

## BILL ANALYSIS

Senate Research Center

H.B. 1470  
By: Hartnett (Harris)  
Jurisprudence  
5/19/2003  
Engrossed

### DIGEST AND PURPOSE

The Real Estate, Probate, and Trust Law Section of the State Bar of Texas studies the need for statutory changes in guardianship law and receives comments and suggestions from its members and from others active in this area of the law, including judges and academics. The Real Estate, Probate, and Trust Law Section of the State Bar of Texas recommends statutory changes in those areas for which there is a broad consensus on the need for such change. H.B. 1470 amends and clarifies existing guardianship law.

### 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 the heading to Section 606, Texas Probate Code, to read as follows:

Sec. 606. JURISDICTION WITH RESPECT TO GUARDIANSHIP PROCEEDINGS.

SECTION 2. Amends Section 606, Texas Probate Code, by amending Subsections (b), (c), and (d) and adding Subsections (b-1), (b-2), (b-3), (b-4), and (b-5), as follows:

(b) Requires all applications, petitions, and motions regarding guardianships, mental health matters and other matters covered by this chapter, in those counties in which there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, to be filed and heard in the county court. Provides that the judge of the county court, in contested guardianship matters, may on the judge's own motion, or shall on the motion of any party to the proceeding, take certain actions.

(b-1) Created from existing text.

(b-2) Provides that a statutory probate court judge assigned to a contested guardianship, rather than probate, matter as provided by Subsection (b) of this section, rather than subsection, has the jurisdiction and authority granted to a statutory probate court by Sections 607 and 608 of this code. Requires the statutory probate court judge, on resolution of a contested matter, including an appeal of a matter, to which a statutory probate court judge has been assigned, to transfer the resolved portion of the case to the county court for further proceedings not inconsistent with the orders of the statutory probate court judge. Deletes text regarding the county court continuing to exercise jurisdiction.

(b-3) Provides that the district court, in contested matters transferred to the district court, but not concurrently with the county court, has the general jurisdiction of a probate court. Requires the district court, on resolution of a contested matter, but not all pending matters, including an appeal of a matter, to transfer the resolved, rather than contested, portion of the case, rather than guardianship proceeding, to the county court for further proceedings not inconsistent with the orders of the district court.

(b-4) Requires the county court to continue to exercise jurisdiction over the management of the guardianship with the exception of the contested matter until final disposition of the contested matter is made by the assigned judge or the district court.

(b-5) Authorizes the clerk of the district court, if a contested portion of the proceeding is transferred to a district court under Subsection (b-3) of this section, rather than subsection, to perform in relation to the transferred portion of the proceeding any function a county clerk may perform in that type of contested proceeding.

(c) Requires all applications, petitions, and motions regarding guardianships, mental health matters, or other matters addressed by this chapter, in those counties in which there is no statutory probate court, but in which there is a county court at law or other statutory court exercising the jurisdiction of a probate court, to be filed and heard in those courts and the constitutional county court, but not in the district courts, unless otherwise provided by law.

(d) Requires all applications, petitions, and motions regarding guardianships, mental health, rather than illness, matters, or other matters addressed by this chapter, in those counties in which there is a statutory probate court, to be filed and heard in the statutory probate court. Deletes text regarding said requirement unless otherwise provided by law.

SECTION 3. Reenacts and amends Section 606(e), Texas Probate Code, as amended by Chapters 63 and 484, Acts of the 77th Legislature, Regular Session, 2001, to delete text regarding a statutory probate court having concurrent jurisdiction with the district court in certain actions.

SECTION 4. Reenacts and amends Section 606(f), Texas Probate Code, as amended by Chapters 63 and 484, Acts of the 77th Legislature, Regular Session, 2001, to delete text regarding a court that exercises original probate jurisdiction having the power to hear all matters incident to an estate and text regarding whether a ward had died, regained capacity, or the ward's disabilities of minority have been removed.

SECTION 5. Amends Section 606, Texas Probate Code, by adding Subsections (h), (i), and (j), as follows:

(h) Provides that a statutory probate court has concurrent jurisdiction with the district court in all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a guardian and in all actions involving a guardian in which each other party aligned with the guardian is not an interested person in the guardianship.

