

2017 Texas Guardianship & Probate Legislative Update

Susan M. Redford

Judicial Program Manager

susanr@county.org



Plenty of Guardianship Bills

- 19 out of 45 guardianship bills sent to Governor
- More consensus this session on GS issues
- More state involvement in GS through OCA
- Many bills to solidify less restrictive alternatives to GS
- All bills effective 9.1.17 unless stated or vetoed

Key to Abbreviations

- **EC = Estates Code**
- **GC = Government Code**
- **HSC = Health & Safety Code**
- **EDC = Education Code**
- **PC = Property Code**
- **IP = Incapacitated Person**
- **SB = Senate Bill**
- **HB = House Bill**
- **SDMA = Supported Decision Making Agreement**
- **OCA = Office of Court Administration**
- **JBCC = Judicial Branch Certification Commission**



SB 36 - Registration of GS Programs

- **GC 155.153** – A guardianship program (that is not contracted with HHSC) cannot provide guardianship services unless it is registered with JBCC
- **GC 155.154** – JBCC to post an updated list of all registered guardianship programs on website quarterly
- **GC 155.152** – JBCC shall adopt minimum standards for the operation of guardianship programs
- **EC 1104.359** – A unregistered, suspended or expired guardianship program may not be appointed as guardian

SB 39 - Supported Decision Making

- **EC 1357.052(b) & 1357.056(a) – Supporter is a Fiduciary**
the supporter owes to the adult with a disability the following fiduciary duties added to statutory SDMA form:
 - To act in good faith
 - To act within the authority granted by the agreement
 - To act loyally and without self-interest
 - To avoid conflicts of interest
- **EC 57.052(c)** – adds that the relationship between the supporter and adult with disability is one of trust and confidence and does not undermine the decision making authority of the adult.

SB 39 - Issues Involving SDMAs

- **EC 1357.053b** – amended to provide that a **SDMA is terminated** by the appointment and qualification of a temporary or permanent guardian of the person or estate of the adult with a disability.
- **EC 1357.0525 – Alternate Supporter** - if adult decides to pay the supporter to provide certain services, the adult may amend the SDMA to designate an alternate supporter to monitor the provision of the paid services by the primary supporter. (intended to prevent conflicts of interest)

SB 39 - Intervention by Interested Parties

- **EC 1055.003(d) new** - A person who is entitled to receive notice of the initial guardianship application is not required to file a motion to intervene in a guardianship proceeding.
- EC 1051.104 – children, siblings, facility administrators, agent under POA, person named in declaration of guardian or will, living relatives within third degree.
- EC 1051.103 - parents, conservator, spouse, guardian if not applicant

SB 39 – Powers of Attorney

- **EC 751.052(a)(1)& (b)** – the appointment of a permanent Guardian for a principal of a POA **revokes** the POA upon G's qualification and agent is to deliver all assets to G and account to G as if G were the principal
- **EC 751.052(a) (2)** – the appointment of a temporary G for a principal of a POA **suspends** the POA for the duration of the guardianship unless the court's order affirms the POA and confirms the validity of named agent

SB 39 – Removal of POA Agent

- **EC 753.001** – A successor agent or any person interested in a guardianship proceeding against the principal (including AAL or GAL) may file a petition to remove a person serving as agent under a POA and appoint a willing successor agent named in the POA
- Court may remove the agent
 - who has breached fiduciary duties or
 - who has materially violated the terms of the POA causing a financial loss to the principal or
 - who is incapacitated or
 - who fails to make an accounting.

