

BILL ANALYSIS

Senate Research Center
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H.B. 2368
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Jurisprudence
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Engrossed

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 changes affecting trusts. Currently, Section 1104.021 (Trustee Named as Beneficiary in Policy), Insurance Code, contains an incorrect reference to a trust that "designates a beneficiary" of a life insurance policy. Trusts do not designate beneficiaries of life insurance policies; they are designated as beneficiaries of the policies.

This legislation adds a provision modifying distribution powers to prevent inadvertent tax or creditor problems to the trustee, amends ad litem appointment and compensation, and amends statutes to comply with recent Internal Revenue Service rulings.

H.B. 2368 amends current law relating to trusts.

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 1104.021(a), Insurance Code, to provide that the validity of a trust agreement or declaration of trust that is designated as, rather than that designates, a beneficiary of a life insurance policy is not affected by whether any corpus of the trust exists in addition to the right of the trustee to receive insurance proceeds.

SECTION 2. Amends Sections 112.010(c) and (c-1), Property Code, as follows:

(c) Authorizes certain persons, except as provided by Subsection (c-1), to disclaim an interest in a trust created in any manner other than by will, including the independent executor or independent administrator of a deceased beneficiary, without court approval. Makes a nonsubstantive change.

(c-1) Prohibits a person authorized to disclaim an interest in a trust under Subsection (c) from disclaiming the interest if the person in the person's capacity as beneficiary, personal representative, independent executor, or independent administrator has either exercised dominion and control over the interest or accepted any benefits from the trust. Makes nonsubstantive changes.

SECTION 3. Amends Subchapter A, Chapter 113, Property Code, by adding Section 113.029, as follows:

Sec. 113.029. DISCRETIONARY POWERS; TAX SAVINGS. (a) Requires the trustee, notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of certain terms, to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Provides that subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:

(1) a person, other than a settlor, who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit, is authorized to exercise the power only in accordance with an ascertainable standard relating to the trustee's individual health, education, support, or maintenance with the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and

(2) a trustee is prohibited from exercising a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) Authorizes a power the exercise of which is limited or prohibited by Subsection (b) to be exercised by a majority of the remaining trustees whose exercise of the power is not limited or prohibited by Subsection (b). Authorizes the court, if the power of all trustees is limited or prohibited by Subsection (b), to appoint a special fiduciary with authority to exercise the power.

(d) Provides that Subsection (b) does not apply to a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined by Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was previously allowed, any trust during any period that the trust may be revoked or amended by its settler, or a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c), Internal Revenue Code of 1986.

SECTION 4. Amends Section 115.013(d), Property Code, to require that notice under Section 115.015, rather than Section 115.014 of this Act, be given either to a person who will be bound by the judgment or to one who can bind that person under this section, and provides that notice may be given to both.

SECTION 5. Amends the heading to Section 115.014, Property Code, to read as follows:

Sec. 115.014. GUARDIAN OR ATTORNEY AD LITEM.

SECTION 6. Amends Section 115.014, Property Code, by amending Subsection (b) and adding Subsections (d) and (e), as follows:

(b) Authorizes a court, at any point in a proceeding, to appoint an attorney ad litem to represent any interest that the court considers necessary, including an attorney ad litem to defend an action under Section 114.083 (Rights and Liabilities for Committing Torts) for a beneficiary of the trust who is a minor or who has been adjudged incompetent. Deletes existing text requiring a court to appoint a guardian ad litem to defend an action under Section 114.083 of this Act for a beneficiary of the trust who is a minor or who has been adjudged incompetent.

(d) Entitles a guardian ad litem to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding.

(e) Entitles an attorney ad litem to reasonable compensation for services in the amount set by the court in the manner provided by Section 144.064 (Costs).

SECTION 7. Amends Section 116.006(d), Property Code, to authorize the court to appoint one or more guardians ad litem or attorneys ad litem pursuant to Section 115.014. Requires the trustee to advance from the trust principal all costs incident to the judicial determination, including the reasonable attorney's fees and costs of the trustee, any beneficiary or beneficiaries who are parties to the action and who retain counsel, any guardian ad litem, and any attorney ad litem. Makes nonsubstantive changes.

SECTION 8. Amends Section 116.172(a), Property Code, by amending Subdivision (2) and adding Subdivision (3), to redefine "payment" and define "separate fund."

SECTION 9. Amends Section 116.172, Property Code, by amending Subsection (h) and adding Subsections (i)-(k), as follows:

(h) Provides that Subsections (j) and (k) apply and Subsection (b) (relating to requiring a trustee to allocate to income and to principal the balance of payment and any other payment) and (c) (relating to requiring a trustee to allocate to income the part of the payment that does not exceed a certain amount) do not apply in determining the allocation of a payment made from a separate fund to a trust to which an election to qualify for a marital deduction under Section 2056(b)(7), Internal Revenue Code of 1986, has been made, or a trust that qualifies for the marital deduction under Section 2056(b)(5), Internal Revenue Code of 1986. Deletes existing text requiring a trustee, if, to obtain an estate tax marital deduction for a trust, the trustee must allocate more of a payment to income than provided for by this section, to allocate to income the additional amount necessary to obtain the marital deduction.

(i) Provides that Subsections (h), (j), and (k) do not apply if and to the extent that a series of payments would, without the application of Subsection (h), qualify for the marital deduction under Section 2056(b)(7)(C), Internal Revenue Code of 1986.

(j) Requires the trustee to determine the internal income of the separate fund for the accounting period as if the separate fund were a trust subject to this code. Requires a trustee, on request of the surviving spouse, to demand of the person administering the separate fund that this internal income be distributed to the trust. Requires the trustee to allocate a payment from the separate fund to income to the extent of the internal income of the separate fund, and the balance to the principal. Requires the trustee on request of the surviving spouse, to allocate principal to income to the extent the internal income of the separate fund exceeds payments made to the trust during the accounting period from the separate fund.

(k) Requires that the internal income of the separate fund, if the trustee cannot determine the internal income of the separate fund but can determine the value of the separate fund, be four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. Requires that the internal income of the fund, if the trustee can determine neither the internal income of the separate fund nor the fund's value, be the product of the interest rate and the present value of the expected future payment, as determine under Section 7520, Internal Revenue Code of 1986, for the month preceding the accounting period for which the computation is made.

SECTION 10. (a) Makes application of Section 113.029, Property Code, as added by this Act, prospective to September 1, 2009.

(b) Provide that except as otherwise expressly provided by the will, the terms of the trust, or this act, the changes in law made by this Act apply to a trust existing or created on or after September 1, 2009, the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending as of September 1, 2009, and the estate of a decedent who dies on or after September 1, 2009.

(c) Provides that for a trust existing on September 1, 2009, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2009.

SECTION 11. Effective date: September 1, 2009.