

1-1 By: Hartnett (Senate Sponsor - Watson) H.B. No. 2368
1-2 (In the Senate - Received from the House May 13, 2009;
1-3 May 14, 2009, read first time and referred to Committee on
1-4 Jurisprudence; May 23, 2009, reported favorably by the following
1-5 vote: Yeas 5, Nays 0; May 23, 2009, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to trusts.

1-9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-10 SECTION 1. Section 1104.021(a), Insurance Code, is amended
1-11 to read as follows:

1-12 (a) An individual may make a trust agreement providing that
1-13 the proceeds of a life insurance policy insuring the individual be
1-14 made payable to a trustee named as beneficiary in the policy. The
1-15 validity of a trust agreement or declaration of trust that is
1-16 designated as ~~designates~~ a beneficiary of a life insurance policy
1-17 is not affected by whether any corpus of the trust exists in
1-18 addition to the right of the trustee to receive insurance proceeds.

1-19 SECTION 2. Sections 112.010(c) and (c-1), Property Code,
1-20 are amended to read as follows:

1-21 (c) Except as provided by Subsection (c-1) ~~[of this~~
1-22 ~~section]~~, the following persons may disclaim an interest in a trust
1-23 created in any manner other than by will:

1-24 (1) a beneficiary, including a beneficiary of a
1-25 spendthrift trust;

1-26 (2) the personal representative of an incompetent,
1-27 deceased, unborn or unascertained, or minor beneficiary, with court
1-28 approval by the court having jurisdiction over the personal
1-29 representative; and

1-30 (3) the independent executor or independent
1-31 administrator of a deceased beneficiary, without court approval.

1-32 (c-1) A person authorized to disclaim an interest in a trust
1-33 under Subsection (c) ~~[of this section]~~ may not disclaim the
1-34 interest if the person in the person's ~~[his]~~ capacity as
1-35 beneficiary, personal representative, ~~[or]~~ independent executor,
1-36 or independent administrator has either exercised dominion and
1-37 control over the interest or accepted any benefits from the trust.

1-38 SECTION 3. Subchapter A, Chapter 113, Property Code, is
1-39 amended by adding Section 113.029 to read as follows:

1-40 Sec. 113.029. DISCRETIONARY POWERS; TAX SAVINGS. (a)
1-41 Notwithstanding the breadth of discretion granted to a trustee in
1-42 the terms of the trust, including the use of terms such as
1-43 "absolute," "sole," or "uncontrolled," the trustee shall exercise a
1-44 discretionary power in good faith and in accordance with the terms
1-45 and purposes of the trust and the interests of the beneficiaries.

1-46 (b) Subject to Subsection (d), and unless the terms of the
1-47 trust expressly indicate that a requirement provided by this
1-48 subsection does not apply:

1-49 (1) a person, other than a settlor, who is a
1-50 beneficiary and trustee of a trust that confers on the trustee a
1-51 power to make discretionary distributions to or for the trustee's
1-52 personal benefit may exercise the power only in accordance with an
1-53 ascertainable standard relating to the trustee's individual
1-54 health, education, support, or maintenance within the meaning of
1-55 Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986;
1-56 and

1-57 (2) a trustee may not exercise a power to make
1-58 discretionary distributions to satisfy a legal obligation of
1-59 support that the trustee personally owes another person.

1-60 (c) A power the exercise of which is limited or prohibited
1-61 by Subsection (b) may be exercised by a majority of the remaining
1-62 trustees whose exercise of the power is not limited or prohibited by
1-63 Subsection (b). If the power of all trustees is limited or
1-64 prohibited by Subsection (b), the court may appoint a special

2-1 fiduciary with authority to exercise the power.

2-2 (d) Subsection (b) does not apply to:

2-3 (1) a power held by the settlor's spouse who is the
2-4 trustee of a trust for which a marital deduction, as defined by
2-5 Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was
2-6 previously allowed;

2-7 (2) any trust during any period that the trust may be
2-8 revoked or amended by its settlor; or

2-9 (3) a trust if contributions to the trust qualify for
2-10 the annual exclusion under Section 2503(c), Internal Revenue Code
2-11 of 1986.

