ABIGAIL E. O'CONNOR
11075 Bluff Creek Circle
Anchorage, AK 99515
907-795-9050

April 15, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: Sen.John.Coghill@akleg.gov

The Honorable Mia Costello
Senate Judiciary Committee
State Capitol, Room 504
Juneau, Alaska 99801

via email: Sen.Mia.Costello@akleg.gov

The Honorable Mike Shower
Senate Judiciary Committee
State Capitol, Room 417
Juneau, Alaska 99801

via email: Senator.Mike.Shower@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, Alaska 99801

via email: Senator.Bill.Wielechowski@akleg.gov

The Honorable Pete Kelly
Senate Judiciary Committee
State Capitol, Room 111
Juneau, Alaska 99801

via email: Senator.Pete.Kelly@akleg.gov

Re: House Bill 208 / Response to University of Alaska Foundation letter dated April 10, 2018

Dear Senator Coghill and Members of the Senate Judiciary Committee:

My name is Abigail E. O'Connor, and I am a trust & estates lawyer in Anchorage, also licensed in Florida. I have testified previously telephonically regarding HB 208. You recently received a letter from the University of Alaska Foundation in opposition to HB 208. I appreciate the opportunity to respond to the issues raised in that letter.

Issue #1: Notice

The UAF letter says that HB208 will reduce the notice requirements for beneficiaries, and says that under current law, beneficiaries are notified when changes are made to the trust, and that HB 208 would change that requirement. My response is as follows:

- HB 208 does not change the trust modification provisions (AS 13.36.345 – 13.36.360).

- As for trust decanting, which I think is what the letter intended to address, current law requires notice to "a qualified beneficiary…" (AS 13.36.159(d)(3), w/emphasis). I interpret "a" to mean "one" and guess that most others would as well. HB 208 clarifies this language to "at least one qualified beneficiary…" (HB 208, Section 20, w/emphasis). Meaning, if a trustee is going to decant a trust, it has to give notice to at least one qualified beneficiary. **This is not a reduction in the requirement**; if anything, it may encourage notice to more than one beneficiary.

The UAF letter says that HB 208 creates a scenario where UAF might not be informed if gifted funds are being diverted until years after changes have occurred. I disagree. The change from "a" to "at least one" does not make it more or less likely that UAF would be unaware of funds being diverted. In addition, all trust beneficiaries are entitled to request annual account statements (AS 13.36.080(a)(3)). If UAF is concerned about its vulnerability under current law, they should request annual account statements, as these would show any diversion of funds.

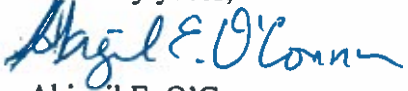
Issue #2: Expansion of Powers & Safeguards on Authority

The UAF letter indicates that HB 208 expands the power of trustees. This is true; in fact, that is the whole point – to expand the possibilities for trustees to allow trusts to ebb and flow with changes in beneficiary circumstances, law, and whatever other changes come down the pike during the thousand years that trusts can continue in existence.

The UAF letter explains that many trustees are not trained professionals, do not have the benefit of legal counsel, and do not fully understand the appropriate use of powers as trustees, and therefore we need safeguards on their authority. But individual trustees wreck trusts all the time with our existing laws. In my experience, if a trustee wants to do something nefarious with a trust or acts negligently, they do not navigate through all of the weeds to find a route in the statutes. They either wrongfully distribute out all the assets to one beneficiary, invest poorly, or mismanage funds. These issues exist with existing law. There are no statutory safeguards to prevent these concerns; only remedies, such as the prudent investor rule, the duty to inform and account, and breach of fiduciary duty actions. These remedies still will exist with HB 208.

The real safeguard is not to be found in the statutes – it is to be found in proper trustee selection and support. Not all clients want corporate trustees, so they choose friends, relatives, spouses. When appointing a friend or loved one as a trustee, the settlor should explain to them that they can and should hire counsel if they want to change the trust or have questions about trust administration. Alaska law permits trustees to hire attorneys (AS 13.36.109(24)). Fiduciary responsibilities are serious and should not be taken lightly. Settlors need to carefully think about who they want to serve, and them give them the resources to ask for help when needed. This is the counsel that attorneys need to offer our clients, and it is in this caretaking process where the real safeguard lies.

Sincerely yours,



Abigail E. O'Connor

HOMPESCH EVANS & AVERETT
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

119 N. CUSHMAN STREET, SUITE 400
FAIRBANKS, ALASKA 99701-2879

TELEPHONE
(907) 452-1700
FACSIMILE
(907) 456-5693
EMAIL
hompesch@hompesch.com

RICHARD W. HOMPESCH II
SUSAN L. EVANS
DEREK R. AVERETT
HEIDI M. HOLMES

PROFESSIONAL STAFF
BARBARA CORY-HOMPESCH
ENROLLED AGENT (IRS)

April 15, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
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via email: sen.mike.shower@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, Alaska 99801

via email: sen.bill.wielechowski@akleg.gov

Re: House Bill 208 / Response to Ms. Susan Foley's letter dated April 10, 2018 and her opposition to decanting provisions of House Bill 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I support HB 208. I testified by telephone on Monday, February 19, and in Juneau on Wednesday, March 7. I wrote you on February 21 in response to the letter from Mr. David Shaftel. This time I am responding to the letter dated April 10, 2018 from the University of Alaska Foundation (the "University").

The statement in the University's letter that HB 208 would change the notice requirement when changes are made to a trust is inaccurate:

> "HB 208 could considerably change the mechanics of [the decanting] process by expanding the power of trustees and reducing notice requirements to beneficiaries. Under current law, beneficiaries are notified when they are named in a donor's estate, and when changes are made to the trust. HB 208 would change that requirement. Provisions in the legislation create a scenario where the UA Foundation might not be informed if gifted

funds are being diverted until years after changes have occurred" (emphasis added).[1]

Decanting a trust results in changes to a trust, but HB 208 does not substantively change the notice requirements. Under existing law a trustee has to give notice of a decanting to "a qualified beneficiary."[2] HB 208 would require the trustee to give notice to "**at least one** qualified beneficiary[.]"[3] Since HB 208 does not substantively change the notice requirements under existing law, the University's objection to the notice required under existing law is no reason to oppose HB 208.[4]

It is very unlikely that the "UA Foundation might not be informed if gifted funds are being diverted until years after changes have occurred." All beneficiaries of a trust have a right to demand an accounting.[5] HB 208 does change that right. If a trust were decanted, a trustee should disclose the decanting in her accounting. If the trustee failed to disclose the decanting in

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[1] See, first two sentences of fourth full paragraph on page 1 of April 10 letter.

[2] See, AS 13.36.159(d)(3).

[3] See, lines 23 and 24 of section 20 of HB 208.

Alaska Statutes (AS) 13.35.159(d) currently states:

"[a] copy of the invaded trust, the appointed trust and the instrument exercising the power shall be delivered to (1) the settlor, if living, of the invaded trust, (2) a person having the right, under the terms of the trust to remove or replace the authorized trustee exercising the power under AS 13.36.157; and (3) a qualified beneficiary or a person who may represent and bind a qualified beneficiary under AS 13.06.120."

HB 208 proposes to change AS 13.35.159(d) to:

"[a] copy of the invaded trust, **a copy of** the **signed** appointed trust, **a conformed copy of the appointed trust or an unsigned copy of the substantial form of the proposed appointed trust,** and the instrument exercising the power shall be delivered to (1) the settlor, if living, of the invaded trust, (2) a person having the right, under the terms of the trust to remove or replace the authorized trustee exercising the power under AS 13.36.157; and (3) **at least one** [A] qualified beneficiary or a person who may represent and bind a qualified beneficiary under AS 13.06.120."

[3] See, AS 13.36.080(a)(3): "upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually . . . ."\

[4] An irrevocable trust also may be modified by going to court and following the procedure set out in Alaska Statutes (AS) 13.36.345-365; but, HB 208 does not change theses statutes or the notice required to petition the court to modify an irrevocable trust.

her accounting, the trustee may be committing malfeasance – or in the worst case scenario - fraud and would not be released from her liability for decanting the trust. The University (and other beneficiaries) still could file a claim against the trustee years later when the decanting was discovered.

Existing law already includes protections for charities. Under existing law a trustee may not decant a trust to "jeopardize . . . the deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for . . . the charitable deduction."[6] HB 208 does not change this requirement.

Oftentimes uninformed or dishonest trustees make bad decisions. I agree with the comment in the University's letter that

> "[m]any trustees in Alaska are not trained professionals . . . [and] [o]ften don't have the benefit of legal counsel familiar with the concept of fiduciary responsibility, nor do they fully understand the appropriate use of their power as trustees."[7]

However, if an uninformed or dishonest trustee wants to divert money from a charity (contrary to the donor's intent), it is more effective to do so by making improper or ill-advised outright distributions to someone other than the charity. When monies are distributed in further trust by a decanting, a disaffected individual or charitable beneficiary will have an easier time recovering the monies because they still are in trust under the control of a trustee and are more easily traced. When a trustee distributes money outright, the money is usually gone and the money is difficult - if not impossible - to trace and recover.

For the last five years, I have reviewed decantings for compliance with Alaska law. In my experience, only sophisticated and/or professional trustees decant trusts. These trustees get advice from their attorneys including an explanation of the trustee's personal liability for abusing our statutory decanting power. Alaska's current decanting statutes (AS 13.36.157-159) are complex and difficult to understand and apply. Without the benefit of legal counsel "familiar with the concept of fiduciary responsibility" it is unlikely that an untrained individual trustee who does not "fully understand the appropriate use of their powers as trustee"[8] would even consider decanting a trust under current law - let alone be able to comply with all of the existing statutory requirements. An untrained individual trustee does not have to resort to a complicated decanting exercise to accomplish an unjust result; there are ample opportunities elsewhere.

The additional safeguards suggested by the University make decanting by sophisticated and/or professional trustees more cumbersome and expensive. If Alaska's decanting laws become more difficult to employ, sophisticated and/or professional trustees (who would likely not defraud a charity in the first place) will move their trusts to Nevada and decant the trust

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[6] See, AS 13.36.158(i)(5)(A).

[7] See, second and third sentences of first full paragraph on page 2 of April 10 letter.

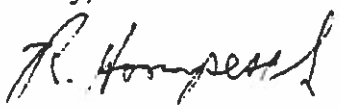
[8] See, third sentence of first full paragraph on page 2 of Susan Foley's April 10 letter.

under Nevada law. And uniformed or dishonest trustees will continue to make improper or ill-advised outright distributions without using Alaska's decanting power.

In my view, the University's suggested revisions to HB 208 do little to safeguard the University and other beneficiaries from uninformed or dishonest trustees. Alaska's decanting statutes have sufficient safeguards already and HB 208 does not reduce those safeguards.

