

SUBJECT: Establishing self-settled asset protection trusts

COMMITTEE: Judiciary & Civil Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Leach, Julie Johnson, Davis, Flores, Moody, Murr, Vasut
1 nay — Schofield
1 absent — Slawson

WITNESSES: For — Ben King, Ross & Shoalmire PLLC
Against — William Pargaman, Texas Real Estate and Probate Institute;
Craig Hopper, Texas Real Estate and Probate Institute

BACKGROUND: Some have suggested that permitting self-settled asset protection trusts in Texas would help individuals to better protect their assets, deter costly litigation, and incentivize parties to conduct business in Texas.

DIGEST: HB 4376 would establish provisions for self-settled asset protection trusts. A self-settled asset protection trust would be defined as a spendthrift trust of which the settlor was a beneficiary and the trust met certain other conditions. The trust would have to be:

- created in a writing signed by the settlor;
- irrevocable;
- not requiring any part of the income or principal of the trust to be distributed to the settlor; and
- not intended to hinder, delay, or defraud known creditors.

The bill would require at least one trustee of the trust to be either an individual who resided and was domiciled in Texas, a trust company meeting certain conditions, or a financial institution meeting certain conditions.

A spendthrift trust could be considered a self-settled asset protection trust even if under the trust terms:

- the settlor was allowed to prevent a distribution under the trust;
- the settlor held a special lifetime or testamentary power of appointment, so long as that power could not be exercised in the settlor's favor;
- the settlor was a beneficiary of a trust that qualified as a charitable remainder trust;
- the settlor was authorized or entitled to receive a percentage of the value of the trust each year;
- the settlor was authorized or entitled to receive income or principal from certain grantor retained trusts; or
- the settlor was authorized or entitled to use real property held under a qualified personal residence trust or possessed a qualified annuity interest.

A self-settled asset protection trust would be created if the settlor manifested an intention to create a self-settled asset protection trust in the terms of the writing. The bill would specify that no specific language would be required for the creation of such a trust.

A settlor of a self-settled asset protection trust would only have the powers and rights established by a trust instrument. Any agreement between the settlor and the trustee that attempted to grant or permit the retention of greater rights or authority than was stated in the trust instrument would be void.

The trust instrument would be required to name or clearly refer to the beneficiary of the trust. A provision for a beneficiary would be for the beneficiary's support, education, maintenance, and benefit. Under the bill, the validity of the trust could not depend on the beneficiary's character, capacity, incapacity, competency, or incompetency. A provision for a beneficiary would extend to all income from the trust estate, other than that dedicated for administrative and tax purposes.

If the settlor provided discretion to the trustee with respect to one of the following matters, that discretion would be absolute:

- the sum to be applied for or paid to a beneficiary;
- the application or payment of sums for or to a beneficiary;
- the amount of trust income to be applied for or paid to a beneficiary; or
- payment of all or any part of the income to any one or more of the beneficiaries.

A self-settled asset protection trust would restrain and prohibit the assignment, alienation, acceleration, and anticipation of any interest of the beneficiary. In addition, the trust estate, or the corpus or capital of the trust estate, could not be assigned, alienated, diminished, or impaired by any alienation, transfer, or seizure that would cut off or diminish payments, rents, profits, earnings, or income of the trust that would otherwise be available for the benefit of a beneficiary.

Mandatory or discretionary payments by a trustee to a beneficiary could only be made for the benefit of the beneficiary. The bill would restrict the ways in which mandatory or discretionary payments could be made. The bill also would establish other provisions related to the trust income and trust estate. The bill would specify conditions under which a beneficiary would have legal estate in the corpus of the trust estate.

The bill would allow an accumulation of the income from the trust property to be directed in the trust instrument for the benefit of one or more beneficiaries within a specific timeframe. The bill also would provide for the direction of such trust income that was for a longer term than allowed by law.

The bill would restrict the ability of a settlor's creditor to initiate a claim except under certain conditions, including providing clear and convincing evidence that a transfer of property was fraudulent or that it would violate a certain legal obligation.

The bill also would restrict the ability of a person to bring an action against an advisor or trustee except under certain conditions, including providing clear and convincing evidence that the person caused damages by violating the law knowingly and in bad faith.

The bill would provide for a trustee to exercise the trustee's discretion or authority to distribute trust income or principal to or for the settlor by appointing the property of the original trust in favor of a second trust for the benefit of the settlor, which would also be considered a self-settled asset protection trust as long as it satisfied the requirements articulated in the bill.

The bill would provide for a trust from out of state to be recognized as a self-settled asset protection trust if the requirements of the bill were met and the domicile was changed to Texas.

The bill would take effect September 1, 2023, and would only apply to a transfer of property to a self-settled asset trust that occurred on or after the effective date. Property that was transferred to a self-settled asset protection trust before the effective date would be considered transferred on the earliest date on or after the effective date. For a trust the domicile of which was changed to Texas on or after the effective date, the provisions of the bill would apply to transfers made to the trust before, on, or after the effective date.