

## **BILL ANALYSIS**

C.S.H.B. 2368  
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Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Section 112.010, Texas Trust Code, allows an independent executor of the estate of a deceased beneficiary to disclaim an interest in a trust without court approval, but there is no authorization for an independent administrator of the estate of a deceased beneficiary to disclaim an interest in a trust without court approval. While the Probate Code includes an independent administrator in the definition of "independent executor," the Texas Trust Code includes no such definition. Some trust instruments inadvertently grant a trustee a distribution power in favor of the trustee as beneficiary, and this can cause tax or creditor problems for the trustee. Section 114.003, Texas Trust Code, contains provisions relating to a trustee's duties in a situation where a third party is given the power to direct certain actions of the trustee in certain areas. Some trustees feel that the current language leads to uncertainty as to when the trustee must follow the directions of the third party and when the trustee may be held liable for those actions. Current law does not make clear the extent a settlor can eliminate the fiduciary duties of the third party.

Section 115.014, Texas Trust Code, authorizes the appointment of a guardian ad litem in certain proceedings, but does not authorize the appointment of an attorney ad litem. Current law also does not expressly provide for the compensation of an attorney ad litem. Section 116.172, Texas Trust Code, contains provisions relating to the allocation of receipts of a trust from deferred payment methods, such as retirement plans, between the trust's income and principal. The provisions can present tax problems if the trust is designed to qualify for the federal estate tax marital deduction. The Internal Revenue Service has raised objections to current Texas law because it may not contain an effective marital deduction savings clause. Section 1104.021, Insurance Code, contains an incorrect reference to a trust that "designated a beneficiary" of a life insurance policy. Trusts do not designate beneficiaries of life insurance policies; trusts are designated as beneficiaries of the policies.

C.S.H.B. 2368 allows an independent executor or an independent administrator of the estate of a deceased beneficiary of a trust to disclaim an interest in the trust without court approval. The bill limits the ability of a trust instrument to grant a trustee a distribution power in favor of the trustee as a beneficiary and authorizes the settlor to provide otherwise in the trust. The bill authorizes the appointment of an attorney ad litem in certain trust proceedings, and authorizes the compensation of a guardian ad litem and of an attorney ad litem. The bill clarifies provisions relating to the allocation of payments to the income or the balance of the trust. The bill clarifies that Insurance Code provisions apply to a trust that is designated as a beneficiary of a life insurance policy.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

## **ANALYSIS**

C.S.H.B. 2368 amends the Texas Trust Code to authorize the independent administrator of a deceased beneficiary, without court approval, to disclaim an interest in a trust created in any matter other than by will. The bill prohibits a person from disclaiming an interest in a trust if the person in the person's capacity as independent administrator has either exercised dominion and control over the interest or has accepted any benefits from the trust.

C.S.H.B. 2368 requires a trustee, notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute," "sole," or "uncontrolled," 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. The bill authorizes 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 to exercise the power only in accordance with an ascertainable standard relating to the trustee's individual health, education, support, or maintenance within the meaning of federal law, unless the terms of the trust expressly indicate that this provision does not apply. The bill prohibits a trustee from exercising a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person, unless the terms of the trust expressly indicate that this provision does not apply. The bill makes the provisions relating to the limitation on the power of discretionary distribution inapplicable to a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction was previously allowed, to any trust during any period that the trust may be revoked or amended by its settlor, or to a trust if contributions to the trust qualify for the annual exclusion under federal law. The bill establishes that a power, the exercise of which is subject to the provisions relating to the limitation on the power of discretionary distribution, may be exercised by a majority of the remaining trustees whose exercise of power is not limited or prohibited under the provisions. The bill authorizes the court to appoint a special fiduciary with authority to exercise the power if the power of all trustees is limited or prohibited. The bill makes a technical correction.

C.S.H.B. 2368 authorizes a court, at any point in a proceeding by or against a trustee or concerning a trust, to appoint an attorney ad litem to represent any interest that the court considers necessary, including an attorney ad litem to defend certain actions. The bill 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, and entitles an attorney ad litem to reasonable compensation for services in the amount set by the court in the manner provided for by law. The bill makes conforming changes.

C.S.H.B. 2368 redefines "payment" and defines "separate fund."

C.S.H.B. 2368 sets out provisions relating to the allocation of receipts of a trust from deferred payment methods between the trust's income and principal and relating to a trust that elects to qualify or qualifies for a federal estate tax marital deduction.

C.S.H.B. 2368 amends the Insurance Code to clarify that the validity of a trust agreement or declaration of trust that is designated as a beneficiary of a life insurance policy, rather than a trust agreement or declaration of trust 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 life insurance proceeds.

C.S.H.B. 2368 sets out the applicability of the bill's provisions to a trust, a decedent's estate, and an act or omission relating to a trust.

## **EFFECTIVE DATE**

September 1, 2009.

## **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 2368 omits a provision included in the original defining "investment decision." The substitute omits provisions included in the original establishing a person given authority by the terms of the trust to direct the modification or termination of the trust, or to direct, consent to, or disapprove of a trustee's actual or proposed investment decision, distribution decision, or other decision of the trustee as an advisor, and an advisor's duties and liabilities; the authority of trust provisions to give an advisor certain duties; and the authority of the settlor to relieve an advisor of certain fiduciary duties. The substitute removes provisions in the original exempting a trustee from liability for any loss under certain conditions; providing that a trustee does not have certain duties if the terms of the trust provide that a trustee is to follow the direction of an advisor; and presuming that actions of the trustee pertaining to matters within the scope of the advisor's authority to be administrative actions.

C.S.H.B. 2368 omits a provision included in the original that struck language exempting a trustee from certain liability for acting in accordance with an advisor's direction under certain conditions. The substitute omits a provision included in the original that struck language establishing that a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries, and establishing the holder of a power to direct as liable for any loss that results from a breach of the person's fiduciary duty.