

BILL ANALYSIS

Senate Research Center
80R17282 MTB-F

C.S.H.B. 417
By: Hartnett (Wentworth)
Jurisprudence
5/3/2007
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

C.S.H.B. 417 addresses several areas of guardianship law. The bill requires the term of a guardian or attorney ad litem that is appointed in each case in a proceeding for the appointment of a guardian to automatically expire upon the appointment of a guardian or denial of the application for a guardian unless the court determines that retention of the guardian or attorney ad litem is in the best interest of the ward. This bill also authorizes a court to appoint a guardian ad litem or court investigator to investigate the need for guardianship in the case that no such application has been filed, and the bill authorizes unmarried parents of an incapacitated adult to be appointed as joint guardians unless the ward was the subject of a suit affecting the parent-child relationship in which only one or neither of the parents was named guardian.

Additionally, the bill makes several changes regarding the appointment of a guardian for a person who is mentally incapacitated, the grounds by which a person may be removed from the guardianship position, and other changes suggested by practitioners of probate 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 Section 645, Texas Probate Code, by adding Subsection (f), as follows:

(f) Provides that the term of appointment of a guardian ad litem made in a proceeding for the appointment of a guardian expires, without a court order, on the date the court either appoints a guardian or denies the application for appointment of guardian, unless the court determines that the continued appointment of the guardian ad litem is in the ward's best interest.

SECTION 2. Amends Section 646, Texas Probate Code, by adding Subsection (e), as follows:

(e) Provides that the term of appointment of an attorney ad litem made in a proceeding for the appointment of a guardian expires, without a court order, on the date the court either appoints a guardian or denies the application for appointment of guardian, unless the court determines that the continued appointment of the guardian ad litem is in the ward's best interest.

SECTION 3. Amends Section 665A, Texas Probate Code, to require the court to order payment of a fee set by the court as compensation to the attorneys, mental health professionals and interpreters appointed under Section 665A (Payment for Professional Services), Probate Code, rather than Sections 646 (Appointment of Attorney Ad Litem and Interpreter) or 687 (Examinations and Reports), Probate Code, and to make a conforming change.

SECTION 4. Amends Section 682, Texas Probate Code, to require an application to commence a proceeding for the appointment of a guardian to be sworn to by the applicant and state certain information, including the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested to be included in the court's order of appointment, including the termination of the right of a proposed ward who is 18 years of age or older to vote in a public election, and the termination of the proposed ward's eligibility to hold or obtain a license to

operate a motor vehicle under Chapter 521 (Driver's Licenses and Certificates), Transportation Code.

SECTION 5. Amends Section 683, Texas Probate Code, as follows:

Sec. 683. COURT'S INITIATION OF GUARDIANSHIP PROCEEDINGS. (a) Requires the court to appoint a guardian ad litem or court investigator to investigate the conditions and circumstances of a person believed to be incapacitated to determine whether the person is indeed incapacitated and whether a guardianship is necessary. Requires the guardian ad litem or court investigator, upon determination after investigation that the person is indeed incapacitated and that a guardianship is necessary, to file an application for the appointment of a guardian of the person or estate, or both, for the person, rather than of the person believed to be incapacitated.

(b) Authorizes the court, in establishing probable cause, to require a written letter or certificate from a physician who has examined the person believed to be incapacitated that satisfies the requirements of Section 687(a), except that the letter must be dated no earlier than the 120th day before the date of appointment of a guardian ad litem or court investigator, rather than the 120th day before the date of the filing of an application.

(c) Authorizes a court that appoints a guardian ad litem under Subsection (a), rather than a court that creates a guardianship for a ward under this chapter, to authorize compensation of the guardian ad litem from available funds of the proposed ward's estate, regardless of whether a guardianship is created for the proposed ward. Deletes existing text requiring a guardian ad litem to file an application under Subsection (a). Authorizes the court to authorize compensation from the county treasury to pay for the services of the guardian ad litem if the ward or proposed ward is found unable to pay for those services after examination of the ward's or proposed ward's assets.

SECTION 6. Amends Section 687(a), Texas Probate Code, to require the required physician's letter or certificate for a court to grant an application to create a guardianship for an incapacitated person to contain certain information, including stating whether in the physician's opinion the proposed ward has the mental capacity to vote in a public election and has the ability to safely operate a motor vehicle.

SECTION 7. Amends Section 690, Texas Probate Code, to include both parents of an incapacitated adult as joint guardians of a ward if the court finds it to be in the best interest of the ward and if the incapacitated person has not been the subject of a suit affecting the parent-child relationship; or has been the subject of such a suit and both of the parents of the incapacitated person's parents were named as joint managing conservators in the suit but are no longer serving in that capacity.

SECTION 8. Amends Sections 693(a) and (b), Texas Probate Code, as follows:

(a) Makes conforming changes. Includes among the findings of fact and specifications required in an order appointing a guardian under this subsection whether the person is totally incapacitated because of a mental condition and that the person does not have the capacity to operate a motor vehicle and to vote in a public election.

