Asset Protection Trusts in Texas? Really?
By
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The last hundred years of our history has fostered an increasing number of risks to individual wealth. For instance, the United States judicial system has developed in a way that causes many individuals to feel exposed to legal judgments that are wholly disproportionate to any actual liability. This fear, along with a general distrust of governmental regulatory agencies and the potential liability arising from future legislation, has led many individuals to look for ways to protect themselves from these risks.

The “spendthrift trust” (which protects a trust’s assets from the claims of a non-settlor beneficiary’s creditors) was created at the end of the 19th century in response to the general social fear and unease arising out of the unstable economic and business environment during those times.1 Though creditors and many scholars disliked spendthrift trusts,2 individuals demanded them, courts approved of them,3 and by the first part of the 20th century, nearly every state had adopted the spendthrift trust concept by either statute or common law.4 State legislation allowing spendthrift trusts was passed in response to a concern that property conveyed in trust for beneficiaries would be used as collateral for the beneficiary’s debts or otherwise imprudently assigned by a financially irresponsible, or “spendthrift,” beneficiary.

Given the merit of a settlor’s desire to protect a beneficiary from himself, some states’ legislatures agreed to codify this concept, and other states’ courts approved it under common law. But they balanced this arguably pro-debtor result with the corresponding concept that an individual should not be able to use a trust to protect assets for his or her own benefit. Thus, in the United States, spendthrift trust statutes and case law historically prohibited a person from setting a spendthrift trust for his or her own benefit (called a “self-settled spendthrift trust”). Many non-U.S. jurisdictions, however, allow a settlor to be a beneficiary of a trust that contains anti-alienation provisions similar to a spendthrift trust, thereby protecting the settlor’s beneficial interest in the trust from the claims of his creditors—this is otherwise known as an “asset protection trust.” This feature of non-U.S. law, along with other asset-protective aspects of offshore jurisdictions, has led many U.S. persons to settle trusts in foreign jurisdictions.

1 The worldwide economic downturn of 1873–1896 is referred to as the “Long Depression.”
4 Dukeminier and Johanson at 632, citing J. Gray, Restraints on the Alienation of Property (2d ed., 1885) (“State after State has given in its adhesion to [the spendthrift trust] doctrine . . . and yet I cannot recant”).

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However, over the last couple of decades, the attitude in the United States toward asset protection trusts has been shifting, and now 15 states have passed legislation that, to one extent or another, allows for the creation of domestic asset protection trusts.  

Although many estate planners think that “asset protection” planning is distinct from “traditional” trust and estate planning, limited liability has always been a fundamental part of our legal system and a core estate-planning concept. The fundamental nature of asset protection in our legal system can be seen most clearly in each state’s statutory and common-law vehicles for sheltering assets from creditors’ claims while allowing the debtor to have the continued use and benefit of the sheltered assets. For example, corporations, limited liability companies, limited partnerships, retirement plans, life insurance, annuities, homestead, and of course, spendthrift trusts, are all time-honored estate-planning and wealth-protective vehicles. In short, estate planning by its very nature has always been an exercise in asset protection planning, as its goal is to preserve wealth for current and future generations.

Texas, like most states, protects assets held in a spendthrift trust from the claims of the beneficiaries’ creditors, and Texas is one of the most protective states in this regard, as the only exception to spendthrift protection in Texas is a claim for child support. However, also like most states, it was impossible to create an “asset protection” trust under Texas law—until recently.

In 2013, the Texas legislature revised section 112.035 of the Texas Trust Code (the spendthrift trust statute) to add significant exceptions to the prohibition against spendthrift protection for self-settled trusts. As discussed in greater detail below, the revised statute provides expansive opportunities for spouses to use inter vivos trusts to shield their assets from creditors, and it also opens the door to using powers of appointment as a mechanism for establishing an asset protection trust (of sorts) in Texas.

A new subsection (g) to the Texas spendthrift trust statute opens with:

“For the purpose of this section, property contributed to the following trusts is not considered to have been contributed by the settlor, and a person who would otherwise be

5 Alaska, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming.

6 Tex. Prop. Code Ann. § 112.035(a), (b). (Note that Subtitle B of Title 9 of the Texas Property code is referred to as the “Texas Trust Code”).


