

By: Hartnett

H.B. No. 2368

A BILL TO BE ENTITLED

AN ACT

relating to trusts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 1104.021(a), Insurance Code, is amended to read as follows:

(a) An individual may make a trust agreement providing that the proceeds of a life insurance policy insuring the individual be made payable to a trustee named as beneficiary in the policy. The validity of a trust agreement or declaration of trust that is designated as [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. Sections 112.010(c) and (c-1), Property Code, are amended to read as follows:

(c) Except as provided by Subsection (c-1) [~~of this section~~], the following persons may disclaim an interest in a trust created in any manner other than by will:

(1) a beneficiary, including a beneficiary of a spendthrift trust;

(2) the personal representative of an incompetent, deceased, unborn or unascertained, or minor beneficiary, with court approval by the court having jurisdiction over the personal representative; and

(3) the independent executor or independent

1 administrator of a deceased beneficiary, without court approval.

2 (c-1) A person authorized to disclaim an interest in a trust
3 under Subsection (c) [~~of this section~~] may not disclaim the
4 interest if the person in the person's [~~his~~] capacity as
5 beneficiary, personal representative, [~~or~~] independent executor,
6 or independent administrator has either exercised dominion and
7 control over the interest or accepted any benefits from the trust.

8 SECTION 3. Subchapter A, Chapter 113, Property Code, is
9 amended by adding Section 113.029 to read as follows:

10 Sec. 113.029. DISCRETIONARY POWERS; TAX SAVINGS. (a)
11 Notwithstanding the breadth of discretion granted to a trustee in
12 the terms of the trust, including the use of terms such as
13 "absolute," "sole," or "uncontrolled," the trustee shall exercise a
14 discretionary power in good faith and in accordance with the terms
15 and purposes of the trust and the interests of the beneficiaries.

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

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

27 (2) a trustee may not exercise a power to make

1 discretionary distributions to satisfy a legal obligation of
2 support that the trustee personally owes another person.

3 (c) A power the exercise of which is limited or prohibited
4 by Subsection (b) may be exercised by a majority of the remaining
5 trustees whose exercise of the power is not limited or prohibited by
6 Subsection (b). If the power of all trustees is limited or
7 prohibited by Subsection (b), the court may appoint a special
8 fiduciary with authority to exercise the power.

9 (d) Subsection (b) does not apply to:

10 (1) a power held by the settlor's spouse who is the
11 trustee of a trust for which a marital deduction, as defined by
12 Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was
13 previously allowed;

14 (2) any trust during any period that the trust may be
15 revoked or amended by its settlor; or

16 (3) a trust if contributions to the trust qualify for
17 the annual exclusion under Section 2503(c), Internal Revenue Code
18 of 1986.

19 SECTION 4. Section 115.013(d), Property Code, is amended to
20 read as follows:

21 (d) Notice under Section 115.015 [~~115.014 of this Act~~] shall
22 be given either to a person who will be bound by the judgment or to
23 one who can bind that person under this section, and notice may be
24 given to both. Notice may be given to unborn or unascertained
25 persons who are not represented under Subdivision (1) or (2) of
26 Subsection (c) by giving notice to all known persons whose
27 interests in the proceedings are substantially identical to those

1 of the unborn or unascertained persons.

2 SECTION 5. The heading to Section 115.014, Property Code,
3 is amended to read as follows:

4 Sec. 115.014. GUARDIAN OR ATTORNEY AD LITEM.

5 SECTION 6. Section 115.014, Property Code, is amended by
6 amending Subsection (b) and adding Subsections (d) and (e) to read
7 as follows:

8 (b) At any point in a proceeding a court may appoint an
9 attorney ad litem to represent any interest that the court
10 considers necessary, including an attorney [~~A court shall appoint a~~
11 ~~guardian~~] ad litem to defend an action under Section 114.083 [~~of~~
12 ~~this Act~~] for a beneficiary of the trust who is a minor or who has
13 been adjudged incompetent.

14 (d) A guardian ad litem is entitled to reasonable
15 compensation for services in the amount set by the court to be taxed
16 as costs in the proceeding.

17 (e) An attorney ad litem is entitled to reasonable
18 compensation for services in the amount set by the court in the
19 manner provided by Section 114.064.

20 SECTION 7. Section 116.006(d), Property Code, is amended to
21 read as follows:

22 (d) If the trustee of a trust reasonably believes that one
23 or more beneficiaries of such trust will object to the manner in
24 which the trustee intends to exercise or not exercise a
25 discretionary power conferred by Section 116.005 [~~of this chapter~~],
26 the trustee may petition the court having jurisdiction over the
27 trust, and the court shall determine whether the proposed exercise

1 or nonexercise by the trustee of such discretionary power will
2 result in an abuse of the trustee's discretion. The trustee shall
3 state in such petition the basis for its belief that a beneficiary
4 would object. The failure or refusal of a beneficiary to sign a
5 waiver or release is not reasonable grounds for a trustee to believe
6 the beneficiary will object. The court may appoint one or more
7 guardians ad litem or attorneys ad litem pursuant to Section
8 115.014 [~~of this subtitle~~]. If the petition describes the proposed
9 exercise or nonexercise of the power and contains sufficient
10 information to inform the beneficiaries of the reasons for the
11 proposal, the facts upon which the trustee relies, and an
12 explanation of how the income and remainder beneficiaries will be
13 affected by the proposed exercise or nonexercise of the power, a
14 beneficiary who challenges the proposed exercise or nonexercise has
15 the burden of establishing that it will result in an abuse of
16 discretion. The trustee shall advance from the trust principal all
17 costs incident to the judicial determination, including the
18 reasonable attorney's fees and costs of the trustee, any
19 beneficiary or beneficiaries who are parties to the action and who
20 retain counsel, [~~and~~] any guardian ad litem, and any attorney ad
21 litem. At the conclusion of the proceeding, the court may award
22 costs and reasonable and necessary attorney's fees as provided in
23 Section 114.064 [~~of this subtitle~~], including, if the court
24 considers it appropriate, awarding part or all of such costs
25 against the trust principal or income, awarding part or all of such
26 costs against one or more beneficiaries or such beneficiary's or
27 beneficiaries' share of the trust, or awarding part or all of such

1 costs against the trustee in the trustee's individual capacity, if
2 the court determines that the trustee's exercise or nonexercise of
3 discretionary power would have resulted in an abuse of discretion
4 or that the trustee did not have reasonable grounds for believing
5 one or more beneficiaries would object to the proposed exercise or
6 nonexercise of the discretionary power.

7 SECTION 8. Section 116.172(a), Property Code, is amended by
8 amending Subdivision (2) and adding Subdivision (3) to read as
9 follows:

10 (2) "Payment" means a payment that a trustee may
11 receive over a fixed number of years or during the life of one or
12 more individuals because of services rendered or property
13 transferred to the payer in exchange for future payments. The term
14 includes a payment made in money or property from the payer's
15 general assets or from a separate fund created by the payer[
16 ~~including a private or commercial annuity, an individual retirement~~
17 ~~account, and a pension, profit-sharing, stock-bonus, or~~
18 ~~stock-ownership plan].~~

19 (3) "Separate fund" includes a private or commercial
20 annuity, an individual retirement account, and a pension,
21 profit-sharing, stock-bonus, or stock-ownership plan.

22 SECTION 9. Section 116.172, Property Code, is amended by
23 amending Subsection (h) and adding Subsections (i), (j), and (k) to
24 read as follows:

25 (h) Subsections (j) and (k) apply and Subsections (b) and
26 (c) do not apply in determining the allocation of a payment made
27 from a separate fund to:

1 (1) a trust to which an election to qualify for a
2 marital deduction under Section 2056(b)(7), Internal Revenue Code
3 of 1986, has been made; or

4 (2) a trust that qualifies for the marital deduction
5 under Section 2056(b)(5), Internal Revenue Code of 1986 [~~If, to~~
6 ~~obtain an estate tax marital deduction for a trust, a trustee must~~
7 ~~allocate more of a payment to income than provided for by this~~
8 ~~section, the trustee shall allocate to income the additional amount~~
9 ~~necessary to obtain the marital deduction]~~.

10 (i) Subsections (h), (j), and (k) do not apply if and to the
11 extent that a series of payments would, without the application of
12 Subsection (h), qualify for the marital deduction under Section
13 2056(b)(7)(C), Internal Revenue Code of 1986.

14 (j) The trustee shall determine the internal income of the
15 separate fund for the accounting period as if the separate fund were
16 a trust subject to this code. On request of the surviving spouse,
17 the trustee shall demand of the person administering the separate
18 fund that this internal income be distributed to the trust. The
19 trustee shall allocate a payment from the separate fund to income to
20 the extent of the internal income of the separate fund, and the
21 balance to the principal. On request of the surviving spouse, the
22 trustee shall allocate principal to income to the extent the
23 internal income of the separate fund exceeds payments made to the
24 trust during the accounting period from the separate fund.

25 (k) If the trustee cannot determine the internal income of
26 the separate fund but can determine the value of the separate fund,
27 the internal income of the separate fund shall be four percent of

1 the fund's value, according to the most recent statement of value
2 preceding the beginning of the accounting period. If the trustee
3 can determine neither the internal income of the separate fund nor
4 the fund's value, the internal income of the fund shall be the
5 product of the interest rate and the present value of the expected
6 future payments, as determined under Section 7520, Internal Revenue
7 Code of 1986, for the month preceding the accounting period for
8 which the computation is made.

9 SECTION 10. (a) The changes in law made by Section 113.029,
10 Property Code, as added by this Act, apply only to a trust that is
11 created or becomes irrevocable on or after September 1, 2009.

12 (b) Except as otherwise expressly provided by the will, the
13 terms of the trust, or this Act, the changes in law made by this Act
14 apply to:

15 (1) a trust existing or created on or after September
16 1, 2009;

17 (2) the estate of a decedent who dies before September
18 1, 2009, if the probate or administration of the estate is pending
19 as of September 1, 2009; and

20 (3) the estate of a decedent who dies on or after
21 September 1, 2009.

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

26 SECTION 11. This Act takes effect September 1, 2009.