(i) Provides that a statutory probate court has jurisdiction over any matter appertaining to an estate or incident to an estate and has jurisdiction over any cause of action in which a guardian in a guardianship proceeding pending in the statutory probate court is a party.

(j) Authorizes a statutory probate court to exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.

SECTION 6. Amends Section 607(b), Texas Probate Code, to redefine "appertaining to estates" and "incident to an estate" in a statutory probate court, but not a district court. Requires any cause of action appertaining to or incident to a guardianship estate, except for situations in which the jurisdiction of a statutory probate court is concurrent with that of a district court or any other court, to be brought in a statutory probate court. Deletes text regarding a district court.

SECTION 7. Amends Section 608, Texas Probate Code, as follows:

Sec. 608. TRANSFER OF GUARDIANSHIP PROCEEDING. Authorizes a judge of a statutory probate court, on the motion of a party to the action or of a person interested in a guardianship, to transfer to the judge's court from a district, county, or statutory court a cause of action appertaining to or incident to a guardianship estate that is pending in the

statutory probate court or a cause of action relating to a guardianship in which a guardian, ward, or proposed ward in a guardianship, rather than personal representative of an estate, pending in the statutory probate court is a party and to consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the guardianship estate.

SECTION 8. Amends Section 633, Texas Probate Code, by amending Subsections (d) and (f) and adding Subsection (d-1), as follows:

(d) Requires the applicant to mail a copy of the application for guardianship and a notice containing the information required in the citation issued under Subsection (b) of this section by registered or certified mail, return receipt requested, or by any other form of mail that provides proof of delivery, to certain persons, if their whereabouts are known or can be reasonably ascertained, including each person named as next of kin in the application for guardianship as required by Section 682(10) or (12) of this code.

(d-1) Requires the applicant to file with the court certain documents.

(f) Prohibits the court from acting on an application for the creation of a guardianship until the Monday following the expiration of the 10-day period beginning the date service of notice and citation has been made as provided by Subsections (b), (c), and (d)(1) of this section and the applicant has complied with Subsection (d-1) of this section. Provides that the validity of a guardianship created under this chapter is not affected by the failure of the applicant, rather than clerk or applicant, to comply with the requirements of Subsections (d)(2)-(9), rather than (d)(2)-(8), of this section.

SECTION 9. Amends Section 634, Texas Probate Code, as follows:

Sec. 634. SERVICE ON ATTORNEY. (a) Prohibits an attorney ad litem, except as provided by Section 633(e), rather than 633(f), of this code, from waiving personal service of citation.

(b) Authorizes a notice served on an attorney under this section to be served by registered or certified mail, return receipt requested, by any other form of mail requiring proof of delivery, or by delivery to the attorney in person.

(c) Created from existing text.

SECTION 10. Amends Section 665B(a), Texas Probate Code, to authorize a court that creates a guardianship for a ward under this chapter, on request of a person who filed an application to be appointed guardian of the proposed ward or for the appointment of another suitable person as guardian of the proposed ward, 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, from available funds of the ward's estate or the county treasury if certain conditions exist.

SECTION 11. Amends Section 682, Texas Probate Code, as follows:

Sec. 682. APPLICATION; CONTENTS. Requires the application to be sworn to by the applicant and state certain information.

SECTION 12. Amends Section 687(c), Texas Probate Code, to require the proposed ward, if the basis of the proposed ward's alleged incapacity is mental retardation, to be examined by a physician or psychologist licensed in this state or certified by the Texas Department of Mental Health and Mental Retardation to perform the examination, unless there is written documentation filed with the court that shows that the proposed ward has been examined according to the rules adopted by the Texas Department of Mental Health and Mental Retardation not earlier than 24, rather than six, months before the date of a hearing to appoint a guardian for the proposed ward.

