

By: Hartnett

H.B. No. 3080

A BILL TO BE ENTITLED

AN ACT

1
2 relating to guardianships and other matters relating to
3 incapacitated persons.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 665, Texas Probate Code, is amended by
6 amending Subsections (a), (b), (c), and (d) and adding Subsections
7 (a-1) and (d-1) to read as follows:

8 (a) The court may authorize compensation for a guardian or a
9 temporary guardian serving as a guardian of the person alone from
10 available funds of the ward's estate or other funds available for
11 that purpose. The court may [~~shall~~] set the compensation in an
12 amount not exceeding five percent of the ward's gross income.

13 (a-1) In determining whether to authorize compensation for
14 a guardian under this section, the court shall consider the ward's
15 monthly income from all sources and whether the ward receives
16 medical assistance under the state Medicaid program.

17 (b) The guardian or temporary guardian of an estate is
18 entitled to reasonable compensation on application to the court at
19 the time the court approves any annual accounting or final
20 accounting filed by the guardian or temporary guardian under this
21 chapter. A fee of five percent of the gross income of the ward's
22 estate and five percent of all money paid out of the estate, subject
23 to the award of an additional amount under Subsection (c) of this
24 section following a review under Subsection (c)(1) of this section,

1 is considered reasonable under this subsection if the court finds
2 that the guardian or temporary guardian has taken care of and
3 managed the estate in compliance with the standards of this
4 chapter.

5 (c) On application of an interested person or on its own
6 motion, the court may:

7 (1) review and modify the amount of compensation
8 authorized under Subsection (a) or [Subsection] (b) of this section
9 if the court finds that the amount is unreasonably low when
10 considering the services rendered as guardian or temporary
11 guardian; and

12 (2) authorize compensation for the guardian or
13 temporary guardian in an estimated amount the court finds
14 reasonable that is to be paid on a quarterly basis before the
15 guardian or temporary guardian files an annual or final accounting
16 if the court finds that delaying the payment of compensation until
17 the guardian or temporary guardian files an accounting would create
18 a hardship for the guardian or temporary guardian.

19 (d) A finding of unreasonably low compensation may not be
20 established under Subsection (c) of this section solely because the
21 amount of compensation is less than the usual and customary charges
22 of the person or entity serving as guardian or temporary guardian.
23 A court that authorizes payment of estimated quarterly compensation
24 under Subsection (c) of this section may later reduce or eliminate
25 the guardian's or temporary guardian's compensation if, on review
26 of an annual or final accounting or otherwise, the court finds that
27 the guardian or temporary guardian:

1 (1) received compensation in excess of the amount
2 permitted under this section;

3 (2) has not adequately performed the duties required
4 of a guardian or temporary guardian under this chapter; or

5 (3) has been removed for cause.

6 (d-1) If a court reduces or eliminates a guardian's or
7 temporary guardian's compensation as provided by Subsection (d) of
8 this section, the guardian or temporary guardian and the surety on
9 the guardian's or temporary guardian's bond are liable to the
10 guardianship estate for any excess compensation received.

11 SECTION 2. The heading to Section 665B, Texas Probate Code,
12 is amended to read as follows:

13 Sec. 665B. COMPENSATION OF ATTORNEY REPRESENTING APPLICANT
14 [CERTAIN ATTORNEYS].

15 SECTION 3. Section 665B(a), Texas Probate Code, is amended
16 to read as follows:

17 (a) A court that creates a guardianship or creates a
18 management trust under Section 867 of this code for a ward under
19 this chapter, on request of a person who filed an application to be
20 appointed guardian of the proposed ward, an application [~~or~~] for
21 the appointment of another suitable person as guardian of the
22 proposed ward, or an application for the creation of the management
23 trust, may authorize compensation of an attorney who represents the
24 person who filed the application at the application hearing,
25 regardless of whether the person is appointed the ward's guardian
26 or whether a management trust is created, from:

27 (1) available funds of the ward's estate or management

1 trust, if created; or

2 (2) the county treasury if:

3 (A) the ward's estate or, if created, management
4 trust, is insufficient to pay for the services provided by the
5 attorney; and

6 (B) funds in the county treasury are budgeted for
7 that purpose.

