

BILL ANALYSIS

Senate Research Center

S.B. 1426
By: Zaffirini
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

As the 1993 “Guardianship Laws and Practices in Texas” report by the Senate Interim Committee on Health and Human Services stated so lucidly: “If everyone had someone who cared enough to help with basic decisions when they are unable to proceed on their own, there would be no need for the state or county or any private entity to get involved in guardianship. Unfortunately, this is not the case. There are, undoubtedly, thousands of Texans in need of assistance but with no one to provide it, and all indications are that the numbers are going to get bigger instead of smaller.” This statement was written 26 years ago, and our population, especially in the 65 and older category, has grown significantly since then, yet Texas still does not guarantee a guardian of last resort.

Currently, judges are given the responsibility of appointing guardians for persons who are unable to reasonably care for themselves or their property. In the majority of cases, a spouse, adult child, other family member, or close acquaintance files the petition to be the person’s guardian. In some cases, there is no family member or friend who is qualified, available, or willing to serve as a guardian, and the court may have to ask a guardianship program, a Health and Human Services Commission’s guardian, or an attorney to serve as the guardian in these situations. Due to the complexity of the person’s disabilities, the person’s ability to pay, or the potential guardian’s lack of resources, potential guardians may refuse to serve. In some instances, this places the judge and the person in need in a dire situation where the judge becomes desperate enough to appoint someone despite their shortcomings. A guardian of last resort is an entity that would tackle these difficult situations where no family members or guardianship service providers are an option. Without a guardian of last resort, the state of Texas is exposing our most vulnerable population to considerable risk.

To implement a Texas Judicial Council recommendation, S.B. 1426 would provide a clear legal framework for counties interested in establishing an office of public guardian or contracting with a nonprofit guardianship program to be the guardian of last resort. These entities would serve as guardians for persons who have no family members qualified to serve as guardian, lack resources to pay for a private guardian, and do not qualify for alternatives to guardianship. These changes would provide counties with the legal certainty and procedures to establish successfully guardian of last resort programs that ensure that no vulnerable Texan is placed at risk.

As proposed, S.B. 1426 amends current law relating to the establishment by a county of public guardians for certain incapacitated persons, funding for guardianships by public guardians and related services, and compensation deductions in certain guardianships.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Supreme Court of Texas in SECTION 3 (Section 1104.338, Estates Code), and SECTION 21 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 1002, Estates Code, by adding Sections 1002.0215 and 1002.0265, as follows:

Sec. 1002.0215. OFFICE OF PUBLIC GUARDIAN. Defines "office of public guardian."

Sec. 1002.0265. PUBLIC GUARDIAN. Defines "public guardian."

SECTION 2. Amends Section 1104.251(a), Estates Code, as follows:

(a) Requires an individual to be certified under Subchapter C (Effect of Transfer on Death Deed; Liability of Transferred Property for Creditors' Claims), Chapter 155, Government Code, if the individual:

(1)–(2) makes no changes to these subdivisions;

(3) makes a nonsubstantive change to this subdivision;

(4) is an employee of the Health and Human Services Commission (HHSC) providing guardianship services to a ward of HHSC, rather than is an employee of DADS providing guardianship services to a ward of DADS;

(5) is a public guardian; or

(6) will represent the interests of a ward as a guardian on behalf of a public guardian.

SECTION 3. Amends Chapter 1104, Estates Code, by adding Subchapter G-1, as follows:

SUBCHAPTER G-1. PUBLIC GUARDIANS

Sec. 1104.326. DEFINITION. Defines "office" to mean an office of public guardian established under this subchapter.

Sec. 1104.327. ESTABLISHMENT OF OFFICES; PUBLIC GUARDIANS. (a) Authorizes the commissioners court of a county by order to:

(1) create an office of public guardian to provide guardianship services described by Section 1104.334 to incapacitated persons; or

(2) enter into an agreement with a person operating a nonprofit guardianship program or private professional guardianship program located in the county or in an adjacent county to act as a public guardian by providing guardianship services described by Section 1104.334 to incapacitated persons.

(b) Requires the commissioners court of a county, subject to Subsection (c) and Section 1104.328, to appoint an individual as public guardian to administer the office of public guardian established under Subsection (a)(1) and authorizes the commissioners court to employ or authorize the public guardian to employ personnel necessary to perform the duties of the office, including personnel who will represent the interests of a ward as a guardian on behalf of the office if approved by the commissioners court.

