

BILL ANALYSIS

Senate Research Center

H.B. 3080
By: Hartnett (Watson)
Jurisprudence
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The primary purpose of this bill is to provide a court with more flexibility in setting the compensation of a guardian where most of the ward's income-producing assets are not held in the guardianship estate, protect the ward's estate from excessive compensation where an attorney is also serving as guardian, and provide additional alternatives for a management trust in lieu of a guardianship where the estate is relatively small or located in a rural location.

H.B. 3080 relates to guardianships and other matters relating to incapacitated persons.

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. Amends Section 665, Texas Probate Code, by amending Subsections (a)-(d) and adding Subsections (a-1) and (d-1), as follows:

- (a) Authorizes, rather than requires, the court to set the compensation in an amount not exceeding five percent of the ward's gross income.
- (a-1) Creates this subsection from existing text.
- (b) Provides that a fee of five percent of the gross income of the ward's estate and five percent of all money paid out of the estate, subject to the award of an additional amount under Subsection (c) of this section following a review under Subsection (c)(1) (relating to authorizing the court to review and modify the amount of compensation authorized under Subsection (a)) of this section, is considered reasonable under this subsection if the court finds that the guardian or temporary guardian has taken care of and managed the estate in compliance with the standards of this chapter.
- (c) Authorizes the court, on application of an interested person or on its own motion, to review and modify the amount of compensation authorized under Subsection (a) or (b), rather than under Subsection (b), of this section if the court finds that the amount is unreasonably low when considering the services rendered as guardian or temporary guardian, and to authorize compensation for the guardian or temporary guardian in an estimated amount the court finds reasonable that is to be paid on a quarterly basis before the guardian or temporary guardian files an annual or final accounting if the court finds that delaying the payment of compensation until the guardian or temporary guardian files an accounting would create a hardship for the guardian or temporary guardian.
- (d) Authorizes a court that authorizes payment of estimated quarterly compensation under Subsection (c) of this section to later reduce or eliminate the guardian's or temporary guardian's compensation if, on review of an annual or final accounting or otherwise, the court finds that the guardian or temporary guardian received compensation in excess of the amount permitted under this section, has not adequately performed the duties required of a guardian or temporary guardian under this chapter, or has been removed for cause.

(d-1) Provides that if a court reduces or eliminates a guardian's or temporary guardian's compensation as provided by Subsection (d) of this section, the guardian or temporary guardian and the surety on the guardian's or temporary guardian's bond are liable to the guardianship estate for any excess compensation received.

SECTION 2. Amends the heading to Section 665B, Texas Probate Code, to read as follows:

Sec. 665B. COMPENSATION OF ATTORNEY REPRESENTING APPLICANT.

SECTION 3. Amends Section 665B(a), Texas Probate Code, to authorize a court that creates a guardianship or creates a management trust under Section 867 (Creation of Management Trust) of this code for a ward under this chapter, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, to authorize compensation of an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether a management trust is created, from available funds of the ward's estate or management trust, if created; or the county treasury if the ward's estate or, if created, management trust, is insufficient to pay for the services provided by the attorney and funds in the county treasury are budgeted for that purpose. Makes a nonsubstantive change.

SECTION 4. Amends Subpart H, Part 2, Chapter XIII, Texas Probate Code, by adding Section 665D, as follows:

Sec. 665D. COMPENSATION AND PAYMENT OF ATTORNEY'S FEES OF ATTORNEY SERVING AS GUARDIAN. (a) Provides that an attorney who serves as guardian and who also provides legal services in connection with the guardianship, notwithstanding any other provision of this subpart, is not entitled to compensation for the guardianship services or payment of attorney's fees for the legal services from the ward's estate or other funds available for that purpose unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services.

(b) Provides that an attorney described by Subsection (a) of this section is not entitled to payment of attorney's fees for guardianship services that are not legal services.

(c) Requires the court to set the compensation of an attorney described by Subsection (a) of this section for the performance of guardianship services in accordance with Section 665 of this code. Requires the court to set attorney's fees for an attorney described by Subsection (a) of this section for legal services provided in accordance with Sections 665A (Payment for Professional Services), 665B (Compensation of Certain Attorneys), and 666 (Expenses Allowed) of this code.

SECTION 5. Amends Section 677A, Texas Probate Code, by amending Subsection (g) and adding Subsections (i) and (j), as follows:

(g) Authorizes a declaration and affidavit to be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's child. Sets forth the authorized form.

(i) Authorizes a declaration of appointment of a guardian for the declarant's children in the event of the declarant's death or incapacity, as an alternative to the self-proving affidavit authorized by Subsection (g) of this section, to be simultaneously executed, attested, and made self-proved by including a certain form with certain contents.

