

1-1 By: Casteel (Senate Sponsor - Wentworth) H.B. No. 1472
1-2 (In the Senate - Received from the House May 16, 2005;
1-3 May 17, 2005, read first time and referred to Committee on
1-4 Jurisprudence; May 21, 2005, reported favorably by the following
1-5 vote: Yeas 5, Nays 0; May 21, 2005, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to the creation of a management trust by a probate court.

1-9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-10 SECTION 1. Section 867, Texas Probate Code, is amended by
1-11 amending Subsections (b), (c), (d), and (f) and adding Subsections
1-12 (a-1) and (b-1)-(b-5) to read as follows:

1-13 (a-1) The following persons may apply for the creation of a
1-14 trust under this section:

1-15 (1) the guardian of the estate of a ward;

1-16 (2) the guardian of the person of a ward;

1-17 (3) the guardian of both the person of and estate of a
1-18 ward;

1-19 (4) an attorney ad litem or guardian ad litem
1-20 appointed to represent a ward or the ward's interests;

1-21 (5) a person interested in the welfare of an alleged
1-22 incapacitated person who does not have a guardian of the estate; or

1-23 (6) an attorney ad litem or guardian ad litem
1-24 appointed to represent an alleged incapacitated person who does not
1-25 have a guardian or that person's interests.

1-26 (b) On application by an appropriate person as provided by
1-27 Subsection (a-1) of this section ~~[the guardian of a ward or by a~~
1-28 ~~ward's attorney ad litem or an incapacitated person's guardian ad~~
1-29 ~~litem at any time after the date of the ad litem's appointment under~~
1-30 ~~Section 646 or another provision of this code], the court with~~
1-31 ~~jurisdiction over the guardianship [in which the guardianship~~
1-32 ~~proceeding is pending] may enter an order that creates for the~~
1-33 ~~ward's [or incapacitated person's] benefit a trust for the~~
1-34 ~~management of guardianship funds [or funds of the incapacitated~~
1-35 ~~person's estate] if the court finds that the creation of the trust~~
1-36 ~~is in the ward's [or incapacitated person's] best interests.~~
1-37 ~~[Except as provided by Subsections (c) and (d) of this section, the~~
1-38 ~~court shall appoint a financial institution to serve as trustee of~~
1-39 ~~the trust.]~~

1-40 (b-1) On application by an appropriate person as provided by
1-41 Subsection (a-1) of this section and regardless of whether an
1-42 application for guardianship has been filed on the alleged
1-43 incapacitated person's behalf, a proper court may enter an order
1-44 that creates a trust for the management of the estate of an alleged
1-45 incapacitated person who does not have a guardian if the court,
1-46 after a hearing, finds that:

1-47 (1) the person is an incapacitated person; and

1-48 (2) the creation of the trust is in the incapacitated
1-49 person's best interests.

1-50 (b-2) If a proceeding for the appointment of a guardian for
1-51 an alleged incapacitated person is pending, an application for the
1-52 creation of a trust for the alleged incapacitated person under
1-53 Subsection (b-1) of this section must be filed in the same court in
1-54 which the guardianship proceeding is pending.

1-55 (b-3) The court shall conduct a hearing to determine
1-56 incapacity under Subsection (b-1) of this section using the same
1-57 procedures and evidentiary standards as required in a hearing for
1-58 the appointment of a guardian for a proposed ward.

1-59 (b-4) If, after a hearing, the court finds that a person for
1-60 whom an application is filed under Subsection (b-1) of this section
1-61 is an incapacitated person but that it is not in the incapacitated
1-62 person's best interests to have the court create a management trust
1-63 for the person's estate, the court may appoint a guardian of the
1-64 person or estate, or both, for the incapacitated person without the

2-1 necessity of instituting a separate proceeding for that purpose.

2-2 (b-5) Except as provided by Subsections (c) and (d) of this
 2-3 section, the court shall appoint a financial institution to serve
 2-4 as trustee of a trust created under this section.

2-5 (c) If the value of the trust's principal is \$50,000 or
 2-6 less, the court may appoint a person other than a financial
 2-7 institution to serve as trustee of the trust only if the court finds
 2-8 the appointment to be in the ward's or incapacitated person's best
 2-9 interests.

2-10 (d) If the value of the trust's principal is more than
 2-11 \$50,000, the court may appoint a person other than a financial
 2-12 institution to serve as trustee of the trust only if the court finds
 2-13 that:

2-14 (1) no financial institution is willing to serve as
 2-15 trustee; and

2-16 (2) the appointment is in the ward's or incapacitated
 2-17 person's best interests.

2-18 (f) If a trust is created for a ward, the [The] order shall
 2-19 direct a person holding property belonging to the ward or to which
 2-20 the ward is entitled [the guardian or another person] to deliver all
 2-21 or part of the property [assets of the guardianship] to a person or
 2-22 corporate fiduciary appointed by the court as trustee of the trust.
 2-23 If a trust is created for an incapacitated person who does not have
 2-24 a guardian, the order shall direct a person holding property
 2-25 belonging to the incapacitated person or to which the incapacitated
 2-26 person is entitled to deliver all or part of the property to the
 2-27 corporate fiduciary or other person appointed as trustee of the
 2-28 trust. The order shall include terms, conditions, and limitations
 2-29 placed on the trust. The court shall maintain the trust under the
 2-30 same cause number as the guardianship proceeding, if applicable.