SB 39 – Removal of Executor

- **Allows court to remove an independent executor sua sponte**
 - If executor fails to timely file affidavit or certificate required by EC 308.004
- **Clarifies notice requirements for sua sponte removal of a guardian for good cause**

SB 40 – Bonds of Judges

- **GC 25.006 & GC 26.001 - Judges presiding in a court over guardianship proceedings, shall execute a bond of:**
 - **\$100,000 for county with *125,000 or fewer people***
 - **\$250,000 for a county with *more than 125,000 people***
 - **Judge will perform the duties required by the Estates Code**
 - **Or, county may elect to obtain insurance against losses caused by the gross negligence of a county judge or a statutory county court in performing the duties of office**
- Note: Statutory probate court judges post a \$500,000 bond**

SB 511 - Declaration of Guardian

- **EC 1104.203(a-1)** – If a declaration of guardian before need arises **does not expressly disqualify** an individual from serving as the declarant’s guardian,
 - The declaration must be signed by the declarant, and may be **acknowledged by a notary public instead of** being attested to in the declarant’s presence by **two witnesses** as currently required for a declaration of guardian
 - This type of declaration is considered self-proved.

SB 748 – Notice at Age 17

- **EDC 29.017** – within one year of 18th birthday of a student with a disability, the school district is to provide student and student’s parents with:
 - Written notice regarding transfer of rights at age 18
 - Information and resources regarding guardianship, alternatives to guardianship including SDMA and other supports and services that may enable the student to live independently and also post these resources on agency’s website
 - **Nothing in this section prohibits a student from entering into a SDMA after the transfer of rights under this section.**

SB 1016 – Court Investigators

- **EC 1002.009** – allows judges of non-statutory probate courts to appoint court investigators
- **EC 1054.152** – a court investigator appointed in a non-statutory probate court county is only required to supervise a court visitor program if the court operates one
- **EC 1054.156** – a judge of a non-statutory probate court with guardianship jurisdiction may appoint court investigator(s) and the commissioners court of that county sets the salary of the court investigator

SB 1096 – Guardian’s Training

- **EC 1104.003** – A court may not appoint an individual to serve as guardian until the individual has received the training required by GC 155.204 with these exceptions:
 - Attorneys are not required to take this training
 - Certified guardians are not required to take this training
 - Court can waive training per SC rules under GC 155.203
 - Temporary guardians not required to be trained unless they apply to extend term of temporary guardianship
 - **GC 155.203** – TX Supreme Court to establish a process whereby OCA conducts criminal background checks and training for individuals seeking appointment as guardians
 - **GC 155.204** – Training is to be on-line and free to proposed guardians and may be provided in written format upon request

SB 1096 – Criminal Background Checks

- **GC 155.205** – pursuant to the TX Sup Ct rules, OCA will obtain criminal history records from DPS or FBI relating to an individual seeking to be appointed as guardian or temporary guardian
 - Fingerprint-based criminal history if liquid assets \$50,000 or more
 - Name-based criminal history if liquid assets less than \$50,000
 - OCA to share criminal history with court but otherwise keep it confidential and not release it without court order
 - OCA may charge a fee for obtaining criminal history record
 - Guardian is entitled to be reimbursed from GS estate for this

SB 1096 – GS Registration & Database

- **GC 155.151 Registration** – TX Sup Ct shall by rule establish a mandatory registration program whereby all Texas guardianships are required to register with OCA and courts shall notify OCA if guardian is removed
- **GC 155.151 Database** – OCA to establish by 6.1.18 a central database of all guardianships in Texas and make it accessible to DPS to disclose to law enforcement officials:
 - The name, sex, and date of birth of a ward;
 - The name, telephone number and address of the guardian; and
 - The name of the court with jurisdiction over the guardianship
 - For the limited purpose of determining that GS exists and giving contact info and not to determine the scope of the G’s authority

SB 1096 – Duty of Officers

- **CCP 14.055 & 15.171** – as soon as practicable but not later than the first working day after the date the peace officer detains or arrests a ward, the peace officer is to notify the court having jurisdiction over the ward
- **HSC 573.0021** – as soon as practicable but not later than the first working day after the date the peace officer takes a ward into custody, the peace officer shall notify the court having jurisdiction over the ward of the ward's detention or transportation to a mental health facility
- **Officers not required to comply until 7.1.18**

SB 1193 - Digital Assets Act

- **EC Chapter 2001**
- TX Revised Uniform Fiduciary Access to Digital Assets Act
- Since guardians are fiduciaries, this is important information for guardians to use to access digital assets of their incapacitated persons
- It's a lengthy bill but Professor Gerry Beyer has written extensively about it and you can "Google" his articles

SB 1709 – Notice by Guardian

- **EC 1151.056** – A guardian’s duty to notify a ward’s spouse, parents, siblings and children of residential changes, hospitalization, or death of a ward only applies to a relative who:
 - **Has elected in writing to receive notices** about the ward; and
 - Who has not been found by a court or state agency to have abused, neglected or exploited the ward; and
 - Who does not have a protective order issued against them.