8 SECTION 4. Subpart H, Part 2, Chapter XIII, Texas Probate
9 Code, is amended by adding Section 665D to read as follows:

10 Sec. 665D. COMPENSATION AND PAYMENT OF ATTORNEY'S FEES OF
11 ATTORNEY SERVING AS GUARDIAN. (a) Notwithstanding any other
12 provision of this subpart, an attorney who serves as guardian and
13 who also provides legal services in connection with the
14 guardianship is not entitled to compensation for the guardianship
15 services or payment of attorney's fees for the legal services from
16 the ward's estate or other funds available for that purpose unless
17 the attorney files with the court a detailed description of the
18 services performed that identifies which of the services provided
19 were guardianship services and which were legal services.

20 (b) An attorney described by Subsection (a) of this section
21 is not entitled to payment of attorney's fees for guardianship
22 services that are not legal services.

23 (c) The court shall set the compensation of an attorney
24 described by Subsection (a) of this section for the performance of
25 guardianship services in accordance with Section 665 of this code.
26 The court shall set attorney's fees for an attorney described by
27 Subsection (a) of this section for legal services provided in

1 accordance with Sections 665A, 665B, and 666 of this code.

2 SECTION 5. Section 677A, Texas Probate Code, is amended by
3 amending Subsection (g) and adding Subsections (i) and (j) to read
4 as follows:

5 (g) A declaration and affidavit may be in any form adequate
6 to clearly indicate the declarant's intention to designate a
7 guardian for the declarant's child. The following form may, but
8 need not, be used:

9 DECLARATION OF APPOINTMENT OF GUARDIAN FOR MY CHILDREN IN THE EVENT
10 OF MY DEATH OR INCAPACITY

11 I, _____, make this Declaration to appoint as guardian
12 for my child or children, listed as follows, in the event of my
13 death or incapacity:

14 _____
15 _____
16 _____

17 (add blanks as appropriate)

18 I designate _____ to serve as guardian of the person of
19 my (child or children), _____ as first alternate guardian of
20 the person of my (child or children), _____ as second
21 alternate guardian of the person of my (child or children), and
22 _____ as third alternate guardian of the person of my (child or
23 children).

24 I direct that the guardian of the person of my (child or
25 children) serve (with or without) bond.

26 (If applicable) I designate _____ to serve as guardian
27 of the estate of my (child or children), _____ as first

1 alternate guardian of the estate of my (child or children),
2 _____ as second alternate guardian of the estate of my (child
3 or children), and _____ as third alternate guardian of the
4 estate of my (child or children).

5 If any guardian or alternate guardian dies, does not qualify,
6 or resigns, the next named alternate guardian becomes guardian of
7 my (child or children).

8 Signed this _____ day of _____, 20__.

9
10 _____
11 Declarant

12 _____
13 Witness

Witness

14 SELF-PROVING AFFIDAVIT

15 Before me, the undersigned authority, on this date personally
16 appeared _____, the declarant, and _____ and _____
17 as witnesses, and all being duly sworn, the declarant said that the
18 above instrument was his or her Declaration of Appointment of
19 Guardian for the Declarant's Children in the Event of Declarant's
20 Death or Incapacity and that the declarant had made and executed it
21 for the purposes expressed in the declaration. The witnesses
22 declared to me that they are each 14 years of age or older, that they
23 saw the declarant sign the declaration, that they signed the
24 declaration as witnesses, and that the declarant appeared to them
25 to be of sound mind.

26
27 _____
28 Declarant

29
30 _____
31 Affiant

Affiant

32 Subscribed and sworn to before me by _____, the above

1 named declarant, and _____ (names of affiants)
2 affiants, on this ___ day of _____, 20__.

3 _____
4 Notary Public in and for the
5 State of Texas
6 My Commission expires:
7 _____

8 (i) As an alternative to the self-proving affidavit
9 authorized by Subsection (g) of this section, a declaration of
10 appointment of a guardian for the declarant's children in the event
11 of the declarant's death or incapacity may be simultaneously
12 executed, attested, and made self-proved by including the following
13 in substantially the same form and with substantially the same
14 contents:

15 I, _____, as declarant, after being duly
16 sworn, declare to the undersigned witnesses and to the undersigned
17 authority that this instrument is my Declaration of Appointment of
18 Guardian for My Children in the Event of My Death or Incapacity, and
19 that I have made and executed it for the purposes expressed in the
20 declaration. I now sign this declaration in the presence of the
21 attesting witnesses and the undersigned authority on this ___ day
22 of _____, 20__.

23 _____
24 Declarant

25 The undersigned, _____ and
26 _____, each being 14 years of age or older, after
27 being duly sworn, declare to the declarant and to the undersigned
28 authority that the declarant declared to us that this instrument is

1 the declarant's Declaration of Appointment of Guardian for the
2 Declarant's Children in the Event of Declarant's Death or
3 Incapacity and that the declarant executed it for the purposes
4 expressed in the declaration. The declarant then signed this
5 declaration and we believe the declarant to be of sound mind. We now
6 sign our names as attesting witnesses on this _____ day of
7 _____, 20_____.

8 _____
9 Witness

10 _____
11 Witness

12 Subscribed and sworn to before me by the above named
13 declarant, and affiants, this _____ day of _____, 20_____.

14 _____
15 Notary Public in and for the State of Texas

16 My Commission Expires: _____

17 (j) A declaration that is executed as provided by Subsection
18 (i) of this section is considered self-proved to the same extent a
19 declaration executed with a self-proving affidavit under
20 Subsection (g) of this section is considered self-proved.

21 SECTION 6. Section 679, Texas Probate Code, is amended by
22 amending Subsection (i) and adding Subsections (k) and (l) to read
23 as follows:

24 (i) A declaration and affidavit may be in any form adequate
25 to clearly indicate the declarant's intention to designate a
26 guardian. The following form may, but need not, be used:

27 DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF

GUARDIAN

I, _____, make this Declaration of Guardian, to operate if the need for a guardian for me later arises.

1. I designate _____ to serve as guardian of my person, _____ as first alternate guardian of my person, _____ as second alternate guardian of my person, and _____ as third alternate guardian of my person.

2. I designate _____ to serve as guardian of my estate, _____ as first alternate guardian of my estate, _____ as second alternate guardian of my estate, and _____ as third alternate guardian of my estate.

3. If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes my guardian.

4. I expressly disqualify the following persons from serving as guardian of my person: _____, _____, and _____.

5. I expressly disqualify the following persons from serving as guardian of my estate: _____, _____, and _____.

Signed this ___ day of _____, 20__.

Declarant

Witness

Witness

SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this date personally appeared _____, the declarant, and _____ and _____ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of

1 Guardian and that the declarant had made and executed it for the
2 purposes expressed in the declaration. The witnesses declared to
3 me that they are each 14 years of age or older, that they saw the
4 declarant sign the declaration, that they signed the declaration as
5 witnesses, and that the declarant appeared to them to be of sound
6 mind.

7 _____
8 Declarant
9 _____
10 Affiant
11 _____
12 Affiant

13 Subscribed and sworn to before me by the above named
14 declarant and affiants on this ____ day of _____, 20__.

15 _____
16 Notary Public in and for the
17 State of Texas
18 My Commission expires:
19 _____

20 (k) As an alternative to the self-proving affidavit
21 authorized by Subsection (i) of this section, a Declaration of
22 Guardian in the Event of Later Incapacity or Need of Guardian may be
23 simultaneously executed, attested, and made self-proved by
24 including the following in substantially the same form and with
25 substantially the same contents:

26 I, _____, as declarant, after being duly
27 sworn, declare to the undersigned witnesses and to the undersigned
28 authority that this instrument is my Declaration of Guardian in the
29 Event of Later Incapacity or Need of Guardian, and that I have made
30 and executed it for the purposes expressed in the declaration. I now
31 sign this declaration in the presence of the attesting witnesses

1 and the undersigned authority on this ____ day of _____, 20__.

