

**2003 LEGISLATIVE DEVELOPMENTS**  
**Probate, Guardianship & Trust**

**SAN ANTONIO ESTATE PLANNING COUNCIL**

By

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- “HE’S DEAD?” Real Estate in a Decedent’s Estate,” Advanced Real Estate Drafting Course 2002
- “TEXAS LEGISLATIVE REPORT 2001, Starting Over Again,” State Bar of Texas, 24th Annual Advanced Estate Planning and Probate Course 2001.
- “Probate and Trusts, Statutory Update,” 53 SMU Law Review 1273 (Summer 2000)
- "A TOPICAL GUIDE: Advanced Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Estate Planning and Probate Course 1992, 1997,1998, 1999, 2000 & 2001
- "A TOPICAL GUIDE: Advanced Drafting: Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Drafting: Estate Planning and Probate Course 1999 & 2000.
- “COMMUNITY PROPERTY FOR ACCOUNTANTS,” Travis County CPAs Annual Conference. 1999.
- “TEXAS LEGISLATIVE REPORT 1999, Laws for The Millennium,” State Bar of Texas, 23rd Annual Advanced Estate Planning and Probate Course 1999.
- “TEXAS LEGISLATIVE REPORT 1997, Next to Last Stop Before The Millennium,” State Bar of Texas, 21st Annual Advanced Estate Planning and Probate Course 1997.
- "The 706 for Country Lawyers and Other Simple People," Travis County Probate and Trust Law Section, 1994.
- "DEATH AND TAXES: An Introduction To Taxes Concerning A Probate Attorney," prepared for the University of Texas Legal Assistant Program--1993.
- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, magazine of the Real Property, Probate and Trust Section, ABA
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**Introduction.** The full text of all bills and all of the legislative history can be found at:

<http://www.capitol.state.tx.us/>

This site should be used to determine the final status of the bills. Members of the Real Estate, Probate and Trust Law Section, you can also consult its website:

[www.reptl.org](http://www.reptl.org)

The bills can be printed directly or downloaded.

**The Section.** Much of the legislation passed this session was originally drafted by the Real Estate, Probate and Trust Law Section of the State Bar of Texas. This continues a tradition by the Section of more than 30 years of drafting legislation that improves our jurisprudence.

**The Section's Legislative Committee.** The Section has a Legislative Committee that oversees the proposals as they move through the legislative process. The Chair is Jerry Frank Jones. The members are: Glenn Karisch, Bill Pargaman, Al Golden, Steve Tackett, Steve Saunders, Sam Hildebrand, Becky Bernhardt, Harry Wolff and Lisa Jamieson.

Barbara Klitch has worked with the Section for over 10 years. She does the daily search for bills of interest. She summarizes the bills and co-ordinates the efforts of the committee.

**Texas Academy of Probate Lawyers.** The Texas Academy of Probate Lawyers is a private organization. Because of restrictions on the activities of the Section, the Academy was formed about 15 years ago. The Academy serves a vital function in the legislative process.

**Key Legislators.** There are three key legislators: Without Senator Chris Harris of

Arlington and Rep. Will Hartnett of Dallas many of the Section's bill would not have passed this session. In addition, Rep. Ken Paxton of Collin County is a freshman who practices in our area and was very involved in several Section bills.

1. **PROBATE**

a. **Jurisdiction, Venue & Transfer : Section 5 & 5A.**

i. **HB 1473** amends Sections 5 and 5A.

(1) This bill includes a number of changes that are just language clean up and are not intended to make any substantive changes.

(2) The bill also clarifies some of the rules when a contested matter in a county court is transferred or assigned. It makes clear that a district court or statutory probate court only receives the contested issues; that the administration of the estate stays in the county court; and that they are to return the matter to the county court upon resolution.

(3) The bill struck the "... unless otherwise provided by law..." language from Section 5(d). This deletion probably means that the constitutional county courts cannot hear any probate proceeding in counties with statutory probate courts.

(4) The bill does change the jurisdictional rules for statutory probate courts under Sections 5(e) and 5A(b).

(5) This bill states that statutory probate courts have exclusive jurisdiction in all matters incident to,

appertaining to or when a personal representative is a party

(6) The only exceptions: There is concurrent jurisdiction with the district court only as follows:

(a) "in all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a personal representative,"

(b) "in all actions involving inter vivos trusts,"

(c) "in all actions involving charitable trusts," and

(d) "in all actions involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate." This provision is in response to the recent Texas Supreme Court case of In re SWEPI, L.P., 85 S.W.3d 800 (Tex.2002).

(7) Then it repeals the longstanding rule in Section 5(e) that says jurisdiction is concurrent in actions involving testamentary trusts. However, Section 5A(b) continues to say that the "...interpretation and administration of testamentary trusts..." are "...appertaining to estates' and 'incident to estate'..." Whether or not this means statutory probate courts have exclusive jurisdiction over testamentary trusts is not clear. Do district courts still have jurisdiction under Texas Trust Code Section 115.001? And what happens if the estate has been closed?

For example, who has jurisdiction (and venue) where the will was probated in Travis County statutory probate court but the trustee now lives in Bastrop County (county court at law) or Harris County (statutory probate court).

Or, who has jurisdiction where the will was probated in the Travis County statutory probate court and years later (with the estate having been closed) can the trustee who is living in Travis County file in the Travis County district court?

(8) These amendments are intended to resolve the issue touched on in In re Azle Manor, 83 S.W.3d 410 (Tex. Civ.--Ft. Worth 2002. The current language of 5A(b) says a

“cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court.”

(9) This language worked under the traditional definition of “appertaining to” and “incident to.”

(10) However, in 1997 those phrased were amended in Section 5A(b) to include any action “filed against or on behalf of a personal representative.” As a result, while not the intention of the 1997 amendments, the clear reading is that all actions involving a personal representative must be brought in the statutory probate court.

ii. **HB 4.** In addition, Sections 3.05, 3.06 and 3.07 were inserted into HB4 (the “Tort Reform” bill) in the Senate. Those sections amend the Probate Code. In 1997 Civil Practice and Remedies Code Section 15.007 was passed. It says that venue in the CP&R Code prevails rather than the provisions of the Probate Code in actions involving personal injury, death or property damages. The exact effect of that language on venue and on transfers under

Probate Code Sections 5B and 608 have spawned litigation: Reliant Energy, Inc. v. Gonzalez, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (2003 WL 1961839) (Tex.App.-Hous. [14 Dist.],2003); In re Houston Northwest Partners, Ltd., 98 S.W.3d 777 (Tex.App.-Austin,2003); and, In re J7S Inc.,979 S.W.2d 374 (Tex.App.-Houston [14 Dist.],1998). It is not clear how well these amendments solve the problem.

(1) HB4 amends Probate Code Section 5A, by adding subsection (f)

(f) Notwithstanding any other provision of this chapter, the proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code.

This bills reference to “property damages” is the same phrase that is used in Section 15.007 CPRC and it is assumed it means to refer to the property damage (typically the wrecked car) that flows out of the same occurrence as the personal injuries. Unfortunately, it is not so restricted. It should take some time to learn what “property damage” means and when an administrator has to go to another county to pursue some “damage” claim.

(2) HB4 also amends Section 5B (the transfer statute) by adding subsection (b)

(b) Notwithstanding any other provision of this chapter, the proper venue for an action by or against a personal representative for personal

injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code.

The purpose of this change is not so clear. It is a repeat of the amendment to Section 5A regarding venue and does not refer to transfers. And it again has the unfortunate language about “property damage.”

(3) HB 4 also amends Section 607 but enough does not amend 608. see infra.

**b. Documents On Transfer: Section 8(c)(2).** HB 1473. Some clerks have complained that the language of Section 8(c)(2) required them to provide the original file and to prepare a certified copy of the minutes. This was believed to be an unnecessary duplication which is fixed by this amendment. There was not a similar fix for guardianship proceedings.

**c. Tortious Interference With Inheritance Rights: Section 10C.** HB1473. Rep. Will Hartnett added Section 10C to this bill.

i. It provides that the filing or contesting in probate court “of any pleading relating to a decedent’s estate” does not constitute tortious interference with inheritance of the estate.

ii. It further says that this Section does not abrogate any rights a person might have under Rule 13 of the Texas Rules of Civil Procedure or Chapter 10 of the Texas Civil Practice and Remedies Code.

iii. It makes no reference to the impact on common law remedies such

as malicious prosecution, abuse of process or the like.

