

Rebecca Japko

10-12-22 Testimony Re: Interim Charge #4

President PART: Parents and Allies for Remarkable Texans Living Texas SSLCs

PO Box 40096

Austin TX 78704

[ourparttexas@gmail.com](mailto:ourparttexas@gmail.com) & [ourparttexas.com](http://ourparttexas.com)

Good morning, Chairman Leach and committee members, my name is Rebecca Japko. I am the President of Parents and Allies for Remarkable Texans. We are a non-profit organization advocating for the appropriate care for all individuals with intellectual and development disabilities. Our main focus is to shine a light on the extreme support requirements of the people who qualify for living in the State Supported Living Centers. PART strongly supports upholding current guardianship law as it currently exists under the Texas Estate Code. Thank you for inviting me to speak concerning Interim Charge #4.

### **(1) We ask that this Committee protect current guardianship law**

Under the Texas Estate Code, an incapacitated person is a minor, or an adult who cannot provide food, clothing, or shelter for themselves, care for their own physical health, or manage their own finances.

**(TEC § 1002.017)**

Subtitle A  
General Provisions

#### **Chapter 1002 Definitions**

**Sec. 1002.017 Incapacitated Person**

**“Incapacitated person” means:**

- (1) a minor;
- (2) an adult who, because of a physical or mental condition, is **substantially unable** to:
  - (A) **provide food, clothing, or shelter for himself or herself;**
  - (B) **care for the person’s own physical health; or**
  - (C) **manage the person’s own financial affairs;**

It is the court who appoints the guardian to act **in the best interest** of an incapacitated person.

**(TEC § 1104.101)** While Texas recognizes two types of guardianships; (1) guardianship of the person, where the court appoints someone to manage the life decisions, including health affairs, of the incapacitated person, and (2) guardianship of the estate, where the court appoints someone to manage the payment of any funds due to the incapacitated person.

A guardian is a fiduciary of a ward. The guardian must display the highest degree of loyalty and dependability to the ward. The guardian must always strive to provide the known preferences of the ward. This is especially true with family guardians who are guardians out of love.

Subtitle D  
Creation of Guardianship

#### **CHAPTER 1104. SELECTION OF AND ELIGIBILITY TO SERVE AS GUARDIAN**

**Sec. 1104.101- Appointment According to Circumstances and Best Interests**

The court shall appoint a guardian for an incapacitated person other than a minor according to the circumstances and ***considering the incapacitated person’s best interests.***

Let me give you a couple of cases in California illustrating why current Texas guardianship law should be protected. From **Abc10.com**

**Garth Schutte**

**'I want to live at home' | The battle of a conservatorship funded by tax dollars**

**Andrew Findley**

**Families fighting state-run conservatorships are trapped in a broken, systemic web of conflicting interests**

## **(2) The Committee Should Recognize That Guardianship Protects Individual Rights**

The Committee should recognize that guardianship protects individual rights. In our U.S. Constitution, the Bill of Rights lays out our individual rights as it relates to our government, which includes, under the First Amendment; the right to free speech. (U.S. Const. Amend. I)

Our Texas Constitution tells us that all free men have equal rights. (Tex. Const. Art. I § 3) But courts established that claims of violation of [individual] rights must be based on different treatment of similarly situated parties. *City of Houston v. Downstream Envtl., LLC*, S.W.3d 24, 38 (Tex. App. -Houston [1<sup>st</sup> Dist.] 2014. pet. denied)

Subtitle D Creation of Guardianship	<b>CHAPTER 1101. GENERAL PROCEDURE TO APPOINT GUARDIAN</b>  <b>Sec. 1101.103</b> - Determination of Incapacity of Certain Adults: Physician Examination  (a) ...., unless the applicant presents to the court a <u>written letter or certificate from a physician</u> licensed in this state that is: (1) dated not earlier than the 120th day before the date the application is filed; and (2) based on an examination the physician performed not earlier than the 120th day before the date the application is filed. (b) <u>The letter or certificate must:</u> (1) describe the nature, degree, and severity of the proposed ward's incapacity, including any <u>functional deficits</u> regarding the proposed ward's ability to: (A) handle business and managerial matters; (B) manage financial matters; (C) operate a motor vehicle; (D) make personal decisions regarding residence, voting, and marriage; and (E) consent to medical, dental, psychological, or psychiatric treatment;	<b>CHAPTER 1101. GENERAL PROCEDURE TO APPOINT GUARDIAN</b>  <b>Sec. 1101.103</b> - Determination of Incapacity of Certain Adults: Physician Examination cont'd  (2) in providing a description under Subdivision (1) regarding the proposed ward's ability to operate a motor vehicle and make personal decisions regarding voting, state whether in the physician's opinion the proposed ward: (A) has the mental capacity to vote in a public election; and (B) has the ability to safely operate a motor vehicle; (3) provide an <u>evaluation of the proposed ward's physical condition and mental functioning and summarize the proposed ward's medical history</u> if reasonably available; (3-a) in providing an evaluation under Subdivision (3), <u>state whether improvement in the proposed ward's physical condition and mental functioning is possible</u> and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary;
--	---	--