I continue to urge the Senate Judiciary Committee to recommend passage of House Bill 208. Thank you for your efforts in that regard.

Sincerely,



Richard W. Hompesch II

R. S. THWAITES, JR., LLC
Richard S. Thwaites, Jr., Attorney
4871 Hunter Drive
Anchorage, AK 99502

Senator John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: senator.john.coghill@akleg.gov

RE: House Bill 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I have been a member of the Alaska Bar Association for more than 50 years and have focused my practice primarily on estate planning. In 1986 I was elected a fellow of the American College of Trust and Estate Council (ACTEC). You may recall I was, and have been, an active advocate to the adoption of the Alaska Trust Act in 1997 and many of the subsequent related statutes. Those statutes have made Alaska one of the premier locations for family estate planning in our country.

During those years the House and Senate committee members listened to various parties object to passage of each of the statutes. National organizations, local organizations and individuals cited theoretical situations that could result in adverse consequences, or the proposed statute may cause Alaska laws to be contrary to the national uniform laws. In fact, in the twenty plus years the trust and estate laws have been in existence, only rare cases have arisen, usually involving fraudulent transfers or statute of frauds issues, which courts have corrected. No statute is immune from dishonest individuals. The current Alaska statutes serve as tools of more sophisticated practitioners and been adopted in some degree by other states. HB 208 contains decanting provisions the help maintain Alaska's preeminence among those other sophisticated trust jurisdictions. I truly believe the new provisions will help Alaskans and non-Alaskans continue to use the Alaska trust laws as a tool for their estate planning clients. The adoption of HB 208 is necessary in these present times where national tax laws may shift the estate planning needs of many.

I am not an owner of Peak Trust but I am one of its directors. I fully support this bill and hope it will be enacted this year.

Thank you.

Respectfully yours,

Richard S. Thwaites Jr.

Richard S. Thwaites Jr.

 Bus/Fax (907) 274-1565 email: thwaites.law@gmail.com

MANLEY & BRAUTIGAM
ATTORNEYS AT LAW • A PROFESSIONAL CORPORATION

PETER B. BRAUTIGAM
MARIBETH CONWAY
SANDON M. FISHER
RYAN W. FITZPATRICK
COLE M. LINDEMANN
F. STEVEN MAHONEY
ROBERT L. MANLEY
CHARLES F. SCHUETZE

February 26, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: sen.john.coghill@akleg.gov

The Honorable Mia Costello
Senate Judiciary Committee
State Capitol, Room 504
Juneau, Alaska 99801

via email: sen.mia.costello@akleg.gov

The Honorable Pete Kelly
Senate Judiciary Committee
State Capitol, Room 111
Juneau, Alaska 99801

via email: sen.pete.kelly@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, Alaska 99801

via email: sen.bill.wielechowski@akleg.gov

Re: House Bill 208 - Letter in Support

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I was born and raised in Alaska, my family having arrived in Alaska in the 1930's. I live and work in Anchorage and have been practicing law for 33+ years in the areas of estate planning, wills, trusts and estate administration. I have served clients with very diverse trust needs here in Alaska and in other states like Washington, Oregon, California, Arizona, Kansas, New Mexico, New York, Arkansas, and Minnesota.

1127 W. 7th Avenue, Anchorage, Alaska 99501 | Phone (907) 334-5600 | Fax (907) 334-9958
peter@mb-lawyers.com | www.mb-lawyers.com

Like many of the others who have testified in favor of HB 208, I am a Fellow of the American College of Trust & Estate Counsel (ACTEC), a group of highly qualified attorneys recognized for their continued work in improving the laws affecting trusts and estates. I am also the current and past State Chair for ACTEC for Alaska. I have testified as an expert witness in both federal and state courts on trust and estate related issues.

On February 21, 2018, it was my desire to testify in favor of HB 208, however time constraints did not allow for my testimony. **I support HB 208.** Although I respect Mr. Shaftel, I do not agree with him and his testimony on HB 208.

The informal group that have helped promote HB 208 have worked diligently to ensure HB 208 is fair, balanced and is in the best interest of *all* Alaskans. All of us have worked very hard to make sure that HB 208 is the best law for the State of Alaska. All of us, including Mr. Shaftel, have carefully discussed and considered all concerns, ideas and objections in the drafting HB 208. However, after much discussion and debate, Dave's ideas were rejected as not realistic given our many years of combined legal practice experience.

All of us who have testified in favor of HB 208 are *not aware* and *have not seen* any "manipulation and abuse" as painted by Dave. We also are not aware of any case law in any other state that would support Dave's claims of abuse. Further, I believe that many other states already have laws that are like HB 208, including New Hampshire, Delaware, Nevada, Arizona and South Dakota to name a few. HB 208 follows a national trend and will keep Alaska competitive in the area of trust law.

I feel it is important to understand that Dave is one single lone voice who is not happy and wants to defeat HB 208. The rest of us who are in favor of HB 208 have **over 145 years of combined legal experience** in trust and estate work here in Alaska. If HB 208 becomes law, and Dave is still not happy, then he can always make the choice to draft his trusts to avoid the impact of HB 208; the statute allows for that planning.

Decanting is a *very import* tool to help fix unforseen and unanticipated problems in an old trust document.[1] These problems usually involve dealing with difficult assets, unanticipated tax problems, and/or beneficiaries that have difficulties. In many cases our current law addresses these problems. However, our current law is deficient, is not competitive, and can be made better – and that is the intent and goal of HB 208.

[1] For example: I have a client in Arizona. She is the surviving spouse and the credit shelter bypass trust created by her late husband has very large income tax gains. Given the new federal estate tax exemption of $11.2M and her probable death within 3-5 years, she would like to have those assets to be included in her estate to obtain a new income tax basis and minimize the income tax. We will be moving the trust to Alaska and decanting the trust to save over $1.2M in income taxes. She and her 3 children and 5 grandchildren are very happy about this result.

I could go through and address all of Dave's hypothetical problems, but Mr. Hompesch has already done a most excellent job of doing that in his letter addressed to you dated February 21, 2018. I recommend you all review it again.

In summary, those of us attorneys with over 145 years of trust and estate practice experience want HB 208 to become law. We feel that HB 208 is good for Alaska's economy. HB 208 is good for Alaska residents. HB 208 will help make Alaska a preeminent state for trust administration. Thus, **from one Alaskan to another, I urge you to approve HB 208.**

Thank you for your time and attention to this matter. If you have any questions or concerns, please do not hesitate to call me.

Sincerely,

MANLEY & BRAUTIGAM P.C.

By: 
Peter B. Brautigam

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FAULKNER BANFIELD

A PROFESSIONAL CORPORATION
8420 AIRPORT BLVD., SUITE 101 • JUNEAU, ALASKA 99801-6924
PHONE: (907) 586-2210 • FAX: (907) 586-8090

BETHANN BOUDAH CHAPMAN
Direct Phone: 907.523.6147
bchapman@faulknerbanfield.com

February 26, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
Via email: senator.john.coghill@akleg.gov

The Honorable Mia Costello
Senate Judiciary Committee
Via email: senator.mia.costello@akleg.gov

The Honorable Pete Kelly
Senate Judiciary Committee
Via email: senator.pete.kelly@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
Via email: senator.bill.wielechowski@akleg.gov

The Honorable Click Bishop
Senate Judiciary Committee
Via email: senator.click.bishop@akleg.gov

Re: HB 208
Our File No.

Dear Senators Coghill, Costello, Kelly, Wielechowski, and Bishop,

Thank you for taking the time to hearing testimony on HB 208. I am writing to follow up on the section regarding notice to beneficiaries (section 22) and to address Mr. Shaftel's concern.

I have practiced law in Juneau for 30 years with a primary focus on trust, estates and special needs planning. I represent clients throughout Alaska and other states, including Washington, Texas and Montana. I have used Alaska's "decanting" provision, that is the ability to move assets from one trust to a new trust, many times to help protect my clients and their families from problems due to unforeseen circumstances. For example, I have moved assets from one trust to a new trust to protect a beneficiary with disabilities from losing public assistance; to settle litigation among family members and to protect beneficiaries with drug addiction issues. In the latter case, had a direct distribution been made to the beneficiary, he may have depleted all the assets and caused himself harm.

Concerns have been raised about the abuse of decanting. A trustee may decant a trust only if that trustee can distribute trust assets outright to beneficiaries. Since Alaska granted trustees this power in 1998, I am not aware of one instance where a trustee has abused the power to move assets from one trust to another. If a trustee distributes assets outright, then those assets are gone. In contrast, decanting the assets to another trust allows the trustee to continue to control when and how the assets are used. Decanting increases the protection for beneficiaries versus outright gifts.

Section 22 of HB 208- does not change the advance notice requirement in current law; it simply clarifies the provision. A trustee seeking to move assets to a new trust must give advance notice of the exercise of that power to the settlor, any person with the right to remove a trustee, and "a qualified beneficiary,"; Section 22 clarifies that "a beneficiary" means that is advance notice must be given to "at least one" qualified beneficiary. A concern has been raised that a beneficiary will never know that a decanting took place., all of the beneficiaries will learn about the decanting when a trustee provides a summary of trust activities. True, the beneficiary may not have *advance* notice; but that beneficiary would not have advance notice of a trust distribution, so there is no increased detriment.

As mentioned above, a trustee's power to move assets from one trust to another derives from the trustee's power to distribute principal to one or more beneficiary. For example, a grandparent sets up a trust for 3 grandchildren and gives the trustee the discretion to distribute the assets to any one of the grandchildren. A trustee could exercise that discretion and distribute all the assets to just one grandchild. The trustee is not required to give any notice of its decision to the other two grandchildren. The trustee is required to provide information about trust activities to all three grandchildren, however, and those other two grandchildren will learn about the distribution when they receive that information.

If the trustee instead decides to move the trust assets to a new trust for that grandchild, rather than make an outright distribution, HB 208 requires advance notice to at least one beneficiary, the settlor, and anyone with the power to remove the trustee. Even though the power to move assets to a new trust is the same power as making an

outright distribution, HB 208 provides more safeguards. Other states, such as New Hampshire, South Dakota, Delaware and Nevada require no advance notice.

All beneficiaries of a trust are entitled to information about a trust. All beneficiaries retain the right to challenge a trustee's decision (whether that decision is an outright distribution or a distribution to a new trust). HB 208 balances the ability of a trustee to exercise his discretion for the benefit of the trust beneficiaries without judicial proceedings with the beneficiaries' rights to information about the trust and challenge a trustee's action.