8 Tex. Prop. Code Ann. § 112.035(d); Daniels v. Pecan Valley Ranch, Inc. 831 S.W.2d 372 (App. 4 Dist. 1992, writ denied) (holding that a “[s]ettlor cannot create [a] spendthrift trust for his own benefit and have [the] trust insulated from [the] rights of creditors.”); see also First Bank and Trust v. Goss, 533 S.W.2d (Civ. App. 1976).

9 See Exhibit A for a copy of Section 112.035 reflecting the 2013 amendments.

10 All asset protection planning is subject to fraudulent transfer restrictions—that is, a person cannot make a transfer with the intent to hinder, delay, or defraud existing or reasonably foreseeable creditors; future creditors are not protected by fraudulent transfer law, and rightfully so. See Tex. Bus. & C. Code, Title 3, Ch. 24, for the Texas Uniform Fraudulent Transfer Act. An in-depth discussion of fraudulent transfer considerations is outside the scope of this paper.
treated as a settlor or a deemed settlor of the following trusts may not be treated as a settlor . . .”

At the outset, this new language begins to unwind the historical prohibition against spendthrift protection for self-settled trusts in Texas by no longer treating a settlor-beneficiary of certain types of trusts as the “settlor.”

So what types of trusts get this special treatment? Primarily, trusts created for, or by, the settlor’s spouse, and secondarily, trusts over which someone other than the settlor held a general power of appointment or exercised any power of appointment.

We will review each provision of the 2013 amendments in turn, but first it will be helpful to provide context with a short summary of the Texas spendthrift trust statute as it was originally enacted and the amendments that were made to the statute prior to 2013.

**Brief History of Amendments to the Texas Spendthrift Trust Statute Prior to 2013**

The current Texas spendthrift trust statute was enacted in 1983. The statute as originally enacted stated that a settlor may provide in the terms of a trust instrument that the interest of a beneficiary may not be voluntarily or involuntarily transferred, and that a declaration in a trust instrument that the interest of a beneficiary shall be held subject to a “spendthrift trust” is sufficient to restrain the voluntary or involuntary alienation of a beneficiary’s interest in the trust.11

The original statute went on to provide that if the settlor is also a beneficiary of the trust, a spendthrift provision will not prevent the settlor’s creditors from satisfying claims from the settlor’s interest in the trust estate.12 For this purpose, a beneficiary is not considered a “settlor” of the trust if the beneficiary: (1) holds or exercises the power to consume, invade, appropriate, or distribute property to himself, if the power is exercisable only with the consent of an adverse party or is limited by an ascertainable standard (health, education, maintenance, and support); or (2) holds or exercises a lifetime limited power of appointment or a testamentary limited or general power of appointment.13

In 1995, as a matter of public policy, a specific exception to spendthrift trust protection was added to the Texas Family Code which allows a court to order the trustee of a spendthrift trust to make distributions from the trust to satisfy the beneficiary’s child-support obligations.14

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11 Tex. Prop. Code Ann. § 112.035(a) and (b).
13 Tex. Prop. Code Ann. § 112.035(f) (originally, subsection (e)). The recent case of *Faulkner v. Kornman*, 2015 WL 6444955, illustrates the protection of spendthrift trusts in the bankruptcy context. In that case, the Bankruptcy Court recognized a Texas trust as being a valid spendthrift trust when the sole beneficiary was serving as trustee and the trustee’s power to make distributions was limited by an ascertainable standard. Although the Bankruptcy Court held that the trust corpus could not be reached to satisfy a judgment, the Court left open the question whether distributions in excess of the ascertainable standard would be reachable.
In 1997, the spendthrift trust statute was amended to provide that a beneficiary will not be considered a “settlor” of a trust merely because of a lapse, waiver, or release of: (1) a lifetime limited power of appointment or a testamentary limited or general power of appointment; or (2) a right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver, or release in any calendar year does not exceed: (i) the greater of $5,000 or 5% of the trust assets; or (ii) the federal gift tax annual exclusion amount, whichever is greater.\(^{15}\)

In 2007, a clause was added to the general prohibition against spendthrift protection for a self-settled trust, stating that a settlor will not be considered a “beneficiary” of a trust “solely because a trustee who is not the settlor is authorized to pay or reimburse the settlor for, or pay directly to the taxing authorities, any tax on trust income or principal that is payable by the settlor under the law imposing the tax.”\(^{16}\)

This brings us to the 2013 amendments to the Texas spendthrift trust statute, which are the focus of this paper.

