SUBJECT: Probate Code revisions concerning guardianship and incapacity

COMMITTEE: Judicial Affairs — favorable, with amendment

VOTE: 8 ayes — Thompson, Hartnett, Capelo, Deshotel, Hinojosa, Solis, Talton, Uresti

0 nays

1 absent — Garcia

WITNESSES: For — Lisa Jamieson, Real Estate, Probate, and Trust Law Section of State Bar; Jerry Jones, Real Estate, Probate, and Trust Law Section of State Bar of Texas; *Registered but not testifying*: Guy Herman, Judges of the Statutory Probate Courts of Texas

Against — None

BACKGROUND: Under the Probate Code, power-of-attorney authority automatically terminates after a court appoints a guardian for the estate of a principal. Compensation for a guardian only can be drawn from available funds of the ward's estate. When a minor's estate consists only of cash in the amount of $25,000 or less, guardianship may be terminated and assets paid to the county clerk who will then manage the funds.

A surviving parent may appoint a guardian by will or written declaration for his or her minor children or incapacitated adult children and their estates only in the event of the parent's death. The Probate Code outlines requirements for written declarations for appointing guardians for minors or incapacitated adult children, but only in the event of the parent's death and not if the parent becomes incapacitated. A self-proving affidavit currently is required as prima facie evidence that the declarant was competent at the time he or she appointed a guardian.

Although the Probate Code outlines the procedure a nonresident must follow to seek guardianship as a resident agent, no provision is made for changing a guardian's resident agent or appointing a successor resident agent. Nor does

the code address the resignation of a resident agent or the removal of a nonresident guardian who does not have a resident agent to accept service of process. The Probate Code does not address what happens when the appointed joint guardians' marriage dissolves.

When a spouse becomes incapacitated, the Probate Code currently gives the other spouse full powers to manage the entire community estate, including the incapacitated spouse's separate property. The spouse's special powers end if a court finds that the incapacitated spouse has recovered. The fiduciary duty of the spouse is not discussed.

DIGEST:

HB 1132 as amended would make various revisions to the Probate Code and Family Code concerning guardianships and incapacity.

Durable Power of Attorney. HB 1132 would require the termination of a durable power of attorney only upon the appointment of a permanent guardian. If the court appointed a temporary guardian, HB 1132 would allow the court to suspend the powers of the attorney until the term of the temporary guardian expired. HB 1132 would not preclude an application for or issuance of a temporary restraining order.

Application for Temporary Guardianship. HB 1132 would delete the requirement that the social security number of the applicant and the proposed ward be included on the sworn, written application to the court.

Compensation of a Guardian. HB 1132 would authorize a court to allow for compensation for a person acting as guardian to be drawn from the ward's estate as well as from other available funds.

Designation of Guardian in the Event of Incapacity. HB 1132 would allow the surviving parent of a minor to designate a guardian for the minor children and their estate not only in the event of the parent's death but also in case of the parent's incapacity. The same would apply for a surviving parent of an incapacitated adult child.

Written Declarations of Guardianship. HB 1132 would require written declarations by certain parents to appoint guardians for their minor children,

for their incapacitated adult children, and for themselves. The written declaration would have to be signed by the declarant and be:

- written wholly in the handwriting of the declarant; or
- attested to by two credible witnesses in the presence of the declarant;

A handwritten declaration that is attested to by witnesses may be signed by another person on the declarant's behalf in the declarant's presence.

When filed with the court, a written declaration could be submitted along with a notarized self-proving affidavit that complies in form and content with the code and clearly indicates the declarant's intention to designate a guardian by written declaration.

Proof of Written Declaration. HB 1132 would add sec. 677B to explain how to prove the written declaration of certain parents to designate their childrens' guardian. A properly executed and witnessed self-proving declaration and affidavit would be prima facie evidence of the declarant's competency at the time the declaration was executed and could be admitted as evidence by the court without testimony.

A wholly handwritten declaration could be proved anytime during a declarant's lifetime by attaching an affidavit by the declarant to the effect that:

- this instrument was the declarant's written declaration designating guardians for the declarant's children;
- the declarant was at least 18 years of age when the declaration was executed;
- the declarant was of sound mind; and
- the declarant had not revoked the declaration.

A declaration that was wholly handwritten by the declarant and not self-proved could be proved in the same manner as an attested written will produced in court is proved under Probate Code, sec. 84.

