

Texas Judicial Council

Elders Committee

November 14, 2014

The population over age 65 in Texas is projected to more than double from an estimated 2,855,467 in 2012 to more than 6 million by 2040.¹ Many of those individuals will need help managing their affairs – some through the appointment of a guardian. Texas currently has only 424 state-certified guardians who handle only approximately 5,000, or 13%, of the more than 40,000 active guardianships. Families, friends, and attorneys serve as guardians in the remaining cases. Only 10 of Texas' 254 counties have probate courts with resources to adequately prevent abuse.

Texas Judicial Council Elders Committee Charge

Prior to his retirement in 2013, Chief Justice Wallace B. Jefferson formed the Elders Committee of the Texas Judicial Council to:

“Assess the ways in which the Texas courts interact with the elderly, including guardianship, probate, elder abuse and other proceedings, and identify judicial policies or initiatives that could be enacted to protect and improve the quality of life for the elderly in Texas.”

Elders Committee Legislative Recommendations

In 2013 the Supreme Court of Texas was provided a grant from the National Guardianship Network to establish the Texas Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). The Elders Committee worked in conjunction with the WINGS to identify strengths and weaknesses in the state's current system of adult guardianship. WINGS has representatives from the judiciary, Texas Legal Services, AARP, Disability Rights Texas, Alzheimer's Association, Texas Guardianship Association, ARC of Texas, Social Security Administration, ADAPT of Texas, Texas Department of Aging and Disability Services, Texas Department of Family and Protective Services, Texas Council for Developmental Disabilities, and the State Bar of Texas. The WINGS group met on November 15, 2013, and June 24, 2014 and developed several proposals to address issues identified by the group.

The Elders Committee held a public hearing on January 30, 2014, and again on August 15, 2014, to consider WINGS proposals and to discuss potential recommendations to address the committee's charge. The Elders Committee makes three recommendations:

- The Legislature should strengthen guardianship alternatives and improve guardianships.
- The Legislature should create a statewide guardian of last resort.
- The Legislature should fund OCA's legislative appropriations request exceptional item entitled “enhance judicial services to the elderly and incapacitated.”

¹ Population Projections for the State of Texas by Age Group for 2010 – 2050, Texas State Data Center.

1. The Legislature should strengthen guardianship alternatives and improve guardianships.

Commentary

Under full guardianship, wards relinquish all rights to self-determination and guardians have full authority over their wards' personal and financial affairs. Due to the seriousness of the loss of individual rights, guardianships are considered to be an option of last resort.² The National Probate Standards³ (Standard 3.3.10) encourages courts to appoint a guardian only if no less intrusive alternatives exist.

One of the weaknesses identified by the Elders Committee is a lack of statutory language for a supported decision-making agreement. These provisions would clearly define the requirements of such an agreement. It is expected that such an agreement may reduce the number of individuals needing guardians; therefore, the Committee recommends the addition of §751 to the Estates Code to recognize supported decision-making agreements, which are a less restrictive alternative to guardianship for adults with a disability who need assistance with decisions regarding daily living but who do not wish to delegate authority over those decisions to an agent.

Additional issues identified by the Committee about alternatives to guardianship are the need to require that the applicant or applicant's attorney certify to the court that alternatives to guardianship have been explored (§§ 1051.104 and 1101.001); that the court make findings that alternatives to guardianship have been explored and determined to not be feasible before establishing a guardianship (§1101.101); and that a court make a finding that no less restrictive alternatives exist to resolve the need for a guardianship, that the court shall deny the appointment of a guardian if a preexisting guardianship alternative meets the need of an adult who is the subject of a guardianship proceeding, and the court shall consider terminating or modifying a guardianship if a guardianship alternative meets the need of the adult (§ 1001.001). As part of the efforts to strengthen guardianship alternatives, the definition of supports and services and their consideration as an alternative to guardianship needs to be added to statute (§§ 1002, 1054.004, 1054.054, 1101.101, 1101.103, 1101.152, 1202.051, 1202.151, 1202.001, 1202.152, 1202.153 and 1202.154).

When a guardianship does need to be established, safeguards are needed to protect the ward's autonomy to the fullest extent possible. The Elders Committee is concerned with ensuring that guardianships are designed around the needs and preferences (when possible) of the ward; therefore, the Elders Committee recommends requiring that the court consider the ward's rights in making decisions about residence (§§ 1001.001, 1101.001, 1101.151, 1101.152, 1202.051 and 1202.156) and considering the ward's preference of guardian, when possible (§ 1001.001). In addition, the Committee recommends requiring that the physician state whether improvement in a proposed ward's condition is possible and, if so, when the individual should be reevaluated to determine if the guardianship remains necessary (§§ 1101.103 and 1101.153), which would enable the court to reevaluate the guardianship in a timeframe determined by the needs of the ward.

The Committee also recommends adding a protection for the ward by requiring court approval before placing a ward in a more restrictive care facility, except in an emergency. This recommendation

² Guardianship Basics, Center for Elders and the Courts, <http://www.eldersandcourts.org/Guardianship/Guardianship-Basics.aspx>.

³ *National Probate Court Standards*, National Center for State Courts and National College of Probate Court Judges, 2013, <http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>.

strengthens the ward's right to the least restrictive residential option appropriate for his or her needs (§1151.051).

Because of the specialized and complex nature of guardianship cases and the serious loss of liberty facing the ward, the Elders Committee finds that improvement is needed in the training of attorneys handling these cases. The Committee recommends that this be accomplished by expanding the number of training hours for court-appointed attorneys from three to four hours and requiring that one hour of training be on alternatives to guardianship. Additionally, the Committee recommends that the applicant's attorney be required to have the same certification as court-appointed attorneys (§ 1054.201).

Suggested Statutory Changes

Section 751

Section 751, Estates Code is amended by adding Subchapter B, Sections 751.007, 751.008, 751.009, 751.010, 751.011, 751.012, 751.013, 751.014, 751.015 and 751.016 to read as follows:

Sec. 751.007. SHORT TITLE. This act may be cited as the Supported Decision-Making Agreement Act.

Sec. 751.008. DEFINITIONS

(a) "Adult" means anyone who has reached 18 years of age or under 18 and has had the disability of minority removed;

(b) "Disability" means a physical or mental impairment that substantially limits one or more major life activities;

(c) "Person" includes natural persons, corporations, or private or public entities providing healthcare, education, habilitation, or care and treatment.

(d) "Supported Decision-Making" means a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including but not limited to, where the adult wants to live; what services, supports, and medical care the adult wants; who the adult wants to live with; and where the adult wants to work, without impeding the self-determination of the adult;

(e) "Supported Decision-Making Agreement" is an agreement between an adult with a disability and a supporter entered into under this subchapter;

(f) "Supporter" means an adult who is selected by an adult with a disability.

Sec. 751.009. PURPOSE

The purpose of this chapter is to recognize a less restrictive alternative to guardianship for adults with a disability who need assistance with decisions regarding daily living but who do not wish to delegate authority over those decisions to an agent.

Sec. 751.010. SCOPE OF SUPPORTED DECISION-MAKING AGREEMENT

In a supported decision-making agreement, an adult with a disability may voluntarily, without undue influence or coercion, authorize his or her supporter to do any or all of the following:

(1) Assist the adult with a disability in understanding the options, responsibilities and consequences in order to make life decisions related to where the adult with a disability wants to live, what supports or services the adult with a disability wants, who the adult with a disability wants to live with, and where the adult with a disability wants to work; however, the supporter is not authorized to make such decisions on behalf of the adult with a disability.

(2) Assist the adult with a disability in accessing, collecting or obtaining any information that is relevant to the decision from any person including, but not limited to, medical, psychological, financial, educational, or treatment records;

(3) Assist the adult with a disability in understanding the information; and

(4) Assist the adult in communicating the decision to other persons.

Sec. 751.011. DURATION AND EXERCISE OF SUPPORTED DECISION-MAKING AGREEMENT

(a) A supporter may exercise the authority granted to the supporter in the supported decision-making agreement.

(b) The supported decision-making agreement shall extend until terminated by either party.

Sec. 751.012. ACCESS TO PERSONAL INFORMATION

(a) A supporter is only authorized to assist the adult with a disability in accessing, collecting, or obtaining information that is relevant to a decision referred to in a supported decision-making agreement.

(b) Where a supporter has assisted an adult with a disability to access, collect, or obtain personal information, including protected health information under the Health Insurance Portability Act ("HIPAA") and educational records under the Family Education Rights and Privacy Act ("FERPA"), about an adult with a disability under this section, the supporter shall ensure the information is kept privileged and confidential from unauthorized access, use, or disclosure.

(c) This does not preclude an adult with a disability from seeking personal information without the assistance of a supporter.

Sec. 751.013. AUTHORIZING AND WITNESSING OF SUPPORTED DECISION-MAKING AGREEMENT

(a) A supported decision-making agreement must 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) If signed before two witnesses, the attesting witnesses must be at least 14 years of age.

Sec. 751.014 LIMITATION OF LIABILITY

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 in good faith in reliance upon a writing that purports to be a supported decision-making agreement.

Sec. 751.015. REPORTING AND INVESTIGATING ABUSE, NEGLECT, AND EXPLOITATION OF AN ADULT WITH A DISABILITY BY THE SUPPORTER

(a) If a person who receives a copy or is aware of the supported decision-making agreement has reason to believe that the adult with a disability is being abused, neglected or exploited by the supporter, the person shall report the alleged abuse, neglect or exploitation to the Department of Family and Protective Services.