(c) Authorizes the commissioners court of a county to enter into an agreement with an individual to act as public guardian under Subsection (b) on a part-time basis with appropriate compensation if the commissioners court determines a full-time appointment does not serve the needs of the county and the individual who is appointed on a part-time basis is not employed in or does not hold another position that presents a conflict of interest.

(d) Authorizes the commissioners courts of two or more counties to collectively enter into an agreement to create and fund an office of public guardian for purposes of Subsection (a)(1) and to appoint the same individual as public guardian to that office under Subsection (b) or with a person operating a

guardianship program described by Subsection (a)(2) to serve as a public guardian for purposes of that subdivision.

(e) Provides that an individual appointed as public guardian under Subsection (b) serves a term of five years.

Sec. 1104.328. QUALIFICATIONS OF PUBLIC GUARDIAN. Requires an individual, to be appointed as public guardian under Section 1104.327(b), to be a licensed attorney or be certified under Subchapter C (Standards for and Certifications of Certain Guardians), Chapter 155, Government Code and have demonstrable guardianship experience.

Sec. 1104.329. CONFLICT OF INTEREST. (a) Requires an office or public guardian, except as provided by Subsection (b), to be independent from providers of services to wards and proposed wards and prohibits the office or public guardian from directly providing housing, medical, legal, or other direct, non-surrogate decision-making services to a ward or proposed ward, unless approved by the court.

(b) Authorizes an office or public guardian to provide money management services described by Section 531.125 (Grants), Government Code, or other representative payee services to a ward or proposed ward.

Sec. 1104.330. COMPENSATION. Requires a person appointed or acting as public guardian under Section 1104.327 to receive compensation as set by the commissioners court and provides that the person is not entitled to compensation under Subchapter A (Compensation of Guardians in General), Chapter 1155, unless approved by the court.

Sec. 1104.331. BOND REQUIREMENT. (a) Requires a public guardian to file with the court clerk a general bond in an amount fixed by the commissioners court payable to the county and issued by a surety company approved by the county judge. Requires a bond to be conditioned on the faithful performance by the person of the person's duties and, if the public guardian administers an office, the office's duties.

(b) Provides that the bond required by this section satisfies any bond required under Chapter 1105.

Sec. 1104.332. VACANCY. Requires the commissioners court, if an individual appointed as public guardian under Section 1104.327(b) vacates the position, to appoint, subject to Section 1104.328, an individual to serve as public guardian for the unexpired term.

Sec. 1104.333. POWERS AND DUTIES. (a) Requires an office or public guardian to:

(1) if applicable, evaluate the financial status of a proposed ward to determine whether the proposed ward is eligible to have the office or public guardian appointed guardian of the ward under Section 1104.334(a)(2)(A); and

(2) serve as guardian of the person or of the estate of a ward, or both, on appointment by a court in accordance with the requirements of this title.

(b) Authorizes a court with jurisdiction over the guardianship proceeding, in connection with a financial evaluation under Subsection (a)(1) and on the request of an office or public guardian, to order the release of public and private records, including otherwise confidential records, to the office or public guardian.

(c) Prohibits a state agency from charging an office or public guardian for providing the office or public guardian with a copy of public information requested from the agency by the office or public guardian.

Sec. 1104.334. APPOINTMENT OF OFFICE OR PUBLIC GUARDIAN AS GUARDIAN. (a) Authorizes a court, in accordance with applicable law, including Subchapter C (Determination of Necessity of Guardianship; Findings and Proof), Chapter 1101, to appoint an office or public guardian to serve as guardian of the person or of the estate of a ward, or both, if:

(1) on the date the guardianship application is filed, the ward resides in or is located in the county served by the office or public guardian; and

(2) the court finds that:

(A) the ward does not have sufficient assets or other resources to pay a private professional guardian to serve as the ward's guardian;

(B) the ward does not have a family member, friend, or other suitable person or entity willing and able to serve as the ward's guardian; or

(C) the appointment of an office or public guardian is in the ward's best interest.

(b) Provides that, for purposes of Subsection (a)(2)(A), the determination of a ward's ability to pay a private professional guardian is dependent on:

(1) the nature, extent, and liquidity of the ward's assets;

(2) the ward's disposable net income, including income of a recipient of medical assistance that is used to pay expenses under Section 1155.202(a);

(3) the nature of the guardianship;

(4) the type, duration, and complexity of services required by the ward; and

(5) additional, foreseeable expenses.

(c) Provides that the number of appointments of an office under this section may not exceed 35 wards for each guardian representing the interests of wards on behalf of the office.

