

BILL ANALYSIS

C.S.H.B. 3080
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Sections 665 and 868, Texas Probate Code, authorize compensation of the guardian of a person and of the trustee of a guardianship management trust at the end of an accounting period. Due to the large amount of work that is sometimes required, the delay in payment, which can last for over a year, may cause a hardship to the representative.

Section 665 limits compensation paid a guardian to a percentage of the income of the ward's estate. This limitation may produce unreasonably low compensation when the ward's assets are held in a guardianship management trust.

Section 665B authorizes compensation of legal fees for a person applying for the appointment as a guardian, even if the applicant is not the person appointed. The law, however, does not expressly authorize compensation of legal fees for a person applying for the creation of a guardianship management trust.

A guardian's compensation is determined by a formula relating to receipts and disbursements of the ward's estate, while attorney's fees are determined by a reasonable compensation determination by the court, usually based on the hours worked and the attorney's hourly rate. Confusion may arise as to the proper method of compensation when a guardian is an attorney, providing legal services in addition to the guardianship services, and seeks compensation for both.

Sections 677A and 679 relating to guardianship designations for minor children or for oneself are determined to be self-proven by attaching an affidavit of the designator and attesting witnesses that the designation was executed in accordance with the requisite formalities. When proving an affidavit requires that the designator and attesting witnesses sign the designation a second time problems occasionally arise when one or more required signatures are inadvertently omitted. The use of the optional one-step method may reduce errors related to missing signatures. Guardianship designations executed with the current two-step method will continue in existence.

C.S.H.B. 3080 permits a court to exceed the percentage limitations tied to a ward's guardianship estate where a ward's assets are held in a guardianship management trust and trust funds are available to pay reasonable compensation. The bill permits a court to authorize quarterly estimated compensation for guardians of a person and trustees of guardianship management trusts. However, the court retains the ability to compel the guardian or trustee to return excess fees if it is determined at the end of the accounting period that the advances exceed the amounts to which the individual is entitled. The bill authorizes compensation for an attorney of a person applying for the creation of a guardianship management trust. The bill establishes that, in order to receive compensation for legal services provided, an attorney who serves as a guardian needs to itemize the legal services provided to the ward. The bill provides that such an attorney is not entitled to compensation for guardianship services that are not legal services. The bill adds optional provisions for a one-step execution method for guardianship designations, based in part on a similar optional provision in other law. The bill authorizes the court to appoint eligible

persons or entities to serve as trustee of a management trust instead of a financial institution, under certain conditions. The bill provides for the establishment of pooled trust subaccounts and for the transfer of property from a management trust to a subaccount.

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

C.S.H.B. 3080 amends the Texas Probate Code to authorize a court, on application of an interested person or on its own motion, to authorize compensation for the guardian or temporary guardian of a person in an estimated amount the court finds reasonable to be paid on a quarterly basis before the guardian or temporary guardian files an annual or final accounting, if the court finds that delaying the payment of compensation until the guardian or temporary guardian files the accounting would create a hardship. The bill authorizes a court that authorizes such compensation under a finding of unreasonably low compensation to later reduce or eliminate the guardian's or temporary guardian's compensation if, on review of an annual or final accounting or otherwise, the court finds that the guardian or temporary guardian received compensation in excess of the permitted amount, has not adequately performed the duties required under law, or has been removed for cause. The bill establishes that if a court reduces or eliminates a guardian's or temporary guardian's compensation, the guardian or temporary guardian and the surety on the guardian's or temporary guardian's bond are liable to the guardianship estate for any excess compensation received. The bill makes conforming changes relating to the court's authorization to set a guardian's or temporary guardian's compensation.

C.S.H.B. 3080 authorizes the compensation of an attorney representing a person applying for the creation of a management trust.

C.S.H.B. 3080 establishes that an attorney who serves as guardian and who also provides legal services in connection with the guardianship is not entitled to compensation for the guardianship services or payment of attorney's fees for the legal services from the ward's estate or other funds available for that purpose unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services. The bill establishes that the attorney is not entitled to compensation for guardianship services that are not legal services. The bill requires the court to set the compensation of the attorney for the performance of guardianship services in accordance with provisions regarding the compensation of guardians and temporary guardians. The bill requires the court to set attorney's fees for the attorney for legal services provided in accordance with provisions relating to payment for professional services, compensation of an attorney representing an applicant, and allowable expenses.

C.S.H.B. 3080 prescribes an alternative form to the self-proving affidavit that may be used in substantially the same form with substantially the same contents by a parent to appoint a guardian for the parent's children in the event of the parent's death or incapacity. The bill establishes that the alternative declaration is considered self-proved to the same extent a declaration executed with a self-proving affidavit is considered self-proved.

