

BILL ANALYSIS

Senate Research Center

H.B. 1132
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Jurisprudence
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Engrossed

DIGEST AND PURPOSE

Under current law, the appointment of a temporary or permanent guardian of an estate automatically terminates the authority of an agent for the ward to act under the ward's durable power of attorney. This may be detrimental to the ward if a temporary guardian is appointed but the court determines that no permanent guardian is needed or if there is a limited need for a guardian to act, but the court cannot authorize a guardian to take limited actions without destroying the authority of the agent to act under the power of attorney. While a court may authorize compensation to a guardian from the ward's estate, there is no provision regarding governmental funds as an alternate source of compensation. The surviving parent of a minor or an adult incapacitated child is permitted to appoint someone, by will or written declaration, to be guardian of the person of the parent's minor children or adult incapacitated child after the death of the parent, but not in the event of the surviving parent's subsequent incapacity. There are requirements for written declarations relating to adult incapacitated children, but not for minor children. A court is permitted to terminate the guardianship of the estate of a minor ward, but only if the guardianship assets are less than \$25,000, whereas a county clerk is permitted to hold property of a ward worth less than \$50,000 without the need for a guardianship. A nonresident seeking guardianship is required to file a designation of resident agent to accept service of process, but there are no procedures for a guardian to appoint a successor resident agent or for a resident agent to resign. A married couple may serve as joint guardians of a minor, but a court is not authorized to name a sole guardian upon dissolution of the marriage. If a judicial determination of incapacity is obtained, the spouse of the incapacitated person has the right to manage the entire community property estate without court supervision. However, there are no procedures for times when the management by the non-incapacitated spouse is called into question. As proposed, H.B. 1132 modifies provisions relating to guardianships and other related matters concerning incapacitated persons.

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 485, Texas Probate Code, by changing a reference from "guardian" to "permanent guardian." Authorizes a court to suspend the powers of the attorney in fact or agent on the qualification of the temporary guardian of the estate until the date on which the term of the temporary guardian expires, if, after execution of a durable power of attorney, a court of the principal's domicile appoints a temporary guardian of the estate of the principal. Prohibits this section from being construed to prohibit the application for or issuance of a temporary restraining order under applicable law.

SECTION 2. Amends Section 601, Texas Probate Code, to define "community administrator."

SECTION 3. Amends Section 665(a), Texas Probate Code, to authorize a court to authorize compensation for a guardian or a temporary guardian serving as a guardian of the person alone from available funds of the ward's estate or other funds available for that purpose.

SECTION 4. Amends Section 676, Texas Probate Code, to authorize the surviving parent of a minor, notwithstanding Subsection (b) and Section 690, by will or written declaration to appoint any eligible person to be guardian of the person of the parent's minor children after the death of the parent or in the event of the parent's incapacity. Requires the court as appropriate, after the death of the surviving parent of a minor or if the court finds the surviving parent is an incapacitated person, to appoint the person designated in the will or declaration to serve as guardian of the person of the parent's minor children in preference to those otherwise entitled to serve as guardian under this chapter unless the court finds that the designated guardian is disqualified, is dead, refuses to serve, or would not serve the best interests of the minor children. Provides that the powers of a person appointed to serve as the designated guardian of the person or estate, or both, of a minor child solely because of the incapacity of the minor's surviving parent and in accordance with this section and Section 677A of this code terminate when a probate court enters an order finding that the surviving parent is no longer an incapacitated person. Makes a conforming change.

SECTION 5. Amends Section 677, Texas Probate Code, to require the court as appropriate, after the death of the surviving parent of an adult individual who is an incapacitated person or if the court finds the surviving parent becomes an incapacitated person after being appointed the individual's guardian, to appoint the person designated in the will or declaration to serve as guardian in preference to those otherwise entitled to serve as guardian under this chapter unless the court finds that the designated guardian is disqualified, is dead, refuses to serve, or would not serve the best interests of the adult individual. Provides that the powers of a person appointed to serve as the designated guardian of the person or estate, or both, of an adult individual solely because of the incapacity of the individual's surviving parent and in accordance with this section and Section 677A of this code terminate when a probate court enters an order finding that the surviving parent is no longer an incapacitated person and reappointing the surviving parent as the individual's guardian. Makes conforming changes.

SECTION 6. Amends Section 677A, Texas Probate Code, to require a written declaration appointing an eligible person to be guardian of the person of the parent's child under Section 676(d) or 677(b) of this code to be signed by the declarant and be written wholly in the handwriting of the declarant or attested to in the presence of the declarant by certain witnesses. Authorizes declaration that is not written wholly in the handwriting of the declarant to be signed by another person for the declarant under the direction of and in the presence of the declarant. Authorizes, rather than requires, a declaration described by this section to have attached a self-proving affidavit signed by the declarant and the witnesses attesting to the competence of the declarant and the execution of the declaration. Authorizes the declaration and any self-proving affidavit to be filed with the court at any time after the application for appointment of a guardian is filed and before a guardian is appointed. Adds the word "incapacity" to a declaration when referring to the condition of the person signing the declaration. Defines "self-proving affidavit." Makes conforming changes.