**d. Ademption by Satisfaction: Section 37C.** HB 1473 adds Section 37C. The common law recognizes ademption by satisfaction (that a gift during life overrides a gift in a will). However, there is no statutory guidance in Texas for this. This new statute makes clear that a lifetime gift is in satisfaction of or to be deducted from a bequest in a will only if:

- i. The will so provides;
- or,
- ii. The testator makes such a declaration in a contemporaneous writing; or,
  - iii. The devisee so acknowledges in writing.

**e. Exercise of Powers of Appointment: Section 58c.** HB 1473 adds Section 58c. There is very little guidance in Texas law regarding the exercise of a power of appointment. This statutory addition reflects existing law that a power of appointment is not exercised unless

- i. The testator makes specific reference; or,
- ii. There is some indication in writing that the testator intended to include the property subject to the power.

The bill says that a residuary clause does not exercise a power unless it specifically states that a power is being exercised.

**f. Contractual Wills: Section 59A.** HB 1473 amends the contractual will statute, Section 59A. There has been substantial controversy over the

effectiveness of documents other than a will that have provisions taking effect at death. The most common examples are agreements incident to divorce and buy sell agreements. To make clear that other documents can control disposition at death (even though not specifically referred to in the will), the statute now reads that a contract can be established not only by the provisions of a will but also by the “provisions of a written instrument that is binding and enforceable.”

**g. Pretermitted Children: Section 67(a).** HB 1473 amends Section 67(a). Section 67 makes provision, in some circumstances, for children who are born after a will is written (pretermitted children). One of those circumstances is when the testator provided for his living children. However, substantial confusion has arisen when the testator made only contingent provision for those living children. This amendment makes clear that even such a contingent provision includes pretermitted children.

**h. Non Substantive Change: Section 245.** HB 1473 makes a non substantive change to Section 245. This rewrite brings the language into harmony with the Guardianship Code provisions of Section 668.

**i. Priority of Section 243 Attorneys Fees: Section 322, Class 2.** Under Section 243 a litigant can be awarded his attorneys fees for opposing a will. However, currently those fees would probably be consigned to Class 8 status as just another unsecured claim. At the same time a litigant who successfully proposes a will gets his attorneys fees classified as Class 2. In an insolvent estate this means

that some attorneys fees could be treated differently from others. This makes all attorneys fees, even those awarded under Section 243 as Class 2 claims.

**j. Interest Rate: Section 378B(f).** HB 1473 amends Section 378B(f). This section identifies the interest rate to be used in pecuniary bequests. However, it refers to the old civil statutes. This changes the reference to the current Finance Code section.

## 2. MULTI PARTY ACCOUNTS: Convenience Accounts.

**a. Multi Party Can Be Convenience: Sections 438A & B.** HB 2238 amends 438A and 438B. This bill would allow a convenience signor on any multi party account.

**b. Pledging: Section 442.** HB 1590 provides

i. that a convenience signor may not pledge an account.

ii. that if a multi party account is pledged that the bank shall give notice to all parties to the account who did not make the pledge within 30 days. The notice does not have to go to a POD payee, a beneficiary or a convenience signor.

iii. Credit unions are not included in this statute.

## 3. GUARDIANSHIP

**a. Jurisdiction: Section 606.** HB 1470 amends Section 606, similar to the

changes made to Sections 5 and 5A by HB 1473, supra.

i. This bill includes a number of changes that are just language clean up and are not intended to make any substantive changes.

ii. The bill also clarifies some of the rules when a contested matter in a county court is transferred or assigned. It makes clear that a district court or statutory probate court only receives the contested issues; that the administration of the estate stays in the county court; and that they are to return the matter to the county court upon resolution.

iii. This bill strikes the language "... unless otherwise provided by law..." from Section 606(d). Like the deletion of the same language from Section 5(d) (supra), this probably means that the constitutional county courts cannot hear any guardianship proceeding in counties with statutory probate courts.

iv. The bill does change the jurisdictional rules for statutory probate courts under Section 606.

v. This bill states that statutory probate courts have exclusive jurisdiction in all matters incident to, appertaining to or when a personal representative is a party

vi. The only exceptions: There is concurrent jurisdiction with the district court only as follows:

(1) "in all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a personal representative," and

(2) "in all actions involving a personal representative of an estate in which each other party aligned with the personal representative is not an

interested person in that estate." See, discussion of Swepi, supra.

vii. As written this means any divorce proceeding in which either spouse is subject to a guardianship must be brought in the statutory probate court and may not be brought in the district court.

viii. These amendments are intended to resolve the issue involving 606 and 608 which are discussed under **Probate Jurisdiction, supra**.

b. **Venue. Section 607.** As mentioned above, HB 4 amends Section 607 by adding subsection (e)

(e) Notwithstanding any other provision of this chapter, the proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code.

See discussion under Probate A ii, supra. In addition to the problems discussed there, notice that the bill did not amend Section 608 regarding transfers of matters in which a guardian is involved.

c. **Transfer: Section 608.** (HB1470). Amends Section 608. This bill allows a statutory probate court to transfer a proceeding in which a guardian of the person is involved. Currently it only applies to guardians of the estate.

d. **Notice: Section 633(d) & 634.**

i. HB 1470 allows the attorney to send the certified mail notice. It also allows the notice to be sent by "any

other form of mail that provides proof of delivery.”

ii. The applicant or his attorney must certify that all of the required notices have been given and file a copy of the notice and proofs of service.

iii. Section 634 is also amended to allow notice to the attorney not only by certified mail but also “other form of mail requiring proof of service.”

e. **Immunity for Guardian Ad Litem: Section 645A.** HB 1985 adds Section 645A. This bill would immunize guardian ad litem from liability unless the action was based on gross negligence, bad faith or fraud. This only applies to appointments under Sections 645, 683 and 694A “involving the creation, modification or termination of a guardianship.” This does not apply when a guardian ad litem is appointed under other circumstances, such as Section 681 when there is a conflict between the guardian and the ward.

f. **Attorneys Fees: Section 665B(a).** HB 1470 amends Section 665B(a) to allow attorneys fees to be paid to the applicant if they apply for the appointment of a suitable person. It is no longer necessary to ask that the applicant be appointed to recover attorneys fees.

g. **Guardianship Application: Section 682.** HB 1470 also amends the application requirements of Section 682. It makes clear that you have to state the names and addresses only to the extent they are known.

h. **Physician’s certificate for Mental Retardation: Section 687(c).** HB 1470 amends section 687(c) and now

permits a physician’s certificate that is up to 24 months old, rather than the current 6 months, for guardianships based on mental retardation.

i. **Inventory Due in 30 Days: Section 729.** HB 1470 amends Section 729(a) and (e). Inventories must now be filed within 30 days of qualification.

j. **Transport to Mental Health Facilities: Section 743(b).** HB 2679 amends Section 743(b) to include in the annual report any filings for emergency detention. See, Section 767, *infra*.

k. **Guardianship Termination: Limitation raised to \$100,000: Section 745.** HB 1470 amends Section 745. A guardianship less than \$100,000 can now be terminated and the proceeds placed in the registry of the court. This brings Section 745 in line with Sections 887 (debtor may pay liquidated obligation into registry of the court without a guardianship), 889 (allows sale of a minor’s interest in property without a guardianship), 890 (allows sales when there is only a guardianship of person) which were raised to \$100,000 last session.

l. **Termination of Guardian’s of the Person: Section 747(b).** HB 1709 amends Section 747(b) and requires that the guardian of the person file an affidavit within 60 days of the time the guardianship is to be settled. The affidavit should state the reason the guardianship is terminating.

m. **Transport to Mental Health Facilities: Section 767.** HB 2679 amends Section 767 to allow a guardian to deliver a ward to a inpatient mental health facility for a preliminary examination under

Subchapters A and C, Chapter 573, Health and Safety Code. Conforming amendments have been made to Sections 573.003, 573.004, 573.021(c), 573.023(a), 473.024(c) and 473.025 of the Health and Safety Code.

For several sessions various groups have tried to provide a way to ease the process for wards to receive mental health treatment. This bill finally finds a compromise that all groups agreed on.

**n. Psychoactive Medication.**

**Section 770A** HB 2679 also allows a guardian of the person to consent to the administration of psychoactive medication if the ward is under a protective custody order under Chapter 574 of the Health and Safety Code.

