

BILL ANALYSIS

S.B. 1624
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Judiciary & Civil Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

State law provides for the appointment of attorneys ad litem for proceedings to restore a ward's capacity, yet wards may not always receive adequate representation. This may be due to biases, lack of training, and limited knowledge of better alternatives of the appointed attorney. This is further complicated by instances in which courts do not review guardianships often enough and wards have few opportunities to regain their rights or report issues with the guardianship. When both legal representation and court review fail, wards are left with limited options for recourse. S.B. 1624 seeks to provide proposed wards and wards with more options and ensure that these people are adequately protected. The bill allows persons with a guardian to choose and hire attorneys to advocate for their wishes in restoration or modification hearings. The bill also provides additional guidance regarding guardianship reviews and reports by court investigators and guardians ad litem and on what evidence can be considered in hearings for termination of guardianships. This legislation seeks to increase transparency and accountability in the guardianship system and improve the chances of persons under guardianship having their expressed wishes heard and respected.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Supreme Court in SECTION 17 of this bill.

ANALYSIS

S.B. 1624 amends the Estates Code to require an attorney ad litem appointed for a ward or proposed ward under statutory provisions relating to guardianship to represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes. The bill specifies that the purposes for which a court is required to appoint an attorney ad litem in a proceeding for the appointment of a guardian includes representing the proposed ward's expressed wishes. The bill requires an attorney ad litem appointed in a proceeding for the complete restoration of the ward's capacity or for the modification of the ward's guardianship to represent the ward's interests, including the ward's expressed interests. The bill establishes that such an attorney ad litem has an attorney-client relationship with the ward that the attorney is appointed to represent.

With respect to the authorization for a person at any time to retain an attorney who holds the requisite certificate to represent the person's interests in a guardianship proceeding instead of having those interests represented by an attorney ad litem, S.B. 1624 revises the authorization as follows:

- by expanding the authorization to any ward or proposed ward;
- by specifying that the purposes for which the attorney is retained is to represent the ward's or proposed ward's expressed wishes; and
- by specifying that the proceedings in which the attorney may represent the ward or proposed ward include a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship.

However, the bill authorizes the court, on the motion of a party to a guardianship proceeding or on the court's own motion, to hold a hearing on such a ward's or proposed ward's capacity to retain an attorney instead of being represented by an attorney ad litem. The bill establishes that the burden of proof is on the party motioning the court. If the court finds by a preponderance of evidence that the ward or proposed ward does not understand the guardianship proceeding or the purpose for which the attorney was retained, the court may appoint an attorney ad litem under applicable statutory provisions. The bill replaces the authorization for a court to remove an attorney ad litem appointed for a proceeding for the appointment of a guardian if the court finds that the ward or the proposed ward has capacity to contract with a requirement for the court to remove an attorney ad litem appointed for a proceeding for the appointment of a guardian, a proceeding for the complete restoration of the ward's capacity or for the modification of the ward's guardianship, or another applicable proceeding if the ward or proposed ward has retained an attorney. The bill includes an attorney retained by a ward or proposed ward among the attorneys that are required to be provided copies of all of the current records in the guardianship case and that may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records.

S.B. 1624 prohibits a person appointed as a guardian ad litem for purposes of representing the interests of an incapacitated person in a guardianship proceeding from being any of the following:

- an interested person who is an heir, devisee, spouse, creditor, or any other person having a property right in or claim against an estate being administered; or
- an attorney ad litem appointed for the guardianship proceeding, except as provided by statutory provisions relating to the appointment of a guardian ad litem in the interest of judicial economy, the appointment of the attorney ad litem for purposes of the complete restoration of the ward's capacity or for modification of the guardianship, and the removal of a guardian without notice.

S.B. 1624 includes among the required contents of a guardian's sworn affidavit statements indicating the supports and services the ward has received or is currently receiving. The bill requires such statements to include the following:

- information regarding actions the guardian is taking to encourage the development of the ward's maximum self-reliance and independence;
- a list of all the supports and services the ward is currently receiving, including certain relevant information regarding medical and mental health services provided;
- where the ward receives such supports and services;
- who provides the supports and services received by the ward;
- a list of the supports and services the ward previously received or attempted to receive and why the support or service was discontinued or not received; and
- the guardian's opinion on whether the ward has the capacity or sufficient capacity with supports and services for complete restoration of the ward's capacity or modification of the guardianship or the reasons why the ward does not have the capacity or sufficient capacity with supports and services for complete restoration of the ward's capacity or modification of the guardianship.

S.B. 1624 authorizes a court in which the guardianship proceeding is pending to conduct a hearing to determine whether a guardianship should be continued, modified, or terminated.

S.B. 1624 replaces the authorization for a statutory probate court in its annual review of a guardianship to review any report prepared by an applicable court investigator, guardian ad litem, or court visitor; conduct a hearing; or review the annual account of the estate or the annual report relating to the support and maintenance of the ward with a requirement for a statutory probate court to review any such report. The bill removes the authorization for a statutory probate court, in reviewing a guardianship, to conduct a hearing. The bill requires the court investigator or court visitor in the guardianship proceeding, as appropriate, if an investigation report by a court investigator or an evaluation report by an appointed court visitor is required and unless a court orders that a report be made more frequently, to prepare an additional investigation or evaluation report every three years beginning on the date the original letters of guardianship are issued unless a court orders that a report be completed more frequently. The bill requires the court investigator or court visitor, as appropriate, before preparing such an additional report to do the following:

- meet with the ward in person, using necessary and appropriate communication supports;
- present the bill of rights for wards to the ward in the ward's preferred language and manner of communication;
- document the ward's statement of guardianship; and
- document the supports and services currently available to the ward and whether the guardian's rights and powers can be limited because a less restrictive alternative to guardianship is appropriate.

S.B. 1624 requires the ward's statement of guardianship to include whether the ward desires a full restoration of the ward's capacity or modification of the ward's guardianship and any other information the ward wishes to share with the court. The bill provides for the ward's guardianship statement to be in written or verbal form under specified conditions.

S.B. 1624 requires a court that is not a statutory probate court to review any annual account of the estate and any annual report relating to the support and maintenance of the ward or any additional investigation or evaluation reports prepared by a court investigator or court visitor, as applicable.

S.B. 1624 authorizes a ward to have private communications with the ward's physicians or other medical professionals, unless limited by the court or otherwise restricted by law or the court, after a hearing requested by the ward's guardian, orders the private communications to be limited due to the risk of substantial harm to the ward or the communications being unduly burdensome to the physician or medical professional.

S.B. 1624 replaces requirements relating to presenting a physician's letter or certificate before the court for purposes of the court granting an order to completely restore a ward's capacity or modify a guardianship with requirements added by the bill. The bill also repeals the following Estates Code provisions:

- the provision that establishes that a written letter or certificate from a physician regarding a ward is not required before the appointment of a court investigator or a guardian ad litem to investigate the ward's circumstances; and
- the authorization for a guardian ad litem appointed to investigate a ward's circumstances to also be appointed by the court to serve as attorney ad litem in a proceeding for complete restoration of the ward's capacity or for the modification of guardianship.

With respect to the replaced requirements, S.B. 1624 requires an applicant for a court order for complete restoration of a ward's capacity or modification of guardianship to present to the court and the court to consider a written letter or certificate as evidence of capacity, or sufficient capacity with supports and services, at a related hearing from the following professionals:

- if the ward's incapacity resulted from a physical condition or mental condition, a physician licensed in Texas; or
- if the ward's incapacity resulted from a mental condition, a psychologist licensed in Texas or certified by the Health and Human Services Commission (HHSC) to perform

the examination, in accordance with rules adopted by the executive commissioner of HHSC governing examinations of that kind.

The bill requires the physician or psychologist who provides such a letter or certificate to have experience examining individuals with the physical or mental condition resulting in the ward's incapacity or have an established patient-provider relationship with the ward. The bill requires the letter or certificate to be signed by the physician or psychologist and dated not earlier than the 120th day before the date the application was filed or after the date the application was filed but before the date of the hearing.

S.B. 1624 authorizes a court to consider the following evidence of capacity, or sufficient capacity with supports and services, at the hearing:

- a statement from a representative of the local mental health authority or the local intellectual and developmental disability authority listing services received by the ward and the effectiveness of those services;
- medical records;
- affidavits of treating professionals regarding the effectiveness of supports and services the ward is receiving;
- documentation from a health care provider providing supports or services to the ward under Medicaid, including a Medicaid waiver program authorized under the federal Social Security Act;
- an affidavit of the ward's employer or day habilitation program manager regarding the ward's ability to perform the necessary tasks;
- documentation from the U.S. Social Security Administration identifying the ward's representative payee; or
- any other evidence demonstrating the ward's capacity.

S.B. 1624 replaces the authorization for the court to appoint the necessary physicians to examine the ward if the court determines necessary with a requirement for the court to appoint a physician or psychologist to complete an examination of the ward if the court determines necessary. The bill requires the physician or psychologist to be chosen by the ward, provided, but authorizes the court to appoint the necessary physicians or psychologists if the ward makes no choice, the ward's physician or psychologist of choice is not available, or additional information is needed or required after an examination by the ward's physician or psychologist of choice. The bill's provisions regarding such a letter from a physician or a psychologist apply only to a proceeding for the complete restoration of capacity or modification of a guardianship commenced on or after the bill's effective date. Such a proceeding commenced before the bill's effective date is governed by the law in effect on the date the proceeding was commenced, and the former law is continued in effect for that purpose.

If an intellectual disability is the basis of a ward's alleged incapacity, S.B. 1624 requires the written letter or certificate by a qualified physician or psychologist to contain the following instead of the information otherwise required in letters from a physician or psychologist:

- a statement, in the physician's or psychologist's opinion, regarding whether the ward has the capacity, or sufficient capacity with supports and services, to provide food, clothing, and shelter for himself or herself, care for the ward's own physical health, and manage the ward's financial affairs;
- a statement of how or in what manner the ward's ability to make or communicate reasonable decisions concerning himself or herself is affected by the ward's mental capacity; and
- any other information required by the court.

S.B. 1624 requires a court investigator and a court visitor at least once every two years to complete two hours of training, including one hour of training on alternatives to guardianship and supports and services available to a proposed ward, in accordance with the training requirements provided by the bill.

S.B. 1624 amends the Government Code to require the Texas Supreme Court, in consultation with the Judicial Branch Certification Commission, to ensure that at least one hour of training related to alternatives to guardianships and supports and services that are available to a proposed ward is provided to each judge with jurisdiction to hear a guardianship proceeding, each court investigator appointed in such a proceeding, and each court visitor appointed in the proceeding at least once every two years. The bill requires the supreme court to adopt the rules necessary to provide such training not later than December 1, 2023. The bill requires a judge who is in office on the bill's effective date or a court investigator or court visitor who is appointed in a guardianship proceeding on or before the bill's effective date to complete the required training not later than December 1, 2025.

S.B. 1624 applies to a guardianship proceeding created before, on, or after the bill's effective date and an application for a guardianship pending on, or filed on or after, the bill's effective date, except as otherwise provided by the bill.

S.B. 1624 repeals Sections 1202.054(b-1) and (d), Estates Code.

EFFECTIVE DATE

September 1, 2023.