

## **BILL ANALYSIS**

C.S.H.B. 1186  
By: Hartnett  
Judiciary  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Numerous transfers of property are subject to the Texas Probate Code. The purpose of this bill is to clarify and amend the treatment of certain of such transfers.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

Section 1 amends Section 5 of the Texas Probate Code. The change to Subsection (b-2) makes it clear that a statutory probate judge assigned to hear a contested probate matter in a county that has no statutory probate court or county court at law has the jurisdiction and authority granted by Section 5 (most notably, jurisdiction to hear a related matter involving a testamentary trust) when he or she hears the contested matter. The change to Subsection (e) makes it clear that a statutory probate court has concurrent jurisdiction with the district court to hear not only actions involving inter vivos trusts and charitable trusts (which currently is the law), but also actions by or against trustees or involving a testamentary trust.

Section 2 amends Section 58b(a) of the Probate Code. Section 58b prohibits a devise or bequest of property to an attorney who prepares or supervises the preparation of the will or to the attorney's heirs. The reference to "heir" is clarified, in that one cannot be an heir of the living.

Sections 3 and 6. Section 3 adds Section 71A to the Probate Code. Section 6 makes corresponding changes to Section 306 of the Probate Code. Texas common law still applies the exoneration of liens doctrine. In many states, including the Uniform Probate Code states, the common law doctrine of exoneration has been reversed. New Section 71A makes the default rule in Texas that a specific gift of property securing a lien passes subject to the lien. Under Section 71A and corresponding changes to Section 306, rights of creditors and rights with respect to exempt property are not affected.

Sections 4 and 5. Sections 4 and 5 amend Sections 271 and 272 of the Probate Code, respectively. Current Section 271 of the Probate Code sets apart exempt property for the use and benefit of the surviving spouse, minor children, and unmarried children remaining with the family of the deceased. This conflicts with the case of *Zwernemann v. Von Rosenberg*, 13 S.W. 485 (Tex. 1890), which held unconstitutional the predecessor statute which purported to give possessory rights in a homestead to an adult child. These changes make the statute consistent with the *Zwernemann* case.

Section 7 amends Section 322 of the Probate Code. There have been situations in which there are not sufficient liquid assets in the guardianship at the time of the ward's death to pay the outstanding guardianship administration expenses. The judge will not allow the guardian to sell assets after death; therefore, the sale of assets must be completed in the decedent's estate. When a guardian files a claim in the decedent's estate for guardianship administration expenses, they are classified as a Class 8 Claim as opposed to a Class 2 Claim, only because of the ward's death. This change gives the guardian's claim Class 2 status in the deceased ward's estate.

. Section 8 adds new Chapter XI-A to the Probate Code. This new Chapter in effect revokes gifts to an ex-spouse under a living trust in the event spouses divorce but fail to revoke or amend

the living trust prior to the death of one of the ex-spouses. This is similar to effect of divorce on a will in Section 69 of the Probate Code.

### **EFFECTIVE DATE**

September 1, 2005

### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

The substitute contains an entirely new section 1 amending Section 5(b-2) and (e) of the Probate Code expanding the jurisdiction of a statutory probate court judge to hear all actions by or against a trustee and involving testamentary trusts.

Section 3 of the original bill is deleted from the substitute.

Section 6 of the substitute does not contain the changes set forth in the original to Sections 306(a) and (c) and substantially alters the new subsection (c-1).

The substitute deletes the change contained in section 7 of the original bill to Section 322, Class 3, Probate Code.

Section 8 of the substitute deletes the definition of "Governing Instrument" from Section 471, Probate Code. The substitute also amends the language of Section 472. The substitute deletes Section 473 of the original bill and renumbers the original 474 as 473. The substitute also deletes section 475 of the original.