Sincerely,

BethAnn Boudah Chapman

STEPHEN E. GREER
ATTORNEY AT LAW

P.O. BOX 24-2903
ANCHORAGE, ALASKA 99524-2903

405 W. 36th Ave., Suite 200
ANCHORAGE, AK 99503

TEL: (907) 561-5520
FAX: (907) 563-5020
steve@stephengreerlaw.com

March 16, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: senator.john.coghill@akleg.gov

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Senate Judiciary Committee
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Juneau, Alaska 99801

via email: senator.mia.costello@akleg.gov

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Senate Judiciary Committee
State Capitol, Room 111
Juneau, Alaska 99801

via email: senator.pete.kelly@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, Alaska 99801

via email:senator.bill.wielechowski@akleg.gov

Senator Mike Shower
Senate Judiciary
State Capitol, Room 417
Juneau AK, 99801

via email: senator.mike.shower@akleg.gov

Re: HB 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I am an independent solo practitioner who practices exclusively in the area of estate planning. I have been a past chair of the Estate Planning Section of the Bar Association for many years and I have no financial connection or reason to side with anyone regarding HB 208. The opinions expressed herein are mine and mine alone.

I want to lend my support to HB 208 as it was originally introduced to Senate Judiciary. I have been very involved with past trust legislation, going back as far as 2000. In fact, Dave Shaftel and I have worked together extensively in the past regarding previously enacted trust legislation. However, although I understand Mr. Shaftel's concerns, my views differ with him regarding HB 208 and I join those attorneys who are supporting this bill.

Our present decanting statute as found in AS 13.36.157 et. seq. is much too cumbersome and the flexibility that is possible with HB 208 is needed. As it now stands, not every client (particularly mine, who are for the most part middle class working Alaskans) can afford the legal costs associated with undertaking the decanting process that our present decanting statute entails.

Notwithstanding the existence of any statute, whether existing or proposed, every attorney who utilizes a decanting procedure will still have to determine for himself or herself if a proposed change will result in a beneficiary being harmed and will then have to undertake due process procedures measures to ensure the beneficiary has adequate notice and opportunity to be heard. We can not, nor should we, assume that decanting changes involve changes that harm, rather help, the individuals involved. We need the changes made in proposed HB 208 to make the process easier and less expensive for the average Alaskan.

If you have any questions, I will be only too happy to respond.

Kindest regards,

Stephen E. Greer

Jordan Shilling

From: Kenneth@KirkAlaska.com
Sent: Monday, March 19, 2018 2:13 PM
To: Sen. John Coghill; Sen. Bill Wielechowski
Subject: HB 208 comments

Gentlemen, the concerns regarding HB 208 and its decanting provisions was just brought to my attention. I am an estate planning attorney in Anchorage, and was a longtime trial lawyer here as well.

I believe the comments of David Shaftel are well taken. The bill would go far beyond the normal authority of trustees, and I don't see how it is called for.

To understand this, it may help to understand the different roles that people have in these trusts:

1. There is the Settlor, also called the Grantor or Trustor. This is the person (or couple) who creates the trust in the first place, and set the rules for the trust, including who the beneficiaries will be, and how much they each get.
2. Then there is the Trustee, which is the manager of the trust. In most cases, the Trustee is the Settlor in the beginning, but when the Settlor can no longer manage the trust him or herself, somebody else (who has been named by the Settlor in the trust documents) takes over management. The Trustee must follow the rules set by the Settlor in the trust documents.
3. Some trusts also provide for a Trust Protector, which could be an individual, organization, or committee. If there is a Trust Protector, the powers have to be specifically laid out. Sometimes they include the authority to change beneficiaries, and sometimes they don't. If somebody is creating a trust and wants to keep open the possibility of the terms of the trust being altered in the future, when they can no longer do so themselves, they can appoint a Trust Protector and give them specific authority to change beneficiaries.

HB 208 blurs the lines between the Trustee's authority, as a manager of the trust; and the authority of a Settlor. It is a bit like setting up a corporation, and saying that the President of the corporation gets to decide who will serve on the board. That is the stockholders' decision, not the President's decision.

I read the response to Mr. Shaftel's objections by Peak Trust Company (which used to be Alaska Trust Company and is a well-respected professional trustee). I have no doubt that Peak would not change beneficiaries without having a very good reason to do so. However the vast majority of trustees are not professional fiduciaries. They are friends and family members, and often times they are beneficiaries of the trust themselves. While large trusts of this sort Peak deals with can afford to have trust companies at the helm, it is not a feasible option for smaller trusts (it would be hard to justify recommending a professional trust company for a trust with less than $2 million). In those situations, the risk that a friend or family member will dramatically alter the intended outcome, is much greater.

This bill is being pushed by ACTEC, which generally represents very wealthy clients. Although I may be wrong, I suspect they are doing this to facilitate some strategies for getting their clients out of some of the irrevocable trusts that their clients no longer want, now that the estate tax laws have changed. However this will affect any size trust, and I believe it will do a lot of damage to people with a few million dollars or less.

I strongly encourage you not to pass HB 208 in its current form.

Jordan Shilling

From: David Rohlfing <dcrohlfing@gmail.com>
Sent: Monday, March 19, 2018 2:29 PM
To: Sen. John Coghill; Sen. Bill Wielechowski
Subject: Fwd: HB 208

Dear Senators Coghill and Wielechowski,

Please see below an email I sent to Senator Wielechowski's aide, Nate Graham, expressing my concerns about the pending HB 208.

I appreciate you taking the time to review my comments and those of other estate planning and probate practitioners in the state. In general, I do not think the proposed bill will provide benefits to Alaskans in a manner that is sufficient to outweigh the significant drawbacks that would come along with it.

I am happy to provide additional comments or answer questions about my statement.

Best,

Dave

---------- Forwarded message ----------
From: **David Rohlfing** <dcrohlfing@gmail.com>
Date: Mon, Mar 19, 2018 at 12:35 PM
Subject: HB 208
To: Nate.Graham@akleg.gov

Hi Nate,

My name is Dave Rohlfing and I am an attorney in Anchorage. My practice is statewide and consists of estate planning, guardianship, probate, trust administration and litigation, and pro bono federal tax controversy services to low-income folks. I work at the private firm Shaftel Delman Kaufman, LLC and at the 501(c)(3) non-profit Alaska Business Development Center.

As you are likely aware, members of the estate planning & probate section of the Alaska bar were forwarded your email and accompanying materials regarding the pending HB 208. One of the partners at my firm, Dave Shaftel, provided written testimony on the content of the bill. I have reviewed the proposed bill, the written testimony, Representative Johnson's sponsor statement, and the commentary from Susan Bart in her capacity as Reporter for the Uniform Trust Decanting Act.

Based on all of this, I urge the Alaska senate not to pass this bill as currently written because it expands the powers of trustees while at the same time reducing the amount of oversight the actions of the trustee will be subject to.

As a baseline, it is necessary to know the roles that beneficiaries and trustees play in a trust relationship. While I hesitate to (re)state the obvious, the risk is outweighed by the importance of starting with a basic understanding. Unlike some fiduciary roles, such as personal representative, guardian, conservator, and even corporate director or officer, a trustee is generally not subject to court or governmental oversight or monitoring. Granted that the law sets out the

duties of a trustee, but the only persons with the information and authority to enforce those duties (unless the trustee is engaging in criminal activity) are the beneficiaries. Beneficiaries are given a right to receive information about the trust instrument and activities of the trustee, including accounting and inventory of the trust, similar to a shareholder's report from a corporation. The beneficiaries may then review the trustee's reports and, if it appears the trustee is violating fiduciary duties, the beneficiaries may take legal action. Generally, this is the only avenue a beneficiary has to vindicate the rights granted under a trust.

HB 208 has two separate aims that frustrate this basic element of the trust relationship. One is to allow for the appointment of an "unlimited authorized trustee" with authority to essentially change the beneficiaries of a trust, arguably without being subject to any meaningful fiduciary duty. The other is to limit the notice requirements to beneficiaries, allowing the trustee to make notice to just one beneficiary prior to allowing the unlimited authorized trustee to make these changes. As noted in commentary you have already received, the upshot of this is to allow the trustee to take actions that are in the best interest of just one of many beneficiaries while only providing notice of the planned action to that beneficiary who will benefit from it.

This is a recipe for disaster in an area that is already, unfortunately, subject to significant abuse. I represent beneficiaries of trusts in cases where the trustee has acted badly and taken advantage of the beneficiaries' lack of sophistication regarding the administration of the trust. I am contacted fairly regularly by beneficiaries in similar situations who have insufficient resources to retain an attorney to protect their rights. The proposed changes will essentially legitimize some of these abuses, but the results will be the same - those without the ability to protect their legitimate rights as beneficiaries will be hurt.

I understand that political decisions often are choices about allocation of benefits and drawbacks, so stories about the potential dangers are only valuable to the extent that negatives outweigh the positives. In this case, as someone who works closely with different players in this area of the law, and with clients who are both very wealthy and those of extremely limited means, it is difficult for me to identify anyone who will benefit from these changes in any meaningful way, much less in a manner that outweighs the significant drawbacks, of which I have only highlighted a few, but which are well outlined in the Dave Shaftel's testimony and the comments of Ms. Bart, including potential federal estate, gift, and income tax issues as well as pitfalls for people who have already accomplished significant planning under the current law which may need to be amended to protect against the abuses that this law would essentially legitimize.

Alaska's law in the area of estates and trusts is one of the most specialized in the country, and has gotten that way at least in part by relying on the extremely knowledgeable and capable attorneys and other professionals who have been involved in its development over the past 2 decades. Passing this bill will introduce uncertainty into an area of the law that relies on consistency, because it deals with long-term decision making and planning. We already have very well developed and sophisticated statutes that allow irrevocable trusts to be changed if unexpected matters arise. There is no need to create additional safeguards to prevent trust distributions to people suffering from addiction or subject to creditor claims - our law already allows for this.

I appreciate you taking the time to read my email and am happy to answer any questions you have about the issues I have highlighted or other matters about the proposed bill.

Thanks,

Dave

--
Anchorage, AK
Cell: (907) 632-5251
Work: (907) 276-6015

Jordan Shilling

From: Beth Chapman <bchapman@faulknerbanfield.com>
Sent: Tuesday, March 20, 2018 6:10 AM
To: Sen. John Coghill; Sen. Bill Wielechowski
Cc: Peter Brautigam; abigail.oconnor@hklaw.com; Steve Greer; Rich Hompesch
Subject: HB 208

To: the Honorable Senator John Coghill and the Honorable Senator Bill Wielechowski,

As a member of the Alaska Bar Association, I received the following email seeking input regarding HB 208. As an initial matter, this email was sent by Mr. Shaftel along with his opposition letter; it did not include any of the letters in support of HB 208 or the responses filed to his opposition.

