found that the proposed ward is totally without
24 capacity to care for himself or herself, manage his or her property,
25 operate a motor vehicle, make personal decisions regarding
26 residence, and vote in a public election, the court may appoint a
27 guardian of the proposed ward's person or estate, or both, with full

1 authority over the incapacitated person except as provided by law.

2 (b) An order appointing a guardian under this section must
3 contain findings of fact and specify:

4 (1) the information required by Section 1101.153(a);

5 (2) that the guardian has full authority over the
6 incapacitated person;

7 (3) if necessary, the amount of funds from the corpus
8 of the person's estate the court will allow the guardian to spend
9 for the education and maintenance of the person under Subchapter A,
10 Chapter 1156;

11 (4) whether the person is totally incapacitated
12 because of a mental condition;

13 (5) that the person does not have the capacity to
14 operate a motor vehicle, make personal decisions regarding
15 residence, and ~~to~~ vote in a public election; and

16 (6) if it is a guardianship of the person of the ward
17 or of both the person and the estate of the ward, the rights of the
18 guardian with respect to the person as specified in Section
19 1151.051(c)(1).

20 SECTION 11. Sections 1101.152(a) and (b), Estates Code, are
21 amended to read as follows:

22 (a) If it is found that the proposed ward lacks the capacity
23 to do some, but not all, of the tasks necessary to care for himself
24 or herself or to manage his or her property with or without supports
25 and services, the court may appoint a guardian with limited powers
26 and permit the proposed ward to care for himself or herself,
27 including making personal decisions regarding residence, or to

1 manage his or her property commensurate with the proposed ward's
2 ability.

3 (b) An order appointing a guardian under this section must
4 contain findings of fact and specify:

5 (1) the information required by Section 1101.153(a);

6 (2) the specific powers, limitations, or duties of the
7 guardian with respect to the person's care or the management of the
8 person's property by the guardian;

9 (2-a) the specific rights and powers retained by the
10 person:

11 (A) with the necessity for supports and services;

12 and

13 (B) without the necessity for supports and
14 services;

15 (3) if necessary, the amount of funds from the corpus
16 of the person's estate the court will allow the guardian to spend
17 for the education and maintenance of the person under Subchapter A,
18 Chapter 1156; and

19 (4) whether the person is incapacitated because of a
20 mental condition and, if so, whether the person:

21 (A) retains the right to make personal decisions
22 regarding residence or vote in a public election; or

23 (B) maintains eligibility to hold or obtain a
24 license to operate a motor vehicle under Chapter 521,
25 Transportation Code.

26 SECTION 12. Section 1101.153, Estates Code, is amended by
27 adding Subsection (a-1) to read as follows:

1 (a-1) If the letter or certificate under Section
2 1101.103(b)(3-a) stated that improvement in the ward's physical
3 condition or mental functioning is possible and specified a period
4 of less than a year after which the ward should be reevaluated to
5 determine continued necessity for the guardianship, an order
6 appointing a guardian must include the date by which the guardian
7 must submit to the court an updated letter or certificate
8 containing the requirements of Section 1101.103(b).

9 SECTION 13. Section 1104.002, Estates Code, is amended to
10 read as follows:

11 Sec. 1104.002. PREFERENCE OF INCAPACITATED PERSON. Before
12 appointing a guardian, the court shall make a reasonable effort to
13 consider the incapacitated person's preference of the person to be
14 appointed guardian and, to the extent consistent with other
15 provisions of this title, shall give due consideration to the
16 preference indicated by the incapacitated person, regardless of
17 whether the person has designated by declaration a guardian before
18 the need arises under Subchapter E.

19 SECTION 14. Section 1151.051, Estates Code, is amended by
20 adding Subsection (e) to read as follows:

21 (e) Notwithstanding Subsection (c)(1) and except in cases
22 of emergency, a guardian of the person of a ward may only place the
23 ward in a more restrictive care facility if:

24 (1) the guardian files an application with the court;
25 (2) the guardian provides notice to any persons who
26 have requested notice; and

27 (3) the placement is authorized by court order.