SECTION 13. Amends Sections 729(a) and (e), Texas Probate Code, as follows:

(a) Requires the guardian of the estate, not later than the 30th, rather than 90th, day after the date the guardian of the estate qualifies as guardian, unless a longer time is granted by the court, to file with the clerk of the court a verified, full, and detailed inventory, in one written instrument, of all the property of the ward that has come into the guardian's possession or knowledge.

(e) Makes a conforming change.

SECTION 14. Reenacts and amends Section 745(c), Texas Probate Code, as amended by Chapters 127, 217, and 1174, Acts of the 77th Legislature, Regular Session, 2001.

SECTION 15. Amends Section 762(b), Texas Probate Code, to require the court clerk, on the filing of an application for a hearing under this section, to issue a notice stating that the application for reinstatement was filed, the name of the ward, but not decedent, and the name of the applicant. Requires the clerk to issue the notice to the applicant, the ward, a person interested in the welfare of the ward, but not the decedent's estate, or the ward's estate, and, if applicable, a person who has control of the care and custody of the ward.

SECTION 16. Amends Section 765, Texas Probate Code, as follows:

Sec. 765. SUCCESSORS' RETURN OF INVENTORY, APPRAISEMENT, AND LIST OF CLAIMS. Requires a successor guardian who has qualified to succeed a prior guardian to make and return to the court an inventory, appraisal, and list of claims of the estate, not later than the 30th day, rather than 90 days, after the date the successor guardian qualifies as guardian, in the same manner as is required of an original appointee.

SECTION 17. Amends Section 767, Texas Probate Code, as follows:

Sec. 767. POWERS AND DUTIES OF GUARDIANS OF THE PERSON. Provides that a guardian of a person has certain rights, powers, and duties.

SECTION 18. Amends Section 768, Texas Probate Code, as follows:

Sec. 768. GENERAL POWERS AND DUTIES OF GUARDIAN OF THE ESTATE. Provides that it is the duty of the guardian of the estate to take care of and manage the estate as a prudent person would manage the person's own property, except as otherwise provided by this chapter.

SECTION 19. Amends Section 774(a), Texas Probate Code, to authorize a guardian, on written application to the court and when a guardian of the estate deems it is in the best interest of the estate, to, if authorized by an order of the court, perform certain acts, including establishing a trust in accordance with 42 U.S.C. Section 1396p(d)(4)(B), as amended, and directing that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code.

SECTION 20. Amends Section 776, Texas Probate Code, as follows:

Sec. 776. New heading: AMOUNTS ALLOWABLE FOR EDUCATION AND MAINTENANCE OF WARD. (a) Requires the guardian of the estate, subject to Section 777 of this code, if a monthly allowance for the ward was not ordered in the court's order appointing a guardian, to file an application with the court requesting a monthly allowance to be expended from the income and corpus of the ward's estate for the education and maintenance of the ward and the maintenance of the ward's property.

(a-1) Requires the guardian to file the application requesting the monthly allowance not later than the 30th day after the date on which the guardian qualifies as guardian or the date specified by the court, whichever is later.

Requires the application to clearly separate amounts requested for education and maintenance of the ward from amounts requested for maintenance of the ward's property.

(a-2) Requires the court, in determining the amount of the monthly allowance for the ward and the ward's property, to consider the condition of the estate and the income and corpus of the estate necessary to pay the reasonably anticipated regular education and maintenance expenses of the ward and maintenance expenses of the ward's property. Requires the court's order setting a monthly allowance to specify the types of expenditures the guardian may make on a monthly basis for the ward or the ward's property. Provides that an order setting a monthly allowance does not affect the guardian's duty to account for expenditures of the allowance in the annual account required by Section 741 of this code. Deletes text regarding a sum in excess of the income of the ward's estate and text regarding prohibiting the guardian from being allowed more than the net income of the estate.

(a-3) Requires the guardian of the estate, when different persons have the guardianship of the person and estate of a ward, to pay to the guardian of the person the monthly allowance, rather than a certain sum, set by the court, at a time specified by the court, for the education and maintenance of the ward. Makes a conforming change.