Termination of Guardianship. HB 1132 would increase the allowable amount of a minor's cash estate from $25,000 to $50,000 before a county clerk could terminate guardianship and take over management of the estate.

Changing a Resident Agent. HB 1132 would add secs. 760A to address the procedure for changing a resident agent. A guardian would be able to file a statement of "Designation of Successor Resident Agent" with the court in which guardianship procedures are pending to change the resident agent to accept service of process in a guardianship or related proceeding.

The statement would have to contain the names and addresses of the guardian, resident agent, and successor resident agent. The designation of a successor resident agent would take effect on the date on which the statement was filed with the court.

Resignation of a Resident Agent. HB 1132 would add sec. 760B to allow a guardian's resident agent to resign by giving the guardian notice and by filing a "Resignation of Resident Agent" statement with the court in which the guardianship proceedings were pending. The statement would have to:

- contain the name of the guardian;
- contain the address of the guardian most recently known by the resident agent;
- state that the guardian had been notified of the resignation and that the guardian did not have a resident agent; and
- contain the date on which the guardian was notified of the resignation.

The resident agent would be required to mail a certified, return-receipt-requested copy of the resignation statement to the guardian and to each party in the case or to the parties' attorneys or to the designated representative of record.

The resident agent's resignation would take effect on the date the court entered an order accepting the resignation. Resignation would not be accepted if the requirements of the resignation statement were not met.

Removal of Guardian. HB 1132 would allow the court to remove without notice a nonresident guardian who did not designate a resident guardian to accept service of process in any guardianship or related proceeding.

Joint Guardians. HB 1132 also would allow the court to remove a guardian when it determines that, because of the dissolution of the joint guardians' marriage, the continuation of only one of the joint guardians as sole guardian

would be in the best interest of the ward. If a joint guardian was removed in this case, the other joint guardian would continue to serve as sole guardian, unless removed for a reason other than the dissolution of the marriage.

Estate Planning. HB 1132 would add sec. 865A to allow guardians to apply to the court for an order to seek an in camera inspection of a ward's will for the purposes of establishing an estate plan. The application would have to be sworn to by the guardian, list all the instruments requested for inspection, and state reasons for the necessity to inspect the requested instruments.

A person who filed an application for in camera inspection would be required to send a copy of the application to:

- each person who had custody of a requested instrument;
- the ward's spouse;
- the ward's defendants;
- all devisees under an instrument relating to the ward's estate; and
- any other persons as directed by the court.

The applicant could request a hearing on the application after the 10th day after the notice requirement is completed. Notice of the date, time, and place of the application hearing also would have to be sent by certified mail to the above list of parties.

After a hearing on the application, if good cause for an in camera inspection were found, the court would require all persons in custody of the requested instrument to deliver the instruments to the court. If the court found good cause for an in camera inspection after its own review, it would release the instruments to the applicant only for the purpose of estate planning.

A court would be able to appoint a guardian ad litem for the ward at any time during these proceedings if it was in the best interest of the ward. Attorneys would not violate their attorney-client privilege for complying with court orders to release an instrument requested for an in camera inspection.

Incapacitated spouse. HB 1132 would allow a court to appoint the husband or wife of an incapacitated spouse to act as community administrator of the entire community estate, including the incapacitated spouse's separate

property. The spouse who was not incapacitated would be presumed to be suitable and competent to serve as community administrator.

HB 1132 would delete the section of the code that precludes the necessity for court-appointed guardianship of the incapacitated spouse's property. The requirement for qualification as guardian of the incapacitated spouse's separate property would not deprive the competent spouse of the right to manage, control, and dispose of the entire community estate.

If a non-incapacitated spouse was removed as community administrator, did not qualify to serve as guardian, or was not suitable to serve as community administrator, HB 1132 would allow the court to:

- appoint a new guardian for the incapacitated spouse if one had not already been appointed or if the appointed guardian was the competent spouse;
- order the competent spouse to deliver to the incapacitated spouse's guardian a portion (not to exceed one-half) of the community property; and
- authorize the new guardian to administer the incapacitated spouse's separate property, any community property subject to the incapacitated spouse's sole control; and any property delivered to the guardian as the incapacitated spouse's share of community property.

After a spouse who was not incapacitated was removed or disqualified to serve as guardian, the spouse who was not incapacitated would continue to administer:

- the person's own separate property;
- any community property over which the person had sole control;
- any community property subject to the spouses' joint control or the community property remaining after delivery of a portion of the community property to the guardian of the incapacitated spouse's estate; and
- any income earned on the above properties that the person was authorized to administer.

The duties between spouses, including the duty to support the other spouse, and the rights of any creditors of either spouse would not be affected by the manner in which HB 1132 would administer community property.

The special powers under this chapter would terminate when and if the court found that the incapacitated spouse regained competency.

Accounting by a community administrator. HB 1132 would add sec. 883B to allow the court to order a community administrator to file a detailed inventory and appraisement and file an accounting of:

- any community property subject to the incapacitated spouse's sole control;
- any community property subject to the spouses' joint control; and
- any income earned on properties described above.

HB 1132 would require the inventory and appraisement ordered of a community administrator to be prepared in the same form and manner as that required of a guardian, and would require that it be filed no later than the 90th day after the date of the order. The same would be true for an accounting ordered of a community administrator, but the accounting could not be filed any later than the 60th day after the date on which the accounting order was issued. Subsequent periodic accountings then could be ordered at intervals of not less than 12 months.

Removal of community administrator. HB 1132 would add sec. 883C to allow a court to remove a community administrator if:

- the administrator failed to comply with a court order for an inventory and appraisement, accounting, or subsequent accounting;
- sufficient grounds existed to believe the community administrator had or was about to misapply or embezzle the property in his or her care;
- the administrator was proven guilty of gross misconduct or mismanagement of the administrator's duties; or
- the administrator became incapacitated, was sentenced to a penitentiary, or for any other reason became legally incapacitated from properly performing the administrator's fiduciary duty.

The removal order would have to state the cause of removal and disposition of assets remaining in the name or control of the administrator. A community administrator would be able to recover costs from the incapacitated spouse's portion of community property for defending in good faith the removal of the administrator.

Attorney Ad Litem. HB 1132 would add sec. 883D to allow the court to appoint an attorney ad litem to represent the interests of an incapacitated spouse and his or her community property. The attorney ad litem could demand from the community administrator an accounting or inventory and appraisement of the incapacitated spouse's part of the community estate being managed by the administrator. The administrator would have to comply with the demand no later than the 60th day after receiving the demand.

The accounting or inventory and appraisement would have to be in the form and manner required by the attorney ad litem and would have to be filed with the court if the attorney ad litem so required.

A guardian of an incapacitated married person's estate would have to deliver community property on demand to the competent spouse if the competent spouse became community administrator.

Lawsuit Information. HB 1132 would require a person whose spouse was judicially declared incapacitated and who acquired control of the community estate to notify the court in writing of any suit that would dissolve the marriage or name the incapacitated spouse as a defendant.

HB 1132 would take effect September 1, 2001, and all code revisions would apply only after the effective date of the bill.

SUPPORTERS SAY:

The Real Estate, Probate and Trust Law Section of the State Bar of Texas met over the course of a year to discuss problems, inconsistencies, and omissions in the Texas Probate Code involving guardianships and incapacity. Many sections in the code needed clarification because the intent was unclear. The revisions included in HB 1132 are a result of this study.

The current Probate Code includes several different ways to designate the various types of guardians, including guardians of a minor, guardians of an incapacitated person, and self-appointed guardians. However, various parts of the code were written at different times in the past and often are inconsistent. HB 1132 would unify the procedures for appointing any type of guardian to create consistency in the code.

Procedures for designating guardians should be uniform and consistent to minimize the chance of error and to ensure that the designor's intentions are carried out. By providing a suggested format for designating a guardian and making written declarations, HB 1132 would conform guardian declarations to those used when creating a valid will in Texas. This would make designation of a guardian less complicated and easier to understand.

A surviving parent incapable of caring for his or her children should be able to appoint a guardian who could better or more adequately provide for the parent's children.

OPPONENTS SAY:

No apparent opposition.

NOTES:

The committee amendment would revise sections of the Family Code that would be affected by the changes to the Probate Code under this bill. For example, incapacitation would no longer be considered an unusual circumstance when determining control of marital property, nor would spousal incapacitation apply to amending or vacating an original order of the court. The portion of the Family Code pertaining to sale of separate and community homestead also would be revised to require a judicial declaration of a spouse's incapacitation under the Probate Code before the competent spouse could sell the homestead.

The companion bill, SB 722 by Bernsen, was referred to the Senate Jurisprudence Committee on February 19.