Under the TEC, in order to hold that a party [the ward in this case] is incapacitated, the courts require a written letter or certificate from a licensed physician in Texas that includes describing the nature, degree, and severity of incapacity. (**TEC § 1101.103 (1)**) It must also state whether improvement in the person's physical condition and mental functioning is even possible. (**TEC § 1101.103 (1)**)

The Courts are currently obligated to design and oversee that the guardianship is encouraging the development or maintenance of as much independence as possible. **(TEC § 1001.001 (b))**

Subtitle A  
General Provisions

#### Chapter 1001 Purpose and Construction

##### Sec. 1001.001

Policy; Purpose of Guardianship

(a) A court may appoint a guardian with either full or limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the incapacitated person.

(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 by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence.

### (3) Supported Decision Making (SDM) Should Not Infringe on Guardianship Law

Under the Texas Estate Code, the Supported Decision-Making Agreement Act allows for an agreement between an adult with a disability and a **supporter**. **(TEC § 1357.001 & 002 (4))**

Subtitle I  
Other Special Proceedings and Substitutes for Guardianship

#### Chapter 1357 Supported Decision-making Agreement Act

##### Sec. 1357.002 Definitions

In this chapter:

(1) "Adult" means an individual 18 years of age or older or an individual under 18 years of age who has had the disabilities of minority removed.

(2) "Disability" means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities.

(3) "Supported decision-making" means a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.

(4) "Supported decision-making agreement" is an agreement between an adult with a disability and a supporter entered into under this chapter.

(5) "Supporter" means an adult who has entered into a supported decision-making agreement with an adult with a disability.

While the purpose of SDM is to recognize a less restrictive alternative to guardianship it is **NOT to be considered for persons who are incapacitated**. **(TEC § 1357.003)**

Subtitle I  
Other Special Proceedings and Substitutes for Guardianship

#### Chapter 1357 Supported Decision-making Agreement Act

##### Sec. 1357.003 Purpose

The purpose of this chapter is to recognize a less restrictive substitute for guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship under this title.

SDMs are not required to perform the protective duties of a guardian such as:

- Acting in the best interest of an incapacitated person.
- Posting a bond in an amount set by the court and taking an oath to assure that they will fulfill their duties and responsibilities.
- The duty to provide care, supervision, and protection for the ward.
- The duty to provide the ward with clothing, food, medical care, and shelter.

SDMs do not have the same duties since they are **NOT** supporting an incapacitated person.

The only legal alternative for persons **who are incapacitated** to have their best interests protected, is by a guardian who holds the fiduciary duty to act in the protected or incapacitated person's best interest. (**TEC § 1002.012**)

A supporter who enters into a SDM or other alternative, with an incapacitated person may run the risk of being accused of fraud.

<p>Burden of Proof to determine incapacity <b>Clear and Convincing Evidence</b> and Alternatives to guardianship must be found <b>NOT to be feasible</b> by the same burden of proof before the guardianship is ordered. (<b>TEC § 1101.101 (D)</b>)</p>	<p><b>CHAPTER 1101. GENERAL PROCEDURE TO APPOINT GUARDIAN</b> Sec. 1101.101 - Findings and Proof Required (a) Before appointing a guardian for a proposed ward, the court must: (1) find by <b>clear and convincing evidence</b> that: (A) <b>the proposed ward is an incapacitated person</b>; (B) it is in the proposed ward's best interest to have the court appoint a person as the proposed ward's guardian; (C) the proposed ward's rights or property will be protected by the appointment of a guardian; (D) <b>alternatives to guardianship</b> that would avoid the need for the appointment of a guardian have been considered and determined <b>not to be feasible</b>; ...</p>
--	--