**o. Creation of Qualifying**

**Income Trust: Section 774(a)** HB 1470 amends Section 774(a). A court may authorize a guardian to create a qualifying income trust pursuant to 42 U.S.C. Section 1396p(d)(4)(B). Such a trust may be created only if it will allow the ward to become eligible for medical assistance under Chapter 32 of the Human Resources Code.

**p. Allowance Application**

**Within 30 Days: Section 776(a).** HB 1470 amends Section 776(a) to require the filing of an application for an allowance for the ward. It has to be filed within 30 days.

**q. Court's Authority:**

**Unauthorized Expenditures : Section 776(b).** HB 1470 also amends 776(b) to give the court's broader discretion to ratify expenditures made by the guardian before any allowance is set or in excess of the

allowance.. The current \$5,000 cap is eliminated. The court must determine:

- i. That it was not convenient or possible to first secure court permission;
- ii. That the expenditures were reasonable and proper (the burden of proof on this one is "clear and convincing"); and
- iii. That the court would have approved the expenditure if applied for in advance.

**r. Livestock Commissions:**

**Section 814.** HB 1470 amends Section 814 to raise the amount for livestock sales from 3% to 5%. This makes the guardianship provision consistent with the probate provision that was changed last session, see Section 335.

**s. Duty to Invest: Section 855.**

HB 1470 amends Section 855 .

i. This amendment adopts the old Texas prudent person rule. Because that rule, Property Code Section 113.056, was repealed this session, its terms are copied into the Guardianship Code. Section 855 goes on to say that the guardian shall also consider:

- (1) anticipated costs of caring for the ward;
- (2) the wards, age, education, current income, ability to earn additional income; net worth and liabilities;
- (3) the nature of the ward's estate; and
- (4) any other resources reasonably available to the ward.

ii. It also provides that in reviewing the guardian's investments that the overall investments shall be considered, rather than only a single investment.

iii. Then it repeats the old investment list but says it is a safe harbor for the guardian.

iv. Finally, this section says a court may modify or eliminate the investment duty on a clear and convincing showing that the change is in the ward's best interest.

t. **Retention of Assets for 1 year: Section 855A.** HB 1470 adds Sections 855A and 855B. 855A allows the guardian to retain assets for 1 year, but see below.

u. **Investment Plan. 180 Days: Section 855B.** HB 1470 also creates 855B which requires the guardian to file an investment plan within 180 days of being appointed.

i. That plan and the court's order shall:

- (1) Authorize the guardian to develop and implement the plan;
- (2) Declare which assets, if any, must be retained, even if they are unproductive of income;
- (3) Set out any loans, real estate investments, or purchases of life insurance or annuities;
- (4) Set out any modification or elimination of the guardian's investment duties;
- (5) State when the investments and investment plan shall be reviewed;

ii. 855B also states that the fact that an asset is the subject of a specific bequest or that it is held as a joint account with right of survivorship does not prevent the guardian from:

(1) Taking possession and control of the asset; or,

(2) Prevent the court from modifying or eliminating the duty with respect to any such asset.

iii. Finally, 855B says that this procedure does not apply if a different procedure is prescribed "by a guardian" or if another investment or sale is specifically authorized by other law.

v. **Loans: Section 858.** HB 1470 amends Section 858 regarding loans.

i. First it changes the current standard of obtaining "the highest rate of interest" to a "reasonable rate of interest." Then it gives a safe harbor if the interest rate is equal to 120% of the applicable short term, mid term, or long term rates set under Section 7520 of the Internal Revenue Code.

ii. The collateral requirement of twice the value of the loan continues from the old statute.

iii. Then it says the guardian who makes a loan with court permission is not liable for defaulting loans unless the guardian was negligent or committed fraud in the making, managing or collecting of the loan.

iv. It says a guardian may not complete a loan until he receives a written opinion from an attorney that the documents are "regular" and that the title is "clear."

v. The guardian may obtain title insurance in lieu of the attorney's opinion or an abstract of title.

vi. Then it requires the borrower to pay any attorneys fees required by this section.

vii. If the guardian does not have a court order in advance, the guardian shall submit an affidavit of the loan within 30 days of making it.

w. **Standards for Investment in Real Estate: Section 860(a).** HB 1470 amends 860(a). A guardian may invest in real estate if:

- i. the guardian believes the investment is in the ward's best interest;
- ii. there are sufficient funds on hand to maintain the ward and to pay the maintenance, insurance and taxes on the real estate; and
- iii. the guardian obtains an order from the court authorizing the investment.

x. **Liability for Failure to Invest: Section 863.** HB 1470 amends Section 863. It says th damages for a guardian, and his surety, if the guardian fails to invest or lend as set out is the greater of:

- i. the highest legal rate of interest on the principal during the period the guardian failed to invest; or,
- ii. the overall return that would have been made on the principal if the principal were invested in the manner provided by this subpart.

y. **867 Trusts. Section 868** HB 3503, Section 868, states that no exculpatory clause is enforceable unless

- i. "the provision is limited to specific facts and circumstance unique to the property of that trust and is not applicable generally to the trust; and
- ii. "the court creating or modifying the trust makes a specific finding by clear and convincing evidence that the inclusion of the provision is in the best interest of the beneficiary of the trust."

This provision was enacted in response to Texas Commerce Bank v. Grizzle, *infra*. which held that a district

court could exculpate a corporate trustee of a trust created by a court under Section 142 of the Property Code.

z. **867 Trusts. No Guardian Required: Section 868A.** HB 1470 amends Section 868A. After September 1, 2003 there will be no more requirement for a guardian when an 867 trust is established.

aa. **Community Fund Set Aside: No Partition: Section 883.** HB 1470 amends Section 883. This section makes clear that if community property is divided or set aside pursuant to 883 that it does not cause a partition. This means the property is still community property and is treated as such for purposes of inheritance and for federal income and estate tax purposes. In particular that both halves of all community still gets the step up in basis.

bb. **Temporary Guardianships**

i. **Ad Litem Before Guardianships: Section 875.** HB 2189 provides that no temporary guardianship shall be issued until an ad litem is appointed.

ii. **Hearing Delay: 30 Days: Section 875.** HB 2189 also states that the hearing on a temporary guardianship can only be delayed for 30 days.

iii. **Presumption of Incapacity: Section 875.** HB 2189. Currently Section 875(b) provides that the establishment of a temporary guardianship raises no presumption of incapacity. The committee amendment in the Senate strikes that language,

(b) ~~A person for whom a temporary guardian has been appointed may not be presumed to be incapacitated~~ The person retains all rights and powers that are not specifically granted to the person's temporary guardian by court order.

#### 4. TRUST CODE

a. **Texas Uniform Principal and Income Act: Chapter 16.** HB 2241 adds Chapter 16 to the trust code. This sets out the Uniform Principal and Income Act as adopted for Texas. This bill also repeals most of the sections of the Probate Code and the Trust code that previously controlled allocations of receipts and disbursements.

The highlights:

i. Effective Date. This act is effective January 1, 2004 and at that time applies to all trusts whether created before or after that date.

ii. Repeal. This bill repeals the current income and principal provisions, Sections 113.101 through 113.111 of the current Trust Code.

iii. Default Rules. These are default rules and can be overridden by the direction of the settlor.

iv. Power To Adjust. Trustee has the power to adjust between principal and income, Section 116.005. If a trustee decides to invest in all capital growth stocks, he can then allocate some of those capital gains to income. Similar, if interest

rates are 18% and he invests strictly in interest bearing assets, he can allocate some of the income to principal. The act sets out the factors a trustee should consider. The act also states when a trustee may not make an adjustment. One of those circumstances is when the trustee is also a beneficiary under the trust.

#### v. Judicial Control.

Section 116.006 was one of the two issues most hotly contested. The final agreement provided that a trustee could seek a judicial declaration of whether or not the exercise, or non exercise, of the power to adjust was an abuse of discretion. Those provisions include:

(1) The trustee can seek a court ruling only if it reasonably believes that a beneficiary will object:

(2) The petition must set out the basis of that belief;

(3) The court may appoint ad litem pursuant to Section 115.014;

(4) The burden of proof is on the beneficiary who challenges the trustee's decision;

(5) The trustee must advance all necessary costs, including attorneys fees, of not only the trustee but also any contesting beneficiary and ad litem;

(6) At the conclusion the court may assess all such costs and attorneys fees against income or principal and may further charge those costs and attorneys fees against a beneficiary or beneficiaries' share of the trust or against the trustee in its individual capacity.

vi. Non Charitable Unitrusts

(1) Proposed Treasury Regulation. IRS issued Proposed Treasury Regulation 1.643(b)-1 on February 15, 2001. That regulation allows a reasonable allocation between principal and income pursuant to state law. The proposed regulation says that any allocation between 3% and 5% is a reasonable apportionment of the return.

