By:  Zaffirini, et al. S.B. No. 1624

(Leach)

A BILL TO BE ENTITLED

AN ACT

relating to guardianships, alternatives to guardianship, and supports and services for incapacitated persons.

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

SECTION 1.  Section 1054.001, Estates Code, is amended to read as follows:

Sec. 1054.001.  APPOINTMENT OF ATTORNEY AD LITEM IN PROCEEDING FOR APPOINTMENT OF GUARDIAN. In a proceeding under this title for the appointment of a guardian, the court shall appoint an attorney ad litem to represent the proposed ward's interests, including the proposed ward's expressed wishes.

SECTION 2.  Section 1054.003, Estates Code, is amended to read as follows:

Sec. 1054.003.  ACCESS TO RECORDS. 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 shall be provided copies of all of the current records in the guardianship case. The attorney ad litem or retained attorney may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records.

SECTION 3.  Section 1054.006, Estates Code, is amended to read as follows:

Sec. 1054.006.  REPRESENTATION OF WARD OR PROPOSED WARD BY ATTORNEY. (a) A ward or proposed ward [~~The following persons~~] may at any time retain an attorney who holds a certificate required by Subchapter E to represent the ward's or proposed ward's [~~person'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[~~:~~

[~~(1)  a ward who retains the power to enter into a contract under the terms of the guardianship, subject to Section 1202.103; and~~

[~~(2)  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)  Subject to Subsection (c), if a ward or proposed ward has retained an attorney under Subsection (a), [~~If~~] the court shall [~~finds that the ward or the proposed ward has capacity to contract, the court may~~] 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)  On the motion of a party to a guardianship proceeding or on the court's own motion, the court may hold a hearing on the ward's or proposed ward's capacity to retain an attorney under Subsection (a). 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 Section 1054.001, Section 1202.101, or another provision of this title.

(d)  An attorney retained by a ward or proposed ward under this section must represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes.

SECTION 4.  Section 1054.007, Estates Code, is amended by adding Subsection (c) to read as follows:

(c)  An attorney ad litem appointed for a ward or proposed ward under this title shall represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes.

SECTION 5.  Section 1054.051, Estates Code, is amended to read as follows:

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

(b)  A person appointed as a guardian ad litem may not be:

(1)  an interested person, as defined by Section 1002.018(1); or

(2)  an attorney ad litem appointed for the guardianship proceeding except as provided by Section 1054.052, 1202.101, or 1203.051.

SECTION 6.  Subchapter D, Chapter 1054, Estates Code, is amended by adding Section 1054.157 to read as follows:

Sec. 1054.157.  REQUIRED TRAINING. At least once every two years, a court investigator and a court visitor shall 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.  Section 1151.351(b), Estates Code, is amended to read as follows:

(b)  Unless limited by a court or otherwise restricted by law, a ward is authorized to the following:

(1)  to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;

(2)  to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;

(3)  to be treated with respect, consideration, and recognition of the ward's dignity and individuality;

(4)  to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);

(5)  to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;

(6)  to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;

(7)  to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;

(8)  to exercise full control of all aspects of life not specifically granted by the court to the guardian;

(9)  to control the ward's personal environment based on the ward's preferences;

(10)  to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;

(11)  to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;

(12)  to have a court investigator or guardian ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;

(13)  to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;

(14)  to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;

(15)  to personal privacy and confidentiality in personal matters, subject to state and federal law;

(16)  to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward:

(A)  the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and

(B)  the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);

(17)  to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;

(18)  to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;

(19)  to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

(20)  to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;

(21)  to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;

(22)  to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;

(23)  to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation;

(24)  to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward; [~~and~~]

(25)  to make decisions related to sexual assault crisis services, including consenting to a forensic medical examination and treatment, authorizing the collection of forensic evidence, consenting to the release of evidence contained in an evidence collection kit and disclosure of related confidential information, and receiving counseling and other support services; and

(26)  to have 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:

(A)  the risk of substantial harm to the ward; or

(B)  the communications being unduly burdensome to the physician or medical professional.