#### (4) **Contrast Burden of Proof for incapacity with the 5 Criteria for an Order of Civil Commitment**

<p><b>Texas Health and Safety Code</b> <b>Sec. 593.052</b></p>	<p><b>ORDER FOR (CIVIL) COMMITMENT.</b></p> <p>(a) A proposed resident may not be committed to a residential care facility (SSLC) <b>unless</b>:</p> <ul style="list-style-type: none"><li>(1) the proposed resident is a person with an <b>intellectual disability</b>;</li><li>(2) <b>evidence</b> is presented showing that because of the proposed resident's intellectual disability, the proposed resident:<ul style="list-style-type: none"><li>(A) <b>represents a substantial risk of physical impairment or injury to the proposed resident or others</b>; or</li><li>(B) <b>is unable to provide for and is not providing for the proposed resident's most basic personal physical needs</b>;</li></ul></li><li>(3) <b>the proposed resident cannot be adequately and appropriately habilitated in an available, less restrictive setting</b>; and</li><li>(4) the residential care facility provides habilitative services, care, training, and treatment appropriate to the proposed resident's needs.</li></ul> <p>(b) If it is determined that the requirements of Subsection (a) have been met and that long-term placement in a residential care facility is appropriate, the court shall commit the proposed resident for care, treatment, and training to a community center or the department when space is available in a residential care facility.</p>
--	---

## **ORDER FOR (CIVIL) COMMITMENT.**

### **Burden of Proof**

At least two Texas courts of appeals have found that in order to commit a person for long-term placement in a State Supported Living Center, each of the elements in subsection 593.052(a) of the Texas Health and Safety Code **MUST BE PROVEN BEYOND A REASONABLE DOUBT.**

See *Pratt v. State*, 907 S.W.2d 38, 44 (Tex. App.—Dallas 1995, writ denied);  
[Pratt v. State, 907 SW 2d 38 - Tex: Court of Appeals, 5th Dist. 1995](#)

In re A.W., 443 S.W.3d 405, 414 (Tex. App.—Eastland 2014, no pet.).  
[In re AW, 443 SW 3d 405 - Tex: Court of Appeals, 11th Dist. 2014](#)

Page 80  
<http://benchbook.texasjcmh.gov/>

**(5) Proposed Termination of Guardianship SB 1129 removed during 87<sup>th</sup> Reg.**

**SUBCHAPTER F. TERMINATION OF GUARDIANSHIP OF THE PERSON ON  
FINDING THAT THE WARD'S INCAPACITY NEEDS CAN BE MANAGED WITHOUT  
GUARDIANSHIP**

**PART Proposed language submitted in November 2020**

SECTION 4. Subchapter D, Chapter 1055, Estates Code, is amended to read as follows:

**SUBCHAPTER D. MEDIATION**

**Sec. 1055.151. MEDIATION OF CONTESTED GUARDIANSHIP PROCEEDING.**

(a) Subject to Subsection (b), on [On] the written agreement of the parties or on the court's own motion, the court may refer a contested guardianship proceeding to mediation.

(b) If the court refers to mediation a proceeding under Subsection (a) regarding the appointment of a guardian for a proposed ward:

(1) a determination of incapacity of the proposed ward may be an issue to be mediated, but the applicant for guardianship must still prove to the court that the proposed ward is an incapacitated person in accordance with the requirements of Chapter 1101; and

(2) all parties to the proceeding shall evaluate during the mediation alternatives to guardianship and supports and services available to the proposed ward, including whether the supports and services and alternatives to guardianship would be **practicable (strike: feasible)** to avoid the need for appointment of a guardian.

Sec. 1202.231. TERMINATION OF GUARDIANSHIP OF THE PERSON ON FINDING THAT WARD'S INCAPACITY NEEDS CAN BE MANAGED WITHOUT GUARDIANSHIP.

(a) On application by the guardian of the person of a ward, a court investigator or guardian ad litem appointed by the court, (strike: or another person interested in the ward's welfare) who has been granted permission by the court to intervene under Section 1055.003, or on the court's own motion, the court may order that the guardianship of the person of the ward terminate and be settled and closed if the court makes the findings required under Section 1202.232.

Sec. 1202.233. FINDINGS REQUIRED. Before ordering the termination of a guardianship of the person under Section 1202.231, the court must find clear and convincing evidence (strike: by a preponderance of the evidence) that:

- (1) the ward remains a partially or completely incapacitated person:
  - (A) those individuals incapacitated by significant neurological or developmental disabilities from birth through life, and whose lack of capacity has remained static or regressive in nature, shall be presumed to remain incapacitated.
  - (B) the presumption shall remain dispositive unless and until it is overcome by clear and convincing evidence to the contrary.