(j) Provides that a declaration that is executed as provided by Subsection (i) of this section is considered self-proved to the same extent a declaration executed with a self-proving affidavit under Subsection (g) of this section is considered self-proved.

SECTION 6. Amends Section 679, Texas Probate Code, by amending Subsection (i) and adding Subsections (k) and (l), as follows:

(i) Authorizes a declaration and affidavit to be in any form adequate to clearly indicate the declarant's intention to designate a guardian. Sets forth the authorized content of the form.

(k) Authorizes a Declaration of Guardian in the Event of Later Incapacity or Need of Guardian, as an alternative to the self-proving affidavit authorized by Subsection (i) of this section, to be simultaneously executed, attested, and made self-proved by including a certain form with certain content.

(l) Provides that a declaration that is executed as provided by Subsection (k) of this section is considered self-proved to the same extent a declaration executed with a self-proving affidavit under Subsection (i) of this section is considered self-proved.

SECTION 7. Amends Section 767(b), Texas Probate Code, to provide that a guardian of the person of a ward, notwithstanding Subsection (a)(4) (relating to providing that a guardian of the person has the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward) of this section, has the power to personally transport the ward or to direct the ward's transport by emergency medical services or other means to an inpatient mental health facility for a preliminary examination in accordance with Subchapters A (Apprehension by Peace Officer or Transportation for Emergency Detention by Guardian) and C (Emergency Detention, Release, and Rights), Chapter 573 (Emergency Definition), Health and Safety Code.

SECTION 8. Amends Sections 867(b-3) and (c)-(e), Texas Probate Code, as follows:

(b-3) Requires the court to appoint an attorney ad litem and authorizes the court, if necessary, to appoint a guardian ad litem, to represent the interests of the alleged incapacitated person in the proceeding.

(c) Authorizes the court, subject to Subsection (d) of this section, if the court finds that it is in the ward's or incapacitated person's best interests, to appoint a person or entity that meets the requirements of Subsection (e) of this section to serve as trustee of the trust instead of appointing a financial institution to serve in that capacity. Deletes existing text authorizing the court, if the value of the trust's principal is \$50,000 or less, to appoint a person other than a financial institution to serve as trustee of the trust only if the court finds the appointment to be in the ward's or incapacitated person's best interests.

(d) Authorizes the court, if the value of the trust's principal is more than \$150,000 to appoint a person or entity other than a financial institution in accordance with Subsection (c) of this section to serve as trustee of the trust only if the court, in addition to the finding required by that subsection, finds that the applicant for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area willing to serve as trustee. Deletes existing text authorizing the court, if the value of the trust's principal is more than \$50,000, to appoint a person other than a financial institution to serve as trustee of the trust only if the court finds that no financial institution is willing to serve as trustee, and the appointment is in the ward's or incapacitated person's best interests. Makes nonsubstantive changes.

(e) Provides that an individual, including an individual who is certified as a private professional guardian, a nonprofit corporation qualified to serve as a guardian, and a guardianship program are eligible for appointment as trustee under Subsection (c) or (d) of this section. Deletes existing text requiring the court, before making a finding that there is no financial institution willing to serve as trustee under Subsection (d)(1) (relating to authorizing the court, if the value of the trust's principal is more than \$50,000, to appoint a person other than a financial institution to serve as trustee to the trust only if the court finds that no financial institution is willing to serve as trustee) of this section, to check any list corporate fiduciaries located in this state that is maintained at the office of

the presiding judge of the statutory probate courts or at the principal office of the Texas Bankers Association.

SECTION 9. Amends Section 868(a), Texas Probate Code, to require that a trust created under Section 867 of this code, except as provided by Subsection (d) (relating to authorizing the court, when creating or modifying a trust, to omit or modify certain terms only if the court determines that the omission or modification meets certain criteria), provides that the trustee, subject to the court's approval, rather than on annual application to the court and subject to the court's approval, is entitled to receive reasonable compensation for services that the trustee provided to the ward or incapacitated person as the ward's or incapacitated person's trustee that is to be paid from the trust's income, principal, or both; and determined, paid, reduced, and eliminated in the same manner as compensation of a guardian of an estate under Section 665 (Compensation of Guardians and Temporary Guardians) of this code.

SECTION 10. Amends Subpart N, Part 4, Chapter XIII, Texas Probate Code, by adding Section 868C, as follows:

Sec. 868C. TRANSFER OF MANAGEMENT TRUST PROPERTY TO POOLED TRUST. (a) Authorizes the court, if the court determines that it is in the ward's or incapacitated person's best interests, to order the transfer of all property in a management trust created under Section 867 of this code to a subaccount of a pooled trust established in accordance with Subpart I, Part 5, of this chapter. Requires that the transfer of property from the management trust to the subaccount of the pooled trust be treated as a continuation of the management trust and be prohibited from being treated as the establishment of a new trust for purposes of 42 U.S.C. Section 1396p(d)(4)(A) or (C) or otherwise for purposes of the ward's or incapacitated person's eligibility for medical assistance under Chapter 32 (Maternal and Infant Health Improvement), Human Resources Code.