(b) If the Department of Family and Protective Services makes a final finding, including a disposition after an appeal, that the adult with a disability has been abused, neglected or exploited by the supporter the supported decision-making agreement is ended.

Sec. 751.016 FORM OF SUPPORTED DECISION-MAKING AGREEMENT

The supported decision-making agreement shall be valid if it is in substantially the following form; but it may be in any form not inconsistent with the requirements of this chapter:

SUPPORTED DECISION-MAKING AGREEMENT

Appointment of Supporter

I, _____ (insert your name), make this agreement from my own free will.

I agree that:

Name:

Address:

Phone Number:

Email Address:

is my supporter. My supporter may help me with the decisions I make every day to provide for food, clothing and shelter for myself; to take care of my physical health; and to manage my financial affairs. My supporter is not allowed to make decisions for me. To help me with my decisions, my supporter may:

1. Help me get the information that is relevant to the decision including, but not limited to medical, psychological, financial, educational, or treatment records;
2. Help me understand my options so I can make a decision; or
3. Help me communicate my decision to other persons.

Y/N____ A release letting the supporter see protected health information under the Health Insurance Portability Act ("HIPAA") is attached.

Y/N____ A release letting the supporter see educational records under the Family Education Rights and Privacy Act ("FERPA") is attached.

Effective Date of Supported Decision-Making Agreement

This supported decision-making agreement is effective immediately and will continue until it is ended by my supporter or me.

Consent of Supporter

I consent to act as a supporter.

(signature of supporter)

(printed name of supporter)

Signature

(my signature)

(my printed name)

(witness 1 signature)

(printed name of witness 1)

(witness 2 signature)

(printed name of witness 2)

Signed this _____ day of _____, 20__

(my signature)

State of _____

County of _____

This document was acknowledged before me on _____ (date)

by _____ and _____
(name of adult with a disability) (name of supporter)

(signature of notary)

(seal, if any, of notary)

(printed name)

My commission expires: _____

WARNING: PROTECTION FOR THE ADULT WITH A DISABILITY

IF A PERSON WHO RECEIVES A COPY OR IS AWARE OF THE SUPPORTED DECISION-MAKING AGREEMENT HAS REASON TO BELIEVE THAT THE ADULT WITH A DISABILITY IS SUFFERING FROM ABUSE, NEGLECT, OR EXPLOITATION CAUSED BY THE SUPPORTER, THE PERSON SHALL REPORT THE ALLEGED ABUSE, NEGLECT OR EXPLOITATION TO THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES BY CALLING THE ABUSE HOTLINE AT 1-800-252-5400 OR BY EMAIL AT WWW.TXABUSEHOTLINE.ORG.

Section 1001.001

Chapter 1001.001, Estates Code, is amended to read as follows:

Sec. 1001.001. POLICY; PURPOSE OF GUARDIANSHIP. (a) A court may appoint a guardian with full authority over an incapacitated person or may grant a guardian limited authority over an incapacitated person as indicated by the incapacitated person’s actual mental or physical limitations and only as necessary to promote and protect the well-being of the person.

(b) In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including the right to make personal decisions regarding residence.

(c) Before the initiation of a guardianship proceeding or the appointment of a guardian, a court must make a finding that no less restrictive alternatives exist to resolve the need for a guardianship, including, but not limited to:

- (1) Executing a Medical Power of Attorney under Chapter 166, Health and Safety Code;

- (2) Appointment of a durable power of attorney under Section 751.002;
(3) Declaration for mental health treatment under Chapter 137, Civil Practices and Remedies
- Code;
- (4) Establishment of a supported decision-making agreement under Section 751.07-751.016;
(5) Appointment of a representative payee to manage public benefits;
(6) Establishment a joint bank account;
(7) Creation of a management trust under Chapter 867, Subpart N;
(8) Creation of a special needs trust;
(9) Designation of a guardian before the need arises under Section 1104.101; or
(10) Establishment of alternate forms of decision-making based on person centered planning.
- (a) The court shall deny the appointment of a guardian if a preexisting guardianship alternative meets the need of an adult who is the subject of a guardianship proceeding.
(b) If an adult has not designated a guardian before the need arises, then the court shall consider the adult's preference of the person to be appointed guardian by the court.
(c) The court shall consider terminating or modifying a guardianship if a guardianship alternative meets the need of the adult.

Section 1002

Chapter 1002, Estates Code, is amended by adding Section 1002.031 to read as follows:

Sec. 1002.031. SUPPORTS AND SERVICES. "Supports and services" means available formal and informal resources and assistance that enable an individual to meet his or her need for food, clothing, or shelter, to care for his or her physical or mental health, to manage his or her financial affairs or to make personal decisions regarding residence, voting, operating a motor vehicle and marriage.

