

BILL ANALYSIS

Senate Research Center

S.B. 39
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 39 is an omnibus guardianship bill prepared by Real Estate Probate and Trust Law (REPTL) Section of the Texas Bar. Specifically, S.B. 39 clarifies that children and siblings do not need court permission to intervene in guardianship cases involving their loved ones. This ensures that these immediate family members have an opportunity to state their position in court.

S.B. 39 also allows an application for guardianship to omit the address of any person with a guardian who was ever protected by a protective order, as opposed to just a person who is protected at the time the application is filed. This expands this privacy protection to a greater number of at-risk Texans.

What's more, S.B. 39 codifies the duties of a supporter under a supported decision-making agreement (SDMA), including the duties to act in good faith, to act within the authority granted in the agreement, to act loyally and without self-motivation, and to avoid conflicts of interest. This clarity regarding responsibilities under SDMAs encourages more persons to use this tool.

S.B. 39 clarifies the court procedure to remove an agent who has a power of attorney (POA) and is engaged in malfeasance and to appoint a successor agent named in the POA, so the court does not have to resort to a guardianship to protect a person.

Lastly, S.B. 39 provides for the automatic suspension of a POA when a guardianship of the estate is established. This change prevents situations where there are two persons, guardian of the estate and agent under POA, with conflicting authority to make financial decisions on behalf of the same person. (Original Author's / Sponsor's Statement of Intent)

S.B. 39 amends current law relating to estates and to guardianships, substitutes for guardianships, and durable powers of attorney for persons with disabilities or who are incapacitated.

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. (a) Amends Section 361.052, Estates Code, as follows:

Sec. 361.052. REMOVAL WITH NOTICE. (a) Creates this subsection from existing text. Authorizes the court to remove a personal representative on the court's own motion, or on the complaint of any interested person, after the representative has been cited by personal service to answer at a time and place set in the notice, rather than fixed in the notice, if:

(1) through (5) makes no changes to these subdivisions; or

(6) the representative, as executor or administrator, fails to make a final settlement by the third anniversary of the date letters

testamentary or of administration are granted, unless that period is extended by the court on a showing of sufficient cause supported by oath, rather than make a final settlement by the third anniversary of the date letters testamentary or of administration are granted, unless that period is extended by the court on a showing of sufficient cause supported by oath or timely file the affidavit or certificate required by Section 308.004 (Affidavit or Certificate).
Makes nonsubstantive changes.

(b) Authorizes the court on the court's own motion, if a personal representative, as executor or administrator, fails to timely file the affidavit or certificate required by Section 308.004, to remove the personal representative after providing 30 days' written notice to the personal representative to answer at a time and place set in the notice, by certified mail, return receipt requested, to the representative's last known address and the last known address of the representative's attorney of record.

(b) Amends Section 404.0035, Estates Code, as follows:

Sec. 404.0035. REMOVAL OF INDEPENDENT EXECUTOR WITH NOTICE.

(a) Authorizes the probate court, on the court's own motion, to remove an independent executor appointed under this subtitle (Independent Administration) after providing 30 days' written notice of the court's intention to the independent executor, requiring answering at a time and place set in the notice, by certified mail, return receipt requested, to certain addresses, if the independent executor, among certain other actions, fails to timely file the affidavit or certificate required by Section 308.004. Deletes existing text authorizing the probate court, on the court's own motion, to remove an independent executor appointed under this subtitle after providing 30 days' written notice of the court's intent to remove the independent executor, by certified mail, return receipt requested, to certain addresses, if the independent executor takes certain actions. Makes nonsubstantive changes.

(b) Authorizes the probate court, on its own motion or on a motion of any interested person, after the independent executor has been cited by personal service to answer at a time and place set in the notice, rather than fixed in the notice, to remove an independent executor under certain circumstances, rather than under certain circumstances, including when the independent executor fails to timely file the affidavit or certificate required by Section 308.004. Redesignates existing Subdivisions (3) through (5) as Subdivisions (2) through (4).

(c) Amends Section 1023.003, Estates Code, as follows:

Sec. 1023.003. New heading: TRANSFER OF GUARDIANSHIP TO ANOTHER COUNTY. (a) Creates this subsection from existing text and makes no further changes to this subsection.

(b) Authorizes the court in which a guardianship is pending, on the court's own motion and with notice as provided by Section 1023.004, to transfer the transaction of the business of the guardianship to another county if the ward resides in the county to which the guardianship is to be transferred.

(d) Amends Section 1023.004, Estates Code, as follows:

Sec. 1023.004. NOTICE. (a) Requires that the sureties on the bond of the guardian, on filing an application or on motion of a court to transfer a guardianship to another county under Section 1023.003, be cited by personal service to appear and show cause why the guardianship should not be transferred, rather than requires that the sureties on the bond of the guardian, on filing an

application to transfer a guardianship to another county, be cited by personal service to appear and show cause why the application should not be granted.