(b) Prohibits the court from allowing termination of the management trust created under Section 867 of this code from which property is transferred under this section until all of the property in the management trust has been transferred to the subaccount of the pooled trust.

SECTION 11. Amends Section 870(b), Texas Probate Code, to provide that the trust terminates on the date the court determines that continuing the trust is no longer in the ward's or incapacitated person's best interests, subject to Section 868C(b) of this code, or on the death of the ward or incapacitated person, if the ward or incapacitated person is not a minor.

SECTION 12. Amends Section 875(k), Texas Probate Code, to authorize the court, on the court's own motion or on the motion of any interested party, if an application for a temporary guardianship, for the conversion of a temporary guardianship to a permanent guardianship, or for a permanent guardianship is challenged or contested, to appoint a temporary guardian, rather than new temporary guardian, or grant a temporary restraining order under Rule 680 (Temporary Restraining Order), Texas Rules of Civil Procedure, or both, without issuing additional citation if the court finds that the appointment or the issuance of the order is necessary to protect the proposed ward or the proposed ward's estate.

SECTION 13. Amends Part 5, Chapter XIII, Texas Probate Code, by adding Subpart I, as follows:

SUBPART I. ESTABLISHMENT OF POOLED TRUST SUBACCOUNTS; TRANSFERS

Sec. 910. DEFINITIONS. Defines "beneficiary," "medical assistance," "pooled trust," and "subaccount."

Sec. 911. APPLICATION. Authorizes a person interested in the welfare of a minor, a disabled person, or any other incapacitated person to apply to the court for the establishment of a subaccount for the benefit of the minor, disabled person, or other incapacitated person as the beneficiary.

Sec. 912. APPOINTMENT OF ATTORNEY AD LITEM. Requires the court to appoint an attorney ad litem for a person who is a minor or has a mental disability and who is the subject of an application under Section 911 of this code. Entitles the attorney ad litem to a reasonable fee and reimbursement of expenses to be paid from the person's property.

Sec. 913. TRANSFER. Authorizes the court, if the court finds that it is in the best interests of a person who is the subject of an application under Section 911 of this code, to order the establishment of a subaccount of which the person is the beneficiary, and the transfer to the subaccount of any of the person's property on hand or accruing to the person.

Sec. 914. TERMS OF SUBACCOUNT. Requires that the terms governing the subaccount unless the court orders otherwise, provide that:

(1) the subaccount terminates on the earliest of the date of the beneficiary's 18th birthday, if the beneficiary is not disabled on that date and was a minor at the time the subaccount was established; the beneficiary's death; or an order of the court terminating the subaccount; and

(2) on termination, any property remaining in the beneficiary's subaccount after making any required payments to satisfy the amounts of medical assistance reimbursement claims for medical assistance provided to the beneficiary under this state's medical assistance program and other states' medical assistance programs is required to be distributed to the beneficiary, if on the date of termination the beneficiary is living and is not incapacitated; the beneficiary's guardian, if on the date of termination the beneficiary is living and is incapacitated; or the personal representative of the beneficiary's estate, if the beneficiary is deceased on the date of termination.

Sec. 915. JURISDICTION EXCLUSIVE. Provides that the court that orders the establishment of a subaccount for a beneficiary has exclusive jurisdiction of a subsequent proceeding or action that relates to both the beneficiary and the subaccount, and the proceeding or action may only be brought in that court, notwithstanding any other law.

Sec. 916. FEES AND ACCOUNTING. (a) Authorizes the manager or trustee of a pooled trust to assess fees against a subaccount of that pooled trust established under this subpart in accordance with the manager's or trustee's standard fee structure; and pay those fees from the subaccount.

(b) Requires the manager or trustee of the pooled trust, if required by the court, to file a copy of the annual report of account with the court clerk.

SECTION 14. (a) Makes application of this Act prospective, except as otherwise provided by this section, applying to:

(1) a guardianship created before, on, or after the effective date of this Act; and

(2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.

(b) Makes application of Sections 665, 665B, and 868, Texas Probate Code, as amended by this Act, and Section 665D, Texas Probate Code, as added by this Act, prospective.

(c) Makes application of Sections 867 and 870, Texas Probate Code, as amended by this Act, and Section 868C, Texas Probate Code, as added by this Act, prospective.

(d) Makes application of Subpart I, Part 5, Chapter XIII, Texas Probate Code, as added by this Act, prospective.

SECTION 15. Effective date: September 1, 2009.