I want to reiterate that I fully support HB 208 and disagree with Mr. Shaftel's characterization of the bill. I have practiced law in Juneau for the past 30 years. My practice is focused on helping "everyday" Alaskans plan for their family. I have used the current version of the "decanting" statute to help many Alaskans protect their families from unanticipated circumstances. We have helped ensure trust funds remained in trust for special needs children; children with substance abuse issues (and then used the trust funds to pay for treatment), and to settle litigation among family members by creating new trusts for each sibling. I am not aware of one instance where this statute has been used to completely rewrite an estate plan or to cause harm.
I believe that the current statute is too limiting and requires many Alaskans to incur additional costs to obtain judicial relief (and in some courts, wait months for a hearing date). We have submitted our detailed response to Mr. Shaftel's concerns.
All trustees must adhere to their fiduciary duty – HB 208 will allow trustees to have more flexibility to help Alaskans benefit and protect their families without incurring the cost of a judicial proceeding and increased attorneys fees. I am happy to answer any questions you may have.

In summary, I fully support HB 208.

Regards, Beth Chapman

BethAnn B. Chapman
Faulkner Banfield, P.C./8420 Airport Blvd. Suite 101, Juneau, AK 99801
Direct line: (907) 523-6147/Main Line: (907) 586-2210/Fax: (907) 586-8090
bchapman@faulknerbanfield.com/www.faulknerbanfield.com

Dear Estate Planning Attorneys:

House Bill 208 is presently before Senate Judiciary. This is a controversial bill that greatly broadens decanting powers in Alaska. In effect, this bill would allow a trustee, who is not a settlor or beneficiary, to completely change the dispositive plan of a trust. This can be done by only giving notice to one beneficiary, and the bill limits the trustee's fiduciary responsibilities to only one beneficiary.

The chairman of Senate Judiciary, Senator Coghill, and Senator Wielechowski have decided to ask Alaska estate planning practitioners their opinion of House Bill 208. The bill is being held for one week to gather this input. Attached is a copy of House Bill 208, my letter opposing House Bill 208, and an email from Susan Bart, Reporter of the Uniform Trust Decanting Statute.

Would you please review these materials and then email your opinion to the senators at the email addresses below.

Your response can be:

I am opposed to House Bill 208

or

I am in favor of House Bill 208

or

Here are comments regarding House Bill 208

The senators' email addresses are as follows:

sen.john.coghill@akleg.gov
sen.bill.wielechowski@akleg.gov

Thank you for your participation.

Dave Shaftel

Jordan Shilling

From: Paula Jacobson <pjacobsonlaw@gmail.com>
Sent: Tuesday, March 20, 2018 9:34 AM
To: Sen. John Coghill
Subject: I support HB 208

--
Paula M. Jacobson
LAW OFFICE OF PAULA M. JACOBSON
604 West 2nd Avenue
Anchorage, Alaska 99501
Phone: (907) 561-4905
Fax: (907) 782-4133

Jordan Shilling

From: Joe M. Moran <joem@lbblawyers.com>
Sent: Tuesday, March 20, 2018 10:08 AM
To: Sen. John Coghill
Subject: HB 298

I support HB 208. Joe Moran

Sent from my iPhone

Jordan Shilling

From: julie wrigley <jwrigleyak@gmail.com>
Sent: Tuesday, March 20, 2018 4:43 PM
To: Sen. John Coghill
Subject: Re: Input Requested from Estate Planning Attorneys re House Bill 208

Dear Sen. Coghill

I'm opposed to HB 208. I urge you not to move this bill forward.

Sincerely,
Julie Wrigley

Estate Planning Attorney
Member, Alaska Bar Association since 1999
Adjunct Professor University of Alaska Anchorage

Jordan Shilling

From: Sandon M Fisher <sandon@mb-lawyers.com>
Sent: Tuesday, March 20, 2018 9:45 PM
To: Sen. Bill Wielechowski; Sen. John Coghill
Subject: HB 208

Good evening Senators Coghill and Wielechowski.

I want to take a moment to express my support for HB 208.

Respectfully,

Sandon M. Fisher, Attorney
Manley & Brautigam, P.C.
1127 W. 7th Avenue
Anchorage AK 99501

907-334-5600
www.mb-lawyers.com

Jordan Shilling

From: TerriLee Bartlett <terrilee.bartlett@gmail.com>
Sent: Wednesday, March 21, 2018 9:30 AM
To: Sen. John Coghill; Sen. Bill Wielechowski
Subject: Amendments to HB 208

Dear Senators Coghill, Wielechowski and Members of the Senate Judiciary Committee:

I am in agreement with attorneys Peter Brautigam, Beth Chapman, Abigail O'Connor, Stephen Greer, Richard Hompesch, Jonathan Blattmachr, Diana Zeyel and Peak Trust Company and support HB 208 as originally introduced to Senate Judiciary. We need a flexible and inexpensive decanting process.

I work at a financial institution but must express my views as my own and not those of my firm.

--
TerriLee Bartlett
907-529-5247

Jordan Shilling

From: Mike Jungreis <mj@reevesamodio.com>
Sent: Thursday, March 22, 2018 12:10 PM
To: Sen. John Coghill; Sen. Bill Wielechowski
Subject: I support HB 208

Senators Coghill and Wielechowski:

This message is sent in support of the pending legislation to update and improve the Alaska trust statutes. As a lawyer who has seen business come to our state as a result of the original Alaska trust law, I think it is critical that we retain our competitive advantage in this area by updating it to keep it the best in the nation. The smartest trust and estate lawyers in Alaska have been working for years to hone this version. Although there have been some criticisms leveled at the current version, I urge you both not to allow the supposed "perfect" be the enemy of the good.

Please vote in favor of HB 208, a measure to improve Alaska without any cost to the state.

Sincerely

Michael Jungreis
907.222.7105 phone (direct)
907.222.7199 facsimile
REEVES AMODIO LLC
Attorneys at Law
500 L Street, Suite 300
Anchorage, Alaska 99501

Jordan Shilling

From: Peter Brautigam <Peter@mb-lawyers.com>
Sent: Monday, March 26, 2018 7:04 AM
To: Sen. John Coghill
Cc: bchapman@faulknerbanfield.com; Steve Greer; Abby OConnor; Rich Hompesch
Subject: FW: Steve Oshins on Trust Situs Smackdown: Preview, What to Expect and a Possible Spoiler Alert

Dear Senator:

In the past, Alaska was the number 1 jurisdiction for trusts and trust administration. Alaska has now fallen in it's ranking.

Below is a seminar-debate that will present trust law issues in the 4 primary states --- Nevada, Delaware, North Dakota, and Alaska. You can see that the debate (fight) as to which state is the best is worthy of national attention and debate. When I attend national seminars, the discussion can be quite competitive. You may also want to see the Decanting Chart below (https://docs.wixstatic.com/ugd/b211fb_e22a41932407481c8d324afe4c6e388a.pdf) showing that Alaska now ranks number 7 --- behind New Hampshire, Ohio and Tennessee.

Despite Steve Oshin's claim that Nevada will win the debate, we want Alaska to be once again the Number 1 jurisdiction in the US for trust administration. I like many others support HB 208 so that Alaska can once again take the lead in the US for trust law and administration.

Thank you!

Peter Brautigam
Manley & Brautigam, PC
1127 W. 7th Avenue, Anchorage, Alaska 99501
www.mb-lawyers.com
907-334-5600

From: Steve Oshins <stevesletters@leimbergservices.com>
Sent: Monday, March 26, 2018 7:16 AM
To: Peter Brautigam <Peter@mb-lawyers.com>
Subject: Steve Oshins on Trust Situs Smackdown: Preview, What to Expect and a Possible Spoiler Alert

"The webinar description and registration page can be found at this link. My four-minute oral promo can be heard at this link.

*As stated on the description and registration page, this webinar is expected to be the '**GREATEST EVENT IN THE HISTORY OF THE ESTATE PLANNING INDUSTRY!**'"*

On Thursday, March 29th from 3:00 to 4:20 Eastern time, **LISI** will be hosting a webinar with **Steve Oshins, Jonathan Blattmachr, Dick Nenno** and **Al King** titled, **"TRUST SITUS SMACKDOWN"**.

Steven J. Oshins, Esq., AEP (Distinguished) is an attorney at the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who was inducted into the NAEPC Estate Planning Hall of Fame® in 2011. He is listed in The Best Lawyers in America®. He has written some of Nevada's most important estate planning

and creditor protection laws. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com. His law firm's web site is http://www.oshins.com.

Steve authors three different annual state rankings charts and one state income tax chart:

- The Annual Domestic Asset Protection Trust State Rankings Chart
- The Annual Dynasty Trust State Rankings Chart
- The Annual Trust Decanting State Rankings Chart
- The Annual Non-Grantor Trust State Income Tax Chart

Now, here is Steve Oshins' commentary:

SUMMARY:

On Thursday, March 29th from 3:00 to 4:20 Eastern time, I will be presenting a webinar with **Jonathan Blattmachr, Dick Nenno** and **Al King** for **LISI**titled, "**TRUST SITUS SMACKDOWN**".

Jonathan will be representing Alaska, Dick will be representing Delaware, Al will be representing South Dakota and I will be representing Nevada.

COMMENT:

For many years, Nevada, Alaska, Delaware and South Dakota have battled one another for supremacy as the number 1 trust jurisdiction. Each of these four states is a part of most planners' lists of first-tier trust jurisdictions and each of these four states rightfully deserves its esteemed spot in this small group of top jurisdictions. But which is number 1?

Top Features of a First-Tier Trust Jurisdiction

Each of these four trust jurisdictions excels in many of the areas that most planners would conclude are the necessary attributes of a top trust jurisdiction. Each has strong Dynasty Trust laws, each has strong Domestic Asset Protection Trust laws, each has strong Trust Decanting laws and each has no Fiduciary State Income Tax.

Especially given that the State and Local Tax Deduction is now limited to $10,000 per year after the recent Tax Act, state income tax avoidance using one of these trust jurisdiction has become that much more valuable to many planners. This and many other planning concepts will certainly be mentioned during the webinar.

Steve vs. Jonathan vs. Dick vs. Al

Each of the four of us has marketed our preferred trust jurisdiction for many years. To that extent, we are competitors. However, this fierce competition has been good for all four of these first-tier trust jurisdictions as it has substantially increased the number of planners who are now using out-of-state trusts to help their clients by raising awareness of the opportunities that exist.

Rivalries are good for the entire industry because we each push each other to work harder to improve our jurisdictions' laws in order to try to maintain and increase our chosen jurisdiction's piece of the multi-million dollar jurisdictional pie.

What to Expect

Each of the four of us will be given time to present our case that our chosen jurisdiction is the best. For the first time ever, none of us will be able to simply say, "My state is the best at everything!" That strategy may work when there are no competitors, but not when the audience will be hearing from all four of us in the same presentation.

There is no telling what each competitor's strategy will be. However, during the course of this 80-minute webinar, the attendees will surely learn about the importance of planning "outside the box" using the laws of a first-tier trust jurisdiction.

This webinar will be part educational and part entertainment. The attendees will not only learn how to make use of first-tier trust laws, but they will also witness a competition like no other in the history of the financial and estate planning industry.

