

NO. [REDACTED]

---

IN THE COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO

---

IN THE MATTER OF  
THE GUARDIANSHIP OF [REDACTED]

---

On Appeal from the  
Probate Court No. 1, El Paso County, Texas  
Trial Court Cause No. [REDACTED]

---

**BRIEF OF AMICUS CURIAE  
DISABILITY RIGHTS TEXAS**

---

TAFT ROBINSON  
Texas Bar No. 24091371  
DISABILITY RIGHTS TEXAS  
2222 W. Braker Ln.  
Austin, Texas 78758  
(512) 454-4816 (Phone)  
(512) 454-3999 (Fax)  
trobinson@drtx.org (Email)

PETER GOETSCHEL  
Texas Bar No. 24116432  
VINSON & ELKINS LLP  
1001 Fannin Street  
Suite 2500  
Houston, TX 77002  
(713) 758-2384 (Phone)  
(713) 615-5780 (Fax)  
pgoetschel@velaw.com (Email)

*Attorneys for Amicus Curiae*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF COMPLIANCE WITH TEX. R. APP. P. 11(c) .....	1
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I. ALTERNATIVES TO GUARDIANSHIP INCREASE SELF- DETERMINATION AND IMPROVE QUALITY OF LIFE.....	6
II. RECENT TEXAS REFORMS REQUIRE STRONG CONSIDERATION OF “ALTERNATIVES TO GUARDIANSHIP” AND OF “SUPPORTS AND SERVICES,” MAKING GUARDIANSHIPS A LAST RESORT.....	8
A. Texas Guardianship Law is Intended to Promote Self- Determination.....	8
B. House Bill 39.....	8
C. Texas Estates Code After H.B. 39—Mandatory Consideration of “Supports and Services” and “Alternatives to Guardianship” At Each Stage of a Guardianship Case.....	13
1. The application for guardianship .....	13
2. The physician’s certificate .....	14
3. The role of ad litem.....	14
4. The Court Investigator .....	15
5. The obligations of the probate court .....	15
III. THE “SUPPORTS AND SERVICES” OBLIGATION.....	16
A. Guardianships are Inappropriate Absent Clear and Convincing Evidence that “Supports and Services” to Meet an Individual’s Needs are Unavailable.....	16
B. The Nature of “Supports and Services,” and Examples.....	17
C. Selected Examples of “Supports and Services” Relevant to This Case .....	22
1. Medicaid-waiver services.....	22
2. Informal supports from family .....	24

IV.	RELEVANT CASE LAW FROM OTHER STATES .....	26
IV.	THE MANDATE TO SEEK “ALTERNATIVES TO GUARDIANSHIP” .....	288
A.	Guardianships Are Inappropriate Absent Clear and Convincing Evidence that “Alternative to Guardianship” Are Unavailable .....	288
B.	The Nature of “Alternative to Guardianship” and Examples, Including Person-Centered Planning.....	28
V.	LIMITED GUARDIANSHIP.....	32
A.	Guardianships are not “one size fits all,” and should be tailored to the individual and only those powers necessary to meet the individual’s needs given to the guardian.....	33
	CONCLUSION .....	36
	CERTIFICATE OF COMPLIANCE.....	39
	CERTIFICATE OF SERVICE .....	40

## TABLE OF AUTHORITIES

### Cases

<i>Guardianship of A.E.</i> , 552 S.W.3d 873 (Tex. App.—Fort Worth 2018, no pet.) .....	17
<i>In re G.M.</i> , 596 S.W.2d 846 (Tex. 1980) .....	17
<i>In re Guardianship Hahn</i> , 276 S.W.3d 515 (Tex. App.—San Antonio 2008, no pet.) .....	16
<i>In re Guardianship of Dameris L.</i> , 38 Misc. 3d 570, 956 N.Y.S.2d 848 (Sur. 2012).....	20
<i>In re Guardianship of Miller</i> , 2010-Ohio-2159, 187 Ohio App. 3d 445, 932 N.E.2d 420 .....	27
<i>In re Perry</i> , 727 A.2d 539 (Pa. 1999).....	26
<i>Little v. Little</i> , 576 S.W.2d 493 (Tex. Civ. App.—San Antonio 1979, no writ).....	3
<i>Matter of Fritz G.</i> , 77 N.Y.S.3d 872 (N.Y.A.D. 2018) .....	8
<i>Matter of Guardianship of Hedin</i> , 528 N.W.2d 567 (Iowa 1995).....	27
<i>Saldarriaga v. Saldarriaga</i> , 121 S.W.3d 493 (Tex. App.—Austin 2003, no pet.).....	17

### Statutes

1 TEX. ADMIN. CODE § 353.1153 .....	22
1 TEX. ADMIN. CODE § 353.601 .....	22
1 TEX. ADMIN. CODE § 354.1361(24) .....	29
1 TEX. ADMIN. CODE § 354.1367(c).....	29

TEX. EST. CODE § 1001.001(a).....	32
TEX. EST. CODE § 1001.001(b) .....	16, 32
TEX. EST. CODE § 1002.0015(1)–(8).....	28
TEX. EST. CODE § 1002.0015(9) .....	28
TEX. EST. CODE § 1002.031 .....	18, 24
TEX. EST. CODE § 1054.004(a)(4) .....	14
TEX. EST. CODE § 1054.004(c)(1) .....	15
TEX. EST. CODE § 1054.004(c)(2) .....	15
TEX. EST. CODE § 1054.054(c).....	14
TEX. EST. CODE § 1054.151 .....	15, 32
TEX. EST. CODE § 1054.201(a).....	15
TEX. EST. CODE § 1054.201(b).....	15
TEX. EST. CODE § 1101.001(b)(3-a).....	13
TEX. EST. CODE § 1101.001(b)(3-b).....	13
TEX. EST. CODE § 1101.101(a)(1)(E).....	16, 17, 37
TEX. EST. CODE § 1101.101(a)(1)(D) .....	16, 17, 28, 37
TEX. EST. CODE § 1101.101(c).....	16
TEX. EST. CODE § 1101.103(b)(4)(E).....	14
TEX. EST. CODE § 1101.103(b)(6) .....	14
TEX. EST. CODE § 1101.103(b)(6-a).....	14
TEX. EST. CODE § 1101.152(a).....	16, 33
TEX. EST. CODE § 1151.351 .....	9
TEX. EST. CODE § 1357 .....	8

TEX. EST. CODE, Title 3.....	9
TEX. PROBATE CODE ANN. § 648A(a) (West 2013).....	13
29 U.S.C. § 794e .....	1
42 U.S.C. § 10801, <i>et seq.</i> .....	1
42 U.S.C. § 15001, <i>et seq.</i> .....	1
Uniform Guardianship and Protective Proceedings Act (UGPPA) § 301(a)(1)(B) (July 2017) .....	7
N.Y. Mental Hyg. § 81.02(a)(2) .....	8

**Regulations**

42 C.F.R. § 441.301(c).....	29
-----------------------------	----

**Legislative History**

Act of May 18, 2015, 84th Leg., R.S., ch. 214, § 25, 2015 Tex. Gen. Laws 1302.....	11
H.J. of Tex., 84th Leg., R.S. 3740 (2015), available online at <a href="http://www.journals.house.state.tx.us/hjrnl/84r/pdf/84RDAY72FINAL.PDF">http://www.journals.house.state.tx.us/hjrnl/84r/pdf/84RDAY72FINAL.PDF</a> .....	11
S.J. of Tex., 84th Leg., R.S. 1482 (2015), available online at <a href="http://www.journals.senate.state.tx.us/sjrnl/84r/pdf/84RSJ05-11-F.PDF">http://www.journals.senate.state.tx.us/sjrnl/84r/pdf/84RSJ05-11-F.PDF</a> .....	11
House Research Organization Bill Analysis (Apr. 20, 2015), available online at <a href="http://www.hro.house.state.tx.us/pdf/ba84r/hb0039.pdf">http://www.hro.house.state.tx.us/pdf/ba84r/hb0039.pdf</a> .....	12