(b) Includes among the findings of fact and specifications required in an order appointing a guardian under this subsection whether the person is totally incapacitated because of a mental condition, and, if so, whether the person retains the right to vote in a public election or maintains eligibility to hold or obtain a license to operate a motor vehicle.

SECTION 9. Amends Section 694C, Texas Probate Code, by adding Subsection (c), as follows:

(c) Entitles an attorney ad litem appointed under Section 694C (Appointment of Attorney Ad Litem) to reasonable compensation for services in the amount set by the

court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or a modification of the ward's guardianship.

SECTION 10. Amends Sections 694G and 694H, Texas Probate Code, as follows:

Sec. 694G. ORDER OF COMPLETE RESTORATION OF WARD'S CAPACITY. Requires the order completely restoring the ward's capacity, if the court finds that a ward is no longer an incapacitated person, to contain findings of fact and to specify certain information, including that the ward's mental capacity is completely restored if the ward's incapacity resulted from a medical condition.

Sec. 694H. MODIFICATION OF GUARDIANSHIP. Makes a conforming change.

SECTION 11. Amends Subpart A, Part 3, Chapter XIII, Texas Probate Code, by adding Section 694L, as follows:

Sec. 694L. PAYMENT FOR GUARDIANS AD LITEM. Entitles a guardian ad litem, appointed under Section 645(b), Probate Code, in a proceeding involving the complete restoration of the ward's capacity or a modification of the ward's guardianship, to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or a modification of the ward's guardianship.

SECTION 12. Amends Section 695(a), Texas Probate Code, by authorizing the court to appoint a successor guardian, upon the death, resignation, or removal of a guardian, without citation or notice on a finding that a necessity for the immediate appointment of a successor guardian exists.

SECTION 13. Amends Sections 759(a) and (f), Texas Probate Code, as follows:

(a) Deletes existing text authorizing the court to appoint a successor guardian, upon the death, resignation, or removal of a guardian, without citation or notice on a finding that a necessity for the immediate appointment of a successor guardian exists.

(f) Deletes existing text prohibiting other letters to be granted except on application. Deletes existing text presuming that the person who is required to appear and show cause why the application should not be granted is living.

SECTION 14. Amends Section 760(b), Texas Probate Code, to make a conforming change.

SECTION 15. Amends Sections 761(c) and (f), Texas Probate Code, as follows:

(c) Includes that the guardian would be ineligible for appointment as a guardian under Section 681 (Persons Disqualified to Serve as Guardians), Texas Probate Code, in the list of circumstances for which the court is authorized to remove a guardian on its own motion, or on the complaint of an interested person. Makes conforming changes.

(f) Makes a conforming change.

SECTION 16. Amends Section 823, Texas Probate Code, as follows:

Sec. 823. New heading: CITATION ON APPLICATION. Requires the clerk, in filing an application for the sale of real estate under Section 820 (Application for Sale of Real Estate), Texas Probate Code, (application for sale) to issue a citation to all persons interested in the guardianship that describes the land, interest, or part of the land or interest sought to be sold and that informs, rather than requires, the persons of the right under Section 824 (Opposition to Application), Texas Probate Code, to file an opposition to the sale during the period prescribed by the court as shown in the citation. Deletes existing text requiring those filing in opposition of the sale to appear at the time set by the court and to show cause why the sale should not be made.

SECTION 17. Amends Section 824, Texas Probate Code, by authorizing a person interested in the guardianship to file the person's opposition to the sale of real estate during the period provided in the citation issued under Section 823, rather than before an order of sale is made by the court.

SECTION 18. Amends Subpart H, Part 4, Chapter XIII, Texas Probate Code, by adding Section 824A, as follows:

Sec. 824A. HEARING ON APPLICATION AND ANY OPPOSITION. (a) Requires the clerk of a court in which an application for sale is filed to immediately call to the attention of the judge any opposition to the sale that is filed during the period provided in the citation issued under Section 823. Requires the court to hold a hearing on an application for sale if an opposition to the sale is filed during that period.

(b) Provides that a hearing on an application for sale is not required under this section if no opposition to the application is filed during the appropriate period. Authorizes the court, in its discretion, to determine that a hearing is necessary on the application for sale even if no opposition was filed during that period.

(c) Requires the court, upon ordering a hearing under Subsection (a) or (b), to designate in writing a date and time for hearing the application for sale, any opposition, and pertinent evidence for both. Requires the clerk to issue a notice to the applicant and to each person who files an opposition to the sale, if applicable, of the hearing's date and time.

(d) Authorizes the judge, by entries on the docket, to continue a hearing held under this section from time to time until the judge is satisfied concerning the application for sale.

SECTION 19. Amends Section 825, Texas Probate Code, to require the court to order the sale to be made if the court is satisfied, rather than satisfied on hearing, that the sale of the property of the guardianship described in the application for sale is necessary and advisable.

