

BILL ANALYSIS

Senate Research Center
77R3285 CLG-D

S.B. 722
By: Bernsen
Jurisprudence
3/1/2001
As Filed

DIGEST AND PURPOSE

Currently, the Texas Probate Code contains inconsistencies in need of clarification and update. As proposed, S.B. 722 addresses certain issues pertaining to guardianship and 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, to provide that if, after execution of a durable power of attorney, a court of the principal's domicile appoints a permanent guardian of the estate of the principal, the powers of the attorney in fact or agent terminate on the qualification of the guardian of the estate. Authorizes the court, 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, 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. Prohibits Subsection (b) of 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 the 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(d), Texas Probate Code, to authorize the surviving parent of a minor to appoint, by will or written declaration, 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. Makes a conforming change.

SECTION 5. Amends Section 677(b), Texas Probate Code, to authorize the surviving parent of an adult individual who is an incapacitated person to appoint, by will or written declaration, an eligible person to be guardian of the person of the adult individual after the parent's death or in the event of the parent's incapacity if the parent is the guardian of the person of the adult individual. Replaces existing text effectively pertaining to a person's inability to care for oneself with the term "incapacitated person." Makes a conforming change.

SECTION 6. Amends Section 677A, Texas Probate Code, as follows:

- (a) Requires 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 meet certain specific conditions.

(b) Authorizes a 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.

(c) Authorizes, rather than requires, a declaration described by Subsection (a)(2) of 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. Deletes existing text pertaining to a declaration and affidavit being evidence.

(d) 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.

(e) and (f) Reletters existing subsections.

(g) Authorizes a certain form to be used.

(h) Defines "self-proving affidavit."

SECTION 7. Amends Chapter XIA3, Texas Probate Code, by adding Section 677B, as follows:

Sec. 677B. PROOF OF WRITTEN DECLARATION OF CERTAIN PARENTS TO DESIGNATE CHILDREN'S GUARDIAN. (a) Defines "declaration," "self-proving," and "self -proving declaration."

(b) 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.

(c) Authorizes at any time during the declarant's lifetime, a written declaration described by Section 677A(a) of this code 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.

(d) Provides that a properly executed and witnessed self-proving declaration and affidavit, including a declaration and affidavit described by Section 677A(c) 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.

(e) Authorizes a written declaration described by Section 677(a)(1) 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.

(f) Authorizes a written declaration described by Section 677A(a)(2) 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, as follows:

(a) Requires the declaration to be signed by the declarant and meet certain specific criteria.

(c) Authorizes a declaration that is not written wholly in the handwriting of a declarant to be signed by another person for the declarant under the direction of and in the presence of the declarant.

(d) Authorizes a declaration described by Subsection (a)(2) of 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. Makes a conforming change. Reletters existing text of Subsection (c).

(e) Makes a conforming change. Reletters existing Subsection (d).

(f), (g), and (h) Reletters existing subsections.

(i) Authorizes a certain form, rather certain forms, to be used. Reletters existing Subsection (g).

(j) Defines “self-proving affidavit.”

SECTION 9. Amends Chapter XIII A3, Texas Probate Code, by adding Section 679A, as follows:

Sec. 679A. PROOF OF WRITTEN DECLARATION TO DESIGNATE GUARDIAN BEFORE NEED ARISES. (a) Defines “declaration,” “self-proving affidavit,” and “self-proving declaration.”

(b) - (f) Make conforming changes.

SECTION 10. Amends Section 702(b), Texas Probate Code, to make a conforming change.

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, 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.

SECTION 12. Amends Chapter XIII D4, Texas Probate Code, by adding Sections 760A and 760B, as follows:

Sec. 760A. CHANGE OF RESIDENT AGENT. (a) 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. Sets forth information required to be contained in the statement.

(b) 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. (a) 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 entitled “Redesignation of Resident Agent” that contains certain specific information.

(b) Requires the resident agent to send, by certified mail, return receipt requested, a copy of a resignation statement filed under Subsection (a) of this section to the guardian at the address most recently known by the agent, and each party in the case or the party’s attorney or other designated representative of record.

(c) 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 the 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 notices or other process because of certain facts. 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 the 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 Chapter XIIIIM4, 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) Sets forth criteria required of an application filed under this section.

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

(d) Requires notice required by Subsection (c) of this section to be delivered by certified mail to a person described by Subsection (c)(2), (3), (4), or (5) of this section and by registered or certified mail to a person described by Subsection (c)(1) of 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 that notice of the date, time, and place of the hearing to be given by the applicant to each person described by Subsection (c)(1) of 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, after conducting an in camera review of the instrument, if good cause exists, to release all or part of the instrument to the applicant only for the purpose described by Subsection (a) of this section.

(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 (Rules of Civil Procedure), Government Code, from amending or adopting rules in conflict with this subsection.

SECTION 15. Amends Section 875(c), Texas Probate Code, to delete existing text pertaining to the social security numbers of the applicant and proposed ward.

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

(a) Provides that, except as provided by Subsection (c) of this section, when a husband or wife is judicially declared to be incapacitated:

- the other spouse, in the capacity of surviving partner of the marital partnership, acquires full power to manage, control, and dispose of the entire community estate as community administrator, including the part of the community estate that the incapacitated spouse legally has the power to manage in the absence of the incapacity, without an administration; and
- 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 of this code, 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. Deletes existing text pertaining to the guardianship of the estate of a incapacitated spouse. Provides that the qualification of a guardian of the estate of the separate property of an incapacitated spouse as required under Subsection (a) of this section 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 of this code 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 meets certain conditions;
- is 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
- is required to authorize the guardian of the estate of the incapacitated spouse to administer certain specific properties and incomes.

(d) Requires a spouse who is not incapacitated, 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) of this section, as appropriate, to continue to administer certain specific properties and incomes.

(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, rather than other spouse, has been recovered.

SECTION 18. Amends Chapter XIII5C, 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 specific properties and incomes.

(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, 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 specific properties and incomes.

(c) Requires an inventory and appraisal ordered under Subsection (a) of this section to meet certain specific criteria.

(d) Sets forth criteria required of an accounting ordered under Subsection (b) of this section.

(e) Authorizes the court, after an initial accounting has been filed by a community administrator under this section, 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 if certain specific conditions exist.

(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 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 Chapter XIII5C, Texas Probate Code, by adding Section 884A, as follows:

Sec. 884A. 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. Makes application of the changes in law made by this Act to Section 485, Texas Probate Code, prospective.

SECTION 22. Makes application of the changes in law made by this Act to Sections 676(d) and 677(b), Texas Probate Code, prospective.

SECTION 23. Makes application of the changes in law made by this Act to Sections 577A and 679, Texas Probate Code, and Sections 677B and 679A, Texas Probate Code, as added by this Act, prospective.

SECTION 24. Makes application of Sections 760A and 760B, Texas Probate Code, as added by this Act, prospective.

SECTION 25. Makes application of the changes in law made by this Act to Section 761, Texas Probate Code, prospective.

SECTION 26. Makes application of Sections 2, 10, 16, 17, and 19 of this Act and Sections 883B, 883C, and 883D, Texas Probate Code, as added by this Act, prospective.

SECTION 27. Makes application of the changes in law made by this Act to Section 745(c), Texas Probate Code, prospective.

SECTION 28. Makes application of the changes in law made by this Act to Section 875(c), Texas Probate Code, prospective.

SECTION 29. Effective date: September 1, 2001.