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

(c)  The guardian of the person shall file a sworn affidavit that contains:

(1)  the guardian's current name, address, and telephone number;

(2)  the ward's date of birth and current name, address, telephone number, and age;

(3)  a description of the type of home in which the ward resides, which shall be described as:

(A)  the ward's own home;

(B)  a nursing home;

(C)  a guardian's home;

(D)  a foster home;

(E)  a boarding home;

(F)  a relative's home, in which case the description must specify the relative's relationship to the ward;

(G)  a hospital or medical facility; or

(H)  another type of residence;

(4)  statements indicating:

(A)  the length of time the ward has resided in the present home;

(B)  the reason for a change in the ward's residence, if a change in the ward's residence has occurred in the past year;

(C)  the date the guardian most recently saw the ward;

(D)  how frequently the guardian has seen the ward in the past year;

(E)  whether the guardian has possession or control of the ward's estate;

(F)  whether the ward's mental health has improved, deteriorated, or remained unchanged during the past year, including a description of the change if a change has occurred;

(G)  whether the ward's physical health has improved, deteriorated, or remained unchanged during the past year, including a description of the change if a change has occurred;

(H)  whether the ward has regular medical care; [~~and~~]

(I)  the ward's treatment or evaluation by any of the following persons during the past year, including the person's name and a description of the treatment:

(i)  a physician;

(ii)  a psychiatrist, psychologist, or other mental health care provider;

(iii)  a dentist;

(iv)  a social or other caseworker; or

(v)  any other individual who provided treatment; and

(J)  supports and services the ward has received or is currently receiving, as described by Subsection (d);

(5)  a description of the ward's activities during the past year, including recreational, educational, social, and occupational activities, or a statement that no activities were available or that the ward was unable or refused to participate in activities;

(6)  the guardian's evaluation of:

(A)  the ward's living arrangements as excellent, average, or below average, including an explanation if the conditions are below average;

(B)  whether the ward is content or unhappy with the ward's living arrangements; and

(C)  unmet needs of the ward;

(7)  a statement indicating whether the guardian's power should be increased, decreased, or unaltered, including an explanation if a change is recommended;

(8)  a statement indicating that the guardian has paid the bond premium for the next reporting period;

(9)  if the guardian is a private professional guardian, a guardianship program, or the Health and Human Services Commission, whether the guardian or an individual certified under Subchapter C, Chapter 155, Government Code, who is providing guardianship services to the ward and who is filing the affidavit on the guardian's behalf, is or has been the subject of an investigation conducted by the Judicial Branch Certification Commission during the preceding year; and

(10)  any additional information the guardian desires to share with the court regarding the ward, including:

(A)  whether the guardian has filed for emergency detention of the ward under Subchapter A, Chapter 573, Health and Safety Code; and

(B)  if applicable, the number of times the guardian has filed for emergency detention and the dates of the applications for emergency detention.

(d)  The statements in the sworn affidavit regarding the ward's supports and services under Subsection (c)(4)(J) must 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 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.  Section 1201.052, Estates Code, is amended to read as follows:

Sec. 1201.052.  ANNUAL DETERMINATION; HEARING. (a) To determine whether a guardianship should be continued, modified, or terminated, the court in which the guardianship proceeding is pending:

(1)  shall review annually each guardianship in which the application to create the guardianship was filed after September 1, 1993; and

(2)  may review annually any other guardianship.

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

SECTION 10.  Section 1201.053, Estates Code, is amended to read as follows:

Sec. 1201.053.  METHOD OF DETERMINATION. (a) In reviewing a guardianship under Section 1201.052, a statutory probate court shall review any [~~may~~]:

(1)  [~~review any~~] report prepared by:

(A)  a court investigator under Section 1054.153 or 1202.054;

(B)  a guardian ad litem under Section 1202.054; or

(C)  a court visitor under Section 1054.104;

(2)  [~~conduct a hearing; or~~

[~~(3)  review an~~] annual account prepared under Subchapter A, Chapter 1163; and

(3)  [~~, or a~~ ] report prepared under Subchapter C, Chapter 1163.

