

## Real Estate, Probate & Trust Law Section of the State Bar of Texas

### 2021 Proposed Legislation Relating to Trusts

1. Section 1 of the proposed bill amends Property Code section 41.002(a)(1) to conform its homestead protection qualifying language with the homestead exemption qualifying language under Tax Code Section 11.13(j). This addresses a recent federal court case where it was held that grantors of a trust did not meet the creditor-protection homestead test under the Property Code because their trust used the phrase “at no cost” (per the Property Code) to establish a homestead qualifying trust instead of “rent free and without charge” (per the Tax Code). This proposal adopts “rent free and without charge” into the Property Code.

2. Section 2 of the proposed bill amends Trust Code section 112.035 to clarify that Texas follows the Restatement Second of Property (Donative Transfers) (1986) approach on creditor exposure for assets subject to a testamentary general power of appointment after the death of the donee of the power. Texas has generally followed this approach, which is consistent with the common law rule. However, The Restatement Third of Trusts (2003) and the Uniform Power of Appointment Act (2013) diverged from the common law and Restatement Second rule, and provide that at the death of the donee of a general testamentary power of appointment created by a person other than the donee, the appointive property subject to the general power is subject to the creditors’ claims against the estate of the power holder, and whether the power holder has or has not exercised the power has no effect on this issue.

The current Texas statute does not expressly address the rule in Texas as it applies to the creditors of the donee of a testamentary general power of appointment after death. There is concern that a court might be confused by the statute’s silence and mistakenly adopt the approach found in the Restatement Third and UPAA. This proposal clarifies that the historical approach in the Restatement Second and common law should continue to be followed.

3. Section 3 of the proposed bill amends Trust Code section 112.0715 to clarify that when decanting a trust, the second trust can take on the same name and, if permitted by applicable law, the tax identification number of the first trust.

4. Section 4 of the proposed bill amends Section 115.014(a) of the Trust Code to give guidance to a court in determining when to appoint an attorney *ad litem* to a trust proceeding. The proposal requires the court to find that the interests of a minor, an incapacitated, unborn, or unascertained person, or person whose identity or address is unknown is inadequately represented before appointing an attorney *ad litem* for such person. This proposed change conforms with the standard for appointing a guardian *ad litem* in a trust proceeding.

REPTL has received no statements of position on these proposed changes and has submitted these proposals to all sections and committees of the State Bar of Texas, as required by its Legislative Policy. If any comments are received, they will be forwarded to the State Bar.

Real Estate, Probate, and Trust Law Section State  
Bar of Texas

By: \_\_\_\_\_

Lauren D. Hunt, Co-Chair, Estate & Trust  
Legislative Affairs Committee

Date: \_\_\_\_\_