

SUBJECT: Revising certain statutes concerning guardianships and management trusts

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Leach, Davis, Julie Johnson, Krause, Middleton, Moody, Schofield, Smith

0 nays

1 absent — Dutton

SENATE VOTE: On final passage, March 25 — 30-0

WITNESSES: For — Lauren Hunt, Real Estate, Probate, Trust Law section of State Bar of TX; (*Registered, but did not testify*: Guy Herman, Statutory Probate Courts of Texas; Terry Hammond, Texas Guardianship Association; and 10 individuals)

Against — None

BACKGROUND: Estates Code sec. 1101.101 allows a court to appoint a guardian for a proposed ward if the proposed ward is an incapacitated person and it is in the proposed ward's best interest to have the court appoint a person as guardian. Sec. 1105.051 requires that for qualification purposes, a guardian must take an oath to discharge faithfully the duties of guardian for the person or estate, or both, of a ward.

Sec. 1151.351 establishes the Bill of Rights for Wards and specifies that a person under guardianship has the right to have a court investigator, guardian ad litem, or attorney ad litem investigate a complaint from the person under guardianship or any person about the guardianship.

Estates Code ch. 1301 describes the requirements to establish a management trust, defined by sec. 1301.053 as a trust created by a court for the management of funds of a person if the court finds that the creation of the trust is in the person's best interest.

Sec. 1355.002 governs payment of claims to nonresident creditors, specifying that "creditor" means a person who is entitled to money in an amount not more than \$100,000 and is a non-resident minor, a non-resident person who a court adjudged to have a disability, or a former ward of a terminated guardianship who has no legal guardian qualified in Texas.

DIGEST:

SB 626 would implement revisions to statutes concerning guardianships and alternatives, including to notice requirements for and termination of management trusts, county courts-at-law jurisdiction, the Guardianship Bill of Rights, and the process for nonresident guardians to withdraw sales proceeds for a ward. The bill also would allow guardianship applicants to submit declarations as an alternative to an oath and would make a variety of corrections to the Estates Code for consistency across statutes.

Matters related to a guardianship proceeding. SB 626 would define a matter related to a guardianship proceeding in a county without a statutory probate court but with a county court at law exercising original probate jurisdiction to include:

- all matters and actions constituting a guardianship proceeding in a county without a statutory probate court or a county court at law exercising original probate jurisdiction; and
- the interpretation and administration of a testamentary or inter vivos trust in which a ward was an income or remainder beneficiary.

The bill would expand the definition of a matter related to a guardianship proceeding in a county with a statutory probate court to include matters and actions constituting a guardianship proceeding in a county without a statutory probate court but with a county court at law exercising original probate jurisdiction.

These provisions would apply only to actions filed on or after the bill's effective date.

Unsworn declarations. A guardian could make a declaration as specified by the bill instead of taking an oath for qualification purposes. The bill would provide examples with which an oath or a declaration would have to substantially conform, and a declaration would have to be signed by the declarant.

The bill would define "declaration" to mean a declaration taken by a person appointed to serve as guardian to qualify to serve.

These provisions would apply only to the qualification of a guardian that occurred on or after the bill's effective date.

Bill of rights for wards. The bill would specify that under the Bill of Rights for Wards, unless limited by a court or otherwise restricted by law, a ward would be authorized to have only a court investigator or guardian ad litem, not an attorney ad litem, appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship.

Notice of guardianship proceeding. SB 626 would specify that the proper newspaper to be used for notice of a guardianship proceeding would be a newspaper of general circulation in the county, instead of requiring notice to be published in a newspaper printed in that county.

Creation of management trusts, notice. SB 626 would require notice to be given on the filing of an application for the creation of a management trust in the same manner as issuance and service of notice on the filing of an application for guardianship. It would not be necessary to serve a citation on a person who filed the application for creation of a management trust or for the person to waive the issuance and personal service of citation.

If the person for whom an application for creation of a management trust was filed was a ward, the sheriff or other officer would have to serve each guardian of the ward personally with citation to appear and answer the

application in addition to serving the persons required to be served under existing law related to the filing of an application for guardianship. Notice would not be required if a proceeding for the appointment of a guardian was pending for the person for whom an application for creation of a management trust was filed.

These provisions would apply only to an application for creation of a management trust filed on or after the bill's effective date.

Termination of management trusts. The bill would require that a management trust created for a ward or incapacitated person provide for the termination of the trust in certain situations.

If the person for whom the trust was created was a minor, the trust would have to terminate on the earlier of the person's death or the person's 18th birthday, or on the date provided by court order, which could be no later than the person's 25th birthday.

If the person for whom the trust was created was a minor and also was incapacitated for a reason other than being a minor, the trust would have to terminate on the person's death or when the person regained capacity.

If the person for whom the trust was created was not a minor, the trust would have to terminate according to the terms of the trust, on the date the court determined that continuing the trust was no longer in the person's best interests, or on the person's death.

