

BILL ANALYSIS

Senate Research Center
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C.S.H.B. 39
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State Affairs
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Demographers project that the segment of Texas' population over the age of 65 will more than double within the next 25 years. Many of these persons may become incapacitated as they grow older, and, depending on the nature or degree of incapacity, may require the appointment of a guardian or other form of assistance. What's more, data indicates that the number of active guardianships in Texas already has increased significantly in the last four years. This dramatic increase, coupled with the potential for more guardianship needs in the future, suggests it is imperative that Texas take steps to ensure the guardianship system is not overburdened.

The Texas Judicial Council has made recommendations for changes to the guardianship system to help prepare Texas for the expected increase in the need for guardianships. C.S.H.B. 39 would implement these recommendations by ensuring that attorneys and judges explore all alternatives to guardianship prior to appointing a guardian, providing courts with the ability to review the continuation of a guardianship if a person's capacity improves, requiring attorneys and judges to consider the proposed ward's capacity to make decisions about the ward's residence, ensuring that attorneys working on guardianship matters are well-trained, and providing a framework for supported decision-making agreements as an alternative to guardianship.

This bill would strengthen guardianship alternatives and improve the current guardianship system.

C.S.H.B. 39 amends current law relating to guardianships for incapacitated persons and to substitutes for guardianships for certain adults with disabilities.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 1001.001(b), Estates Code, to require the court, in creating a guardianship that gives a guardian limited authority over an incapacitated person, to design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence.

SECTION 2. Amends Chapter 1002, Estates Code, by adding Sections 1002.0015 and 1002.031, as follows:

Sec. 1002.0015. ALTERNATIVES TO GUARDIANSHIP. Defines "alternatives to guardianship."

Sec. 1002.031. SUPPORTS AND SERVICES. Defines "supports and services."

SECTION 3. Amends Section 1002.015, Estates Code, to redefine "guardianship proceeding."

SECTION 4. Amends Section 1054.004, Estates Code, by amending Subsection (a) and adding Subsections (c), as follows:

(a) Requires an attorney ad litem, to the greatest extent possible, to discuss with the proposed ward certain legal options, including whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of the guardian. Makes a nonsubstantive changes.

(c) Requires the attorney ad litem, before the hearing, to discuss with the proposed ward the attorney ad litem's opinion regarding:

(1) whether a guardianship is necessary for the proposed ward; and

(2) if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services.

SECTION 5. Amends Section 1054.054, Estates Code, by adding Subsections (c) and (d), as follows:

(c) Requires the guardian ad litem to investigate whether a guardianship is necessary for the proposed ward, and evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian.

(d) Provides that the information gathered by the guardian ad litem under Subsection (c) is subject to examination by the court.

SECTION 6. Amends Sections 1054.201(a) and (b), Estates Code, as follows:

(a) Requires an attorney for an applicant for guardianship and a court-appointed attorney in a guardianship proceeding, including an attorney ad litem, to be certified by the State Bar of Texas, or a person or other entity designated by the state bar, as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or the state bar's designee.

(b) Requires the State Bar of Texas to require four hours, rather than three hours, of credit for certification under this subchapter, including one hour on alternatives to guardianship and supports and services available to proposed wards.

SECTION 7. Amends Section 1101.001(b), Estates Code, as follows:

(b) Requires that the application be sworn to by the applicant and state:

(1)-(3) Makes no change to these subdivisions;

(3-a) whether alternatives to guardianship and available supports and services to avoid guardianship were considered;

(3-b) whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for a guardianship;

(4) the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation or termination of rights requested to be included in the court's order of appointment, including a termination of the right of a proposed ward to make personal decisions regarding residence;

(5)-(15) Makes no change to these subdivisions.

Makes nonsubstantive changes.