**Other Authorities**

A. Frank Johns, <i>Person-Centered Planning in Guardianship: A Little Hope for the Future</i> , 2012 Utah L. Rev. 1541 (2012).....	30
American Bar Association Commission on Law and Aging – American Psychological Association, <i>Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges</i> (2006)	

available online at <a href="https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf">https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf</a> .....	19, 20, 21
Assoc. Judge Clarinda Comstock, <i>Advocating to Avoid Guardianship—Less Restrictive Alternatives to Guardianship, Supports and Services</i> , 1–2, 17 (Harris Co. Probate Court No. 4, Aug. 11, 2015).....	12, 18
Bruce J. Winick, <i>The Side Effects of Incompetency Labeling and the Implications for Mental Health Law</i> , 1 Psychol. Pub. Pol’y & L. 6 (1995) .....	6
Chief Justice Nathan L. Hecht, <i>The State of the Judiciary in Texas, Presented to the 84<sup>th</sup> Legislature</i> (February 18, 2015) <a href="https://www.txcourts.gov/media/857636/state-of-the-judiciary-2015.pdf">https://www.txcourts.gov/media/857636/state-of-the-judiciary-2015.pdf</a> ....	11
Conference of State Court Administrators (COSCA), <i>The Demographic Imperative: Guardianships and Conservatorships</i> (December 2010), <a href="https://cosca.ncsc.org/__data/assets/pdf_file/0009/6030/cosca-white-paper-2010.pdf">https://cosca.ncsc.org/__data/assets/pdf_file/0009/6030/cosca-white-paper-2010.pdf</a> .....	6
David Slayton, Texas Office of Court Administration, <i>Texas Guardianship Reform Efforts</i> , available at <a href="https://nvcourts.gov/AOC/Committees_and_Commissions/Guardianship/Study/Documents/Texas_Guardianship_Presentation/">https://nvcourts.gov/AOC/Committees_and_Commissions/Guardianship/Study/Documents/Texas_Guardianship_Presentation/</a> .....	10
Dorothy Squatrito Millar, <i>Guardianship Alternatives: Their Use Affirms Self-Determination of Individuals with Intellectual Disabilities</i> , 48 Educ. & Training in Autism and Developmental Disabilities 291, available online at <a href="http://daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/Full_Journals/ETADD_48(3)_291-305.pdf">http://daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/Full_Journals/ETADD_48(3)_291-305.pdf</a> . .....	20, 21
Eliana J. Theodorou, <i>Supported Decision-Making in the Lone-Star State</i> , 93 N.Y.U. L. Rev. 973 (2018) .....	8, 11
Jeff Prince, <i>In Whose Best Interest?</i> , FORT WORTH WKLY. (Sept. 8, 2010), <a href="https://www.fweekly.com/2010/09/08/in-whose-best-interest/">https://www.fweekly.com/2010/09/08/in-whose-best-interest/</a> .....	10
Jeff Prince, <i>Rethinking Guardianship</i> , FORT WORTH WKLY. (May 19, 2010) .	10
Jennifer L. Wright, <i>Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings</i> , 12 Elder L.J. 53 (2004).....	6

Jennifer Wright, <i>Guardianship for your own good: Improving the well-being of respondents and wards in the USA.</i> INT’L J.L. & PSYCHIATRY, 33(5) (2010).....	33
Jonathan G. Martinis, <i>Supported Decision-Making: Protecting Rights, Ensuring Choices</i> , 36 BIFOCAL 107 (ABA Commission on Law and Aging, 2015)...	7
Jonathan Martinis, <i>Supported Decision Making: From Justice for Jenny to Justice for All!</i> 341 (2019).....	33
Jonathan Martinis, “ <i>The right to make choices</i> ”: <i>How vocational rehabilitation can help young adults with disabilities increase self-determination and avoid guardianship.</i> J. OF VOC. REHAB. 42(3) (2015) .....	33
Judge Stephen M. King, <i>The Ad Litem Manual for 2017</i> , online at online at <a href="http://access.tarrantcounty.com/content/dam/main/probate- courts/probate-court-1/Documents/The_Ad_Litem_Manual.pdf">http://access.tarrantcounty.com/content/dam/main/probate- courts/probate-court-1/Documents/The_Ad_Litem_Manual.pdf</a> .....	18, 21
Lawrence A. Frolik, <i>Guardianship Reform: When the Best Is the Enemy of the Good</i> , 9 STAN. L. & POL’Y REV. 347 (1998).....	35
Leslie Salzman, <i>Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?</i> , 4 St. Louis U.J. Health L. & Pol’y 279 (2011).....	7
Leslie Salzman, <i>Rethinking Guardianship (Again): Substituted Decision Making As A Violation of the Integration Mandate of Title II of the Americans with Disabilities Act</i> , 81 U. Colo. L. Rev. (2010) .....	35, 37
Michael Barajas, <i>How Judges, Probate Attorneys and Guardianship Orgs Abuse the Vulnerable</i> , SAN ANTONIO CURRENT (Sept. 4, 2012), <a href="https://www.sacurrent.com/sanantonio/how-judges-probate-attorneys-and-guardianship-orgs-abuse-the-vulnerable/Content?oid=2243812">https://www.sacurrent.com/sanantonio/how-judges-probate-attorneys-and-guardianship-orgs-abuse-the-vulnerable/Content?oid=2243812</a> .....	10
Nancy Hodgson, Vicki A. Freedman, Douglas Granger, & Amy Erno, <i>Biobehavioral Correlates of Relocation in the Frail Elderly: Salivary Cortisol, Affect, and Cognitive Function</i> , 52 J. AM. GERIATRIC SOC’Y. 1856 (2004).....	34
Neelum Arya, <i>Family-Driven Justice</i> , 56 Ariz. L. Rev. 623 (2014); .....	7
Patrick Michels, <i>Out of Reach</i> , TEX. OBSERVER (Apr. 3, 2017), <a href="https://www.texasobserver.org/texas-guardianship-neglect/">https://www.texasobserver.org/texas-guardianship-neglect/</a> .....	10

Patrick Michels, *Who Guards the Guardians*, TEX. OBSERVER (July 6, 2016),  
<https://www.texasobserver.org/texas-guardianshipabuse/>. .....10

Rachel Aviv, *How the Elderly Lose Their Rights*, NEW YORKER (Oct. 9, 2017),  
<https://www.newyorker.com/magazine/2017/10/09/how-theelderly-lose-their-rights>.....10

Rebekah Dilleral (2016). *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision Making*. FORDHAM URB. L.J., 43, 506.....34

Susan B. Garland, *Calls for Court Reform as Legal Guardians Abuse Older Adults*, N.Y. TIMES (July 28, 2017) .....10

Texas Department of Aging and Disability Services, *Explanation of IDD Services and Supports*, available at  
<https://www.dads.state.tx.us/providers/LA/explanation/IDDServicesEng.pdf>  
.....20

Texas Department of Family and Protective Services, *APS Investigations and Services*, available at  
[https://www.dfps.state.tx.us/Adult\\_Protection/Investigations\\_and\\_Services.asp](https://www.dfps.state.tx.us/Adult_Protection/Investigations_and_Services.asp)  
.....25

Texas Health and Human Services Commission, *Mental Health Authorities/Local Behavioral Health Authorities*, available at <https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/resources/preadmission-screening-resident-review-pasrr/local-mental-health-authoritieslocal-behavioral-health-authorities> .....25

Texas Health and Human Services, *Section 6000, Specific STAR+PLUS HCBS Program Services*, available at <https://hhs.texas.gov/laws-regulations/handbooks/sph/section-6000-specific-starplus-hcbs-program-services>.....23

Texas Office of Court Administration, *Texas Guardianship Cases: Improving Court Processes and Monitoring Practices in Courts*, (2014) available at [http://www.txcourts.gov/media/700159/GUARDIANSHIP-STUDY\\_11-12-14-Final.pdf](http://www.txcourts.gov/media/700159/GUARDIANSHIP-STUDY_11-12-14-Final.pdf). .....9

The Arc of Texas, *Alternatives to Guardianship* (Summer 2016), available at  
[https://www.thearcoftexas.org/wp-  
content/uploads/2016/06/Alternatives\\_to\\_Guardianship\\_for\\_  
Families\\_2016-06.pdf](https://www.thearcoftexas.org/wp-content/uploads/2016/06/Alternatives_to_Guardianship_for_Families_2016-06.pdf).....19

NO. [REDACTED]

---

IN THE COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO

---

IN THE MATTER OF  
THE GUARDIANSHIP OF [REDACTED]

---

On Appeal from the  
Probate Court No. 1, El Paso County, Texas  
Trial Court Cause No. [REDACTED]

---

To the Honorable Second Court of Appeals:

**STATEMENT OF COMPLIANCE WITH TEX. R. APP. P. 11(c)**

No fee was paid nor will be paid for preparing this brief by any source.

**STATEMENT OF INTEREST OF *AMICUS CURIAE***

Disability Rights Texas (DRTx) respectfully submits this *amicus curiae* in support of Appellant [REDACTED]. DRTx is the federally mandated protection and advocacy agency for Texans with disabilities, established under the Developmental Disabilities Assistance and Bill of Rights Act.<sup>1</sup> The protection and advocacy system was created in 1975 following a media investigation of Willowbrook State School

---

<sup>1</sup> 42 U.S.C. § 15001, *et seq.* Congress subsequently expanded the responsibilities of the system under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, *et seq.* and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act, 29 U.S.C. § 794e.

in New York—a state-operated institution for children with intellectual and developmental disabilities—that exposed deplorable conditions and inhumane treatment of residents. In response, Congress passed legislation in 1975 designating an organization in each state and territory to protect and advocate for the rights of people with disabilities. In 1977, Texas Governor Dolph Briscoe designated DRTx as the protection and advocacy agency for Texans with disabilities.

DRTx’s mission is to help people with disabilities understand and exercise their rights under the law, ensuring their full and equal participation in society. DRTx provides legal representation to persons with disabilities in the areas of health care, community integration, protection and civil rights, education, housing, and accessibility, and engages in policy, regulatory, and legislative advocacy on behalf of persons with disabilities.