**Section 112.035(g)(1): Spousal Trusts That Qualified for the Federal Gift Tax Marital Deduction**

The first 2013 addition to the Texas spendthrift trust statute provides that the settlor will not be deemed a “settlor” of an irrevocable *inter vivos* marital trust, as long as the settlor’s gift to the trust qualified for the federal gift tax marital deduction, either by making the “QTIP” election\(^ {17}\) or by giving the spouse a testamentary or *inter vivos* general power of appointment (“GPOA”) over the trust property.\(^ {18}\) (In each case, the donee spouse is entitled to receive the income of the trust for life.) If either of these requirements is met under the Internal Revenue Code, then the settlor can become a beneficiary of the trust upon the death of his spouse—at which time he will no longer be considered the “settlor”—and the trust assets will be fully protected from the claims of his creditors under the Texas spendthrift trust statute.\(^ {19}\)

Assets held in a QTIP or GPOA trust will be included in the donee spouse’s gross estate, and the donee spouse becomes the new “transferor” of those assets for federal tax purposes.\(^ {20}\) Therefore, this change to the Texas statute merely causes Texas debtor/creditor law to follow federal transfer tax law’s view of who the new “settlor” should be.

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\(^{15}\) Tex. Prop. Code Ann. § 112.035(e).


\(^{17}\) That is, the “Qualified Terminable Interest Property” election under IRC § 2523(f).

\(^{18}\) Under IRC § 2523(e).

\(^{19}\) Tex. Prop. Code Ann. § 112.035(g)(1).

\(^{20}\) IRC § 2044.
Section 112.035(g)(2): Spousal Trusts That Did Not Qualify for the Gift Tax Marital Deduction

While it is easy to see the logic behind the special treatment of QTIP and GPOA trusts, the legislature’s reasoning behind the second new provision of the Texas spendthrift trust statute is less easy to discern. Simply stated, this subsection provides that a settlor will not be treated as the “settlor” for purposes of the spendthrift trust statute of any irrevocable trust created for his spouse of which he becomes a beneficiary at the spouse’s death—no QTIP election or GPOA required.

The question here is: why did the Texas legislature go to the trouble of specifically requiring a QTIP election or the inclusion of a spousal GPOA in the previous subsection, when this provision catches all spousal trusts? We don’t know, but we’re happy to accept the legislature’s gift of planning opportunities, two of which we can identify immediately. First, high-net-worth clients can use this provision to engage in asset-protected, estate-freeze transactions, where assets that are expected to appreciate significantly in value over time can be gifted at a low value now, with the appreciation escaping estate taxation in both the settlor-spouse’s estate and in the donee-spouse’s estate, and with neither spouse’s creditors being able to reach the trust’s assets. Second, clients whose net worth falls below the estate tax exemption, and who are thus otherwise not typical candidates for advanced estate planning, can also engage in estate-freeze planning and receive creditor protection to boot.

Thanks, Texas legislature.

Section 112.035(g)(3)(A): Reciprocal (Non-Reciprocal) Spousal Trusts

The third new provision of the Texas spendthrift trust statute provides that the beneficiary of an irrevocable trust established by the beneficiary’s spouse will not be deemed the “settlor” of that trust under the spendthrift trust statute, “regardless of whether or when the [spouse-beneficiary] was the settlor of an irrevocable trust for the benefit of that [spouse-settlor].” In short, this provision allows for the assets in “reciprocal” or “non-reciprocal” (i.e., nearly reciprocal) spousal trusts to be protected from both spouses’ creditors. As such, Texas spouses could partition all of their community property to be the 50-50 separate property of each spouse, and then each spouse could

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21 To the extent that the donor spouse retains a beneficial interest in the trust following the donee spouse’s death, special care must be taken in structuring the trust’s provisions to avoid inclusion of the trust assets in the donor spouse’s gross estate for federal tax purposes. IRC § 2037.