SECTION 8. Amends Section 1101.101, Estates Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Requires the court, before appointing a guardian for a proposed ward, to make certain findings, including finding by clear and convincing evidence that alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible, and supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

(c) Requires that a finding under Subsection (a)(2)(D)(ii) (requiring the court to find by a preponderance of the evidence 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) specifically state whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

SECTION 9. Amends Section 1101.103(b), Estates Code, as follows:

(b) Requires that the letter or certificate (relating to a letter or certificate that is required from a physician licensed in this state to grant an application to create a guardianship for an incapacitated person):

(1) and (2) Makes no change to these subdivisions;

(3) provide an evaluation of the proposed ward's physical condition and mental functioning, rather than mental function, and summarize the proposed ward's medical history if reasonably available;

(3-a) in providing an evaluation under Subdivision (3), state whether improvement in the proposed ward's physical condition and mental functioning is possible and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary;

(4) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward's physical or mental health, including the proposed ward's ability to understand or communicate, recognize familiar objects and individuals, solve problems, rather than perform simple calculations, reason logically, and administer to daily life activities with and without supports and services;

(5) and (6) Makes no change to these subdivisions;

(6-a) state whether a guardianship is necessary for the proposed ward and, if so, whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services; and

(7) Makes no change to this subdivision.

SECTION 10. Amends Sections 1101.151(a) and (b), Estates Code, as follows:

(a) Requires the court, if it is found that the proposed ward is totally without capacity to care for himself or herself, manage his or her property, operate a motor vehicle, make personal decisions regarding residence, and vote in a public election, to appoint a guardian of the proposed ward's person or estate, or both, with full authority over the incapacitated person except as provided by law.

(b) Requires that an order appointing a guardian under this section contain findings of fact and specify:

(1)-(4) Makes no change to these subdivisions;

(5) that the person does not have the capacity to operate a motor vehicle, make personal decisions regarding residence, and vote in a public election; and

(6) Makes no change to this subdivision.

Makes a nonsubstantive change.

SECTION 11. Amends Sections 1101.152(a) and (b), Estates Code, as follows:

(a) Requires the court, if it is found 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 with or without supports and services, to appoint a guardian with limited powers and permit the proposed ward to care for himself or herself, including making personal decisions regarding residence, or to manage his or her property commensurate with the proposed ward's ability.

(b) Requires that an order appointing a guardian under this section contain findings of fact and specify:

(1) and (2) Makes no change to these subdivisions;

(2-a) the specific rights and powers retained by the person:

(A) with the necessity for supports and services; and

(B) without the necessity for supports and services;

(3) Makes no change to this subdivision;

(4) whether the person is incapacitated because of a mental condition and, if so, whether the person:

(A) retains the right to make personal decisions regarding residence or to vote in a public election; or

(B) maintains eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521 (Driver's Licenses and Certificates), Transportation Code.

SECTION 12. Amends Section 1101.153, Estates Code, by adding Subsection (a-1), as follows:

(a-1) Requires that an order appointing a guardian, if the letter or certificate under Section 1101.103(b)(3-a) stated that improvement in the ward's physical condition or mental functioning is possible and specified a period of less than a year after which the ward should be reevaluated to determine continued necessity for the guardianship, to include the date by which the guardian is required to submit to the court an updated letter or certificate containing the requirements of Section 1101.103(b).

SECTION 13. Amends Section 1104.002, Estates Code, to require the court, before appointing a guardian, to make a reasonable effort to consider the incapacitated person's preference of the person to be appointed guardian and, to the extent consistent with other provisions of this title, give due consideration to the preference indicated by the incapacitated person, regardless of whether the person has designated by declaration a guardian before the need arises under Subchapter E (Written Declaration to Designate Guardian Before Need Arises).

SECTION 14. Amends Section 1151.051, Estates Code, by adding Subsection (e), as follows:

(e) Provides that, notwithstanding Subsection (c)(1) (providing that the guardian of a person has the right to have physical possession of the ward and to establish the ward's legal domicile) and except in cases of emergency, a guardian of the person of a ward may

only place the ward in a more restrictive care facility if the guardian provides notice of the proposed placement to the court and any person who has requested notice and after:

- (1) the court orders the placement at a hearing on the matter, if the ward or another person objects to the proposed placement before the eighth business day after the person's receipt of the notice; or
- (2) the seventh business day after the court's receipt of the notice, if the court does not schedule a hearing, on its own motion, on the proposed placement before that day.

SECTION 15. Amends Sections 1202.001(b) and (c), Estates Code, as follows:

(b) Requires a guardianship to be settled and closed when the ward is found by the court to have full capacity, or sufficient capacity with supports and services, to care for himself or herself and to manage the ward's property.

(c) Creates an exception under Section 1101.153(a-1). Makes no further change to this subsection.

SECTION 16. Amends Section 1202.051, Estates Code, as follows:

Sec. 1202.051. APPLICATION AUTHORIZED. Authorizes a ward or any person interested in the ward's welfare to file a written application with the court for an order:

- (1) Makes no change to this subdivision.
- (2) finding that the ward lacks the capacity, or lacks sufficient capacity with supports and services, to do some or all of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and granting additional powers or duties to the guardian; or
- (3) finding that the ward has the capacity, or sufficient capacity with supports and services, to do some, but not all, of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and permitting the ward to care for himself or herself, make personal decisions regarding residence, or manage the ward's own financial affairs commensurate with the ward's ability, with or without supports and services.

Makes a nonsubstantive change.

SECTION 17. Amends Section 1202.151(a), Estates Codes, as follows:

(a) Requires the court, except as provided by Section 1202.201 (Removal of Firearm Disability on Complete Restoration of Ward's Capacity), at a hearing on an application filed under Section 1202.051 (Application Authorized), to consider only evidence regarding the ward's mental or physical capacity at the time of the hearing that is relevant to the complete restoration of the ward's capacity or modification of the ward's guardianship, including whether the guardianship is necessary, and whether specific powers or duties of the guardian should be limited if the ward receives supports and services.

SECTION 18. Amends Section 1202.152(b), Estates Code, as follows:

(b) Requires 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 perform certain activities.

SECTION 19. Amends Section 1202.153(c), Estates Code, as follows:

(c) Requires the court, before limiting the powers granted to or duties required to be performed by the guardian under an application filed under Section 1202.051, to find by a preponderance of the evidence that the current nature and degree of the ward's incapacity, with or without supports and services, warrants a modification of the guardianship and that some of the ward's rights need to be restored, with or without supports and services.

SECTION 20. Amends Section 1202.154(a), Estates Code, to require that a court order entered with respect to an application filed under Section 1202.051 to completely restore a ward's capacity or modify a ward's guardianship state certain information, including, if applicable, any necessary supports and services for the restoration of the ward's capacity or modification of the guardianship. Makes nonsubstantive changes

SECTION 21. Amends Section 1202.156, Estates Code, to require that the order modifying the guardianship, if the court finds that a guardian's powers or duties should be expanded or limited, to contain findings of fact and specify, in addition to the information required by Section 1202.154, if the ward's incapacity resulted from a mental condition, whether the ward retains the right to vote and make personal decisions regarding residence.

SECTION 22. Amends the heading to Subtitle I, Title 3, Estates Code, to read as follows:

SUBTITLE I. OTHER SPECIAL PROCEEDINGS AND SUBSTITUTES FOR
GUARDIANSHIP

SECTION 23. Amends Subtitle I, Title 3, Estates Code, by adding Chapter 1357, as follows:

CHAPTER 1357. SUPPORTED DECISION-MAKING AGREEMENT ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 1357.001. SHORT TITLE. Provides that this chapter may be cited as the Supported Decision-Making Agreement Act.

Sec. 1357.002. DEFINITIONS. Defines "adult," "disability," "supported decision-making," "supported decision-making agreement," and "supporter."

Sec. 1357.003. PURPOSE. Provides that the purpose of this chapter is to recognize a less restrictive substitute for guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship under this title.

[Reserves Sections 1357.004-1357.050 for expansion.]

SUBCHAPTER B. SCOPE OF AGREEMENT AND AGREEMENT REQUIREMENTS

Sec. 1357.051. SCOPE OF SUPPORTED DECISION-MAKING AGREEMENT. Authorizes an adult with a disability to voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which the adult with a disability authorizes the supporter to do any or all of the following:

(1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability;

(2) subject to Section 1357.054, assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person;

(3) assist the adult with a disability in understanding the information described by Subdivision (2); and

(4) assist the adult in communicating the adult's decisions to appropriate persons.

Sec. 1357.052. **AUTHORITY OF SUPPORTER.** Authorizes a supporter to exercise the authority granted to the supporter in the supported decision-making agreement.

Sec. 1357.053. **TERM OF AGREEMENT.** (a) Provides that, except as provided by Subsection (b), the supported decision-making agreement extends until terminated by either party or by the terms of the agreement.