Marketing and Registration

The webinar description and registration page can be found at this link. My four-minute oral promo can be heard at this link.

As stated on the description and registration page, this webinar is expected to be the "GREATEST EVENT IN THE HISTORY OF THE ESTATE PLANNING INDUSTRY!"

Spoiler Alert

I will win.

Summary

The use of out-of-state trusts has increased over the years. This webinar will be both educational and entertaining. In the webinar, the speakers will each state their case for their chosen jurisdiction to be considered the number 1 trust jurisdiction.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Steve Oshins

Jordan Shilling

From: Casey Carruth-Hinchey <casey@shaftellaw.com>
Sent: Tuesday, March 27, 2018 5:43 PM
To: Sen. John Coghill; Sen. Bill Wielechowski
Subject: HB 208

Dear Senator Coghill and Senator Wielechowski,

I am an associate attorney at Shaftel Delman Kaufman, LLC, and co-chair of the Estate Planning and Probate Law Section of the Alaska Bar Association. I am writing on my own behalf as an estate planning attorney (neither as a representative of my firm nor of the Estate Planning and Probate Law section of the Alaska Bar) to express my concern regarding HB 208.

I am opposed to HB 208, even with amendments (although if this bill were to pass, the five presently proposed amendments should be included, at a minimum). If passed, this bill would make sweeping changes to Alaska's current decanting statutes. Although these statutes could use a few tweaks, HB 208 goes too far.

If passed, among other issues, HB 208 would allow nearly any trustee (so long as they are not a settlor or a beneficiary) to use decanting to ride roughshod over standards governing trust distributions.

As an example, a trust that allowed discretionary distributions to be made to a child only for certain purposes, such as education, could be expanded to allow the trustee to make distributions for any purpose. Or, alternatively, a trust requiring regular distributions of income or a unitrust amount (i.e., a percentage of the trust's overall value) to a child could be changed to eliminate any such distributions. My clients often put significant thought into choosing a trust's distribution provisions, and would be horrified to learn that an existing trust could be changed in the manner this bill would allow.

Thank you for your consideration.

Sincerely,
Casey

--
Casey Carruth-Hinchey
Associate

Shaftel Delman Kaufman, LLC
1029 W. 3rd Ave., Suite 600
Anchorage, AK 99501
Ph: (907) 276-6015
Fax: (907) 278-6015

E-mail: casey@shaftellaw.com
Website: www.shaftellaw.com

Jordan Shilling

From: Harry Need <hwneed@hotmail.com>
Sent: Wednesday, March 28, 2018 11:40 AM
To: Sen. John Coghill; Sen. Bill Wielechowski; Sen. Mia Costello; Sen. Pete Kelly; Sen. Mike Shower
Cc: afpalaskachapter@gmail.com
Subject: HB 208
Attachments: HB 208 - AFP AK.pdf; donor_bill_of_rights.pdf

Dear Senator Coghill and Members of the Senate Judiciary Committee:

By unanimous motion, on March 21, 2018, the board of directors of the Alaska Chapter of the Association of Fundraising Professionals (AFP) expressed our shared uncertainties and concerns regarding House Bill 208. Please see our letter, attached.

We respectfully request that you continue to hold HB 208 until the impact this bill may have on the charitable sector is better understood and the proposed amendments are sufficiently addressed.

Sincerely,

Harry W. Need, CFRE, President
Association of Fundraising Professionals, Alaska Chapter

The Alaska Chapter of AFP is 170 professional fundraisers representing nearly as many nonprofit organizations throughout the state. Essential to our shared endeavors is that all donors shall "be assured that their gifts will be used for the purposes for which they were given." (Art. IV, *A Donor Bill of Rights*.)

Jordan Shilling

From: Steve O'Hara <sohara@bgolaw.pro>
Sent: Tuesday, March 20, 2018 2:42 PM
To: Sen. John Coghill
Subject: House Bill 208

Dear Senator,

I have drafted trusts in Alaska for over 33 years.

I am opposed to House Bill 208. This proposed law needs further study.

The many Alaskans I have represented over the years created trusts with certain ascertainable standards -- and with the reasonable expectation that Alaska law would continue to protect those standards, ultimately for the benefit of the trust beneficiaries.

I am concerned that House Bill 208, as written, would hurt Alaskans by diluting ascertainable standards.

Thank you for your attention to the importance of further study in this matter.

Steven T. O'Hara

Attorney At Law

601 West Fifth Avenue, Suite 900, Anchorage, AK 99501

T 907.276.1711 F 907.279.5358

sohara@bgolaw.pro www.bgolaw.pro

www.60yearsofboxing.org

Jordan Shilling

From: Steve O'Hara <sohara@bgolaw.pro>
Sent: Thursday, April 05, 2018 11:24 AM
To: Sen. John Coghill
Subject: Support for House Bill 208

Dear Senator,

I have drafted trusts in Alaska for over 33 years.

On March 20th I wrote you about House Bill 208, believing the Bill required further study.

This additional time has given me the opportunity to consider House Bill 208, and I am now writing in support of the Bill as an additional means of continuing to diversify Alaska's economy by bringing outside work into the state.

Thank you for your attention to this matter.

-Steve

Steven T. O'Hara

Attorney At Law

601 West Fifth Avenue, Suite 900, Anchorage, AK 99501

T 907.276.1711 F 907.279.5358

sohara@bgolaw.pro www.bgolaw.pro

www.60yearsofboxing.org

Jordan Shilling

From: julie wrigley <jwrigleyak@gmail.com>
Sent: Tuesday, March 20, 2018 4:43 PM
To: Sen. John Coghill
Subject: Re: Input Requested from Estate Planning Attorneys re House Bill 208

Dear Sen. Coghill

I'm opposed to HB 208. I urge you not to move this bill forward.

Sincerely,
Julie Wrigley

Estate Planning Attorney
Member, Alaska Bar Association since 1999
Adjunct Professor University of Alaska Anchorage

Jordan Shilling

From: David Rohlfing <dcrohlfing@gmail.com>
Sent: Monday, March 19, 2018 2:29 PM
To: Sen. John Coghill; Sen. Bill Wielechowski
Subject: Fwd: HB 208

Dear Senators Coghill and Wielechowski,

Please see below an email I sent to Senator Wielechowski's aide, Nate Graham, expressing my concerns about the pending HB 208.

I appreciate you taking the time to review my comments and those of other estate planning and probate practitioners in the state. In general, I do not think the proposed bill will provide benefits to Alaskans in a manner that is sufficient to outweigh the significant drawbacks that would come along with it.

I am happy to provide additional comments or answer questions about my statement.

Best,

Dave

---------- Forwarded message ----------
From: **David Rohlfing** <dcrohlfing@gmail.com>
Date: Mon, Mar 19, 2018 at 12:35 PM
Subject: HB 208
To: Nate.Graham@akleg.gov

Hi Nate,

My name is Dave Rohlfing and I am an attorney in Anchorage. My practice is statewide and consists of estate planning, guardianship, probate, trust administration and litigation, and pro bono federal tax controversy services to low-income folks. I work at the private firm Shaftel Delman Kaufman, LLC and at the 501(c)(3) non-profit Alaska Business Development Center.

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As a baseline, it is necessary to know the roles that beneficiaries and trustees play in a trust relationship. While I hesitate to (re)state the obvious, the risk is outweighed by the importance of starting with a basic understanding. Unlike some fiduciary roles, such as personal representative, guardian, conservator, and even corporate director or officer, a trustee is generally not subject to court or governmental oversight or monitoring. Granted that the law sets out the

duties of a trustee, but the only persons with the information and authority to enforce those duties (unless the trustee is engaging in criminal activity) are the beneficiaries. Beneficiaries are given a right to receive information about the trust instrument and activities of the trustee, including accounting and inventory of the trust, similar to a shareholder's report from a corporation. The beneficiaries may then review the trustee's reports and, if it appears the trustee is violating fiduciary duties, the beneficiaries may take legal action. Generally, this is the only avenue a beneficiary has to vindicate the rights granted under a trust.

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I appreciate you taking the time to read my email and am happy to answer any questions you have about the issues I have highlighted or other matters about the proposed bill.

Thanks,

Dave

--
Anchorage, AK
Cell: (907) 632-5251
Work: (907) 276-6015

R. S. THWAITES, JR., LLC
Richard S. Thwaites, Jr., Attorney
4871 Hunter Drive
Anchorage, AK 99502

Senator John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: senator.john.coghill@akleg.gov

RE: House Bill 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I have been a member of the Alaska Bar Association for more than 50 years and have focused my practice primarily on estate planning. In 1986 I was elected a fellow of the American College of Trust and Estate Council (ACTEC). You may recall I was, and have been, an active advocate to the adoption of the Alaska Trust Act in 1997 and many of the subsequent related statutes. Those statutes have made Alaska one of the premier locations for family estate planning in our country.

During those years the House and Senate committee members listened to various parties object to passage of each of the statutes. National organizations, local organizations and individuals cited theoretical situations that could result in adverse consequences, or the proposed statute may cause Alaska laws to be contrary to the national uniform laws. In fact, in the twenty plus years the trust and estate laws have been in existence, only rare cases have arisen, usually involving fraudulent transfers or statute of frauds issues, which courts have corrected. No statute is immune from dishonest individuals. The current Alaska statutes serve as tools of more sophisticated practitioners and been adopted in some degree by other states. HB 208 contains decanting provisions the help maintain Alaska's preeminence among those other sophisticated trust jurisdictions. I truly believe the new provisions will help Alaskans and non-Alaskans continue to use the Alaska trust laws as a tool for their estate planning clients. The adoption of HB 208 is necessary in these present times where national tax laws may shift the estate planning needs of many.

I am not an owner of Peak Trust but I am one of its directors. I fully support this bill and hope it will be enacted this year.

Thank you.

Respectfully yours,

Richard S. Thwaites Jr.

Bus/Fax (907) 274-1565 email: thwaites.law@gmail.com

Jordan Shilling

From: vance sanders <vasanderslaw@gmail.com>
Sent: Wednesday, April 04, 2018 10:51 AM
To: Sen. Bill Wielechowski; Sen. John Coghill
Subject: HB 208

Honorable Senators Coghill and Wielechowski:

I have practiced law continuously in Alaska since 1984. In that 34-year period, a significant portion of my practice has involved representing disabled Alaskans. Since passage of the trust decanting legislation, I have used that device in many, many cases, primarily to assist families with significantly disabled children, who receive federal SSI and Medicaid benefits. While the decanting statue has been most helpful to these families, in my view the current statute is too limiting, and results in costs to folks least able to pay them, as well as uncertainly in the ultimate judicial outcome.

I wholly agree with Juneau Attorney Beth Chapman's detailed response to Mr. Shaftel's stated concerns about HB 208. I too am fully supportive of HB 208 and urge its passage for the benefit of all Alaskans.