22 Note that low-basis assets gifted to trusts in an estate-freeze transaction will retain their low basis and will not receive a basis adjustment at the donee spouse’s death. IRC §§ 1014; 1015. With the recent increase in federal income tax rates and the imposition of the net investment income tax, the costs and benefits of paying estate tax and receiving a basis adjustment versus paying no estate tax and incurring capital gains tax should be quantified. When no estate tax would otherwise be due in the case of clients with lower net worth, the tax benefits of such a transaction are greatly reduced, and the use of a QTIP or GPOA trust might actually be preferable.
transfer his or her separate property to a trust for the other spouse—both trusts would enjoy spendthrift protection.\(^{23}\)

Typically, there is no good estate planning reason to create truly reciprocal trusts. The IRS will ignore such trusts for transfer tax purposes because it views them as taxpayer antics aimed at shielding the gifted assets from transfer taxes while allowing the donor to benefit from assets that he received as the beneficiary of an identical trust that someone else created for him. This is also referred to as a “cross” transaction, leaving both transferors in a nearly identical position that they would have occupied if they had created trusts for themselves. If reciprocal trusts are found to have been created to avoid inclusion in the transferors’ gross estates, the trusts will be “uncrossed” so that each transferor is treated as both the beneficiary and the settlor of the trust that was established for his benefit, thus pulling all of the transferred assets back into the transferor’s gross estate under Internal Revenue Code Sections 2036(a)(2) and 2038.\(^{24}\) As a result, in most circumstances, the spouses will create trusts for each other that are non-reciprocal, paying careful attention in the drafting process to relevant authority of federal tax law outlining the boundaries of the reciprocal trust doctrine.

Under common law, there may also be an argument that reciprocal trusts can be “uncrossed” for purposes of creditors’ claims, not only for federal tax purposes.\(^{25}\) Indeed, if creditors could reach the assets of such trusts under state law, then that alone could have the unfortunate impact of causing inclusion of the trust assets in the donor’s gross estate for federal estate tax purposes.\(^{26}\) With this new provision of the Texas spendthrift trust statute, creditors may not employ the reciprocal trust doctrine as a means of gaining access to trust assets. This, in turn, negates the risk of estate-tax inclusion under federal law, assuming that the trusts are otherwise properly structured to avoid the reciprocal trust doctrine.

Of course, if the spouses are not transfer-tax motivated, or if their assets are not significant enough to pose an estate tax problem, then establishing “intentionally defective reciprocal spousal trusts” could provide an easy way to achieve asset protection for spouses in Texas.

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\(^{23}\) Of course, all marital property planning should be carefully considered with respect to the spouses’ rights between themselves, as partitioning community property to separate property divests each spouse of rights to the community that they would otherwise have absent a partition.

\(^{24}\) See Lembman v. Comm’r, 109 F.2d 99 (2nd. Cir. 1940); U.S. v. Estate of Grace, 395 U.S. 316 (1969); (reciprocal trusts “uncrossed” for estate tax purposes to extent of material value where each settlor created a trust for the other; the test is “whether the trusts created by the settlors placed each other in approximately the same objective economic position as they would have been in if each had created his own trust with himself, rather than the other, as life beneficiary”); Estate of Bischoff v. Comm’r, 69 T.C. 32 (1977) (reciprocal powers were sufficient to uncross trusts, even when reciprocal interests were not created); TAM 8019041 (reciprocal trust doctrine applied to substantially identical trusts established by two brothers, in which each named the other as trustee; trusts were interrelated and part of “coordinated transaction”); cf. Estate of Green, 68 F.2d 151 (6th Cir. 1995) (refusing to follow Bischoff and apply reciprocal trust doctrine based upon reciprocal powers alone).

\(^{25}\) See Restatement (Third) of Trusts, § 58, cmt. f, Reporter Note’s cmt. f.

\(^{26}\) IRC §§ 2036, 2038.
Section 112.035(g)(3)(B): Non-Spousal General Power of Appointment Trusts

The final type of trust of which the settlor-beneficiary will not be considered the “settlor” is one whose property “was subject to a general power of appointment in another person,” with no requirement that the trust be for the benefit of the settlor’s spouse or that the settlor’s beneficial interest be delayed—it is only required that the holder of the GPOA was not the settlor.

Curiously, the legislature used the word “was” subject to a GPOA, instead of “is” subject to a GPOA, when drafting the new provision. A plain-meaning application of this language gives rise to the following possible examples of trust of which the settlor (“John” in these examples) can be a beneficiary but will not be treated as the “settlor” under the spendthrift statute:

- John creates an irrevocable trust for the benefit of himself and his descendants, and under the terms of the trust document, he grants Susan a right to withdraw gifts to the trust for a period of 30 days. If she does not exercise the withdrawal right, it lapses. Susan does not exercise the power and allows it to lapse.

- John creates an irrevocable trust for the benefit of Paul, and grants Susan a GPOA over the trust property. The day after the trust was created, Susan exercises her power in favor of a trust for the benefit of John.