(2) No Statutory Conversion. Some states have included statutory provisions allowing a trustee to convert to a unitrust. That solution was not included.

(3) Settlor Created Non Charitable Unitrusts. However, Section 116.007 provides that a settlor may create a non charitable unitrust provided that the income element is between 3% and 5%. This complies with the 643 Proposed Regulations.

vii. Decedents' Estates. Sections 116.051 and 116.052 govern distributions of principal and income upon the termination of a decedent's estate. Also see Section 116.152, "Distributions From Trust or Estate." This bill amends Probate Code Section 378B making clear that this new Chapter 116 controls.

viii. Administrative Expenses. This act changes the allocation of administrative expenses. Currently they are all charged to income. Section 116.201 changes that; they will be allocated half to principal and half to income.

ix. Deferred Compensation. The Uniform Act's

provisions on "Deferred Compensation, Annuities and Similar Payments," Section 116.172 was changed. It says that 4% of the deferred compensation fund shall be treated as income. For example if the IRA is \$1,000,000, and it is required to distribute \$60,000, 4% of the IRA (\$40,000) shall be treated as income and the balance (\$20,000) shall be allocated as principal. There is a glitch in this section as a result of "help" from Legislative Counsel.

x. Royalties. Section 116.174 on "Minerals, Water and Other Natural Resources" was changed from the "Uniform Act." The Uniform Act allocated 10% to income and 90% to principal.

(1) Equitable. The trustee is to allocate royalties "equitably (Section 116.174(a)(3))

(2) Grandfather. But there is a grandfather clause for any trusts which have mineral interests before January 1, 2004 and have been allocating them under any "lawful scheme." This would typically be the current statute which allocates 27 1/2% to principal and the balance to income.

(3) Safe harbor. Finally, it provides for a safe harbor allocation equal to the federal depletion allowance.

b. **Texas Uniform Prudent Investor Act: Chapter 17.** HB 2240 adds Chapter 17 to the trust code. Historically Texas and most of the States of the United States have used the prudent man standard. This bill brings the "prudent investor" standard to Texas.

i. Effective Date. This act is effective January 1, 2004 and at that

time applies to all trusts whether created before or after that date.

ii. Default Rule. This is a default rule and can be overridden by the direction of the settlor.

iii. Modern Portfolio Theory. This standard of investment has sometimes been referred to as the “modern portfolio theory.”

iv. Total Return. Most important, it says a trustee’s performance is reviewed as a whole and not by reference to each investment. This will allow a trustee to make some investments that they would not make under current law wherein each investment must stand alone. Section 116.004 says the investments must be evaluated,

“not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.”

v. Delegation of the Investment Function. The statute amends the current delegation statute.

(1) Section 117.011 now says if the delegation is done properly that the trustee will not be liable for the actions of the agent.

(2) The agent has duties of reasonable care and not those of a trustee.

(3) The statute specifically says that it is not a proper delegation

(a) To delegate to an affiliate;

(b) To agree to arbitration; or

(c) To agree to a shortened period of limitation.

c. **Charities: Power to Adjust: Section 113.0211.** HB 1471 gives charitable trustees the power to make adjustments between principal and income. This was modeled on the provisions of the Uniform Acts when their passage was in doubt.

d. **Grizzle and Exculpation: Sections 113.059. HB 3503.** The Texas Supreme Court recently held that a corporate trustee could be exculpated in a Section 142.005 trust and that only the legislature sets public policy restrictions on trusts, Texas Commerce Bank v. Grizzle, 96 S.W.3d 240, 252 (Tex.2002). In that case the district court established a Section 142 trust and provided the corporate trustee with exculpatory provisions. The mother of the beneficiary subsequently sued claiming that the trustee had breached his duty of loyalty.

i. The Supreme Court, in ruling against the beneficiary, held

(1) That the legislature sets public policy;

(2) That the district court could exculpate the corporate trustee;

(3) The only limitation on exculpation from self dealing was that specifically set out in Trust Code Sections 113.052 (loans) and 113.053 (sales).

ii. The problems created by this opinion were accentuated in the recent Waco Court of Appeals case of Clifton v. Hopkins and First National Bank of Temple,

107 S.W.3d 755 (Tex.App.-Waco, 2003).

iii. HB 3503 solves the major problems flowing from the opinion about the limits of exculpatory clauses.

iv. Section 113.059 (drawing on Section 222 of the Restatement of Trusts, Second) now says that a settlor may not relieve a trustee of liability for

- (1) A breach of trust committed
  - (a) In bad faith;
  - (b) Intentionally; or,
  - (c) With reckless indifference to the interest of the beneficiary; or
- (2) Any profit derived from a breach of trust.

v. It also states that no provision relieving a trustee of liability is effective if the result of abuse of a fiduciary or confidential relationship with the settlor.

vi. These provisions come from Section 222 of the Restatement of Trusts 2nd.

vii. This bill makes clear that a court cannot exculpate a trustee under a trust created under Section 867 of the Guardianship Code trust nor under a Section 142 created under the Property Code except under very specific findings. see discussion at Guardianship Code Section 867, supra, and Property Code Section 142.005, infra.

e. **Court's Discretion to Remove a Trustee.** HB 1471 amends Section 113.082(a) of the Trust Code.

i. First, this bill resolves a long standing problem regarding the court's discretion to remove trustees. In Akin v. Dahl, 661 S. W. 2d 911, 913 (Tex. 1983) the Texas Supreme Court held that a trustee had to be removed and that the trial court did not have discretion as to whether or not to remove even though this section said "may." This long standing problem resurfaced in the recent case of Lee v. Lee, 47 S. W. 3d 767, 785-6 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2001). This bill adds after "may" the words "in its discretion."

ii. This bill also states specifically that the failure to provide an accounting is grounds for removal.

iii. A provision was also added to provide that a charitable trustee could not be removed solely for exercising the power to adjust conferred on them under Section 113.0211, supra.

f. **Accountings Due 90 Days After Demand: Section 113.151(a).** HB 1471 also amends Section 113.151(a). This provides that any demanded accounting must be provided within 90 days. This gives trustees and beneficiaries a clear statement of time for accountings and eliminates the confusion from the current "reasonable time" standard. A trustee may go to court to obtain additional time.

g. **Attorneys Fees: Section 131.151(a).** Finally HB 1471 provides in Section 113.151(a) that if the trustee does not timely provide the accounting and the beneficiary is successful in compelling the accounting, the court may charge the beneficiaries attorneys fees against the trust or against the trustee individually. Or the

court may charge the fees against the beneficiary.

## 5. **PROPERTY CODE**

a. **Exemptions, 529 Plans, Section 42.0022.** SB 1588 provides that any plan under Section 529 of the Internal Revenue Code is exempt from claims of creditors. The two Texas plans “Texas Guaranteed Tuition Plan” (formerly known as the “Texas Tomorrow Plan”) and the “Tomorrow’s College Investment Plan” have been exempt from creditors. But those provisions were buried in the Education Code. They are now moved to our general exemption provisions and the protection is broadened to cover plans from other states.

b. **142 Trusts: Section 142.005** HB 3503 states that no exculpatory clause is enforceable unless

- i. “the provision is limited to specific facts and circumstance unique to the property of that trust and is not applicable generally to the trust; and
- ii. “the court creating or modifying the trust makes a specific finding by clear and convincing evidence that the inclusion of the provision is in the best interest of the beneficiary of the trust.”

c. **Powers of Appointment. Section 181.001 et seq.** HB 1472 codifies the common law rules on powers of appointment. Unless the instrument provides otherwise, the donee of a power of appointment may

- i. Make appointments of present or future interests;

- ii. Make appointments with conditions and limitations;
- iii. Make appointments with restraints on alienation upon the appointed interests;
- iv. Make appointments to a trustee;
- v. Make appointments that create additional powers of appointment;
- vi. If the donee could appoint outright, he may create additional powers of appointment; and
- vii. Make appointments that create any rights existing under common law.

6. **BUSINESS ORGANIZATIONS CODE.** HB1156 creates the new Business Organizations Code. This is a huge re-write of the various current statutes on all types of business organizations.

7. **PARTNERSHIPS.** HB 1637 amends Article 6132b-4.04 of the Partnership Act. Currently the statute says a partner owes a duty of loyalty and care to the partnership and the partners. This bill extends those duties to the “transferees of deceased partners.”