SECTION 20. Amends Section 855B, Texas Probate Code, by amending Subsections (a) and (b) and adding Subsection (a-1), as follows:

(a) Requires the guardian, within 180 days of the guardian being qualified to become guardian of the estate or another date specified by the court, to have estate assets invested according to Section 855(b), or to file a written application with the court for an order authorizing the guardian to take certain actions in relation to the development and implementation of an investment plan, and to modify or eliminate the guardian's duty to invest the estate (application for investment). Makes conforming changes.

(a-1) Authorizes the court to approve an investment plan under Subsection (a)(2) without a hearing.

(b) Requires the court to render an order granting the authority requested in the application for investment or an order modifying or eliminating the guardian's duty to keep the estate invested if the court determines, rather than on hearing of the application for investment and on a finding by the preponderance of evidence, that the action requested is in the best interests of the ward and the ward's. Makes a conforming change.

SECTION 21. Amends Chapter 1, Election Code, by adding Section 1.020, as follows:

Sec. 1.020. VOTING DISABILITY OR CANDIDACY DISQUALIFICATION: DETERMINATION OF MENTAL INCAPACITY. (a) Provides that a person determined to be totally mentally incapacitated by a court exercising probate jurisdiction is not subject to a voting disability or candidacy disqualification under this code if, subsequent to that determination, the person's mental capacity has been completely restored by a final judgment of a court exercising probate jurisdiction.

(b) Provides that a person determined to be partially mentally incapacitated without the right to vote by a court exercising probate jurisdiction is not subject to a voting disability or candidacy disqualification under this code if, subsequent to that determination, the person's guardianship has been modified to include the right to vote or the person's mental capacity has been completely restored by a final judgment of a court exercising probate jurisdiction.

SECTION 22. Amends Section 11.002, Election Code, to redefine "qualified voter."

SECTION 23. Amends Section 13.001(a), Election Code, to require a person, to be eligible for registration as a voter in this state, to meet certain criteria, including to have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote.

SECTION 24. Amends Section 13.002, Election Code, by amending Subsection (c) and adding Subsections (e) and (f), Election Code, as follows:

(c) Makes conforming changes.

(e) Requires an applicant who has been determined to be totally mentally incapacitated by a court and who is eligible to register to vote, instead of the statement required under Subsection (c), to include in the registration application a statement that the person's mental capacity has been completely restored by a final judgment of a court.

(f) Requires an applicant who has been determined to be partially mentally incapacitated without the right to vote by a court and who is eligible to register to vote, instead of the statement required under Subsection (c), to include in the registration application a statement that the person's guardianship has been modified to include the right to vote or the person's mental capacity has been completely restored, as applicable, by a final judgment of a court.

SECTION 25. Amends the heading to Section 16.002, Election Code, to read as follows:

Sec. 16.002. MENTAL INCAPACITY.

SECTION 26. Amends Section 16.002(a), Election Code, to require the clerk of each court that has the proper jurisdiction to adjudge a person mentally incapacitated, rather than incompetent, to prepare an abstract of each final judgment of a court served by a clerk occurring in the month adjudging a state resident 18 years of age or older to be totally mentally incapacitated or partially mentally incapacitated without the right to vote, adjudging the mental capacity of a state resident 18 years of age or older to be completely restored, or modifying the guardianship of a person 18 years of age or older to include the right to vote. Makes a conforming change.

SECTION 27. Amends Section 16.031(a), Election Code, to make conforming changes.

SECTION 28. Amends Section 141.001(a), Election Code, to make conforming changes.

SECTION 29. Amends Section 141.031, Election Code, to make conforming changes.

SECTION 30. Amends Section 143.005(b), Election Code, to make conforming changes.

SECTION 31. Amends Section 144.003(b), Election Code, to make a conforming change.

SECTION 32. Amends Section 192.032(b), Election Code, to make a conforming change.

SECTION 33. Repealer: Section 822 (Setting on Hearing of Application), Texas Probate Code.

SECTION 34. (a) Makes application of Sections 645(f) and 646(e), Texas Probate Code, prospective.

- (b) Makes application of Section 665A, Texas Probate Code, prospective, unless the proceeding is pending on the effective date of this Act.
- (c) Makes application of Section 683, Texas Probate Code, prospective.
- (d) Makes application of Section 694C and 694L, Texas Probate Code, prospective.
- (e) Makes application of Sections 690, 693, and 855B, Texas Probate Code, prospective.
- (f) Makes application of Sections 695(a) and 759(f), Texas Probate Code, prospective.
- (g) Makes application of Section 760, Texas Probate Code, prospective.
- (h) Makes application of Sections 761(f), Texas Probate Code, prospective.
- (i) Makes application of Sections 823, 824, and 825, Texas Probate Code, prospective.
- (j) Makes application of the changes in law made by this Act to the Election Code, prospective.

SECTION 35. Effective date: September 1, 2007.