Presumably, favorable spendthrift protection was given to such trusts because a GPOA is not granted lightly due to the fact that assets subject to a GPOA will be included in the holder’s gross estate at death,\(^ {27}\) the lapse or release of a GPOA during the holder’s lifetime will be considered a taxable gift,\(^ {28}\) and the granting of the GPOA requires a high level of trust between the settlor and the power holder. Thus, the value of assets that could be protected by this provision is potentially limited.

Also, the same logic for allowing protection of marital deduction trusts seems to apply here, as the federal tax laws treat the holder of a GPOA as the new “transferor” of the assets that are subject to the power.\(^ {29}\) An argument might also be made that subsections (e) and (f) of Section 112.035 of the Texas Trust Code already serve to cause the holder of an inter vivos GPOA to be treated as the settlor of the trust while the power is presently exercisable or following the lapse, release, or waiver of that power, in the same manner as federal transfer tax law. Therefore, this new provision might have constituted an effort to clarify what was implied by other provisions of the Texas spendthrift trust statute—namely, that the existence of a GPOA severs the original settlor’s status as settlor for purposes of the spendthrift trust statute.

In summary, although a number of complicated tax issues must be wrestled with whenever dealing with GPOAs, this new provision provides the possibility of allowing an individual to create a

\(^{27}\) IRC § 2041.

\(^{28}\) IRC § 2514(b).

\(^{29}\) IRC § 2041; 2514(b).
protective trust for himself currently (i.e., he doesn’t have to wait for his spouse to die), provided that he has a trustworthy and creditor-free friend who also doesn’t mind using estate tax exemption to facilitate the settlor’s asset protection efforts. Grandma, mind sharing your unused exemption with me?

Section 112.035(d)(2):  
Trusts Created by Exercise of General or Limited Power of Appointment

Let’s now turn our focus away from the new subsection (g) and look back up to subsection (d) of the Texas spendthrift trust statute, which recites the general prohibition against self-settled spendthrift trusts, and is stated as follows:

“If the settlor is also a beneficiary of the trust, a [spendthrift provision] does not prevent the settlor’s creditors from satisfying claims from the settlor’s interest in the trust estate.”³⁰

In 2013, when the Texas legislature added subsection (g) to allow a settlor to be a beneficiary of certain spousal trusts and non-spousal GPOA trusts, it also added a new provision to subsection (d) above.

The new language of subsection (d) provides that a settlor will not be considered a beneficiary of a trust for purposes of the general prohibition against self-settled spendthrift trusts solely because the settlor’s interest in the trust was created by another person’s exercise of a power of appointment (general or limited). Unlike the non-spousal GPOA trust provisions discussed above, this provision seems to prohibit the settlor’s beneficial interest from being specifically retained by the settlor in the trust instrument; instead, the settlor must rely on a beneficiary’s exercise of a power of appointment in favor of the settlor. If these requirements are met, the settlor’s beneficial interest in such a trust will be protected from the claims of his creditors. For example:

- John creates a trust for the benefit of Susan and grants Susan a limited testamentary power of appointment exercisable in favor of any one or more of the descendants of John’s parents. Susan predeceases John and exercises her limited power of appointment in her will in favor of a trust for John and his descendants.

- Alternatively, John creates a trust for the benefit of John’s spouse and descendants and grants Susan a limited power of appointment exercisable during her lifetime or upon death and in favor of any one or more of the descendants of John’s parents. Shortly after the trust’s settlement, Susan exercises her lifetime power of appointment in favor of a trust for John and his descendants.³¹

³¹ Or, perhaps to avoid the argument that John and Susan had a prearranged plan that she would favorably exercise her power for John’s benefit, Susan holds the power during her lifetime with the intention of exercising it only if John needs access to the assets but, in any event, exercises it upon her death in favor of a trust for John and his descendants.
In either example, although John was the original source of the assets in the trust for his benefit, he will not be considered a settlor-beneficiary of the trust for purposes of the spendthrift trust statute because his beneficial interest arose via Susan’s exercise of her power of appointment.

Now if we look back to the new subsection (g), you will note that the protections for the settlor’s interest in spousal trusts and non-spousal GPOA trusts depend upon the settlor’s being a “beneficiary” of such trusts. The Texas legislature must have thought that the new language of subsection (d), which does not treat the settlor as a “beneficiary” of trusts created by exercise of a power of appointment, might have negated the protections of subsection (g), so it added a new subsection (h), which makes it clear that for purposes of subsection (g), a person will be a “beneficiary” if he is named under the trust instrument or through the exercise of a limited or general power of appointment. Therefore, a settlor won’t be a “beneficiary” under subsection (d) in certain circumstances, but he will be a “beneficiary” under subsection (g).

Conclusion

The 2013 changes to the Texas spendthrift trust statute may have profoundly reversed what has traditionally been a complete prohibition on self-settled spendthrift trusts (that is, “asset protection trusts”) in Texas. Thus far, no clarity has been provided by the legislature or the courts as to whether the opportunities for potentially aggressive asset-protection motivated trust planning were intentional, or whether they are the byproduct of changes that were drafted broadly but were primarily aimed at conforming Texas trust law with federal tax law’s view of who should be treated as the “transferor” of a trust. Until guidance is provided otherwise, Texas may well be considered a domestic venue for (quasi) asset protection trusts.
§ 112.035. Spendthrift Trusts

(a) A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.

(b) A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a “spendthrift trust” is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by this subtitle.

(c) A trust containing terms authorized under Subsection (a) or (b) of this section may be referred to as a spendthrift trust.

(d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor’s beneficial interest does not prevent the settlor’s creditors from satisfying claims from the settlor’s interest in the trust estate. A settlor is not considered a beneficiary of a trust solely because:

1. a trustee who is not the settlor is authorized under the trust instrument to pay or reimburse the settlor for, or pay directly to the taxing authorities, any tax on trust income or principal that is payable by the settlor under the law imposing the tax; or
2. the settlor’s interest in the trust was created by the exercise of a power of appointment by a third party.

(e) A beneficiary of the trust may not be considered a settlor merely because of a lapse, waiver, or release of:

1. a power described by Subsection (f); or
2. the beneficiary’s right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver, or release in any calendar year does not exceed the greater of the amount specified in:
   A. Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986, or
   B. Section 2503(b), Internal Revenue Code of 1986.

(f) A beneficiary of the trust may not be considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary’s interest in the trust, or to have the power to make a voluntary or involuntary transfer of the beneficiary’s interest in the trust, merely because the beneficiary, in any capacity holds or exercises:

1. a presently exercisable power to:
(A) consume, invade, appropriate, or distribute property to ro for the benefit of the beneficiary, if the power is:
   (i) exercisable only on consent of another person holding an interest adverse to the beneficiary’s interest; or
   (ii) limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary; or
(B) appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary’s estate, or a creditor of the beneficiary’s estate;

(2) a testamentary power of appointment; or
(3) a presently exercisable right described by Subsection (e)(2).

(g) For the purpose of this section, property contributed to the following trusts is not considered to have been contributed by the settlor, and a person who would otherwise be treated as a settlor or a deemed settlor of the following trusts may not be treated as a settlor:

(1) an irrevocable inter vivos marital trust if:
   (A) the settlor is a beneficiary of the trust after the death of the settlor’s spouse; and
   (B) the trust is treated as:
      (i) qualified terminable interest property under Section 2523(f), Internal Revenue Code of 1986; or
      (ii) a general power of appointment trust under Section 2523(e), Internal Revenue Code of 1986;

(2) an irrevocable inter vivos trust for the settlor’s spouse if the settlor is a beneficiary of the trust after the death of the settlor’s spouse; or

(3) an irrevocable trust for the benefit of a person:
   (A) if the settlor is the person’s spouse, regardless of whether or when the person was the settlor of an irrevocable trust for the benefit of that spouses; or
   (B) to the extent that the property of the trust was subject to a general power of appointment in another person.

(h) For the purposes of Subsection (g), a person is a beneficiary whether named a beneficiary:

(1) under the initial trust instrument; or

(2) through the exercise of a limited or power of appointment by:
   (A) that person’s spouse; or
   (B) another person.

Added by Acts 1983, 68th Leg., p. 3332, Ch. 567, art. 2, Sec. 2, eff. Jan. 1, 1984. Amended by:
Acts 1997, 75th Leg., Ch. 109, Sec. 1, eff. Sept. 1, 1997.
Acts 2007, 80th Leg., R.S., Ch. 451 (H.B. 564), Sec. 4, eff. September 1, 2007.
Acts 2013, 83rd Leg., R.S., Ch. 699 (H.B. 2913), Sec. 2, eff. September 1, 2013.