SUBJECT: Allowing for certain notarized designations of guardians

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Smithee, Farrar, Gutierrez, Murr, Neave, Rinaldi, Schofield

0 nays

2 absent — Hernandez, Laubenberg

SENATE VOTE: On final passage, April 19 — 31-0 on Local and Uncontested Calendar

WITNESSES: *On House companion, HB 1022:*
For — Lora Davis, State Bar of Texas Real Estate-Probate and Trust Law Section; (*Registered, but did not testify*: Craig Hopper, Glenn Karisch, Jeffrey Myers, Donald Totusek, and Melissa Willms, State Bar of Texas Real Estate-Probate and Trust Law Section; Guy Herman, Statutory Probate Courts of Texas; Reginald Smith, Communities for Recovery; Maria Castillo; Winkie Myers)

Against — None

BACKGROUND: Estates Code, sec. 1104.202 allows individuals who are not incapacitated to designate by declaration a person to serve as guardian if the declarant becomes incapacitated. The court is required to appoint a person named in a declaration to serve as guardian unless it finds that the person is disqualified or would not serve the ward's best interest. Under no circumstances may a court appoint a guardian whom the declarant has disqualified in a declaration.

Sec. 1104.203 requires that declarations naming a guardian be signed by the declarant, written wholly in the declarant's handwriting, and attested to by at least two credible witnesses who are not named as guardians or alternate guardians by the declaration.

DIGEST: SB 511 would add an option for declaring a guardian before the need

arises under which a declarant would sign a declaration that could be acknowledged by a notary public instead of being attested to in the declarant's presence by two witnesses. This option would be available only if the declaration did not expressly disqualify any individual from serving as the declarant's guardian.

A declaration to which was attached an optional form for an affidavit, as provided in the bill, would be considered self-proved.

The bill would take effect September 1, 2017, and would apply only to declarations executed on or after that date.

SUPPORTERS SAY:

SB 511 would allow individuals to avoid the unnecessary expense and inconvenience of witness attestations for declarations of preferred guardians. This is consistent with an overall trend in estate planning to move away from these types of outdated practices.

A court still would have to appoint a guardian, at which time anyone who contested the validity of the declaration would have the opportunity to object to an individual's appointment. The bill would not affect declarations that disqualified a person from serving as a guardian, which still would require the two-witness attestation.

OPPONENTS SAY:

SB 511 would remove the gatekeeping effect that the two-witness requirement has in guardianship declarations that protects against fraud or abuse of vulnerable persons.

NOTES:

A companion bill, HB 1022 by Wray, was approved by the House on April 20 on the Local and Consent Calendar.