

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 617
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State Affairs
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

As part of its ongoing review of Texas law, the Real Estate, Probate, and Trust Law Section of the State Bar of Texas (a.k.a. the REPTL Section) has proposed S.B. 819, which will clarify certain issues that currently exist in the Texas Property Code. Specifically, the bill clarifies that a beneficiary's right to withdraw funds from contributions to a trust does not create a self-settled trust even if there are multiple donors to such trust, that the 84th Legislature's modification to the trust forfeiture statute does not apply to causes of action that were previously protected by Texas law, and that the proper venue for a trust action involving multiple trustees, when none of them are corporate trustees.

The bill additionally updates trust modification provisions by allowing a trust to be reformed to correct drafting error, if there is clear and convincing evidence, and to allow a modification or reformation to qualify a distributee for governmental benefits. The bill updates a U.S. Treasury Code reference regarding the definition of community trusts. The bill makes it clear that a trustee's ability to delegate includes the ability to delegate to an agent matters involving real estate transactions.

The bill addresses issues in the recently created decanting statute, including, clarifying certain definitions, allowing a trustee with full discretion over a trust to decant even if it materially impairs the rights of a beneficiary, clarifying that a beneficiary will still have the right to sue the trustee even if the beneficiary fails to object to a decanting, and clarifying that notice is not required when notice has been waived.

The bill allows the beneficiary to exercise a power of appointment to create estate inclusion (estate tax), thereby allowing the assets to have their basis adjusted for income tax savings while maintaining benefits of the trust structure. Finally, the bill addresses an issue in the recently created disclaimer statute clarifying that notice is not required when notice has been waived. (Original Author's / Sponsor's Statement of Intent)

C.S.S.B. 617 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 111.0035(b), Property Code, to provide that the terms of a trust prevail over any provision of this subtitle (Texas Trust Code: Creation, Operation, and Termination of Trusts), except that the terms of a trust are prohibited from limiting the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to modify, reform, or terminate a trust, rather than modify or terminate a trust, or take other action under Section 112.054 (Judicial Modification or Termination of Trusts).

SECTION 2. Amends Section 112.035(e), Property Code, as follows:

(e) Prohibits a beneficiary of the trust from being considered a settlor merely because of lapse, waiver, or release of:

(1) makes no change to this subdivision; or

(2) makes a nonsubstantive change:

(A) the amount specified in Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986; or

(B) the amount specified in Section 2503(b), Internal Revenue Code of 1986, with respect to the contributions by each donor.

SECTION 3. Amends Section 112.038, Property Code, as follows:

Sec. 112.038. FORFEITURE CLAUSE. (a) Creates this subsection from existing text.

(b) Provides that this section is not intended to and does not repeal any law, recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.

SECTION 4. Amends the heading to Section 112.054, Property Code, to read as follows:

Sec. 112.054. JUDICIAL MODIFICATION, REFORMATION, OR TERMINATION OF TRUSTS.

SECTION 5. Amends Section 112.054, Property Code, by amending Subsections (a), (b), and (c) and adding Subsections (b-1), (e), and (f), as follows:

(a) Authorizes a court, on the petition of a trustee or beneficiary, to order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:

(1) through (2) makes no changes to these subdivisions;

(3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment, rather than prevent waste or avoid impairment, of the trust's administration;

(4) the order is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; makes a nonsubstantive change; or

(5) makes no change to this subdivision.

(b) Requires the court to exercise its discretion to order a modification or termination under Subsection (a) or reformation under Subsection (b-1) in the manner that conforms as nearly as possible to the probable intention of the settlor. Requires the court to consider spendthrift provisions as a factor in making its decision whether to modify, terminate, or reform, but provides that the court is not precluded from exercising its discretion to modify, terminate, or reform solely because the trust is a spendthrift trust.

(b-1) Authorizes a court, on the petition of a trustee or a beneficiary, to order that the terms of the trust be reformed if:

- (1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration;
- (2) reformation is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or
- (3) reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent.

(c) Authorizes the court to direct that an order described by Subsection (a)(4) or (b-1) has retroactive effect.

(e) Authorizes an order described by Subsection (b-1)(3) to be issued only if the settlor's intent is established by clear and convincing evidence.

(f) Provides that Subsection (b-1) is not intended to state the exclusive basis for reformation of trusts, and that the bases for reformation of trusts in equity or common law are not affected by this section.

SECTION 6. Amends Section 112.058(a)(2), Property Code, to redefine "community trust."

SECTION 7. Amends Sections 112.071(5), (6), and (7), Property Code, to redefine "full discretion," "limited discretion," and "presumptive remainder beneficiary."

SECTION 8. Amends Section 112.072(a), Property Code, as follows:

(a) Authorizes an authorized trustee who has the full discretion to distribute the principal of a trust to distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one, more than one, or all of the current beneficiaries of the first trust and for the benefit of one, more than one, or all of the successor or presumptive remainder beneficiaries of the first trust. Deletes existing text authorizing an authorized trustee who has the full discretion to distribute the principal of a trust to distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one or more current beneficiaries of the first trust who are eligible to receive income or principal from the trust and for the benefit of one or more successor or presumptive remainder beneficiaries of the first trust who are eligible to receive income or principal from the trust.

SECTION 9. Amends Section 112.074, Property Code, by amending Subsection (c) and adding Subsections (e-1) and (e-2), as follows:

(c) Requires the authorized trustee, except as provided by Subsection (e-1), in addition to the notice required under Subsection (a), to give written notice of the trustee's decision to the Texas attorney general (attorney general) if certain conditions are met.

