SUBJECT: Establishing independent guardianships of the person of certain minors

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Leach, Dutton, Julie Johnson, Krause, Middleton, Moody, Schofield, Smith

1 nay — Davis

WITNESSES: For — D'Anne Thompson; David Thompson; (*Registered, but did not testify*: Colby Nichols, Texas Association of School Administrators; Thomas Parkinson)

Against — Guy Herman, Travis County Probate Court; Craig Hopper; Lauren Hunt; (*Registered, but did not testify*: Jeff Miller, Disability Rights Texas)

On — Terry Hammond, Texas Guardianship Association

BACKGROUND: Estates Code Title 3 establishes requirements for the court appointment of a guardian of the person of a ward. Title 3 also establishes the grounds on which a guardian applicant may be disqualified, including incapacity or inexperience, unsuitability, notoriously bad conduct, conflict of interest, and other factors.

Application requirements. Under Estates Code sec. 1103.001 a person may file an application for the appointment of a guardian of the person, estate, or both, of a proposed ward who is a minor and because of incapacity will require a guardianship after the individual is no longer a minor.

Under secs. 1101.103 and 1101.104, a court may not grant an application to create a guardianship for an incapacitated person, including a ward for whom intellectual disability is the basis of the ward's incapacity, unless the guardian applicant presents a written letter or certificate that describes the nature and severity of the proposed ward's incapacity and provides

other information and evaluations of the ward's condition and ability. The written letter or certificate must be from a licensed Texas physician or licensed or certified psychologist and must be based on an examination performed within a certain period of time in relation to the date the application is filed.

Annual report and determination. Estates Code sec. 1163.101 requires that a guardian of the person file an annual report containing certain information about the guardianship.

Sec. 1201.052 requires an annual review by the court to determine whether a guardianship should be continued, modified, or terminated for each guardianship in which the application to create the guardianship was filed after September 1, 1993.

DIGEST:

CSHB 1675 would establish a procedure to appoint a caregiver parent as independent guardian of the person for certain minors with profound intellectual disabilities. The procedure would apply only to proceedings for the appointment of a guardian of the person of a proposed ward in which the proposed guardian was a parent and primary caregiver of the proposed ward and the ward was a minor with a profound intellectual disability that would require a guardianship of the person after the ward was no longer a minor. The bill would be known as Caleb's Law.

The bill would require that the proposed ward's profound intellectual disability be diagnosed by a physician licensed to practice in Texas or determined following an examination by a psychologist licensed in Texas or certified by the Health and Human Services Commission (HHSC).

A guardianship created under the bill would be considered an independent guardianship of the person of a ward, and a guardian appointed under the bill would be considered an independent guardian of the person of a ward.

Application and appointment. Under CSHB 1675, a parent and primary caregiver of a proposed ward who applied for an appointment as guardian could present to the court certain materials in order to be appointed

without a hearing or the appointment of an attorney ad litem as long as certain requirements were met.

The materials the parent could present to the court would include a sworn affidavit, a written letter or certificate from a licensed Texas physician or psychologist, and a written request that the court make the appointment. The affidavit would have to state that the applicant was a parent of a proposed ward with a profound intellectual disability and that the applicant:

- was and had been the primary caregiver of the proposed ward throughout all or most of his or her childhood;
- had never been the subject of an allegation, complaint, or investigation concerning the abuse, neglect, or exploitation of the proposed ward;
- sought to be appointed guardian of the person of the proposed ward; and
- was not disqualified from serving as a guardian under applicable law.

The written letter or certificate would have to meet certain requirements under Estate Code secs. 1101.103 and 1101.104, and the written request from the applicant would have to ask that the court make the necessary findings for appointment of a guardian and appoint the parent as guardian without a hearing, the necessity of appointment of an attorney ad litem, or investigation by a court investigator. The written request also would have to ask that, after the appointment and qualification of the applicant as guardian, no other action would be had in the probate court in relation to the guardianship of the person of the ward other than the review on the continuation, modification, or termination of the guardianship.

If the court received these materials and was able to make the requisite findings to determine a guardianship of the person was necessary, the court would be required to appoint the parent as independent guardian of the proposed ward's person without conducting a hearing, appointing an attorney ad litem or court investigator unless:

- the parent was disqualified from serving as a guardian;
- the court had any reason to believe that one or more of the assertions in the affidavit were untrue; or
- the court found that the appointment was not in the best interest of the proposed ward.