1 SECTION 15. Sections 1202.001(b) and (c), Estates Code, are
2 amended to read as follows:

3 (b) A guardianship shall be settled and closed when the
4 ward:

5 (1) dies and, if the ward was married, the ward's
6 spouse qualifies as survivor in community;

7 (2) is found by the court to have full capacity, with
8 or without supports and services, to care for himself or herself and
9 to manage the ward's property;

10 (3) is no longer a minor; or

11 (4) no longer must have a guardian appointed to
12 receive funds due the ward from any governmental source.

13 (c) Except for an order issued under Section 1101.153(a-1),
14 an [An] order appointing a guardian or a successor guardian may
15 specify a period of not more than one year during which a petition
16 for adjudication that the ward no longer requires the guardianship
17 may not be filed without special leave.

18 SECTION 16. Section 1202.051, Estates Code, is amended to
19 read as follows:

20 Sec. 1202.051. APPLICATION AUTHORIZED. A ward or any
21 person interested in the ward's welfare may file a written
22 application with the court for an order:

23 (1) finding that the ward is no longer an
24 incapacitated person and ordering the settlement and closing of the
25 guardianship;

26 (2) finding that the ward lacks the capacity, with or
27 without supports and services, to do some or all of the tasks

1 necessary to provide food, clothing, or shelter for himself or
2 herself, to care for the ward's own physical health, or to manage
3 the ward's own financial affairs and granting additional powers or
4 duties to the guardian; or

5 (3) finding that the ward has the capacity, with or
6 without supports and services, to do some, but not all, of the tasks
7 necessary to provide food, clothing, or shelter for himself or
8 herself, to care for the ward's own physical health, or to manage
9 the ward's own financial affairs and:

10 (A) limiting the guardian's powers or duties; and

11 (B) permitting the ward to care for himself or
12 herself, make personal decisions regarding residence, or [~~to~~]
13 manage the ward's own financial affairs commensurate with the
14 ward's ability, with or without supports and services.

15 SECTION 17. Section 1202.151(a), Estates Code, is amended
16 to read as follows:

17 (a) Except as provided by Section 1202.201, at a hearing on
18 an application filed under Section 1202.051, the court shall
19 consider only evidence regarding the ward's mental or physical
20 capacity at the time of the hearing that is relevant to the complete
21 restoration of the ward's capacity or modification of the ward's
22 guardianship, including whether:

23 (1) the guardianship is necessary; and

24 (2) specific powers or duties of the guardian should
25 be limited if the ward receives supports and services.

26 SECTION 18. Section 1202.152(b), Estates Code, is amended
27 to read as follows:

1 (b) A letter or certificate presented under Subsection (a)
2 must:

3 (1) describe the nature and degree of incapacity,
4 including the medical history if reasonably available, or state
5 that, in the physician's opinion, the ward has the capacity, with or
6 without supports and services, to:

7 (A) provide food, clothing, and shelter for
8 himself or herself;

9 (B) care for the ward's own physical health; and

10 (C) manage the ward's financial affairs;

11 (2) provide a medical prognosis specifying the
12 estimated severity of any incapacity;

13 (3) state how or in what manner the ward's ability to
14 make or communicate responsible decisions concerning himself or
15 herself is affected by the ward's physical or mental health;

16 (4) state whether any current medication affects the
17 ward's demeanor or the ward's ability to participate fully in a
18 court proceeding;

19 (5) describe the precise physical and mental
20 conditions underlying a diagnosis of senility, if applicable; and

21 (6) include any other information required by the
22 court.

23 SECTION 19. Section [1202.153](#)(c), Estates Code, is amended
24 to read as follows:

25 (c) Before limiting the powers granted to or duties required
26 to be performed by the guardian under an application filed under
27 Section [1202.051](#), the court must find by a preponderance of the

1 evidence that the current nature and degree of the ward's
2 incapacity, with or without supports and services, warrants a
3 modification of the guardianship and that some of the ward's rights
4 need to be restored, with or without supports and services.

