

BILL ANALYSIS

Senate Research Center
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H.B. 1190
By: Hartnett (Harris)
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 conducted a multi-year study of the Uniform Trust Code promulgated by the National Conference of Commissioners on Uniform State Laws. They concluded that Texas should not adopt the Uniform Trust Code in full, but that various provisions of the Uniform Trust Code should be included in the Texas Trust Code to improve that code.

H.B. 1190 institutes the recommended changes to the Texas Trust Code.

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 111.002, Property Code, by deleting Subsection (a) regarding trust conflicts. Makes nonsubstantive change.

SECTION 2. Amends Section 111, Property Code, by adding Section 111.0035, as follows:

Sec. 111.0035. DEFAULT AND MANDATORY RULES; CONFLICT BETWEEN TERMS AND STATUTE. (a) Sets forth the entities that are governed by this subtitle, except as provided by the terms of a trust and Subsection (b).

(b) Prohibits the terms of a trust from limiting specific requirements, duties, and liabilities; certain powers of a court; the applicability of Section 114.007 to an exculpation term of a trust; and the periods of limitation for commencing a judicial proceeding regarding a trust.

SECTION 3. Amends Section 111.004, Property Code, by amending Subdivision (14) to redefine "settlor," and adding Subdivision (25) to define "breach of trust."

SECTION 4. Amends Section 112.009(a), Property Code, by authorizing a person named as a trustee to engage in specific conduct without accepting the trust.

SECTION 5. Amends Section 112.035, Property Code, by amending Subsection (e) and adding Subsection (f), as follows:

(e) Prohibits a beneficiary of the trust to be considered a settlor merely because of a lapse, waiver, or release of a power described by Subsection (f) or the beneficiary's right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver, or release in any calendar year does not exceed the greater of the amount specified in specific portions of the Internal Revenue Code.

(f) Prohibits a beneficiary of the trust from being considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or to have the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary, in any capacity, holds or exercises specific powers.

SECTION 6. Amends Subchapter B, Chapter 112, Property Code, by adding Section 112.037, as follows:

Sec. 112.037. TRUST FOR CARE OF ANIMAL. (a) Authorizes a trust to be created to provide for the care of an animal alive during the settlor's lifetime. Provides that the trust terminates on the death of the animal or, if the trust is created to provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal.

(b) Authorizes a trust authorized by this section to be enforced by a person appointed in the terms of the trust or, if a person is not appointed in the terms of the trust, by a person appointed by the court. Authorizes a person having an interest in the welfare of an animal that is the subject of a trust authorized by this section to request the court to appoint a person to enforce the trust or to remove a person appointed to enforce the trust.

(c) Authorizes property of a trust authorized by this section, except as provided by Subsections (d) and (e), to be applied only to the property's intended use under the trust.

(d) Authorizes property of a trust authorized by this section to be applied to a use other than the property's intended use under the trust to the extent the court determines that the value of the trust property exceeds the amount required for the intended use.

(e) Requires property not required for the trust's intended use, except as otherwise provided by the terms of the trust, to be distributed to specific individuals.

(f) Sets forth, for the purposes of Section 112.036, the lives in being used to determine the maximum duration of a trust authorized by this section.

SECTION 7. Amends Section 112.054, Property Code, as follows:

(a) Authorizes a court, on the petition of a trustee or a 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:

(2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust. Deletes existing text regarding compliance with the terms of trust;

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

(4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions; or

(5) subject to Subsection (d), continuance of the trust is not necessary to achieve any material purpose of the trust or the order is not inconsistent with a material purpose of the trust.

(b) Requires the court to exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the probable intention of the settlor.

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

(d) Prohibits the court from taking the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. Provides that a minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents of the beneficiary's behalf.

SECTION 8. Amends the heading to Section 112.057, Property Code, to read as follows:

Sec. 112.057. DIVISION AND COMBINATION OF TRUSTS.

SECTION 9. Amends Sections 112.057(a), (c), and (d), Property Code, as follows:

(a) Authorizes a trustee, unless expressly prohibited by the terms of the instrument establishing the trust, divide a trust into two or more separate trusts without a judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the original trust. Deletes existing text regarding the division of the trust.

(c) Authorizes the trustee, unless expressly prohibited by the terms of the instrument establishing a trust, to combine, rather than merge, two or more trusts into a single trust without judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of one of the separate trusts. Deletes existing text referring to identical terms in a single trust. Makes conforming changes.

(d) Makes conforming changes.

SECTION 10. Amends Subchapter A, Chapter 113, Property Code, by adding Section 113.003, as follows:

Sec. 113.003. OPTIONS. Authorizes a trustee to grant an option involving a sale, lease, or other disposition of trust property, including an option exercisable beyond the duration of the trust or acquire and exercise an option for the acquisition of property, including an option exercisable beyond the duration of the trust.

SECTION 11. Amends Section 113.021(a), Property Code, by authorizing a trustee to make a distribution required or permitted to be made to any beneficiary in any of the following ways when the beneficiary is a minor or a person who in the judgment of the trustee is incapacitated by reason of legal incapacity, physical or mental illness, or infirmity to a custodian for the minor beneficiary under the Texas Uniform Transfers to Minors Act or a uniform gifts or transfers to minors act of another state or by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

SECTION 12. Amends Subchapter A, Chapter 113, Property Code, by adding Section 113.027, as follows:

Sec. 113.027. DISTRIBUTIONS GENERALLY. Authorizes a trustee, when distributing trust property, dividing, or terminating a trust, to perform specific actions regarding making distributions, allocate particular assets, value the trust property, of adjust distribution, division, or termination.

SECTION 13. Amends Section 113.051, Property Code, to require the trustee to administer the trust in good faith according to its terms and this subtitle.

SECTION 14. Amends Section 113.058(b), Property Code, to require a noncorporate trustee, unless a court orders otherwise or the instrument creating the trust provides otherwise, to give bond payable to each person interested in the trust, as their interests may appear, and conditioned on the faithful performance of the trustee's duties.

SECTION 15. Amends Subchapter B, Chapter 113, Property Code, by adding Section 113.060, as follows:

Sec. 113.060. **INFORMING BENEFICIARIES.** Requires the trustee to keep the beneficiaries of the trust reasonably informed concerning the administration of the trust and the material facts necessary for the beneficiaries to protect the beneficiaries' interests.

SECTION 16. Amends Section 113.082(a), Property Code, to authorize a trustee to be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court is authorized, in its discretion, to remove a trustee and deny part or all of the trustee's compensation if the trustee become incapacitated or insolvent or the court finds other cause for removal.

SECTION 17. Amends Section 113.085, Property Code, as follows:

Sec. 113.085. **EXERCISE OF POWERS BY MULTIPLE TRUSTEES.** (a) Authorizes cotrustees that are unable to reach a unanimous decision to act by majority decision.

(b) Authorizes the remaining cotrustees, if a vacancy occurs in a cotrusteeship, to act for the trust.

(c) Requires a cotrustee to participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other cotrustees, and has filed the delegation in the records of the trust.

(d) Authorizes the remaining cotrustee or a majority of the remaining cotrustees to act for the trust, if a cotrustee is unavailable to participate in the performance of a trustee's function for a reason described by Subsection (c)(1) and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property.

(e) Authorizes a trustee to delegate to a cotrustee the performance of a trustee's function unless the settlor specifically directs that function to be performed jointly. Authorizes the cotrustee making the delegation to revoke the delegation, unless a cotrustee's delegation under this subsection is irrevocable. Deletes existing text referring to trustee successors.

SECTION 18. Amends Section 113.171(a), Property Code, to make a conforming change.

SECTION 19. Amends Section 114.003, Property Code, as follows:

Sec. 114.003. **POWERS TO DIRECT.** (a) Authorizes the terms of a trust to give a trustee or other person a power to direct the modification or termination of the trust.

(b) Requires the trustee, if the terms of a trust give a person the power to direct certain actions of the trustee, to act in accordance with the person's direction unless the direction is manifestly contrary to the terms of the trust or the trustee knows the direction would constitute a serious breach of a fiduciary duty that the person holding the power to direct owes to the beneficiaries of the trust.

(c) Provides that a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Provides that the holder of a power to direct is liable for any loss that results from a breach of the person's fiduciary duty. Deletes existing text regarding trustee liability.

SECTION 20. Amends Section 114.006, Property Code, as follows:

Sec. 114.006. **LIABILITY OF COTRUSTEES FOR ACTS OF OTHER COTRUSTEES.**

(a) Provides that a trustee who does not join in an action of a cotrustee is not liable for

the cotrustee's action, unless the trustee does not exercise reasonable care as provided by Subsection (b).

(b) Requires each trustee to exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and compel a cotrustee to redress a serious breach of trust.

(c) Provides that a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any cotrustee of the dissent at or before the time of the action is not liable for the action. Deletes existing text regarding exercising power for trustees.

SECTION 21. Amends Subchapter A, Chapter 114, Property Code, by adding Sections 114.007 and 114.008, as follows:

Sec. 114.007. EXCULPATION OF TRUSTEE. (a) Provides that a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for a specific breach of trust committed and any profit derived by the trustee from a breach of trust.

(b) Provides that a term in a trust instrument relieving the trustee of liability for a breach of trust is ineffective to the extent that the term is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor.

(c) Provides that this section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Provides that this section, except as provided in Section 111.0035, does not prohibit the settlor, by the terms of the trust, from expressly relieving the trustee from a duty or restriction imposed by this subtitle or by common law or directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Sec. 114.008. REMEDIES FOR BREACH OF TRUST. Authorizes the court, to remedy a breach of trust that has occurred or might occur, to perform specific functions to achieve this measure. Provides that, notwithstanding Subsection (a)(9), a person other than a beneficiary who, without knowledge that a trustee is exceeding or improperly exercising the trustee's powers, in good faith assists a trustee or in good faith and for value deals with a trustee is protected from liability as if the trustee had or properly exercised the power exercised by the trustee.

SECTION 22. Amends Sections 115.001(c) and (d), Property Code, as follows:

(c) Authorizes the court to intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. Provides that a trust is not subject to continuing judicial supervision unless the court orders continuing supervision. Deletes existing text referring to written orders.

(d) Provides that the jurisdiction of the district court over proceedings concerning trusts is exclusive except for jurisdiction conferred by law on a statutory probate court, a court that creates a trust under Section 867 (Creation of Management Trust), Probate Code, or a court that creates a trust under Section 142.005.

SECTION 23. Amends Section 115.011(b), Property Code, by providing that the only necessary parties to such an action (regarding contingent beneficiaries designated as a class) are a beneficiary designated by name in the instrument creating the trust and the trustee, if a trustee is serving at the time the action is filed. Makes a conforming change.

SECTION 24. Amends Section 115.014, Property Code, by adding Subsection (c), to authorize a guardian ad litem to consider general benefit accruing to the living members of a person's family.

SECTION 25. Amends Section 116.005(c), Property Code, by deleting Subdivision (1) regarding trustees being prohibited from making adjustments on income interest in a trust.

SECTION 26. Amends Sections 116.172(c) and (d), Property Code, as follows:

(c) Requires a trustee, if no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, to allocate to income the part of the payment that does not exceed an amount equal to:

(1) four percent of the fair market value of the future payment asset on the date specified, rather than as determined, in Subsection (d); minus

(2) the total amount that the trustee has allocated to income for all previous payments, rather than one payment, received from the future payment asset during the same accounting period in which the payment is made.

(d) Provides that for the purposes of Subsection (c)(1), the determination of the fair market value of a future payment asset is made on the later of the date on which the future payment asset first becomes subject to the trust or the last day, rather than the first day, of the accounting period of the trust that immediately precedes the accounting period during which the payment is received.

SECTION 27. Amends Section 121.003, Property Code, to make conforming changes.

SECTION 28. Amends Section 142.005(a) and (d), Property Code, as follows:

(a) Authorizes any court of record with jurisdiction, to hear a suit in which a minor who has no legal guardian or incapacitated person is represented by a next friend or an appointed guardian ad litem.

(d) Provides that a court that creates a trust under this section has continuing jurisdiction and supervisory power over the trust, including the power to construe, amend, revoke, and modify, or terminate the trust. Provides that a trust created under this section is not subject to revocation by the beneficiary or a guardian of the beneficiary's estate.

SECTION 29. Repealer: Section 113.059 (Power of Settlor to Alter Trustee's Responsibilities), Property Code.

SECTION 30. Provides that Section 5 of this Act is intended to clarify existing law, but only as expressly provided by that section. Prohibits an inference from being drawn from the amendments made by that section for situations not specifically described by that section. Provides that Section 26 of this Act is intended to clarify existing law.

SECTION 31. Sets forth the trusts and estates that are affected by the changes in law made by this Act, except as otherwise provided by a will, the terms of a trust, or this Act. Makes application of this Act prospective.

SECTION 32. Effective date: January 1, 2006.