

## **BILL ANALYSIS**

Senate Research Center  
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C.S.S.B. 387  
By: Rodríguez  
State Affairs  
3/31/2015  
Committee Report (Substituted)

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

As part of its ongoing review of Texas probate, guardianship, and trust law, the Real Estate, Probate, and Trust Law Section of the State Bar of Texas has proposed several updates to the law regarding trusts. Most of the updates are intended to clean up the current law regarding trusts.

C.S.S.B. 387 amends current law relating to trusts and certain other forms of asset protection.

### **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 42.0021(a) and (b), Property Code, as follows:

(a) Changes a comma to the word "or" in a list of certain assets that are exempt from an attachment, execution, and seizure for the satisfaction of debts.

(b) Provides that contributions to an individual retirement account, individual retirement annuity, or Roth IRA that are "excess contributions" within the meaning of Section 4973, rather than contributions that exceed the amounts permitted under the applicable provisions, of the Internal Revenue Code of 1986, and any accrued earnings on such excess contributions, are not exempt under this section unless otherwise exempt by law. Provides that amounts qualifying as nontaxable transfers or rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Provides that amounts treated as rollover contributions, rather than qualified rollover contributions, under Section 402A(c)(3), 402A(c)(4), or 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). Provides that, in addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), 408(d)(6), 408(d)(9), or 408A of the Internal Revenue Code of 1986 on or after January 1, 1993, are treated as exempt amounts under Subsection (a). Provides that amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

SECTION 2. Amends Section 111.0035(b), Property Code, as follows:

(b) Provides that the terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:

(1)-(3) Makes no change to these subdivisions;

(4) a trustee's duty:

(A) Makes no change to this paragraph;

(B) to act in good faith and in accordance with the purposes of the trust, except as otherwise provided by Subchapter E, Chapter 114, with regard to a directing party and an excluded fiduciary;

(5) a directing party's duty to act in good faith and in accordance with the purposes of the trust;

(6) Creates this subdivision from existing text. Makes no further change.

(7) Redesignates existing Subdivision (6) as Subdivision (7). Makes no further change.

SECTION 3. Amends Section 111.004(7), Property Code, by redefining "interested person" to include a directing party.

SECTION 4. Amends Section 112.035(e), Property Code, to prohibit a beneficiary of the trust from being considered a settlor merely because of a lapse, waiver, or release of 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:

(A) the amount specified in Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986; or

(B) the amount specified in Section 2503(b), Internal Revenue Code of 1986, with respect to the contributions by each donor.

SECTION 5. Amends Section 112.038, Property Code, as follows:

Sec. 112.038. FORFEITURE CLAUSE. (a) Creates this subsection from existing text.

(b) Provides that this section is not intended to and does 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.

SECTION 6. Amends Sections 112.054(a) and (c), 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:

(1)-(3) Makes no change to these subdivisions;

(4) and (5) Makes nonsubstantive changes to these subdivisions; or

(6) the order is necessary 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.

(c) Authorizes the court to direct that an order described by Subsection (a)(4) or (6) has retroactive effect.

SECTION 7. Amends Sections 112.071(5), (6), and (7), Property Code, to redefine "full discretion," "limited discretion," and "presumptive remainder beneficiary."

SECTION 8. Amends Section 112.072(a), Property Code, as follows:

(a) Authorizes an authorized trustee who has the full discretion to distribute the principal of a trust to distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one, more than one, or all of the current beneficiaries of the first trust and for the benefit of one, more than one, or all of the successor or presumptive remainder beneficiaries of the first trust, rather than beneficiaries of the first trust who are eligible to receive income or principal from the trust and for the benefit of one or more successor or presumptive remainder beneficiaries of the first trust who are eligible to receive income or principal from the trust.

SECTION 9. Amends Section 112.078, Property Code, by adding Subsection (f) to provide that this section does not limit a beneficiary's right to bring an action against a trustee for a breach of trust.

SECTION 10. Amends Section 112.085, Property Code, as follows:

Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. Prohibits an authorized trustee from exercising a power to distribute principal of a trust under Section 112.072 or 112.073 to:

- (1) Makes no change to this subdivision;
- (2) materially limit a trustee's fiduciary duty:
  - (A) under the terms of the trust; or
  - (B) in a manner that would be prohibited by Section 111.0035, except as provided by Subchapter E, Chapter 144;
- (3) decrease or indemnify against a trustee's liability, except as provided by Subchapter E, Chapter 144;
- (4) add a provision exonerating a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
- (5) and (6) Makes no change to these subdivisions.

Deletes existing text prohibiting an authorized trustee from exercising a power to distribute principal of a trust under Section 112.072 or 112.073 to materially impair the rights of a beneficiary of the trust.

SECTION 11. Amends Section 113.018, Property Code, as follows:

Sec. 113.018. New heading: EMPLOYMENT AND APPOINTMENT OF AGENTS.

(a) Creates subsection from existing text and makes no further change to this subsection.

(b) Authorizes a trustee, without limiting the trustee's discretion under Subsection (a), 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.