SECTION 7. Amends Part 3A, Chapter XIII, Texas Probate Code, by adding Section 677B, as follows:

Sec. 677B. PROOF OF WRITTEN DECLARATION OF CERTAIN PARENTS TO DESIGNATE CHILDRENS' GUARDIAN. Defines "declaration," "self-proving affidavit," and "self-proving declaration." Authorizes the court, if a declaration is self-proved, to admit the declaration into evidence without the testimony of witnesses attesting to the competency of the declarant and the execution of the declaration. Provides that additional proof of the execution of the declaration with the formalities and solemnities and under the circumstances required to make it a valid declaration is not necessary. Authorizes a written declaration described by Section 677A of this code, at any time during the declarant's lifetime, to be made self-proved in the same form and manner a will written wholly in the handwriting of a testator is made self-proved under Section 60 of this code. Provides that a properly executed and witnessed self-proving declaration and affidavit, including a declaration and affidavit described by Section 677A of this code, are prima facie evidence that the declarant was competent at the time the declarant executed the declaration and that the guardian named in the declaration would serve

the best interests of the ward. Authorizes a written declaration described by Section 677A of this code that is not self-proved to be proved in the same manner a will written wholly in the handwriting of the testator is proved under Section 84 of this code. Authorizes a written declaration described by Section 677A of this code that is not self-proved to be proved in the same manner an attested written will produced in court is proved under Section 84 of this code.

SECTION 8. Amends Section 679, Texas Probate Code, to make conforming changes.

SECTION 9. Amends Part 3A, Chapter XIII, Texas Probate Code, by adding Section 679A, as follows:

Sec. 679A. PROOF OF WRITTEN DECLARATION TO DESIGNATE GUARDIAN BEFORE NEED ARISES. Makes conforming changes.

SECTION 10. Amends Section 702(b), Texas Probate Code, to provide that a bond is not required to be given by a guardian that is a corporate fiduciary, as defined by Section 601, rather than 601(5), of this code.

SECTION 11. Amends Section 745(c), Texas Probate Code, to authorize the guardianship of the estate, when the estate of a minor ward consists only of cash or cash equivalents in an amount of \$50,000 or less, rather than \$25,000 or less, to be terminated and the assets paid to the county clerk of the county in which the guardianship proceeding is pending, and requires the clerk to manage the funds as provided by Section 887 of this code.

SECTION 12. Amends Part 4D, Chapter XIII, Texas Probate Code, by adding Sections 760A and 760B, as follows:

Sec. 760A. CHANGE OF RESIDENT AGENT. Authorizes a guardian to change its resident agent to accept service of process in a guardianship proceeding or other matter relating to the guardianship by filing a statement of the change entitled "Designation of Successor Resident Agent" with the court in which the guardianship proceeding is pending. Requires the statement to contain the names and addresses of certain individuals. Provides that the designation of a successor resident agent made in a statement filed under this section takes effect on the date on which the statement is filed with the court.

Sec. 760B. RESIGNATION OF RESIDENT AGENT. Authorizes a resident agent of a guardian to resign as the resident agent by giving notice to the guardian and filing with the court in which the guardianship proceeding is pending a statement that contains certain information. Requires the resident agent to send, by certified mail/return receipt requested, a copy of a resignation statement filed under this section to certain individuals. Provides that the resignation of a resident agent takes effect on the date on which the court enters an order accepting the agent's resignation. Prohibits a court from entering an order accepting the agent's resignation unless that agent complies with the requirements of this section.

SECTION 13. Amends Section 761, Texas Probate Code, to authorize the court, on its own motion or on motion of any interested person, including the ward, and without notice, to remove any guardian, appointed under this chapter, who cannot be served with notice or other processes because of the fact that the guardian is a nonresident of this state who does not have a resident agent to accept service of process in any guardianship proceeding or other matter relating to the guardianship. Authorizes the court to remove a guardian on its own motion, or on the complaint of an interested person, after the guardian has been cited by personal service to answer at a time and place set in the notice, when the court determines that, because of the dissolution of the joint guardians' marriage, the termination of the guardians' joint appointment and the continuation of only one of the joint guardians as the sole guardian is in the best interest of the ward. Provides that if a joint guardian is removed under this section, the

other joint guardian is entitled to continue to serve as the sole guardian unless removed for a reason other than the dissolution of the joint guardians' marriage.