## 8. **FAMILY CODE**

a. **Economic Contributions. Section 3.403** Last Session the controversial Equitable Reimbursement statutes were revised and renamed. This session HB 885 reworks the formula. The rework solves a

possible double accounting problem if the current statute is read literally.

**b. Partition: Community Property: Section 4.102.** HB 885.

i. This bill (amending Section 4.102) would allow divorcing spouses to agree that all income during the year of divorce is the income of that spouse. This will allow divorced spouses to file separate income tax returns without having to share information.

ii. This bill also provides that if community property is partitioned into separate property the income is also treated as community property unless the agreement specifically provides otherwise.

**c. Enforcing Conversion Agreements: Section 4.205.** HB 885 amends Section 4.205. Last session the Texas Legislature adopted Section 4.201 et seq allowing the conversion of separate property to community property. This amendment makes clear that the successors to a deceased spouse (whether it be heirs or a personal representative) may make the same proof as that deceased spouse.

**d. Uniform Parentage Act: Section 160.602.** HB 729. Section 160.602 et seq. This amendment to the Family Code sets out rules regarding gestational agreements. This was a controversial bill last session.

**e. Adult Adoptions.** HB1497 amends Section 162.506 and allows the adoption of an adult by only one spouse but only upon petition of both spouses.

**9. CIVIL PRACTICE AND REMEDIES CODE.**

**a. Probate Court Jurisdiction.** HB 1666 amends Section 141.002(2) and adds statutory probate courts to those courts which may approve a transfer of structured settlement payments.

**10. FINANCE CODE**

**a. Trust Accounts with Limited Documentation. Section 125.309.** HB 1307. This bill has numerous sections regarding credit unions. It effects trust practice in the amendments to Section 125.309 allowing a certificate of trust rather than the trust instrument itself. The bill allows the credit union to rely on the certificate and even make distributions to the beneficiaries if there is no trustee and no successor mechanism provided. As originally drafted it allowed the credit union to rely on the certificate even if presented with a copy of the trust showing the certificate to be in error. It is believed that has been changed and will now prevent reliance on the certificate if the credit union is presented with a copy of the trust by a trustee, beneficiary or grantor.

This provision is modeled after a similar provision that controls banks, Section 34.306.

**11. GOVERNMENT CODE.**

**a. State Bar Sunset.** HB 599 amends Section 81.003 and continues the

State Bar. This act also allows the State Bar to pass referendums if one half of the persons voting vote in favor. Currently it requires one half of the licensed attorneys.

b. **Associate Judges.** HB 1539 amends Chapter 54 regarding associate judges. It changes the names of probate masters to associate judges. With this bill associated judges may hear jury trials.

## 12. **HEALTH AND SAFETY CODE**

a. **Presumption of Anatomical Gifts.** HB 2111 adds Sections 692.0035 and 692..0045. This bill creates a presumption that you intended to make anatomical gifts unless you specifically state otherwise.

13. **MENTAL HEALTH AND SAFETY CODE. Transporting Wards** HB 2679 adds Sections 573.003 and 573.004. This is the counterpart to the amendment to Section 743(b) of the Guardianship Code, supra. This allows guardians to transport their wards to a mental health facility for a preliminary examination.

14. **PENAL CODE. Interfering with Possession of A Ward.** HB 1470 adds Section 25.10. This provision makes it a state jail felony to interfere with a guardian's possession of a ward.

15. **ESTATE RECOVERY.** HB 2292 now allows recovery of medicaid costs out of a decedent's estate. In particular, it

allows the state to recover its medicaid expenditures from the decedent's home. Previously the medicaid recipients home had been exempt, even after death, from nursing home costs.

## 16. **TAX CODE.**

a. **Inheritance Tax.** (HB 313 & HJR 47) There were several bills attempting to "de-couple" the Texas inheritance tax from the disappearing federal state death tax credit, or to ban future increases in the state inheritance tax. Both died in committee.

b. **Franchise Tax** (HB 694, HB 3146 and SB 1030). There were also several bills attempting to impose a franchise tax on partnerships. Some were directed at partnerships or other entities still taxed as corporations for federal income tax purposes. Others were broader in scope but exempted partnerships in which all of the partners were natural persons. It was been suggested that this exemption should include trusts who have nothing but natural persons and charities as beneficiaries. All franchise tax amendments died in committee.

TEXAS UNIFORM PRUDENT INVESTOR ACT

AN ACT

relating to the management of certain trusts and the adoption of the Uniform Prudent Investor Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle B, Title 9, Property Code, is amended by adding Chapter 117 to read as follows:

CHAPTER 117. UNIFORM PRUDENT INVESTOR ACT

Sec. 117.001. SHORT TITLE. This chapter may be cited as the "Uniform Prudent Investor Act."

Sec. 117.002. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among the states enacting it.

Sec. 117.003. PRUDENT INVESTOR RULE. (a) Except as otherwise provided in Subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Sec. 117.004. STANDARD OF CARE; PORTFOLIO STRATEGY; RISK AND RETURN OBJECTIVES. (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (1) general economic conditions;
- (2) the possible effect of inflation or deflation;
- (3) the expected tax consequences of investment decisions or strategies;
- (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) the expected total return from income and the appreciation of capital;
- (6) other resources of the beneficiaries;
- (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) Except as otherwise provided by and subject to this subtitle, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Sec. 117.005. DIVERSIFICATION. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Sec. 117.006. DUTIES AT INCEPTION OF TRUSTEESHIP. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter.

Sec. 117.007. LOYALTY. A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

Sec. 117.008. IMPARTIALITY. If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

Sec. 117.009. INVESTMENT COSTS. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

Sec. 117.010. REVIEWING COMPLIANCE. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Sec. 117.011. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS. (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;  
(2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust;  
and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of Subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated, unless:

(1) the agent is an affiliate of the trustee; or  
(2) under the terms of the delegation:  
(A) the trustee or a beneficiary of the trust is required to arbitrate disputes with the agent; or  
(B) the period for bringing an action by the trustee or a beneficiary of the trust with respect to an agent's actions is shortened from that which is applicable to trustees under the law of this state.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

Sec. 117.012. LANGUAGE INVOKING STANDARD OF CHAPTER. The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this chapter: "investments permissible by law for investment of trust funds," "legal

investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

SECTION 2. Section 111.004(1), Property Code, is amended to read as follows:

(1) "Affiliate" includes:

(A) [means] a person who directly or indirectly, through one or more intermediaries, controls, is [controlling,] controlled by, or is under common control with another person; or

(B) any officer, director, partner, employee, or relative of a person, and any corporation or partnership of which a person is an officer, director, or partner[, including a person with whom a trustee has an express or implied agreement regarding the direct or indirect purchase of trust investments by each from the other, except a broker or stock exchange].

SECTION 3. Section 113.006, Property Code, is amended to read as follows:

Sec. 113.006. GENERAL AUTHORITY TO MANAGE AND INVEST TRUST PROPERTY. Subject to the requirements of Chapter 117, a [A] trustee may manage the trust property and invest and reinvest in property of any character on the conditions and for the lengths of time as the trustee considers proper, notwithstanding that the time may extend beyond the term of the trust.

SECTION 4. Sections 113.053(e) and (g), Property Code, are amended to read as follows:

(e) A trustee may:

(1) comply with the terms of a written executory contract signed by the settlor, including a contract for deed, earnest money contract, buy/sell agreement, or stock purchase or redemption agreement; and

(2) sell the stock, bonds, obligations, or other securities of a corporation to the issuing corporation or to its corporate affiliate if the sale is made under an agreement described in Subdivision (1) or complies with the duties imposed by Chapter 117 [Section 113.056].

(g) In addition to other investments authorized by law for the investment of funds held by a fiduciary or by the instrument governing the fiduciary relationship, and notwithstanding any

other provision of law and subject to the standard contained in Chapter 117 [Section 113.056], a bank or trust company acting as a fiduciary, agent, or otherwise, in the exercise of its investment discretion or at the direction of another person authorized to direct the investment of funds held by the bank or trust company as fiduciary, may invest and reinvest in the securities of an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.) if the portfolio of the investment company or investment trust consists substantially of investments that are not prohibited by the governing instrument. The fact that the bank or trust company or an affiliate of the bank or trust company provides services to the investment company or investment trust, such as those of an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise, and receives compensation for those services does not preclude the bank or trust company from investing or reinvesting in the securities if the compensation is disclosed by prospectus, account statement, or otherwise. An executor or administrator of an estate under a dependent administration or a guardian of an estate shall not so invest or reinvest unless specifically authorized by the court in which such estate or guardianship is pending.