Section 1051.104

Section 1051.104, Estates Code, is amended to read as follows:

Sec. 1051.104. NOTICE BY APPLICANT FOR GUARDIANSHIP. (a) The person filing an application for guardianship shall mail a copy of the application and a notice containing the information required in the citation issued under Section 1051.102 by registered or certified mail, return receipt requested, or by any other form of mail that provides proof of delivery, to the following persons, if their whereabouts are known or can be reasonably ascertained:

- (1) each adult child of the proposed ward;
- (2) each adult sibling of the proposed ward;
- (3) the administrator of a nursing home facility or similar facility in which the proposed ward resides;
- (4) the operator of a residential facility in which the proposed ward resides;
- (5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward;
- (6) a person designated to serve as guardian of the proposed ward by a written declaration under Subchapter E, Chapter 1104, if the applicant knows of the existence of the declaration;
- (7) a person designated to serve as guardian of the proposed ward in the probated will of the last surviving parent of the proposed ward;
- (8) a person designated to serve as guardian of the proposed ward by a written declaration of the proposed ward's last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration; and

(9) each person named as another relative within the third degree by consanguinity in the application as required by Section 1101.001(b)(11) or (13) if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parent, adult sibling, or adult child.

(b) The applicant shall file with the court:

(1) a copy of any notice required by Subsection (a) and the proofs of delivery of the notice;
and

(2) an affidavit sworn to by the applicant or the applicant's attorney stating:

(A) that the notice was mailed as required by Subsection (a); and

(B) the name of each person to whom the notice was mailed, if the person's name is not shown on the proof of delivery.

(c) At or before the hearing on the application or in the sworn affidavit required by Subsection (b)(2), the applicant or the applicant's attorney must certify to the court that the guardianship is necessary and reasonable efforts have been made to explore alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian.

(d) The information required by Subsection (c) is subject to examination by the court.

~~(e)~~ Failure of the applicant to comply with Subsections (a)(2)-(9) does not affect the validity of a guardianship created under this title.

Section 1054.004

Section 1054.004, Estate Code, is amended to read as follows:

Sec. 1054.004. Duties. (a) An attorney ad litem appointed under Section 646 of this code to represent a proposed ward shall interview the proposed ward within a reasonable time before the hearing in the proceeding for the appointment of a guardian. To the greatest extent possible, the attorney shall discuss with the proposed ward;

(1) the laws and facts of the case;

(2) the proposed ward's legal options regarding disposition of the case;

(3) the grounds on which the guardianship is sought; and

(4) whether alternatives to guardianship under Section 1001.001(c) of this code could meet the needs of the ward and thereby avoid the appointment of a guardian.

(b) Before the hearing, the attorney shall review:

(1) the application for guardianship;

(2) certificates of current physical, medical, and intellectual examinations; and

(3) all of the proposed ward's relevant medical, psychological, and intellectual testing records.

(c) Before the hearing, the attorney shall investigate whether the guardianship is necessary or the specific powers or duties of the guardian should be limited if the proposed ward receives supports and services. If it is determined that the guardianship is necessary, the attorney must certify to the court that the guardianship is necessary and reasonable efforts have been made to explore alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian.

Section 1054.054

Section 1054.054, Estates Code, is amended to read as follows:

Sec. 1054.054. DUTIES. (a) A guardian ad litem is an officer of the court.

(b) A guardian ad litem shall protect the incapacitated person whose interests the guardian has been appointed to represent in a manner that will enable the court to determine the action that will be in that person's best interests.

(c) The guardian ad litem shall investigate whether the guardianship is necessary 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) The information gathered by the guardian ad litem pursuant to Subsection (c) is subject to examination by the court.

Section 1054.201

Section 1054.201, Estates Code, is amended to read as follows:

Sec. 1054.201. CERTIFICATION REQUIRED. (a) The applicant's attorney and a (A) court-appointed attorney in a guardianship proceeding, including an attorney ad litem, must 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) The State Bar of Texas shall require ~~three~~ four hours of credit for certification under this subchapter.

(c) The certification required by subsection (a) must include one hour of training on alternatives to guardianship and supports and services available to proposed wards.

Section 1101.001

Section 1101.001, Estates Code, is amended as follows:

Sec. 1101.001. APPLICATION; CONTENTS. Any person may commence a proceeding for the appointment of a guardian by filing a written application in a court having jurisdiction and venue. The application must be sworn to by the applicant and state:

(1) the name, sex, date of birth, and address of the proposed ward;

(2) the name, relationship, and address of the person the applicant desires to have appointed as guardian;

(3) whether guardianship of the person or estate, or both, is sought;

(4) whether guardianship alternatives under Section 1001.001(c) of this code were considered, and whether any guardianship alternatives meet the needs of the proposed ward and avoid necessity of a guardianship;

(5) 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:

(A) the right of a proposed ward to make personal decisions regarding residence;

