

SUBJECT: Creating rules relating to special needs trusts, at-death transfers, etc.

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 9 ayes — Leach, Farrar, Y. Davis, Julie Johnson, Krause, Meyer, Neave, Smith, White

0 nays

WITNESSES: For — Glenn Karisch, State Bar of Texas, Real Estate, Probate, and Trust Law Section; (*Registered, but did not testify:* Lauren Hunt, State Bar of Texas, Real Estate, Probate, and Trust Law Section, Council Member & Fiduciary Litigation Chair; Craig Hopper, William Pargaman, and Melissa Willms, State Bar of Texas, Real Estate, Probate, and Trust Law Section; Guy Herman, Travis County Probate Court and Presiding Statutory Probate Judge of Texas)

Against — None

BACKGROUND: Property Code sec. 111.004(14) defines a settlor as a person who creates a trust or contributes property to a trustee of a trust, a trustee as a person holding the property in trust, and a beneficiary as the person for whose benefit property is held in trust.

Sec. 111.0035(b) provides that the terms of a trust prevail over any other provisions in the Texas Trust Code, with certain exceptions, including that the terms of the trust may not limit the power of a court to adjust or deny a trustee's compensation if the trustee commits a breach of trust.

Sec. 142.005 allows a court with jurisdiction to hear a suit involving a beneficiary who is a minor or incapacitated, on application and on a finding that the creation of the trust would be in the best interests of the beneficiary, to enter a decree providing for the creation of a trust for the management of any funds recovered in a suit by a next friend or guardian. If the beneficiary of the trust created by the court is a minor, the trust terminates on the beneficiary's death, beneficiary's attaining the age stated

in the trust, or the beneficiary's 25th birthday, whichever comes first. If the beneficiary is an incapacitated person, the trust terminates on the death of the beneficiary or when the beneficiary regains capacity.

DIGEST:

HB 2245 would provide additional rules for the management and termination of certain court-created trusts whose beneficiaries were minors, incapacitated, or disabled. The bill would require that provisions in certain trusts that were intended to take effect or become irrevocable upon the settlor's death be interpreted according to rules applicable to the construction and interpretation of wills when the settlor died. HB 2245 would also provide rules relating to the distribution of trust principal to a second trust, a court's power to override the terms of a trust, and the effect of a court-ordered reformation of a trust.

Court-created trusts. HB 2245 would provide that a trust created by a court for the benefit of a minor who was considered disabled for certain purposes of the federal Social Security Act (SSA) would terminate on the beneficiary's death.

Pooled trust subaccounts. The bill would define a management trust as a trust created by a court upon a determination that the trust would be in the best interest of a beneficiary that is a minor or incapacitated.

Certain persons would be permitted to apply to the court with continuing jurisdiction over a management trust for the establishment of a subaccount in a pooled trust that complied with provisions of the SSA that would be solely for the benefit of the proposed beneficiary for whom a management trust had or could be established. The persons who could submit such applications would be:

- the trustee of a management trust established for the proposed beneficiary;
- a person who had filed an application for the appointment of a guardian of the person or estate of the proposed beneficiary;
- an attorney ad litem or guardian ad litem appointed to represent the proposed beneficiary; or

- a proposed beneficiary who was not a minor or incapacitated person.

The court would be required to appoint an attorney ad litem for a proposed beneficiary who is a minor or an incapacitated person and the subject of an application. A court also could appoint an attorney ad litem or guardian ad litem to represent the interests of a beneficiary with a physical disability who was not incapacitated. The attorney ad litem or the guardian ad litem would be entitled to a reasonable fee and reimbursement of expenses to be paid from the proposed beneficiary's property.

If the court found it in the best interest of the proposed beneficiary, the court could order the establishment of a pooled trust subaccount and the transfer to the subaccount of any of the beneficiary's property. The transfer of property from the management trust to the pooled trust subaccount would be treated as a continuation of the management trust.

The court could not terminate a management trust until all property had been transferred to the pooled trust subaccount.

The terms of the subaccount would provide that the subaccount would terminate on:

- the beneficiary's 18th birthday if the beneficiary was not considered disabled for certain purposes under the Social Security Act and was a minor at the time the subaccount was established;
- the beneficiary's death; or
- a court order terminating the subaccount.

Any property remaining in the subaccount upon termination and after making any required payments to satisfy medical assistance reimbursement claims would be distributed to:

- the beneficiary, if the beneficiary was living and not a minor or incapacitated person;
- the beneficiary's guardian of the estate, if the beneficiary was living

- and a minor or incapacitated person; or
- the personal representative of the beneficiary's estate, if the beneficiary was deceased.

The manager or trustee of a pooled trust could assess fees against and pay fees from a subaccount of the pooled trust in accordance with a standard fee structure. If required by the court, a copy of the annual report of the account would have to be filed with the clerk of the court.

A court that ordered the establishment of subaccount for a beneficiary would have exclusive jurisdiction over any subsequent proceeding or action that related to both the beneficiary and the subaccount.

At-death transfers. HB 2245 would require that a trust amendable or revocable by the settlor containing a transfer intended to take effect or become irrevocable upon the settlor's death be subject to the provisions of the Estates Code dealing with the construction and interpretation of wills when the settlor died.

In applying these provisions, the settlor would be treated as the testator, the beneficiaries of the transfer would be treated as devisees, and the transfer would be treated as a devise. A transfer of specifically identifiable trust property would be a specific bequest, a transfer from the general assets of the trust would be a general bequest, and a transfer of trust property remains after all specific and general transfers had been satisfied would be the residuary estate.

Rules related to the abatement of bequests in connection with payments of debts and expenses of administration would apply.

Distribution to second trust. The bill would specify that a second trust could be created by a distribution of principal to a trust created either under the same trust instrument as the trust from which the principal was distributed or under a different trust instrument. If a second trust was created under the same trust instrument, the property would not have to be retitled.

It would be the Legislature's intent that this provision be a codification of the common law of this state in effect immediately before September 1, 2019.

Disgorgement. HB 2245 would specify that the terms of a trust could not limit the power of a court to order disgorgement of a trustee's compensation if the trustee committed a breach of trust or make an award of costs or attorneys fees for a proceeding under the Property Code.

Reformation. The bill would cause the court-ordered reformation of a trust to be effective as of the creation of the trust without the need for a court order directing that it have retroactive effect.

Effect of dissolution of marriage on trusts. HB 2245 would add the provisions in Estates Code ch. 123, subch. B, relating to the effect of dissolution of marriage on trusts, to the Property Code.

Effective date. The bill would take effect September 1, 2019, and would apply to a trust existing on or created on or after that date, unless otherwise expressly provided by trust, a will creating a trust, or this bill.

For a trust existing prior to the above date, the bill would apply only to an act or omission relating to the trust that occurred on or after that date.

Provisions in this bill relating to the construction of a trust containing an at-death transfer would apply only if the settlor's death occurred on or after that date.

Provisions relating to the effects that dissolution of marriage has on certain trusts would apply to a trust only with respect to a marriage that was dissolved on or after September 1, 2019.