In Summary

- PART's contention is that if the burden of proof for a Civil Commitment is "beyond a reasonable doubt" then the burden of proof for an applicant seeking termination of a guardianship should at least be "clear and convincing evidence" that the ward's needs can be managed without the necessity of a continued guardianship due to ward's incapacity is no longer static.
- Burden of Proof to determine incapacity is currently "clear and convincing evidence"
- And alternatives to guardianship must be found NOT to be feasible by the same burden of proof before the guardianship is ordered. (TEC § 1101.101 (D)).

## 'I want to live at home' | The battle of a conservatorship funded by tax dollars

For the first 39 years of his life, Garth Schutte (IDD, Autism, OCD) relied on his mother, Jill to assist him with all his activities of daily living. After taking Garth to the hospital due to her concerns regarding his health. Garth mentioned to one of the nurses, 'My mom puts a red plastic straw in my private part,' Jill said. Garth was describing how his mother, who was trained, used a prescribed urinary catheter to drain his urine. The catheter is how Garth's state conservatorship began.

An abuse report was sent to Adult Protective Services (APS) as well as Alta Regional Center — the state-run facility that supports people with disabilities and their families. The Regional Center took Garth and placed him in a state-funded care facility or vendor. His mother and brothers were not notified, despite Mom having a power of attorney over Garth. For three months, no one told their family where Garth was living.

The Schutte family decided to get conservatorship over Garth. The family began the lengthy legal process. Then after three months, Garth was suddenly dropped off at Jill's home by regional center employees due to a clerical error.

Less than 24 hours later, three sheriff's deputies arrived to do a welfare check. But after speaking with Garth and doing a home inspection, their concerns disappeared. One deputy offered the Schutte's advice: "The most important thing you can do is go get that conservatorship as quickly as you can because that'll prevent them from pulling all this." The Schutte family decided to take his advice and continued onward with the conservatorship process.

Garth's attorney ad litem refused to meet with him at least five times. When this news story was broadcast early June 2022, the attorney ad litem had yet to meet Garth. The judge listened to the regional center and gave temporary conservatorship of Garth to the Department of Developmental Services and not to the family as recommended by the court investigator. The Center also asked that DDS have a power to control who Garth could see.

Garth's mother said he has been moved five times in six months. As of mid-July 2022, Jill hadn't seen or spoken with Garth for 12 weeks. Visitation and phone calls, between Garth and his family, has been stopped. "We have not been (to his care home). We are not allowed to go there. We are not allowed to know the exact address," said Jill. "We have not seen him or heard from him."

## **Families fighting state-run conservatorships are trapped in a broken, systemic web of conflicting interests**

Mr. and Mrs. Findley sought conservatorship for their son Andrew nearly four years ago. Court records show that Andrew has autism as well as other developmental disabilities and requires 24-hour care. Deborah, said that they provided Andrew with the best of everything and that included therapists.

As he approached age 18, their family moved to another town in California. Thinking that they could continue his care, they petitioned the court for conservatorship. Deborah (Mom) says they were blindsided by the state and now she cannot see her son, Andrew, in person.

The probate court received, along with the Findley's petition for conservatorship, was another one from California's Department of Developmental Services (DDS). DDS' petition said that DDS should be conservator instead of Andrew's parents because "throughout Andrew's life his parents have interfered with his health, safety, welfare." And they alleged in court that the parents could not handle his aggressive behaviors and were not providing the care he needs.

Deborah says that, "(The) court-appointed investigator never interviewed us. Still hasn't in three years. We never got due process." She has spent over \$300,000 in legal fees fighting the state's court-ordered conservatorship, trying to get access to him. In December 2021, she was only granted virtual visitation with "guidelines" restricting her on the questions she is allowed to ask. Over the past three years, she has been given less than 100 hours of virtual contact with him.".

Andrew is now 21 years old, and was difficult to understand and unfocused during a recent virtual visit. Mom says this is due to the multiple medications he has been prescribed. But due the state conservatorship she has no say. She didn't know where he was for nine months or what was his condition.

California law allows the Director of the Department of Developmental Services to be appointed as conservator. DDS often becomes a conservator by way of its regional centers. That is what happened in Andrew's case; Tri-Counties Regional Center nominated DDS to be conservator, court records show.

Deborah says this is a conflict of interest because when a regional center nominates DDS as a conservator and it is granted, the responsibilities of the conservator are returned to the regional center, funded by DDS.