C.S.H.B. 3080 prescribes an alternative form to the self-proving alternative declaration for the appointment of a guardian that may be used in substantially the same form with substantially the same contents to declare a guardian in the event of later incapacity or need of a guardian. The bill establishes that the alternative declaration of guardian in the event of later incapacity or need of guardian is considered self-proved to the same extent a declaration executed with a self-proving affidavit is considered self-proved.

C.S.H.B. 3080 clarifies that a guardian of a ward has the power to direct the ward's transport by emergency medical services or other means, in addition to personally transporting the ward, to an inpatient mental health facility for a preliminary examination.

C.S.H.B. 3080 requires a court to appoint an attorney ad litem and authorizes the court, if necessary, to appoint a guardian ad litem, to represent the interests of an allegedly incapacitated person in a hearing to determine the incapacity of that person. The bill increases from \$50,000 to \$150,000 the threshold for the value of a management trust's principal above which the court is authorized to appoint a person or entity other than a financial institution to serve as trustee of the trust. The bill makes such an appointment contingent on a finding by the court that the applicant for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area willing to serve in that capacity. The bill establishes eligibility for appointment as a trustee of a management trust for an individual, including an individual who is certified as a private professional guardian, a nonprofit corporation qualified to serve as a guardian, and a guardianship program. The bill removes the requirement that the court check any list of corporate fiduciaries located in the state that is maintained at the office of the presiding judge of the statutory probate courts or at the principal office of the Texas Bankers Association before making a finding that there is no financial institution willing to serve as trustee of such a trust.

C.S.H.B. 3080 removes a condition in the requirements for a management trust subjecting a trustee's entitlement to compensation on annual application to the court, in addition to the court's approval. The bill clarifies that a trustee's compensation is to be paid, reduced, and eliminated, in addition to being determined, in the same manner as compensation of a guardian of an estate under other law.

C.S.H.B. 3080 authorizes the court to order the transfer of all property in a management trust to a subaccount of a pooled trust established in accordance with the bill's provisions if the court determines that it is in the ward's or incapacitated person's best interests. The bill establishes that the transfer of property from the management trust to the subaccount of the pooled trust is to be treated as a continuation of the management trust and not treated as the establishment of a new trust for purposes of federal law or otherwise in determining the ward's or incapacitated person's eligibility for Medicaid under the state Medicaid program. The bill prohibits the court from allowing termination of the management trust from which property is transferred to a pooled trust until all of the property in the management trust has been transferred to the subaccount of the pooled trust. The bill makes related conforming changes.

C.S.H.B. 3080 authorizes a person interested in the welfare of a minor, a disabled person, or any other incapacitated person to apply to the court for the establishment of a subaccount for the benefit of the minor, disabled person, or other incapacitated person as the beneficiary. The bill requires the court to appoint an attorney ad litem for a person who is a minor or has a mental disability and who is the subject of an application to the court for the establishment of a subaccount for that person's benefit. The bill establishes that the attorney ad litem is entitled to a reasonable fee and reimbursement of expenses to be paid from the person's property. The bill authorizes the court to order the establishment of a subaccount of which the person is the beneficiary, and the transfer to the subaccount any of the person's property on hand or accruing to the person if the court finds that it is in the best interests of a person who is the subject of such an application. The bill provides for the terms under which the subaccount terminates and for the disposition of any property remaining in the beneficiary's subaccount after making any required payments to satisfy reimbursement claims for Medicaid services provided to the beneficiary. The bill establishes that the court ordering the establishment of a subaccount for a beneficiary has exclusive jurisdiction of a subsequent proceeding or action that relates to both the beneficiary and the subaccount. The bill sets out procedures for the assessment of fees by the manager or trustee of a pooled trust against a subaccount of that trust. The bill defines "beneficiary," "medical assistance," "pooled trust," and "subaccount."

C.S.H.B. 3080 makes its provisions applicable to a guardianship created before, on, or after the effective date of the bill and an application for guardianship or the creation of a management trust pending on, or filed on or after, the effective date of the bill.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 3080 omits provisions in the original relating to the proper venue for certain causes of action appertaining to or incident to a guardianship estate or relating to a guardianship in which a guardian, ward, or proposed ward is a party. The substitute omits a repealer in the original that repealed a section of the Texas Probate Code to conform to the omitted provision.

C.S.H.B. 3080 differs from the original by adding provisions relating to the appointment of certain persons or entities as the trustee of a management trust under certain conditions and to the establishment of pooled trust subaccounts and the transfer of management trust property to a subaccount of a pooled trust. The substitute includes savings provisions not included in the original to reflect added provisions in the substitute.