2-31 SECTION 2. Subpart N, Part 4, Chapter XIII, Texas Probate
 2-32 Code, is amended by adding Section 867A to read as follows:

2-33 Sec. 867A. VENUE. If a proceeding for the appointment of a
 2-34 guardian for the alleged incapacitated person is not pending on the
 2-35 date the application is filed, venue for a proceeding to create a
 2-36 trust for an alleged incapacitated person under Section 867(b-1) of
 2-37 this code must be determined in the same manner as venue for a
 2-38 proceeding for the appointment of a guardian is determined under
 2-39 Section 610 of this code.

2-40 SECTION 3. Sections 868(a), (b), (d), and (f), Texas
 2-41 Probate Code, are amended to read as follows:

2-42 (a) Except as provided by Subsection (d) of this section, a
 2-43 trust created under Section 867 of this code must provide that:

2-44 (1) the ward or incapacitated person is the sole
 2-45 beneficiary of the trust;

2-46 (2) the trustee may disburse an amount of the trust's
 2-47 principal or income as the trustee determines is necessary to
 2-48 expend for the health, education, support, or maintenance of the
 2-49 ward or incapacitated person;

2-50 (3) the income of the trust that the trustee does not
 2-51 disburse under Subdivision (2) of this subsection must be added to
 2-52 the principal of the trust;

2-53 (4) if the trustee is a corporate fiduciary, the
 2-54 trustee serves without giving a bond; and

2-55 (5) the trustee, on annual application to the court
 2-56 and subject to the court's approval, is entitled to receive
 2-57 reasonable compensation for services that the trustee provided to
 2-58 the ward or incapacitated person as the ward's or incapacitated
 2-59 person's trustee that is:

2-60 (A) to be paid from the trust's income,
 2-61 principal, or both; and

2-62 (B) determined in the same manner as compensation
 2-63 of a guardian of an estate under Section 665 of this code.

2-64 (b) The trust may provide that a trustee make a
 2-65 distribution, payment, use, or application of trust funds for the
 2-66 health, education, support, or maintenance of the ward or
 2-67 incapacitated person or of another person whom the ward or
 2-68 incapacitated person is legally obligated to support, as necessary
 2-69 and without the intervention of a guardian or other representative

of the ward or of a representative of the incapacitated person, to:

(1) the ward's guardian;

(2) a person who has physical custody of the ward or incapacitated person or another person whom the ward or incapacitated person is legally obligated to support; or

(3) a person providing a good or service to the ward or incapacitated person or another person whom the ward or incapacitated person is legally obligated to support.

(d) When creating or modifying a trust, the court may omit or modify terms required by Subsection (a)(1) or (2) of this section only if the court determines that the omission or modification:

(1) is necessary and appropriate for the ward or incapacitated person to be eligible to receive public benefits or assistance under a state or federal program that is not otherwise available to the ward or incapacitated person; and

(2) is in the ward's or incapacitated person's best interests.

(f) If the trustee determines that it is in the best interest of the ward or incapacitated person, the trustee may invest funds of the trust in the Texas tomorrow fund established by Subchapter F, Chapter 54, Education Code.

SECTION 4. Section 869(b), Texas Probate Code, is amended to read as follows:

(b) The ward or guardian of the ward's estate or the incapacitated person, as applicable, may not revoke the trust.

SECTION 5. Section 869C, Texas Probate Code, is amended to read as follows:

Sec. 869C. JURISDICTION OVER TRUST MATTERS. A court that creates a trust under Section 867 of this code has the same jurisdiction to hear matters relating to the trust as the court has with respect to ~~the~~ guardianship and other matters covered by this chapter.

SECTION 6. Section 870, Texas Probate Code, is amended to read as follows:

Sec. 870. TERMINATION OF TRUST. (a) If the ward or incapacitated person is a minor, the trust terminates:

(1) on the death of the ward or incapacitated person or the ward's or incapacitated person's 18th birthday, whichever is earlier; or

(2) on the date provided by court order which may not be later than the ward's or incapacitated person's 25th birthday.

(b) If the ward or incapacitated person is not ~~an incapacitated person other than~~ a minor, the trust terminates on the date the court determines that continuing the trust is no longer in the ward's or incapacitated person's best interests or on the death of the ward or incapacitated person.

SECTION 7. Section 871(b), Texas Probate Code, is amended to read as follows:

(b) If a trust has been created under this section for a ward, the ~~The~~ trustee shall provide a copy of the annual account to the guardian of the ward's estate or person.

SECTION 8. Section 873, Texas Probate Code, is amended to read as follows:

Sec. 873. DISTRIBUTION OF TRUST PROPERTY. Unless otherwise provided by the court, the trustee shall:

(1) prepare a final account in the same form and manner that is required of a guardian under Section 749 of this code; and

(2) on court approval, distribute the principal or any undistributed income of the trust:

(A) to the ward or incapacitated person when the trust terminates on its own terms;

(B) to the successor trustee on appointment of a successor trustee; or

(C) to the representative of the deceased ward's or incapacitated person's estate on the ward's or incapacitated person's death.

SECTION 9. This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the

4-1 effective date of this Act is governed by the law in effect when the
4-2 application was filed, and the former law is continued in effect for
4-3 that purpose.

4-4 SECTION 10. This Act takes effect September 1, 2005.

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