SECTION 5. Section 113.055(b), Property Code, is amended to read as follows:

(b) A trustee may:

(1) retain stock already owned by the trust unless [if] the retention does not satisfy the requirements prescribed by Chapter 117 [satisfies Section 113.056 of this Act]; and

(2) exercise stock rights or purchase fractional shares under Section 113.053 of this Act.

SECTION 6. The heading of Section 113.056, Property Code, is amended to read as follows:

Sec. 113.056. AUTHORIZATION TO MAKE CERTAIN INVESTMENTS [STANDARD FOR TRUST MANAGEMENT AND INVESTMENT].

SECTION 7. Sections 113.056(a) and (d), Property Code, are amended to read as follows:

(a) Unless the terms of the trust instrument provide otherwise, and subject to the investment standards provided by this subtitle and any investment standards provided by the trust instrument, the trustee may invest all or part of the trust assets in [in acquiring, investing, reinvesting, exchanging, retaining, selling, supervising, and managing trust property, including] an investment vehicle authorized for the collective investment of

trust funds pursuant to Part 9, Title 12, of the Code of Federal Regulations[, a trustee shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income from as well as the probable increase in value and the safety of their capital. In determining whether a trustee has exercised prudence with respect to an investment decision, such determination shall be made taking into consideration the investment of all the assets of the trust, or the assets of the collective investment vehicle, as the case may be, over which the trustee had management and control, rather than a consideration as to the prudence of the single investment of the trust, or the single investment of the collective investment vehicle, as the case may be].

(d) Subject to any investment standards provided by this chapter, Chapter 117, or the trust instrument [Within the limitations of Subsection (a) of this section], whenever the instrument directs, requires, authorizes, or permits investment in obligations of the United States government, the trustee may invest in and hold such obligations either directly or in the form of interests in an open-end management type investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., or in an investment vehicle authorized for the collective investment of trust funds pursuant to Part 9, Title 12 of the Code of Federal Regulations, so long as the portfolio of such investment company, investment trust, or collective investment vehicle is limited to such obligations and to repurchase agreements fully collateralized by such obligations.

SECTION 8. Section 114.001(b), Property Code, is amended to read as follows:

(b) The trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property or for a failure to make a profit that does not result from a failure to perform the duties set forth in this subtitle [Section 113.056] or from any other breach of trust.

SECTION 9. Section 45.107, Education Code, is amended to read as follows:

Sec. 45.107. INVESTMENT OF GIFTS, DEVISES, AND BEQUESTS. A gift, devise, or bequest made to a school district to provide college scholarships for graduates of the district may be invested [or retained] by the board of trustees of the district as provided by Section 117.004 [113.056], Property Code, unless otherwise

specifically provided by the terms of the gift, devise, or bequest.

SECTION 10. Section 815.307, Government Code, is amended to read as follows:

Sec. 815.307. DUTY OF CARE. The assets of the retirement system shall be invested and reinvested without distinction as to their source in accordance with Section 67, Article XVI, Texas Constitution. Investment decisions are subject to the standard provided in the Texas Trust Code by Section 117.004(b) [Section 113.056(a)], Property Code.

SECTION 11. Section 825.301(a), Government Code, is amended to read as follows:

(a) The board of trustees shall invest and reinvest assets of the retirement system without distinction as to their source in accordance with Section 67, Article XVI, Texas Constitution. For purposes of the investment authority of the board of trustees under Section 67, Article XVI, Texas Constitution, "securities" means any investment instrument within the meaning of the term as defined by Section 4, The Securities Act (Article 581-4, Vernon's Texas Civil Statutes), 15 U.S.C. Section 77b(a)(1), or 15 U.S.C. Section 78c(a)(10). An interest in a limited partnership or investment contract is considered a security without regard to the number of investors or the control, access to information, or rights granted to or retained by the retirement system. Any instrument or contract intended to manage transaction or currency exchange risk in purchasing, selling, or holding securities is considered to be a security. Investment decisions are subject to the standard provided in the Texas Trust Code by Section 117.004(b) [Section 113.056(a)], Property Code.

SECTION 12. Section 840.303, Government Code, is amended to read as follows:

Sec. 840.303. DUTY OF CARE. The assets of the retirement system shall be invested and reinvested without distinction as to their source in accordance with Section 67, Article XVI, Texas Constitution. Investment decisions are subject to the standard provided in the Texas Trust Code by Section 117.004(b) [Section 113.056(a)], Property Code.

SECTION 13. Section 845.301(a), Government Code, is amended to read as follows:

(a) The assets of the retirement system shall be invested and reinvested without distinction as to their source in accordance with Section 67, Article XVI, Texas Constitution. For purposes of the investment authority of the board of trustees under Section 67, Article XVI, Texas Constitution, "securities" means any investment

instrument within the meaning of the term as defined by Section 4, The Securities Act (Article 581-4, Vernon's Texas Civil Statutes), 15 U.S.C. Section 77b(a)(1), or 15 U.S.C. Section 78c(a)(10). Investment decisions are subject to the standard provided in the Texas Trust Code by Sections 117.004(a)-(c) [Section 113.056(a)], Property Code.

SECTION 14. Section 333(b), Texas Probate Code, is amended to read as follows:

(b) In determining whether to order the sale of an asset under Subsection (a) of this section, the court shall consider:

(1) the representative's duty to take care of and manage the estate as a person of ordinary prudence, discretion, and intelligence would exercise in the management of the person's own affairs; and

(2) whether the asset constitutes an asset that a trustee is authorized to invest under Chapter 117 [Section 113.056] or Subchapter F, Chapter 113, Property Code.

SECTION 15. Section 812(b), Texas Probate Code, is amended to read as follows:

(b) In determining whether to order the sale of an asset under Subsection (a) of this section, the court shall consider:

(1) the guardian's duty to take care of and manage the estate as a person of ordinary prudence, discretion, and intelligence would exercise in the management of the person's own affairs; and

(2) whether the asset constitutes an asset that a trustee is authorized to invest under Chapter 117 [Section 113.056] or Subchapter F, Chapter 113, Property Code.

SECTION 16. Section 856(a), Texas Probate Code, is amended to read as follows:

(a) If a guardian of an estate deems it is in the best interests of the ward the guardian is appointed to represent to invest on behalf of the ward in the Texas tomorrow constitutional trust fund [Tomorrow Fund] established by Subchapter F, Chapter 54, Education Code, or to invest in or sell any property or security in which a trustee is authorized to invest by either Chapter 117 [Section 113.056] or Subchapter F, Chapter 113, of the Texas Trust Code (Subtitle B, Title 9, Property Code), and the investment or sale is not expressly permitted by other sections of this chapter, the guardian may file a written application in the court in which the guardianship is pending that asks for an order authorizing the guardian to make the desired investment or sale and states the reason why the guardian is of the opinion that the investment or

sale would be beneficial to the ward. A citation or notice is not necessary under this subsection unless ordered by the court.

SECTION 17. Sections 113.003, 113.056(b) and (c), and 113.060, Property Code, are repealed.

SECTION 18. (a) This Act takes effect January 1, 2004, and applies only to a trust existing on or created after that date.

(b) With respect to a trust existing on January 1, 2004, this Act applies only to an act or decision relating to the trust occurring after December 31, 2003.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 2240 was passed by the House on May 1, 2003, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2240 on May 30, 2003, by a non-record vote.

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Chief Clerk of the House

I certify that H.B. No. 2240 was passed by the Senate, with amendments, on May 28, 2003, by the following vote: Yeas 31, Nays 0.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor

TEXAS UNIFORM PRINCIPAL AND INCOME ACT

AN ACT

relating to adoption of the Uniform Principal and Income Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle B, Title 9, Property Code, is amended by adding Chapter 116 to read as follows:

CHAPTER 116. UNIFORM PRINCIPAL AND INCOME ACT

SUBCHAPTER A. DEFINITIONS, FIDUCIARY DUTIES, AND OTHER MISCELLANEOUS PROVISIONS

Sec. 116.001. SHORT TITLE. This chapter may be cited as the Uniform Principal and Income Act.

Sec. 116.002. DEFINITIONS. In this chapter:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Subchapter D.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust

require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

#### Sec. 116.003. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

#### Sec. 116.004. FIDUCIARY DUTIES; GENERAL PRINCIPLES. (a)

In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Subchapters B and C, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter

do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 116.005(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

Sec. 116.005. TRUSTEE'S POWER TO ADJUST. (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 116.004(a), that the trustee is unable to comply with Section 116.004(b). The power to adjust conferred by this subsection includes the power to allocate all or part of a capital gain to trust income.

(b) In deciding whether and to what extent to exercise the power conferred by Subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) the nature, purpose, and expected duration of the trust;

(2) the intent of the settlor;

(3) the identity and circumstances of the beneficiaries;

(4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If Subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by Subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in Subsection (c)(1)-(6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in Subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by Subsection (a).

Sec. 116.006. JUDICIAL CONTROL OF DISCRETIONARY POWER. (a) The court may not order a trustee to change a decision to exercise or not to exercise a discretionary power conferred by Section 116.005 of this chapter unless the court determines that the decision was an abuse of the trustee's discretion. A trustee's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which Subsection (a) applies include:

(1) a decision under Section 116.005(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal; and

(2) a decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors in deciding whether and to what extent to exercise the discretionary power conferred by Section 116.005(a).

(c) If the court determines that a trustee has abused the trustee's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) to the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the trustee to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position;

(2) to the extent that the abuse of discretion has

resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the trustee to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust; and

(3) to the extent that the court is unable, after applying Subdivisions (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the trustee to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) If the trustee of a trust reasonably believes that one or more beneficiaries of such trust will object to the manner in which the trustee intends to exercise or not exercise a discretionary power conferred by Section 116.005 of this chapter, the trustee may petition the court having jurisdiction over the trust, and the court shall determine whether the proposed exercise or nonexercise by the trustee of such discretionary power will result in an abuse of the trustee's discretion. The trustee shall state in such petition the basis for its belief that a beneficiary would object. The failure or refusal of a beneficiary to sign a waiver or release is not reasonable grounds for a trustee to believe the beneficiary will object. The court may appoint one or more guardians ad litem pursuant to Section 115.014 of this subtitle. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the trustee relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion. The trustee shall advance from the trust principal all costs incident to the judicial determination, including the reasonable attorney's fees and costs of the trustee, any beneficiary or beneficiaries who are parties to the action and who retain counsel, and any guardian ad litem. At the conclusion of the proceeding, the court may award costs and reasonable and necessary attorney's fees as provided in Section 114.064 of this subtitle, including, if the court considers it appropriate, awarding part or all of such costs against the trust principal or income, awarding part or all of such costs against one

or more beneficiaries or such beneficiary's or beneficiaries' share of the trust, or awarding part or all of such costs against the trustee in the trustee's individual capacity, if the court determines that the trustee's exercise or nonexercise of discretionary power would have resulted in an abuse of discretion or that the trustee did not have reasonable grounds for believing one or more beneficiaries would object to the proposed exercise or nonexercise of the discretionary power.

Sec. 116.007. PROVISIONS REGARDING NONCHARITABLE UNITRUSTS. (a) This section does not apply to a charitable remainder unitrust as defined by Section 664(d), Internal Revenue Code of 1986 (26 U.S.C. Section 664), as amended.

(b) In this section:

(1) "Unitrust" means a trust the terms of which require distribution of a unitrust amount.

(2) "Unitrust amount" means a distribution mandated by the terms of a trust in an amount equal to a fixed percentage of not less than three or more than five percent per year of the net fair market value of the trust's assets, valued at least annually. The unitrust amount may be determined by reference to the net fair market value of the trust's assets in one year or more than one year.

(c) Distribution of the unitrust amount is considered a distribution of all of the income of the unitrust and shall not be considered a fundamental departure from applicable state law. A distribution of the unitrust amount reasonably apportions the total return of a unitrust.

(d) Unless the terms of the trust specifically provide otherwise, a distribution of the unitrust amount shall be treated as first being made from the following sources in order of priority:

(1) from net accounting income determined as if the trust were not a unitrust;

(2) from ordinary accounting income not allocable to net accounting income;

(3) from net realized short-term capital gains;

(4) from net realized long-term capital gains; and

(5) from the principal of the trust estate.

[Sections 116.008-116.050 reserved for expansion]

SUBCHAPTER B. DECEDENT'S ESTATE OR

TERMINATING INCOME INTEREST

Sec. 116.051. DETERMINATION AND DISTRIBUTION OF NET INCOME.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Subchapters C, D, and E which apply to trustees and the rules in Subdivision (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Subchapters C, D, and E which apply to trustees and by:

(A) including in net income all income from property used to discharge liabilities;

(B) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under Subdivision (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will. Unless otherwise provided by the will or the terms of the trust, a

beneficiary who receives a pecuniary amount, regardless of whether in trust, shall be paid interest on the pecuniary amount at the legal rate of interest as provided by Section 302.002, Finance Code. Interest on the pecuniary amount is payable:

(A) under a will, beginning on the first anniversary of the date of the decedent's death; or

(B) under a trust, beginning on the first anniversary of the date on which an income interest ends.

(4) A fiduciary shall distribute the net income remaining after distributions required by Subdivision (3) in the manner described in Section 116.052 to all other beneficiaries even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in Subdivision (1) because of a payment described in Section 116.201 or 116.202 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

(6) A fiduciary, without reduction for taxes, shall pay to a charitable organization that is entitled to receive income under Subdivision (4) any amount allowed as a tax deduction to the estate or trust for income payable to the charitable organization.

Sec. 116.052. DISTRIBUTION TO RESIDUARY AND REMAINDER BENEFICIARIES. (a) Each beneficiary described in Section 116.051(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the

current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

[Sections 116.053-116.100 reserved for expansion]

## SUBCHAPTER C. APPORTIONMENT AT BEGINNING

### AND END OF INCOME INTEREST

Sec. 116.101. WHEN RIGHT TO INCOME BEGINS AND ENDS. (a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) on the date it is transferred to the trust in the

case of an asset that is transferred to a trust during the transferor's life;

(2) on the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) on the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under Subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

Sec. 116.102. APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN DECEDENT DIES OR INCOME INTEREST BEGINS. (a) A trustee shall allocate an income receipt or disbursement other than one to which Section 116.051(1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which Section 116.151 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes

distributions at regular intervals.

Sec. 116.103. APPORTIONMENT WHEN INCOME INTEREST ENDS. (a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.  
[Sections 116.104-116.150 reserved for expansion]

## SUBCHAPTER D. ALLOCATION OF RECEIPTS DURING

### ADMINISTRATION OF TRUST

#### PART 1. RECEIPTS FROM ENTITIES

Sec. 116.151. CHARACTER OF RECEIPTS. (a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which Section 116.152 applies, a business or activity to which Section 116.153 applies, or an asset-backed security to which Section 116.178 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

- (1) property other than money;

(2) money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) money received in total or partial liquidation of the entity; and

(4) money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) to the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) if the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under Subsection (d)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

Sec. 116.152. DISTRIBUTION FROM TRUST OR ESTATE. A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, Section 116.151 or 116.178 applies to a receipt from the trust.

Sec. 116.153. BUSINESS AND OTHER ACTIVITIES CONDUCTED BY TRUSTEE. (a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general

accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

- (1) retail, manufacturing, service, and other traditional business activities;
- (2) farming;
- (3) raising and selling livestock and other animals;
- (4) management of rental properties;
- (5) extraction of minerals and other natural resources;
- (6) timber operations; and
- (7) activities to which Section 116.177 applies.

[Sections 116.154-116.160 reserved for expansion]

## PART 2. RECEIPTS NOT NORMALLY APPORTIONED

Sec. 116.161. PRINCIPAL RECEIPTS. A trustee shall allocate to principal:

- (1) to the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
- (2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this subchapter;
- (3) amounts recovered from third parties to reimburse the trust because of disbursements described in Section 116.202(a)(7) or for other reasons to the extent not based on the

loss of income;

(4) proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) other receipts as provided in Part 3.

Sec. 116.162. RENTAL PROPERTY. To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

Sec. 116.163. OBLIGATION TO PAY MONEY. (a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which Section 116.172, 116.173, 116.174, 116.175, 116.177, or 116.178 applies.

Sec. 116.164. INSURANCE POLICIES AND SIMILAR CONTRACTS.

(a) Except as otherwise provided in Subsection (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its

trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to Section 116.153, loss of profits from a business.

(c) This section does not apply to a contract to which Section 116.172 applies.

