

By: Hartnett

H.B. No. 3080

A BILL TO BE ENTITLED

AN ACT

relating to guardianships and other matters relating to incapacitated persons.

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

SECTION 1. Section 608, Texas Probate Code, is amended to read as follows:

Sec. 608. TRANSFER OF GUARDIANSHIP PROCEEDING. (a) A judge of a statutory probate court, on the motion of a party to the action or of a person interested in a guardianship, may transfer to the judge's court from a district, county, or statutory court a cause of action appertaining to or incident to a guardianship estate that is pending in the statutory probate court or a cause of action relating to a guardianship in which a guardian, ward, or proposed ward in a guardianship pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the guardianship estate.

(b) Except with respect to a cause of action described by Section 15.007, Civil Practice and Remedies Code, or Section 123.005, Property Code, venue of a cause of action described by Subsection (a) of this section is proper, as provided by Section 610A(a) of this code, in the statutory probate court in which the guardianship is pending, and the judge of the statutory probate court may transfer the cause of action as provided by Subsection (a)

1 of this section to the statutory probate court, regardless of  
2 whether venue would otherwise be proper or mandatory in the county  
3 of the court from which the action will be transferred.

4 SECTION 2. Subpart B, Part 2, Chapter XIII, Texas Probate  
5 Code, is amended by adding Section 610A to read as follows:

6 Sec. 610A. VENUE FOR CERTAIN ACTIONS APPERTAINING TO OR  
7 INCIDENT TO AN ESTATE OR IN WHICH GUARDIAN, WARD, OR PROPOSED WARD  
8 IS PARTY. (a) Except with respect to a cause of action described  
9 by Section 15.007, Civil Practice and Remedies Code, venue for the  
10 following is proper in the court in which the guardianship estate is  
11 pending:

12 (1) a cause of action appertaining to or incident to a  
13 guardianship estate; and

14 (2) a cause of action related to a guardianship in  
15 which a guardian, ward, or proposed ward is a party.

16 (b) Except with respect to a cause of action described by  
17 Section 15.007, Civil Practice and Remedies Code, venue for a cause  
18 of action against a former guardian of a ward is proper in the court  
19 in which the ward's guardianship is pending or was last pending.

20 (c) Notwithstanding any other provision of this chapter,  
21 the proper venue for an action by or against a guardian for personal  
22 injury, death, or any property damages related to the personal  
23 injury or death action is determined under Section 15.007, Civil  
24 Practice and Remedies Code.

25 SECTION 3. Section 665, Texas Probate Code, is amended by  
26 amending Subsections (a), (b), (c), and (d) and adding Subsections  
27 (a-1) and (d-1) to read as follows:

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

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

10 (b) The guardian or temporary guardian of an estate is  
11 entitled to reasonable compensation on application to the court at  
12 the time the court approves any annual accounting or final  
13 accounting filed by the guardian or temporary guardian under this  
14 chapter. A fee of five percent of the gross income of the ward's  
15 estate and five percent of all money paid out of the estate, subject  
16 to the award of an additional amount under Subsection (c) of this  
17 section following a review under Subsection (c)(1) of this section,  
18 is considered reasonable under this subsection if the court finds  
19 that the guardian or temporary guardian has taken care of and  
20 managed the estate in compliance with the standards of this  
21 chapter.

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

24 (1) review and modify the amount of compensation  
25 authorized under Subsection (a) or [~~Subsection~~] (b) of this section  
26 if the court finds that the amount is unreasonably low when  
27 considering the services rendered as guardian or temporary

1 guardian; and

2 (2) authorize compensation for the guardian or  
3 temporary guardian in an estimated amount the court finds  
4 reasonable that is to be paid on a quarterly basis before the  
5 guardian or temporary guardian files an annual or final accounting  
6 if the court finds that delaying the payment of compensation until  
7 the guardian or temporary guardian files an accounting would create  
8 a hardship for the guardian or temporary guardian.

9 (d) A finding of unreasonably low compensation may not be  
10 established under Subsection (c) of this section solely because the  
11 amount of compensation is less than the usual and customary charges  
12 of the person or entity serving as guardian or temporary guardian.  
13 A court that authorizes payment of estimated quarterly compensation  
14 under Subsection (c) of this section may later reduce or eliminate  
15 the guardian's or temporary guardian's compensation if, on review  
16 of an annual or final accounting or otherwise, the court finds that  
17 the guardian or temporary guardian:

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

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

22 (3) has been removed for cause.

23 (d-1) If a court reduces or eliminates a guardian's or  
24 temporary guardian's compensation as provided by Subsection (d) of  
25 this section, the guardian or temporary guardian and the surety on  
26 the guardian's or temporary guardian's bond are liable to the  
27 guardianship estate for any excess compensation received.

1 SECTION 4. The heading to Section 665B, Texas Probate Code,  
2 is amended to read as follows:

3 Sec. 665B. COMPENSATION OF ATTORNEY REPRESENTING APPLICANT  
4 [~~CERTAIN ATTORNEYS~~].

5 SECTION 5. Section 665B(a), Texas Probate Code, is amended  
6 to read as follows:

7 (a) A court that creates a guardianship or creates a  
8 management trust under Section 867 of this code for a ward under  
9 this chapter, on request of a person who filed an application to be  
10 appointed guardian of the proposed ward, an application [~~or~~] for  
11 the appointment of another suitable person as guardian of the  
12 proposed ward, or an application for the creation of the management  
13 trust, may authorize compensation of an attorney who represents the  
14 person who filed the application at the application hearing,  
15 regardless of whether the person is appointed the ward's guardian  
16 or whether a management trust is created, from:

17 (1) available funds of the ward's estate or management  
18 trust, if created; or

19 (2) the county treasury if:

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

23 (B) funds in the county treasury are budgeted for  
24 that purpose.

25 SECTION 6. Subpart H, Part 2, Chapter XIII, Texas Probate  
26 Code, is amended by adding Section 665D to read as follows:

27 Sec. 665D. COMPENSATION AND PAYMENT OF ATTORNEY'S FEES OF

1 ATTORNEY SERVING AS GUARDIAN. (a) Notwithstanding any other  
2 provision of this subpart, an attorney who serves as guardian and  
3 who also provides legal services in connection with the  
4 guardianship is not entitled to compensation for the guardianship  
5 services or payment of attorney's fees for the legal services from  
6 the ward's estate or other funds available for that purpose unless  
7 the attorney files with the court a detailed description of the  
8 services performed that identifies which of the services provided  
9 were guardianship services and which were legal services.

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

13 (c) The court shall set the compensation of an attorney  
14 described by Subsection (a) of this section for the performance of  
15 guardianship services in accordance with Section 665 of this code.  
16 The court shall set attorney's fees for an attorney described by  
17 Subsection (a) of this section for legal services provided in  
18 accordance with Sections 665A, 665B, and 666 of this code.

19 SECTION 7. Section 677A, Texas Probate Code, is amended by  
20 amending Subsection (g) and adding Subsections (i) and (j) to read  
21 as follows:

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

26 DECLARATION OF APPOINTMENT OF GUARDIAN FOR MY CHILDREN IN THE EVENT  
27 OF MY DEATH OR INCAPACITY

1 I, \_\_\_\_\_, make this Declaration to appoint as guardian  
2 for my child or children, listed as follows, in the event of my  
3 death or incapacity:

4 \_\_\_\_\_  
5 \_\_\_\_\_  
6 \_\_\_\_\_

7 (add blanks as appropriate)

8 I designate \_\_\_\_\_ to serve as guardian of the person of  
9 my (child or children), \_\_\_\_\_ as first alternate guardian of  
10 the person of my (child or children), \_\_\_\_\_ as second  
11 alternate guardian of the person of my (child or children), and  
12 \_\_\_\_\_ as third alternate guardian of the person of my (child or  
13 children).

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

16 (If applicable) I designate \_\_\_\_\_ to serve as guardian  
17 of the estate of my (child or children), \_\_\_\_\_ as first  
18 alternate guardian of the estate of my (child or children),  
19 \_\_\_\_\_ as second alternate guardian of the estate of my (child  
20 or children), and \_\_\_\_\_ as third alternate guardian of the  
21 estate of my (child or children).

22 If any guardian or alternate guardian dies, does not qualify,  
23 or resigns, the next named alternate guardian becomes guardian of  
24 my (child or children).

25 Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

26 \_\_\_\_\_  
27 \_\_\_\_\_  
28 Declarant

1 \_\_\_\_\_  
2 Witness

\_\_\_\_\_ Witness

3 SELF-PROVING AFFIDAVIT

4 Before me, the undersigned authority, on this date personally  
5 appeared \_\_\_\_\_, the declarant, and \_\_\_\_\_ and \_\_\_\_\_  
6 as witnesses, and all being duly sworn, the declarant said that the  
7 above instrument was his or her Declaration of Appointment of  
8 Guardian for the Declarant's Children in the Event of Declarant's  
9 Death or Incapacity and that the declarant had made and executed it  
10 for the purposes expressed in the declaration. The witnesses  
11 declared to me that they are each 14 years of age or older, that they  
12 saw the declarant sign the declaration, that they signed the  
13 declaration as witnesses, and that the declarant appeared to them  
14 to be of sound mind.

