SUBJECT: Promoting alternative guardianships for incapacitated persons

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Smithee, Farrar, Clardy, Laubenberg, Raymond, Schofield, Sheets, S. Thompson

0 nays

1 absent — Hernandez

WITNESSES: For — Farhat Chishty and Debby Salinas Valdez, Guardianship Advocates for the Disabled & Elderly (GRADE); and five individuals; (*Registered, but did not testify*: Joe Sanchez, AARP Texas; Bob Kafka, ADAPT of Texas; Dennis Borel, Coalition of Texans with Disabilities; Joe Tate, Community NOW!; Kathryn Lewis, Disability Rights Texas; Mark Cundall, Disability Voting Action Project; Gyl Switzer, Mental Health America of Texas; Greg Hansch, National Alliance on Mental Illness (NAMI) Texas; Will Francis, National Association of Social Workers - Texas Chapter; Catherine Cranston, Personal Attendant Coalition of Texas; Guy Herman, Statutory Probate Courts of Texas; Rona Statman, Texas Advocates; Ginger Mayeaux, The Arc of Texas; Carlos Higgins, TX Silver Haired Legislature; and seven individuals)

Against — None

On — David Slayton, Office of Court Administration, Texas Judicial Council; Nathan Hecht, Supreme Court of Texas, Texas Judicial Council; Belinda Carlton, Texas Council for Developmental Disabilities; (*Registered, but did not testify*: Jemila Lea, Hogg Foundation for Mental Health)

BACKGROUND: Title 3 of the Estates Code lays out the requirements for guardianships, as well as the process for creating, modifying, and terminating guardianships. Among the requirements for creating, modifying or terminating a guardianship are those governing:

- the content of a guardianship application or application to terminate or modify;
- physician's evaluations of the proposed ward;
- burdens of proof at guardianship proceedings; and
- findings of fact for a determination of incapacity.

Title 3 also establishes the requirements for full guardianships and limited guardianships. A guardian with full authority is appointed when a court finds that the proposed ward is totally without capacity to care for himself or herself, manage his or her property, operate a motor vehicle, and vote in a public election. A guardian with limited powers is appointed when a court finds that the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

DIGEST:

HB 39 would require that all substitutes for guardianship be considered before creating a full guardianship, require that doctors evaluate proposed wards to determine if guardianship was necessary before creating a guardianship, preserve wards' rights to make decisions regarding their residence, and provide for guidance and training for attorneys and court appointees involved in guardianship cases.

Substitutes for guardianship. The bill would define "alternatives to guardianship" to include:

- execution of a medical power of attorney;
- appointment of an attorney in fact or agent under a durable power of attorney;
- execution of a declaration for mental health treatment;
- appointment of a representative payee to manage public benefits;
- establishment of a joint bank account;
- creation of a management trust;
- creation of a special needs trust;
- designation of a guardian before the need arises; and
- establishment of alternate forms of decision-making on person-

centered planning.

The bill would define "supports and services" to mean available formal and informal resources and assistance that enable an individual to:

- meet the individual's needs for food, clothing, or shelter;
- care for the individual's physical or mental health;
- manage the individual's financial affairs; or
- make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

HB 39 would require an application for the appointment of a guardian to state whether alternatives to guardianship and available supports and services to avoid guardianship had been considered and whether the alternatives were feasible and would avoid the need for guardianship. A court would be required to find, by clear and convincing evidence, that alternatives had been considered and determined not feasible before appointing a guardian for a proposed ward.

At a hearing on an application for a complete restoration of a ward's capacity or modification of a guardianship, evidence as to whether the guardianship was necessary and whether the specific powers or duties of the guardian should be limited if the ward received supports and services would be relevant.

The bill would require a court to make a reasonable effort to consider, and give due consideration to, the incapacitated person's preference as to who should be appointed guardian, regardless of whether the incapacitated person had designated a guardian before the need arose.

HB 39 would require a court to give consideration to aspects of the ward's capacity both with and without supports and services before reaching certain decisions or taking certain actions. These would include:

- requiring a court order appointing a guardian with limited authority to specifically state whether the proposed ward lacked capacity,

with and without supports and services, to make decisions about residence, voting, driving, and marriage;

- requiring that the possibility of supports and services be considered in a finding of partial lack of capacity;
- requiring that any order appointing a partial guardian specify the specific rights and powers retained by the ward both with and without supports and services;
- allowing use of supports and services to be considered in an application to modify the powers of a guardian;
- allowing supports and services to be considered for a finding that the nature and degree of the ward's incapacity warranted a modification of the guardianship and the restoration of some of the ward's rights;
- allowing a court to terminate a guardianship if the ward, with supports and services, was found to have full capacity to care for himself or herself and to manage his or her property; and
- requiring that a court order completely restoring a ward's capacity or modifying the guardianship state any necessary supports and services for the restoration or modification.

Evaluation by physicians. Under the bill, the physician's letter or certificate required for a court to grant an application to create a guardianship would be required to state:

- whether improvement in the proposed ward's condition was possible and, if so, the period after which the ward should be reevaluated to determine whether guardianship continued to be necessary;
- how the proposed ward's abilities to administer daily life activities, both with and without supports and services, were affected by the ward's physical or mental health; and
- whether a guardianship was necessary for the proposed ward and, if so, whether specific powers or duties of the guardian should be limited if the proposed ward received supports and services.

If the letter or certificate stated that improvement in the ward's condition

was possible and specified a period of less than a year after which the ward should be reevaluated to determine continued necessity for guardianship, the bill would require that an order appointing a guardian include the date by which an updated letter or certificate would be required.

Under the bill, the physician's letter or certificate, required in a hearing for complete restoration of the ward's capacity, would take supports and services into account when stating whether or not the ward had capacity.

Decisions regarding residence. The bill would prohibit a guardian, except in cases of emergency, from moving the ward to a more restrictive care facility unless the guardian filed an application with the court, provided notice to any persons who had requested it, and the placement was authorized by court order.

HB 39 would require that an application for the appointment of guardianship specifically include any request for termination of a ward's right to make personal decisions regarding residence.

The bill would add lack of capacity to make personal decisions about residence to the list of incapacities that a court would be required to find in order for it to appoint a guardian with full authority. An order appointing a full guardian would be required to specify that the proposed ward lacked this capacity.

HB 39 would specify making personal decisions about residences as part of the proposed ward caring for himself or herself under a limited guardianship. It would require that an order appointing a partial guardian for a person who was incapacitated due to a mental condition specify whether the person retained the right to make personal decisions regarding residence.

HB 39 would require that limited guardianships be designed to allow incapacitated persons to make personal decisions regarding their residence.

Under the bill, a ward or other interested party could file an application for an order to limit the guardian's powers that would permit the ward to make decisions regarding residence.

Under HB 39, any order modifying guardianship would be required to specify whether the ward retained the right to make personal decisions regarding residence if the ward's incapacity resulted from a mental condition.

Attorneys and court appointees. The bill would require that any attorney for an applicant for guardianship complete the same course of study and certification by the State Bar of Texas that is required of court-appointed attorneys in guardianship proceedings. HB 39 would increase the number of hours required for certification from three hours to four and require that one of those hours involve instruction on alternatives to guardianship and supports and services available to proposed wards.

Attorney ad litem. The bill would require an attorney ad litem to discuss with the proposed ward whether alternatives to guardianship would meet the ward's needs and avoid the need for appointment of a guardian. The attorney ad litem also would be required to investigate whether a guardianship was necessary and, if necessary, whether specific powers or duties of the guardian should be limited if the proposed ward received supports and services. If the attorney ad litem determined that a guardianship was necessary, the attorney would be required to certify to the court that it was necessary and that reasonable efforts had been made to explore alternatives to guardianship and supports and services.

Guardian ad litem. Under the bill, the guardian ad litem would be required to investigate whether a guardianship was necessary for the proposed ward and evaluate alternatives to guardianship and supports and services available to the ward that would avoid the need for appointment of a guardian. The information gathered by the guardian ad litem would be subject to examination by the court.

Effective date. HB 39 would take effect September 1, 2015, and would apply to a guardianship created before, on, or after that date. The bill would apply to an application for guardianship pending on, or filed on or after, the effective date.

Certain provisions would apply to guardianship proceedings, applications for the restoration of a ward's capacity, and proceedings for the restoration of a ward's capacity or the modification of a ward's guardianship that were filed on or after the effective date. Certain provisions would apply to appointments of attorneys and guardians ad litem made on or after the effective date.

SUPPORTERS SAY:

HB 39 would help ensure that guardianship was used only as a last resort and would provide guidance to attorneys, judges and individuals involved in guardianship proceedings. Applications for guardianship have increased dramatically in recent years, and there are currently about 50,000 active guardianships in the state. This increase is expected to accelerate as a result of the "silver tsunami" Texas will experience as the "baby boomer" generation ages. Although guardianship is a useful tool for those who need it, it can be a costly and excessive restriction on those who do not.

This bill would improve the guardianship process by promoting substitutes for guardianship, ensuring that physicians help determine whether guardianship is necessary and whether courts implement the least restrictive guardianship provisions possible. It also would help by promoting training and providing guidance to attorneys and individuals involved in guardianship proceedings.

Substitutes for guardianship. Although guardianship can be a godsend to some, it can be a curse to others. Frequently, people apply for guardianship for someone in need of care without realizing how restrictive guardianships can be. HB 39 would present those applicants with substitutes for guardianship — including alternatives to guardianship and available supports and services — that could better suit the needs of the wards. This early consideration would help ensure that individuals who did not require overly restrictive guardianships received needed assistance

without having their freedom curtailed. The consideration of supports and services also would make it more likely that wards were placed in less restrictive partial guardianships.

Because it would apply to guardianships created before its effective date, HB 39 also would make it easier for individuals who are currently in overly restrictive guardianships to tailor those guardianships to better meet their needs. By allowing alternatives to guardianship and supports and services to be considered in motions to modify the guardianships, this bill would expand the avenues to allow current wards greater autonomy.

Evaluation by physicians. Although the vast majority of applications for guardianship are filed by concerned and well-meaning individuals, guardianship can be used to take advantage of a proposed ward. This bill would help prevent the improper use of guardianship provisions by ensuring that a physician weighed in on the need for assistance and whether alternatives to guardianship or supports and services sufficiently met the proposed ward's needs or if a partial or complete guardianship was needed.

HB 39 would ensure that if a ward's condition improved, he or she would not remain trapped under burdensome conditions. Instead the ward would be reevaluated at regular intervals to ensure that the ward's autonomy was not hampered by unnecessary restrictions.

Under the bill, physicians' opinions on the capacity of wards and their guardianship needs would be made available to the courts in hearings to terminate or modify guardianships. In some cases, this could provide evidence that would help wards move to less restrictive guardianships.

Decisions regarding residence. HB 39 would help protect a fundamental right that too often is taken away from persons under guardianship — the right to select their place of residence. Guardianship frequently is used to move wards into assisted living facilities, even when it is not in the best interest of the ward. This bill would place consideration of the ward's capacity to make decisions about where to live at every stage of

guardianship proceedings. These considerations would ensure that wards were not moved to care facilities that were more restrictive than their needs dictated.

Attorneys and court appointees. The bill would ensure that those involved with guardianship proceedings received the proper training and guidance to fulfill their roles and protect the interests of the wards. Requiring attorneys representing applicants for guardianships to be properly certified would ensure that these attorneys were trained on how to consider the needs and autonomy of the ward at the application stage. Increasing the number of hours necessary for certification and requiring training on alternatives to guardianship and supports and services further would promote the use of substitutes for guardianship, thus helping to ensure that wards' needs were properly addressed. The certification process should not be an issue for attorneys because the courses required by this bill are widely available through the State Bar of Texas and can be completed through both live and online courses.

HB 39 would provide guidance on the role of attorneys and guardians ad litem. This training would be essential to ensure that they carried out their roles in a way that was most conducive to the needs of the proposed ward. Although the current actions of attorneys ad litem and guardians ad litem are usually in line with the guidance provided in this bill, explicitly requiring that they consider alternatives to guardianship, supports and services, and whether guardianship was necessary would create uniformity in the way the needs of wards were protected across the state.

The requirements for attorneys and guardians ad litem in this bill would ensure that courts across the state handled guardianship proceedings in a way that fit the needs of the proposed ward. Although larger counties have probate courts in which judges and attorneys are well versed in guardianship issues, guardianship proceedings in 244 Texas counties are handled by constitutional county courts in which judges sometimes do not have law degrees and attorneys have not had significant experience with guardianship proceedings. This bill would ensure that those counties had proper guidance in these proceedings.

OPPONENTS SAY:

Substitutes for guardianship. This bill unnecessarily would burden the guardianship process. Although there are times when alternatives to guardianship and supports and services are appropriate, taking time to consider them in every case would be unnecessary. This bill would add costly, unnecessary steps in cases where guardianship clearly was necessary.

Attorneys and court appointees. HB 39 could create a monopoly for attorneys who practice guardianship law. It would impose a costly barrier to entrance to practice in guardianship proceedings that would make it difficult, especially in small counties, for concerned individuals to find attorneys to assist with guardianship applications. Attorneys with large guardianship practices would not hesitate to seek certification, but attorneys in rural areas who did not regularly practice guardianship law likely would choose not to pay for the courses. This would limit severely the availability of guardianship attorneys in these areas.

By requiring special certification for applicants' attorneys, this bill would set a bad precedent. Very few areas of law require certification beyond a general license to practice. Generally, certifications are required for attorneys who represent individuals in need of care, such as children or wards of guardianship. However, attorneys for applicants do not represent the ward — they represent the concerned friend or family member applying for the guardianship.

This bill could create a conflict of interest for attorneys ad litem. By requiring them to share with the court their findings on whether guardianship was necessary for a proposed ward, the bill would force attorneys ad litem to violate attorney-client privilege and potentially do something contrary to the interest of their client. An attorney ad litem has a duty to be an advocate for the proposed ward's stated interests, even if the attorney believes that guardianship is necessary for a ward who does not want it. The requirements of this bill would run counter to that duty. This conflict of interest would not exist for the guardian ad litem, who would be much better situated to evaluate whether guardianship was

necessary for the proposed ward.

NOTES: The Senate companion bill, SB 1224 by Schwertner, was referred to the Senate State Affairs Committee on March 17.