

By: Hartnett

H.B. No. 2368

A BILL TO BE ENTITLED

AN ACT

1
2 relating to trusts.

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

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

6 (a) An individual may make a trust agreement providing that
7 the proceeds of a life insurance policy insuring the individual be
8 made payable to a trustee named as beneficiary in the policy. The
9 validity of a trust agreement or declaration of trust that is
10 designated as [designates] a beneficiary of a life insurance policy
11 is not affected by whether any corpus of the trust exists in
12 addition to the right of the trustee to receive insurance proceeds.

13 SECTION 2. Sections 112.010(c) and (c-1), Property Code,
14 are amended to read as follows:

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

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

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

24 (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 114.003, Property Code, is amended to
20 read as follows:

21 Sec. 114.003. POWERS TO DIRECT. (a) In this section,
22 "investment decision" means, with respect to any investment, the
23 retention, purchase, sale, exchange, tender, or other transaction
24 affecting the ownership of the investment or rights in the
25 investment, and an adviser with authority with respect to
26 investment decisions is an investment adviser.

27 (b) Where one or more persons are given authority by the

1 terms of a trust to direct the modification or termination of the
2 trust, or to direct, consent to, or disapprove of a trustee's actual
3 or proposed investment decision, distribution decision, or other
4 decision of the trustee, those persons shall be considered to be
5 advisers. Unless an adviser is also a beneficiary of the trust or
6 the terms of the trust provide otherwise, an adviser shall be
7 considered to be a fiduciary when exercising that authority. An
8 adviser must act in good faith with regard to the purposes of the
9 trust and the interests of the beneficiaries. Unless the terms of
10 the trust provide that the adviser need not act as a fiduciary, the
11 adviser is liable for any loss that results from a breach of the
12 adviser's fiduciary duty.

13 (c) The terms of a trust may give an adviser [~~a trustee or~~
14 ~~other person~~] a power to direct the modification or termination of
15 the trust, or to consent to or disapprove a trustee's actual or
16 proposed investment decision, distribution decision, or other
17 decision of the trustee. Except as provided by Section 111.0035,
18 this section does not prohibit the settlor, by the terms of the
19 trust, from expressly:

20 (1) relieving the adviser from a duty or restriction
21 imposed by this subtitle or by common law; or

22 (2) directing or permitting the adviser to act or
23 refrain from acting if the directed or permitted act or failure to
24 act would otherwise violate a duty or restriction imposed by this
25 subtitle or by common law.

26 (d) [~~(b)~~] If the terms of a trust give an adviser [~~a person~~]
27 the power to direct certain actions of the trustee, the trustee

1 shall act in accordance with the adviser's [~~person's~~] direction
2 and, except in cases of wilful misconduct or gross negligence on the
3 part of the trustee, the trustee is not liable for any loss
4 resulting directly or indirectly from those actions unless[+]

5 [~~(1)~~] the direction is manifestly contrary to the
6 terms of the trust[+~~or~~

7 [~~(2)~~ ~~the trustee knows the direction would constitute~~
8 ~~a serious breach of a fiduciary duty that the person holding the~~
9 ~~power to direct owes to the beneficiaries of the trust~~].

10 (e) Whenever the terms of a trust provide that a trustee is
11 to follow the direction of an adviser with respect to an investment
12 decision, distribution decision, or other decision of the trustee,
13 then, except to the extent that the terms of a trust provide
14 otherwise, the trustee does not have a duty to:

15 (1) monitor the conduct of the adviser;

16 (2) provide advice to the adviser;

17 (3) consult with the adviser; or

18 (4) communicate with, warn, or apprise any beneficiary
19 or third party concerning instances in which the trustee would or
20 might have exercised the trustee's own discretion in a manner
21 different from the manner directed by the adviser.

22 (f) Absent clear and convincing evidence to the contrary,
23 the actions of the trustee pertaining to matters within the scope of
24 the adviser's authority, including confirming that the adviser's
25 directions have been carried out, and recording and reporting
26 actions taken at the adviser's direction, are presumed to be
27 administrative actions taken by the trustee solely to allow the

1 trustee to perform those duties assigned to the trustee under the
2 terms of the trust. The trustee's administrative actions are not
3 considered to constitute an undertaking by the trustee to monitor
4 the adviser or otherwise participate in actions within the scope of
5 the adviser's authority.

