

BILL ANALYSIS

C.S.S.B. 286

By: Harris

Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Section 665A of the Probate Code provides for the payment of professional services in guardianship cases. Under Section 665A, the court must order the payment of fees for compensation to attorneys, mental health professionals, and interpreters appointed in guardianship cases to be taxed as costs in the case. The costs are all paid out of the proposed ward's estate. If a proposed ward's assets are insufficient to pay for the services provided by these professionals, the county in which the case is being heard is responsible for the costs.

Section 665A of the Probate Code provides that a court may authorize the payment of fees for an attorney who represents a person applying for the creation of a guardianship out of the proposed ward's estate whether or not a guardianship is actually established so long as the applicant acted in good faith. If the ward's estate is insufficient to pay the attorney's fees, the county can be responsible for paying the fees.

These provisions allow a proposed ward's estate to become depleted just by setting up a guardianship for his or her benefit. This is especially true when families disagree over who should be the guardian or how the proposed ward should be cared for. It can also be expensive for counties when a ward's estate is unable to pay for the assessed fees.

This bill may allow a court to allocate attorney's fees among the different parties in the case, as the court determines is fair and just. The bill ensures that if family members are litigating over the guardianship, the proposed ward or the county would not have to pay all of the expenses of the litigation.

As proposed, C.S.S.B. 286 amends current law relating to attorney's fees and other amounts taxed as costs in guardianship proceedings.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

ANALYSIS

SECTION 1. Amends Section 665A, Texas Probate Code, as follows:

Sec. 665A. PAYMENT FOR PROFESSIONAL SERVICES. Requires the court to order the payment of a fee in an amount set by the court that is fair and just as compensation to the attorneys, mental health professionals, and interpreters appointed under this chapter, as applicable, to be taxed as costs in the case. Authorizes the court to allocate attorney's fees taxed as costs under this section among the parties as the court finds is fair and just. Provides that if after examining the proposed ward's assets the court determines the proposed ward is unable to pay for costs allocated to the proposed ward for services provided by an attorney, a mental health professional, or an interpreter appointed under this chapter, as applicable, the county is responsible for those costs, rather than the cost of those services.

SECTION 2. Reenacts Section 665B, Texas Probate Code, as amended by Chapters 314 (H.B. 587) and 390 (H.B. 3080), Acts of the 81st Legislature, Regular Session, 2009, and amends it as follows:

Sec. 665B. PAYMENT OF ATTORNEY'S FEES TO CERTAIN ATTORNEYS. (a) Authorizes a court that creates a guardianship or creates a management trust under Section 867 (Creation of Management Trust) of this code for a ward under this chapter, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, to authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers fair and just, to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether a management trust is created, from:

(1) subject to Subsection (a-1) of this section, the parties to the guardianship proceeding, allocated as the court finds is fair and just; or

(2) subject to Subsection (a-1) of this section, available funds of the management trust, rather than the ward's estate, if created. Makes nonsubstantive changes.

(a-1) Creates this subsection from existing text. Authorizes the court to authorize amounts allocated to the ward's estate under Subsection (a)(1) of this section or amounts to be paid from available funds of the management trust as provided by Subsection (a)(2) of this section to instead be paid from the county treasury, subject to Subsection (c) of this section, if:

(1) the ward's estate or management trust is insufficient to pay the amounts, rather than to pay for the services provided by the attorney; and

(2) funds in the county treasury are budgeted for that purpose. Makes conforming and nonsubstantive changes.

(b) Makes no changes to this subsection.

(c) Authorizes the court to authorize the payment of attorney's fees from the county treasury under Subsection (a-1), rather than Subsection (a), or this section only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services described by that subsection from any other source.

SECTION 3. Amends Section 669(a), Texas Probate Code, as follows:

(a) Requires that in a guardianship matter, except as provided by Subsection (b) of this section or Section 665A or 665B(a) of this code, the cost of the proceeding, including the cost of the guardian ad litem or court visitor, be set in an amount the court considers fair and just and to be paid out of the guardianship estate, or, if the estate is insufficient to pay for the cost of the proceeding, the cost of the proceeding to be paid out of the county treasury, and the judgment of the court to be issued accordingly.

SECTION 4. Provides that the changes in law made by this Act apply to a guardianship created before, on, or after the effective date of this Act.

EFFECTIVE DATE

Upon passage or September 1, 2011.

COMPARISON OF ORIGINAL TO SUBSTITUTE

SECTION 1 of the original bill is eliminated, and Section 665A, Probate Code is repealed as its provisions are made redundant by this bill

SECTION 1 of the Substitute amends Section 665B, Probate Code, to provide that in the determination of the "fair and just" allocation of attorney's fees, the attorney's fees are to be paid from the funds available to the ward's estate or management trust, if created, except that the court may require the funds to be paid from the county treasury subject to Subsection (a-1) of this section and Section 669 of this code. Subsection (a-1) retains current law that the funds will be paid from the county treasury if the funds in the ward's estate or management trust are insufficient to pay the amounts and funds in the county treasury are budgeted for that purpose.

SECTION 2 makes conforming changes to Section 665D(c), Probate Code, relating to the repeal of Section 665A of this code.

SECTION 3 amends Section 669 (a), Probate Code, to provide that except as provided by Subsection (b) of this section, in a guardianship matter, the cost of the proceeding, including the cost of the guardian ad litem, attorney ad litem, court investigator, court visitor, mental health professionals, interpreters, and other attorneys, shall be set in an amount the court considers fair and just and shall be paid out of the guardianship estate, or, if the estate is insufficient to pay for the cost of the proceeding, the cost of the proceeding shall be paid out of the county treasury, except as provided by Subsection (c) of this section.

Subsection (b), of this section is amended to provide that if a court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require that party to pay all or part of the cost of the proceeding.

Subsection (c) is added to this section to provide that the court may order the applicant in a guardianship proceeding to pay the cost of the guardian ad litem or court visitor appointed in the proceeding if the guardianship estate is insufficient to pay that cost and the applicant's gross annual family income exceeds 200 percent of the federal poverty level.

SECTION 4 of the Substitute makes conforming changes to Section 875(i), Probate Code, relating to the repeal of Section 665A of this code.

SECTION 5 repeals Section 665A, Probate Code.

SECTION 6. Provides that the changes in law made by this Act apply to a guardianship created before, on, or after the effective date of this Act.

SECTION 7. Effective date: upon passage or September 1, 2011.