

**SUBJECT:** Revising certain provisions for certain trusts

**COMMITTEE:** Judiciary & Civil Jurisprudence — committee substitute recommended

**VOTE:** 8 ayes — Leach, Julie Johnson, Davis, Flores, Murr, Schofield, Slawson, Vasut

0 nays

1 absent — Moody

**WITNESSES:** For — Lauren Hunt, TREP (*Registered, but did not testify*: Guy Herman, Presiding Judge of the Statutory Probate Courts of Texas; Craig Hopper, Dyann McCully, Texas Real Estate Probate Institute)

Against — None

**BACKGROUND:** Sec. 41.0021(a) of the Property Code defines a "qualifying trust" as an express trust in which the instrument or court order creating the express trust provides that a settlor or beneficiary of the trust has the right to revoke the trust without the consent of another person, exercise an inter vivos general power of appointment over the property that qualifies for the homestead exemption, or use and occupy the residential property as the settlor's or beneficiary's principal residence at no cost to the settlor or beneficiary, other than payment of taxes and other costs and expenses:

- for the life of the settlor or beneficiary;
- for the shorter of the life of the settlor or beneficiary or a term of years specified in the instrument or court order; or
- until the date the trust is revoked or terminated by an instrument or court order recorded in the real property records of the county in which the property is located and that describes the property with sufficient certainty to identify the property.

Additionally, a qualifying trust is an express trust in which the trustee of a acquires the property in an instrument of title or under a court order that describes the property with sufficient certainty to identify the property and

the interest acquired, and is recorded in the real property records of the county in which the property is located.

Sec. 112.035(f) prohibits a beneficiary of a spendthrift 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 a certain right or power to:

- consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary, if the power is exercisable only on consent of another person holding an interest adverse to the beneficiary's interest, or limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary; or
- appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate.

Sec. 112.036(b) and (c) establish the effective date of a trust as the date the trust becomes irrevocable. An interest in a trust must vest, if at all:

- not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021; or
- not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation, if the effective date of the trust is before September 1, 2021.

Sec. 112.0715(a) and (b) allow for a second trust to be created by a distribution of principal to a trust created under the same trust instrument as the first trust from which the principal is distributed or to a trust created under a different trust instrument. If a second trust is created by a distribution of principal to a trust created under the same trust instrument as the first trust from which the principal is distributed, the property is not required to be retitled.

Sec. 115.014(b) allows a court to appoint an attorney ad litem to represent

any interest that the court considers necessary at any point in a proceeding, including an attorney ad litem to defend an action under sec. 114.083 for a beneficiary of the trust who is a minor or who has been adjudged incompetent.

DIGEST: CSHB 2196 would amend and specify certain provisions of the Property Code.

**Homestead in qualifying trust.** CSHB 2196 would amend the definition of “qualifying trust” to include an instrument transferring property to the trust or any other agreement that was binding on the trustee. The bill would require a spouse who was also a settlor of the trust to consent to the revocation of the trust. The bill would allow a settlor or beneficiary of the trust to exercise an inter vivos general power of appointment over the qualified property either alone or when aggregated with property subject to an inter vivos general power of appointment held by a spouse who was also a settlor of the trust. Additionally, the bill would amend the section to allow the settlor or beneficiary to use and occupy the property as the settlor’s or beneficiary’s principal residence rent free and without charge, except for taxes and other costs.

**Spendthrift trust.** CSHB 2196 would prohibit a beneficiary of a spendthrift trust or the estate of such a beneficiary from being considered to be a settlor merely because the beneficiary held or exercised a testamentary power of appointment other than a general power, held or exercised a testamentary general power of appointment, or exercised a testamentary general power in favor of or for the benefit of the takers in default of the appointive assets. If a beneficiary exercised a testamentary general power in such a way, the appointive assets would be subject to the claims of creditors of the beneficiary if the beneficiary’s property was insufficient to meet the beneficiary’s debts. Unless the appointive assets were appointed to the beneficiary’s estate, they would not be subject to administration as a part of the beneficiary’s estate, recovery by the personal representative of the beneficiary’s estate, or the payment of taxes or administration expenses of the beneficiary’s estate.

**Perpetuities.** The bill would amend sec. 112.036(b) and (c) regarding perpetuities. The bill would establish the effective date of trust as the date the governing instrument creating an interest in the trust became irrevocable with respect to that interest. If an interest in one trust was distributed to another trust with a different effective date, the effective date of that interest in the second trust would become the earlier of the effective dates.

The bill would modify the requirements for which an interest in a trust would be required to vest. Such an interest would vest if the effective date was on or after September 1, 2021, no later than the later of 300 years after the effective date or 21 years after some life in being at the time of the effective date, plus a gestation period. Additionally, such an interest would vest, if the effective date was before September 1, 2021, no later than 21 years after some life in being at the time of the effective date, plus a period of gestation.

**Creation of a second trust.** CSHB 2196 would amend second trust creation provisions to allow a second trust to be created by a distribution of principal to a second trust that retained the name used by the first trust. A second trust could retain, under certain circumstances, the tax identification number of the first trust. The bill would revise the conditions under which a second trust would not be required to be retitled. Under the provisions of the bill, a second trust would not be required to be retitled if it was created by a principal distribution to a trust that retained the name of the first trust.

**Legal representation.** The bill would amend sec. 115.014(b) to include the requirement for a court to determine that other legal representation of an interest would be inadequate before appointing an attorney ad litem to represent the interest.

Sec. 112.0715(c) of the Property Code, establishing that the section was intended to only be a codification of common law in effect prior to September, 2019, would be repealed. Instead, the bill would specify that the Legislature intended the amended sections 112.0715(a) and (b) to be a

codification of the common law of Texas in effect immediately before the effect date of the bill. The changes in law made by the bill would apply to a trust created before, on, or after the effective date of the bill.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2023.

**SUPPORTERS  
SAY:**

CSHB 2196 would make several necessary changes to clarify certain provisions pertaining to trusts. The bill would align the language of the Property and Tax Codes regarding the qualification of revocable trusts as homesteads. The bill would better define the rule against perpetuities, which in recent years could have caused people to believe that they would receive an additional 300 years for each trust created by the original trust. The bill would allow a new trust decanted from an original trust to retain the name and employer identification number of the original trust, which would help to clarify how certain new trusts function upon creation. The bill would condition a court's authority to appoint an attorney ad litem to represent certain interests in a trust proceeding, which would align with the current provisions by which a court could appoint a guardian ad litem.

**CRITICS  
SAY:**

No concerns identified.