15 \_\_\_\_\_  
16  
17 Declarant

18 \_\_\_\_\_  
19  
20 Affiant

\_\_\_\_\_ Affiant

21 Subscribed and sworn to before me by \_\_\_\_\_, the above  
22 named declarant, and \_\_\_\_\_ (names of affiants)  
23 affiants, on this \_\_\_ day of \_\_\_\_\_, 20\_\_.

24 \_\_\_\_\_  
25 Notary Public in and for the  
26 State of Texas  
27 My Commission expires:  
28 \_\_\_\_\_

29 (i) As an alternative to the self-proving affidavit  
30 authorized by Subsection (g) of this section, a declaration of  
31 appointment of a guardian for the declarant's children in the event  
32 of the declarant's death or incapacity may be simultaneously



1 executed, attested, and made self-proved by including the following  
2 in substantially the same form and with substantially the same  
3 contents:

4 I, \_\_\_\_\_, as declarant, after being duly  
5 sworn, declare to the undersigned witnesses and to the undersigned  
6 authority that this instrument is my Declaration of Appointment of  
7 Guardian for My Children in the Event of My Death or Incapacity, and  
8 that I have made and executed it for the purposes expressed in the  
9 declaration. I now sign this declaration in the presence of the  
10 attesting witnesses and the undersigned authority on this \_\_\_\_ day  
11 of \_\_\_\_\_, 20\_\_.

12 \_\_\_\_\_  
13 Declarant

14 The undersigned, \_\_\_\_\_ and  
15 \_\_\_\_\_, each being 14 years of age or older, after  
16 being duly sworn, declare to the declarant and to the undersigned  
17 authority that the declarant declared to us that this instrument is  
18 the declarant's Declaration of Appointment of Guardian for the  
19 Declarant's Children in the Event of Declarant's Death or  
20 Incapacity and that the declarant executed it for the purposes  
21 expressed in the declaration. The declarant then signed this  
22 declaration and we believe the declarant to be of sound mind. We now  
23 sign our names as attesting witnesses on this \_\_\_\_ day of  
24 \_\_\_\_\_, 20\_\_.

25 \_\_\_\_\_  
26 Witness

1 \_\_\_\_\_

2 Witness

3 Subscribed and sworn to before me by the above named  
4 declarant, and affiants, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

5 \_\_\_\_\_

6 Notary Public in and for the State of Texas

7 My Commission Expires: \_\_\_\_\_

8 (j) A declaration that is executed as provided by Subsection  
9 (i) of this section is considered self-proved to the same extent a  
10 declaration executed with a self-proving affidavit under  
11 Subsection (g) of this section is considered self-proved.

12 SECTION 8. Section 679, Texas Probate Code, is amended by  
13 amending Subsection (i) and adding Subsections (k) and (l) to read  
14 as follows:

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

18 DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF  
19 GUARDIAN

20 I, \_\_\_\_\_, make this Declaration of Guardian, to operate  
21 if the need for a guardian for me later arises.

22 1. I designate \_\_\_\_\_ to serve as guardian of my person,  
23 \_\_\_\_\_ as first alternate guardian of my person, \_\_\_\_\_ as  
24 second alternate guardian of my person, and \_\_\_\_\_ as third  
25 alternate guardian of my person.

26 2. I designate \_\_\_\_\_ to serve as guardian of my estate,  
27 \_\_\_\_\_ as first alternate guardian of my estate, \_\_\_\_\_ as

1 second alternate guardian of my estate, and \_\_\_\_\_ as third  
2 alternate guardian of my estate.

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

6 4. I expressly disqualify the following persons from serving  
7 as guardian of my person: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

8 5. I expressly disqualify the following persons from serving  
9 as guardian of my estate: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

10 Signed this \_\_\_ day of \_\_\_\_\_, 20\_\_.

11  
12 \_\_\_\_\_  
13 Declarant

14  
15 \_\_\_\_\_  
16 Witness

\_\_\_\_\_   
Witness

17 SELF-PROVING AFFIDAVIT

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

28  
29 \_\_\_\_\_  
30 Declarant

31  
32 \_\_\_\_\_  
33 Affiant

\_\_\_\_\_   
Affiant

1 Subscribed and sworn to before me by the above named  
2 declarant and affiants on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

