

BILL ANALYSIS

Senate Research Center
86R2864 AJA-F

H.B. 2245
By: Wray; Raymond (Rodríguez)
State Affairs
5/10/2019
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

As part of its ongoing review of Texas law, the Real Estate, Probate, and Trust Law Section of the State Bar of Texas has proposed several updates to state law regarding trusts. H.B. 2245 seeks to implement those proposed updates.

H.B. 2245 clarifies that a trustee cannot use a trust's exoneration provision to avoid paying back compensation or paying attorney's fees and costs if ordered to do either by a court.

H.B. 2245 applies Chapter 255, Estates Code, to the interpretation and construction of living trusts when used as a will substitute to dispose of a settlor's assets upon death.

H.B. 2245 clarifies that a reformation of a trust, by its nature, applies from the beginning of the trust, and no affirmative statement of retroactivity needs to be included in the reformation judgment.

H.B. 2245 clarifies that, when distributing principal into a second trust under (a.k.a. "decanting"), such second trust may be recreated under the same trust instrument as the first trust. It is intended to decrease transaction costs and make decanting a more viable tool.

H.B. 2245 adds provisions regarding the effect of divorce on revocable dispositions in trust in favor of a former spouse and the former spouse's family.

H.B. 2245 clarifies that a special needs trust created for a disabled minor under Chapter 142, Property Code, can last for the beneficiary's lifetime.

H.B. 2245 allows for the transfer of funds from a management trust to a pooled trust (if the court with continuing jurisdiction determines that it is in the trust beneficiary's best interest).

H.B. 2245 amends current law relating to trusts.

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 111.0035(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 are prohibited from limiting:

(1)–(4) makes no changes to these subdivisions;

(5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power, among other certain actions, to adjust, deny, or order disgorgement of a trustee's compensation if the trustee commits a breach of

trust, or to make an award of costs and attorney's fees under Section 114.064 (Costs); or

(6) makes no change to this subdivision.

SECTION 2. Amends Subchapter B, Chapter 112, Property Code, by adding Section 112.0335, as follows:

Sec. 112.0335. CONSTRUCTION OF CERTAIN TRUSTS. (a) Provides that, unless the terms of the trust provide otherwise, if a trust is created and amendable or revocable by the settlor, or by the settlor and the settlor's spouse, Chapter 255 (Construction and Interpretation of Wills), Estates Code, applies at the settlor's death to the construction and interpretation of at-death transfers as if the settlor of the trust is the testator, the beneficiaries of the at-death transfer are devisees, and the at-death transfers are devises.

(b) Provides that Section 355.109 (Abatement of Bequests), Estates Code, applies to the abatement of at-death transfers.

(c) Defines "at-death transfer."

(d) Provides that, for purposes of the Estates Code provisions specified by this section:

(1) an at-death transfer of specifically identifiable trust property is a specific bequest, devise, or legacy;

(2) an at-death transfer from the general assets of the trust that does not transfer specifically identifiable property is a general bequest, devise, or legacy; and

(3) an at-death transfer of trust property that remains after all specific and general transfers have been satisfied is the residuary estate.

SECTION 3. Amends Section 112.054(c), Property Code, as follows:

(c) Authorizes the court to direct that an order described by Subsection (a)(4) (relating to authorizing a court, on the petition of a trustee or a beneficiary, to issue certain orders if certain conditions are met, including that the order is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions), rather than described by Subsection (a)(4) or (b-1) (relating to authorizing a court, on the petition of a trustee or a beneficiary, to order that the terms of the trust be reformed if certain conditions are met), has retroactive effect. Provides that the reformation of a trust under an order described by Subsection (b-1) is effective as of the creation of the trust.

SECTION 4. Amends Subchapter D, Chapter 112, Property Code, by adding Section 112.0715, as follows:

Sec. 112.0715. CREATION OF SECOND TRUST. (a) Authorizes a second trust to be created by a distribution of principal under Section 112.072 (Distribution to Second Trust: Trustee With Full Discretion) or 112.073 (Distribution To Second Trust: Trustee With Limited Discretion) 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.

(b) Provides that, if a second trust is created by a distribution of principal under Section 112.072 or 112.073 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.

(c) Provides that the legislature intends this section to be a codification of the common law of this state in effect immediately before September 1, 2019.

SECTION 5. Amends Chapter 112, Property Code, by adding Subchapter E, as follows:

SUBCHAPTER E. EFFECT OF DISSOLUTION OF MARRIAGE ON CERTAIN
TRANSFERS IN TRUST

Sec. 112.101. DEFINITIONS. Defines "disposition or appointment of property" "divorced individual," "relative," and "revocable."

Sec. 112.102. REVOCATION OF CERTAIN NONTESTAMENTARY TRANSFERS; TREATMENT OF FORMER SPOUSE OR FORMER SPOUSE'S RELATIVE AS BENEFICIARY UNDER CERTAIN POLICIES OR PLANS. (a) Provides that the dissolution of the marriage revokes a provision in a trust instrument that was executed by a divorced individual as settlor before the divorced individual's marriage was dissolved and that:

(1) is a revocable disposition or appointment of property made to the divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual;

(2) revocably confers a general or special power of appointment on the divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual; or

(3) revocably nominates the divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual to serve:

(A) as a personal representative, trustee, conservator, agent, or guardian; or

(B) in another fiduciary or representative capacity.

(b) Provides that Subsection (a) does not apply if one of the following provides otherwise:

(1) a court order;

(2) the express terms of a trust instrument executed by the divorced individual before the individual's marriage was dissolved; or

(3) an express provision of a contract relating to the division of the marital estate entered into between the divorced individual and the individual and the individual's former spouse before, during, or after the marriage.

(c) Provides that Sections 9.301 (Pre-Decree Designation of Ex-Spouse As Beneficiary of Life Insurance) and 9.302 (Pre-Decree Designation of Ex-Spouse As Beneficiary in Retirement Benefits and Other Financial Plans), Family Code, govern the designation of a former spouse as a beneficiary of certain life insurance policies or as a beneficiary under certain retirement plans or other financial plans.

Sec. 112.103. EFFECT OF REVOCATION. (a) Provides that an interest granted in a provision of a trust instrument that is revoked under Section 112.102(a)(1) or (2) passes as if the former spouse of the divorced individual who executed the trust instrument and each relative of the former spouse who is not a relative of the divorced individual disclaimed the interest granted in the provision.

(b) Provides that an interest granted in a provision of a trust instrument that is revoked under Section 112.102(a)(3) passes as if the former spouse and each relative of the former spouse who is not a relative of the divorced individual died immediately before the dissolution of the marriage.

Sec. 112.104. LIABILITY OF CERTAIN PURCHASERS OR RECIPIENTS OF CERTAIN PAYMENTS, BENEFITS, OR PROPERTY. Provides that a bona fide purchaser of property from a divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual or a person who receives from the former spouse or any relative of the former spouse who is not a relative of the divorced individual a payment, benefit, or property in partial or full satisfaction of an enforceable obligation:

(1) is not required by this subchapter to return the payment, benefit, or property; and

(2) is not liable under this subchapter for the amount of the payment or the value of the property or benefit.

Sec. 112.105. LIABILITY OF FORMER SPOUSE OR FORMER SPOUSE'S RELATIVE FOR CERTAIN PAYMENTS, BENEFITS, OR PROPERTY. Provides that a divorced individual's former spouse or any relative of the former spouse who is not a relative of the divorced individual who, not for value, receives a payment, benefit, or property to which the former spouse or the relative of the former spouse who is not a relative of the divorced individual is not entitled as a result of Sections 112.102(a) and (b):

(1) shall return the payment, benefit, or property to the person who is entitled to the payment, benefit, or property under this subchapter; or

(2) is personally liable to the person described by Subdivision (1) for the amount of the payment or the value of the benefit or property received, as applicable.

Sec. 112.106. CERTAIN TRUSTS WITH DIVORCED INDIVIDUALS AS JOINT SETTLORS. (a) Provides that this section applies only to a trust created under a trust instrument that:

(1) was executed by two married individuals as settlors whose marriage to each other is subsequently dissolved; and

(2) includes a provision described by Section 112.102(a).

(b) Requires the trustee, on the death of one of the divorced individuals who is a settlor of a trust to which this section applies, to divide the trust into two trusts, each of which are required to be composed of the property attributable to the contributions of only one of the divorced individuals.

(c) Authorizes an action authorized in a trust instrument described by Subsection (a) that requires the actions of both divorced individuals to be taken with respect to a trust established in accordance with Subsection (b) from the surviving divorced individual's contributions solely by that divorced individual.

(d) Provides that the provisions of this subchapter apply independently to each trust established in accordance with Subsection (b) as if the divorced individual from whose contributions the trust was established had been the only settlor to execute the trust instrument described by Subsection (a).

(e) Provides that this section does not apply if one of the following provides otherwise:

(1) a court order;

(2) the express terms of a trust instrument executed by the two divorced individuals before their marriage was dissolved; or

(3) an express provision of a contract relating to the division of the marital estate entered into between the two divorced individuals before, during, or after their marriage.

SECTION 6. Amends Section 142.005(b), Property Code, as follows:

(b) Requires the decree to provide for the creation of a trust for the management of the funds for the benefit of the beneficiary and for terms, conditions, and limitations of the trust, as determined by the court, that are not in conflict with following mandatory provisions:

(1)–(3) Makes no changes to these subdivisions.

(4) Requires the trust, if the beneficiary is a minor who is not considered disabled for purposes of 42 U.S.C. Chapter 7, Subchapter XVI, to terminate on the death of the beneficiary, on the beneficiary's attaining an age stated in the trust, or on the 25th birthday of the beneficiary's attaining an age stated in the trust, or on the 25th birthday of the beneficiary, whichever occurs first.

(4-a) Requires the trust, if the court finds that a minor beneficiary is considered disabled for purposes of 42 U.S.C. Chapter 7, Subchapter XVI, to terminate on the death of the beneficiary.

(4-b) Creates this subdivision from existing text and requires the trust, if the beneficiary is an incapacitated person, to terminate on the death of the beneficiary or when the beneficiary regains capacity.

(5)–(7) Makes no changes to these subdivisions.

SECTION 7. Amends Chapter 142, Property Code, by adding Section 142.010, as follows:

Sec. 142.010. TRANSFER OF TRUST PROPERTY TO A POOLED TRUST SUBACCOUNT. (a) Defines "management trust."

(b) Authorizes the court, if the court with continuing jurisdiction over a management trust determines that it is in the best interests of the beneficiary for whom the management trust is created, to order the transfer of all property in the management trust to a pooled trust subaccount established in accordance with Chapter 143.

(c) Authorizes but does not require the court, for purposes of a proceeding to determine whether to transfer property from a management trust to a pooled trust subaccount, to appoint an attorney ad litem or guardian ad litem to represent the interests of a management trust beneficiary who has a physical disability and is not an incapacitated person. Entitles the attorney ad litem or the guardian ad litem to a reasonable fee and reimbursement of expenses to be paid from the management trust property.

(d) Requires the transfer of property from the management trust to the pooled trust subaccount to be treated as a continuation of the management trust and prohibits the transfer from being treated as the establishment of a new trust for purposes of 42 U.S.C. Section 1396p (d) (4) (A) or (C) or otherwise for purposes of the management trust beneficiary's eligibility for medical assistance under Chapter 32 (Medical Assistance Program), Human Resources Code.

(e) Prohibits the court from allowing termination of the management trust from which property is transferred under this section until all of the property in the management trust has been transferred to the pooled trust subaccount.

SECTION 8. Amends Subtitle A, Title 10, Property Code, by adding Chapter 143, as follows:

CHAPTER 143. POOLED TRUST SUBACCOUNTS

Sec. 143.001. DEFINITIONS. Defines "beneficiary," "incapacitated person," "medical assistance," "pooled trust," and "subaccount."

Sec. 143.002. APPLICATION TO ESTABLISH SUBACCOUNT. Authorizes certain persons to apply to the court having jurisdiction under Section 142.005 (Trust For Property) for the establishment of a subaccount solely for the benefit of a proposed beneficiary who is a person for whom a management trust has been or could be established for the person's benefit under Section 142.005.

Sec. 143.003. APPOINTMENT OF ATTORNEY AD LITEM. (a) Requires the court to appoint an attorney ad litem for a person who is a minor or an incapacitated person and who is the subject of an application under Section 143.002.

(b) Provides that the attorney ad litem is entitled to a reasonable fee and reimbursement of expenses to be paid from the person's property.

Sec. 143.004. ESTABLISHMENT OF SUBACCOUNT. Authorizes the court, if the court finds that it is in the best interests of a person who is the subject of an application under Section 143.002, to order the establishment of a subaccount of which the person is the beneficiary and the transfer to the subaccount of any of the person's property on hand or accruing to the person.

Sec. 143.005. TERMS OF SUBACCOUNT. Requires that the terms governing the subaccounts, unless the court orders otherwise, provide that:

(1) the subaccount terminates on the earliest of the date of:

(A) the beneficiary's 18th birthday, if the beneficiary:

(i) is not found by the court to be considered disabled for purposes of 42 U.S.C. Chapter 7, Subchapter XVI and

(ii) is a minor at the time the subaccount is established;

(B) the beneficiary's death; or

(C) a court order terminating the subaccount; and

(2) on termination, any property remaining in the beneficiary's subaccount after any required payments to satisfy the amounts of medical assistance reimbursement claims for medical assistance provided to the beneficiary under this state's medical assistance program and other states' medical assistance programs are required to be distributed to:

(A) the beneficiary, if on the date of termination the beneficiary is living and is not a minor or incapacitated person; or

(B) the beneficiary's guardian of the estate, if on the date of termination the beneficiary is living and is a minor or incapacitated person; or

(C) the personal representative of the beneficiary's estate, if on the date of termination the beneficiary is deceased.

Sec. 143.006. FEES AND REPORTING. (a) Authorizes the manager or trustee of a pooled trust to:

(1) assess fees against a subaccount of that pooled trust that is established under this chapter, in accordance with the manager's or trustee's standard fee structure; and

(2) pay fees assessed under Subdivision (1) from the subaccount.

(b) Requires the manager or trustee of the pooled trust, if required by the court, to file a copy of the annual report of account with the court clerk.

Sec. 143.007. JURISDICTION EXCLUSIVE. Provides that, notwithstanding any other law, the court that orders the establishment of a subaccount for beneficiary has exclusive jurisdiction of a subsequent proceeding or action that relates to both the beneficiary and the subaccount, and the proceeding or action is authorized to be brought only in that court.

SECTION 9. (a) Provides that, 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 on or created on or after September 1, 2019.

(b) Provides that for a trust existing on September 1, 2019, that was created before that date, 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, 2019.

(c) Provides that Section 112.0335, Property Code, as added by this Act, applies to a trust only if the settlor's death occurs on or after September 1, 2019.

(d) Provides that Subchapter E, Chapter 112, Property Code, as added by this Act, applies to a trust only with respect to a dissolution of marriage that occurs on or after September 1, 2019.

SECTION 10. Effective date: September 1, 2019.