2-12 SECTION 4. Section 115.013(d), Property Code, is amended to
2-13 read as follows:

2-14 (d) Notice under Section 115.015 [~~115.014 of this Act~~] shall
2-15 be given either to a person who will be bound by the judgment or to
2-16 one who can bind that person under this section, and notice may be
2-17 given to both. Notice may be given to unborn or unascertained
2-18 persons who are not represented under Subdivision (1) or (2) of
2-19 Subsection (c) by giving notice to all known persons whose
2-20 interests in the proceedings are substantially identical to those
2-21 of the unborn or unascertained persons.

2-22 SECTION 5. The heading to Section 115.014, Property Code,
2-23 is amended to read as follows:

2-24 Sec. 115.014. GUARDIAN OR ATTORNEY AD LITEM.

2-25 SECTION 6. Section 115.014, Property Code, is amended by
2-26 amending Subsection (b) and adding Subsections (d) and (e) to read
2-27 as follows:

2-28 (b) At any point in a proceeding a court may appoint an
2-29 attorney ad litem to represent any interest that the court
2-30 considers necessary, including an attorney [~~A court shall appoint a~~
2-31 ~~guardian~~] ad litem to defend an action under Section 114.083 [~~of~~
2-32 ~~this Act~~] for a beneficiary of the trust who is a minor or who has
2-33 been adjudged incompetent.

2-34 (d) A guardian ad litem is entitled to reasonable
2-35 compensation for services in the amount set by the court to be taxed
2-36 as costs in the proceeding.

2-37 (e) An attorney ad litem is entitled to reasonable
2-38 compensation for services in the amount set by the court in the
2-39 manner provided by Section 114.064.

2-40 SECTION 7. Section 116.006(d), Property Code, is amended to
2-41 read as follows:

2-42 (d) If the trustee of a trust reasonably believes that one
2-43 or more beneficiaries of such trust will object to the manner in
2-44 which the trustee intends to exercise or not exercise a
2-45 discretionary power conferred by Section 116.005 [~~of this chapter~~],
2-46 the trustee may petition the court having jurisdiction over the
2-47 trust, and the court shall determine whether the proposed exercise
2-48 or nonexercise by the trustee of such discretionary power will
2-49 result in an abuse of the trustee's discretion. The trustee shall
2-50 state in such petition the basis for its belief that a beneficiary
2-51 would object. The failure or refusal of a beneficiary to sign a
2-52 waiver or release is not reasonable grounds for a trustee to believe
2-53 the beneficiary will object. The court may appoint one or more
2-54 guardians ad litem or attorneys ad litem pursuant to Section
2-55 115.014 [~~of this subtitle~~]. If the petition describes the proposed
2-56 exercise or nonexercise of the power and contains sufficient
2-57 information to inform the beneficiaries of the reasons for the
2-58 proposal, the facts upon which the trustee relies, and an
2-59 explanation of how the income and remainder beneficiaries will be
2-60 affected by the proposed exercise or nonexercise of the power, a
2-61 beneficiary who challenges the proposed exercise or nonexercise has
2-62 the burden of establishing that it will result in an abuse of
2-63 discretion. The trustee shall advance from the trust principal all
2-64 costs incident to the judicial determination, including the
2-65 reasonable attorney's fees and costs of the trustee, any
2-66 beneficiary or beneficiaries who are parties to the action and who
2-67 retain counsel, [~~and~~] any guardian ad litem, and any attorney ad
2-68 litem. At the conclusion of the proceeding, the court may award
2-69 costs and reasonable and necessary attorney's fees as provided in

3-1 Section 114.064 [~~of this subtitle~~], including, if the court
 3-2 considers it appropriate, awarding part or all of such costs
 3-3 against the trust principal or income, awarding part or all of such
 3-4 costs against one or more beneficiaries or such beneficiary's or
 3-5 beneficiaries' share of the trust, or awarding part or all of such
 3-6 costs against the trustee in the trustee's individual capacity, if
 3-7 the court determines that the trustee's exercise or nonexercise of
 3-8 discretionary power would have resulted in an abuse of discretion
 3-9 or that the trustee did not have reasonable grounds for believing
 3-10 one or more beneficiaries would object to the proposed exercise or
 3-11 nonexercise of the discretionary power.