(B) the right of a proposed ward who is 18 years of age or older to vote in a public election; and

(C) the proposed ward's eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code;

(6) the facts requiring that a guardian be appointed and the interest of the applicant in the appointment

(7) the nature and description of any guardianship of any kind existing for the proposed ward in any other state;

(8) the name and address of any person or institution having the care and custody of the proposed ward;

(9) the approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled;

(10) the name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney;

(11) if the proposed ward is a minor and if known by the applicant:

(A) the name of each parent of the proposed ward and state the parent's address or that the parent is deceased;

(B) the name and age of each sibling, if any, of the proposed ward and state the sibling's address or that the sibling is deceased; and

(C) if each of the proposed ward's parents and adult siblings are deceased, the names and addresses of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity and who are adults;

(12) if the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the preceding two-year period and, if so, the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding;

(13) if the proposed ward is an adult and if known by the applicant:

(A) the name of the proposed ward's spouse, if any, and state the spouse's address or that the spouse is deceased;

(B) the name of each of the proposed ward's parents and state the parent's address or that the parent is deceased;

(C) the name and age of each of the proposed ward's siblings, if any, and state the sibling's address or that the sibling is deceased;

(D) the name and age of each of the proposed ward's children, if any, and state the child's address or that the child is deceased; and

(E) if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased, or, if there is no spouse, parent, adult sibling, or adult child, the names and addresses of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity and who are adults;

(14) facts showing that the court has venue over the proceeding; and

(15) if applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who is certified under Subchapter C, Chapter 111, Government Code, and has complied with the requirements of Section 1002.025 of this code.

Section 1101.101

Section 1101.101, Estates Code, is amended to read as follows:

Sec. 1101.101. FINDINGS AND PROOF REQUIRED. (a) Before appointing a guardian, the court must:

(1) find by clear and convincing evidence that:

(A) alternatives to guardianship that would avoid the need for appointment of a guardian have been explored and determined to not be feasible;

(B) supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been explored and determined to not be feasible;

~~(A)~~(C) the proposed ward is an incapacitated person;
~~(B)~~(D) it is in the proposed ward's best interest to have the court appoint a person as guardian of the proposed ward; and
~~(C)~~(E) the proposed ward's rights or property will be protected by the appointment of a guardian; and

(2) find by a preponderance of the evidence that:

(A) the court has venue of the case;

(B) the person to be appointed guardian is eligible to act as guardian and is entitled to appointment, or, if no eligible person entitled to appointment applies, the person appointed is a proper person to act as guardian;

(C) if a guardian is appointed for a minor, the guardianship is not created for the primary purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment; and

(D) the proposed ward:

(i) is totally without capacity as provided by this title to care for himself or herself and to manage his or her property; or

(ii) 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, or to make personal decisions regarding residence, voting, operating a motor vehicle and marriage with or without the provision of supports and services.

(b) The court may not grant an application to create a guardianship unless the applicant proves each element required by this title.

Section 1101.103

Section 1101.103, Estates Code, is amended to read as follows:

Sec. 1101.103. DETERMINATION OF INCAPACITY OF CERTAIN ADULTS: PHYSICIAN EXAMINATION.

(a) Except as provided by Section 1101.104, the court may not grant an application to create a guardianship for an incapacitated person, other than a minor or person for whom it is necessary to have a guardian appointed only to receive funds from a governmental source, unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is:

(1) dated not earlier than the 120th day before the date of the filing of the application is filed; and

(2) based on an examination the physician performed not earlier than the 120th day before the date the application is filed.

(b) The letter or certificate must:

(1) describe the nature, degree, and severity of incapacity, including functional deficits, if any, regarding the proposed ward's ability to:

(A) handle business and managerial matters;

(B) manage financial matters;

(C) operate a motor vehicle;

(D) make personal decisions regarding residence, voting, and marriage; and

(E) consent to medical, dental, psychological, or psychiatric treatment;

(2) in providing a description under Subdivision (1) regarding the proposed ward's ability to operate a motor vehicle and make personal decisions regarding voting, state whether in the physician's opinion the proposed ward:

(A) has the mental capacity to vote in a public election; and

(B) has the ability to safely operate a motor vehicle;

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

(4) in providing the 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 of time after which the individual should be re-evaluated to determine if guardianship continues to be necessary.

~~(4)~~(5) 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 person's physical or mental health, including the proposed ward's ability to:

(A) understand or communicate;

(B) recognize familiar objects and individuals;

(C) problem solve;

~~(C) perform simple calculations;~~

(D) reason logically; and

(E) administer to daily life activities with or without the provision of supports

and services;

~~(5)~~(6) state whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding;

~~(6)~~(7) describe the precise physical and mental conditions underlying a diagnosis of a mental disability, and state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting;

(8) state whether the guardianship is necessary or the specific powers or duties of the guardian should be limited if the proposed ward receives supports and services; and

~~(7)~~(9) include any other information required by the court.

