

Possible Ways to Eliminate Opposition to HB 660

At the Senate Jurisprudence Committee hearing April 25, 2007, HB 660 (REPTL's *Gonzalez v. Reliant Energy, Inc.* venue/transfer fix) was left pending because Sen. Duncan wished to reduce or eliminate the ability of litigants to "forum shop." His focus was on a Section 608 transfer where a witness described his client's side of a case that is now subject to a mandamus proceeding in which he accused the other side of "forum shopping."

Whether or not the "forum shopping" label is accurate, it may be impossible to pass HB 660 without some change intended to address this issue. Of course, one option is to attempt to kill HB 660. There are three principle disadvantages to that strategy:

1. We would leave courts and litigants facing the current post-Reliant Energy uncertainty in non-tort cases.
2. We would be inviting a serious effort to restrict statutory probate court venue and transfer power next session in a bill that we may be unable to affect.
3. We may be unsuccessful killing the bill and be stuck this session with an unacceptable bill.

For these reasons, it is worth thinking about ways HB 660 may be changed to gain sufficient support for its passage without doing too much damage to the current scheme. To further the discussion, following are several ideas, ranging from the least severe to more severe. When considering these, the following factors should be considered to apply to all suggestions:

A. *If possible, the changes should apply only to guardianships.* The case described by the witness was a guardianship case, and the ease with which someone may establish venue for a guardianship makes guardianships

more potentially abusive. Since there are far fewer guardianships than decedents' estates, this cuts the problem by more than half. On the other hand, sometimes the need for the transfer power is greatest in guardianships, since resolution of the transferred case may dramatically affect the ability of the guardian to care for the ward.

B. *If possible, the changes should apply only to the transfer power* in Sections 5B and 608 and not to the statutory probate court's ability to hear cases originally filed in those courts. Virtually all of the focus is on the transfer power, so that's where we should focus our attention.

#	Description of Change	Bill Text	Pros/Cons
1	List factors court is to consider when deciding whether or not to make a 5B or 608 transfer.	New §608(b) If any party opposes the transfer, then the court shall consider the following factors when deciding whether or not to transfer a cause of action under Subsection (a):	Pro: Reduces the problem by more than half – there are more decedents' estates than guardianships. Con: The need for a transfer in a guardianship may be more critical – to pay for the ward's care. There is no reason to require these factors to be considered if no party opposes the transfer.
1A	Judicial economy	If the transfer is likely to promote judicial economy.	This is the main justification for the transfer power, so it is appropriate to list it as a factor.
1B	Number of parties	The number of parties to the cause of action that are unrelated to the guardianship other than because of their involvement in the cause of action.	If the cause of action is one party versus the guardian, there is more justification than if the guardian is one of dozens of parties.

1C	Convenience of the parties	The convenience of the parties to the cause of action.	
1D	Purpose of guardianship	If a primary purpose of the creation of the guardianship was to permit the transfer of the cause of action.	If the guardianship was established long before the cause of action commenced, then it is less likely that the motion to transfer is an attempt to forum shop.
1E	Effect on assets or care of ward	The effect, if any, the resolution of the lawsuit is likely to have on the assets in the ward's estate or on the ability of the guardian to care for the ward.	
1F	Speed resolution of underlying case	Whether the transfer is likely to hasten the conclusion of the cause of action.	
1G	The stage of the case	The status of the cause of action, including the status of discovery, scheduling orders and trial preparation.	
1H	Relative interest of ward in case	The size of the ward's interest in the cause of action when compared to the interests of the other parties to the cause of action.	If the ward has a relatively small interest in the case when compared to other parties, then the court should be reluctant to transfer the case.
2	Require findings prior to transfer	New §6089b) If a motion to transfer a cause of action under Subsection (a) is opposed, the	A step up from requiring the court to consider factors is to require it to make specific findings before transferring a

		judge shall not transfer a cause of action under Subsection (b) unless it finds that:	case.
2A	Judicial economy	The transfer is likely to promote judicial economy.	
2B	Purpose of guardianship	A primary purpose of the guardianship was not to permit the transfer of the cause of action.	
2C	Effect on assets or care of ward	The cause of action is likely to have a material effect on the assets of the ward's estate during the period of the ward's minority or likely incapacity or on the ability of the guardian to care for the ward.	
2D	Speed resolution of the underlying case	The transfer of the cause of action is likely to hasten the conclusion of the cause of action.	
3	Prohibiting transfers in certain cases.	New §608(b) If a motion to transfer a cause of action under Subsection (a) is opposed, a judge may not transfer the cause of action if:	
3A	Guardianship established after commencement of lawsuit	If the application to appoint a guardian of a ward was filed after the filing of the petition	This is a hard- and fast-test that would be easy to apply. It would lead to some inequities, but it would make it virtually

		initiating the cause of action to be transferred.	impossible to claim “forum shopping” in any transferred case.
3B	Ward does not have a permanent domicile in county	If the ward does not maintain his or her permanent residence and domicile in the county where the statutory probate judge making the transfer is sitting.	A real vulnerability on the “forum shopping” argument is the fact that a guardianship can be based on a person “found” in the county. Requiring a finding of domicile helps with this, even if it is not a relevant issue under current law.
3C	Unrelated parties	If there are three or more parties to the cause of action that are not related to the ward within three degrees of consanguinity (provided, however, that for purposes of determining the number of parties, affiliated entities shall be counted as one parties and attorneys ad litem and guardians ad litem shall be ignored).	Games can be played with the number of parties, so this is not the best condition. However, there is a greater public policy basis for prohibiting transfers when there are a lot of unrelated parties.