These provisions would apply only to an application for the creation or modification of a management trust filed on or after the bill's effective date.

Nonresident creditors. SB 626 would specify that payment of claims to nonresident creditors would apply to:

- a nonresident minor who had a nonresident guardian of the estate appointed by a foreign court;

- a nonresident adjudged by a foreign court to be incapacitated who had a nonresident guardian of the estate appointed by that foreign court; or
- the nonresident former ward of a terminated guardianship who had no legal guardian in this state.

On presentation of an order of a county or probate court of the county in which money due to a creditor was held, the bill would allow such money to be withdrawn by a nonresident guardian of the estate appointed by a foreign court for a creditor who was a nonresident minor or a nonresident person who was adjudged to be incapacitated. The order would have to direct the court clerk to deliver the money to the creditor's nonresident guardian of the estate, and the guardian of the estate would be required to present to the court exemplified copies of the order of the foreign court appointing the guardian and current letters of guardianship issued in the foreign jurisdiction.

The court could require the nonresident guardian to provide proof of adequate bond in the foreign jurisdiction if the court determined that was in the best interest of the nonresident minor or nonresident incapacitated person.

These provisions would apply only to an application for an order for the delivery of money that was filed on or after the bill's effective date.

Other provisions. SB 626 would make various conforming changes in statute. The bill would specify a court's authority with respect to payment of costs in a guardianship proceeding and would specify differences between sale by public auction versus private contract with respect to sales of personal and real property in a guardianship.

The bill would change outdated references to Texas Government Code ch. 11, subch. C, the Department of Aging and Disability Services, and the Guardianship Certification Board.

The bill also would specify that the trustee of a management trust created

for a ward would have to provide a copy of the annual account to "each guardian of the ward" instead of to "the guardian of the ward's estate or person."

The bill would take effect September 1, 2021, and would apply to a guardianship created before, on, or after that date and to an application for a guardianship pending on, or filed on or after that date, unless otherwise specified by the bill.

**SUPPORTERS
SAY:**

SB 626 would implement a variety of technical corrections and clarifications to the Estates Code recommended by guardianship law practitioners that would improve the guardianship process.

County courts-at-law jurisdiction. Under current law, it is unclear whether county courts-at-law with guardianship jurisdiction can hear cases involving trusts in which a person under guardianship is an owner or beneficiary, and some of these cases are forced to go to district court. The bill would allow county courts-at-law to hear cases regarding trusts if the beneficiary was a person under guardianship in that court, which would improve judicial economy.

Unsworn declarations. Currently, guardianship applicants are required to make an oath, which must be notarized, regarding their commitment to discharge their duties as a guardian faithfully. The bill would allow a guardianship applicant to make a statutory declaration, which does not have to be notarized, as an alternative to such an oath. This could make the guardianship process more efficient and accessible. Further, a person who made a false statement in a declaration would still be subject to criminal liability, as the declaration would be made under penalty of perjury, ensuring that necessary safeguards would still exist concerning the guardianship application process.

Notice of proceeding. Newspapers often are printed in a county other than the county in which they are circulating, so the bill appropriately provides that the proper newspaper for notice of a guardianship proceeding is a newspaper of general circulation in the county where the

proceeding will be. Accordingly, this provision could allow for more effective distribution of notice to all parties with a potential interest in a guardianship proceeding.

Management trusts. While most Texas courts require notice to the person with a disability and their family members to create a management trust, such a requirement is not codified in statute. By requiring that upon a person applying to create a management trust, notice be served to the potential beneficiary, the beneficiary's guardian, and family members, the bill would help to ensure that all parties' rights in a management trust were protected.

Certain management trusts created for the benefit of a minor who has a serious disability that is likely to last his or her entire life contain a provision that the trustee will pay back the state for all Medicaid expenses made on behalf of the beneficiary upon the beneficiary's death. However, current law also provides that a management trust created for a minor terminates the earlier of the minor's death, 18th birthday, or the date provided by court order not later than the minor's 25th birthday. This inconsistency between laws could result in the triggering of the Medicaid payback requirement for certain trusts upon a minor with a serious disability turning 25, even though the beneficiary was still alive. The bill's provisions allowing management trusts to last until the removal of a disability or until the beneficiary died would prevent such inadvertent termination of a management trust benefitting a person with a disability, stopping trusts from being emptied that were still in use.

Withdraw of sale proceeds by nonresident guardian. The Estates Code does not clearly authorize a guardian who is not a Texas resident to withdraw property sale proceeds and use them to benefit the person under guardianship. The bill would help to ensure that a person under guardianship would benefit from the sale of property by clearly outlining the procedure for and explicitly authorizing a nonresident guardian to use sale proceeds to benefit the person under guardianship.

CRITICS

No concerns identified.

SAY: