

BILL ANALYSIS

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S.B. 1649
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1649 addresses issues raised by lawyers who practice trust law and who identified areas of the law that need to be modified so as to preclude unnecessary litigation due to lack of clarity.

The Property Code and Tax Code have different provisions regarding what language is needed for a revocable trust to qualify as a homestead. There has been confusion in the legal community about whether that language in each code aligns.

A law that passed in 2021 related to the rule against perpetuities included provisions about the effective date of a trust that could cause people to believe that they get an additional 300 years for each trust created by the original trust, leading to essentially no rule against perpetuities.

When a trust is decanted into a new trust, there is confusion about whether the new trust can keep the name and employer identification number (EIN) of the original trust.

In a trust proceeding, a court appointing a guardian ad litem must make a finding that a person's interests are inadequately represented before making the appointment, but the same finding is not required for an attorney ad litem.

S.B. 1649 updates the Property Code to reflect the same language as is in the Tax Code that can allow a revocable trust to qualify for a homestead exemption. The provision related to the rule against perpetuities clarifies that "effective date" of any trust created by original document is the effective date of the originating trust, so new trusts that spawn from the original trust do not get new start dates that begin a new 300 years. The bill language provides that when decanting, the new trust can use the same name and EIN as the old trust and that, in a trust proceeding, the court must find that the person's interests are inadequately represented before appointing an attorney ad litem.

As proposed, S.B. 1649 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 41.0021(a), Property Code, to redefine "qualifying trust."

SECTION 2. Amends Section 111.0035(b), Property Code, as follows:

(b) Provides that the terms of a trust prevail over any provision of Subtitle B (Texas Trust Code: Creation, Operation, and Termination of Trusts), except that the terms of a trust are prohibited from limiting certain items, including the applicability of Section 112.0365. Makes nonsubstantive changes.

SECTION 3. Amends Section 112.035, Property Code, by adding Subsections (f-1), (f-2), and (f-3), as follows:

(f-1) Prohibits a beneficiary of the trust or the estate of a beneficiary of the trust from being considered to be a settlor merely because the beneficiary, in any capacity:

- (1) held or exercised a testamentary power of appointment other than a general power of appointment;
- (2) held a testamentary general power of appointment; or
- (3) exercised a testamentary general power of appointment in favor of or for the benefit of the takers in default of the appointive assets.

(f-2) Provides that the appointive assets, if a beneficiary of the trust exercised a testamentary general power of appointment in favor of or for the benefit of any appointee other than the takers in default of the appointive assets, are:

- (1) subject to the claims of creditors of the beneficiary, but only to the extent the beneficiary's own property is insufficient to meet the beneficiary's debts; and
- (2) unless appointed to the beneficiary's estate, not subject to:
 - (A) administration as a part of the beneficiary's estate;
 - (B) recovery by the personal representative of the beneficiary's estate, except as provided by Section 2207B, Internal Revenue Code of 1986; or
 - (C) the payment of taxes or administration expenses of the beneficiary's estate.

(f-3) Defines "general power of appointment."

SECTION 4. Amends Sections 112.036(b) and (c), Property Code, as follows:

(b) Provides that the effective date, rather than the effective date of a trust, for purposes of Section 112.036 (Rule Against Perpetuities), is the date the governing instrument creating an interest in the trust becomes irrevocable with respect to that interest. Provides that the effective date of an interest in one trust, if that interest is distributed to another trust with a different effective date, becomes the earlier of the effective dates of the two trusts.

(c) Provides that an interest in a trust must vest, if at all:

- (1) if the effective date is on or after September 1, 2021, not later than the later of 300 years after the effective date or 21 years after some life in being at the time of the effective date, plus a period of gestation; or
- (2) if the effective date is before September 1, 2021, except as provided by Subsection (d) (relating to authorizing an interest in a trust that has an effective date before September 1, 2021, to vest if the trust instrument provides that an interest in the trust vests under the provisions of this section applicable to trusts on the date that the interest vests), not later than 21 years after some life in being at the time of the effective date, plus a period of gestation, rather than at the time of the creation of the interest, plus a period of gestation, if the effective date of the trust is before September 1, 2021.

Makes nonsubstantive changes to this subsection.

SECTION 5. Amends Subchapter B, Chapter 112, Property Code, by adding Section 112.0365, as follows:

Sec. 112.0365. IMPERMISSIBLE RESTRAINTS ON ALIENATION. (a) Provides that this section applies only to a trust that became irrevocable on or after September 1, 2021.

(b) Provides that terms of a trust instrument restricting the sale or requiring the retention of a real property asset are unenforceable after 100 years have elapsed from the trust's acquisition of that real property asset. Provides that this section does not affect any common law limit on restraint on alienation.

SECTION 6. Amends Sections 112.0715(a) and (b), Property Code, as follows:

(a) Authorizes a second trust to be created by a distribution of principal under certain statutes to a second trust that retains the name used by the first trust, rather than to a trust created under the same trust instrument as the first trust from which the principal is distributed or to a trust created under a different trust instrument. Authorizes the second trust to retain, subject to applicable federal law, the tax identification number of the first trust.

(b) Makes conforming changes to this subsection.

SECTION 7. Amends Section 115.014(b), Property Code, to authorize a court at any point in a proceeding to appoint an attorney ad litem to represent any interest that the court considers necessary, including an attorney ad litem for certain purposes, if the court determines that representation of the interest otherwise would be inadequate.

SECTION 8. Repealers: Sections 112.036(f) (relating to prohibiting the settlor of a trust from directing that a real property asset be retained or refusing that a real property asset may be sold for a period longer than 100 years) and 112.0715(c) (relating to providing that the legislature intends Section 112.0715 (Creation of Second Trust) to be a codification of the common law of this state in effect immediately before September 1, 2019), Property Code.

SECTION 9. Provides that Sections 112.0715(a) and (b), Property Code, as amended by this Act, are intended by the legislature to be a codification of the common law of this state in effect immediately before the effective date of this Act.

SECTION 10. Provides that the changes in law made by this Act, except as otherwise provided by this Act, apply to a trust created before, on, or after the effective date of this Act.

SECTION 11. Effective date: upon passage or September 1, 2023.