

## **BILL ANALYSIS**

Senate Research Center  
84R1626 AJA-F

S.B. 387  
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State Affairs  
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As Filed

### **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.

As proposed, S.B. 387 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 42.0021(b), Property Code, as follows:

(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 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 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), 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 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 with respect to the contribution by each donor the greater amount specified in Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986, or Section 2503(b), Internal Revenue Code of 1986.

SECTION 3. Amends Section 112.038, Property Code, as follows:

Sec. 112.038. FORFEITURE CLAUSE. (a) Creates section 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 4. 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 5. Amends Sections 112.071(5), (6), and (7), Property Code, to redefine "full discretion," "limited discretion," and "presumptive remainder beneficiary."

SECTION 6. 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 7. 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 8. 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) Creates this subdivision from existing text and makes no further change to this subsection;

(3) Makes a nonsubstantive change;

(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 9. 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 10. Amends Section 114.003, Property Code, by amending Subsections (b) and (c) and adding Subsections (a-1), (d), (e), and (f), as follows:

(a-1) Defines "trust director."

(b) Provides that if the terms of a trust give a trust director the power to direct certain actions of a trustee, Subsections (c), (d), (e), and (f) apply, without exception, rather than requires the trustee, if the terms of a trust give a person the power to direct certain actions of the trustee, to act in accordance with the person's direction unless the direction is manifestly contrary to the terms of the trust or the trustee knows the direction would constitute a serious breach of fiduciary duty that the person holding the power to direct owes to the beneficiaries of the trust.

(c) Provides that a trust director is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the terms of the trust provide otherwise. Prohibits the terms of the trust from, however, limiting the trust director's duty to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Provides that the trust director is liable for any loss resulting directly or indirectly from a breach of the trust director's fiduciary duty. Makes nonsubstantive changes.

Deletes existing text providing that a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary required to act in good faith. Deletes existing text providing that the holder of a power to direct is liable for any loss that results from a breach of the person's fiduciary duty.

(d) Provides that if the terms of a trust provide that a trustee is to follow the direction of a trust director or act only with the trust director's consent or direction, the trustee is not liable for any loss resulting directly or indirectly from any act taken or not taken by the trustee pursuant to the trust director's direction or as a result of the trust director's failure to direct, consent, or act, after having been requested to do so by the trustee, if:

(1) the direction is not contrary to an express prohibition or mandate in the trust instrument, which shall be evaluated exclusively on the terms of the trust and without reference to any judicial or legal standard;

(2) the trustee does not act in bad faith; and

(3) the trustee does not have actual knowledge that the direction would constitute fraud as applied to the fiduciary duties of the trust director.

(e) Provides that, unless the terms of the trust expressly provide otherwise, a trustee does not have any duty to:

(1) monitor the trust director's conduct;

(2) provide the trust director with advice or consult with the trust director;

(3) inform or warn the trust director or any beneficiary or third party that the trustee disagrees with any of the trust director's actions or directions;

(4) take any action to prevent the trust director from giving any direction or taking any action; or

(5) compel the trust director to redress the director's action or direction.

(f) Provides that absent clear evidence to the contrary, the actions of the directed trustee pertaining to matters within the scope of authority of the trust director, including confirming that the trust director's directions have been carried out and recording and reporting actions taken pursuant to the trust director's direction, are presumed to be administrative actions taken by the trustee and are not considered an undertaking by the trustee to monitor the trust director's actions or participate in actions within the scope of the trust director's authority.

SECTION 11. Amends Sections 115.002(b-1) and (b-2), Property Code, to make nonsubstantive changes.

SECTION 12. 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 13. (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 14. Effective date: September 1, 2015.