2 _____

3 Declarant

4 The _____ undersigned, _____ and

5 _____, each being 14 years of age or older, after

6 being duly sworn, declare to the declarant and to the undersigned

7 authority that the declarant declared to us that this instrument is

8 the declarant's Declaration of Guardian in the Event of Later

9 Incapacity or Need of Guardian and that the declarant executed it

10 for the purposes expressed in the declaration. The declarant then

11 signed this declaration and we believe the declarant to be of sound

12 mind. We now sign our names as attesting witnesses on this ____ day

13 of _____, 20__.

14 _____

15 Witness

16 _____

17 Witness

18 Subscribed and sworn to before me by the above named

19 declarant, and affiants, this ____ day of _____, 20__.

20 _____

21 Notary Public in and for the State of Texas

22 My Commission Expires: _____

23 (1) A declaration that is executed as provided by Subsection

24 (k) of this section is considered self-proved to the same extent a

25 declaration executed with a self-proving affidavit under

26 Subsection (i) of this section is considered self-proved.

1 SECTION 7. Section 767(b), Texas Probate Code, is amended
2 to read as follows:

3 (b) Notwithstanding Subsection (a)(4) of this section, a
4 guardian of the person of a ward has the power to personally
5 transport the ward or to direct the ward's transport by emergency
6 medical services or other means to an inpatient mental health
7 facility for a preliminary examination in accordance with
8 Subchapters A and C, Chapter 573, Health and Safety Code.

9 SECTION 8. Sections 867(b-3), (c), (d), and (e), Texas
10 Probate Code, are amended to read as follows:

11 (b-3) The court shall conduct a hearing to determine
12 incapacity under Subsection (b-1) of this section using the same
13 procedures and evidentiary standards as required in a hearing for
14 the appointment of a guardian for a proposed ward. The court shall
15 appoint an attorney ad litem and, if necessary, may appoint a
16 guardian ad litem, to represent the interests of the alleged
17 incapacitated person in the proceeding.

18 (c) Subject to Subsection (d) of this section, [If the value
19 of the trust's principal is \$50,000 or less, the court may appoint a
20 person other than a financial institution to serve as trustee of the
21 trust only] if the court finds that it is [the appointment to be] in
22 the ward's or incapacitated person's best interests, the court may
23 appoint a person or entity that meets the requirements of
24 Subsection (e) of this section to serve as trustee of the trust
25 instead of appointing a financial institution to serve in that
26 capacity.

27 (d) If the value of the trust's principal is more than

1 \$150,000 [~~\$50,000~~], the court may appoint a person or entity other
2 than a financial institution in accordance with Subsection (c) of
3 this section to serve as trustee of the trust only if the court, in
4 addition to the finding required by that subsection, finds that the
5 applicant for the creation of the trust, after the exercise of due
6 diligence, has been unable to find a [+

7 [~~(1) no~~] financial institution in the geographic area
8 [~~is~~] willing to serve as trustee [~~, and~~

9 [~~(2) the appointment is in the ward's or incapacitated~~
10 person's best interests].

11 (e) The following are eligible for appointment as trustee
12 under Subsection (c) or (d) of this section:

13 (1) an individual, including an individual who is
14 certified as a private professional guardian;

15 (2) a nonprofit corporation qualified to serve as a
16 guardian; and

17 (3) a guardianship program [~~Before making a finding~~
18 ~~that there is no financial institution willing to serve as trustee~~
19 ~~under Subsection (d)(1) of this section, the court must check any~~
20 ~~list of corporate fiduciaries located in this state that is~~
21 ~~maintained at the office of the presiding judge of the statutory~~
22 ~~probate courts or at the principal office of the Texas Bankers~~
23 ~~Association].~~

24 SECTION 9. Section 868(a), Texas Probate Code, is amended
25 to read as follows:

26 (a) Except as provided by Subsection (d) of this section, a
27 trust created under Section 867 of this code must provide that:

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

3 (2) the trustee may disburse an amount of the trust's
4 principal or income as the trustee determines is necessary to
5 expend for the health, education, support, or maintenance of the
6 ward or incapacitated person;