DRTx has a strong interest in protecting the right of people with disabilities to express their own preferences, make their own decisions, and direct their own lives, free from overbroad or undue guardianship. In addition to representing persons with disabilities who are seeking to have their capacity restored or are at risk of being placed under guardianship, DRTx has been engaged in systemic reforms of the guardianship system in Texas. DRTx is a member of the Guardianship Reform and Supported Decision-Making Workgroup (GRSDM), a stakeholder workgroup comprised of organizations and individuals, including advocates for persons with

disabilities and the elderly, guardianship providers, and family members, committed to advancing guardianship policy reform and less restrictive alternatives to guardianship in Texas.

As discussed more fully below, during the 2015 legislative session, GRSDM worked with the Office of Court Administration, the Texas Judicial Council, and other stakeholders to pass significant reforms to guardianship law and practice. These reforms included strengthening procedures to protect persons at risk of guardianship. DRTx has provided extensive training to judges and attorneys on the guardianship reforms, including the “alternatives to guardianship” and “supports and services” requirements.

As amicus curiae, DRTx expresses no opinion on whether the judgment of the Probate Court in this case should be affirmed or reversed, but instead seeks to ensure that this Court be furnished with as much relevant information as possible.<sup>2</sup>

While Appellees assumed [REDACTED] circumstances and the physician’s certified medical examination necessitated the State filing for guardianship, that notion originated after behaviors triggered by erratic mental health treatment by the local mental health authority and minimal effort by adult protective services to communicate with existing supports. In light of [REDACTED] stabilized mental

---

<sup>2</sup> Compare *Little v. Little*, 576 S.W.2d 493, 494 (Tex. Civ. App.—San Antonio 1979, no writ) (observing that such a brief “truly deserves the designation as a gesture by a ‘friend of the court’”).

health treatment and his family’s continued willingness and ability to support his ongoing needs, it is essential that this Court fully understand the type of inquiry required by the recent guardianship reforms.

### **SUMMARY OF ARGUMENT**

Both legal considerations and modern psychology establish that the best interests of an individual with a mental or intellectual disability require imposing the least restrictive arrangement for substitute decision-making by a third party as a last resort; after all available supports and services, and less restrictive alternatives have been exhausted. After the 2015 amendments, Texas law is now consistent.

Guardianships may no longer be imposed without fully considering whether “supports and services” would avoid or delay the need for a guardianship, or would allow for a limited guardianship. Current law also requires full consideration of “alternatives to guardianship.” And these requirements apply at every important stage of the guardianship process—the application, the physician’s certificate, the recommendation of the ad litem and court investigator, and most importantly the judicial determination.

Before appointing a guardian, the court must find—by clear and convincing evidence—that “alternatives to guardianship” and “supports and services” have all been considered and determined not to be feasible as a means of avoiding guardianship.

Courts, government agencies, the ABA, and others have issued guidance listing dozens of things included in the concept of “supports and services.” Supports and services include, for example, informal family support and community-based services such as day habilitation and provider services, both relevant under the facts in this case. Likewise, there are many “alternatives to guardianship,” both in the statute and from available guidance. Person-centered planning is one such alternative listed in the statute. It is potentially relevant under the facts in this case, and again, there is a lot of information available on this process.

In this case, both the attorney ad item and the guardian ad litem identified and advocated for various supports, services, and alternatives—including those listed above, and others—determined to be available to avoid, or at the very least, limit guardianship.<sup>3</sup>

The Probate Court found that the Appellee met their burden to prove by clear and convincing evidence that all of the available supports, services, and alternatives were not feasible as a means of avoiding or limiting guardianship. If this Court agrees, it should affirm. *But* if this Court disagrees, it should consider whether any supports, services, and alternatives would allow the proposed ward to do some, even if not all, necessary tasks. If so, remanding for full consideration of less restrictive

---

<sup>3</sup> Under Texas law, attorneys ad litem play an important role in developing the record on supports and services and alternatives to guardianships available for consideration.

alternatives, supports and services available to avoid, delay, or limit guardianship is appropriate.

## ARGUMENT

### I. ALTERNATIVES TO GUARDIANSHIP INCREASE SELF-DETERMINATION AND IMPROVE QUALITY OF LIFE

In the past, an incompetency label resulted in the deprivation of fundamental liberty and property interests.<sup>4</sup> Appointing a guardian “is in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.”<sup>5</sup> As noted by the Conference of State Court Administrators in 2010, unfavorable outcomes in guardianship proceedings can subject persons with diminished capacity “to an unnecessary loss of fundamental rights, restriction of self-determination, loss of the freedom to choose and take risks, or abuse, neglect and exploitation.”<sup>6</sup>

---

<sup>4</sup> Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 Psychol. Pub. Pol’y & L. 6, 26 (1995) (collecting cases).

<sup>5</sup> Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 Elder L.J. 53, 61 (2004), quoting Chairman Claude Pepper, Subcomm. on Health & Long-Term Care of the House Select Comm. on Aging, 100th Cong.

<sup>6</sup> See CONFERENCE OF STATE COURT ADM’RS., THE DEMOGRAPHIC IMPERATIVE: GUARDIANSHIPS AND CONSERVATORSHIPS, at 1 (2010), [https://cosca.ncsc.org/\\_\\_data/assets/pdf\\_file/0009/6030/cosca-white-paper-2010.pdf](https://cosca.ncsc.org/__data/assets/pdf_file/0009/6030/cosca-white-paper-2010.pdf) (The Conference also recommended that states take immediate action to establish guardianship taskforces to review their guardianship process, court rules and statutes and to implement “best practices” reform).

The harm is not just to one’s civil and constitutional rights. Modern research, using principles of social and cognitive psychology, shows that labeling someone as incompetent “produce[s] potentially serious adverse effects. It often alters the way others view and react to the labeled individual and affects his or her self-esteem and self-concept in ways that may inhibit performance, diminish motivation, and depress mood.”<sup>7</sup>

By contrast, research demonstrates that people with disabilities who exercise greater self-determination have a better quality of life.<sup>8</sup> For these reasons, among others, legislatures, courts, and policymakers have acknowledged that guardianships should only be imposed in circumstances in which they are absolutely necessary. This recognition has resulted in a growing national trend of guardianship reform that requires the exploration of less restrictive alternatives that protect and advance the fundamental rights of people with limitations in decision-making prior to the imposition of a guardianship.<sup>9</sup> Texas has acted as a leader in this trend, in part through its enactment of the 2015 guardianship reforms.

---

<sup>7</sup> *Id.* at 6. *See also id.* at 26–27; Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 St. Louis U.J. Health L. & Pol’y 279, 291–93 (2011); Jonathan G. Martinis, *Supported Decision-Making: Protecting Rights, Ensuring Choices*, 36 BIFOCAL 107, 108 (ABA Commission on Law and Aging, 2015).

<sup>8</sup> *See, e.g.*, Neelum Arya, *Family-Driven Justice*, 56 Ariz. L. Rev. 623, 657–58 (2014); Jonathan G. Martinis, *Supported Decision-Making: Protecting Rights, Ensuring Choices*, 36 BIFOCAL 107, 110 (ABA Commission on Law and Aging, 2015).

<sup>9</sup> *See, e.g.*, Uniform Guardianship and Protective Proceedings Act (UGPPA) § 301(a)(1)(B) (July 2017) (requiring a court determination under a clear-and-convincing standard that respondent’s

## II. TEXAS REFORMS REQUIRE STRONG CONSIDERATION OF “ALTERNATIVES TO GUARDIANSHIP” AND OF “SUPPORTS AND SERVICES,” MAKING GUARDIANSHIPS A LAST RESORT

### A. History of House Bill 39 and 2015 Reforms

Building upon the growing recognition that unnecessary guardianships threaten material harms to proposed wards, who otherwise could avoid guardianships through the use of feasible supports and services or less restrictive alternatives, representatives from several disability rights organizations, including DRTx, joined together to form the GRSDM in 2013 in order to advocate for new Texas guardianship legislation.<sup>10</sup> The GRSDM, following its formation, spent over a year developing, negotiating and advocating for the legislative proposals that were ultimately enacted by the Texas legislature in 2015.<sup>11</sup> The three enacted GRSDM legislative proposals included the Supported Decision-Making Agreement Act,<sup>12</sup> the

---

identified needs cannot be met by any less restrictive alternatives than guardianship, and noting in the applicable Comment that “if the adult’s needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or a wide variety of other interventions that remove fewer rights than guardianship, the court may not impose a guardianship on an adult.”), available online at [https://www.guardianship.org/wp-content/uploads/2018/09/UGCOPPAAct\\_UGPPAct.pdf](https://www.guardianship.org/wp-content/uploads/2018/09/UGCOPPAAct_UGPPAct.pdf); *see also* N.Y. Mental Hyg. § 81.02(a)(2) (providing that guardianship order should constitute the “least restrictive form of intervention”); *Matter of Fritz G.*, 77 N.Y.S.3d 872 (N.Y.A.D. 2018) (reversing the appointment of a guardian due to a failure to show that less restrictive alternatives had been considered).

