

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 1624
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Despite current law's requirement to appoint attorneys ad litem for restoration of rights proceedings, persons may not receive adequate representation, rendering the right to representation meaningless. This may be due to biases, lack of training, and limited knowledge of less restrictive alternatives among the appointed attorneys. Accordingly, S.B. 1624 would allow persons with a guardian to choose and hire attorneys to advocate for their wishes in restoration or modification hearings if the persons have capacity to contract and retain attorneys.

Though the courts are required to review guardianships annually, such reviews occur inconsistently, leaving persons with little recourse to regain their rights or report abuse or issues with the guardian or guardianship. When both mechanisms fail, persons with guardians are left with limited options for recourse. S.B. 1624 would provide 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. These changes would increase transparency and accountability in the guardianship system and improve the chances of persons under guardianship having their expressed wishes heard and respected.

(Original Author's/Sponsor's Statement of Intent)

C.S.S.B. 1624 amends current law relating to guardianships, alternatives to guardianship, and supports and services for incapacitated persons.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Supreme Court of Texas in SECTION 17 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 1054.001, Estates Code, as follows:

Sec. 1054.001. APPOINTMENT OF ATTORNEY AD LITEM IN PROCEEDING FOR APPOINTMENT OF GUARDIAN. Requires the court, in a proceeding under Title 3 (Guardianship and Related Procedures) for the appointment of a guardian, to appoint an attorney ad litem to represent the proposed ward's interests, including the proposed ward's expressed wishes.

SECTION 2. Amends Section 1054.003, Estates Code, as follows:

Sec. 1054.003. ACCESS TO RECORDS. Requires an attorney ad litem appointed under Section 1054.001 or an attorney retained by a ward or proposed ward under Section 1054.006 or 1202.103 (Retention and Compensation of Attorney for Ward) to be provided copies of all of the current records in the guardianship case. Makes a conforming change.

SECTION 3. Amends Section 1054.006, Estates Code, as follows:

Sec. 1054.006. REPRESENTATION OF WARD OR PROPOSED WARD BY ATTORNEY. (a) Authorizes a ward or proposed ward at any time to retain an attorney who holds a certificate required by Subchapter E (Qualifications to Serve as Attorney) to represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes, in a guardianship proceeding, including a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship, instead of having those interests represented by an attorney ad litem appointed under Section 1054.001, Section 1202.101, or another provision of this title. Deletes existing text authorizing the following persons to represent the person's interests in a guardianship proceeding, instead of having those interests represented by an attorney ad litem appointed under Section 1054.001 or another provision of this title: a ward who retains the power to enter into a contract under the terms of the guardianship, subject to Section 1202.103, and a proposed ward for purposes of a proceeding for the appointment of a guardian as long as the proposed ward has capacity to contract.

(b) Requires the court, subject to Subsection (c), if a ward or proposed ward has retained an attorney under Subsection (a), rather than authorizes the court if the court finds that the ward or the proposed ward has capacity to contract, to remove an attorney ad litem appointed under Section 1054.001, Section 1202.101, or any other provision of this title that requires the court to appoint an attorney ad litem to represent the interests of a ward or proposed ward and appoint a ward or a proposed ward's retained counsel.

(c) Authorizes the court, on the motion of a party to a guardianship proceeding, to hold a hearing on the ward's or proposed ward's capacity to retain an attorney under Subsection (a). Provides that the burden of proof is on the party motioning the court. Authorizes 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, to appoint an attorney ad litem under Section 1054.001, Section 1202.101, or another provision of this title.

(d) Requires an attorney retained for a ward or proposed ward under this section to represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes.

SECTION 4. Amends Section 1054.007, Estates Code, by adding Subsection (c), to require an attorney ad litem appointed for a ward or proposed ward under this title to represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes.

SECTION 5. Amends Section 1054.051, Estates Code, as follows:

Sec. 1054.051. APPOINTMENT OF GUARDIAN AD LITEM IN GUARDIANSHIP PROCEEDING. (a) Authorizes a judge, subject to Subsection (b), to appoint a guardian ad litem to represent the interests of an incapacitated person in a guardianship proceeding.

(b) Prohibits a person appointed as a guardian ad litem from being:

(1) an interested person, as defined by Section 1002.018(1) (relating to defining an "interested person" or "person interested" as an heir, devisee, spouse, creditor, or any other person having a property right in or claim against an estate being administered); or

(2) an attorney ad litem appointed for the guardianship proceeding except as provided by Section 1054.052 (Appointment of Guardian ad Litem Relating to Certain Other Suits), 1202.101, or 1203.051 (Removal without Notice; Appointment of Guardian ad Litem and Attorney ad Litem).

SECTION 6. Amends Subchapter D, Chapter 1054, Estates Code, by adding Section 1054.157, as follows:

Sec. 1054.157. REQUIRED TRAINING. 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 Section 22.0133, Government Code.

SECTION 7. Amends Section 1151.351(b), Estates Code, as follows:

(b) Authorizes a ward, unless limited by a court or otherwise restricted by law, to take certain actions, including having private communications with the ward's physicians or other medical professionals, unless 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 due to the communications being unduly burdensome to the physician or medical professional. Makes nonsubstantive changes.

SECTION 8. Amends Section 1163.101, Estates Code, by amending Subsection (c) and adding Subsection (d), as follows:

(c) Requires the guardian of the person to file a sworn affidavit that contains certain information, including statements indicating supports and services the ward has received or is currently receiving, as described by Subsection (d). Makes nonsubstantive changes.

(d) Requires that the statements in the sworn affidavit regarding the ward's supports and services under Subsection (c)(4)(J) (relating to requiring the guardian of the person to file a sworn affidavit that contains statements indicating supports and services the ward has received or is currently receiving) include:

(1) information regarding actions the guardian is taking to encourage the development of the ward's maximum self-reliance and independence;

(2) a list of all the supports and services the ward is currently receiving, including whether the ward:

(A) has a representative payee;

(B) receives services from a local mental health authority or local intellectual and developmental disability authority;

(C) receives any supports and services under Medicaid, including under a Medicaid waiver program authorized under Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n); and

(D) receives any supports and services informally;

(3) where the ward receives the supports and services described by Subdivision (2);

(4) who provides the supports and services described by Subdivision (2);

(5) 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

(6) 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 under Chapter 1202 (Modification or Termination of 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 under Chapter 1202.

SECTION 9. Amends Section 1201.052, Estates Code, as follows:

Sec. 1201.052. New heading: ANNUAL DETERMINATION; HEARING. (a) Creates this subsection from existing text.

(b) Authorizes a court in which the guardianship proceeding is pending to conduct a hearing under this section.

SECTION 10. Amends Section 1201.053, Estates Code, as follows:

Sec. 1201.053. METHOD OF DETERMINATION. (a) Requires, rather than authorizes, a statutory probate court, in reviewing a guardianship under Section 1201.052, to review any:

- (1) report prepared by certain persons;
- (2) annual account prepared under Subchapter A (Annual Account and Other Exhibits by Guardian of the Estate), Chapter 1163; and
- (3) report prepared under Subchapter C (Annual Report by Guardian of the Person), Chapter 1163.

Deletes existing text authorizing a statutory probate court, in reviewing a guardianship under Section 1201.052, to conduct a hearing. Makes nonsubstantive changes.

(a-1) Requires the court investigator or court visitor, as appropriate, unless a court orders that a report be completed more frequently, if a report described by Subsection (a)(1) is required under Section 1054.153 (Investigation Report) or 1054.104 (Evaluation Report), to prepare an additional report described by Subsection (a)(1) every three years beginning on the date the original letters of guardianship are issued.

(a-2) Requires the court investigator or court visitor, as appropriate, before preparing an additional report under Subsection (a-1), to:

- (1) meet with the ward in person, using necessary and appropriate communication supports;
- (2) present the bill of rights for wards under Section 1151.351 (Bill of Rights for Wards) to the ward in the ward's preferred language and manner of communication;
- (3) document the ward's statement of guardianship, as described by Subsection (a-3); and
- (4) 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.

(a-3) Provides that the ward's statement of guardianship:

- (1) is required to include:
 - (A) whether the ward desires a full restoration of the ward's capacity or modification of the ward's guardianship; and
 - (B) any other information the ward wishes to share with the court; and

(2) is authorized to be in the form of:

(A) a written statement made by the ward and filed with the court by the court investigator or court visitor preparing the report;

(B) a verbal statement made to the court investigator or court visitor, as applicable, that is documented in writing and filed with the court by the person receiving the statement; or

(C) a verbal or written statement made by the ward during a hearing either in person or remotely through other means.

(b) Requires a court that is not a statutory probate court to review any account prepared under Subchapter A, Chapter 1163, and any report prepared under Subchapter C, Chapter 1163, or Subsection (a-1). Makes nonsubstantive changes.

SECTION 11. Amends Section 1202.101, Estates Code, as follows:

Sec. 1202.101. APPOINTMENT OF ATTORNEY AD LITEM. (a) Requires the court, unless the ward retains an attorney under Section 1202.103, to appoint an attorney ad litem to represent a ward in a proceeding for the complete restoration of the ward's capacity or for the modification of the ward's guardianship. Requires the attorney ad litem to represent the ward's interests, including the ward's expressed wishes.

(b) Provides that the attorney ad litem has an attorney-client relationship with the ward the attorney ad litem is appointed to represent under this section.

SECTION 12. Amends Section 1202.152, Estates Code, by amending Subsections (a) and (c) and adding Subsections (a-1), (a-2), and (a-3), as follows:

(a) Requires the applicant, subject to Section 1202.1521, to present to the court and requires the court to consider a written letter or certificate as evidence of capacity, or sufficient capacity with supports and services, at a hearing under Section 1202.151 (Evidence and Burdon of Proof at Hearing) from:

(1) a physician licensed in this state, if the ward's incapacity resulted from a physical condition or mental condition; or

(2) a psychologist licensed in this state 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, if the ward's incapacity resulted from a mental condition.

(a-1) Requires the physician or psychologist who provides the letter or certificate under Subsection (a) to:

(1) have experience examining individuals with the physical or mental condition resulting in the ward's incapacity; or

(2) have an established patient-provider relationship with the ward.

(a-2) Requires that the letter or certificate required by Subsection (a) be:

(1) signed by the physician or psychologist; and

(2) dated:

(A) not earlier than the 120th day before the date the application was filed;
or

(B) after the date the application was filed but before the date of the hearing.

(a-3) Authorizes the court to consider the following evidence of capacity, or sufficient capacity with supports and services, at a hearing under Section 1202.151:

- (1) 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;
- (2) medical records;
- (3) affidavits of treating professionals regarding the effectiveness of supports and services the ward is receiving;
- (4) documentation from a health care provider providing supports or services to the ward under Medicaid, including a Medicaid waiver program authorized under Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n);
- (5) an affidavit of the ward's employer or day habilitation program manager regarding the ward's ability to perform the necessary tasks;
- (6) documentation from the United States Social Security Administration identifying the ward's representative payee; or
- (7) any other evidence demonstrating the ward's capacity.

Deletes existing text prohibiting the court from granting an order completely restoring a ward's capacity or modifying a ward's guardianship under an application filed under Section 1202.051 unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated not earlier than the 120th day before the date the application was filed or dated after the date the application was filed but before the date of the hearing.

(c) Requires the court, if the court determines it is necessary, to appoint a physician or psychologist to complete an examination of the ward. Requires the physician or psychologist to be chosen by the ward, provided, however, that 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 court is authorized to appoint the necessary physicians or psychologists to examine the ward. Requires a physician appointed by the court to examine the ward in the same manner and to the same extent as a ward is examined by a physician under Section 1101.103 (Determination of Incapacity of Certain Adults: Physician Examination) or 1101.104 (Examinations and Documentation Regarding Intellectual Disability). Deletes existing text authorizing the court, if the court determines it is necessary, to appoint the necessary physicians to examine the ward in the same manner and to the same extent as a ward is examined by a physician under Section 1101.103 or 1101.104.

SECTION 13. Amends Subchapter D, Chapter 1202, Estates Code, by adding Section 1202.1521, as follows:

Sec. 1202.1521. PHYSICIAN'S LETTER OR CERTIFICATE: REQUIREMENT IF ALLEGED INCAPACITY BASED ON INTELLECTUAL DISABILITY. Requires that the written letter or certificate presented under Section 1202.152(a), instead of containing the information required by Section 1202.152(b), if an intellectual disability is the basis of a ward's alleged incapacity:

- (1) state, in the physician's or psychologist's opinion, whether the ward has the capacity, or sufficient capacity with supports and services, to do any of the

activities listed in Section 1202.152(b)(1) (relating to requiring that a letter or certificate presented under Subsection (a) describe the nature and degree of incapacity, including the medical history if reasonably available, or state that, in the physician's opinion, the ward has the capacity, or sufficient capacity with supports and services, to take certain actions);

(2) state 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

(3) include any other information required by the court.

SECTION 14. Amends Subchapter A, Chapter 22, Government Code, by adding Section 22.0133, as follows:

Sec. 22.0133. JUDICIAL, COURT INVESTIGATOR, AND COURT VISITOR TRAINING RELATED TO GUARDIANSHIPS. Requires the Supreme Court of 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 under Section 1054.156 (Appointment of Court Investigator for Certain Courts), Estates Code, and each court visitor appointed under Section 1054.103, Estates Code, at least once every two years.

SECTION 15. Repealers: Sections 1202.054(b-1) (relating to providing that a written letter or certificate from a physician is not required before the appointment of the court investigator or a guardian ad litem) and (d) (relating to authorizing a guardian ad litem appointed under this section to also be appointed by the court to serve as attorney ad litem), Estates Code.

SECTION 16. (a) Provides that the changes in law made by this Act, except as otherwise provided by this section, apply to:

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

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

(b) Makes application of Section 1202.152, Estates Code, prospective.

SECTION 17. (a) Requires the supreme court, not later than December 1, 2023, to adopt the rules necessary to provide the training required under Section 22.0133, Government Code, as added by this Act.

(b) Requires a judge who is in office on the effective date of this Act or a court investigator or court visitor described by Section 22.0133, Government Code, as added by this Act, who is appointed on or before the effective date of this Act, notwithstanding Section 22.0133, Government Code, as added by this Act, to complete the training required by Section 22.0133, Government Code, as added by this Act, not later than December 1, 2025.

SECTION 18. Effective date: September 1, 2023.