(d) Requires the office, if each guardian representing the interests of wards on behalf of an office reaches the limitation provided by Subsection (c), to immediately give notice to the courts.

Sec. 1104.335. CONFIDENTIALITY AND DISCLOSURE OF INFORMATION. (a) Provides that all files, reports, records, communications, or working papers used or developed by an office or public guardian in the performance of duties relating to a financial evaluation under Section 1104.333(a)(1) or the provision of guardianship services are confidential and not subject to disclosure under Chapter 552 (Public Information), Government Code.

(b) Authorizes confidential information to be disclosed only for a purpose consistent with this subchapter, as required by other state or federal law, or as necessary to enable an office or public guardian to exercise the powers and duties as guardian of the person or of the estate of a ward, or both.

(c) Authorizes a court on its own motion or on the motion of an interested person to order disclosure of confidential information only if:

(1) a hearing on the motion is conducted;

(2) notice of the hearing is served on the office or public guardian and each interested person; and

(3) the court determines after the hearing and an in camera review of the information that disclosure is essential to the administration of justice and will not endanger the life or safety of any individual who:

(A) is being assessed for guardianship services;

(B) is a ward of the office or public guardian; or

(C) provides services to a ward of the office or public guardian.

(d) Requires the Office of Court Administration of the Texas Judicial System (OCA) to establish policies and procedures for the exchange of information between offices, public guardians, and other appropriate governmental entities, as necessary for offices, public guardians, and governmental entities to properly execute their respective duties and responsibilities relating to guardianship services or other needed services for a ward. Provides that an exchange of information under this subsection does not constitute a release for purposes of waiving the confidentiality of the information exchanged.

(e) Authorizes an office or public guardian on request, to the extent consistent with policies and procedures adopted by the office or public guardian, to release confidential information in the record of an individual who is a former ward of the office or public guardian to the individual, the individual's guardian, an executor of the individual's estate.

(f) Requires an office public guardian, before releasing confidential information under Subsection (e), to edit the information to protect the identity of any individual whose life or safety may be endangered by the release. Provides that a release of information under Subsection (e) does not constitute a release for purposes of waiving the confidentiality of the information released.

Sec. 1104.336. CERTAIN ADMINISTRATIVE COSTS. (a) Prohibits the administrative costs of the guardianship services provided to the ward, if an office or public guardian is appointed guardian of the person or of the estate of a ward, or both, from being charged to the ward's estate unless the court determines, subject to Subsection (b), that the ward is financially able to pay all or part of the costs.

(b) Requires a court to measure a ward's ability to pay for costs under Subsection (a) by whether the ward has sufficient assets or other resources to pay a private professional guardian to serve as the ward's guardian in accordance with Section 1104.334(b).

Sec. 1104.337. OFFICE OF COURT ADMINISTRATION OF THE TEXAS JUDICIAL SYSTEM; REPORT. (a) Requires OCA, not later than December 1 of each even-numbered year, to submit a report to the governor and the legislature that contains an evaluation of public guardians established under this subchapter, including the establishment and operation of offices of public guardians under this subchapter and the provision of guardianship services by the offices. Requires the report to include:

(1) an analysis of costs and offsetting savings or other benefits to the state as a result of the establishment and operation of offices and public guardians under this subchapter; and

(2) recommendations for legislation, if any.

(b) Authorizes the OCA, if it is cost-effective and feasible, to contract with an appropriate research or public policy entity with expertise in gerontology, disabilities, and public administration to conduct the analysis described by Subsection (a)(1).

Sec. 1104.338. RULES. Requires the Supreme Court of Texas (supreme court), in consultation with OCA and the presiding judge of the statutory probate courts elected under Section 25.0022 (Administration of Statutory Probate Courts), Government Code, to adopt rules necessary to implement this subchapter.

SECTION 4. Amends Section 1104.402(a), Estates Code, as follows:

(a) Requires the clerk of the county having venue of the proceeding for the appointment of a guardian, except as provided by Section 1104.403 (Submission of Criminal History Record Information by Proposed Guardian), 1104.404 (Exception For Information Concerning Certain Persons) or 1104.406(a) (relating to requiring DADS to obtain criminal history information relating to each individual who is or will be providing guardianship services to a ward of or referred by DADS), to obtain criminal history record information that is maintained by the Department of Public Safety of the State of Texas or the Federal Bureau of Investigation identification division relating to:

(1)–(3) makes no changes to these subdivision,

(4) makes a nonsubstantive change to this subdivision;

(5) a public guardian appointed under Section 1104.327(b);

(6) each person who represents or plans to represent the interests of a ward as a guardian on behalf of an office of public guardian;

(7) each person employed by an office of public guardian who will:

(A) have personal contact with a ward or proposed ward;

(B) exercise control over and manage a ward's estate; or

(C) perform any duties with respect to the management of a ward's estate;
or

(8) creates Subdivision (8) from existing Subdivision (5).

SECTION 5. Amends Section 1104.409, Estates Code, to require the court to use the information obtained under this subchapter only in determining whether to appoint, remove, or continue the appointment of a private professional guardian, a guardianship program, an office of public guardian, or HHSC, rather than a private professional guardian or DADS.

SECTION 6. Amends Section 1155.151(a-2), Estates Code, to add a governmental entity, including an office of public guardian, among other certain persons and entities that are not required to pay court costs on the filing of or during a guardianship proceeding, notwithstanding any other law requiring the payment of court costs in a guardianship proceeding.

SECTION 7. Amends Section 1163.005(a), Estates Code, to require the guardian of the estate to attach to an account the guardian's affidavit stating if the guardian is a private professional guardian, a guardianship program, an office of public guardian, or HHSC, rather than DADS, whether the guardian or an individual certified under Subchapter C (Standards For and Certification of Certain Guardians), Chapter 155, Government Code, rather than Subchapter C, Chapter 111, Government Code, who is providing guardianship services to the ward and who is swearing to the account on the guardian's behalf, is or has been the subject of an investigation conducted by the Judicial Branch Certification Commission, rather than the Guardianship Certification Board, during the accounting period.

SECTION 8. Amends Section 1163.101(c), Estates Code, to make conforming changes.

SECTION 9. Amends Section 101.0814, Government Code, to require the clerk of a statutory county court to collect a supplemental public guardianship and related services fee, rather than a court-initiated guardianship, for probate court actions under Sections 118.052 (Fee Schedule) and 118.055 (Probate Original Action), Local Government Code.

SECTION 10. Amends Section 101.1013, Government Code, to make conforming changes.

SECTION 11. Amends Section 101.1214, Government Code, to make conforming changes.

SECTION 12. Amends Section 155.001, Government Code, by amending Subdivisions (4), (6), and (6-a) and adding Subdivisions (5-a) and (6-b), as follows:

(4) Redefines "guardianship program" to mean a local, county, or regional program, other than an office of public guardian, that provides guardianship and related services to an incapacitated person or other person who needs assistance in making decisions concerning the person's own welfare or financial affairs.

(5-a) Defines "office of public guardian."

(6) Redefines "private professional guardian" to mean a person, other than an attorney, a corporate fiduciary, or an office of public guardian, who is engaged in the business of providing guardianship services.

(6-a) Defines "public guardian."

(6-b) Creates this subdivision from existing text and defines "registration."

SECTION 13. Amends Subchapter B, Chapter 155, Government Code, by adding Section 155.053, as follows:

Sec. 155.053. MONITORING OF COUNTY PUBLIC GUARDIANSHIP AND RELATED SERVICES FUNDS. Requires the Office of Public Guardian (office) to monitor counties to ensure money is appropriately deposited into the public guardianship and related services funds established by counties under Section 118.067 (Supplemental Court-Initiated Guardianship Fee), Local Government Code, and being used in compliance with that section. Requires the office, not later than December 1 of each year, to submit a report to the legislature detailing how money in the funds is being used by counties across the state.

SECTION 14. Amends Section 155.101(a), Government Code, as follows:

(a) Requires the Judicial Branch Certification Commission (TBCC) to adopt minimum standards for:

(1) makes nonsubstantive changes to this subdivision;

(2) the provision of guardianship services by HHSC; and

(3) the provision of guardianship services by offices of public guardians, rather than DADS or its successor agency.

SECTION 15. Amends Section 155.102(a), Government Code, as follow:

(a) Requires the following individuals, to provide guardianship services in this state, to hold a certificate issued under this section:

(1) makes no changes to this subdivision;

(2) makes a nonsubstantive change to this subdivision;

(3) an individual, other than a volunteer, who will provide those services or other services under Section 161.114 (Use of Volunteers), Human Resources Code, to a ward of a guardianship program or HHSC on the program's or HHSC's behalf, rather than DADS on the program's or DADS' behalf;

(4) an individual who is a public guardian; and

(5) an individual who will provide those services to a ward of an office of public guardian

SECTION 16. Amends Section 155.105, Government Code, by adding Subsection (b-1), as follows:

(b-1) Requires each office of public guardian, not later than January 31 of each year, to provide to HHSC a report containing for the preceding year:

(1) the number of wards served by the office;

(2) the total amount of any money received from this state for the provision of guardianship services; and

(3) the amount of money received from any other public source, including a county or the federal government, for the provision of guardianship services, reported by source, and the total amount of money received from those public sources.

