

BILL ANALYSIS

Senate Research Center
83R3599 CLG-F

S.B. 647
By: Rodríguez
Jurisprudence
5/2/2013
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

As part of its ongoing review of Texas probate, guardianship, and trust law, the Real Estate, Probate, and Trust Law Section of the State Bar of Texas has proposed several updates to the law regarding guardianships. Issues covered include mediation settlement guidelines, court costs and attorney's fees, electronic filing of affidavits, appointment and bond requirements, and required terms.

Current law gives the court that creates a guardianship discretion for allowing attorney's fees. However, the size of the fee remains unclear. The revision to Section 1155.054 of the Estates Code provides that the authorized amount of attorney's fees must be considered to be equitable and just by the court.

Section 1155.151 (Cost of Proceeding in Guardianship Matter) currently lists the costs of a guardianship proceeding to include costs of the guardian ad litem and the court visitor. The revisions to this section expand the court costs to include attorneys ad litem, mental health professionals, and court interpreters.

Section 1163.101 (Annual Report Required) normally requires a written sworn declaration to file an annual report. The current requirement, however, may not be up to date with other forms of filing, such as electronic filing. Section 1163.1011 now allows the guardian who files electronically to use an unsworn declaration.

Current law permits a court to create a management trust for individuals with mental incapacity. The issue arises as to whether the rules apply to individuals with physical disabilities only. The amendment to Section 1301.054 (Creation of Trust for Incapacitated Person Without Guardian) states that the court is not required to appoint an attorney or guardian ad litem for a person with physical disabilities only.

Other rules involving persons with physical disabilities only are included in this section. Revisions to Section 1301.058 (Bond Requirements for Trustees) provide that no bond is required of a trustee of a management trust for a person with physical disability only. Section 1301.101 further requires that a management trust created for a person with only physical disabilities to provide a trustee with reasonable compensation for their services.

As proposed, S.B. 647 amends current law relating to guardianships, including the assessment and payment of attorney's fees and other court costs in guardianships, and to court-created management trusts for persons who have physical disabilities or who are incapacitated.

RULEMAKING AUTHORITY

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

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 1051.253(c), Estates Code, as effective January 1, 2014, as follows:

(c) Provides that at the expiration of the 10-day period prescribed by Subsection (a):

(1) the depositions for which the notice was posted are authorized to be taken, rather than commission is authorized to issue for taking the depositions for which the notice was posted; and

(2) the judge is authorized to file cross-interrogatories if no person appears.

SECTION 2. Amends Chapter 1055, Estates Code, as effective January 1, 2014, by adding Subchapter D, as follows:

SUBCHAPTER D. MEDIATION

Sec. 1055.151. **MEDIATION OF CONTESTED GUARDIANSHIP PROCEEDING.** (a) Authorizes the court, on the written agreement of the parties or on the court's own motion, to refer a contested guardianship proceeding to mediation.

(b) Provides that a mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type, in capital letters, or underlined, that the agreement is not subject to revocation by the parties;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(c) Entitles a party, if a mediated settlement agreement meets the requirements of this section, to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law.

(d) Authorizes a court, notwithstanding Subsections (b) and (c), to decline to enter a judgment on a mediated settlement agreement if the court finds that the agreement is not in the ward's or proposed ward's best interests.

SECTION 3. Amends Section 1102.005(b), Estates Code, as effective January 1, 2014, to authorize the court, after examining the proposed ward's assets and determining that the proposed ward is unable to pay for services provided by the guardian ad litem, rather than after examining the ward's or proposed ward's assets and determining that the ward or proposed ward is unable to pay for services provided by the guardian ad litem, to authorize compensation from the county treasury.

SECTION 4. Amends Sections 1155.052(a) and (c), Estates Code, as effective January 1, 2014, as follows:

(a) Provides that, notwithstanding any other provision of this chapter (Compensation, Expenses, and Court Costs), rather than any other provision of this chapter or Section 665B (Compensation of Attorney Representing Applicant), 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.

(c) Requires the court to set attorney's fees for an attorney described by Subsection (a) for legal services provided in accordance with Sections 1155.054, 1155.101 (Reimbursement of Expenses in General), and 1155.151 (Cost of Proceeding in Guardianship Matter),

rather than in accordance with Sections 1155.051 (Compensation for Professional Services in General), 1155.101, and 665B.

SECTION 5. Transfers Section 665B, Texas Probate Code, notwithstanding the transfer of Section 665B, Texas Probate Code, as amended by Chapters 314 (H.B. 587) and 930 (H.B. 3080), Acts of the 81st Legislature, Regular Session, 2009, to the Estates Code and redesignation as Section 665B of that code effective January 1, 2014, by Section 3.01(e), Chapter 823 (H.B. 2759), Acts of the 82nd Legislature, Regular Session, 2011, to Subchapter B, Chapter 1155, Estates Code, redesignates it as Section 1155.054, Estates Code, and reenacts it and amends it as follows:

Sec. 1155.054. PAYMENT OF ATTORNEY'S FEES TO CERTAIN ATTORNEYS. Redesignates existing Section 665B as Section 1155.054. (a) Authorizes a court that creates a guardianship or creates a management trust under Chapter 1301 (Management Trusts) for a ward, 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 equitable 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 available funds of the ward's estate or management trust, if created, subject to Subsections (b) and (d).

Deletes existing text of Subsection (a) authorizing 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, 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 available funds of the ward's estate or management trust, if created; or subject to Subsection (c) of this section, the county treasury if the ward's estate or, if created, management trust, is insufficient to pay for the services provided by the attorney, and funds in the county treasury are budgeted for that purpose. Makes nonsubstantive changes.

(b) Authorizes the court to authorize amounts that otherwise would be paid from the ward's estate or the management trust as provided by Subsection (a) to instead be paid from the county treasury, subject to Subsection (e), if:

(1) the ward's estate or management trust is insufficient to pay the amounts; and

(2) funds in the county treasury are budgeted for that purpose.

(c) Redesignates existing Subsection (b) as Subsection (c). Makes no further change to this subsection.

(d) Authorizes the court, if the 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, to require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section, and requires the court to issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate.

(e) Redesignates existing Subsection (c) as Subsection (e). Authorizes the court to authorize the payment of attorney's fees from the county treasury under Subsection (b), rather than under Subsection (a) of 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 6. Amends Section 1155.151, Estates Code, as effective January 1, 2014, as follows:

Sec. 1155.151. New heading: COSTS IN GUARDIANSHIP PROCEEDING GENERALLY. (a) Requires that the court costs of the proceeding, in a guardianship proceeding, including the cost of the guardians ad litem, attorneys ad litem, court visitor, mental health professionals, and interpreters appointed under this title (Guardianship and Related Procedures), be set in an amount the court considers equitable and just and, except as provided by Subsection (c), be paid out of the guardianship estate, or the county treasury if the estate is insufficient to pay the cost, and requires the court to issue the judgment accordingly. Deletes existing text requiring that the cost of the proceeding in a guardianship matter, except as provided by Subsection (b), including the cost of the guardian ad litem or court visitor, be paid out of the guardianship estate, or requires that the cost of the proceeding be paid out of the county treasury if the estate is insufficient to pay the cost, and requires the court to issue the judgment accordingly.

(b) Requires that the costs attributable to the services of a person described by Subsection (a) be paid under this section at any time after the commencement of the proceeding as ordered by the court.

(c) Authorizes the court, if the 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, to order the party to pay all or part of the costs of the proceeding. Requires the court, if the party found to be acting in bad faith or without just cause was required to provide security for the probable costs of the proceeding under Section 1053.052 (Security for Certain Costs), to first apply the amount provided as security as payment for costs ordered by the court under this subsection. Requires the court, if the amount provided as security is insufficient to pay the entire amount ordered by the court, to render judgment in favor of the estate against the party for the remaining amount. Deletes existing text requiring an applicant for the appointment of a guardian under this title to pay the cost of the proceeding if the court denies the application based on the recommendation of a court investigator.

SECTION 7. Amends Subchapter C, Chapter 1163, Estates Code, as effective January 1, 2014, by adding Section 1163.1011, as follows:

Sec. 1163.1011. USE OF UNSWORN DECLARATION FOR ELECTRONIC FILING OF ANNUAL REPORT. (a) Authorizes a guardian of the person who files the annual report required by Section 1163.101 (Annual Report Required) electronically with the court to use an unsworn declaration made as provided by this section instead of a written sworn declaration or affidavit required by Section 1163.101.

(b) Requires that an unsworn declaration authorized by this section be in writing and subscribed by the person making the declaration as true under penalty of perjury.

(c) Sets forth the language required to be included in the form of an unsworn declaration authorized by this section.

(d) Prohibits an unsworn declaration authorized by Section 132.001 (Unsworn Declaration), Civil Practice and Remedies Code, from being used instead of a written sworn declaration or affidavit required by Section 1163.101.

SECTION 8. Amends Section 1251.013, Estates Code, as effective January 1, 2014, as follows:

Sec. 1251.013. COURT COSTS. Authorizes all court costs, including attorney's fees, if the court appoints a temporary guardian after the hearing required by Section 1251.006(b) (relating to requiring that a hearing, unless postponed as provided by Subsection (c) (relating to authorizing the proposed ward or the proposed ward's attorney to consent to postpone the hearing on the application for temporary guardianship for a period not to exceed 30 days after the date the application is filed), be held not later than the 10th day after the date the application for temporary guardianship is filed), to be assessed as provided by Sections 1155.054 and 1155.151, rather than by Sections 1155.051, 1155.151, and 665B.

SECTION 9. Amends the heading to Section 1301.052, Estates Code, as effective January 1, 2014, to read as follows:

Sec. 1301.052. VENUE FOR PROCEEDING INVOLVING TRUST FOR AN ALLEGED INCAPACITATED PERSON.

SECTION 10. Amends Section 1301.054, Estates Code, as effective January 1, 2014, by amending Subsection (c) and adding Subsection (c-1), as follows:

(c) Requires the court, except as provided by Subsection (c-1), to appoint an attorney ad litem and, if necessary, to appoint a guardian ad litem, to represent the interests of the alleged incapacitated person in the hearing to determine incapacity under Subsection (a) (relating to authorizing a proper court exercising probate jurisdiction, on application by an appropriate person as provided by Section 1301.051 (Eligibility to Apply for Creation of Trust) and regardless of whether an application for guardianship has been filed on the alleged incapacitated person's behalf, to enter an order that creates a trust for the management of the estate of an alleged incapacitated person who does not have a guardian if the court, after a hearing, finds that the person is an incapacitated person and the creation of the trust is in the incapacitated person's best interests).

(c-1) Authorizes the court, if the application for the creation of the trust is filed by a person who has only a physical disability, to, but is not required to, appoint an attorney ad litem or guardian ad litem to represent the interests of the person in the hearing to determine incapacity under Subsection (a).

SECTION 11. Amends Section 1301.055, Estates Code, as effective January 1, 2014, as follows:

Sec. 1301.055. AUTHORITY OF COURT TO APPOINT GUARDIAN INSTEAD OF CREATING TRUST. Authorizes the court, if, after a hearing under Section 1301.054 (Creation of Trust for Incapacitated Person Without Guardian), the court finds that the person for whom the application was filed is an incapacitated person but that it is not in the incapacitated person's best interests for the court to create a trust under this subchapter for the incapacitated person's estate, to appoint a guardian of the person or estate, or both, for the incapacitated person without commencing a separate proceeding for that purpose.

SECTION 12. Amends Sections 1301.057(b), (c), and (d), Estates Code, as effective January 1, 2014, as follows:

(b) Requires the court, except as provided by Subsection (c), to appoint a financial institution to serve as trustee of a management trust, other than a management trust created for a person who has only a physical disability.

(c) Authorizes the court to appoint a person or entity described by Subsection (d) to serve as trustee of a management trust created for a ward or incapacitated person instead of appointing a financial institution to serve in that capacity if the court finds that the appointment is in the best interests of the ward or incapacitated person for whom the trust is created, and if the value of the trust's principal is more than \$150,000, 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 as trustee.

(d) Provides that the following are eligible for appointment as trustee of a management trust created for a ward or incapacitated person under Subsection (c): 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.

SECTION 13. Amends Section 1301.058, Estates Code, as effective January 1, 2014, as follows:

Sec. 1301.058. BOND REQUIREMENTS FOR TRUSTEES. (a) Provides that the following serve without giving a bond in accordance with the trust terms required by Sections 1301.101(a)(4) (relating to requiring that a management trust, except as provided by Subsection (c), provide that a trustee that is a corporate fiduciary serves without giving a bond) and (a-1):

- (1) a trustee of a management trust that is a corporate fiduciary; and
- (2) any other trustee of a management trust created for a person who has only a physical disability.

Deletes existing text providing that a trustee of a management trust that is a corporate fiduciary serves without giving a bond in accordance with the trust terms required by Section 1301.101(a)(4).

(b) Requires the court, except as provided by Subsection (a), to require a person, rather than to require a person other than a corporate fiduciary, serving as trustee of a management trust to file with the county clerk a bond that is in an amount equal to the value of the trust's principal and projected annual income, and meets the conditions the court determines are necessary.

SECTION 14. Amends Section 1301.101, Estates Code, as effective January 1, 2014, to conform to Section 31, Chapter 1085 (S.B. 1196), Acts of the 82nd Legislature, Regular Session, 2011, and further amends it as follows:

Sec. 1301.101. REQUIRED TERMS. (a) Requires that a management trust created for a ward or incapacitated person, except as provided by Subsection (c), provide that:

- (1) the ward or incapacitated person is the sole beneficiary of the trust, rather than the ward or incapacitated person for whom the trust is created is the sole beneficiary of the trust;
- (2) the trustee is authorized to disburse an amount of the trust's principal or income as the trustee determines is necessary to spend for the health, education, maintenance, or support of the person for whom the trust is created, rather than to spend for the health, education, maintenance, or support of the ward or incapacitated person;
- (3)-(4) Makes no change to these subdivisions; and
- (5) subject to the court's approval and Subsection (b), a trustee is entitled to receive reasonable compensation for services the trustee provides to the person for whom the trust is created as the person's trustee, rather than subject to the court's approval and Subsection (b), the trustee is entitled to receive reasonable compensation for services the trustee provides to the ward or incapacitated person as trustee.

(a-1) Requires that a management trust created for a person who has only a physical disability provide that the trustee of the trust:

(1) serves without giving a bond; and

(2) is entitled to receive, without the court's approval, reasonable compensation for services the trustee provides to the person as the person's trustee.

(b) Requires that a trustee's compensation under Subsection (a)(5) be:

(1) Makes no change to this subdivision; and

(2) determined, paid, reduced, and eliminated in the same manner as compensation of a guardian, rather than a guardian of an estate, under Subchapter A (Compensation of Guardians in General), Chapter 1155.

(c) Authorizes the court creating or modifying a management trust to omit or modify otherwise applicable terms required by Subsection (a), (a-1), or (b) if the court is creating the trust for a person who has only a physical disability, or if the court determines that the omission or modification, rather than to omit or modify terms required by Subsection (a)(1) or (2) only if the court determines that the omission or modification:

(1) is necessary and appropriate for the person for whom the trust is created to be eligible to receive public benefits or assistance under a state or federal program that is not otherwise available to the person, rather than 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; or, rather than and,

(2) is in the best interests of the person for whom the trust is created, rather than is in the ward's or incapacitated person's best interests.

SECTION 15. Amends Section 1301.102(a), Estates Code, as effective January 1, 2014, to conform to Section 31, Chapter 1085 (S.B. 1196), Acts of the 82nd Legislature, Regular Session, 2011, and further amends it as follows:

(a) Authorizes a management trust created for a ward or incapacitated person to provide that the trustee make a distribution, payment, use, or application of trust funds for the health, education, maintenance, or support of the person for whom the trust is created or of another person whom the person for whom the trust is created is legally obligated to support, rather than authorizing a management trust to provide that the trustee make a distribution, payment, use, or application of trust funds for the health, education, maintenance, or support of the ward or incapacitated person for whom the trust is created or of another person whom the ward or incapacitated person is legally obligated to support:

(1) Makes no change to this subdivision; and

(2) Makes conforming and nonsubstantive changes.

SECTION 16. Amends Section 1301.103, Estates Code, as effective January 1, 2014, to provide that a provision in a management trust created for a ward or incapacitated person that relieves a trustee from a duty or liability imposed by this chapter or Subtitle B (Texas Trust Code: Creation, Operation, and Termination of Trusts), Title 9 (Trusts), Property Code, is enforceable only under certain circumstances.

SECTION 17. Amends Section 1301.154(a), Estates Code, as effective January 1, 2014, to require the trustee of a management trust created for a ward to prepare and file with the court an

annual accounting of transactions in the trust in the same manner and form that is required of a guardian of the estate under this title (Guardianship and Related Procedures).

SECTION 18. Amends Section 1301.202, Estates Code, as effective January 1, 2014, by adding Subsection (a-1) to authorize the court, but is not required to, for purposes of a proceeding to determine whether to transfer property from a management trust to a pooled trust subaccount, appoint an attorney ad litem or guardian ad litem to represent the interests of a person who has only a physical disability for whom the management trust was created.

SECTION 19. Repealer, effective January 1, 2014: Section 1155.051 (General Powers and Duties of Guardians of the Person), Estates Code.

SECTION 20. (a) Provides that, except as otherwise provided by this section, the changes in law made by this Act apply to:

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

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

(b) Provides that the changes in law made by this Act to Sections 1301.054, 1301.055, 1301.057(b), (c), and (d), 1301.058, 1301.101, and 1301.102(a), Estates Code, apply only to an application for the creation, modification, or termination of a management trust that is filed on or after the effective date of this Act. Provides that an application described by this subsection that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

(c) Provides that the changes in law made by this Act to Sections 1301.103 and 1301.154(a), Estates Code, and by Section 1301.202(a-1), Estates Code, as added by this Act, apply to a management trust created before, on, or after the effective date of this Act.

SECTION 21. Provides that, to the extent of any conflict, this Act prevails over another Act of the 83rd Legislature, Regular Session, 2013, relating to nonsubstantive additions to and corrections in enacted codes.

SECTION 22. Effective date: January 1, 2014.