SECTION 14. Amends Part 4M, Chapter XIII, Texas Probate Code, by adding Section 865A, as follows:

Sec. 865A. INSPECTION OF CERTAIN INSTRUMENT FOR ESTATE PLANNING PURPOSES. (a) Authorizes the guardian of the ward's estate, on the filing of an application under Section 865 of this code, to apply to the court for an order to seek an in camera inspection of a true copy of a will, codicil, trust, or other estate planning instrument of the ward as a means of obtaining access to the instrument for purposes of establishing an estate plan under Section 865 of this code.

(b) Requires an application filed under this section to meet certain requirements.

(c) Requires a person who files an application under this section to send a copy of the application to certain individuals.

(d) Requires notice to be delivered in a specific way to certain individuals described in this section. Authorizes the applicant, after the 10th day after the date on which the applicant complies with the notice requirement, to request that a hearing be held on the application. Requires notice of the date, time, and place of the hearing to be given by the applicant to each person described by this section when the court sets a date for a hearing on the application.

(e) Requires the court, after the conclusion of a hearing on the application and on a finding that there is good cause for an in camera inspection of a requested instrument, to direct the person that has custody of the requested will, codicil, trust, or other estate planning instrument to deliver a true copy of the instrument to the court for in camera inspection only. Requires the court, if good cause exists, to release all or part of the instrument to the applicant only for the purpose described by this section, after conducting an in camera review of the instrument.

(f) Authorizes the court to appoint a guardian ad litem for the ward or an interested party at any stage of the proceedings if it is considered advisable for the protection of the ward or the interested party.

(g) Provides that an attorney does not violate the attorney-client privilege solely by complying with a court order to release an instrument subject to this section. Prohibits the supreme court, notwithstanding Section 22.004, Government Code, from amending or adopting rules in conflict with this subsection.

SECTION 15. Amends Section 875(c), Texas Probate Code, by removing the requirement that the social security numbers of the applicant and proposed ward be included in an application for temporary guardian.

SECTION 16. Amends Section 883, Texas Probate Code, as follows:

Sec. 883. INCAPACITATED SPOUSE. (a) Provides that when a husband or wife, except as provided by Subsection (c), is judicially declared to be incapacitated, if the incapacitated spouse owns separate property, the court is required to appoint the other spouse or another person or entity, in the order of precedence established under Section 677, as guardian of the estate to administer only the separate property of the incapacitated spouse.

(b) Provides that the spouse who is not incapacitated is presumed to be suitable and

qualified to serve as community administrator. Provides that the qualification of a guardian of the estate of the separate property of an incapacitated spouse as required under Subsection (a) does not deprive the competent spouse of the right to manage, control, and dispose of the entire community estate as provided in this chapter.

(c) Provides that if a spouse who is not incapacitated is removed as community administrator or if the court finds that the spouse who is not incapacitated would be disqualified to serve as guardian under Section 681 or is not suitable to serve as community administrator for any other reason, the court is:

- required to appoint a guardian of the estate for the incapacitated spouse if the court has not appointed a guardian of the estate under this section or has appointed the spouse who is not incapacitated as guardian of the estate under this section;
- authorized, after taking into consideration the financial circumstances of the spouses and any other relevant factors, to order the spouse who is not incapacitated to deliver to the guardian of the estate of the incapacitated spouse a portion, not to exceed one-half, of the community property that is subject to the spouses' joint management, control, and disposition under Section 3.102, Family Code; and
- required to authorized the guardian of the estate of the incapacitated spouse to administer certain properties and income.

(d) Requires a spouse who is not incapacitated to continue to administer certain properties, on a person's removal as community administrator or on qualification of a guardian of the estate of the person's incapacitated spouse under Subsection (c), as appropriate.

(e) Provides that the duties and obligations between spouses, including the duty to support the other spouse, and the rights of any creditor of either spouse are not affected by the manner in which community property is administered under this section.

SECTION 17. Amends Section 883A, Texas Probate Code, to require the special powers of management, control, and disposition vested in the community administrator, rather than same spouse, by this chapter, rather than code, to terminate when the decree of a court of competent jurisdiction finds that the mental capacity of the incapacitated spouse has been recovered.

SECTION 18. Amends Part 5C, Chapter XIII, Texas Probate Code, by adding Sections 883B, 883C, and 883D, as follows:

Sec. 883B. ACCOUNTING, INVENTORY, AND APPRAISEMENT BY COMMUNITY ADMINISTRATOR. (a) Authorizes the court, on its own motion or on the motion of an interested person for good cause shown, to order a community administrator to file a verified, full, and detailed inventory and appraisal of certain properties and income.

(b) Authorizes the court, at any time after the expiration of 15 months after the date that a community administrator's spouse is judicially declared to be incapacitated, and on its own motion or on the motion of an interested person for good cause shown, to order the community administrator to prepare and file an accounting of certain properties and income.

(c) Requires an inventory and appraisal ordered under Subsection (a) to be prepared in the same form and manner that is required of a guardian under Section 729 of this code, and be filed not later than the 90th day after the date on which the order is issued.

(d) Requires an accounting ordered under Subsection (b) to be prepared in the same form and manner that is required of a guardian under Section 741 of this code, except that the requirement that an accounting be filed annually with the county clerk does not apply, and to be filed not later than the 60th day after the date on which the order is issued.

(e) Authorizes the court, after an initial accounting has been filed by a community administrator under this section and on the motion of an interested person for good cause shown, to order the community administrator to file subsequent periodic accountings at intervals of not less than 12 months.

Sec. 883C. REMOVAL OF COMMUNITY ADMINISTRATOR. (a) Authorizes a court, on its own motion or on the motion of an interested person and after the community administrator has been cited by personal service to answer at a time and place specified in the notice, to remove a community administrator under certain circumstances.

(b) Requires the order of removal to state the cause of removal and direct by order the disposition of the assets remaining in the name or under the control of the removed community administrator.

(c) Provides that a community administrator who defends an action for the removal of the community administrator in good faith, regardless of whether successful, is entitled to recover from the incapacitated spouse's part of the community estate the community administrator's necessary expenses and disbursements in the removal proceedings, including reasonable attorney's fees.

Sec. 883D. APPOINTMENT OF ATTORNEY AD LITEM FOR INCAPACITATED SPOUSE. (a) Requires the court to appoint an attorney ad litem to represent the interests of an incapacitated spouse in a proceeding to remove a community administrator or other proceeding brought under this subpart.

(b) Authorizes the attorney ad litem to demand from the community administrator an accounting or inventory and appraisal of the incapacitated spouse's part of the community estate being managed by the community administrator.

(c) Requires a community administrator to comply with a demand made under this section not later than the 60th day after the date on which the community administrator receives the demand.

(d) Requires an accounting or inventory and appraisal returned under this subsection to be prepared in the form and manner required by the attorney ad litem, and authorizes the attorney ad litem to require the community administrator to file the accounting and inventory and appraisal with the court.

SECTION 19. Amends Section 884, Texas Probate Code, to require a guardian of the estate of an incapacitated married person who, as guardian, is administering community property as part of the estate of the ward, to deliver on demand the community property to the spouse who is not incapacitated if the spouse becomes community administrator under Section 883 of this code.

SECTION 20. Amends Part 5C, Chapter XIII, Texas Probate Code, by adding Section 884A, as follows:

Sec. 884. LAWSUIT INFORMATION. Requires a person whose spouse is judicially declared to be incapacitated and who acquires the power to manage, control, and dispose of the entire community estate under Section 883 of this code, to inform the court in writing of any

suit filed by or on behalf of the person that is a suit for dissolution of the marriage of the person and the person's incapacitated spouse, or that names the incapacitated spouse as a defendant.

SECTION 21. Amends Section 3.301, Family Code, as follows:

Sec. 3.301. New heading: **MISSING, ABANDONED, OR SEPARATED SPOUSE.**
Deletes "incapacitated" from the list of conditions that are necessary regarding one spouse in order for the other spouse to file a petition to manage, control, and dispose of community or jointly held property.

SECTION 22. Amends Section 3.307(b), Family Code, by deleting the phrase "the incapacitated spouse's capacity is restored," regarding the court's obligation to amend or vacate the original order after notice and hearing.

SECTION 23. Amends Section 5.002, Family Code, as follows:

Sec. 5.002. New heading: **SALE OF SEPARATE HOMESTEAD AFTER SPOUSE JUDICIALLY DECLARED INCAPACITATED.** Authorizes the owner to sell, convey, or encumber the homestead without the joinder of the other spouse, if the homestead is the separate property of a spouse and the other spouse has been judicially declared incapacitated by a court exercising original jurisdiction over guardianship and other matters under Chapter XIII, Texas Probate Code.

SECTION 24. Amends Section 5.101, Family Code, to delete an "incapacitated" person regarding the sale of a separate homestead under unusual circumstances.

SECTION 25. Amends Section 5.102, Family Code, to make a conforming change.

SECTION 26. Amends Section 5.103, Family Code, to make nonsubstantive changes.

SECTION 27. Redesignates Section 5.107, Family Code, as Section 5.003, Family Code, and amends it as follows:

Sec. 5.003. New heading: **SALE OF COMMUNITY HOMESTEAD AFTER SPOUSE JUDICIALLY DECLARED INCAPACITATED.** Makes a conforming change.

SECTIONS 28 - 36. Make application of this Act prospective.

SECTION 37. Effective date: September 1, 2001.