SECTION 17. Amends Section 411.1386(a), Government Code, as follows:

(a) Requires the clerk of the county having venue over a proceeding for the appointment of a guardian under Title 3 (Guardianship and Related Procedures), Estates Code, except as provided by Subsections (a-1), (a-5), and (a-6), to obtain from DPS criminal history record information maintained by DPS that relates to:

(1)–(3) makes no changes to these subdivisions;

(4) makes a nonsubstantive change to these subdivisions;

(5) a public guardian, as defined by Section 1002.0265(1), Estates Code;

(6) each person who represents or plans to represent the interests of a ward as a guardian on behalf of an office of public guardian;

(7) each person employed by an office of public guardian, as defined by Section 1002.0215, Estates Code, who will:

(A) have personal contact with a ward or proposed ward;

(B) exercise control over and manage a ward's estate; or

(C) perform any duties with respect to the management of a ward's estate;
or

(8) creates Subdivision (8) from existing Subdivision (5).

SECTION 18. Amends Section 161.103, Human Resources Code, as follows:

Sec. 161.103. CONTRACT FOR GUARDIANSHIP SERVICES. (a) Creates this subsection from existing text. Authorizes HHSC, rather than DADS, if appropriate, to contract with a political subdivision of this state, a guardianship program as defined by Section 1002.016 (Guardianship Program), Estates Code, a private agency, or another state agency for the provision of guardianship services under this section.

(b) Authorizes a contract under Subsection (a) to allow for the provision of guardianship services by an office of public guardian, as defined by Section 1002.0215, Estates Code.

SECTION 19. Amends Section 118.052, Local Government Code, to require each clerk of a county court to collect Supplemental Public Guardianship and Related Services Fee in Probate Original Actions and Adverse Probate Actions, rather than Court-Initiated Guardianship Fee, for probate court services rendered to any person.

SECTION 20. Amends Section 118.067, Local Government Code, as follows:

Sec. 118.067. New heading: SUPPLEMENTAL PUBLIC GUARDIANSHIP AND RELATED SERVICES FEE. (a) Provides that the "supplemental public guardianship and related services fee" under Section 118.052(2)(E) is for the support of guardianship services provided by public guardians, as defined by Section 1002.0265, Estates Code, or guardianship and other less restrictive alternative services provided to indigent incapacitated persons who do not have family members suitable and willing to serve as guardians or provide less restrictive alternative services, rather than provides that the "supplemental court-initiated guardianship fee" under Section 118.052(2)(E) is for the support of the judiciary in guardianships initiated under Chapter 1102, Estates Code. Requires fees collected under Section 118.052(2)(E) to be deposited in a public guardianship and related services fund, rather than a court-initiated guardianship fund, in the county treasury and may be used only to supplement, rather than supplant, other available county funds used to fund guardianship services or other less restrictive alternative services provided to individuals who are indigent. Deletes existing Subdivisions (1)–(3), providing for certain uses of a court initiated guardianship fund.

(b) Provides that the supplemental public guardianship and related services fee, rather than the court-initiated guardianship fee, is charged for certain actions.

(c) Makes a conforming change to this subsection.

(d) Makes a conforming change to this subsection.

SECTION 21. Requires the Supreme Court of Texas, not later than January 1, 2020, to adopt rules necessary to implement Subchapter G-1, Chapter 1104, Estates Code, as added by this Act, including rules governing the transfer of a guardianship of the person or of the estate of a ward, or both, if appropriate, to an office of public guardian established under that subchapter or a public guardian contracted under that subchapter.

SECTION 22. (a) Makes application of this Act prospective to July 1, 2020.

(b) Authorizes a person who, immediately before July 1, 2020, is serving as guardian of the person or of the estate of a ward, or both, who, under Section 1104.334, Estates Code, as added by this Act, would be eligible for appointment of an office of public guardian as the ward's guardian, notwithstanding any other law, to continue to serve as guardian of the person or of the estate of the ward, or both, unless otherwise removed as provided by law.

SECTION 23. Effective date: September 1, 2019.