(b) Provides that the supported decision-making agreement is terminated if:

(1) the Department of Family and Protective Services (DFPS) finds that the adult with a disability has been abused, neglected, or exploited by the supporters; or

(2) the supporter is found criminally liable for conduct described by Subdivision (1).

Sec. 1357.054. **ACCESS TO PERSONAL INFORMATION.** (a) Provides that a supporter is only authorized to assist the adult with a disability in accessing, collecting, or obtaining information that is relevant to a decision authorized under supported decision-making agreement.

(b) Requires the supporter, if a supporter assists an adult with a disability in accessing, collecting, or obtaining personal information, including protect health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) or educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g), to ensure the information is kept privileged and confidential, as applicable, and is not subject to unauthorized access, use, or disclosure.

(c) Provides that the existence of a supported decision-making agreement does not preclude an adult with a disability from seeking personal information without the assistance of a supporter.

Sec. 1357.055. **AUTHORIZING AND WITNESSING OF SUPPORTED DECISION-MAKING AGREEMENT.** (a) Requires that a supported decision-making agreement be signed voluntarily, without coercion or undue influence, by the adult with a disability and the supporter in the presence of two or more subscribing witnesses or a notary public.

(b) Requires the attesting witnesses, if signed before two witnesses, to be at least 14 years of age.

Sec. 1357.056. **FORM OF SUPPORTED DECISION-MAKING AGREEMENT.** (a) Provides that, subject to Subsection (b), a supported decision-making agreement is valid only if it is in substantially the following form as set forth. Sets forth the form and the language to be used on the form.

(b) Provides that a supported decision-making agreement may be in any form not inconsistent with Subsection (a) and the other requirements of this chapter.

[Reserves Sections 1357.057-1357.100 for expansion.]

SUBCHAPTER C. DUTY OF CERTAIN PERSONS WITH RESPECT TO AGREEMENT

Sec. 1357.101. RELIANCE ON AGREEMENT; LIMITATION OF LIABILITY. (a) Requires a person who receives the original or a copy of a supported decision-making agreement to rely on the agreement.

(b) Provides that a person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement.

Sec. 1357.102. REPORTING OF SUSPECTED ABUSE, NEGLECT, OR EXPLOITATION. Requires a person, if the person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision making agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, to report the alleged abuse, neglect or exploitation to DFPS in accordance with Section 48.051 (Report), Human Resources Code.

SECTION 24. (a) Provides that, except as otherwise provided by this section, the changes in law made by this Act apply to:

(1) a guardianship 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) Provides that Sections 1054.004 (Duties) and 1054.054 (Duties), Estates Code, as amended by this Act, apply only to a guardianship proceeding for which a court has appointed a guardian ad litem or attorney ad litem to represent the interests of a proposed ward on or after the effective date of this Act.

(c) Provides that Sections 1054.201 (Certification Required), 1101.101 (Findings and Proof Required), 1101.103 (Determination of Incapacity of Certain Adults: Physician Examination), 1101.151 (Order Appointing Guardian with Full Authority), 1101.152 (Order Appointing Guardian with Limited Authority), and 1101.153 (General Contents of Order Appointing Guardian), Estates Code, as amended by this Act, apply only to a guardianship proceeding filed on or after the effective date of this Act. Provides that a guardianship proceeding filed before the effective date of this Act is governed by the law in effect on the date the proceeding was filed, and the former law is continued in effect for that purpose.

(d) Provides that Section 1101.001 (Application for Appointment of Guardian; Contents), Estates Code, as amended by this Act, applies only to an application for the appointment of a guardian filed on or after the effective date of this Act. Provides that an application for the appointment of a guardian filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

(e) Provides that Section 1202.051 (Application Authorized), Estates Code, as amended by this Act, applies only to an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date of this Act. Provides that an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

(f) Provides that Sections 1202.151, 1202.152 (Physician's Letter or Certificate Required), 1202.153 (Findings Required), 1202.154 (General Requirements for Order), and 1202.156 (Additional Requirements for Order Modifying Guardianship), Estates Code, as amended by this Act, apply only to a proceeding for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date of this Act. Provides that an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed before the effective date of this Act is

governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

SECTION 25. Effective date: September 1, 2015.