

2018 Texas Guardianship & Probate Legislative Update

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TEXAS ASSOCIATION *of* COUNTIES

85th Legislative Session

- 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**



Alternatives to Guardianship



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 39 – Transfer of Guardianship

- Adds **EC 1023.003 (b)** to allow court, on its own motion to transfer a guardianship to another county if ward resides in the county to which the guardianship is to be transferred
 - Guardian shall be cited by personal service to appear and show cause why guardianship should not be transferred

SB 39 - Confidentiality of Certain Addresses

- **EC 1101.002** amended to allow an applicant for guardian to omit the address of a person named in the application if person is or was protected by a protective order

Exemption From Guardianship Fees

Clerk may not charge or collect a filing fee or any administrative fees from the estate of a proposed ward or ward who became incapacitated as a result of an injury sustained:

- while active member of military in a combat zone (**EC 1053.053**); or
- In line of duty as a law enforcement officer, firefighter and others as set forth in Sec. 615.003 of Texas Gov. Code (**EC 1053.054**)

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
- 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

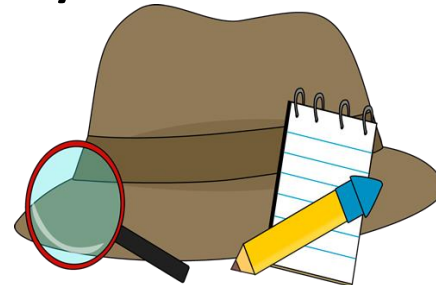
EDC 29.017 – within one year of 18th birthday of a student with a disability, the school district is to provide student and student’s parents with:

- 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



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 – 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

Preparing for 2019

- Guardianship Compliance Program
- Regional guardianship courts
- Discussion regarding Statutory Probate Courts
- Guardian of last resort



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