7 (3) the income of the trust that the trustee does not
8 disburse under Subdivision (2) of this subsection must be added to
9 the principal of the trust;

10 (4) if the trustee is a corporate fiduciary, the
11 trustee serves without giving a bond; and

12 (5) the trustee, [~~on annual application to the court~~
13 ~~and~~] subject to the court's approval, is entitled to receive
14 reasonable compensation for services that the trustee provided to
15 the ward or incapacitated person as the ward's or incapacitated
16 person's trustee that is:

17 (A) to be paid from the trust's income,
18 principal, or both; and

19 (B) determined, paid, reduced, and eliminated in
20 the same manner as compensation of a guardian of an estate under
21 Section 665 of this code.

22 SECTION 10. Subpart N, Part 4, Chapter XIII, Texas Probate
23 Code, is amended by adding Section 868C to read as follows:

24 Sec. 868C. TRANSFER OF MANAGEMENT TRUST PROPERTY TO POOLED
25 TRUST. (a) If the court determines that it is in the ward's or
26 incapacitated person's best interests, the court may order the
27 transfer of all property in a management trust created under

1 Section 867 of this code to a subaccount of a pooled trust
2 established in accordance with Subpart I, Part 5, of this chapter.
3 The transfer of property from the management trust to the
4 subaccount of the pooled trust shall be treated as a continuation of
5 the management trust and may not be treated as the establishment of
6 a new trust for purposes of 42 U.S.C. Section 1396p(d)(4)(A) or (C)
7 or otherwise for purposes of the ward's or incapacitated person's
8 eligibility for medical assistance under Chapter 32, Human
9 Resources Code.

10 (b) The court may not allow termination of the management
11 trust created under Section 867 of this code from which property is
12 transferred under this section until all of the property in the
13 management trust has been transferred to the subaccount of the
14 pooled trust.

15 SECTION 11. Section 870(b), Texas Probate Code, is amended
16 to read as follows:

17 (b) If the ward or incapacitated person is not a minor, the
18 trust terminates on the date the court determines that continuing
19 the trust is no longer in the ward's or incapacitated person's best
20 interests, subject to Section 868C(b) of this code, or on the death
21 of the ward or incapacitated person.

22 SECTION 12. Section 875(k), Texas Probate Code, is amended
23 to read as follows:

24 (k) If an application for a temporary guardianship, for the
25 conversion of a temporary guardianship to a permanent guardianship,
26 or for a permanent guardianship is challenged or contested, the
27 court, on the court's own motion or on the motion of any interested

1 party, may appoint a [~~new~~] temporary guardian or grant a temporary
2 restraining order under Rule 680, Texas Rules of Civil Procedure,
3 or both, without issuing additional citation if the court finds
4 that the appointment or the issuance of the order is necessary to
5 protect the proposed ward or the proposed ward's estate.

6 SECTION 13. Part 5, Chapter XIII, Texas Probate Code, is
7 amended by adding Subpart I to read as follows:

8 SUBPART I. ESTABLISHMENT OF POOLED TRUST SUBACCOUNTS; TRANSFERS

9 Sec. 910. DEFINITIONS. In this subpart:

10 (1) "Beneficiary" means a minor, a disabled person, or
11 any other incapacitated person for whom a subaccount is
12 established.

13 (2) "Medical assistance" means benefits and services
14 under the medical assistance program administered under Chapter 32,
15 Human Resources Code.

16 (3) "Pooled trust" means a trust that meets the
17 requirements of 42 U.S.C. Section 1396p(d)(4)(C) for purposes of
18 exempting the trust from the applicability of 42 U.S.C. Section
19 1396p(d) in determining the eligibility of a person who is disabled
20 for medical assistance.

21 (4) "Subaccount" means an account in a pooled trust
22 established solely for the benefit of a beneficiary.

23 Sec. 911. APPLICATION. A person interested in the welfare
24 of a minor, a disabled person, or any other incapacitated person may
25 apply to the court for the establishment of a subaccount for the
26 benefit of the minor, disabled person, or other incapacitated
27 person as the beneficiary.