<sup>10</sup> *See* SUPPORTED DECISION-MAKING IN THE LONE-STAR STATE, Eliana J. Theodorou, 93 N.Y.U. L. Rev. 973, 995-1006 (2018) (discussing the historical background, development and enactment of H.B. 39 alongside other 2015 Texas guardianship reform bills).

<sup>11</sup> *Id.*

<sup>12</sup> S.B. 1881, 84th Leg., Reg. Sess. (Tex. 2015) (codified at TEX. EST. CODE § 1357 (West 2017)).

Ward’s Bill of Rights,<sup>13</sup> and, as relevant to this amicus brief, the Texas Judicial Council Guardianship Reforms (“House Bill 39” or “H.B. 39”).<sup>14</sup>

Prior to enactment, the GRSDM proposals were influenced and supported by analysis performed by the Texas Office of Court Administration in 2014, which identified key issues facing the Texas guardianship system.<sup>15</sup> The analysis predicted that applications for guardianships in Texas would rise sharply in the coming years due to a rapid increase in the size of the state’s elderly population (this population increase, colloquially referred to as the “silver tsunami,” largely results from the aging of the “Baby Boomer” generation).<sup>16</sup> The analysis also confirmed that the Texas public guardianship system was ill equipped either to manage the rising

---

<sup>13</sup> S.B. 1882, 84th Leg., Reg. Sess. (Tex. 2015) (codified at TEX. EST. CODE § 1151.351 (West 2017)).

<sup>14</sup> H.B. 39, 84th Leg., Reg. Sess. (Tex. 2015) (codified in scattered sections of TEX. EST. CODE tit. 3 (West 2017)).

<sup>15</sup> See NAT’L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS: 2014, at 85-86 (2014), [http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/Wings-Court%20Community%20Partnerships\\_Erica%20Wood.ashx](http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/Wings-Court%20Community%20Partnerships_Erica%20Wood.ashx).

<sup>16</sup> See TEX. OFFICE OF COURT ADMIN., TEXAS GUARDIANSHIP CASES: IMPROVING COURT PROCESSES AND MONITORING PRACTICES IN TEXAS COURTS 2 (2014), [http://www.txcourts.gov/media/700159/GUARDIANSHIP-STUDY\\_11-12-14-Final.pdf](http://www.txcourts.gov/media/700159/GUARDIANSHIP-STUDY_11-12-14-Final.pdf). (noting that “[g]uardianship has become a topic of growing importance in the court community in recent years as courts grapple with how best to handle the increase in cases requiring the appointment of a guardian” in light of the “Silver Tsunami”—the term coined to describe the demographic trend suggesting that as the Baby Boomer generation ages, the need for guardianships will increase dramatically”).

numbers of guardianships or to monitor for abuses, even at the current level of active guardianships.<sup>17</sup>

The rising demand for guardianships and the limitations of the Texas guardianship system were of particular concern at the time, following egregious reports of elder abuse in guardianship systems across the nation.<sup>18</sup> Examples these kinds of abuses occurring in Texas have been well documented in the media in the years leading up to and following the 2015 reforms.<sup>19</sup>

---

<sup>17</sup> *Id.* at 8-11 (concluding that in many Texas guardianship programs, guardian reporting rates remained low, there was a shortage of certified guardians despite large caseloads, and complaints or alerts of possible abuse of persons under guardianships' estates or well-being were frequently left unaddressed); *see also* DAVID SLAYTON, TEX. OFFICE OF COURT ADMIN., TEXAS GUARDIANSHIP REFORM EFFORTS 1, [https://nvcourts.gov/AOC/Committees\\_and\\_Commissions/Guardianship/Study/Documents/Texas\\_Guardianship\\_Presentation/](https://nvcourts.gov/AOC/Committees_and_Commissions/Guardianship/Study/Documents/Texas_Guardianship_Presentation/) (noting that only ten out of 254 Texas counties have probate courts with resources necessary to adequately prevent guardianship abuse).

<sup>18</sup> *See, e.g.*, Rachel Aviv, *How the Elderly Lose Their Rights*, NEW YORKER (Oct. 9, 2017), <https://www.newyorker.com/magazine/2017/10/09/how-theelderly-lose-their-rights> (describing the case of an elderly Nevada couple who were forcibly removed from their home and placed in an assisted living facility after a private, for-profit guardianship company filed an ex parte petition); Susan B. Garland, *Calls for Court Reform as Legal Guardians Abuse Older Adults*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/business/calls-for-court-reform-as-legal-guardians-abuse-older-adults.html> (describing a case of guardianship abuse in Nevada and the inability of courts across the country to adequately monitor guardianship cases to prevent abuse).

<sup>19</sup> *See, e.g.*, Jeff Prince, *In Whose Best Interest?*, FORT WORTH WKLY. (Sept. 8, 2010), <https://www.fwweekly.com/2010/09/08/in-whose-best-interest/>; Jeff Prince, *Rethinking Guardianship*, FORT WORTH WKLY. (May 19, 2010), <https://www.fwweekly.com/2010/05/19/rethinking-guardianship/>; Michael Barajas, *How Judges, Probate Attorneys and Guardianship Orgs Abuse the Vulnerable*, SAN ANTONIO CURRENT (Sept. 4, 2012), <https://www.sacurrent.com/sanantonio/how-judges-probate-attorneys-and-guardianship-orgs-abuse-the-vulnerable/Content?oid=2243812>; Patrick Michels, *Out of Reach*, TEX. OBSERVER (Apr. 3, 2017), <https://www.texasobserver.org/texas-guardianship-neglect/>; Patrick Michels, *Who Guards the Guardians*, TEX. OBSERVER (July 6, 2016), <https://www.texasobserver.org/texas-guardianshipabuse/>.

In his 2015 State of the Judiciary address to 84<sup>th</sup> Texas legislature, Chief Justice Nathan Hecht recognized each of the considerations above.<sup>20</sup> In order to address those challenges, he noted that Texas would do well to ensure that guardianships “exist only when necessary.”<sup>21</sup> Once the GRSDM proposals were filed with the Texas legislature, Chief Justice Hecht went on to advocate for them as part of the solution to many issues facing the Texas guardianship system.<sup>22</sup>

Only three months later, the Texas legislature passed H.B. 39, which included the originally proposed GRSDM legislative amendments, and Gov. Abbott then signed H.B. 39 into law, with an effective date of September 1, 2015. Act of May 18, 2015, 84th Leg., R.S., ch. 214, § 25, 2015 Tex. Gen. Laws 1302. H.B. 39 passed without opposition in the House,<sup>23</sup> and it passed unanimously in the Senate.<sup>24</sup>

---

<sup>20</sup> See Chief Justice Nathan L. Hecht, *The State of the Judiciary in Texas, Presented to the 84<sup>th</sup> Legislature*, 9-10 (February 18, 2015) <https://www.txcourts.gov/media/857636/state-of-the-judiciary-2015.pdf> (noting the burdens that rising numbers of active guardianships, due to the “silver tsunami,” posed an imminent threat to the Texas guardianship system, both in terms of the loss of important rights imposed by guardianships and due to the risks of abuse for persons under guardianships).

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., SUPPORTED DECISION-MAKING IN THE LONE-STAR STATE, 93 N.Y.U. L. Rev. at 1006 (describing Chief Justice Hecht’s participation in the S.B. 1881 hearing).

<sup>23</sup> H.J. of Tex., 84th Leg., R.S. 3740 (2015), available online at <http://www.journals.house.state.tx.us/hjrn/84r/pdf/84RDAY72FINAL.PDF>. The House later concurred in the Senate’s amendments, again without opposition. S.J. of Tex., 84th Leg., R.S. 1681 (2015), <http://www.journals.senate.state.tx.us/sjrnl/84r/pdf/84RSJ05-19-F.PDF>.

<sup>24</sup> S.J. of Tex., 84th Leg., R.S. 1482 (2015), available online at <http://www.journals.senate.state.tx.us/sjrnl/84r/pdf/84RSJ05-11-F.PDF>.

Taking a cue from Chief Justice Hecht, the bill’s supporters intended that the bill “would improve the guardianship process by promoting substitutes for guardianship”; “would help ensure that guardianship was used only as a last resort”; and would ensure that “courts implement the least restrictive guardianship provisions possible.” House Research Organization Bill Analysis at 7–8 (Apr. 20, 2015).<sup>25</sup> The bill supporters similarly noted that the amendments were intended to address the growing demand expected on the guardianship system—due to the aging population of baby boomers—as well as to prevent guardianships from being imposed where they are not needed, particularly in light of the “excessive restriction” they pose to some and a “curse” on others, who do not realize how restrictive guardianships can be. *Id.* at 7. There was a separate recognition that guardianships are expensive, and that considering alternatives to guardianships where possible was a fiscally responsible policy. *Id.* at 7.<sup>26</sup>

The legislative intent behind and the statutory language of the 2015 reforms clearly indicate that courts *must* avoid the imposition of guardianships unless applicants for guardianship have carried their burden of proof to demonstrate that the guardianship is absolutely necessary, after a full consideration of any applicable

---

<sup>25</sup> Available online at <http://www.hro.house.state.tx.us/pdf/ba84r/hb0039.pdf>.

<sup>26</sup> See also Assoc. Judge Clarinda Comstock, *Advocating to Avoid Guardianship—Less Restrictive Alternatives to Guardianship, Supports and Services*, 1–2, 17 (Harris Co. Probate Court No. 4, Aug. 11, 2015).

supports and services and less restrictive alternatives to guardianship that could avoid the guardianship’s imposition, or which would allow for a limited guardianship. The court must find that applicants for a guardianship have met this burden under a clear-and-convincing standard of evidence.<sup>27</sup>

**B. Texas Estates Code After H.B. 39—Mandatory Consideration of “Supports and Services” and “Alternatives to Guardianship” At Each Stage of a Guardianship Case**

As codified, the Texas Estates Code now requires consideration of “supports and services,” and “alternatives to guardianship,” at every important stage of the guardianship process—the application, the physician’s certificate, the recommendations of the ad litem and court investigator, and the judicial determination.

*1. The application for guardianship*

The application for guardianship must state under oath “whether alternatives to guardianship and available supports and services to avoid guardianship were considered,” TEX. EST. CODE § 1101.001(b)(3-a), and it must also state under oath “whether any alternatives to guardianship and supports and services available to the

---

<sup>27</sup> Note that prior to the passage of H.B. 39, while court investigators in Texas were required to “determine whether a less restrictive alternative than guardianship” might be appropriate, the previous probate code did not require a judicial determination supported by evidence in the record, so it was not enforceable. *See* TEX. PROBATE CODE ANN. § 648A(a) (West 2013) (listing duties of a court investigator); *id.* § 684 (listing judicial findings required before the imposition of a guardianship).

proposed ward considered are feasible and would avoid the need for a guardianship.”  
*Id.*, § 1101.001(b)(3-b).

### 2. *The physician’s certificate*

The physician’s certificate must “state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting.” TEX. EST. CODE § 1101.103(b)(6). It must also “state how or in what manner the proposed ward’s ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward’s physical or mental health, including the proposed ward’s ability to . . . administer to daily life activities with and without supports and services.” *Id.*, § 1101.103(b)(4)(E). And it must “state . . . whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services.” § 1101.103(b)(6-a).

### 3. *The role of ad litem*

The guardian ad litem must now “(1) investigate whether a guardianship is necessary for the proposed ward; and (2) evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian.” TEX. EST. CODE § 1054.054(c). The attorney ad litem is also required, “[t]o the greatest extent possible,” to discuss with the proposed ward “whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. TEX. EST. CODE

§ 1054.004(a)(4). Before the hearing, the attorney ad litem must discuss with the proposed ward the attorney ad litem’s opinion regarding “whether a guardianship is necessary,” § 1054.004(c)(1), and if so, “the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services.” § 1054.004(c)(2). And any attorney for the applicant or court-appointed attorney, including an attorney ad litem, must receive training on “alternatives to guardianship and supports and services available to proposed wards.” TEX. EST. CODE § 1054.201(a) and (b).

4. *The Court Investigator*

On the filing of an application for guardianship under Section 1101.001, a court investigator shall investigate the circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate. TEX. EST. CODE § 1054.151.

5. *The obligations of the probate court*

Of the various stages of mandatory consideration, consideration at the judicial determination is the most important, “[b]efore appointing a guardian for a proposed ward, the court must . . . find by clear and convincing evidence that . . . alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and . . . supports and services available to the proposed ward that would avoid the need for the appointment of a

guardian have been considered and determined not to be feasible.” TEX. EST. CODE § 1101.101(a)(1)(D) and (E). Any such finding “must specifically state whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.” *Id.*, § 1101.101(c).<sup>28</sup> If the probate court finds that the proposed ward can, with “supports and services,” do *some* of the necessary tasks but not others, the court may appoint a guardian with limited powers to make those decisions that the ward cannot do even with “supports and services.” § 1101.152(a).

In short, under current law, probate courts may not impose a guardianship without clear and convincing evidence that there are no “alternatives to guardianship” and no “supports and services” that would avoid the need for a formal guardianship.

### **III. THE “SUPPORTS AND SERVICES” OBLIGATION**

#### **A. Guardianships are Inappropriate Absent Clear and Convincing Evidence that “Supports and Services” to Meet an Individual’s Needs are Unavailable**

Because “a person’s liberty interest is implicated in guardianship proceedings,” *In re Guardianship Hahn*, 276 S.W.3d 515, 517 (Tex. App.—San Antonio 2008, no pet.), a probate court is required to follow the strict procedural

---

<sup>28</sup> The 2015 changes also instruct courts to presume “that the incapacitated person retains capacity to make personal decisions regarding the person’s residence.” TEX. EST. CODE § 1001.001(b).

safeguards to protect a person’s liberty interests before taking the drastic action of removing her ability to make her own legal decisions. *Saldarriaga v. Saldarriaga*, 121 S.W.3d 493, 499 (Tex. App.—Austin 2003, no pet.). “A trial court [] abuses its discretion by ruling without supporting evidence.” *Guardianship of A.E.*, 552 S.W.3d 873, 876 (Tex. App.—Fort Worth 2018, no pet.), citing *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). Consequently, the legal and factual sufficiency of the evidence are not independent grounds of error, but are reviewed as part of determining whether the trial court abused its discretion. *A.E.*, 552 S.W.3d at 877.

As shown above, a probate court cannot impose a guardianship unless there is clear and convincing evidence<sup>29</sup> that all available “supports and services” that would avoid the need for a guardian have been considered and determined not to be feasible. TEX. EST. CODE § 1101.101(a)(1)(D) and (E).

### **B. The Nature of “Supports and Services,” and Examples**

“Supports and services” offer a path for many persons with even significant disabilities to avoid the restrictive intervention of guardianship. As one influential Texas commentator has observed, “[t]hese alternatives and Supports and Services

---

<sup>29</sup> The clear and convincing standard of proof is an intermediates one, falling between preponderance (used in ordinary civil proceedings) and reasonable doubt (used in criminal proceedings). *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980). It is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *Id.*

are the basic language of guardianship. Without a thorough understanding of these concepts, it will be virtually impossible to comply with the Estate Code requirements.” Judge Stephen M. King,<sup>30</sup> *The Ad Litem Manual for 2017*, at 12 (hereafter “*Ad Litem Manual for 2017*”).<sup>31</sup>

“Supports and services” are defined as “available formal and informal resources and assistance that enable an individual to: (1) meet the individual’s needs for food, clothing, or shelter; (2) care for the individual’s physical or mental health; (3) manage the individual’s financial affairs; or (4) make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.” TEX. EST. CODE § 1002.031.

There are a variety of resources listing examples of “supports and services.” *See, e.g., Ad Litem Manual for 2017, supra*, at 75, which provides a list of dozens of possible “supports and services,” and the entities providing them (and which is attached hereto as Exhibit A).<sup>32</sup> Texas Health and Human Services Texas Medicaid

---

<sup>30</sup> Judge King serves in the Tarrant County Probate Court Number One.

<sup>31</sup> Available at [http://access.tarrantcounty.com/content/dam/main/probate-courts/probate-court-1/Documents/The\\_Ad\\_Litem\\_Manual.pdf](http://access.tarrantcounty.com/content/dam/main/probate-courts/probate-court-1/Documents/The_Ad_Litem_Manual.pdf).

<sup>32</sup> The same information was reprinted by, e.g., Assoc. Judge Clarinda Comstock, *Advocating to Avoid Guardianship—Less Restrictive Alternatives to Guardianship, Supports and Services*, Appendix D-2 (Harris Co. Probate Court No. 4, Aug. 11, 2015), <http://www.hctx.net/CmpDocuments/51/CLE%20-%20Seminars/Advocating%20to%20Avoid%20Guardianship%20-%20Less%20Restrictive%20Alternatives%20to%20Guardianship,%20Supports%20and%20Services.pdf>. It has also been made available by the Dallas Bar Association, [http://www.dallasbar.org/sites/default/files/Appendix%20A.7%20The\\_Ad\\_Litem\\_Manual\\_for\\_2016%20%28Judge%20King%29.pdf](http://www.dallasbar.org/sites/default/files/Appendix%20A.7%20The_Ad_Litem_Manual_for_2016%20%28Judge%20King%29.pdf).