(e-1) Provides that the trustee is not required to give notice to the attorney general under Subsection (c) if the attorney general waives that requirement in writing.

(e-2) Provides that for purposes of Subsection (e)(3), a beneficiary is considered to have waived the requirement that notice be given under this section if a person to whom notice is required to be given with respect to that beneficiary under Subsection (d) waives the requirement that notice be given under this section.

SECTION 10. Amends Section 112.078, Property Code, by adding Subsection (f), to provide that this section does not limit a beneficiary's right to bring an action against a trustee for a breach of trust.

SECTION 11. Amends Section 112.085, Property Code, as follows:

Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. Prohibits an authorized trustee from exercising power to distribute principal of a trust under Section 112.072 (Distribution to Second Trust: Trustee with Full Discretion) or 112.073 (Distribution to Second Trust: Trustee with Limited Discretion) to:

- (1) makes no change to this subdivision;
- (2) deletes existing text of Subdivision (2) prohibiting distribution to materially impair the rights of any beneficiary of the trust, and redesignates existing Subdivision (3) as Subdivision (2); materially limit a trustee's fiduciary duty:
 - (A) under the terms of the trust; or
 - (B) in a manner that would be prohibited by Section 111.0035 (Default and Mandatory Rules; Conflict Between Terms and Statute);
- (3) redesignates existing Subdivision (4) as Subdivision (3);
- (4) add a provision exonerating, rather than or exonerate, a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
- (5) through (6) makes no changes to these subdivisions.

SECTION 12. Amends Section 113.018, Property Code, as follows:

Sec. 113.018. New heading: EMPLOYMENT AND APPOINTMENT OF AGENTS. (a) Creates this subsection from existing text. Makes no further changes to this subsection.

- (b) Authorizes a trustee, without limiting the trustee's discretion under Subsection (a), to grant an agent powers with respect to property of the trust to act for the trustee in any lawful manner for purposes of real property transactions.
- (c) Authorizes a trustee acting under Subsection (b) to delegate any or all duties and powers to perform certain functions and actions.
- (d) Provides that a trustee who delegates a power under Subsection (b) is liable to the beneficiaries or to the trust for an action of the agent to whom the power was delegated.
- (e) Requires that a delegation by the trustee under Subsection (b) be documented in a written instrument acknowledged by the trustee before an officer authorized under the law of this state or another state to take acknowledgements to deeds of conveyance and administer oaths. Provides that a signature on a delegation by a trustee for purposes of this subsection is presumed to be genuine if the trustee acknowledges the signature in accordance with Chapter 121 (Acknowledgments and Proofs of Written Instruments), Civil Practice and Remedies Code.
- (f) Provides that a delegation to an agent under Subsection (b) terminates six months from the date of acknowledgement of the written delegation unless terminated earlier by the death or incapacity of the trustee, the resignation or removal of the trustee, or a date specified in the written delegation.
- (g) Authorizes a person who in good faith accepts a delegation under Subsection (b) without actual knowledge that the delegation is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority to rely on the delegation as if the delegation were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect, and the agent had not exceeded and had properly exercised the authority.

(h) Authorizes a trustee to delegate powers under Subsection (b) if the governing instrument does not affirmatively permit the trustee to hire agents or expressly prohibit the trustee from hiring agents.

SECTION 13. Amends Sections 115.002(b-1) and (b-2), Property Code, as follows:

(b-1) Requires that, if there are multiple trustees none of whom is corporate trustee, rather than noncorporate trustees, and the trustees maintain a principal office in this state, an action be brought in the county in which the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed or the trustees maintain the principal office.

(b-2) Makes a conforming change.

SECTION 14. Amends Section 163.011, Property Code, to provide Chapters 116 (Uniform Principal and Income Act) and 117 (Uniform Prudent Investor Act), rather than Subtitle B, Title 9 (Trusts) (the Texas Trust Code) does not apply to any institutional fund subject to this chapter (Management Investment, and Expenditure of Institution Funds).

SECTION 15. Amends Section 181.083, Property Code, by adding Subsections (c) and (d), as follows:

(c) Provides that, to the extent specified in an instrument in which a donee exercises a power, any estate or interest in real or personal property created through the exercise of the power by the donee is considered to have been created at the time of the exercise of the donee's power and not at the time of the creation of the donee's power, provided that in the instrument the donee provides certain information.

(d) Provides that Subsection (c) applies regardless of whether the donee's power may be exercised in favor of the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate.

SECTION 16. Amends Section 240.002, Property Code, by amending Subdivision (1) and adding Subdivision (1-a), to define "charity" and redesignate existing Subdivision (1) as (1-a).

SECTION 17. Amends Section 240.0081, Property Code, by amending Subsection (c) and adding Subsections (e-1) and (e-2), as follows:

(c) Includes the exception as provided by Subsection (e-1) to the written notice required of the trustee.

(e-1) Provides that the trustee is not required to give notice to the attorney general under Subsection (c) if the attorney general waives that requirement.

(e-2) Provides that for purposes of Subsection (e)(3), a beneficiary is considered to have waived the requirement that notice be given under this section if a person to whom notice is required to be given with respect to that beneficiary under Subsection (d) waives the requirement that notice be given under this section.

SECTION 18. (a) Provides that, except as otherwise expressly provided by a trust, a will creating a trust, or this section, the changes in law made by this Act apply to a trust existing on or created on or after September 1, 2017.

(b) Provides that for a trust existing on September 1, 2017, that was created before that date, the changes in the law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2017.

SECTION 19. Effective date: September 1, 2017.