(a-1)  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 or 1054.104, the court investigator or court visitor, as appropriate, shall 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)  Before preparing an additional report under Subsection (a-1), the court investigator or court visitor, as appropriate, shall:

(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 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)  The ward's statement of guardianship:

(1)  must 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)  may 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)  A court that is not a statutory probate court:

(1)  shall review:

(A)  any account prepared under Subchapter A, Chapter 1163; and

(B)  any report prepared under Subchapter C, Chapter 1163 or Subsection (a-1); and

(2)  may use any other method to review a guardianship under Section 1201.052 that is determined appropriate by the court according to the court's caseload and available resources.

SECTION 11.  Section 1202.101, Estates Code, is amended to read as follows:

Sec. 1202.101.  APPOINTMENT OF ATTORNEY AD LITEM. (a) Unless the ward retains an attorney under Section 1202.103, the [~~The~~] court shall 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. Unless otherwise provided by the court, the attorney ad litem shall represent the ward only for purposes of the restoration or modification proceeding. The attorney ad litem shall represent the ward's interests, including the ward's expressed wishes.

(b)  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.  Section 1202.152, Estates Code, is amended by amending Subsections (a) and (c) and adding Subsections (a-1), (a-2), and (a-3) to read as follows:

(a)  Subject to Section 1202.1521, the applicant must present to the court and the [~~The~~] court shall consider a written letter or certificate as evidence of capacity, or sufficient capacity with supports and services, at a hearing under Section 1202.151 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 to perform the examination, in accordance with rules adopted by the executive commissioner of the commission governing examinations of that kind, if the ward's incapacity resulted from a mental condition.

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

(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)  The letter or certificate required by Subsection (a) must 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)  The court may 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 [~~may not grant 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:~~

[~~(1)  not earlier than the 120th day before the date the application was filed; or~~

[~~(2)  after the date the application was filed but before the date of the hearing~~].

(c)  If the court determines it is necessary, the court shall [~~may~~] appoint a physician or psychologist to complete an examination of the ward. The physician or psychologist must 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 may appoint the necessary physicians or psychologists to examine the ward. A physician appointed by the court must 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.  Subchapter D, Chapter 1202, Estates Code, is amended by adding Section 1202.1521 to read as follows:

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

(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);

(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.  Subchapter A, Chapter 22, Government Code, is amended by adding Section 22.0133 to read as follows:

Sec. 22.0133.  JUDICIAL, COURT INVESTIGATOR, AND COURT VISITOR TRAINING RELATED TO GUARDIANSHIPS. The supreme court, in consultation with the Judicial Branch Certification Commission, shall 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, Estates Code, and each court visitor appointed under Section 1054.103, Estates Code, at least once every two years.

SECTION 15.  Sections 1202.054(b-1) and (d), Estates Code, are repealed.

SECTION 16.  (a) Except as otherwise provided by this section, the changes in law made by this Act 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)  The changes in law made by this Act to Section 1202.152, Estates Code, apply only to a proceeding for the complete restoration of capacity or modification of a guardianship commenced on or after the effective date of this Act. A proceeding described by this section commenced before the effective date of this Act 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.

SECTION 17.  (a) Not later than December 1, 2023, the Texas Supreme Court shall adopt the rules necessary to provide the training required under Section 22.0133, Government Code, as added by this Act.

(b)  Notwithstanding Section 22.0133, Government Code, as added by this Act, 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 must complete the training required by Section 22.0133, Government Code, as added by this Act, not later than December 1, 2025.

SECTION 18.  This Act takes effect September 1, 2023.