6 ~~[(c) A person, other than a beneficiary, who holds a power~~
7 ~~to direct is presumptively a fiduciary required to act in good faith~~
8 ~~with regard to the purposes of the trust and the interests of the~~
9 ~~beneficiaries. The holder of a power to direct is liable for any~~
10 ~~loss that results from a breach of the person's fiduciary duty.]~~

11 SECTION 5. Section 115.013(d), Property Code, is amended to
12 read as follows:

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

21 SECTION 6. The heading to Section 115.014, Property Code,
22 is amended to read as follows:

23 Sec. 115.014. GUARDIAN OR ATTORNEY AD LITEM.

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

27 (b) At any point in a proceeding a court may appoint an

1 attorney ad litem to represent any interest that the court
2 considers necessary, including an attorney [~~A court shall appoint a~~
3 ~~guardian~~] ad litem to defend an action under Section 114.083 [~~of~~
4 ~~this Act~~] for a beneficiary of the trust who is a minor or who has
5 been adjudged incompetent.

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

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

12 SECTION 8. Section 116.006(d), Property Code, is amended to
13 read as follows:

14 (d) If the trustee of a trust reasonably believes that one
15 or more beneficiaries of such trust will object to the manner in
16 which the trustee intends to exercise or not exercise a
17 discretionary power conferred by Section 116.005 [~~of this chapter~~],
18 the trustee may petition the court having jurisdiction over the
19 trust, and the court shall determine whether the proposed exercise
20 or nonexercise by the trustee of such discretionary power will
21 result in an abuse of the trustee's discretion. The trustee shall
22 state in such petition the basis for its belief that a beneficiary
23 would object. The failure or refusal of a beneficiary to sign a
24 waiver or release is not reasonable grounds for a trustee to believe
25 the beneficiary will object. The court may appoint one or more
26 guardians ad litem or attorneys ad litem pursuant to Section
27 115.014 [~~of this subtitle~~]. If the petition describes the proposed

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

26 SECTION 9. Section 116.172(a), Property Code, is amended by
27 amending Subdivision (2) and adding Subdivision (3) to read as

1 follows:

2 (2) "Payment" means a payment that a trustee may
3 receive over a fixed number of years or during the life of one or
4 more individuals because of services rendered or property
5 transferred to the payer in exchange for future payments. The term
6 includes a payment made in money or property from the payer's
7 general assets or from a separate fund created by the payer[~~7~~
8 ~~including a private or commercial annuity, an individual retirement~~
9 ~~account, and a pension, profit-sharing, stock-bonus, or~~
10 ~~stock-ownership plan].~~

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

14 SECTION 10. Section 116.172, Property Code, is amended by
15 amending Subsection (h) and adding Subsections (i), (j), and (k) to
16 read as follows:

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

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

23 (2) a trust that qualifies for the marital deduction
24 under Section 2056(b)(5), Internal Revenue Code of 1986 [~~If, to~~
25 ~~obtain an estate tax marital deduction for a trust, a trustee must~~
26 ~~allocate more of a payment to income than provided for by this~~
27 ~~section, the trustee shall allocate to income the additional amount~~

1 ~~necessary to obtain the marital deduction].~~

2 (i) Subsections (h), (j), and (k) do not apply if and to the
3 extent that a series of payments would, without the application of
4 Subsection (h), qualify for the marital deduction under Section
5 2056(b)(7)(C), Internal Revenue Code of 1986.

6 (j) The trustee shall determine the internal income of the
7 separate fund for the accounting period as if the separate fund were
8 a trust subject to this code. On request of the surviving spouse,
9 the trustee shall demand of the person administering the separate
10 fund that this internal income be distributed to the trust. The
11 trustee shall allocate a payment from the separate fund to income to
12 the extent of the internal income of the separate fund, and the
13 balance to the principal. On request of the surviving spouse, the
14 trustee shall allocate principal to income to the extent the
15 internal income of the separate fund exceeds payments made to the
16 trust during the accounting period from the separate fund.

17 (k) If the trustee cannot determine the internal income of
18 the separate fund but can determine the value of the separate fund,
19 the internal income of the separate fund shall be four percent of
20 the fund's value, according to the most recent statement of value
21 preceding the beginning of the accounting period. If the trustee
22 can determine neither the internal income of the separate fund nor
23 the fund's value, the internal income of the fund shall be the
24 product of the interest rate and the present value of the expected
25 future payments, as determined under Section 7520, Internal Revenue
26 Code of 1986, for the month preceding the accounting period for
27 which the computation is made.

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

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

7 (1) a trust existing or created on or after September
8 1, 2009;

9 (2) the estate of a decedent who dies before September
10 1, 2009, if the probate or administration of the estate is pending
11 as of September 1, 2009; and

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

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

18 SECTION 12. This Act takes effect September 1, 2009.