5 SECTION 20. Section 1202.154(a), Estates Code, is amended
6 to read as follows:

7 (a) A court order entered with respect to an application
8 filed under Section 1202.051 to completely restore a ward's
9 capacity or modify a ward's guardianship must state:

- 10 (1) the guardian's name;
- 11 (2) the ward's name; [~~and~~]
- 12 (3) whether the type of guardianship being addressed
13 at the proceeding is a:
- 14 (A) guardianship of the person;
- 15 (B) guardianship of the estate; or
- 16 (C) guardianship of both the person and the
17 estate; and

18 (4) if applicable, any necessary supports and services
19 for the restoration of the ward's capacity or modification of the
20 guardianship.

21 SECTION 21. Section 1202.156, Estates Code, is amended to
22 read as follows:

23 Sec. 1202.156. ADDITIONAL REQUIREMENTS FOR ORDER MODIFYING
24 GUARDIANSHIP. If the court finds that a guardian's powers or
25 duties should be expanded or limited, the order modifying the
26 guardianship must contain findings of fact and specify, in addition
27 to the information required by Section 1202.154:

1 (1) the specific powers, limitations, or duties of the
2 guardian with respect to the care of the ward or the management of
3 the ward's property, as appropriate;

4 (2) the specific areas of protection and assistance to
5 be provided to the ward;

6 (3) any limitation of the ward's rights;

7 (4) if the ward's incapacity resulted from a mental
8 condition, whether the ward retains the right to vote and make
9 personal decisions regarding residence; and

10 (5) that the clerk shall modify the letters of
11 guardianship to the extent applicable to conform to the order.

12 SECTION 22. The heading to Subtitle I, Title 3, Estates
13 Code, is amended to read as follows:

14 SUBTITLE I. OTHER SPECIAL PROCEEDINGS AND SUBSTITUTES FOR
15 [~~ALTERNATIVES TO~~] GUARDIANSHIP

16 SECTION 23. (a) Except as otherwise provided by this
17 section, the changes in law made by this Act apply to:

18 (1) a guardianship created before, on, or after the
19 effective date of this Act; and

20 (2) an application for a guardianship pending on, or
21 filed on or after, the effective date of this Act.

22 (b) Sections 1054.004 and 1054.054, Estates Code, as
23 amended by this Act, apply only to a guardianship proceeding for
24 which a court has appointed a guardian ad litem or attorney ad litem
25 to represent the interests of a proposed ward on or after the
26 effective date of this Act.

27 (c) Sections 1054.201, 1101.101, 1101.103, 1101.151,

1 1101.152, and 1101.153, Estates Code, as amended by this Act, apply
2 only to a guardianship proceeding filed on or after the effective
3 date of this Act. A guardianship proceeding filed before the
4 effective date of this Act is governed by the law in effect on the
5 date the proceeding was filed, and the former law is continued in
6 effect for that purpose.

7 (d) Section 1101.001, Estates Code, as amended by this Act,
8 applies only to an application for the appointment of a guardian
9 filed on or after the effective date of this Act. An application
10 for the appointment of a guardian filed before the effective date of
11 this Act is governed by the law in effect on the date the
12 application was filed, and the former law is continued in effect for
13 that purpose.

14 (e) Section 1202.051, Estates Code, as amended by this Act,
15 applies only to an application for the restoration of a ward's
16 capacity or the modification of a ward's guardianship that is filed
17 on or after the effective date of this Act. An application for the
18 restoration of a ward's capacity or the modification of a ward's
19 guardianship that is filed before the effective date of this Act is
20 governed by the law in effect on the date the application was filed,
21 and the former law is continued in effect for that purpose.

22 (f) Sections 1202.151, 1202.152, 1202.153, 1202.154, and
23 1202.156, Estates Code, as amended by this Act, apply only to a
24 proceeding for the restoration of a ward's capacity or the
25 modification of a ward's guardianship that is filed on or after the
26 effective date of this Act. An application for the restoration of a
27 ward's capacity or the modification of a ward's guardianship that is

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1 filed before the effective date of this Act is governed by the law
2 in effect on the date the application was filed, and the former law
3 is continued in effect for that purpose.

4 SECTION 24. This Act takes effect September 1, 2015.