

## **BILL ANALYSIS**

Senate Research Center

H.B. 1186  
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Jurisprudence  
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Engrossed

### **AUTHOR'S/SPONSOR'S STATEMENT OF INTENT**

The Real Estate, Probate, and Trust Law Section of the State Bar of Texas, representing the interests of more than 6,800 lawyers statewide, continually studies the statutes affecting decedents' estates, guardianships, and trusts in Texas and periodically recommends changes of the law in these areas. The section goes through the comprehensive State Bar Board of Directors approval process with all its legislation before it is offered in the legislature.

H.B. 1186 is legislation sponsored by the Real Estate, Probate, and Trust Law Section affecting testamentary transfers (transfers made by will) and nontestamentary transfers (transfers made by trust or other means). The bill makes several changes to the Probate Code intended to make the administration of estates and trusts more efficient and more consistent with the wishes of the testator or trust creator.

H.B. 1186 clarifies jurisdiction of contested probate cases and cases involving trusts. It reverse the common law exoneration of liens doctrine to assure that tax and other problems are avoided and that the testator's wishes are more likely to be followed. It also provides that gifts made by means of a living trust to a former spouse are voided in the event of a divorce, making the rule for living-trust-based estate plans the same as for will-based estate plans.

### **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 Sections 5(b-1), (b-2), and (e), Texas Probate Code, as follows:

(b-1) Authorizes a party to a proceeding to file a motion for assignment of a statutory probate court judge under this section before the matter becomes a contested probate matter, and provides that the motion is given effect as a motion for assignment of a statutory probate court judge under Subsection (b) of this section if the matter later becomes contested. Provides that a transfer of a contested probate matter to district court under any authority other than the authority provided by this section is disregarded for purposes of this section and does not defeat the right of a party to the matter to have the matter assigned to a statutory probate court judge in accordance with this section. Makes nonsubstantive changes.

(b-2) Provides that a statutory probate court judge assigned to a contested probate matter as provided by Subsection (b) of this section has the jurisdiction and authority granted to a statutory probate court by this section.

(e) Provides that a statutory probate court has concurrent jurisdiction with the district court in all actions by or against a trustee and in all actions involving a testamentary trust. Makes a nonsubstantive change.

SECTION 2. Amends Section 58b(a), Texas Probate Code, to provide that a devise or bequest of property in a will is void if the devise or bequest is made to a parent or descendant of a parent of an attorney who prepares or supervises the preparation of the will. Provides that a devise or bequest of property in a will is void if the devise or bequest is made to a spouse of an attorney

who prepares or supervises the preparation of the will, or a spouse of that attorney's parent, descendant of a parent, or employee. Deletes existing text making a devise or bequest to an heir of the attorney void. Makes nonsubstantive changes.

SECTION 3. Amends Chapter IV, Texas Probate Code, by adding Section 71A, as follows:

Sec. 71A. NO RIGHT TO EXONERATION OF DEBTS; EXCEPTION. (a) Provides that, except as provided by Subsection (b) of this section, a specific devise passes to the devisee subject to each debt secured by the property that exists on the date of the testator's death. Provides that the devisee has no right to exoneration from the testator's estate for payment of the debt.

(b) Provides that a specific devise does not pass to the devisee subject to a debt described by Subsection (a) of this section if the will in which the devise is made specifically states that the devise passes without being subject to the debt. Provides that a general provision in the will stating that debts are to be paid is not a specific statement for purposes of this subsection.

(c) Provides that Subsection (a) of this section does not affect the rights of creditors provided under this code or the rights of other persons or entities provided under Part 3 (Setting Apart Homestead and Other Exempt Property, and Fixing the Family Allowance), Chapter VIII, of this code. Requires a claim, if a creditor elects to have a debt described by Subsection (a) of this section allowed and approved as a matured secured claim, to be paid in accordance with Section 306(c-1) of this code.

SECTION 4. Amends Section 271, Texas Probate Code, as follows:

Sec. 271. EXEMPT PROPERTY TO BE SET APART. (a) Requires the court, by order, to set apart the homestead for use and benefit of the surviving spouse and minor children. Makes nonsubstantive changes.

(b) Authorizes the surviving spouse or any person who is authorized to act on behalf of minor children of the deceased to apply to the court within a certain timeframe to have the exempt property, including the homestead, set aside by filing an application and a verified affidavit listing all of the property that the applicant claims is exempt. Authorizes any unmarried children remaining with the family of the deceased to apply to the court to have all exempt property other than the homestead set aside by filing an application and a verified affidavit listing all of the other property that the applicant claims is exempt. Deletes existing text authorizing any unmarried children remaining with the family of the deceased to apply to the court to have any exempt property set aside. Makes nonsubstantive changes.

(c) Creates this subsection from existing text and makes conforming and nonsubstantive changes.

SECTION 5. Amends Section 272, Texas Probate Code, to require the homestead to be delivered to the guardian of the minor children, rather than to the guardian of the minor children and unmarried children living with the family, if there is no surviving spouse.

SECTION 6. Amends Section 306, Texas Probate Code, by adding Subsection (c-1), as follows:

(c-1) Requires the personal representative, if a claimant presents a secured claim against an estate for a certain type of debt, to collect from the devisees the amount of the debt and pay that amount to the claimant in satisfaction of the claim. Sets forth each devisee's share of the debt. Requires the personal representative, if the personal representative is unable to collect from the devisees an amount sufficient to pay the debt, to sell the property securing the debt, subject to Part 5 (Sales) of this chapter. Requires the personal representative to use the sale proceeds to pay the debt and any expenses associated with the sale and to distribute the remaining sale proceeds to each devisee in an amount equal

to a fraction representing the devisee's ownership interest in the property, multiplied by the amount of the remaining sale proceeds. Requires the difference between the sum of the amount of the debt and the expenses associated with the sale and the sale proceeds to be paid under Subsection (c) (Matured Secured Claims) of this section if the sale proceeds are insufficient to pay the debt and any expenses associated with the sale.

SECTION 7. Amends Section 322, Texas Probate Code, to include unpaid expenses of administration awarded in a guardianship of the decedent in Class 2 in the classification of claims against an estate for purposes of priority of payment.

SECTION 8. Amends the Texas Probate Code by adding Chapter XI-A, as follows:

CHAPTER XI-A. PROVISIONS APPLICABLE TO CERTAIN NONTESTAMENTARY TRANSFERS

Sec. 471. DEFINITIONS. Defines "disposition or appointment of property," "divorced individual," and "revocable."

Sec. 472. REVOCATION OF CERTAIN NONTESTAMENTARY TRANSFERS ON DISSOLUTION OF MARRIAGE. (a) Provides that except as otherwise provided by a court order, the express terms of a trust instrument executed by a divorced individual before the individual's marriage was dissolved, or an express provision of a contract relating to the division of the marital estate entered into between a divorced individual and the individual's former spouse before, during, or after the marriage, the dissolution of the marriage revokes the following:

(1) a revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a trust instrument executed before the dissolution of the marriage;

(2) a provision in a trust instrument executed by a divorced individual before the dissolution of the marriage that confers a general or special power of appointment on the individual's former spouse; and

(3) a nomination in a trust instrument executed by a divorced individual before the dissolution of the marriage that nominates the individual's former spouse to serve in a fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, agent, or guardian.

(b) Provides that after the dissolution of a marriage, an interest granted in a provision of a trust instrument that is revoked under Subsection (a)(1) or (2) of this section passes as if the former spouse of the divorced individual who executed the trust instrument disclaimed the interest granted in the provision, and an interest granted in a provision of a trust instrument that is revoked under Subsection (a)(3) of this section passes as if the former spouse died immediately before the dissolution of the marriage.

Sec. 473. LIABILITY FOR CERTAIN PAYMENTS, BENEFITS, AND PROPERTY.

(a) Provides that a bona fide purchaser of property from a divorced individual's former spouse or a person who receives from a divorced individual's former spouse a payment, benefit, or property in partial or full satisfaction of an enforceable obligation is not required by this chapter to return the payment, benefit, or property and is not liable under this chapter for the amount of the payment or the value of the property or benefit.

(b) Requires a divorced individual's former spouse who, not for value, receives a payment, benefit, or property to which the former spouse is not entitled as a result of Section 472(a) to return the payment, benefit, or property to the person who is otherwise entitled to the payment, benefit, or property as provided by this chapter, or the former spouse is personally liable to the person who is otherwise entitled to

the payment, benefit, or property for the amount of the payment or the value of the benefit or property received.

SECTION 9. (a) Makes application of Section 5, Texas Probate Code, as amended by this Act, prospective to an action filed on or after the effective date of this Act.

(b) Makes application of Section 58b, Texas Probate Code, as amended by this Act, and Sections 71A and 306(c-1), Texas Probate Code, as added by this Act, prospective to a will executed on or after the effective date of this Act.

(c) Makes application of Sections 271, 272, and 322, Texas Probate Code, as amended by this Act, prospective to the estate of a decedent who dies on or after the effective date of this Act.

(d) Makes application of Chapter XI-A, Texas Probate Code, as added by this Act, prospective to a trust instrument that was executed before, on, or after the effective date of this Act, by an individual whose marriage is dissolved on or after the effective date of this Act.

SECTION 10. Effective date: September 1, 2005.