(b) Requires the guardian, if an application is filed by a person other than the guardian or if a court made a motion to transfer a guardianship, to be cited by personal service to appear and show cause why the guardianship should not be transferred, rather than requires the guardian, if an application is filed by a person other than the guardian, to be cited by personal service to appear and show cause why the application should not be granted.

(e) Amends Section 1023.005, Estates Code, to require the court to enter a certain order on hearing an application or motion under Section 1023.003, if good cause is not shown to deny the transfer and it appears that transfer of the guardianship is in the best interests of the ward, rather than on hearing an application under Section 1023.003, if good cause is not shown to deny the application and it appears that transfer of the guardianship is in the best interests of the ward.

(f) Amends Section 1203.052, Estates Code, by amending Subsection (a) and adding Subsection (a-1), as follows:

(a) Authorizes the court to remove a guardian as provided by Subsection (a-1) under certain conditions, rather than to remove a guardian on the court's own motion, or on the complaint of an interested person, after the guardian has been cited by personal service to answer at a time and place set in the notice, under certain conditions.

(a-1) Authorizes the court to remove a guardian for a reason listed in Subsection (a) on the:

(1) court's own motion, after the guardian has been notified, by certified mail, return receipt requested, to answer at a time and place set in the notice; or

(2) complaint of an interested person, after the guardian has been cited by personal service to answer at a time and place set in the notice.

(g) Provides that Sections 361.052 and 404.0035, Estates Code, as amended by this section, apply to the estate of a decedent who dies before, on, or after, the effective date of this Act.

(h) Provides that Sections 1023.003, 1023.004, 1023.005, and 1203.052, Estates Code, as amended by this section, apply to a guardianship created before, on, or after the effective date of this Act.

SECTION 2. Amends Section 751.052, Estates Code, as follows:

Sec. 751.052. RELATION OF ATTORNEY IN FACT OR AGENT TO COURT-APPOINTED GUARDIAN OF ESTATE. (a) Deletes existing text providing that if, after execution of a durable power of attorney, a court of the principal's domicile appoints a permanent guardian of the principal's estate, the powers of the attorney in fact or agent terminate on the qualification of the guardian of the estate. Provides that if, after execution of a durable power of attorney, a court appoints a:

(1) permanent guardian of the estate for a ward who is the principal who executed the power of attorney, on the qualification of the guardian, the powers and authority granted to the attorney in fact or agent named in the power of attorney are automatically revoked; or

(2) temporary guardian of the estate for a ward who is the principal who executed the power of attorney, on the qualification of the guardian the powers and authority granted to the attorney in fact or agent named in the power of attorney are automatically suspended for the duration of the guardianship unless the court enters a certain order.

(b) Creates this subsection from existing text. Requires the attorney in fact or agent, if the powers and authority of an attorney in fact or agent are revoked as provided by Subsection (a), to take certain actions. Makes a nonsubstantive change. Deletes existing Subsection (b) authorizing the court, if, after execution of a durable power of attorney, a court of the principal's domicile appoints a temporary guardian of the principal's estate, to suspend the powers of the attorney in fact or agent on a certain qualification. Deletes existing text prohibiting this subsection from being construed in a certain way.

SECTION 3. Amends Section 751.054(a), Estates Code, as follows:

(a) Provides that the revocation by, the death of, or the qualification of a temporary or permanent guardian of the estate of a principal who has executed a durable power of attorney or the removal of an attorney in fact or agent under Chapter 753 does not revoke, suspend, or terminate the agency as to the attorney in fact, agent, or other person who acts in good faith under or in reliance on the power without actual knowledge of the termination or suspension, as applicable, of the power by the revocation, the principal's death, the qualification of a temporary or permanent guardian of the estate of the principal, or the attorney in fact's or agent's removal. Makes nonsubstantive changes.

SECTION 4. Amends Section 751.055(a), Estates Code, as follows:

(a) Provides that, as to an act undertaken in good-faith reliance on a durable power of attorney, a certain affidavit stating that the attorney in fact or agent did not have, at the time the power was exercised, actual knowledge of the termination or suspension of the power, as applicable, by certain events, including the qualification of a temporary or permanent guardian of the principal's estate or the attorney in fact's or agent's removal, is conclusive proof as between the attorney in fact or agent and a certain other person of the nonrevocation, nonsuspension, or nontermination of the power at that time.

SECTION 5. Amends Section 752.051, Estates Code, to set forth certain language in the form known as a "statutory durable power of attorney," including amended language for the removal and suspension of power of attorney.

SECTION 6. Amends Subtitle P, Title 2, Estates Code, by adding Chapter 753, as follows:

CHAPTER 753. REMOVAL OF ATTORNEY IN FACT OR AGENT

Sec. 753.001. PROCEDURE FOR REMOVAL. (a) Defines "person interested."

(b) Authorizes certain persons to file a petition under this section.

(c) Authorizes a probate court, on the petition of a person described by Subsection (b), after a hearing, to enter an order removing a person named and serving as an attorney in fact or agent under a durable power of attorney; authorizing the appointment of a successor attorney in fact or agent who is named in the durable power of attorney if the court makes a certain finding; and, if compensation is allowed by the terms of the durable power of attorney, denying all or part of the removed attorney in fact's or agent's compensation.

(d) Authorizes a court to enter an order under Subsection (c) if the court finds that the attorney in fact or agent has breached the attorney in fact's or agent's fiduciary duties to the principal; that the attorney in fact or agent has materially violated or attempted to violate the terms of the durable power of attorney and the

violation or attempted violation results in a material financial loss to the principal; that the attorney in fact or agent is incapacitated or is otherwise incapable of properly performing the attorney in fact's or agent's duties; or that the attorney in fact or agent has failed to make certain accountings.

Sec. 753.002. NOTICE TO THIRD PARTIES. Requires the successor attorney in fact or agent, not later than the 21st day after the date the court enters an order removing an attorney in fact or agent and authorizing the appointment of a successor, to provide actual notice of the order to each third party that the attorney in fact or agent has reason to believe relied on or may rely on the durable power of attorney.

SECTION 7. Amends Section 1055.003, Estates Code, by amending Subsection (a) and adding Subsection (d), as follows:

(a) Creates an exception as provided by Subsection (d).

(d) Provides that a person who is entitled to receive notice under Section 1051.104 (Notice by Applicant for Guardianship) is not required to file a motion under this section (Intervention by Interested Person) to intervene in a guardianship proceeding.

SECTION 8. Amends Section 1101.002, Estates Code, to authorize an application filed under Section 1101.001 (Application for Appointment of Guardian; Contents) to omit the address of a person named in the application if, among certain other conditions, the application states that the person is or was protected by a protective order issued under Chapter 85 (Issuance of Protective Order), Family Code.

SECTION 9. Amends Section 1151.051(d), Estates Code, to require the guardian to immediately provide written notice to the court that granted the guardianship as required by Section 573.004 (Guardian's Application for Emergency Detention), Health and Safety Code, of the filing of an application under that section.

SECTION 10. Amends Section 1357.052, Estates Code, as follows:

Sec. 1357.052. New heading: **AUTHORITY OF SUPPORTER; NATURE OF RELATIONSHIP.** (a) Creates this subsection from existing text and makes no further changes to this subsection.

(b) Provides that the supporter owes to the adult with a disability fiduciary duties as listed in the form provided by Section 1357.056(a), regardless of whether that form is used for the supported decision-making agreement (agreement).

(c) Provides that the relationship between an adult with a disability and the supporter with whom the adult enters into an agreement is one of trust and confidence and does not determine the decision-making authority of the adult.

SECTION 11. Amends Subchapter B, Chapter 1357, Estates Code, by adding Section 1357.0525, as follows:

Sec. 1357.0525. **DESIGNATION OF ALTERNATE SUPPORTER IN CERTAIN CIRCUMSTANCES.** Authorizes the adult with a disability, in order to prevent a conflict of interest and if the adult makes a determination that the supporter with whom the adult entered into an agreement is the most appropriate person to provide to the adult supports and services for which the supporter will be compensated, to amend the agreement to designate an alternate person to act as the adult's supporter for the limited purpose of participating in person-centered planning as it relates to the provision of those supports and services.

SECTION 12. Amends Section 1357.053(b), Estates Code, as follows:

(b) Provides that the agreement is terminated if, among certain other conditions, a temporary or permanent guardian of the person or estate appointed for the adult with a disability qualifies. Makes nonsubstantive changes.

SECTION 13. Amends Section 1357.056(a), Estates Code, to provide that an agreement is valid only if it is substantially in a certain form and sets forth the form of the agreement.

SECTION 14. (a) Provides that Sections 751.052, 751.054(a), and 751.055(a), Estates Code, as amended by this Act, and Chapter 753, Estates Code, as added by this Act, apply to a durable power of attorney, including a statutory durable power of attorney, executed before, on, or after the effective date of this Act.

(b) Makes application of Section 752.051, Estates Code, as amended by this Act, prospective.

(c) Provides that Section 1055.003, Estates Code, as amended by this Act, applies to a guardianship proceeding that is pending or commenced on or after the effective date of this Act.

(d) Provides that Section 1101.002, Estates Code, as amended by this Act, applies to an application for a guardianship filed on or after the effective date of this Act.

(e) Provides that Sections 1357.052 and 1357.053(b), Estates Code, as amended by this Act, and Section 1357.0525, Estates Code, as added by this Act, apply to an agreement entered into before, on, or after the effective date of this Act.

(f) Makes application of Section 1357.056(a), Estates Code, as amended by this Act, prospective.

SECTION 15. Effective date: September 1, 2017.