State Plan addressing Services and Supports,<sup>33</sup> lists, among other things: service coordination, transportation, habilitation services, employment assistance and supported employment, vocational training, nursing services, behavioral supports including developing an individualized behavior support plan, specialized therapies (e.g., social work, counseling, occupational, physical, or speech and language therapies, or dietary and behavioral health services), training and consulting with family members or other providers, and day habilitation (to improve self-help, socialization and adaptive skills) all which could be considered prior to determining guardianship. The ABA Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges have all collaborated on a publication entitled *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (2006) (hereafter “*Handbook for Judges*”), which lists various options at pages 62–65.<sup>34</sup>

Still other examples include:

- Medicaid Waiver Programs—these can assist with support needed to ensure that medical and personal needs are met, e.g., by medication administration,

---

<sup>33</sup>Available at <https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/resources/compare-long-term-services-supports-ltss-programs>

<sup>34</sup> *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (2006), available at <https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>.

therapy, shopping, grooming, meal preparation, housekeeping and transportation.<sup>35</sup>

- Supportive and Trusted Family Members and Friends—such individuals can assist with explaining potential benefits and risks when making decisions with regard to money management, cooking, hygiene, health care, safety, relationships and everyday living issues.<sup>36</sup>
- Case Management Services—can coordinate services among agencies, with the goal of ensuring that the individual with a disability is as self-sufficient as possible.<sup>37</sup>
- Free or Reduced Price Meals Food and Prescription Delivery—deliver free or reduced price meals and prescription medications to individuals who are unable to cook or pick up medication at a pharmacy.<sup>38</sup>

---

<sup>35</sup> The Arc of Texas, *Alternatives to Guardianship* (Summer 2016), available at [https://www.thearcoftexas.org/wp-content/uploads/2016/06/Alternatives\\_to\\_Guardianship\\_for\\_Families\\_2016-06.pdf](https://www.thearcoftexas.org/wp-content/uploads/2016/06/Alternatives_to_Guardianship_for_Families_2016-06.pdf).

<sup>36</sup> Dorothy Squatrito Millar, *Guardianship Alternatives: Their Use Affirms Self-Determination of Individuals with Intellectual Disabilities*, 48 Educ. & Training in Autism and Developmental Disabilities 291, 299 (Table 1) (Division on Autism and Developmental Disabilities, Council for Exceptional Children 2013) (hereafter “*Guardianship Alternatives*”), available at [http://daddcec.org/Portals/0/CEC/Autism\\_Disabilities/Research/Publications/Education\\_Training\\_Development\\_Disabilities/Full\\_Journals/ETADD\\_48\(3\)\\_291-305.pdf](http://daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/Full_Journals/ETADD_48(3)_291-305.pdf). See also *In re Guardianship of Dameris L.*, 38 Misc. 3d 570, 579, 956 N.Y.S.2d 848, 854–55 (Sur. 2012) (“support network of family, friends and professionals”). [New York law similarly requires consideration of “the availability of ‘other resources,’” which also include things like “visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.” N.Y. Mental Hyg. Law § 81.03(e) (McKinney).]

<sup>37</sup> Texas Department of Aging and Disability Services, *Explanation of IDD Services and Supports*, available at <https://www.dads.state.tx.us/providers/LA/explanation/IDDServicesEng.pdf> (service coordination); ABA Commission on Law and Aging, American Psychological Association, and National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*, at 64 (2006) (“Care management”), available at <https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf> (hereafter “*Handbook for Judges*”); *Guardianship Alternatives*, *supra*, at 299 (Table 1).

<sup>38</sup> *Guardianship Alternatives*, *supra*, at 299 (Table 1); *Handbook for Judges*, *supra*, at 65 (“Meals on wheels,” “Food and prescription drug deliveries”).

- Daily Call or Home Visit Services—volunteers who make daily calls or check-ins, who can get required help and provide social contact.<sup>39</sup>
- Utility Companies—can arrange for contact with a third party if an individual does not pay a utility bill on time.<sup>40</sup>
- Technology—devices such as smart phones or tablets can help an individual become and remain independent, using timers for medication reminders, apps to turn off a stove or lock a door.<sup>41</sup>
- Credit Union and Banking Services—may provide services to help with money management, such as direct deposit of income and benefit checks, making regular payments for rent and utilities, establishing dollar limits on checking or savings accounts, creating joint accounts allowing or requiring two people to access funds or make deposits or withdrawals.<sup>42</sup>
- Credit and Debit Cards—reloadable cards can be used as a money-management tool to help keep to a budget.<sup>43</sup>
- Representative Payee—person appointed by the Social Security or Veterans Administration to assume the financial responsibilities on behalf of an individual with a disability, and to make expenditures for basic needs including food, clothing, medical care and a place to live.<sup>44</sup>

---

<sup>39</sup> *Guardianship Alternatives, supra*, at 299 (Table 1); *Handbook for Judges, supra*, at 65 (“Telephone reassurance programs,” “Home visitors and pets on wheels,” “Daily checks on the person by mail carriers”).

<sup>40</sup> *Ad Litem Manual for 2017, supra* at 75 (“Utility Bill Assistance”); *Handbook for Judges, supra*, at 63 (“Utility company third party notification”); *Guardianship Alternatives, supra*, at 299 (Table 1).

<sup>41</sup> *Guardianship Alternatives, supra*, at 300 (Table 1, cont’d); *Handbook for Judges, supra*, at 65 (“Medication reminder systems”).

<sup>42</sup> *Ad Litem Manual for 2017, supra* at 75 (“Bill Paying Programs”); *Handbook for Judges, supra*, at 63 (“money management services,” “shared bank accounts”); *Guardianship Alternatives, supra*, at 301 (Table 2).

<sup>43</sup> *Guardianship Alternatives, supra*, at 301 (Table 2).

<sup>44</sup> *Handbook for Judges, supra*, at 63; *Guardianship Alternatives, supra*, at 301 (Table 2).

**C. Selected Examples of “Supports and Services” Relevant to This Case**

*1. Medicaid-waiver services*

As noted above, formal “supports and services” can include Medicaid-waiver services. Texas has various Medicaid waivers for elderly and persons with disabilities dependent on eligibility, such as the STAR+PLUS Home and Community Based Services (HCBS) Program, 1 TEX. ADMIN. CODE § 353.1153, administered under the authority of the Texas Health and Human Services Commission. *Id.*; 1 TEX. ADMIN. CODE § 353.601(a).

The STAR+PLUS HCBS program provides individualized services and supports to individuals who are currently living in a nursing facility and want to transition into living in the community; or meet the level-of-care criteria for medical necessity for nursing facility care as determined by HHSC, are living with their families, in their own homes, or in other community settings and have an unmet need for support in the community that can be met through one or more of the STAR+PLUS HCBS program services. *Id.* STAR+PLUS HCBS services include personal assistance services (PAS); nursing services; physical therapy (PT); occupational therapy (OT); speech therapy (ST) services; cognitive rehabilitation therapy (CRT); adaptive aids; medical supplies; minor home modifications (MHMs); emergency response services (ERS); assisted living (AL); adult foster care

(AFC); home-delivered meals; dental services; transition assistance services (TAS); respite care; employment assistance; and supported employment.<sup>45</sup>

Texas Medicaid waivers provide individuals eligible for Medicaid, who meet certain additional eligibility criteria, with home and community-based services as an alternative to institutionalization. In this case, ██████████ could be eligible for STAR+PLUS waiver (SPW) HCBS services because he was recently discharged from a nursing facility to an assisted living. Therefore, would likely meet the level-of-care criteria of medical necessity for nursing facility care as determined by HHSC. This least restrictive option would provide the ability for him to remain and live in a community setting, and allow for his unmet needs to be addressed through one or more of the STAR+PLUS HCBS program services, which would be integrated into the community setting. 5 RR 167-75.

In addition to the day habilitation services received previously, ██████████ would benefit from multiple STAR+PLUS HCBS program services such as personal assistance services (PAS) which provides an attendant to perform personal care tasks required to maintain the individual's physical health. These tasks include things such as bathing, dressing and undressing, preparing meals, toileting; home management tasks that support the individual's health and safety, including;

---

<sup>45</sup> Texas Health and Human Services, Section 6000, Specific STAR+PLUS HCBS Program Services, available at <https://hhs.texas.gov/laws-regulations/handbooks/sph/section-6000-specific-starplus-hcbs-program-services>.

housekeeping services for instance cleaning and laundry, shopping for or with the individual; escorting assistance tasks, including; assisting with or arranging for transportation and escorting on public transit, but not providing transportation; accompanying the individual to a clinic, doctor's office, or other trip made for the purpose of obtaining a medical diagnosis or treatment; and waiting in a doctor's office or clinic with an individual if necessary due to the individual's condition or distance from home.<sup>46</sup> [REDACTED] would also benefit from nursing services to provide medication administration, assessments and intervention if necessary; cognitive rehabilitation therapy (CRT); and respite care to provide temporary relief for caregivers (daughter and son in law), enabling them to take a much-needed break from the demands of caregiving .<sup>47</sup>

## 2. *Informal supports from family*

Texas law also confirms that "supports and services" can be informal, TEX. EST. CODE § 1002.031, and as noted above, informal supports may consist of the natural support received from family and friends.

The record shows that [REDACTED] lived with his daughter from August 2018 until January 2019. During this period [REDACTED] daughter, son in law, and two grandsons provided informal supports. 5 RR 116. [REDACTED] lived in his

---

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

daughter's home and she provided meals and took him shopping which enabled ██████████ ██████████ to meet his needs for food, clothing, or shelter. *Id.* at 118. ██████████ daughter administered his medication and discussed scheduled and unscheduled visits to ensure he received needed medical and mental health care. *Id.* at 119-130. ██████████ and his daughter managed his financial affairs together. *Id.* at 171-172. After discussion with his family, who provided necessary information for ██████████ ██████████ to make informed decisions, he made personal decisions regarding residence, voting, and operating a motor vehicle. *Id.* at 126.

Initially for months, the informal supports received from ██████████ family were sufficient and met his needs, until his mental health became too unstable. *Id.* at 116-123. While the local mental health authority (LMHA) unsuccessfully attempted to prescribe a therapeutic treatment, ██████████ symptoms outweighed the capacity of informal supports alone. *Id.* at 132-136, 139-141. Regrettably, during this time Adult Protective Services (APS) and the LMHA failed to offer additional adequate supports and services to alleviate or prevent further injury as obligated.<sup>48</sup> *Id.* at 57-60.

---

<sup>48</sup> Texas Department of Family and Protective Services, APS Investigations and Services, available at [https://www.dfps.state.tx.us/Adult\\_Protection/Investigations\\_and\\_Services.asp](https://www.dfps.state.tx.us/Adult_Protection/Investigations_and_Services.asp); Local Mental Health Authorities/Local Behavioral Health Authorities, available at <https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/resources/preadmission-screening-resident-review-pasrr/local-mental-health-authoritieslocal-behavioral-health-authorities>.

The Guardian Ad Litem recommended to the court that the best interest for [REDACTED], and the least restrictive alternative for him, would be to live with and receive supports and services from his daughter. *Id.* at 186. Furthermore, the HHSC guardianship specialist agreed, “[REDACTED] should have the right to live with family members if they are able to meet his needs and provide for his health and safety.” *Id.* at 92.

One question for the Court in this case is whether there was clear and convincing evidence that the above “supports and services,” and others, were insufficient to meet [REDACTED] needs. It is worth noting, in the context of this inquiry, that [REDACTED] has not been given the opportunity to live independently with supports and services under conditions conducive to success such as effective mental health treatment and access to available supports and services.

#### **IV. Relevant Case Law from Other States**

Courts in other states are now interpreting similarly reformed guardianship laws, and are issuing orders that avert guardianship (or restore rights) in cases in which an individual’s needs can be met short of the appointment of a guardian. For example, in *In re Perry*, 727 A.2d 539, 540 (Pa. 1999), the Pennsylvania Supreme Court found that decision-making supports already in place were sufficient in assisting her with making decisions and care for herself; the court upheld the denial of guardianship. In reaching its decision, the Court held that “a person cannot be

deemed incapacitated if his impairment is counterbalanced by friends or family or other supports.” *Id.* at 541. In *In re Guardianship of Dameris L.*, 38 Misc. 3d 570, 956 N.Y.S.2d 848 (Sur. 2012), a New York court considering removal of a guardianship noted that because the ward now received supported decision-making services, “guardianship is no longer warranted because there is now a system of supported decision making in place that constitutes a less restrictive alternate to the Draconian loss of liberty entailed by a plenary . . . guardianship.” *Id.*, 956 N.Y.S.2d at 853. The court further elaborated that courts must consider less restrictive alternatives such as “support network of family, friends, and professionals before the drastic judicial intervention of guardianship can be imposed.” *Id.* at 854–55. The resources available to Dameris “constitute[d] the least restrictive alternative, precluding the imposition of a legal guardian.” *Id.* at 866. *See also Matter of Guardianship of Hedin*, 528 N.W.2d 567, 579 (Iowa 1995) (in determining whether a guardianship should be established, limited or removed, courts “must consider the availability of third-party assistance to meet a ward’s or proposed ward’s needs for such necessities”); *In re Guardianship of Miller*, 2010-Ohio-2159, ¶ 10, 187 Ohio App. 3d 445, 453, 932 N.E.2d 420, 426 (“[I]t is the duty of the Court to protect the rights of individuals and within the least restrictive alternative possible.”).

## **V. THE MANDATE TO SEEK “ALTERNATIVES TO GUARDIANSHIP”**

### **A. Guardianships Are Inappropriate Absent Clear and Convincing Evidence that “Alternatives to Guardianship” Are Unavailable**

The probate court cannot impose a guardianship unless there is clear and convincing evidence that “alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.” TEX. EST. CODE § 1101.101(a)(1)(D).

### **B. The Nature of “Alternatives to Guardianship” and Examples, Including Person-Centered Planning**

“Alternatives to guardianship” include, for example, a medical power of attorney, a durable power of attorney, a declaration for mental health treatment, appointment of a representative payee, establishment of a joint bank account, the creation of a management trust and/or special-needs trust, and the designation of a guardian in advance of need. TEX. EST. CODE § 1002.0015(1)–(8). But the term also includes “the establishment of alternate forms of decision-making based on person-centered planning.” TEX. EST. CODE § 1002.0015(9).

Person-centered planning is a key part of guardianship reform, but the concept is also used in various other (sometimes-related) contexts. For example, it is used in the context of Medicaid-waiver programs like those described in Part III.B above. The Texas regulations governing one such waiver program, HCBS, describe person-centered planning as a “[ ] process that includes people chosen by the individual, is directed by the individual to the maximum extent possible, enables the individual to

make informed choices and decisions...offers choices to the individual regarding the services and supports they receive and from whom.” 1 Tex. Admin. Code § 354.1361(24). Among other things, it “identifies the individual’s goals, needs, and preferences with regard to his or her services,” “considers information from the individual or LAR to determine any risks that might exist to the health and welfare of the individual as a result of living in the community,” and “identifies those services that are critical to the health and welfare of the individual.” 1 TEX. ADMIN. CODE § 354.1367(c).

Corresponding federal regulations are similar. For example, in the context of Home and Community–Based waiver services, 42 C.F.R. § 441.301(c) describes person-centered planning as a process led by the individual, and including others chosen by the individual, that among other things:

- offers the individual informed choices;
- records the alternatives considered;
- reflects the services and supports, including natural (e.g., family) supports, that are important to meet the individual’s functional needs and personal choices;
- reflects the individual’s strengths and preferences;
- includes identified goals and desired outcomes;
- reflects risk factors and measures to minimize them;
- is understandable to the individual receiving services and supports, and to the individuals important in supporting him or her; and

- identifies the individual and/or entity responsible for monitoring the plan.

“According to experts in the field, there is no one definition of person-centered planning; it is described more as a spectrum of processes based on one general philosophical background.” A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 Utah L. Rev. 1541, 1547–48 (2012).

While traditional guardianship is system-driven, person-centered philosophy is a person-directed process where the individual identifies what is important. It is a philosophy that applies the principle of self-determination. The individual’s circle of support is expanded to include anyone important in the person’s life, thereby assisting the individual to achieve goals while maintaining safeguards. The key elements of person-centered planning include person-directed preferences and establishing a vision based on the person’s abilities, and strengths, which are determined from informal and formal knowledge. There is an emphasis on network building, which requires collaborative teamwork with the use of a facilitator. Person-centered planning has been successfully developed within bureaucratic environments. Agencies and programs serving individuals with developmental disabilities, and in delivering person-centered planning, strive to make individuals the center of planning and decision making, while treating family members as partners. Person-centered planning maintains focus on the positives of a person’s life, discovering gifts, skills and capacities of the individual, and staying mindful of the person’s priorities of life.

*Id.* at 1548–49 (footnotes omitted).

Many resources now exist regarding person-centered planning, from state and federal governments, from the academic community, and committed advocates working to support older adults and people with disabilities. For example, the Texas Health and Human Services Commission requires local authorities serving

individuals with intellectual and developmental disabilities to use person-directed planning as the foundation for service delivery to individuals receiving various services. The Commission's *Person Directed Planning Guidelines* manual is available online.<sup>49</sup> The U.S. Department of Health and Human Services' Administration for Community Living has a Person-Centered Planning initiative.<sup>50</sup> The Texas-based Institute for Person-Centered Practices was founded as a partnership between the Center on Disability Studies at the University of Texas at Austin and the Center on Disability and Development at Texas A&M University (both of which are part of a larger network of Universities Centers of Excellence in Intellectual and Developmental Disabilities). The Institute provides resources and training around person-centered planning.<sup>51</sup>

In the instant case, the Attorney Ad Litem questioned [REDACTED] preferences multiple times throughout the hearing. [REDACTED] himself testified that his preference would be to live with his daughter. 5 RR 167-175. The guardian ad litem testified in her opinion it was in [REDACTED] best interest and a less restrictive alternative to live with and receive supports and services from his daughter. *Id.* at 86. The HHSC guardianship specialist testified that [REDACTED] did

---

<sup>49</sup> See <https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/providers/long-term-care/lidda/persondirectedplanningguidelines.pdf>.

<sup>50</sup> See <https://acl.gov/programs/consumer-control/person-centered-planning>.

<sup>51</sup> See <http://www.person-centered-practices.org/about.html>.

tell her his preference would be to live with his daughter. *Id.* at 76, 80-81. The specialist also testified that living with family is less restrictive than guardianship and would obviate the need for guardianship if his needs could be met while living with family. *Id.* On the other hand, the Court Investigator—mandated by statute<sup>52</sup> “to determine whether a less restrictive alternative to guardianship is appropriate”—reported to the Probate Court “It’s just my recommendation that he is in need of guardianship and that HHSC be appointed as the guardian for the person and estate.” *Id.* at 86. Without explanation or reference to any considered support, service or less restrictive alternative. Consequently, there was no discussion justifying to the court why the host of supports and services available were infeasible or why the “considered” less restrictive alternatives to guardianship were infeasible.

## **VI. LIMITED GUARDIANSHIP**

As noted above, Texas law limits a guardian’s authority to only that which is “*necessary* to promote and protect the well-being of the incapacitated person.” TEX. EST. CODE § 1001.001(a) (emphasis added). The law also requires courts to “design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.” *Id.*, § 1001.001(b). Finally, if the court finds that the proposed ward can, with “supports and services,” do *some* of the necessary tasks but not others, the court may appoint a guardian with limited

---

<sup>52</sup> TEX. EST. CODE § 1054.151.

powers to make those decisions that the ward cannot do even with “supports and services.” *Id.*, § 1101.152(a).

**A. Guardianships are not “one size fits all,” they should be tailored to the individual and only those powers necessary to meet the person’s needs given to the guardian.**

Research and experience show that mechanically placing people with disabilities in guardianship, and particularly in overbroad or undue guardianships, is harmful.<sup>53</sup> Guardianships are overbroad or undue when they remove more rights than are necessary or when they are ordered for people who can make their own decisions, with or without supports.<sup>54</sup> Overbroad and undue guardianships can have a “significant negative impact on physical and mental health, longevity, ability to function, and reports of subjective well-being.”<sup>55</sup>

There are various reasons why overboard and undue guardianships are harmful. When people are ordered into guardianship, they go to court and watch their friends, family members, and professionals testify about all the things they supposedly can’t do.<sup>56</sup> They hear judges ruling that they’re incapacitated or unable

---

<sup>53</sup> MARTINIS, JONATHAN, SUPPORTED DECISION MAKING: FROM JUSTICE FOR JENNY TO JUSTICE FOR ALL! 341 (2019).

<sup>54</sup> Jonathan Martinis (2015). “*The right to make choices*”: *How vocational rehabilitation can help young adults with disabilities increase self-determination and avoid guardianship*. J. OF VOC. REHAB. 42(3), 221-227.

<sup>55</sup> Jennifer Wright (2010). *Guardianship for your own good: Improving the well-being of respondents and wards in the USA*. INT’L J.L. & PSYCHIATRY, 33(5), 350-368.

<sup>56</sup> MARTINIS, *supra* note 37.

to make decisions for themselves.<sup>57</sup> It's perfectly understandable that people in that situation would "begin to believe in [their] inability to make reasoned decisions and life choices, regardless of the accuracy of the assertion."<sup>58</sup>

Additionally, depriving individuals of choice over the outcomes they experience produces feelings of helplessness, hopelessness, passivity and depressions.<sup>59</sup> Negative effects of guardianship can also be correlated to the increased rate of unnecessary institutionalization of individuals placed in guardianship.<sup>60</sup> While there is some controversy regarding the exact health consequences of an involuntary institutional relocation, there is general agreement that such a major life change is a stressful event with some adverse health consequences, particularly in the period immediately after the relocation.<sup>61</sup>

Reformed statutes require that courts tailor guardianship so that the guardian is given only those powers necessary to meet the person's needs. The person under guardianship is *supposed* to retain decision-making powers over other aspects of their lives not specifically designated to the guardian's control.<sup>62</sup> On paper, these

---

<sup>57</sup> Wright, *supra* note 39.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., Nancy Hodgson, Vicki A. Freedman, Douglas Granger, & Amy Erno, *Biobehavioral Correlates of Relocation in the Frail Elderly: Salivary Cortisol, Affect, and Cognitive Function*, 52 J. AM. GERIATRIC SOC'Y. 1856, 1856–62 (2004).

<sup>62</sup> Rebekah Dilleral (2016). *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision Making*. FORDHAM URB. L.J., 43, 506.

reforms are significant. In practice, however, they can be judged as a limited success.<sup>63</sup> As Lawrence Frolik has argued, despite the significant changes in guardianship law, the culture and practice remain largely unchanged.<sup>64</sup>

Empirical studies indicate that courts simply do not take advantage of the limited guardianship option and rarely limit the guardian's authority. Rather, courts continue to vest guardians with unnecessarily broad powers over the individual's person and property for several possible reasons: courts habitually err on the side of protection; courts find it difficult to ascertain the precise areas of decision making with which the individual needs assistance; courts deem it necessary to avoid confusion about the scope of the guardian's authority; or courts wish to avoid the need for additional future proceedings to expand the scope of a more limited initial order.

Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making As A Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 174-175 (2010).

Here the court found “[...]by clear and convincing evidence that [REDACTED] is--has a *partial incapacity or limited incapacity* and is in need of a guardian with authority over his person ... and that alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible. And supports and services available to [REDACTED] that would avoid the

---

<sup>63</sup> *Id.*

<sup>64</sup> Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 348 (1998) (“But the rock of guardianship culture and practice still stands, and stands mainly unchanged.”). Lawrence Frolik is a national expert on the legal issues facing older Americans, and one of the founders of the field of Elder Law. He has published widely on law and aging issues as well as legal issues faced by persons with disabilities.

need for the appointment of guardian have also been considered and determined not to be feasible.” 5 RR 190-191 (emphasis added). The court ordered a full guardianship, and ██████████ remains involuntarily placed in a locked facility.

The language in the trial court’s ruling is curious. If the trial court determined due to partial or limited incapacity, the less restrictive alternatives to guardianship and supports and services available were not feasible to avoid guardianship, limited guardianship remained a reasonable option not exercised.

In the alternative, if reversal is not indicated, this Court can remand for consideration of a guardianship limited to the relevant and necessary tasks to meet ██████████ needs. If this Court finds by clear and convincing evidence that ██████████ could do some, but not all, of the tasks necessary to care for himself with the aforementioned “supports and services” or other guardianship alternatives a limited guardianship would be appropriate. A limited guardianship would allow ██████████ to care for himself, including making personal decisions regarding residence, or to manage his property.

## **CONCLUSION**

Jurisprudence often lags behind research; it takes time for legislatures to reform laws to reflect current best practices. In the past, Texas law generally accepted the notion of supplanting, rather than assisting, the decision-making process for individuals with disabilities.

But just as we recognize that the law—and common principles of human decency—generally require that we build a ramp so that an individual with a physical impairment can enter a building without being carried up the steps, we should also recognize a legal obligation to provide decision-making support to an individual with limitations in mental capabilities rather than assign a guardian to make decisions for that person.

Leslie Salzman, *Rethinking Guardianship (Again)*, *supra*, 81 U. Colo. L. Rev. at 157, 165–66 (2010).

This is exactly what the Texas Legislature did in 2015, when it required probate courts to avoid guardianship unless there is clear and convincing evidence that there are no “alternatives to guardianship” and no “supports and services” that would avoid the need for a guardianship. TEX. EST. CODE § 1101.101(a)(1)(D) and (E). If there are “alternatives to guardianship” or “supports and services” that are sufficient to meet the needs of a person with a disability, guardianship is not warranted. Under current law, a probate court is authorized to create a guardianship only as a last resort.

Despite statutory changes, and despite encouraging decisions elsewhere, “many courts continue to hold deeply embedded tendencies toward protection over autonomy, and courts continue to issue guardianship orders that are not necessary and are overly broad in scope.” Leslie Salzman, *Rethinking Guardianship (Again)*, *supra*, 81 U. Colo. L. Rev. at 178.

Amicus seeks to aid this Court in deciding this case consistent with the plain language and intent of the provisions at issue. This Court also has the opportunity to provide meaningful guidance to courts and litigants on these provisions, and to ensure that the goals of this legislation—reducing the number of guardianships, and making the appointment of a guardian the last resort—are achieved.

This Court should reverse unless it finds—by clear and convincing evidence—that supports, services, and other alternatives to guardianship have all been considered, and are not feasible in this case. If this Court finds that such clear and convincing evidence *does* exist as to some but not all necessary tasks, it should remand for consideration of a limited guardianship. Finally, the Court can affirm, but only if it finds—by clear and convincing evidence—that supports, services, and other alternatives to guardianship have been considered and are not feasible, a full guardianship is required.

Respectfully submitted,

s/ Taft Robinson

TAFT ROBINSON  
Texas Bar No. 24091371  
DISABILITY RIGHTS TEXAS  
2222 West Braker Lane  
Austin, Texas 78758  
(512) 454-4816 (Phone)  
(512) 454-3999 (Fax)  
trobinson@drtx.org  
phofer@drtx.org

PETER GOETSCHEL  
Texas Bar No. 24116432  
VINSON & ELKINS LLP  
1001 Fannin Street  
Suite 2500  
Houston, TX 77002  
(713) 758-2384 (Phone)  
(713) 615-5780 (Fax)  
pgoetschel@velaw.com (Email)

ATTORNEYS FOR AMICUS CURIAE

### **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(B) because this brief contains 8,977 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because this brief has been prepared in a proportionally spaced typeface using

Microsoft Word software in Times New Roman 14-point font in text, and Times New Roman 12-point font in footnotes.

*s/ Taft Robinson*  
TAFT ROBINSON

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of August, 2020, a true and correct copy of the foregoing document was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

*s/ Taft Robinson*  
Taft Robinson