3-12 SECTION 8. Section 116.172(a), Property Code, is amended by
 3-13 amending Subdivision (2) and adding Subdivision (3) to read as
 3-14 follows:

3-15 (2) "Payment" means a payment that a trustee may
 3-16 receive over a fixed number of years or during the life of one or
 3-17 more individuals because of services rendered or property
 3-18 transferred to the payer in exchange for future payments. The term
 3-19 includes a payment made in money or property from the payer's
 3-20 general assets or from a separate fund created by the payer[~~—~~
 3-21 ~~including a private or commercial annuity, an individual retirement~~
 3-22 ~~account, and a pension, profit-sharing, stock-bonus, or~~
 3-23 ~~stock-ownership plan].~~

3-24 (3) "Separate fund" includes a private or commercial
 3-25 annuity, an individual retirement account, and a pension,
 3-26 profit-sharing, stock-bonus, or stock-ownership plan.

3-27 SECTION 9. Section 116.172, Property Code, is amended by
 3-28 amending Subsection (h) and adding Subsections (i), (j), and (k) to
 3-29 read as follows:

3-30 (h) Subsections (j) and (k) apply and Subsections (b) and
 3-31 (c) do not apply in determining the allocation of a payment made
 3-32 from a separate fund to:

3-33 (1) a trust to which an election to qualify for a
 3-34 marital deduction under Section 2056(b)(7), Internal Revenue Code
 3-35 of 1986, has been made; or

3-36 (2) a trust that qualifies for the marital deduction
 3-37 under Section 2056(b)(5), Internal Revenue Code of 1986 [If, to
 3-38 obtain an estate tax marital deduction for a trust, a trustee must
 3-39 allocate more of a payment to income than provided for by this
 3-40 section, the trustee shall allocate to income the additional amount
 3-41 necessary to obtain the marital deduction].

3-42 (i) Subsections (h), (j), and (k) do not apply if and to the
 3-43 extent that a series of payments would, without the application of
 3-44 Subsection (h), qualify for the marital deduction under Section
 3-45 2056(b)(7)(C), Internal Revenue Code of 1986.

3-46 (j) The trustee shall determine the internal income of the
 3-47 separate fund for the accounting period as if the separate fund were
 3-48 a trust subject to this code. On request of the surviving spouse,
 3-49 the trustee shall demand of the person administering the separate
 3-50 fund that this internal income be distributed to the trust. The
 3-51 trustee shall allocate a payment from the separate fund to income to
 3-52 the extent of the internal income of the separate fund, and the
 3-53 balance to the principal. On request of the surviving spouse, the
 3-54 trustee shall allocate principal to income to the extent the
 3-55 internal income of the separate fund exceeds payments made to the
 3-56 trust during the accounting period from the separate fund.

3-57 (k) If the trustee cannot determine the internal income of
 3-58 the separate fund but can determine the value of the separate fund,
 3-59 the internal income of the separate fund shall be four percent of
 3-60 the fund's value, according to the most recent statement of value
 3-61 preceding the beginning of the accounting period. If the trustee
 3-62 can determine neither the internal income of the separate fund nor
 3-63 the fund's value, the internal income of the fund shall be the
 3-64 product of the interest rate and the present value of the expected
 3-65 future payments, as determined under Section 7520, Internal Revenue
 3-66 Code of 1986, for the month preceding the accounting period for
 3-67 which the computation is made.

3-68 SECTION 10. (a) The changes in law made by Section 113.029,
 3-69 Property Code, as added by this Act, apply only to a trust that is

4-1 created or becomes irrevocable on or after September 1, 2009.

4-2 (b) Except as otherwise expressly provided by the will, the
4-3 terms of the trust, or this Act, the changes in law made by this Act
4-4 apply to:

4-5 (1) a trust existing or created on or after September
4-6 1, 2009;

4-7 (2) the estate of a decedent who dies before September
4-8 1, 2009, if the probate or administration of the estate is pending
4-9 as of September 1, 2009; and

4-10 (3) the estate of a decedent who dies on or after
4-11 September 1, 2009.

4-12 (c) For a trust existing on September 1, 2009, that was
4-13 created before that date, the changes in law made by this Act apply
4-14 only to an act or omission relating to the trust that occurs on or
4-15 after September 1, 2009.

4-16 SECTION 11. This Act takes effect September 1, 2009.

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