1 Sec. 912. APPOINTMENT OF ATTORNEY AD LITEM. The court shall
2 appoint an attorney ad litem for a person who is a minor or has a
3 mental disability and who is the subject of an application under
4 Section 911 of this code. The attorney ad litem is entitled to a
5 reasonable fee and reimbursement of expenses to be paid from the
6 person's property.

7 Sec. 913. TRANSFER. If the court finds that it is in the
8 best interests of a person who is the subject of an application
9 under Section 911 of this code, the court may order:

10 (1) the establishment of a subaccount of which the
11 person is the beneficiary; and

12 (2) the transfer to the subaccount of any of the
13 person's property on hand or accruing to the person.

14 Sec. 914. TERMS OF SUBACCOUNT. Unless the court orders
15 otherwise, the terms governing the subaccount must provide that:

16 (1) the subaccount terminates on the earliest of the
17 date of:

18 (A) the beneficiary's 18th birthday, if the
19 beneficiary is not disabled on that date and was a minor at the time
20 the subaccount was established;

21 (B) the beneficiary's death; or

22 (C) an order of the court terminating the
23 subaccount; and

24 (2) on termination, any property remaining in the
25 beneficiary's subaccount after making any required payments to
26 satisfy the amounts of medical assistance reimbursement claims for
27 medical assistance provided to the beneficiary under this state's

1 medical assistance program and other states' medical assistance
2 programs shall be distributed to:

3 (A) the beneficiary, if on the date of
4 termination the beneficiary is living and is not incapacitated;

5 (B) the beneficiary's guardian, if on the date of
6 termination the beneficiary is living and is incapacitated; or

7 (C) the personal representative of the
8 beneficiary's estate, if the beneficiary is deceased on the date of
9 termination.

10 Sec. 915. JURISDICTION EXCLUSIVE. Notwithstanding any
11 other law, the court that orders the establishment of a subaccount
12 for a beneficiary has exclusive jurisdiction of a subsequent
13 proceeding or action that relates to both the beneficiary and the
14 subaccount, and the proceeding or action may only be brought in that
15 court.

16 Sec. 916. FEES AND ACCOUNTING. (a) The manager or trustee
17 of a pooled trust may:

18 (1) assess fees against a subaccount of that pooled
19 trust established under this subpart in accordance with the
20 manager's or trustee's standard fee structure; and

21 (2) pay those fees from the subaccount.

22 (b) If required by the court, the manager or trustee of the
23 pooled trust shall file a copy of the annual report of account with
24 the court clerk.

25 SECTION 14. (a) Except as otherwise provided by this
26 section, the changes in law made by this Act apply to:

27 (1) a guardianship created before, on, or after the

1 effective date of this Act; and

2 (2) an application for a guardianship pending on, or
3 filed on or after, the effective date of this Act.

4 (b) Sections 665, 665B, and 868, Texas Probate Code, as
5 amended by this Act, and Section 665D, Texas Probate Code, as added
6 by this Act, apply to the payment, reduction, or elimination of
7 compensation for services performed on or after the effective date
8 of this Act. Payment, reduction, or elimination of compensation for
9 services performed before the effective date of this Act is
10 governed by the law in effect on the date the services were
11 performed, and the former law is continued in effect for that
12 purpose.

13 (c) Sections 867 and 870, Texas Probate Code, as amended by
14 this Act, and Section 868C, Texas Probate Code, as added by this
15 Act, apply to an application for the creation, modification, or
16 termination of a management trust under Subpart N, Part 4, Chapter
17 XIII, Texas Probate Code, that is filed on or after the effective
18 date of this Act. An application for the creation, modification, or
19 termination of a management trust filed before the effective date
20 of this Act is governed by the law in effect on the date the
21 application was filed, and the former law is continued in effect for
22 that purpose.

23 (d) Subpart I, Part 5, Chapter XIII, Texas Probate Code, as
24 added by this Act, applies to an application for the establishment
25 of a subaccount of a pooled trust that is filed on or after the
26 effective date of this Act.

27 SECTION 15. This Act takes effect September 1, 2009.