Sealing of court records. The court would be required to seal the written letter or certificate submitted under the bill and any other medical record or document examined by the court unless the court found good cause not to do so. The records sealed under the bill would not be open for inspection except by court order after a finding of good cause and after notice was sent to the guardian of the ward whose information was sealed or in connection with a criminal or civil proceeding as otherwise provided by law.

Letters of guardianship. Letters of guardianship issued under the bill would not expire unless the guardian was removed or would otherwise be ineligible to serve or unless the court found that it was not in the best interest of the ward.

A parent appointed as independent guardian of the ward's person under the bill who was not also appointed as guardian of the ward's estate would not be required to give a bond to the court for a letter of guardianship.

Regular report and determination. An independent guardian of the person of a ward appointed under the bill would not be required to file an annual report on the guardianship unless the court found that was not in the best interest of the ward.

To determine whether a guardianship of the person of a ward created under the bill should be continued, modified, or terminated, the court in which the guardianship proceeding was pending would have to review the guardianship of the person at the court's discretion but not more frequently than once every five years unless the guardian of the ward's person was also the guardian of the ward's estate.

Other provisions. The bill would take effect September 1, 2021, and would apply only to guardianship proceedings pending or commenced on or after that date.

If a guardianship was created before September 1, 2021, and if on the date the application for guardianship was filed the ward met the bill's description of a proposed ward with a profound intellectual disability, and the guardian was the parent and primary caregiver of the ward, the guardian could petition the court with jurisdiction to authorize that the guardianship be treated on a prospective basis as an independent guardianship as established by CSHB 1675.

SUPPORTERS SAY:

CSHB 1675 would make the guardianship process less invasive and burdensome for parents of children with profound intellectual disabilities who require guardianship after turning 18 by establishing an alternative application process for these guardianships. This process would not require an initial hearing, appointment of an attorney ad litem, or an investigation done by a court investigator.

State law requires that parental rights be transferred to a child when the child turns 18 unless someone has been granted a guardianship for the child. This places the burden on parents to prove that they are fit to serve as guardian, even if their parenting has met a reasonable or even exceptional standard of care. Minors with profound intellectual disabilities require extraordinary time, energy, and resources for appropriate care, and parents already providing this care should not have to purchase their right to continue being parents from the state.

Court oversight and safeguards. The guardianship process under the bill acknowledges the unique situation of parent caregivers of minors with profound intellectual disabilities and would provide those parents with an alternative path to guardianship, while still requiring court oversight and necessary safeguards. Eliminating the current requirements for appointment of an attorney ad litem, an initial hearing, and a court

investigation would strike a fair balance between the court's interest in protecting the rights of a ward and the parent caregivers' interest in continuing to care for their child without unnecessary intrusion by the state.

Appointment of an attorney ad litem for a minor with a profound intellectual disability could be costly to the parent caregiver and would be unlikely to change the outcome of the guardianship proceeding due to communication barriers between the attorney and the minor. The lengthy investigations and court proceedings required under current law are both unnecessary and invasive if a parent caregiver attests to the requirements of the affidavit under the bill. Relaxing these current requirements for the unique set of parents and children covered by the bill would save resources of both the court and the parent caregivers while providing sufficient protection for the rights of minors with profound intellectual disabilities.

Regular reports and review. Parents of minors with profound intellectual disabilities often are already connected with a network of similarly situated parents and have a safety net of professional reporters with whom they interact. These parent caregivers should be able to continue the difficult job of caring for their child with the existing support of their community and without the burden of annual court reports and determinations on their fitness as a guardian for their own child.

CRITICS SAY:

CSHB 1675 would eliminate needed safeguards put in place for protection of the rights of minors with profound intellectual disabilities. When children become adults, they are given certain rights, for which an attorney ad litem advocates in a guardianship proceeding. The proceeding is not intended to be punitive but to ensure that the rights of the minor are protected using the least restrictive methods after consideration of possible supports and services.

Current guardianship proceedings maintain a minimum standard of protection for the rights of the minor and help ensure that unfit parents do

not permanently control the rights of their children. An alternative process for certain minors with profound intellectual disabilities could raise concerns about the unequal treatment of similarly situated groups. Under the bill, a minor with a profound intellectual disability and a parent who met certain requirements would not receive an attorney ad litem to represent the minor's interests in a guardianship proceeding, which could create inequalities in outcomes for this vulnerable group.

It is the state's responsibility to ensure that the individuals covered by this bill are sufficiently protected, and judges should be able to use their discretion for review and modification of guardianships under their jurisdiction. The removal of the annual report required by the parent caregiver and restriction of the court's discretion to review or modify an independent guardianship of the person of the ward could curtail the state's ability to adequately perform its duty of safeguarding minors with profound intellectual disabilities.