(c) Authorizes a trustee acting under Subsection (b) to delegate any or all of the duties and powers to:

- (1) execute and deliver any legal instruments relating to the sale and conveyance of the property, including affidavits, notices, disclosures, waivers, or designations or general or special warranty deeds binding the trustee with vendor's liens retained or disclaimed, as applicable, or transferred to a third-party lender;

- (2) accept notes, deeds of trust, or other legal instruments;
- (3) approve closing statements authorizing deductions from the sale price;
- (4) receive trustee's net sales proceeds by check payable to the trustee;
- (5) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the sale;
- (6) take any action, including signing any document, necessary or appropriate to sell the property and accomplish the delegated powers;
- (7) contract to purchase the property for any price on any terms;
- (8) execute, deliver, or accept any legal instruments relating to the purchase of the property or to any financing of the purchase, including deeds, notes, deeds of trust, guaranties, or closing statements;
- (9) approve closing statements authorizing payment of prorations and expenses;
- (10) pay the trustee's net purchase price from funds provided by the trustee;
- (11) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the purchase; or
- (12) take any action, including signing any document, necessary or appropriate to purchase the property and accomplish the delegated powers.

(d) Provides that a trustee who delegates a power under Subsection (b) is liable to the beneficiaries or to the trust for an action of the agent to whom the power was delegated.

(e) Requires a delegation by the trustee under Subsection (b) 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. Provides that a signature on a delegation by a trustee for purposes of this subsection is presumed to be genuine if the trustee acknowledges the signature in accordance with Chapter 121 (Acknowledgement and Proofs of Written Instruments), Civil Practice and Remedies Code.

(f) Provides that a delegation to an agent under Subsection (b) terminates 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.

(g) Authorizes a person who in good faith accepts a delegation under Subsection (b) 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:

- (1) the delegation were genuine, valid, and still in effect;
- (2) the agent's authority were genuine, valid, and still in effect; and
- (3) the agent had not exceeded and had properly exercised the authority.

(h) Authorizes a trustee to delegate powers under Subsection (b) if the governing instrument does not affirmatively permit the trustee to hire agents or expressly prohibit the trustee from hiring agents.

SECTION 12. Amends Chapter 114, Property Code, by adding Subchapter E, as follows:

#### SUBCHAPTER E. DIRECTED TRUSTS

Sec. 114.101. DEFINITIONS. Defines "directing party," "distribution trust advisor," "excluded fiduciary," "fiduciary," "governing instrument," "independent fiduciary," "investment trust advisor," "power," and "trust protector" in this subchapter.

Sec. 114.102. APPLICABILITY OF SUBCHAPTER. (a) Provides that this subchapter applies to all trusts created on or after September 1, 2015, except to the extent the governing instrument expressly prohibits the application of this subchapter by specific reference to this subchapter.

(b) Provides that, except as provided by Subsection (a), on and after September 1, 2015, this subchapter applies to a trust existing on or created on or after that date that:

- (1) appoints or provides for a directing party, including a party granted power or authority effectively comparable in substance to that of a directing party as provided by this subchapter;
- (2) is modified in accordance with applicable law or the terms of the governing instrument to appoint or provide for a directing party; or
- (3) 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 this subchapter, whether or not the court order specifies that this subchapter governs the responsibilities, actions, and liabilities of persons designated as a directing party or excluded fiduciary.

Sec. 114.103. INVESTMENT TRUST ADVISOR. (a) Authorizes an investment trust advisor to be designated in the governing instrument of a trust. Authorizes the governing instrument to use the title "investment trust advisor" or any similar name or description demonstrating the intent to provide for the position and function of an investment trust advisor as defined by Section 114.101.

(b) Provides that the powers of an investment trust advisor:

- (1) may be exercised or not exercised in the discretion of the investment trust advisor; and
- (2) except as provided by this subchapter, are binding on all other persons, including each beneficiary, fiduciary, and excluded fiduciary and any other party having an interest in the trust.

(c) Provides that, unless otherwise provided by the governing instrument, an investment trust advisor's powers include the authority to:

- (1) direct the trustee with respect to:
  - (A) the retention, purchase, transfer, assignment, sale, or encumbrance of trust property; and
  - (B) the investment and reinvestment of principal and income of the trust;

(2) direct the trustee with respect to all management, control, and voting powers related directly or indirectly to trust assets, including voting proxies for securities held in trust;

(3) select and employ one or more advisors, managers, consultants, counselors, or other agents in accordance with Section 113.018; and

(4) determine the frequency and methodology for valuing any asset for which there is no readily available market value.

Sec. 114.104. DISTRIBUTION TRUST ADVISOR. (a) Authorizes a distribution trust advisor to be designated in the governing instrument of a trust. Authorizes the governing instrument to use the title "distribution trust advisor" or any similar name or description demonstrating the intent to provide for the position and function of a distribution trust advisor as defined by Section 114.101.

(b) Provides that the powers of a distribution trust advisor:

(1) may be exercised or not exercised in the discretion of the distribution trust advisor; and

(2) except as otherwise provided by this subchapter, are binding on all other persons, including each beneficiary, fiduciary, and excluded fiduciary and any other party having an interest in the trust.