SB 1709 – Notice by Guardian

- For GS cases created before or pending on 9.1.17:
 - **EC 1151.056(h) new** – A guardian,
 - as soon as possible but not later than 9.1.19
 - shall provide notice to the ward's spouse, parents, siblings and children whose whereabouts are known or can be reasonably ascertained
 - that the relative must file an election in writing in order to receive notice about the ward under this section.

SB 1710 – Restoration Letters

- **EC 1202.051** – if the guardian of ward for whom a letter seeking restoration has been filed has resigned, was removed or died, the court may not require the appointment of a successor guardian before considering the application for restoration (intended to overturn the *Ryan Tonner* ruling)
- **EC 1202.054(b-1)** – a doctor’s letter is not required before the court appoints the court investigator or GAL to investigate a letter requesting restoration
- **EC 1202.054(b-2)** – court to send the ward a letter by certified mail within 30 days of receipt of restoration letter advising the ward of the date on which a GAL or CI was appointed and giving the ward their contact information, and ward is to be sent report of the investigation’s findings and conclusions

SB 1764 – ABLE Accounts

- **EC 1161.003(7)** – an ABLE account established under Education Code Chapter 54 Texas Achieving a Better Life Experience has been added to the guardian of the estate’s safe harbor investments
- **EC 1202.003** – a court may order the closure of a guardianship of the estate where all ward’s assets have been placed in an ABLE account and the ward is designated as the beneficiary of the account
- **PC 142.004** – money recovered in a lawsuit for an IP by a GAL or next friend may be put in ABLE acct

SB 2027 – Employment for Individuals with Intellectual Disabilities

- HHSC and the Texas Workforce Commission are to conduct a study on occupational training programs available for individuals with an intellectual disability
- Study must look at TX regions to be improved and develop strategies to place individuals into fulfilling jobs using improved training programs
- HHSC to report study results by 12.1.18

PROBATE



HB 1814

- Requires certain probate applications to include last three digits of applicant's DL and SSN
- Also requires last three digits of testator's or decedent's DL and SSN

HB 1877

- Allows court to impose a fine not to exceed \$1,000 if executor makes misrepresentations in affidavit that beneficiaries received verified and full accounting and inventory and appraisement
- Can be on court's own motion or motion of interested party
- Must give executor notice and set hearing

HB 2271

- **Omnibus Probate Bill**
 - **Revises procedure for identifying next of kin for probate**
 - **Expands def. of child to include equitable adoption**
 - **Clarifies the effect of divorce on trusts and survivorship agreements**
 - **Eliminates provisions allowing certain notifications to be made by publication**
 - **Prohibits closing of an estate until all state inheritance taxes paid**
 - **Prohibits closing of an estate until properties passing through the representative's possession have been distributed or paid**
 - **Increases maximum value of small estate to \$75,000**

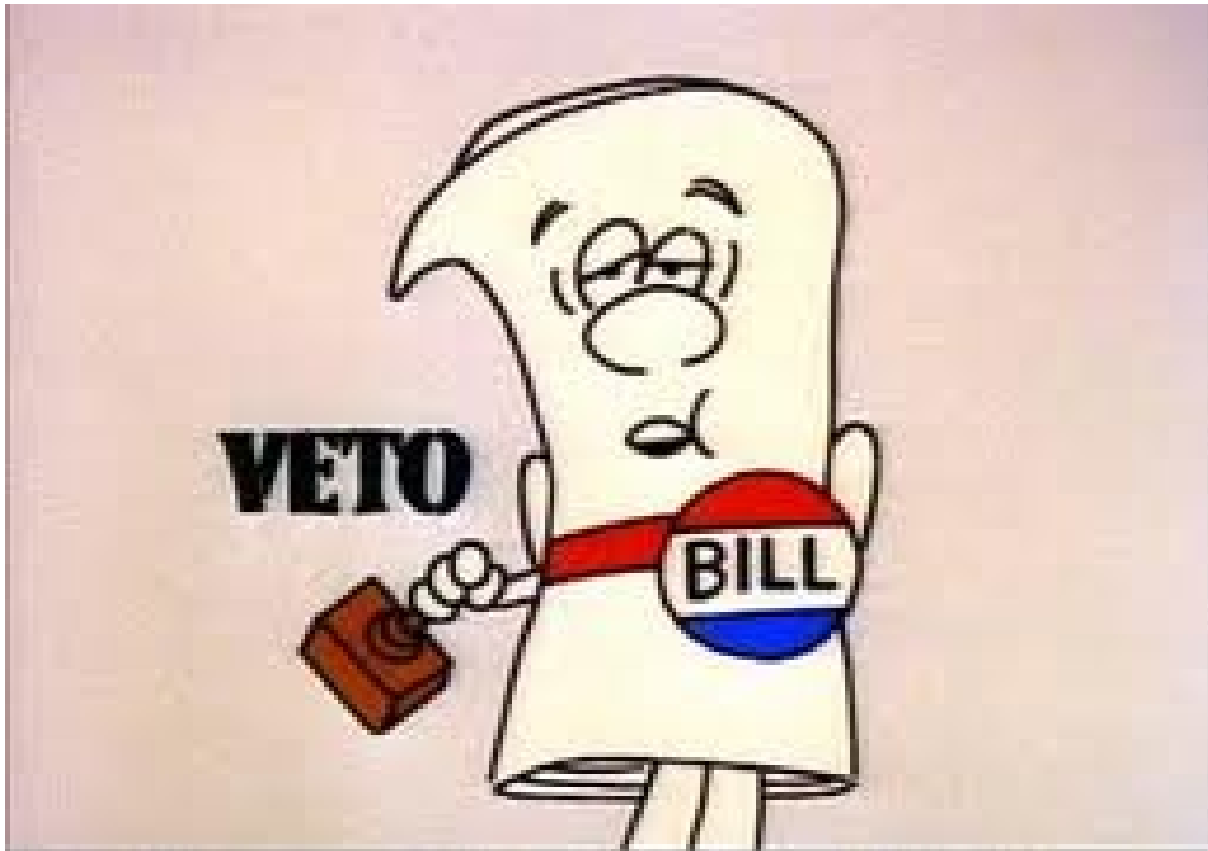
SB 499

- Adopts Uniform Partition of Heirs' Property Act
 - Revised procedures governing request to partition real property jointly owned as a result of testate succession or family gift. (Prop. Code Ch. 23A)

SB 1193

- **Revised Uniform Fiduciary Access to Digital Assets Act**
 - Allows testator to leave instructions for disclosure, disposition, and distribution of digital assets to be incorporated into a will, trust or other document
 - Establishes rights and responsibilities of server hosts and other custodians
 - Same fiduciary duty for digital assets as tangible property (for custodian and representative)

VETOED BILLS



SB 667 – GS Compliance Program

VETOED

- **Vetoed** by Governor on 6.12.17
- **GC 72.121** – OCA to establish GS compliance program to provide resources/assistance to guardianship courts by:
 - Maintaining an electronic database to monitor filings of inventories, accounting and other reports required of guardians; and
 - Hiring GS compliance specialists to:
 - Review GS cases and report any deficiencies by guardians
 - Audit annual accounts and report findings to courts
 - Work with courts to develop best practices for case management
 - Report concerns about ward’s well-being or financial abuse to courts
 - OCA to file **annual reports** with legislature every January
 - Courts are **required to participate** in the program
 - OCA may report any judicial action or omission in response to a specialist’s report to State Commission on Judicial Conduct

SB 1912

- Mental Health Public Defender Offices
 - Discretionary bill allowing counties to establish mental health public defenders offices
 - Also revised procedures for civil commitment of persons with mental or intellectual disabilities