7 \_\_\_\_\_  
8 (k) As an alternative to the self-proving affidavit  
9 authorized by Subsection (i) of this section, a Declaration of  
10 Guardian in the Event of Later Incapacity or Need of Guardian may be  
11 simultaneously executed, attested, and made self-proved by  
12 including the following in substantially the same form and with  
13 substantially the same contents:

14 I, \_\_\_\_\_, as declarant, after being duly  
15 sworn, declare to the undersigned witnesses and to the undersigned  
16 authority that this instrument is my Declaration of Guardian in the  
17 Event of Later Incapacity or Need of Guardian, and that I have made  
18 and executed it for the purposes expressed in the declaration. I now  
19 sign this declaration in the presence of the attesting witnesses  
20 and the undersigned authority on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

21 \_\_\_\_\_  
22 Declarant

23 The undersigned, \_\_\_\_\_ and  
24 \_\_\_\_\_, each being 14 years of age or older, after  
25 being duly sworn, declare to the declarant and to the undersigned  
26 authority that the declarant declared to us that this instrument is  
27 the declarant's Declaration of Guardian in the Event of Later  
28 Incapacity or Need of Guardian and that the declarant executed it

1 for the purposes expressed in the declaration. The declarant then  
2 signed this declaration and we believe the declarant to be of sound  
3 mind. We now sign our names as attesting witnesses on this \_\_\_\_\_ day  
4 of \_\_\_\_\_, 20\_\_\_\_\_.

5 \_\_\_\_\_  
6 Witness

7 \_\_\_\_\_  
8 Witness

9 Subscribed and sworn to before me by the above named  
10 declarant, and affiants, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

11 \_\_\_\_\_  
12 Notary Public in and for the State of Texas

13 My Commission Expires:\_\_\_\_\_

14 (l) A declaration that is executed as provided by Subsection  
15 (k) of this section is considered self-proved to the same extent a  
16 declaration executed with a self-proving affidavit under  
17 Subsection (i) of this section is considered self-proved.

18 SECTION 9. Section 767(b), Texas Probate Code, is amended  
19 to read as follows:

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

26 SECTION 10. Section 867(b-3), Texas Probate Code, is

1 amended to read as follows:

2 (b-3) The court shall conduct a hearing to determine  
3 incapacity under Subsection (b-1) of this section using the same  
4 procedures and evidentiary standards as required in a hearing for  
5 the appointment of a guardian for a proposed ward. The court shall  
6 appoint an attorney ad litem and, if necessary, may appoint a  
7 guardian ad litem, to represent the interests of the alleged  
8 incapacitated person in the proceeding.

9 SECTION 11. Section 868(a), Texas Probate Code, is amended  
10 to read as follows:

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

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

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

19 (3) the income of the trust that the trustee does not  
20 disburse under Subdivision (2) of this subsection must be added to  
21 the principal of the trust;

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

24 (5) the trustee, [~~on annual application to the court~~  
25 ~~and~~] subject to the court's approval, is entitled to receive  
26 reasonable compensation for services that the trustee provided to  
27 the ward or incapacitated person as the ward's or incapacitated

1 person's trustee that is:

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

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

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

9 (k) If an application for a temporary guardianship, for the  
10 conversion of a temporary guardianship to a permanent guardianship,  
11 or for a permanent guardianship is challenged or contested, the  
12 court, on the court's own motion or on the motion of any interested  
13 party, may appoint a [~~new~~] temporary guardian or grant a temporary  
14 restraining order under Rule 680, Texas Rules of Civil Procedure,  
15 or both, without issuing additional citation if the court finds  
16 that the appointment or the issuance of the order is necessary to  
17 protect the proposed ward or the proposed ward's estate.

18 SECTION 13. Section 607(e), Texas Probate Code, is  
19 repealed.

20 SECTION 14. (a) The changes in law made by this Act apply  
21 to:

22 (1) a guardianship created before, on, or after the  
23 effective date of this Act; and

24 (2) an application for a guardianship or the creation  
25 of a management trust pending on, or filed on or after, the  
26 effective date of this Act.

27 (b) Notwithstanding Subsection (a) of this section,

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

9 (c) Section 608, Texas Probate Code, as amended by this Act,  
10 and Section 610A, Texas Probate Code, as added by this Act, apply  
11 only to actions commenced on or after the effective date of this  
12 Act. An action that is commenced before the effective date of this  
13 Act is governed by the law applicable to the action immediately  
14 before the effective date of this Act, and that law is continued in  
15 effect for that purpose.

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