

By: Hughes

S.B. No. 2317

A BILL TO BE ENTITLED

AN ACT

relating to self-settled asset protection trusts.

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

SECTION 1. Section 112.035(d), Property Code, is amended to read as follows:

(d) Except as provided by Subchapter F, if ~~if~~ the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate. A settlor is not considered a beneficiary of a trust solely because:

(1) a trustee who is not the settlor is authorized under the trust instrument to pay or reimburse the settlor for, or pay directly to the taxing authorities, any tax on trust income or principal that is payable by the settlor under the law imposing the tax; or

(2) the settlor's interest in the trust was created by the exercise of a power of appointment by a third party.

SECTION 2. Chapter 112, Property Code, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. SELF-SETTLED ASSET PROTECTION TRUST

Sec. 112.151. SELF-SETTLED ASSET PROTECTION TRUST. If a spendthrift trust of which the settlor is a beneficiary satisfies the requirements of Section 112.152:

1 (1) the trust is considered a self-settled asset
2 protection trust; and

3 (2) except as provided by this subchapter, a restraint
4 by the trust of the voluntary or involuntary transfer of the
5 settlor's beneficial interest in the trust prevents the settlor's
6 creditors from satisfying claims from that interest.

7 Sec. 112.152. CREATION. (a) A spendthrift trust of which
8 the settlor is a beneficiary may be considered a self-settled asset
9 protection trust under this subchapter only if:

10 (1) the trust:

11 (A) is created in a writing signed by the
12 settlor;

13 (B) is irrevocable;

14 (C) does not require that any part of the income
15 or principal of the trust be distributed to the settlor; and

16 (D) is not intended to hinder, delay, or defraud
17 known creditors; and

18 (2) at least one trustee of the trust is:

19 (A) an individual who resides in and is domiciled
20 in this state;

21 (B) a trust company that:

22 (i) is organized under federal law or under
23 the laws of this state or another state; and

24 (ii) maintains an office in this state for
25 the transaction of business; or

26 (C) a financial institution, as defined by
27 Section 201.101, Finance Code, that:

1 (i) is organized under federal law or under
2 the laws of this state or another state;

3 (ii) maintains an office in this state for
4 the transaction of business; and

5 (iii) has and exercises trust powers.

6 (b) A spendthrift trust may be considered a self-settled
7 asset protection trust even if under the trust terms:

8 (1) the settlor may prevent a distribution from the
9 trust;

10 (2) the settlor holds a special lifetime or
11 testamentary power of appointment, so long as that power cannot be
12 exercised in favor of the settlor, the settlor's estate, a creditor
13 of the settlor, or a creditor of the settlor's estate;

14 (3) the settlor is a beneficiary of a trust that
15 qualifies as a charitable remainder trust under 26 U.S.C. Section
16 664, or a successor provision, even if the settlor has the right to
17 release all or part of the settlor's retained interest in that trust
18 in favor of one or more of the remainder beneficiaries of the trust;

19 (4) the settlor is authorized or entitled to receive a
20 percentage of the value of the trust each year as specified in the
21 trust instrument, whether of the initial value of the trust assets
22 or their value determined from time to time as provided by the trust
23 instrument, so long as the authorized annual distribution may not
24 exceed:

25 (A) the amount that may be considered income
26 under 26 U.S.C. Section 643(b); or

27 (B) with respect to benefits from any qualified

1 retirement plan or any eligible deferred compensation plan, the
2 minimum required distribution as defined by 26 U.S.C. Section
3 4974(b);

4 (5) the settlor is authorized or entitled to receive
5 income or principal from:

6 (A) a grantor retained annuity trust paying out a
7 qualified annuity interest within the meaning of 26 C.F.R. Section
8 25.2702-3(b); or

9 (B) a grantor retained unitrust paying out a
10 qualified unitrust interest within the meaning of 26 C.F.R. Section
11 25.2702-3(c);

12 (6) the settlor:

13 (A) is authorized or entitled to use real
14 property held under a qualified personal residence trust as
15 described in 26 C.F.R. Section 25.2702-5(c), or a successor
16 provision; or

17 (B) may possess or actually possesses a qualified
18 annuity interest within the meaning of 26 C.F.R. Section
19 25.2702-3(b), or a successor provision;

20 (7) the settlor is authorized to receive income or
21 principal from the trust, so long as the authorized distribution is
22 subject to the discretion of another person; or

23 (8) the settlor is authorized to use real or personal
24 property owned by the trust.

25 (c) Except as provided by this subsection, this section may
26 not be construed to prohibit the settlor of a self-settled asset
27 protection trust from holding any power under the trust, whether or

not the settlor is a cotrustee, including the power to remove and replace a trustee, direct trust investments, or execute other management powers. The settlor may not hold a power to make distributions to himself or herself without the consent of another person.

(d) A self-settled asset protection trust is created under this subchapter if by the terms of the writing creating the trust the settlor manifests an intention to create a self-settled asset protection trust. No specific language is required for the creation of a self-settled asset protection trust under this subchapter.

Sec. 112.153. SETTLOR POWERS. (a) The settlor of a self-settled asset protection trust has only those powers and rights that are conferred on the settlor by the trust instrument.

(b) An agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant or permit the retention of greater rights or authority than is stated in the trust instrument is void.

Sec. 112.154. BENEFICIARIES. (a) The beneficiary of a self-settled asset protection trust must be named or clearly referred to in the trust instrument.

(b) A spouse, former spouse, child, or dependent of the settlor is not a beneficiary of the self-settled asset protection trust unless named or clearly referred to as a beneficiary in the trust instrument.

Sec. 112.155. PROVISIONS FOR SUPPORT. (a) Provision for a beneficiary in a self-settled asset protection trust shall be for the support, education, maintenance, and benefit of the beneficiary

1 without reference to or limitation by the beneficiary's needs,
2 station in life, or mode of life, or the needs of any other person,
3 whether dependent upon the beneficiary or not.

4 (b) The validity of a self-settled asset protection trust
5 does not depend on the beneficiary's character, capacity,
6 incapacity, competency, or incompetency.

7 (c) Provision for a beneficiary extends to all income from
8 the trust estate devoted for that purpose by the settlor of the
9 trust, without exception or deduction, except for:

10 (1) costs or fees regularly earned, paid, or incurred
11 by the trustee for administration of or protection of the trust
12 estate;

13 (2) taxes on the costs or fees regularly earned, paid,
14 or incurred by the trustee for administration of or protection of
15 the trust estate; or

16 (3) taxes on the interest of the beneficiary.

17 Sec. 112.156. DISCRETION OF TRUSTEE. (a) If the settlor of
18 a self-settled asset protection trust provides discretion to the
19 trustee of the trust with respect to one of the following matters,
20 that discretion is absolute:

21 (1) the sum to be applied for or paid to a beneficiary;

22 (2) the application or payment of sums for or to a
23 beneficiary;

24 (3) the amount of trust income to be applied for or
25 paid to a beneficiary; or

26 (4) payment of all or any part of the income to any one
27 or more of the beneficiaries.

1 (b) The trustee has absolute discretion as described under
2 Subsection (a) regardless of whether:

3 (1) the trust provides for the accumulation of income;
4 or

5 (2) a provision for the accumulation of income relates
6 to real or personal property.

7 (c) The discretion of a trustee under this section may not
8 be interfered with for any uncertainty or on any pretext or for any
9 consideration of the needs, station in life, or mode of life of a
10 beneficiary.

11 (d) The giving of discretion described by this section to a
12 trustee does not invalidate a self-settled asset protection trust.

13 Sec. 112.157. RESTRAINTS ON ALIENATION. (a) A self-settled
14 asset protection trust restrains and prohibits the assignment,
15 alienation, acceleration, and anticipation of any interest of a
16 beneficiary by the voluntary or involuntary act of the beneficiary,
17 by operation of law, by any process, or otherwise.

18 (b) The trust estate, or the corpus or capital of the trust
19 estate, of a self-settled asset protection trust may not be
20 assigned, alienated, diminished, or impaired by any alienation,
21 transfer, or seizure that would cut off or diminish payments,
22 rents, profits, earnings, or income of the trust estate that would
23 otherwise be available for the benefit of a beneficiary.

24 (c) Mandatory or discretionary payments by a trustee of a
25 self-settled asset protection trust to a beneficiary may be made
26 only to or for the benefit of the beneficiary and may not be made:

27 (1) by acceleration or anticipation;

1 (2) to any assignee of the beneficiary; or
2 (3) on the basis of any written or oral order given by
3 the beneficiary.

4 (d) Subsection (c) applies to an assignment or order
5 regardless of whether the assignment or order:

6 (1) is the voluntary contractual act of the
7 beneficiary;

8 (2) is made pursuant to or by virtue of any legal
9 process in judgment, execution, attachment, garnishment,
10 bankruptcy, or otherwise; or

11 (3) is made in connection with any contract, tort, or
12 duty.

13 (e) A beneficiary of a self-settled asset protection trust
14 may not order the disposition of the trust income, regardless of
15 whether the order:

16 (1) is voluntary or involuntary; or

17 (2) is made on the order or direction of a bankruptcy
18 court or other court.

19 (f) An interest of a beneficiary of a self-settled asset
20 protection trust is not subject to any process of attachment issued
21 against the beneficiary.

22 (g) An interest of a beneficiary of a self-settled asset
23 protection trust may not be taken in execution under any legal
24 process directed against a beneficiary, a trustee, the trust
25 estate, or the trust income.

26 (h) The trustee of a self-settled asset protection trust
27 shall apply the entire trust estate and trust income solely for the

benefit of a beneficiary, free, clear, and discharged of any obligations of the beneficiary and from any responsibility for that application.

(i) The trustee of a self-settled asset protection trust shall disregard and defeat any assignment or other act, voluntary or involuntary, that is contrary to this subchapter.

Sec. 112.158. NO LEGAL ESTATE OF BENEFICIARY IN CORPUS. A beneficiary of a self-settled asset protection trust has no legal estate in the corpus of the trust estate unless under the terms of the trust:

(1) the beneficiary or a person deriving title from the beneficiary is entitled to conveyance of the corpus of the trust estate immediately, after a term of years, or after a life; and

(2) during that term or life, if applicable, the beneficiary is not entitled to receive income from the corpus of the trust estate.

Sec. 112.159. ACCUMULATION OF INCOME. (a) An accumulation of the income from the trust property of a self-settled asset protection trust may be directed in the trust instrument for the benefit of one or more beneficiaries, beginning within the time permitted for the vesting of future interests and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended.

(b) A direction of the trust income made by the trust instrument that is for a longer term than permitted by law is void only as to the time in excess of the time permitted by law, without regard to whether the direction is severable from other provisions

1 in the trust instrument.

2 (c) If a direction of accumulated trust income is invalid
3 under Subsection (b), the accumulated income may be paid and
4 distributed to the next succeeding beneficiary in interest.

5 Sec. 112.160. LIMITATION ON ACTIONS. (a) A person who is a
6 settlor's creditor when a transfer is made to a self-settled asset
7 protection trust may not bring an action with respect to the
8 transfer unless the action is commenced on or before the later of:

9 (1) the second anniversary of the date on which the
10 transfer was made; or

11 (2) the 180th day after the date on which the creditor
12 discovers or reasonably should have discovered the transfer.

13 (b) A person who becomes a settlor's creditor after a
14 transfer is made to a self-settled asset protection trust may not
15 bring an action with respect to the transfer unless the action is
16 commenced on or before the second anniversary of the date on which
17 the transfer was made.

18 (c) For purposes of Subsection (a), a person is considered
19 to have discovered a transfer at the time a public record is made of
20 the transfer, including:

21 (1) a recording of the conveyance of real property in
22 the deed records of the county in which the property is located;

23 (2) a recording of a bill of sale or other transfer
24 instrument relating to the transfer of personal property:

25 (A) in the county where the transferor
26 principally resides, if the transferor is an individual resident of
27 this state; or

1 (B) in the county in this state where the
2 trustee's principal residence or place of business is located; or

3 (3) the filing of a financing statement under Chapter
4 9, Business & Commerce Code.

5 (d) A settlor's creditor may not bring an action with
6 respect to transfer of property to a self-settled asset protection
7 trust unless the creditor can prove by clear and convincing
8 evidence that the transfer of property was a fraudulent transfer
9 under Chapter 24, Business & Commerce Code, or that the transfer
10 violates a legal obligation owed to the creditor under a contract or
11 a valid court order that is legally enforceable by the creditor. In
12 the absence of such clear and convincing proof, the property
13 transferred is not subject to the claims of the creditor. Proof by
14 one creditor that a transfer of property was fraudulent or wrongful
15 does not constitute proof as to any other creditor, and proof of a
16 fraudulent or wrongful transfer of property as to one creditor does
17 not invalidate any other transfer of property.

18 (e) For purposes of Subsections (a) and (b), if property
19 transferred to a self-settled asset protection trust is
20 subsequently conveyed to the settlor or other trust beneficiary for
21 the purpose of obtaining a loan secured by a mortgage or deed of
22 trust on the property and then reconveyed to the trust, the
23 conveyance from and reconveyance to the trust shall be disregarded
24 and the property is considered to have been transferred to the trust
25 on the date of the original transfer to the trust. The mortgage or
26 deed of trust on the property is enforceable against the trust.

27 (f) A person may not bring an action against an advisor to

the settlor or trustee of a self-settled asset protection trust unless the person can prove by clear and convincing evidence that the advisor knowingly and in bad faith acted in violation of the law of this state, and that the person suffered damages caused by the advisor's action. For purposes of this subsection, "advisor" means a person who gives advice relating to, who is involved in the creation of, transfer of property to, or administration of, or who participates in the preparation of accountings, tax returns, or other reports relating to a self-settled asset protection trust. The term includes an accountant, attorney, or investment advisor.

(g) A person other than a beneficiary or settlor of a self-settled asset protection trust may not bring an action against a trustee of the trust unless the person can prove by clear and convincing evidence that the trustee knowingly and in bad faith acted in violation of the law of this state, and that the person suffered damages caused by the trustee's action. For purposes of this subsection, "trustee" includes a cotrustee and predecessor trustee.

(h) If more than one transfer is made to a self-settled asset protection trust:

(1) for purposes of Subsections (a) and (b), each subsequent transfer to the trust shall be disregarded for the purpose of determining whether a person may bring an action with respect to a previous transfer to the trust; and

(2) any distribution to a beneficiary from the trust is considered to have been made from the most recent transfer made to the trust.

1 Sec. 112.161. EFFECT OF TRANSFER TO SECOND TRUST. For
2 purposes of this subchapter, if a trustee of a self-settled asset
3 protection trust exercises the trustee's discretion or authority to
4 distribute trust income or principal to or for the settlor of the
5 trust by appointing the property of the original trust in favor of a
6 second trust for the benefit of the settlor as provided by
7 Subchapter D:

8 (1) the second trust is considered to be a
9 self-settled asset protection trust under this subchapter so long
10 as it satisfies the requirements of this subchapter other than the
11 self-settlement requirement; and

12 (2) if considered a self-settled asset protection
13 trust under Subdivision (1), property transferred to the second
14 trust is considered for purposes of Sections 112.160(a) and (b) to
15 have been transferred on the date the settlor of the original
16 self-settled asset protection trust transferred the property into
17 that trust, regardless of the fact that the property has been
18 transferred to a second trust.

19 Sec. 112.162. TRUST ADMINISTERED UNDER LAW OF ANOTHER STATE
20 OR FOREIGN JURISDICTION. (a) A trust the domicile of which is
21 changed to this state is considered a self-settled asset protection
22 trust under this subchapter if the requirements of this section are
23 satisfied simultaneously with, or immediately after, the change of
24 domicile to this state. For purposes of Sections 112.160(a) and
25 (b), if the domicile of a self-settled asset protection trust is
26 changed to this state from a jurisdiction having laws substantially
27 similar to this subchapter, a transfer of assets to the trust before

1 the change in domicile to this state is considered to have occurred:

2 (1) on the date the assets were transferred to the
3 trust if, at the time of the transfer and at all times after the
4 transfer, the laws governing the trust were substantially similar
5 to this subchapter; or

6 (2) if Subdivision (1) does not apply, on the earliest
7 date on which the trust was subjected, without interruption, to
8 laws substantially similar to this subchapter.

9 (b) Unless the trust instrument expressly provides
10 otherwise, this subtitle governs the construction, operation, and
11 enforcement in this state of a self-settled asset protection trust
12 created in or outside this state if:

13 (1) any of the trust assets are in this state;

14 (2) the trust affects personal property and the
15 declared domicile of the creator of the trust is in this state; or

16 (3) at least one trustee serving under Section
17 112.152(a)(2) has the power to maintain records and prepare income
18 tax returns for the trust and at least part of the trust
19 administration is performed in this state.

20 SECTION 3. (a) Except as provided by this section, the
21 change in law made by this Act applies only to a transfer of
22 property on or after the effective date of this Act to a
23 self-settled asset protection trust that satisfies the
24 requirements of Subchapter F, Chapter 112, Property Code, as added
25 by this Act.

26 (b) For purposes of Subchapter F, Chapter 112, Property
27 Code, as added by this Act, property transferred before the

1 effective date of this Act to a trust that on or after the effective
2 date of this Act satisfies the requirements of that subchapter is
3 considered transferred to the trust on the earliest date on or after
4 the effective date of this Act on which the trust terms satisfy the
5 requirements of that subchapter.

6 (c) With respect to a trust the domicile of which is changed
7 to this state on or after the effective date of this Act, Subchapter
8 F, Chapter 112, Property Code, as added by this Act, applies with
9 respect to transfers made to the trust before, on, or after the
10 effective date of this Act.

11 SECTION 4. This Act takes effect September 1, 2023.