(b) Requires the guardian, when a guardian has in good faith expended funds from the income and corpus of the estate of the ward for support and maintenance of the ward and the expenditures exceed the monthly allowance authorized by the court, to file a motion with the court requesting approval of the expenditures. Authorizes the court to approve the excess expenditures if certain conditions exist.

SECTION 21. Amends Section 814, Texas Probate Code, as follows:

Sec. 814. SPECIAL PROVISIONS PERTAINING TO LIVESTOCK. (a) Created from existing text.

(b) Created from existing text.

(c) Requires the commission merchant to be paid the merchant's, rather than his, usual and customary charges, not to exceed five, rather than three, percent of the sale price, for the sale of the livestock.

SECTION 22. Amends Subpart L, Part 4, Chapter XIII, Texas Probate Code, by adding Section 854, as follows:

Sec. 854. GUARDIAN REQUIRED TO KEEP ESTATE INVESTED UNDER CERTAIN CIRCUMSTANCES. (a) Provides that the guardian of the estate is not required to invest funds that are immediately necessary for the education, support, and maintenance of the ward or others the ward supports, if any, as provided by this chapter. Requires the guardian of the estate to invest any other funds and assets available for investment unless the court orders otherwise under this subpart.

(b) Authorizes the court to, on its own motion or on written request of a person interested in the guardianship, cite the guardian to appear and show cause why the estate is not invested or not properly invested. Requires the court, at any time after giving notice to all parties, to conduct a hearing to protect the estate, except that the court may not hold a final hearing on whether the estate is properly invested until the 31st day after the date the guardian was originally cited to appear under this subsection. Requires the court, on the hearing of the court's motion or a request made under this section, to render an order the court considers to be in the best interests of the ward.

(c) Authorizes the court to appoint a guardian ad litem for the limited purpose of representing the ward's best interests with respect to the investment of the ward's property at a hearing under this section.

SECTION 23. Amends the heading to Section 855, Texas Probate Code, to read as follows:

Sec. 855. STANDARD FOR MANAGEMENT AND INVESTMENTS.

SECTION 24. Amends Section 855, Texas Probate Code, by amending Subsections (a) and (b) and adding Subsections (a-1) and (g), as follows:

(a) Requires a guardian of the estate, in acquiring, investing, reinvesting, exchanging, retaining, selling, supervising, and managing a ward's estate, to exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of that person's own affairs, considering the probable income from as well as the probable increase in value and the safety of their capital. Requires the guardian to also consider certain other relevant factors.

(a-1) Requires the court, in determining whether a guardian has exercised the standard of investment required by this section with respect to an investment decision, to, absent fraud or gross negligence, take into consideration the investment of all the assets of the estate over which the guardian has management or control, rather than taking into consideration the prudence of only a single investment made by the guardian.

(b) Provides that a guardian of the estate is considered to have exercised the standard required by this section with respect to investing the ward's estate if the guardian invests in certain investments. Deletes text regarding requiring the guardian to invest in a certain manner.

(g) Authorizes the court to modify or eliminate the guardian's duty to keep the estate invested or the standard required by this section with regard to investments of estate assets on a showing by clear and convincing evidence that the modification or elimination is in the best interests of the ward and the ward's estate.

SECTION 25. Amends Subpart L, Part 4, Chapter XIII, Texas Probate Code, by adding Sections 855A and 855B, as follows:

Sec. 855A. RETENTION OF ASSETS. (a) Authorizes a guardian of the estate to retain without court approval until the first anniversary of the date of receipt any property received into the guardianship estate at its inception or added to the estate by gift, devise, inheritance, mutation, or increase, without regard to diversification of investments and without liability for any depreciation or loss resulting from the retention. Requires the guardian to care for and manage the retained assets as a person of ordinary prudence, discretion, and intelligence would in caring for and managing the person's own affairs.

(b) Authorizes the court, on application and a hearing, to render an order authorizing the guardian to continue retaining the property after the period prescribed by Subsection (a) of this section if the retention is an element of the guardian's investment plan as provided by this subpart.