(c) If the court determines it is necessary, the court may appoint the necessary physicians to examine the proposed ward. The court must make its determination with respect to the necessity for a physician's examination of the proposed ward at a hearing held for that purpose. Not later than the fourth day before the date of the hearing, the applicant shall give to the proposed ward and the proposed ward's attorney ad litem written notice specifying the purpose and the date and time of the hearing.

(d) A physician who examines the proposed ward, other than a physician or psychologist who examines the proposed ward under Section 1101.1042(2), shall make available for inspection by the attorney ad litem appointed to represent the proposed ward a written letter or certificate from the physician that complies with the requirements of Subsection (a) and (b).

Section 1101.151

Section 1101.151, Estates Code, is amended as follows:

Sec. 1101.151. ORDER APPOINTING GUARDIAN WITH FULL AUTHORITY. (a) If it is found that the proposed ward is totally without capacity to care for himself or herself, to manage his or her property, to make personal decisions regarding residence, to operate a motor vehicle, and to vote in a public election, the court may appoint a guardian of the individual's person or estate, or both, with full authority over the incapacitated person except as provide by law.

(b) An order appointing a guardian under this subsection must contain findings of fact and specify:

(1) the information required by Subsection (c) of this section;

(2) that the guardian has full authority over the incapacitated person;

(3) if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to expend for the education and maintenance of the person under Section 776 of this code;

(4) whether the person is totally incapacitated because of a mental condition;

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

(6) if it is a guardianship of the person of the ward or of both the person and the estate of the ward, the rights of the guardian with respect to the person as specified in Section 1151.051(c)(1).

(c) an order appointing a guardian under this section that includes the rights of the guardian with respect to the person as specified in Section 1151.051(c)(1) must also contain the following prominently displayed statement in boldfaced type, in capital letters, or underlined.

Section 1101.152

Section 1101.152, Estates Code, is amended as follows:

Sec. 1101.152. ORDER APPOINTING GUARDIAN WITH LIMITED AUTHORITY. (a) 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, the court may appoint a guardian with limited powers and permit the proposed ward to care for himself or herself or to manage his or her property commensurate with the ward's ability with or without supports and services, including the right to make personal decisions regarding residence.

(b) An order appointing a guardian under this section must contain findings of fact that specify:

(1) the information required by Section 1101.153(a);

(2) the specific powers, limitations, or duties of the guardian with respect to person's care or the management of the person's property by the guardian;

(3) the specific rights and powers retained by the person with or without the provision of supports and services;

(4) if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to spend for the education and maintenance of the person under Subchapter A, Chapter 1156; and

(5) whether the person is incapacitated because of a mental condition and, if so, whether the person retains the right to make personal decisions regarding residence, to vote in a public election or maintains eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code.

(c) An order appointing a guardian under this section that includes the right of the guardian to have physical possession of the ward or to establish the ward's legal domicile as specified in Section 1151.051(c)(1) must also contain the following prominently displayed statement in boldfaced type, in capital letters, or underlined:

"NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE

PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS \$10,000.”

Section 1101.153

Section 1101.153, Estates Codes, is amended to read as follows:

Sec. 1101.153. GENERAL CONTENT OF ORDER APPOINTING GUARDIAN. (a) A court order appointing a guardian must specify:

- (1) the name of the person appointed;
- (2) the name of the ward;
- (3) whether the guardian is of the person or estate of the ward, or both;
- (4) the amount of any bond required;
- (5) if it is a guardianship of the estate of the ward and the court considers an appraisal to be necessary, one two or three disinterested persons to appraise the estate and to return the appraisement to the court;
- (6) that the clerk will issue letters of guardianship to the person appointed when the person has qualified according to law.

(b) If the letter or certificate under Section 1101.103(4) stated that improvement in the ward’s physical condition and mental functioning is possible and guardianship may no longer be necessary in less than one year, the order must specify the date by which the guardian must obtain an updated written letter or certificate and submit it to the court. Special leave is not required if the court issues an order under this Subsection.

~~(b)~~(c) An order appointing a guardian may not duplicate or conflict with the powers and duties of any other guardian.

~~(c)~~(d) An order appointing a guardian or a successor guardian may specify as authorized by Section 1202.001(c) a period during which a petition for adjudication that the ward no longer requires the guardianship may not be filed without special leave.

Section 1151.051

Section 1151.051, Estates Code, is amended to read as follows:

Sec. 1151.051. GENERAL POWERS AND DUTIES OF GUARDIANS OF THE PERSON. (a) The guardian of the person of a ward is entitled to take charge of the person of the ward.

(b) The duties of the guardian of the person correspond with the rights of the guardian.

