

## **BILL ANALYSIS**

C.S.H.B. 1191  
By: Hartnett  
Judiciary  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Practitioners in the area of guardianships have noticed provisions in the law which would benefit from additional clarification or other improvement. The purpose of this bill is to make changes to that portion of the Probate Code governing guardianships that are suggested by the Real Estate, Probate and Trust Law Section of the State Bar of Texas.

### **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**

**Sections 1 and 2.** Sections 1 and 2 amend Sections 615 and 616 of the Texas Probate Code, respectively. These sections relate to records to be sent by the county clerk when a guardianship proceeding is transferred to another county. These changes make Sections 615 and 616 more similar to the parallel provisions affecting decedents' estates (Section 8 of the Probate Code). Currently 615 requires the clerk not only to send the original papers in the case but also a transcript of the case to the new county. This means that the county clerk must make certified copies of all of the proceedings and forward them along with the original papers in the proceeding. The guardianship estate must pay for these certified copies which can be very expensive if the guardianship has been in place for a while. The county clerks do not know what to do with the certified copies so they sit around in the clerk's office or are returned to the original clerk because no one knows what to do with them. The Probate Code provision dealing with transfers was changed to provide that the Clerk of the Court from which the proceeding is transferred shall transmit to the court to which the proceeding is transferred the "original file in the proceeding and a certified copy of the index." This is a much more workable plan and will reduce the cost for the guardianship.

**Sections 3 and 4.** Sections 3 and 4 amend Sections 672(b) and 694A(c) of the Probate Code, respectively. Section 694A(c) now requires the court investigator or guardian ad litem to file an application for modification of the guardianship or restoration of the ward even if such officer determines that granting such an application is not in the best interests of the ward. These changes would require the court investigator or guardian ad litem to investigate the circumstances and file a report with the court in each case. However, the court investigator or the guardian ad litem would not have to file an application for modification or restoration unless he or she determines that such course of action is in the best interests of the ward. The corresponding change to Section 672(b) permits the court to review the report filed by the court investigator or guardian ad litem.

**Section 5.** Section 5 amends Section 761(a) of the Probate Code. Under amendments made in 2003, a guardian must file an inventory, appraisal and list of claims within 30 days of qualifying, not 90 days as was previously the law. However, the removal statute, Section 761, still has an outdated reference to the 90-day filing requirement. This change makes the guardian subject to removal for failing to meet the current 30-day filing requirement. This will make this section consistent with the changes from last session.

**Section 6.** Section 6 amends Section 776(a-3) of the Probate Code. This section currently states that a guardian of the estate shall pay to the guardian of the person the monthly allowance set by the court. In those situations in which the guardian of the estate and guardian

of the person are different, the law should not require that all of the monthly allowance be delivered to the guardian of the person. Rather, the law should permit the court to require the guardian of the estate to pay service providers, such as the nursing home, directly. How the monthly allowance should be paid should be determined by the court when setting the monthly allowance. This change permits this.

**Section 7.** Section 7 amends Section 788 of the Probate Code. The current statute makes reference to “this section” when it should refer to Section 792 of the Probate Code. This change corrects this faulty reference.

**Section 8.** Section 8 amends Section 831(c) of the Probate Code. This change deletes inappropriate and unnecessary references to a decedent’s estate. It also makes other changes desired by the Legislative Council to clean up and modernize the statutory language.

**Section 9.** Section 9 amends Section 855B of the Probate Code. Under changes made in 2003, guardians of the estate are required to file investment plans. The 2003 changes anticipated that a guardian’s investment plan may provide for the purchase and sale of securities in accordance with the plan and that, once the plan was approved by the court, the guardian could purchase and sale securities in accordance with the plan without having to meet the Probate Code requirements for the sale of personal property, which may require citation and other notice not appropriate to such transactions. These changes make it clear that no such citation is required, so long as the sale of securities is being made in accordance with the court-approved plan.

**Section 10.** Section 10 adds new Section 874 to the Probate Code. In 2003, Section 875, regarding temporary guardianships, was amended to delete this sentence: “A person for whom a temporary guardian has been appointed may not be presumed to be incapacitated.” Deleting this sentence called into question whether the appointment of a temporary guardian, which may occur without all of the safeguards of a full guardianship proceeding, constitutes a finding of incapacity that could have adverse consequences for the ward, even though he or she may later be found not to be incapacitated. This change clarifies that appointment of a temporary guardian does not create a presumption of incapacity.

#### **EFFECTIVE DATE**

September 1, 2005

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

The substitute changes the description of Section 855B(a)(1)(A) in section 9, line 13, page 6.

The substitute changes Section 855B(f) to read: "A citation or notice is not necessary to invest in or sell securities under an investment plan authorized by the court under Subsection (b)(1) of this section." In the original it reads: " A citation is not necessary under this section unless ordered by the court."

The substitute deletes the words "in other legal proceedings" from the new Section 874, Probate Code. Line 21, p. 7.

The effective date of the change to Section 694A is changed so that it is tied to the date the court investigator or guardian ad litem makes his or her report and not to the date he or she files an application for restoration or modification, since the purpose of the change is to make it unnecessary for him to file such an application if he deems it not in the best interest of the ward.

The substitute adds a new section not in the original, numbered 15 in the substitute, dealing with prospective application to investment plans of changes made to Section 855B of the Probate Code. A reference to 855B is made in Section 13 of the original bill.