SUBJECT: Updating certain trust-related issues in the Property Code

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Smithee, Farrar, Clardy, Laubenberg, Schofield, Sheets, S. Thompson

0 nays

2 absent — Hernandez, Raymond

SENATE VOTE: On final passage, April 9 — 31-0

WITNESSES: (*On House companion bill, HB 1029*)
For — Jeffrey Myers, Real Estate, Probate, and Trust Law Section of the State Bar of Texas; (*Registered but did not testify*: Guy Herman, Statutory Probate Courts of Texas; Craig Hopper, Real Estate, Probate, and Trust Law Section of the State Bar of Texas)

Against — (*Registered but did not testify*: John Heasley, Texas Bankers Association)

On — (*Registered but did not testify*: Leslie Friedlander, Office of the Attorney General)

BACKGROUND: Each legislative session, the State Bar of Texas' Real Estate, Probate, and Trust Law Section proposes changes to Texas law to streamline and simplify trust-related issues, clarify ambiguities, or correct technical deficiencies.

DIGEST: CSSB 387 would update the Property Code in various ways.

Delegating agents for sale of real estate. The bill would allow trustees to grant an agent powers to act for the trustee in real property transactions. The trustee could delegate powers if the governing instrument did not affirmatively permit or expressly prohibit the trustee from hiring agents.

A trustee would be liable to the beneficiaries or to the trust for the actions of the agent. The delegation would be required to be documented in a written instrument acknowledged by the trustee before an officer authorized to take acknowledgments to deeds of conveyance and administer oaths. The delegation would terminate after six months unless terminated earlier by the death or incapacity of the trustee, the resignation or removal of the trustee, or a date specified in the delegation.

The bill would allow a person to rely on a delegation if that person, in good faith, accepted a delegation without actual knowledge that the delegation or the agent's authority was void, invalid, or terminated, or that the agent was exceeding or improperly exercising the agent's authority.

Directed trusts. The bill would allow a governing instrument of a trust to designate directing parties that would be fiduciaries of the trust, would have certain powers and protections granted to trustees, and would be subject to certain fiduciary duties and standards applicable to a trustee. Directing parties could include:

- an investment trust advisor, who would have authority to exercise the investment powers of the trust;
- a distribution trust advisor, who would have authority to exercise the distribution powers and discretions of the trust; and
- a trust protector, who would have authority to make certain decisions affecting the trust.

An investment trust advisor would have the authority to:

- direct the trustee with respect to the retention, purchase, transfer, assignment, sale, and encumbrance of trust property and the investment and reinvestment of principal and interest of the trust;
- direct the trustee with respect to all management, control, and voting powers related to trust assets;
- select and employ certain agents reasonably necessary in the administration of the trust estate; and

- determine the frequency and methodology for valuing any asset for which there was no readily available market value.

A distribution trust advisor would have the power to direct the trustee with regard to all decisions relating directly or indirectly to discretionary distributions to or for one or more beneficiaries.

A trust protector's powers would be granted in the governing instrument and could include broad authority to modify or amend the governing instrument; increase, decrease, or modify the interests of beneficiaries; modify terms of powers of appointment granted by the trust; remove or appoint directing parties; or terminate the trust. Under the bill, if a charity was a beneficiary of the trust, a trust protector would be required to give notice to the attorney general within 60 days of certain actions.

The bill would define "excluded fiduciary" as a fiduciary directed by the governing instrument to act in accordance with the exercise of specified powers by a directing party. The bill would specify which powers would be considered granted to the fiduciary and which would be considered granted to the directing party.

The bill would limit the liability of an excluded fiduciary that complies with the direction of the directing party unless the direction was contrary to an express prohibition or mandate in the governing instrument, the excluded fiduciary's act constituted willful misconduct, or the excluded fiduciary had actual knowledge that the direction constituted fraud.

The bill would provide certain limitations to the default powers granted to a directing party.

Technical and other changes. The bill would make several other changes to the Property Code, including:

- clarifying that excess contributions to a Roth IRA were not exempt from creditors;
- making rollover contributions to certain retirement plans exempt

from creditors;

- allowing the terms of a trust to limit a trustee's duty to act in good faith and in accordance with the purposes of the trust with regard to directed trusts and excluded fiduciaries;
- providing that the terms of a trust could not limit a directing party's duty to act in good faith and in accordance with the purposes of the trust;
- including a directing party in the definition of an "interested person" in the Texas Trust Code;
- limiting a trustee's ability to distribute principal from a trust that was held solely for charitable purposes and had as beneficiaries only charitable entities;
- updating trust modification provisions to allow a trust to be reformed to correct drafting errors if there was clear and convincing evidence of the settlor's intent to reform; and
- providing for postponed vesting of certain estates or interests created by exercise of a donee's powers.

This bill would take effect September 1, 2015, and would apply to trusts created on or after that date. The bill also would apply to acts or omissions that occurred on or after the effective date related to a trust existing on or before that date.