[Sections 116.165-116.170 reserved for expansion]

### PART 3. RECEIPTS NORMALLY APPORTIONED

Sec. 116.171. **INSUBSTANTIAL ALLOCATIONS NOT REQUIRED.** If a trustee determines that an allocation between principal and income required by Section 116.172, 116.173, 116.174, 116.175, or 116.178 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in Section 116.005(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in Section 116.005(d) and may be released for the reasons and in the manner described in Section 116.005(e).

Sec. 116.172. **DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS.** (a) In this section:

(1) "Future payment asset" means the asset from which a payment is derived.

(2) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that the payer characterizes a payment as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income the part of the payment that does not exceed an amount equal to:

(1) four percent of the fair market value of the future payment asset as determined under Subsection (d); less

(2) the total amount that the trustee has allocated to income for a previous payment received from the future payment asset during the accounting period prescribed by Subsection (d).

(d) For purposes of Subsection (c)(1), the determination of a future payment asset is made on the later of:

(1) the date on which the future payment right first becomes subject to the trust; or

(2) the first day of the trust's accounting period during which the future payment asset is received.

(e) For each year a future payment asset is made, the amount determined under Subsection (c) must be prorated on a daily basis unless the determination of a future payment asset is made under Subsection (d)(2) and is for an accounting period of 365 days or more.

(f) A trustee shall allocate to principal the part of the payment described by Subsection (c) that is not allocated to income.

(g) If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of Subsection (c) and this subsection, a payment is not "required to be made" to the extent that it is made only because the trustee exercises a right of withdrawal.

(h) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

Sec. 116.173. LIQUIDATING ASSET. (a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to Section 116.172, resources subject to Section 116.174, timber subject to Section 116.175, an activity subject to Section 116.177, an asset subject to Section

116.178, or any asset for which the trustee establishes a reserve for depreciation under Section 116.203.

(b) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

(c) The trustee may allocate a receipt from any interest in a liquidating asset the trust owns on January 1, 2004, in the manner provided by this chapter or in any lawful manner used by the trustee before January 1, 2004, to make the same allocation.

Sec. 116.174. MINERALS, WATER, AND OTHER NATURAL RESOURCES.

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, the trustee shall allocate the receipt equitably.

(4) If an amount is received from a working interest or any other interest not provided for in Subdivision (1), (2), or (3), the trustee must allocate the receipt equitably.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, the trustee must allocate the receipt equitably.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) The trustee may allocate a receipt from any interest in minerals, water, or other natural resources the trust owns on January 1, 2004, in the manner provided by this chapter or in any lawful manner used by the trustee before January 1, 2004, to make the same allocation. The trustee shall allocate a receipt from any interest in minerals, water, or other natural resources acquired by the trust after January 1, 2004, in the manner provided by this chapter.

(e) An allocation of a receipt under this section is presumed to be equitable if the amount allocated to principal is equal to the amount allowed by the Internal Revenue Code of 1986 as a deduction for depletion of the interest.

Sec. 116.175. TIMBER. (a) To the extent that a trustee

accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) to income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) to principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) to or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in Subdivisions (1) and (2); or

(4) to principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to Subdivision (1), (2), or (3).

(b) In determining net receipts to be allocated pursuant to Subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2004, the trustee may allocate a net receipt from the sale of timber and related products in the manner provided by this chapter or in any lawful manner used by the trustee before January 1, 2004, to make the same allocation. If the trust acquires an interest in timberland after January 1, 2004, the trustee shall allocate net receipts from the sale of timber and related products in the manner provided by this chapter.

Sec. 116.176. PROPERTY NOT PRODUCTIVE OF INCOME. (a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under Section 116.005 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by Section 116.005(a). The trustee may

decide which action or combination of actions to take.

(b) In cases not governed by Subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

Sec. 116.177. DERIVATIVES AND OPTIONS. (a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under Section 116.153 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

Sec. 116.178. ASSET-BACKED SECURITIES. (a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which Section 116.151 or 116.172 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate 10 percent of the payment to income and the balance to principal. [Sections 116.179-116.200 reserved for expansion]

## SUBCHAPTER E. ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

Sec. 116.201. DISBURSEMENTS FROM INCOME. A trustee shall make the following disbursements from income to the extent that they are not disbursements to which Section 116.051(2)(B) or (C) applies:

- (1) one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;
- (2) one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;
- (3) all of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and
- (4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

Sec. 116.202. DISBURSEMENTS FROM PRINCIPAL. (a) A trustee shall make the following disbursements from principal:

- (1) the remaining one-half of the disbursements described in Sections 116.201(1) and (2);
- (2) all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;
- (3) payments on the principal of a trust debt;
- (4) expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;
- (5) premiums paid on a policy of insurance not

described in Section 116.201(4) of which the trust is the owner and beneficiary;

(6) estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

Sec. 116.203. TRANSFERS FROM INCOME TO PRINCIPAL FOR DEPRECIATION. (a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) during the administration of a decedent's estate;

or

(3) under this section if the trustee is accounting under Section 116.153 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

Sec. 116.204. TRANSFERS FROM INCOME TO REIMBURSE PRINCIPAL.

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal

disbursements.

(b) Principal disbursements to which Subsection (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) an amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) a capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) disbursements described in Section 116.202(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in Subsection (a).

Sec. 116.205. INCOME TAXES. (a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

(1) from income to the extent that receipts from the entity are allocated to income; and

(2) from principal to the extent that:

(A) receipts from the entity are allocated to principal; and

(B) the trust's share of the entity's taxable income exceeds the total receipts described in Subdivisions (1) and (2)(A).

(d) For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

Sec. 116.206. ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME

BECAUSE OF TAXES. (a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) elections and decisions, other than those described in Subsection (b), that the fiduciary makes from time to time regarding tax matters;

(2) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

SECTION 2. Sections 111.004(5) and (11), Property Code, are amended to read as follows:

(5) "Income" is defined in Section 116.002 [113.102].

(11) "Principal" is defined in Section 116.002 [113.102].

SECTION 3. Section 378B, Texas Probate Code, is amended by amending Subsections (a), (b), (d), and (g) and adding Subsection (i) to read as follows:

(a) Except as provided by Subsection (b) of this section and unless the will provides otherwise, all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, [interest and] penalties relating to estate taxes, and family allowances, shall be charged

against the principal of the estate. Fees and expenses of an attorney, accountant, or other professional advisor, commissions and expenses of a personal representative, court costs, and all other similar fees or expenses relating to the administration of the estate and interest relating to estate taxes shall be allocated between the income and principal of the estate as the executor determines in its discretion to be just and equitable.

(b) Unless the will provides otherwise, income from the assets of a decedent's estate that accrues after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined according to the rules applicable to a trustee under the Texas Trust Code (Subtitle B, Title 9, Property Code) and distributed as provided by Chapter 116, Property Code, and Subsections (c) and [,] (d)[, and (e)] of this section.

(d) The [Except as provided by Subsection (f) of this section, the] balance of the net income shall be distributed to all other devisees after reduction for the balance of property taxes, ordinary repairs, insurance premiums, interest accrued, [including interest accruing as provided by Subsection (f) of this section after the death of the testator,] other expenses of management and operation of all property from which the estate is entitled to income, and taxes imposed on income that accrues during the period of administration and that is payable or allocable to the devisees, in proportion to the devisees' respective interests in the undistributed assets of the estate.

(g) Income received by a trustee under this section shall be treated as income of the trust as provided by Section 116.101 [113.103], Property Code.

(i) Chapter 116, Property Code, prevails to the extent of any conflict between this section and Chapter 116, Property Code.

SECTION 4. Subchapter D, Chapter 113, Property Code, and Sections 378B(e) and (f), Texas Probate Code, are repealed.

SECTION 5. (a) This Act takes effect January 1, 2004.

(b) Except as otherwise expressly provided by the will, the terms of the trust, or this Act, this Act applies only to:

(1) a trust existing or created on or after January 1, 2004;

(2) the estate of a decedent who dies before January 1, 2004, if the probate or administration of the estate is pending as of January 1, 2004; and

(3) the estate of a decedent who dies on or after January 1, 2004.

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President of the Senate

Speaker of the House

I certify that H.B. No. 2241 was passed by the House on April 30, 2003, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 2241 on May 30, 2003, by a non-record vote.

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Chief Clerk of the House

I certify that H.B. No. 2241 was passed by the Senate, with amendments, on May 28, 2003, by the following vote: Yeas 31, Nays 0.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor