

BILL ANALYSIS

C.S.S.B. 387
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Informed observers note that each legislative session, the Real Estate, Probate, and Trust Law (REPTL) section of the State Bar of Texas proposes changes to Texas law for the purposes of keeping relevant statutes in line with developments in case law and other substantive areas of law, streamlining and simplifying trust related issues, clarifying ambiguities, or correcting technical deficiencies, among other purposes. This session, REPTL proposes several updates to the law regarding trusts. C.S.S.B. 387 seeks to incorporate these proposed changes in updating the applicable statutes.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.S.B. 387 amends the Property Code, in a provision excepting excess contributions to an individual retirement account from a statutory exemption from creditors' claims, to also except such contributions to an individual retirement annuity and a Roth IRA and to clarify that such contributions are "excess contributions" within the meaning of the term in certain provisions of the federal Internal Revenue Code of 1986. The bill, in a provision establishing that amounts treated as rollover contributions under a certain provision of the federal Internal Revenue Code of 1986 related to Roth IRAs are treated as exempt from creditors' claims, includes amounts qualifying as nontaxable transfers under that federal law in addition to nontaxable rollover contributions and expands that provision to include amounts treated as rollover contributions under other specified provisions of that federal law related to rollover contributions from a designated Roth account and related to taxable rollovers to a designated Roth account.

C.S.S.B. 387 includes among the items that a trust may not limit a directing party's duty to act in good faith and in accordance with the purposes of the trust. The bill creates an exception to the prohibition against a trust limiting a trustee's duty to act in good faith and in accordance with the purposes of a trust with regard to a directing party and an excluded fiduciary as provided by the bill's provisions regarding directed trusts. The bill includes a directing party in the definition of "interested person" under the Texas Trust Code.

C.S.S.B. 387, in a provision prohibiting a beneficiary of a spendthrift trust from being considered a settlor merely because of a lapse, waiver, or release of a 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 two amounts specified in federal law, clarifies that one of these amounts is with respect to the contributions to the trust by each donor.

C.S.S.B. 387 establishes that the statutory provisions relating to a forfeiture clause in a trust are not intended to and do 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.

C.S.S.B. 387 adds a condition under which a court may modify or terminate a trust to include the necessity of an order to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intention if the settlor's intent with respect to the error being corrected is proved by clear and convincing evidence and authorizes the court to direct that an order to modify a trust under this condition has retroactive effect.

C.S.S.B. 387 specifies that statutory provisions regarding a court-ordered distribution of the principal of a trust to a second trust do not limit a beneficiary's right to bring an action against a trustee for a breach of trust. The bill removes an exception to an authorized trustee's power to distribute the principal of a trust to a second trust for the purpose of materially impairing the rights of any beneficiary of the trust. The bill specifies that the prohibition against an authorized trustee exercising a power to distribute principal of a trust to materially limit a trustee's fiduciary duty as described by statutory provisions relating to the default and mandatory rules governing a conflict between trust terms and statute applies with respect to a manner that would be prohibited by those statutory provisions. The bill expands the prohibitions against an authorized trustee exercising a power to distribute principal of a trust to include distributing principal from a trust that is held solely for charitable purposes and has as beneficiaries only charitable entities.

C.S.S.B. 387, in regard to a trustee's authorization to employ and appoint agents and other professionals, authorizes a trustee 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 and to delegate any or all of the duties and powers as set out in the bill. The bill makes a trustee who delegates a power to an agent liable to the beneficiaries or to the trust for an action of the agent to whom the power was delegated and requires the delegation to 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 acknowledgments to deeds of conveyance and administer oaths. The bill makes a signature on a delegation by a trustee for such a purpose presumptively genuine if the trustee acknowledges the signature in accordance with Civil Practice and Remedies Code provisions relating to acknowledgements and proofs of written instruments.

C.S.S.B. 387 terminates such a delegation of power to an agent six months from the date of the acknowledgment 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. The bill authorizes a person that in good faith accepts a delegation of power without actual knowledge that the delegation 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, as if the agent's authority were genuine, valid, and still in effect, and as if the agent had not exceeded and had properly exercised the authority. The bill authorizes a trustee to delegate powers to an agent if the governing instrument does not affirmatively permit the trustee to hire agents or expressly prohibit the trustee from hiring agents.

C.S.S.B. 387 authorizes an investment trust advisor, distribution trust advisor, and trust protector to be designated in the governing instrument of a trust and authorizes the governing instrument to use the title "investment trust advisor," "distribution trust advisor," or "trust protector," respectively, or any similar name or description demonstrating the intent to provide for the position and function of an investment trust advisor, distribution trust advisor, or trust protector, respectively, as those roles are defined in the bill. The bill sets out the provisions relating to the powers of an investment trust advisor, distribution trust advisor, and trust protector.

C.S.S.B. 387 establishes that if a fiduciary is directed by the governing instrument to act in

accordance with the exercise of specified powers by a directing party, those specified powers are considered granted not to the fiduciary but to the directing party, and the fiduciary is considered excluded from exercising those specified powers. The bill establishes that if a governing instrument provides that a fiduciary, as to one or more specified matters, is to act, omit action, or make decisions only with the consent of a directing party, then the fiduciary is considered an excluded fiduciary only with respect to those matters. The bill sets out provisions relating to the duty and liability of a directing party and an excluded fiduciary. The bill establishes that a directing party, by accepting an appointment to serve as a directing party of a trust that is subject to state laws, submits to the jurisdiction of the state's courts even if investment advisory agreements or other related agreements provide otherwise, and that the directing party may be made a party to any action or proceeding in which issues relate to a decision or action of the directing party.

C.S.S.B. 387 establishes that none of the default powers granted to a directing party authorize the following actions, except as otherwise provided by the governing instrument: a grantor of a trust to direct distributions; any directing party who is a beneficiary, or a directing party who is not an independent fiduciary and who was appointed by a beneficiary, to direct distributions other than in accordance with the limits of the discretionary powers of a trustee; any directing party to have any incidents of ownership over a life insurance policy insuring the life of the directing party or the directing party's spouse; or any directing party to hold any power that would cause the inclusion of assets of the trust in the directing party's estate that would not otherwise be included. The bill's provisions regarding directed trusts apply to all trusts created on or after September 1, 2015, except to the extent the governing instrument expressly prohibits the application of such provisions by specific reference to the provisions. On and after September 1, 2015, the bill's provisions regarding directed trusts apply to a trust existing on or created on or after that date that appoints or provides for a directing party, including a party granted power or authority effectively comparable in substance to that of a directing party; is modified in accordance with applicable law or the terms of the governing instrument to appoint or provide for a directing party; or is modified in accordance with a court order to appoint or provide for a directing party, including a party granted power or authority effectively comparable in substance to that of a directing party as provided by these bill provisions, whether or not the court order specifies that these bill provisions govern the responsibilities, actions, and liabilities of persons designated as a directing party or excluded fiduciary.

C.S.S.B. 387 specifies that any estate or interest in real or personal property created through the exercise of the power by the donee, to the extent specified in an instrument in which a donee exercises a power, 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 specifically refers to this specified provision as added by the bill, that the donee specifically asserts an intention to exercise a power of appointment by creating another power of appointment described in certain specified provisions of the federal Internal Revenue Code of 1986, or that the donee specifically asserts an intention to postpone the vesting of any estate or interest in the property that is subject to the power, or suspend the absolute ownership or power of alienation of that property, for a period ascertainable without regard to the date of the creation of the donee's power. The bill applies these provisions regardless of whether the donee's power is authorized to be exercised in favor of the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate.

C.S.S.B. 387 applies to a trust existing or created on or after September 1, 2015, except as otherwise expressly provided by a trust or a will creating the trust, and except for a trust existing on September 1, 2015 that was created before that date, in which case the bill applies only to an act or omission relating to the trust that occurs on or after September 1, 2015.

C.S.S.B. 387 repeals Sections 114.003(b) and (c), Property Code, relating to exceptions to the requirement that a trustee act in accordance with the direction of a person given power to direct a trust's modification or termination under the terms of the trust, relating to the duty of the holder of a power to direct to act in good faith as a fiduciary, and relating to the liability of that holder for any loss resulting from a breach of that duty.

EFFECTIVE DATE

September 1, 2015.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 387 may differ from the engrossed in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the engrossed and committee substitute versions of the bill.