Sec. 855B. PROCEDURE FOR MAKING INVESTMENTS OR RETAINING ESTATE ASSETS. (a) Requires the guardian, not later than the 180th day after the date on which the guardian of the estate qualified as guardian or another date specified by the court, to file a written application with the court for a certain order.

(b) Requires the court, on hearing the application under this section and on a finding by the preponderance of the evidence that the action requested in the

application is in the best interests of the ward and the ward's estate, to render an order granting the authority requested in the application or an order modifying or eliminating the guardian's duty to keep the estate invested. Requires the order to state in reasonably specific terms certain information.

(c) Provides that the fact that an account or other asset is the subject of a specific or general gift under a ward's will, if any, or that a ward has funds, securities, or other property held with a right of survivorship does not prevent a guardian of the estate from taking possession and control of the asset or closing the account or the court from authorizing an action or modifying or eliminating a duty with respect to the possession, control, or investment of the account or other asset.

(d) Provides that the procedure prescribed by this section does not apply if a different procedure is prescribed for an investment or sale by a guardian. Provides that a guardian is not required to follow the procedure prescribed by this section with respect to an investment or sale that is specifically authorized by other law.

SECTION 26. Amends the heading to Section 857, Texas Probate Code, to read as follows:

Sec. 857. INVESTMENT IN, OR CONTINUED INVESTMENT IN, LIFE INSURANCE OR ANNUITIES.

SECTION 27. Amends Section 858, Texas Probate Code, as follows:

Sec. 858. LOANS AND SECURITY FOR LOANS. (a) Authorizes a guardian, if, at any time, the guardian of the estate has on hand money belonging to the ward in an amount that provides a return that is more than is necessary for the education, support, and maintenance of the ward and others the ward supports, if applicable, to lend the money for a reasonable, rather than the highest, rate of interest.

(b) Provides that a guardian of the estate is considered to have obtained a reasonable rate of interest for a loan for purposes of Subsection (a) of this section if the rate of interest is at least equal to 120 percent of the applicable short-term, midterm, or long-term interest rate under Section 7520, Internal Revenue Code of 1986, as amended, for the month during which the loan was made.

(c) Provides that except as provided by this subsection, a guardian of the estate who loans estate money with the court's approval on security approved by the court is not personally liable if the borrower is unable to repay the money and the security fails. Provides that if the guardian committed fraud or was negligent in making or managing the loan, including in collecting on the loan, the guardian and the guardian's surety are liable for the loss sustained by the guardianship estate as a result of the fraud or negligence.

(d) Prohibits a guardian of the estate who lends estate money, except as provided by Subsection (e) of this section, from paying or transferring any money to consummate the loan until the guardian performs a certain act.

(e) Authorizes a guardian of the estate to obtain a mortgagee's title insurance policy on any real estate loan in lieu of an abstract and attorney's opinion under Subsection (d) of this section.

(f) Requires the borrower to pay attorney's fees for any legal services required by this section.

(g) Requires the guardian, not later than the 30th day after the date the guardian of the estate loans money from the estate, to file with the court a written report, accompanied by an affidavit, stating fully the facts related to the loan. Provides that this subsection does not apply to a loan made in accordance with a court

order.

(h) Provides that this section does not apply to an investment in a debenture, bond, or other publicly traded debt security.

SECTION 28. Amends Section 860(a), Texas Probate Code, to authorize the guardian of the estate to invest estate assets in real estate if certain conditions exist.

SECTION 29. Amends Section 863, Texas Probate Code, as follows:

Sec. 863. New heading: LIABILITY OF GUARDIAN AND GUARDIAN'S SURETY.

(a) Provides that in addition to any other remedy authorized by law, if the guardian of the estate fails, rather than neglects, to invest or lend estate assets in the manner provided by this subpart, the guardian and the guardian's surety are liable for the principal and the greater of a certain amount. Deletes text regarding investing or lending surplus money.

(b) Provides that in addition to the liability under Subsection (a) of this section, the guardian and the guardian's surety are liable for attorney's fees, litigation expenses, and costs related to a proceeding brought to enforce this section. Deletes text regarding the amount of principal and interest that may be recovered.