(c) Provides that, unless otherwise provided in the governing instrument, a distribution trust advisor's powers include the authority to direct the trustee with regard to all decisions relating directly or indirectly to discretionary distributions to or for one or more beneficiaries.

Sec. 114.105. TRUST PROTECTOR. (a) Authorizes a trust protector to be designated in the governing instrument of a trust. Authorizes the governing instrument to 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) Provides that 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) Requires the terms of the governing instrument to determine the powers of the trust protector, and there are no default powers. Authorizes the powers granted to a trust protector by the governing instrument to 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) Provides that, except as otherwise provided by the governing instrument, a trust protector has no duty to monitor any fiduciary's conduct.

Sec. 114.106. EXCLUDED FIDUCIARY. (a) Provides 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.

(b) Provides 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.

Sec. 114.107. DUTY AND LIABILITY OF DIRECTING PARTY. (a) Provides that, within the limits of the directing party's authority, a directing party:

(1) is a fiduciary of the trust;

(2) except as provided by the governing instrument, has all the powers and protections granted to trustees under this subtitle; and

(3) is subject to the same fiduciary duties and standards applicable to a trustee of a trust, unless the governing instrument provides otherwise.

(b) Prohibits the governing instrument from limiting the duties of the directing party or relieve a directing party of any duties or standards that could not be limited as to a trustee or of which a trustee could not be relieved, including the duties and standards set forth in Sections 111.0035 and 114.007.

Sec. 114.108. DUTY AND LIABILITY OF EXCLUDED FIDUCIARY. (a) Requires an excluded fiduciary to act in accordance with the governing instrument and comply with the directing party's exercise of the powers granted to the directing party by the governing instrument.

(b) Provides that, notwithstanding Section 111.0035, if the terms of a trust provide that an excluded fiduciary is to follow the direction of a directing party or act only with a directing party's consent or direction:

(1) if the excluded fiduciary complies with the direction of a directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from any act taken or not taken by the excluded fiduciary pursuant to the directing party's direction; or

(2) if the directing party fails to direct, consent, or act after having been requested to do so by the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from any act taken or not taken by the excluded fiduciary as a result of the directing party's failure to direct, consent, or act.

(c) Provides that Subsection (b) does not apply if:

(1) the direction is contrary to an express prohibition or mandate in the governing instrument, which shall be evaluated exclusively on the terms of the governing instrument and without reference to any judicial or legal standard;

(2) the excluded fiduciary acts in a manner that constitutes wilful misconduct; or

(3) the excluded fiduciary has actual knowledge that the direction would constitute fraud as applied to the fiduciary duties of the directing party.

(d) Provides that, unless otherwise provided by the governing instrument, an excluded fiduciary does not have any duty to:

(1) monitor the directing party's conduct;

(2) provide the directing party with advice or consult with the directing party;

(3) inform or warn any directing party or any beneficiary or third party that the excluded fiduciary disagrees with any of the directing party's actions or directions;

(4) do anything to prevent the directing party from giving any direction or taking any action; or

(5) compel the directing party to redress the directing party's action or direction.

(e) Requires that, absent clear evidence to the contrary, the actions of an excluded fiduciary pertaining to matters within the limits of authority of the directing party, including confirming that the directing party's directions have been carried out and recording and reporting actions taken pursuant to the directing party's direction, be presumed to be administrative actions taken by the excluded fiduciary and may not be considered an undertaking by the excluded fiduciary to monitor the directing party's actions or participate in actions within the limits of the directing party's authority.

(f) Provides that an excluded fiduciary may, but is not required to, obtain and rely on an opinion of counsel on any matter relevant to this subchapter.

Sec. 114.109. JURISDICTION. Provides that, by accepting an appointment to serve as a directing party of a trust that is subject to the laws of this state, the directing party submits to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and 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.

Sec. 114.110. TAX SAVINGS PROVISIONS. Provides that, notwithstanding the other provisions of this subchapter, and except as otherwise provided by the governing instrument, none of the default powers granted to a directing party authorize:

- (1) a grantor of a trust to direct distributions;
- (2) 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 Section 113.029;
- (3) 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
- (4) 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.

SECTION 13. Amends Sections 115.002(b-1) and (b-2), Property Code, to make nonsubstantive changes.

SECTION 14. Amends Section 181.083, Property Code, by adding Subsections (c) and (d), as follows:

(c) Provides that, to the extent specified in an instrument in which a donee exercises a power, any estate or interest in real or personal property created through the exercise of the power by the donee 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:

- (1) specifically refers to Section 181.083(c), Property Code;
- (2) specifically asserts an intention to exercise a power of appointment by creating another power of appointment described in Section 2041(a)(3) or Section 2514(d), Internal Revenue Code of 1986; or
- (3) 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.

(d) Provides that Subsection (c) applies regardless of whether the donee's power may be exercised in favor of the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate.

SECTION 15. (a) Provides that, except as 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.

(b) Provides that, 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. Repealers: Sections 114.003(b) and (c), Property Code.

SECTION 17. Effective date: September 1, 2015.