SENATE ENGROSSED	HOUSE COMMITTEE SUBSTITUTE
SECTION 1. Sections 42.0021(a) and (b), Property Code, are amended.	SECTION 1. Same as engrossed version.
SECTION 2. Section 111.0035(b), Property Code, is amended.	SECTION 2. Same as engrossed version.
SECTION 3. Section 111.004(7), Property Code, is amended.	SECTION 3. Same as engrossed version.
SECTION 4. Section 112.035(e), Property Code, is amended.	SECTION 4. Same as engrossed version.
SECTION 5. Section 112.038, Property Code, is amended.	SECTION 5. Same as engrossed version.
SECTION 6. Sections 112.054(a) and (c), Property Code, are amended.	SECTION 6. Same as engrossed version.
SECTION 7. Sections 112.071(5), (6), and (7), Property Code, are amended.	SECTION 7. Same as engrossed version.
SECTION 8. Section 112.072(a), Property Code, is amended.	SECTION 8. Same as engrossed version.
SECTION 9. Section 112.078, Property Code, is amended.	SECTION 9. Same as engrossed version.
SECTION 10. Section 112.085, Property Code, is amended to read as follows: Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. An authorized trustee may not exercise a power to distribute principal of a trust under Section 112.072 or 112.073 to: (1) reduce, limit, or modify a beneficiary's current, vested right to: (A) receive a mandatory distribution of income or principal; (B) receive a mandatory annuity or unitrust interest; (C) withdraw a percentage of the value of the trust; or (D) withdraw a specified dollar amount from the trust;	SECTION 10. Section 112.085, Property Code, is amended to read as follows: Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. An authorized trustee may not exercise a power to distribute principal of a trust under Section 112.072 or 112.073 to: (1) reduce, limit, or modify a beneficiary's current, vested right to: (A) receive a mandatory distribution of income or principal; (B) receive a mandatory annuity or unitrust interest; (C) withdraw a percentage of the value of the trust; or (D) withdraw a specified dollar amount from the trust;

- (2) ~~[materially impair the rights of any beneficiary of the trust;~~
~~[(3)]~~ materially limit a trustee's fiduciary duty;
 (A) under the terms of the trust; or
 (B) in a manner that would be prohibited ~~[as described]~~ by Section 111.0035, except as provided by Subchapter E, Chapter 114;
 (3) ~~[(4)]~~ decrease or indemnify against a trustee's liability, except as provided by Subchapter E, Chapter 114;
 (4) add a provision exonerating ~~[or exonerate]~~ a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
 (5) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the distribution power under Section 112.072 or 112.073; or
 (6) reduce, limit, or modify in the second trust a perpetuities provision included in the first trust, unless expressly permitted by the terms of the first trust.

SECTION 11. Section 113.018, Property Code, is amended.

SECTION 12. Chapter 114, Property Code, is amended by adding Subchapter E to read as follows:

SUBCHAPTER E. DIRECTED TRUSTS
Sec. 114.101. DEFINITIONS.

Sec. 114.102. APPLICABILITY OF SUBCHAPTER.

Sec. 114.103. INVESTMENT TRUST ADVISOR.

Sec. 114.104. DISTRIBUTION TRUST ADVISOR.

Sec. 114.105. TRUST PROTECTOR. (a)
A trust protector may be designated in the governing instrument of a trust. The governing instrument may use the title "trust protector" or any similar name or description demonstrating the intent to provide for the position and function of a trust protector as defined by Section 114.101.

(b) The powers of a trust protector:
(1) may be exercised or not exercised in the

- (2) ~~[materially impair the rights of any beneficiary of the trust;~~
~~[(3)]~~ materially limit a trustee's fiduciary duty;
 (A) under the terms of the trust; or
 (B) in a manner that would be prohibited ~~[as described]~~ by Section 111.0035, except as provided by Subchapter E, Chapter 114;
 (3) ~~[(4)]~~ decrease or indemnify against a trustee's liability, except as provided by Subchapter E, Chapter 114;
 (4) add a provision exonerating ~~[or exonerate]~~ a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
 (5) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the distribution power under Section 112.072 or 112.073;
~~[or]~~
 (6) reduce, limit, or modify in the second trust a perpetuities provision included in the first trust, unless expressly permitted by the terms of the first trust; or
 (7) distribute principal from a trust that is held solely for charitable purposes and has as beneficiaries only charitable entities.

SECTION 11. Same as engrossed version.

SECTION 12. Chapter 114, Property Code, is amended by adding Subchapter E to read as follows:

SUBCHAPTER E. DIRECTED TRUSTS
Sec. 114.101. DEFINITIONS.

Sec. 114.102. APPLICABILITY OF SUBCHAPTER.

Sec. 114.103. INVESTMENT TRUST ADVISOR.

Sec. 114.104. DISTRIBUTION TRUST ADVISOR.

Sec. 114.105. TRUST PROTECTOR. (a)
A trust protector may be designated in the governing instrument of a trust. The governing instrument may use the title "trust protector" or any similar name or description demonstrating the intent to provide for the position and function of a trust protector as defined by Section 114.101.