--
Vance A. Sanders
Law Office of Vance A. Sanders, LLC
636 Harris Street
Juneau, AK 99801
vasanderslaw@gmail.com
907-586-1648

Jordan Shilling

From: Janet Tempel <jtempel@peaktrust.com>
Sent: Wednesday, April 04, 2018 10:40 AM
To: Sen. John Coghill; Sen. Bill Wielechowski
Cc: Beth Chapman; Peter Brautigam; Richard W. Hompesch; steve@stephengreerlaw.com; abigail.oconnor@hklaw.com
Subject: In Full Support of HB 208

Dear Senator Coghill and Senator Wielechowski,

I am a long-time member of the Alaska Bar Association. I previously practiced law in the area of estate planning and am currently working in trust administration for Peak Trust Company. I am very familiar with the process of decanting which is the subject of HB 208 and have seen the benefits of decanting in numerous situations. I have worked with most, if not all, of the attorneys who have voiced their opinions regarding this bill and I am aware of the hard work that has gone into the drafting of this bill. While every person is entitled to his/her opinion on this matter, I have no hesitation in stating that I join with the strong majority of attorneys who are in full support of HB 208.

Respectfully,

Janet Tempel

Janet K. Tempel, J.D.
Senior Trust Officer
Peak Trust Company
3000 A Street, Suite 200
Anchorage, AK 99503
jtempel@peaktrust.com
Tel: (907) 278-6775 Fax: (907) 258-1649

Jordan Shilling

From: Mitchell M. Gans <lawmmg@optonline.net>
Sent: Monday, February 26, 2018 7:13 AM
To: Sen. John Coghill
Subject: HB 208

Dear Senator Coghill:

I am the Rivkin Radler Professor of Law at Hofstra University Law School and an Adjunct Professor of Law at New York University School of Law. I have served as the Academic Chair on an advisory committee to the New York State legislature studying the adoption of the Uniform Trust Code in New York.

I was involved with the development of the provisions contained in HB 208, now before your committee. I believe the provisions will represent an important and positive development in the law.

Respectfully yours,

Mitchell M. Gans

Jordan Shilling

From: Richard W. Hompesch <Rich@hompesch.com>
Sent: Wednesday, February 21, 2018 9:54 AM
To: Sen. John Coghill; Sen. Mia Costello; Sen. Pete Kelly; Sen. Bill Wielechowski
Subject: HB 208 and response to D. Shaftel's Feb 16 letter
Attachments: L18-02-21 to Sen Judiciary re HB 208.pdf

Senator Coghill and Members of the Senate Judiciary Committee,

Attached is my letter in support of HB 208 and in response to David G. Shaftel's letter dated February 16, 2018.

I will be available by telephone at the hearing this afternoon to answer any questions.

Rich Hompesch

Richard W. Hompesch II
Hompesch Evans & Averett, P.C.
119 N. Cushman Street, Suite 400 Voice: (907) 452-1700
Fairbanks, Alaska 99701 Fax: (907) 456-5693

Jordan Shilling

From: Bradley Quisenberry <Brad@AnchorageEstatePlanning.com>
Sent: Wednesday, March 21, 2018 9:18 PM
To: Sen. Bill Wielechowski; Sen. John Coghill
Subject: Here are comments regarding House Bill 208

The Honorable Senators John Coghill and Bill Wielechowski,

My name is Bradley R. Quisenberry. I am an estate planning attorney in Anchorage. I have been practicing law here since 2011. In addition, I have a Master of Laws (LL.M.) in Estate Planning from the University of Miami School of Law.

I write this brief email to voice my concern regarding House Bill 208. There are parts of the bill that I like, but there are parts that are concerning. Alaska law allows for the modification of irrevocable trusts through court procedure, but modifying trusts through court procedure is timely and costly. I believe this is mainly due to the fact that the Court will make sure both the settlor's intent and beneficiaries best interests are protected. Decanting is process of modifying a trust, which is both cheaper and easier than the court procedure. But sometimes cheap and easy is not the best route.

Many of the provisions in HB208 would be very useful for trust and estate practitioners, but I think the decanting statutes as written currently and modified by HB208 have potential for abuse. The first change I would suggest is to alter Section 20 of the bill. That section is amending paragraph (d)(3) to allow the decanting trustee to notify "at least one qualified beneficiary ..." Currently that statute makes the decanting trustee notify "A qualified beneficiary ..." I would instead suggest the statute require notice to "all qualified beneficiaries."

The requirement that "all qualified beneficiaries" be noticed is contained in AS 13.36.159(c) when a decanting trustee seeks court approval for the exercise. I suspect that requirement is contained in (c) because we know that the Court would not approve the decanting without notice to all the proper parties. This is due to the fact that without the proper notice, the decanting through the Court would be using state action to deprive somebody of a property interest without proper due process. The U.S. Supreme Court has held that state action affecting property rights must be accompanied by notification of the action. Therefore, pursuant to AS 13.36.159(c), if we use the Court we must give notice to all the parties. However, pursuant to AS 13.36.159(d), if we are not using the Court to affect the property right (the trustee is doing it without court involvement), then no notice may be required (some would argue that it still is). Why not give notice? What is the harm or danger?

A letter from Peak Trust Company to Senator Coghill's office (in response to David Shaftel's letter) gave one example of why we might not want to give notice to all beneficiaries (a beneficiary with substance abuse problems might object). But for every heroin addicted objecting beneficiary we can think of a thousand examples where the lack of notice invites abuse. Do I think our professional trustees here in the State would ever abuse this statute? Absolutely not. I am not concerned about them, I am concerned about the beneficiary of a trust that is allowed to name an independent trustee. It is not hard to find a friendly trustee that will do whatever the beneficiary asks.

I say let's not keep things secret. Let's allow flexibility to "fix" trusts, but let's be open about it and let all the beneficiaries know. If there is going to be an objecting beneficiary, then maybe the trust needs to be modified through judicial process instead of decanting anyway.

My other issue with HB208 is in the deleted portion of AS 13.36.158(e). Section 14 of HB208 is removing the protection of the settlor's intent in creating the trust. The statutory language, as it currently stands, disallows a decanting trustee's modification if there is SUBSTANTIAL evidence of contrary intent by the settlor. Why on earth would we be removing that language? The assets in the trust are the settlor's assets. The settlor gave specific instruction to

the trustee to hold and distribute them in a manner based on his or her intention to provide for the benefit of one or more beneficiaries. If a trustee determines the trust needs changed due to unanticipated circumstances, then the decanting trustee should change the trust, but do it in a manner that the settlor intended.

If anything needs to be changed in AS 13.36.158(e), I would change the words "substantial evidence" to "a preponderance of evidence". In addition, I would change the statute so that a trustee has a fiduciary duty to all the qualified beneficiaries of the trust, instead of how it reads now, which states that a trustee has "a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power ..."

The Alaska Legislature has made Alaska a very attractive place to create trusts. We have been on the forefront of changing hundreds of years of established trust law. In doing so, we have created economic opportunity that did not exist in the state prior to the change in the laws. HB208 has the potential to further strengthen the flexibility of our trust laws, but it does not go far enough to protect the settlor's intent and the beneficiaries of a trust. If I create a trust (or if I help a client create a trust), then I want the document to be honored. I want the settlor's intent in creating the trust to be honored. I want all the beneficiaries of the trust to be treated equally, and if there is good reason to disinherit a beneficiary or to change a distribution standard, then I would expect all of the interested parties to be notified of the change.

Currently, we are allowed to modify trusts through judicial process and through a cumbersome decanting statute. The current decanting statute could stand to be updated, but in doing so, we should make it as strong as possible – it should be written in a way in which it does not invite abuse. I don't expect FNBA or Peak Trust Company to abuse the decanting power. They are both great trust companies. The members of the bar likely wouldn't abuse the statute. But we know that there is going to be some nonprofessional trustee that abuses it, and once again, we are going to get some more bad case law on Alaska Trusts. Those bad cases, which are a result of nonprofessionals trying to abuse our laws (the last bad case was handed down from our own Supreme Court earlier this month), are going to start stacking up. When that happens, Alaska will become less and less attractive for establishing trusts. Why invite the bad cases? Can we have a law that allows a trustee to disinherit a beneficiary in favor of another. Sure, but let's make sure the beneficiary gets notified so they can contest it! Should the modification happen within the settlor's intent? Of course it should, and if there is reason not to, AS 13.36.360 allows the court to determine that a reason for modifying a trust outweighs the interests in accomplishing the material purposes of the trust.

The statutes need to be written in a way that does not invite abuse. There is no reason to be secret -notify all the parties so that individual beneficiaries and charities are protected. Make clear that the trustee has a fiduciary duty to all the beneficiaries. And most importantly, protect the intent of the settlor of the trust.

Yours truly,

Bradley R. Quisenberry
Anchorage Estate Planning and
Probate Services, LLC
(907) 223-1148
www.AnchorageEstatePlanning.com

Jamie M. Delman
1029 W. 3rd Ave., Ste. 600
Anchorage, AK 99501

April 17, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182
Via email: sen.john.coghill@akleg.gov

The Honorable Mia Costello
Senate Judiciary Committee
State Capitol, Room 504
Juneau, AK 99801-1182
Via email: sen.mia.costello@akleg.gov

The Honorable Mike Shower
Senate Judiciary Committee
State Capitol, Room 417
Juneau, Alaska 99801
Via email: sen.mike.shower@akleg.gov

The Honorable Pete Kelly
Senate Judiciary Committee
State Capitol, Room 111
Juneau, AK 99801-1182
Via email: senator.pete.kelly@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, AK 99801-1182
Via email: sen.bill.wielechowski@akleg.gov

RE: House Bill 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

My name is Jamie Delman and I am a partner at Shaftel Delman Kaufman, LLC. My partners, Dave Shaftel and Karl Kaufman, have reviewed this letter and are in concurrence with the opinions expressed herein.

Our understanding is that you have recently received a letter from the UA Foundation expressing concerns about HB 208. In response, you have received letters from attorneys Abigail O'Connor and Richard Hompesch, addressing the concerns highlighted by the UA

Foundation. The purpose of this letter is to respond to the arguments raised by Ms. O'Connor and Mr. Hompesch.

Arguments Regarding Notice

An argument is made that HB 208 does not change the "trust modification" provisions under AS.13.36.345 through AS 13.36.360. While the statutes cited do directly deal with modification, they are not the only statutes that deal with modification. I regularly use the decanting statutes, AS 13.36.157 – AS 13.36.159, which are the primary subject of HB 208, to effect trust modifications (assets of an existing trust are distributed or decanted to a new trust with different provisions).

The letters note that the present law requires notice to only one beneficiary. (See AS 13.36.159(d)(3)). This is true and it is a clear deficiency under existing Alaska law. This deficiency has been discussed by estate planning attorneys and needs to be remedied. Instead of attempting to remedy this deficiency, HB 208 exacerbates it by greatly expanding the decanting power of a trustee. Because a decanting under HB 208 can greatly affect (even eliminate) a beneficiary's rights, all beneficiaries should be given notice whenever a decanting occurs.

It is inadequate to argue that the beneficiaries may be given notice if they request an accounting. The accounting statutes do not require that a decanting be disclosed in the accounting. Further, an accounting may not be rendered until well after the decanting. Under the law, as changed by HB 208, the decanting may have reduced or eliminated the beneficiary's interest in the trust. If a beneficiary's interest in trust assets is eliminated, then that beneficiary would not have a right to an accounting of the new trust.

Finally, often a charitable beneficiary only becomes aware that it is a beneficiary when it receives a distribution from a trust. A charity (or any beneficiary for that matter) cannot be expected to protect an interest that it does not know it has.

Arguments Regarding Safeguards

An additional argument is made concerning the expansion of power under HB 208 and safeguards on such expansions of power. The argument seems to be that bad trustees will act badly no matter what the law says.

This argument undermines the concept of the rule of law in a civilized society. The fact that some people will not comply with a rule cannot be justification for not having the rule; if it were, no rules would be justified. The fact that some people speed does not mean that there should not be a speed limit.

Most people follow the law. They will consult with lawyers to see what is acceptable under the law. If the statutes (rules) allow manipulative behavior, then when a lawyer is consulted, the lawyer may advise the client that the manipulative behavior is acceptable. The decanting statutes (rules) should not allow for manipulative behavior. Rather, they should be guidelines for appropriate behavior.

The existing statute does provide certain safeguards that HB 208 eliminates. For instance, under AS 13.36.158(e), a trustee is prevented from decanting "if there is substantial evidence of a contrary intent of the settlor." Section 14 of HB 208 deletes this safeguarding language.

Argument Regarding Protection of Charitable Intent

An additional argument is made that there is a provision in existing law and in HB 208 that prevents a decanting if it will negatively affect the charitable deduction. This provision does not prevent a decanting if the result of the decanting is shifting from one charity to another. Furthermore, this provision does not prevent a decanting in an instance where a charitable deduction was not taken when assets were contributed to the trust. This happens regularly and for many reasons. Currently, families with assets under 22 million dollars could establish a charitable trust without needing to claim the transfer tax charitable deduction.

Argument Regarding Attractiveness of Alaska Law

Mr. Hompesch states that he has reviewed numerous decantings over the years for compliance with Alaska law. It appears that he is reviewing decantings drafted by attorneys for clients in other states. We are concerned about Alaska residents, and how decanting provisions will affect them.

Mr. Hompesch argues further that if the law requires notice to all beneficiaries, and if trustees have full fiduciary duties to all beneficiaries, then the decanting process will be cumbersome and less attractive to non-residents of Alaska and that they will take their business to Nevada. The expense seems minor in view of the substantial safeguards provided by notice and full fiduciary obligations.

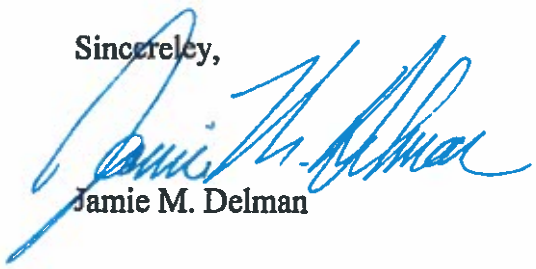
Fiduciary Duties

An additional matter that is not described in the response letters bears particular emphasis. Section 14 of HB 208 makes changes to the fiduciary duties of the trustee. Under this section, a trustee only has to exercise its decanting power in accord with the fiduciary duty it owes to one beneficiary (instead of exercising its fiduciary duties in favor of all beneficiaries). This is a substantial break from existing trust law and is an invitation to abuse.

I strongly oppose the enactment of HB 208. And I am in good company. When the estate planning section of the Alaska Bar was asked to provide input about HB 208, there were more than 20 responses from experienced estate planning lawyers in Alaska opposing enactment of the bill at this time. Some of the responses directly opposed enactment of the bill and some of the responses requested time to study the bill and provide comments about it to lawmakers. In addition to other lawyers, the charitable community has expressed serious concern about the potential impacts of the bill and would like to study the bill and provide input before any decanting changes are enacted, including the Alaska chapter of the Association of Fundraising Professionals, representing 170 fundraising professionals in Alaska.

I appreciate your attention to this very important matter. I am happy to discuss my concerns further with you at your convenience.

Sincerely,



Jamie M. Delman

TELEPHONE
(907) 452-1700
FACSIMILE
(907) 456-5693
EMAIL
hompesch@hompesch.com

HOMPESCH EVANS & AVERETT

ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

119 N. CUSHMAN STREET, SUITE 400
FAIRBANKS, ALASKA 99701-2879

RICHARD W. HOMPESCH II
SUSAN L. EVANS
DEREK R. AVERETT
HEIDI M. HOLMES

PROFESSIONAL STAFF
BARBARA CORY HOMPESCH
ENROLLED AGENT (IRS)

April 10, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: sen.john.coghill@akleg.gov

The Honorable Mia Costello
Senate Judiciary Committee
State Capitol, Room 504
Juneau, Alaska 99801

via email: sen.mia.costello@akleg.gov

The Honorable Pete Kelly
Senate Judiciary Committee
State Capitol, Room 111
Juneau, Alaska 99801

via email: sen.pete.kelly@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, Alaska 99801

via email: sen.bill.wielechowski@akleg.gov

Re: House Bill 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I am writing in support of House Bill 208 as originally introduced. I am an attorney practicing in Fairbanks and I have been primarily working in the area of trusts and estate planning. I am also a member of the Estate Planning and Probate law Section of the Alaska Bar Association.

House Bill 208 will keep Alaska as a leader in trust and estate law. Please vote in favor of House Bill 208.

Sincerely,

Heidi M. Holmes

Heidi M. Holmes

Foley, Foley & Pearson

BRIDGING GENERATIONS

April 10, 2018

The Honorable John Coghill
The Honorable Mia Costello
The Honorable Pete Kelly
The Honorable Bill Wielechowski

Senate Judiciary Committee
State Capital
Juneau, Alaska 99801

Re: Concern Related to Decanting Provisions of House Bill 208

Dear Members of the Senate Judiciary Committee:

Foley, Foley & Pearson, P.C. is a law firm in Anchorage that practices in the area of estates and trusts. We were unaware of this bill until the Senate Judiciary Committee requested comment through the Alaska Bar Association. We thank you for the invitation and opportunity to comment.

Judicial Reformation Versus Decanting.

Any trust can be submitted to the state court for judicial reformation or modification where circumstances have changed or where the original intent of the trustor has been frustrated. Judicial reformation assures fairness, notice and opportunity for all interested parties to be heard. The problem with judicial reformation is that it is time consuming and can be expensive. Consequently, a number of states in recent years have adopted more expansive statutes that allow a trustee to "decant" the trust into a trust with new terms in order to revise and modify the terms of the trust so long as the beneficiaries and terms of distribution remain the same.

Purpose of HB 208.

HB 208 is intended to make the current Alaska laws on decanting of trusts even easier by curtailing notice requirements and potential court involvement in certain situations. One argument in favor of HB 208 is to keep Alaska among the leading state jurisdictions for trust planning and administration. HB 208 has been proposed by an informal committee of estate planning lawyers that have seen meaningful legislation adopted over the years. Our office is not a part of this informal committee. We hold these lawyers in high regard and consider many to be our friends and colleagues. It appears that for the first time this informal committee is split on the language of HB 208.

Who Do the Alaska Trust Laws Serve?

The Alaska trust laws serve primarily two types of clients: 1) wealthy families from other states who want to utilize our favorable trust laws; and 2) Alaskan residents that range from the North Slope oil field laborer to the business professional.

Our firm services primarily Alaska residents who wish to pass on their wealth to family members efficiently and with the least chance of conflict. Our experience is that these clients want to be meaningful about how their wealth passes to the next generation. They also want certainty that their testamentary intent will be accomplished.

Concerns on the Application of HB 208.

HB 208 appears to open the door for significant revisions to a trust after a Settlor has died. The proposed amendments appear to allow a Trustee to make significant changes to a trust, in some cases with little if any notice. Legitimate concerns have been raised that HB 208 allows the modification of trust beneficiaries without due regard to the Settlor's intent. The premises of decanting is that the essence of the original trust be maintained, but the defective or inapplicable provisions are removed without altering the foundation of the Trust. It would seem that modification of shares for trust beneficiaries, including charities, is best suited for the trust modification or reformation provisions already allowed under the Alaska Statues.

Retroactive Application

One concern of our office is that this bill would apply retroactively to existing trusts, including trusts created by Settlors who have already passed away. Even if the law allowed Settlors to "opt-out" of its application, it would be impossible identify and amend all of the trusts that might be already affected. The potential cost to our clients could be substantial.

In conclusion, our office does not support HB 208 as presented to the legislature.

Thank you for carefully considering these issues.

Very truly yours,

William Michael Pearson

Richard H. Foley, Jr.

HOMPESCH EVANS & AVERETT
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

119 N. CUSHMAN STREET, SUITE 400
FAIRBANKS, ALASKA 99701-2879

TELEPHONE
(907) 452-1700
FACSIMILE
(907) 456-5693
EMAIL
hompesch@hompesch.com

RICHARD W. HOMPESCH II
SUSAN L. EVANS
DEREK R. AVERETT
HEIDI M. HOLMES

PROFESSIONAL STAFF
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ENROLLED AGENT (IRS)

April 10, 2018

The Honorable John Coghill
Chairman, Senate Judiciary Committee
State Capitol, Room 119
Juneau, AK 99801-1182

via email: sen.john.coghill@akleg.gov

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via email: sen.pete.kelly@akleg.gov

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, Alaska 99801

via email: sen.bill.wielechowski@akleg.gov

Re: House Bill 208

Dear Senator Coghill and Members of the Senate Judiciary Committee:

I am writing in support of HB 208 as originally introduced. This bill is needed to make our current decanting statute more flexible and make other needed refinements to current law regarding trusts and estates.

I am an attorney practicing in Fairbanks and I have been working primarily in trusts and estates for the last seven years. I am also a member of the Estate Planning and Probate Law Section of the Alaska Bar Association.

As I work with clients on the trusts they are establishing that will likely last 20, 50, even up to 1000 years, one thing becomes apparent to most people. There is no way they can anticipate all the different circumstances which may arise over that long a period of time, such as: changes in tax law, drastic changes in the capacity of a beneficiary because of accident or illness, occupation choices of beneficiaries, maturation of a beneficiary who had previously always struggled, and the list goes on and on.

The acknowledgment of this inability to predict the future leads clients in almost all circumstances to include a decanting provision similar to HB 208 directly into their trust agreements so their trustee has the ability to adapt to changing circumstances more readily. As a statutory provision, HB 208 would improve the current decanting statute (among other positive changes) for the benefit of trusts drafted without an internal decanting provision. This increased flexibility is a benefit not only to Alaskans, but our clients from out of state. Without a flexible decanting statute, a costly and time consuming judicial process is the only avenue to make changes to adapt to changing circumstances.

Please vote in favor of HB 208.

Sincerely,

Derek R. Averett

Schiff Hardin

Schiff Hardin LLP
233 S. Wacker Drive
Suite 7100
Chicago, IL 60606

T 312.258.5500
F 312.258.5600

schiffhardin.com

March 22, 2018

Susan T. Bart
(312) 258.5557
sbart@schiffhardin.com

BY E-MAIL

The Honorable Bill Wielechowski
Senate Judiciary Committee
State Capitol, Room 7
Juneau, AK 99801-1182
Email: sen.bill.wielechowski@akleg.gov

Re: Decanting Provisions of House Bill 208

Dear Senator Wielechowski:

I was the Reporter for the Uniform Trust Decanting Act ("UTDA") and have studied the decanting statutes in all of the various states. My summaries of the state decanting statutes are available on my law firm's website and on the American College of Trust and Estate Counsel website (www.actec.org). I have reviewed Alaska House Bill 208 and am of the opinion that it undercuts the respect that should be given to the grantor's intent and to the interests of all of the beneficiaries of a trust. It will invite irresponsible decanting and undermine fundamental fiduciary duties.

It is important in reviewing a decanting statute to keep in mind that other ways of modifying a trust may be more appropriate in certain circumstances. Often trusts can be modified by agreement of the beneficiaries and the trustees with a nonjudicial settlement agreement. In other circumstances, a court modification, where an impartial judge can weigh the interests of the grantor, the trustee and the beneficiaries, may be the most appropriate way to modify a trust.

Decanting is a very powerful tool and therefore needs to balance the interests of the grantor in seeing that the grantor's fundamental intent is carried out and the interests of all of the beneficiaries. A decanting statute should carefully calibrate the power of the trustee to modify a trust according to the amount of discretion given to that trustee by the grantor. In addition, a decanting statute should require the trustee to balance impartially the interests of all beneficiaries.

The Power to Change Dispositive Provisions. The UTDA intentionally permits changes to the beneficial interests in a trust by decanting only where the grantor had given the trustee unlimited discretion to make discretionary principal distributions to the beneficiaries. Where the grantor grants unlimited discretion to distribute principal, it is clear that the grantor placed a great amount of trust and confidence in the trustee. The grantor's faith in the trustee's judgment supports the assumption that the grantor would trust the trustee's judgment in making modifications to the trust instrument in light of changed circumstances. Where the grantor only gave the trustee limited discretion to make principal distributions, the UTDA and many states follow a bifurcated approach that limits the changes that can be made by decanting to administrative changes.

House Bill 208 would change the Alaska decanting statute from one that follows the bifurcated approach of the UTDA to one that permits any trustee other than the grantor or a beneficiary to make changes to the beneficial interests of the trust regardless of the degree of discretion the grantor gave the trustee to make principal distributions. House Bill 208 does this by (1) eliminating the requirement that a trustee have unlimited discretion over principal in order to change beneficial interests, (2) changing the definition of "authorized trustee," and (3) defining "unlimited authorized trustee" as excluding only the grantor and a beneficiary.

House Bill 208 would subtly change the definition of an "authorized trustee" from a trustee who has *authority* to pay trust principal to a trustee that has the *power* to pay trust principal. I suspect that this change was made because the word "authority" suggests that the trustee needs to have some degree of discretion over principal distributions. By changing the word "authority" to the word "power," arguably a trustee who is merely directed in the trust to distribute principal could be deemed to be an "authorized trustee." For example, a trustee who is directed to pay 4% of the value of the trust each year to a beneficiary from income or principal, may well fall within the definition of an authorized trustee under House Bill 208. In such a case, the grantor did not grant the trustee any discretion over trust principal, yet House Bill 208 would allow the trustee to alter or even eliminate entirely a beneficiary's interest. I know of only one, tiny, state that permits decanting where the trust does not grant the trustee discretion over distributions.

Further, House Bill 208 would eliminate the requirement that an authorized trustee have unlimited discretion to invade trust principal to have the power to change beneficial interests. The Bill is very subtle in that it eliminates that requirement but changes the term "authorized trustee" to the term "unlimited authorized trustee." However, an unlimited authorized trustee is not defined as an authorized trustee who has the unlimited ability to make principal distributions; rather it is merely defined as a trustee who is not a beneficiary or a grantor. The fact that the definition of "unlimited authorized trustee" excludes a beneficiary or the grantor is of little comfort given that the trustee could be a beneficiary's best friend or a business associate.

Extent of Changes to Beneficial Interests. The UTDA and virtually all decanting statutes do not permit a trustee to add a beneficiary to a trust. House Bill 208 arguably permits a trustee to add a new beneficiary. A trustee may decant under the Bill for the benefit of "one or more of the current beneficiaries of the invaded trust to the exclusion of one or more of the other current beneficiaries, *and for the future benefit of beneficiaries who are not current beneficiaries*." While perhaps this is just poorly drafted, it is not a stretch to read this as authorizing the trustee to add beneficiaries to a trust whom the grantor never intended to be beneficiaries.

In addition, the UTDA and all of the decanting statutes do not permit a decanting to take away a right currently enjoyed by a beneficiary to withdraw the trust assets. House Bill 208 would eliminate this restriction. Thus a beneficiary who has already achieved the age after which the grantor directed that the beneficiary have a right to withdraw the trust would be subject to the risk that the trustee would decide to decant the trust and eliminate that beneficiary's rights. This could tempt trustees to decant if the trustee believes the beneficiary may be considering exercising a withdrawal right. On the other hand, this would encourage beneficiaries to withdraw the trust assets at the earliest moment possible so that their benefits from the trust would not be subject to the future whims of the trustee, even where there are significant advantages to retaining the assets in trust.

Further, the UTDA and the vast majority of state statutes do not permit a decanting to eliminate a right currently enjoyed by a beneficiary to receive a periodic mandatory distribution of income or other specified amounts. In cases where the trust directs and the beneficiary is currently receiving an annual specified payment from the trust, for example, 4% of the value of the trust annually, House Bill 208 would create the ongoing possibility that the trustee could take away that "vested" right of the beneficiary at any time. This could subject beneficiaries to inappropriate scrutiny by the trustees about how they are conducting their lives even after the age at which the grantor wanted them to have a mandatory right to distributions.

The UTDA and other decanting statutes realize that there may be circumstances under which a grantor, knowing of changed circumstances, would change the age at which a beneficiary would begin to receive regular mandatory distributions from a trust or would have the right to withdraw trust principal. The UTDA and other statutes permit a trustee who has unlimited discretion to make principal distributions to change the age at which such rights would become effective provided that the beneficiary has not already attained the age mandated by the grantor. This provides sufficient flexibility for trustees to modify trust provisions when a beneficiary has not matured as intended or is in a precarious emotional or financial situation as the mandated age approaches. This approach, however, protects against a trustee maintaining a controlling hand once mandatory distributions begin.

Decanting Revocable Trusts. The UTDA and other decanting statutes apply to irrevocable trusts, not to trusts that are revocable by the grantor. House Bill 208 would permit a trustee to decant a revocable trust. This means that where the trust's grantor intended to retain control over the trust during life, and then directs estate planning distributions from the trust upon the grantor's death, if the grantor becomes incapacitated and is no longer capable of acting as trustee, the successor trustee could use decanting to completely rewrite the grantor's estate plan. Often a revocable trust names as successor trustee a family member who is the one best suited to take care of the grantor's financial affairs during the grantor's life. The successor trustee of a revocable trust is often not the person that the grantor has chosen to be an impartial trustee for trusts created at the grantor's death. Where the grantor intends some person to have the power to rewrite his or her estate plan in the event of incapacity, it is simple for the grantor to specifically grant this power. House Bill 208, however, would effectively give this power to any successor trustee of a revocable trust who is willing to move the trust to Alaska.

Fiduciary Duty. The UTDA and most decanting statutes clearly subject the trustee to all ordinary fiduciary duties in making a decision to decant. These duties include the duty to act impartially with respect to the interests of all beneficiaries. Nonetheless, the UTDA and other decanting statutes are careful to place reasonable restrictions on a trustee's ability to decant rather than relying solely on the general fiduciary duties of a trustee in determining what is an appropriate decanting. Unfortunately, neither the existing Alaska decanting statute nor House Bill 208 imposes on the trustee a fiduciary duty to act impartially with respect to the interests of the beneficiaries. The Alaska statute specifically states that the trustee's fiduciary duty is only to "exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances." The reference to acting in the best interests of only one or more of the beneficiaries undercuts the normal fiduciary duty to act impartially with respect to all of the beneficiaries.

Further, House Bill 208 eliminates language in the Alaska decanting statute that prohibited decanting if there was substantial evidence of a contrary intent of the settlor, and it cannot be established that the settlor would be likely to have changed this intention under the circumstances existing at the time of the decanting. The fact that House Bill 208 eliminates this language is troubling.

Tax Consequences. For the most part, the IRS has not ruled on the income, gift, estate and generation-skipping tax consequences of decanting. The UTDA was drafted to carefully balance the interests of the grantor and the interests of the beneficiaries and to place reasonable limits on the ability to decant with due recognition to the degree of discretion the grantor had given the trustee. One of the reasons this was done was in anticipation that the IRS may be more willing to issue favorable tax rulings if the IRS sees that the decanting statutes in the various states are thoughtful and well-balanced. House Bill 208 would not produce a well-balance decanting statute.

I would be less concerned about the Alaska statute if the effects would be limited to trusts that the grantor intended to be administered under Alaska law. For better or worse, though, an overreaching decanting statute in any state affects all trusts because it is all too easy for a trustee to move a trust from one jurisdiction to another. As thoughtful practitioners realize the havoc that the Alaska statute could inflict on the grantor's intent, and the lack of protections for beneficial interests, they may reach the conclusion that their trusts must prohibit changing jurisdictions to Alaska (or any other states that adopt overly permissive decanting statutes). Trusts that do move to Alaska to take advantage of the overly permissive decanting statute may expect litigation over the legitimacy of the decantings. There are reasonable legal arguments that the public policy of other jurisdictions may not permit trusts to move to Alaska if it may substantially change the beneficial interests of the beneficiaries because of an overly permissive decanting statute in Alaska.

I respect the right of any state to attract trust business by enacting thoughtful trust laws that respect the fundamental principles of trusts. Enacting an overly permissive decanting statute may attract a certain amount of trust business in the short term, but not for the right reasons, and may damage the reputation of the state as a desirable trust jurisdiction.

Respectfully,

Susan T. Bart

STB:jeb