(c) A guardian of the person has:

- (1) the right to have physical possession of the ward and to establish the ward's legal domicile;
- (2) the duty to provide care, supervision, and protection for the ward;
- (3) the duty to provide the ward with clothing, food, medical care, and shelter;
- (4) the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward;
- (5) on application to and order of the court, the power to establish a trust in accordance with 42 U.S.C. Section 1396p(d)(4)(B) and direct that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code; and
- (6) the power to sign documents necessary or appropriate to facilitate employment of the ward if:

(A) the guardian was appointed with full authority over the person of the ward under Section [1101.151](#); or

(B) the power is specified in the court order appointing the guardian with limited powers over the person of the ward under Section [1101.152](#).

(d) Notwithstanding Subsection (c)(4), a guardian of the person of a ward has the power to personally transport the ward or to direct the ward's transport by emergency medical services or other means to an inpatient mental health facility for a preliminary examination in accordance with Subchapters A and C, Chapter 573, Health and Safety Code.

(e) Notwithstanding Subsection (c)(1), the guardian may not place the ward in a more restrictive care facility without first obtaining an order of the court after the filing of an application and notice to any persons who have requested notice unless the change is made under emergency circumstances.

Section 1202.001

Section 1202, Estates Code, is amended to read as follows:

Sec. 1202.001. TERM OF GUARDIAN OR GUARDIANSHIP. (a) Unless otherwise discharged as provided by law, a guardian remains in office until the estate is closed.

(b) A guardianship shall be settled and closed when the ward:

(1) dies and, if the ward was married, the ward's spouse qualifies as survivor in community;

(2) is found by the court to have full capacity to care for himself or herself and to manage the ward's property with or without service and supports;

(3) is no longer a minor; or

(4) no longer must have a guardian appointed to receive funds due the ward from any governmental source.

(c) An order appointing a guardian or a successor guardian may specify a period of not more than one year during which a petition for adjudication that the ward no longer requires the guardianship may not be filed without special leave, with the exception of orders issued under Section 1101.153(b).

(d) A request for an order under this section may be made by informal letter to the court. A person who knowingly interferes with the transmission of the request to the court may be adjudged guilty of contempt of court.

(e) If a nonresident guardian of a nonresident ward qualifies as guardian under this title, any resident guardian's guardianship may be terminated.

Section 1202.051

Section 1202.051, Estates Code, is amended to read as follows:

Sec. 1202.051. APPLICATION AUTHORIZED.

A ward or any person interested in the ward's welfare may file a written application with the court for an order:

(1) finding that the ward is no longer an incapacitated person and ordering the settlement and closing of the guardianship;

(2) finding that the ward lacks the capacity 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 with or without supports and services and granting additional powers or duties to the guardian; or

(3) finding that the ward has the capacity 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 with or without supports and services and:

(A) limiting the guardian's powers or duties; and

(B) permitting the ward to care for himself or herself, to make personal decisions regarding residence or to manage the ward's own financial affairs commensurate with the ward's ability, with or without supports and services.

Section 1202.151

Section 1202.151, Estates Code, is amended to read as follows:

Sec. 1202.151. EVIDENCE AND BURDEN OF PROOF AT HEARING. (a) Except as provided by Section 1202.201, at a hearing on an application filed under Section 1202.051, the court shall 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 but not limited to whether the guardianship is necessary or the specific powers or duties of the guardian should be limited if the proposed ward receives supports and services.

(b) The party who filed the application has the burden of proof at the hearing.

Section 1202.152

Section 1202.152, Estates Code, is amended to read as follows:

Sec. 1202.152. PHYSICIAN'S LETTER OR CERTIFICATE REQUIRED. (a) The court may not grant an order completely restoring a ward's capacity or modifying a ward's guardianship under an application filed under Section 1202.051 unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated:

(1) not earlier than the 120th day before the date the application was filed; or

(2) after the date the application was filed but before the date of the hearing.

(b) A letter or certificate presented under Subsection (a) must:

(1) 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 with or without supports and services to:

(A) provide food, clothing, and shelter for himself or herself;

(B) care for the ward's own physical health; and

(C) manage the ward's financial affairs;

(2) provide a medical prognosis specifying the estimated severity of any incapacity;

(3) state how or in what manner the ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the ward's physical or mental health;

(4) state whether any current medication affects the ward's demeanor or the ward's ability to participate fully in a court proceeding;

(5) describe the precise physical and mental conditions underlying a diagnosis of senility, if applicable; and

(6) include any other information required by the court.

(c) If the court determines it is necessary, the court may appoint the necessary physicians to examine the ward in the same manner and to the same extent as a ward is examined by a physician under Section 1101.103 or 1101.104.

Section 1202.153

Section 1202.153, Estates Code, is amended to read as follows:

Sec. 1202.153. FINDINGS REQUIRED. (a) Before ordering the settlement and closing of a guardianship under an application filed under Section 1202.051, the court must find by a preponderance of the evidence that the ward is no longer partially or fully incapacitated.

(b) Before granting additional powers to the guardian or requiring the guardian to perform additional duties under an application filed under Section 1202.051, the court must find by a preponderance of the evidence that the current nature and degree of the ward's incapacity warrants a modification of the guardianship and that some or all of the ward's rights need to be further restricted.

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

Section 1202.154

Section 1202.154, Estates Code, is amended to read as follows:

Sec. 1202.154. GENERAL REQUIREMENTS FOR ORDER. (a) 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 with or without supports and services must state:

- (1) the guardian's name;
- (2) the ward's name; and
- (3) whether the type of guardianship being addressed at the proceeding is a:
 - (A) guardianship of the person;
 - (B) guardianship of the estate; or
 - (C) guardianship of both the person and the estate.

(b) In an order described by this section, the court may not grant a power to a guardian or require the guardian to perform a duty that is a power granted to or a duty required to be performed by another guardian.

Section 1202.156

Section 1202.156, Estates Code, is amended to read as follows:

Sec. 1202.156. ADDITIONAL REQUIREMENTS FOR ORDER MODIFYING GUARDIANSHIP. If the court finds that a guardian's powers or duties should be expanded or limited, the order modifying the guardianship must contain findings of fact and specify, in addition to the information required by Section 1202.154:

- (1) the specific powers, limitations, or duties of the guardian with respect to the care of the ward or the management of the property of the ward, as appropriate;
- (2) the specific areas of protection and assistance to be provided to the ward;
- (3) any limitation of the ward's rights;
- (4) if the ward's incapacity resulted from a mental condition, whether the ward retains the right to make personal decisions regarding residence, and to vote; and
- (5) that the clerk shall modify the letters of guardianship to the extent applicable to conform to the order.

2. The Legislature should create a statewide guardian of last resort.

Commentary

A guardian of last resort is needed when no one is available to assume the responsibility of guardianship (when no family, friends, relatives, or anyone else interested in serving as a guardian) for a proposed ward or when the assets of the proposed ward are insufficient to pay for a private guardian. Texas does not have a statewide guardian of last resort.

The Texas Department of Aging and Disability Services (DADS) Guardianship Services Program serves people referred by the Adult Protective Services (APS) or Child Protective Services (CPS) divisions of the Texas Department of Family and Protective Services (DFPS). In certain limited circumstances, courts may make direct requests to the DADS program. To be referred by APS to DADS for guardianship, the person must either be an adult with a disability, or be 65 or older and a victim of abuse, neglect, including self-neglect, or exploitation. CPS referrals are minors in CPS conservatorship (which ends at adulthood) who appear to meet the adult definition of incapacity.

The 84th Regular Session Legislative Appropriation Request for DADS estimates that 928 wards will receive guardianship services from DADS staff and 419 wards will receive guardianship services through DADS Private Guardianship Programs (DADS Contractors). Because of the limitations of the DADS Guardianship Services Program, courts struggle to find guardians for wards without family, friends, or resources. A statewide guardian of last resort program can be created through the expansion of the Guardianship Services Program by removing the requirement that people be referred by APS or CPS and through increased funding to provide guardianship services to individuals without other options.

3. The Legislature should fund OCA's legislative appropriations request exceptional item entitled "enhance judicial services to the elderly and incapacitated."

Commentary

As stated previously, only ten of the state's 254 counties have statutory probate courts with court investigators and auditors. In these courts, the court staff are able to investigate and audit guardianship filings to spot potential fraud and abuse. This information is then provided to the statutory probate judge. In the vast majority of the state's counties, judges hearing probate cases (primarily constitutional county judges) simply do not have access to these resources. Reviewing guardianship filings is necessary to ensure the protection of some of our state's most vulnerable citizens.

In Fiscal Year 2013, there were 5,570 new guardianship cases filed in Texas. Of these, 2,981, or 53.5%, were filed in counties without a statutory probate court. In addition, there are 18,713 active guardianship cases in these same counties. A recent review of guardianship cases in Minnesota found that 43% of cases had minor issues, 13% had missing account information or co-mingling of funds, and 14% had major issues including loss or inappropriate use of funds of the individual.

Because of these reasons, the Elders Committee recommends that the Judicial Council support the Office of Court Administration's Legislative Appropriation Request exceptional item request entitled "*Enhance Judicial Services to the Elderly and Incapacitated.*" This request is to "initiate a new pilot program to place Guardianship Compliance Specialists across the state to review guardianship filings for the elderly and incapacitated to determine if guardians are following statutorily-required procedures, to review annual reports filed by the guardians, and to ensure that exploitation and/or neglect of persons under

guardianship (wards) is not occurring.” The total amount of this request is \$1.1 million in the next biennium.