(b) The powers of a trust protector:
(1) may be exercised or not exercised in the

discretion of the trust protector; and
(2) except as otherwise provided by this subchapter, are binding on all other persons, including each beneficiary, investment trust advisor, distribution trust advisor, fiduciary, and excluded fiduciary and any other party having an interest in the trust.
(c) The terms of the governing instrument shall determine the powers of the trust protector, and there are no default powers. The powers granted to a trust protector by the governing instrument may include the authority to:
(1) modify or amend the governing instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code of 1986 or other federal law, state law, or rulings or regulations under federal or state law;
(2) increase, decrease, or modify the interests of any beneficiary or beneficiaries of the trust;
(3) modify or amend the terms of any power of appointment granted by the trust, so long as the modification or amendment does not grant a beneficial interest to any individual, class of individuals, or other party not specifically provided for under the governing instrument;
(4) remove, appoint, or remove and appoint a trustee, investment trust advisor, or distribution trust advisor or another directing party, including the authority to designate a plan of succession for future holders of one of those positions;
(5) terminate the trust, including the authority to determine how the trustee shall distribute the trust property to be consistent with the purposes of the trust;
(6) change the situs of the trust, the governing law of the trust, or both;
(7) appoint one or more successor trust protectors, including the authority to designate a plan of succession for future trust protectors;
(8) interpret terms of the governing instrument at the request of the trustee;
(9) advise the trustee on matters concerning a beneficiary; or
(10) amend or modify the governing instrument to:
(A) take advantage of laws governing restraints on alienation or distribution of trust property; or
(B) improve the administration of the trust.
(d) Except as otherwise provided by the governing instrument, a trust protector has

discretion of the trust protector; and
(2) except as otherwise provided by this subchapter, are binding on all other persons, including each beneficiary, investment trust advisor, distribution trust advisor, fiduciary, and excluded fiduciary and any other party having an interest in the trust.
(c) The terms of the governing instrument shall determine the powers of the trust protector, and there are no default powers. The powers granted to a trust protector by the governing instrument may include the authority to:
(1) modify or amend the governing instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code of 1986 or other federal law, state law, or rulings or regulations under federal or state law;
(2) increase, decrease, or modify the interests of any beneficiary or beneficiaries of the trust;
(3) modify or amend the terms of any power of appointment granted by the trust, so long as the modification or amendment does not grant a beneficial interest to any individual, class of individuals, or other party not specifically provided for under the governing instrument;
(4) remove, appoint, or remove and appoint a trustee, investment trust advisor, or distribution trust advisor or another directing party, including the authority to designate a plan of succession for future holders of one of those positions;
(5) terminate the trust, including the authority to determine how the trustee shall distribute the trust property to be consistent with the purposes of the trust;
(6) change the situs of the trust, the governing law of the trust, or both;
(7) appoint one or more successor trust protectors, including the authority to designate a plan of succession for future trust protectors;
(8) interpret terms of the governing instrument at the request of the trustee;
(9) advise the trustee on matters concerning a beneficiary; or
(10) amend or modify the governing instrument to:
(A) take advantage of laws governing restraints on alienation or distribution of trust property; or
(B) improve the administration of the trust.
(d) Except as otherwise provided by the governing instrument, a trust protector has

no duty to monitor any fiduciary's conduct.

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(e) If a charity is a beneficiary of the trust, a trust protector must give notice to the attorney general not later than the 60th day before the date the trust protector takes an action authorized by Subsection (c)(2), (3), (4), (5), or (6).

Sec. 114.106. EXCLUDED FIDUCIARY.

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Sec. 114.107. DUTY AND LIABILITY OF DIRECTING PARTY.

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Sec. 114.108. DUTY AND LIABILITY OF EXCLUDED FIDUCIARY.

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Sec. 114.109. JURISDICTION.

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Sec. 114.110. TAX SAVINGS PROVISIONS.

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SECTION 13. Sections 115.002(b-1) and (b-2), Property Code, are amended.

SECTION 13. Same as engrossed version.

SECTION 14. Section 181.083, Property Code, is amended.

SECTION 14. Same as engrossed version.

SECTION 15. (a) 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 or created on or after September 1, 2015.

SECTION 15. Same as engrossed version.

(b) For a trust existing on September 1, 2015, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2015.

SECTION 16. Sections 114.003(b) and (c), Property Code, are repealed.

SECTION 16. Same as engrossed version.

SECTION 17. This Act takes effect September 1, 2015.

SECTION 17. Same as engrossed version.