SECTION 30. Amends Section 868A, Texas Probate Code, as follows:

Sec. 868A. DISCHARGE OF GUARDIAN OF ESTATE AND CONTINUATION OF TRUST. Authorizes the court, on or at any time after the creation of a trust under this subpart, to discharge the guardian of the ward's estate if the court determines that the discharge is in the ward's best interests. Deletes text regarding discharging a guardian of the ward's estate only if a guardian of the ward's person remains.

SECTION 31. Amends Section 883, Texas Probate Code, by adding Subsections (f), (g), and (h), as follows:

(f) Provides that this section does not partition community property between an incapacitated spouse and a spouse who is not incapacitated.

(g) Provides that if the court renders an order directing the guardian of the estate of the incapacitated spouse to administer certain community property as provided by Subsection (c) of this section, the community property administered by the guardian is considered the incapacitated spouse's community property, subject to the incapacitated spouse's sole management, control, and disposition under Section 3.102, Family Code. Provides that if the court renders an order directing the spouse who is not incapacitated to administer certain community property as provided by Subsection (d) of this section, the community property administered by the spouse who is not incapacitated is considered that spouse's community property, subject to that spouse's sole management, control, and disposition under Section 3.102, Family Code.

(h) Provides that an order described by Subsection (g) of this section does not affect the enforceability of a creditor's claim existing on the date the court renders the order.

SECTION 32. Amends Chapter 25, Penal Code, by adding Section 25.10, as follows:

Sec. 25.10. INTERFERENCE WITH RIGHTS OF GUARDIAN OF THE PERSON. (a) Defines "possessory right" and "ward."

(b) Provides that a person commits an offense if the person takes, retains, or conceals a ward when the person knows that the person's taking, retention, or concealment interferes with a possessory right with respect to the ward.

(c) Provides that an offense under this section is a state jail felony.



(d) Provides that it is an affirmative defense to prosecution under this section that the taking, retention, or concealment of the ward was authorized by Subtitle E, Title 5, Family Code, or Chapter 48, Human Resources Code.

SECTION 33. Repealer: Sections 606(a) (District courts having original control and jurisdiction) and 607(c) (A statutory probate court having concurrent jurisdiction with a district court), (d) (A statutory probate court exercising pendent and ancillary jurisdiction), and (e) (Subsection (d) applying whether or not the matter is appertaining to or incident to a guardianship estate), Texas Probate Code.

SECTION 34. (a) Provides that the changes in law made by Sections 1-6 and 33 of this Act apply only to a guardianship proceeding or other action commenced on or after the effective date of this Act without regard to whether a guardian of the person or estate, or both, was appointed for the ward before, on, or after that date.

(b) Provides that a guardianship proceeding or other action commenced before the effective date of this Act is governed by the law applicable to the proceeding or action immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 35. Repealer: Sections 389 (Investments Without Court Order), 856 (Other Investments), 859 (Guardian's Liability for Loans), and 864 (Requiring Guardian to Invest or Lend Surplus Funds), Texas Probate Code.

SECTION 36. Provides that the change in law made by Section 7 of this Act applies only to a motion to transfer or a cause of action filed on or after the effective date of this Act.

SECTION 37. Provides that the changes in law made by Sections 8-12 of this Act apply only to an application for the appointment of a guardian filed on or after the effective date of this Act. Provides that an application for the appointment of a guardian filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

SECTION 38. Provides that the changes in law made by Sections 13 and 16 of this Act apply only to a person appointed by a court to serve as guardian of the person or estate of a ward on or after the effective date of this Act. Provides that a person appointed by a court to serve as guardian of the person or estate of a ward before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

SECTION 39. (a) Provides that the changes in law made by Sections 17-29 of this Act apply only to an application for the appointment of a guardian that is filed on or after September 1, 2003.

(b) Authorizes an application for the appointment of a guardian that is filed before September 1, 2003, in which a guardianship has not been created and a guardianship existing on September 1, 2003, to be modified to conform to the changes in law made by Sections 17-29 of this Act:

SECTION 40. Effective date: September 1, 2003.