

**AMENDMENT**

OFFERED IN THE SENATE

BY SENATOR FRENCH

TO: CSSB 165( ), Draft Version "D"

Page 1, line 3, following "**Code**";:

Insert "**relating to the appointment of trust property**";

Page 7, following line 5:

Insert new bill sections to read:

"\* **Sec. 6.** AS 13.36.157 is repealed and reenacted to read:

**Sec. 13.36.157. Exercise of power of appointment.** (a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of that principal to a trustee of an appointed trust for, and only for the benefit of, a current beneficiary of the invaded trust to the exclusion of other current beneficiaries. A permissible appointee of a power of appointment held by a beneficiary of the appointed trust is not considered a beneficiary of the appointed trust. The successor and remainder beneficiaries of the appointed trust may be one or more of the successor and remainder beneficiaries of the invaded trust to the exclusion of other successor and remainder beneficiaries.

(b) An authorized trustee exercising the power under (a) of this section may grant a discretionary power of appointment, including a presently exercisable power of appointment, in the appointed trust to one or more of the current beneficiaries of the invaded trust, to the extent that the beneficiary who is granted the power to appoint is authorized to receive the principal outright under the terms of the invaded trust. A permissible appointee is not limited to the beneficiaries of the invaded trust.

(c) Under (a) and (b) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust may include present or

1 future members of that class.

2 (d) An authorized trustee with the power to invade trust principal but without  
3 unlimited discretion may appoint part or all of the principal of the trust to a trustee of  
4 an appointed trust if the current beneficiaries of the appointed trust are the same as the  
5 current beneficiaries of the invaded trust and the successor and remainder beneficiaries  
6 of the appointed trust are the same as the successor and remainder beneficiaries of the  
7 invaded trust. The shares of the current beneficiaries of the appointed trust must be the  
8 same as the shares of the current beneficiaries of the invaded trust, and the shares of  
9 the successor and remainder beneficiaries of the appointed trust must be the same as  
10 the shares of the successor and remainder beneficiaries of the invaded trust.

11 (e) If the authorized trustee exercises the power under (d) of this section, the  
12 appointed trust must include the same standard authorizing the trustee to distribute the  
13 income or invade the principal of the appointed trust as the standard in the invaded  
14 trust. However, the standard authorizing the trustee to distribute the income or invade  
15 the principal of the appointed trust may be changed if the trustee appoints to an  
16 appointed trust that is a special needs trust, a pooled trust, or a third-party trust.

17 (f) If an authorized trustee exercises the power under (d) and (e) of this section  
18 to extend the duration of the appointed trust beyond the duration of the invaded trust  
19 for any period after the invaded trust would have otherwise terminated under the  
20 provisions of the invaded trust, the appointed trust, in addition to the language  
21 required to be included in the appointed trust under (e) of this section, may also  
22 provide an additional trustee with unlimited discretion to invade the principal of the  
23 appointed trust during the extended duration. The trustee with unlimited discretion  
24 continues to be subject to the restrictions in (d) - (h) of this section.

25 (g) Under (d) - (f) of this section, if the beneficiaries of the invaded trust are  
26 described by a class, the beneficiaries of the appointed trust include present or future  
27 members of that class.

28 (h) If the authorized trustee exercises the power under (d) - (g) of this section  
29 and if the invaded trust grants a power of appointment to a beneficiary of the trust, the  
30 appointed trust must grant this power of appointment in the appointed trust, and the  
31 class of permissible appointees shall be the same as in the invaded trust.

1     \* **Sec. 7.** AS 13.36 is amended by adding new sections to read:

2             **Sec. 13.36.158. Additional provisions relating to exercise of a power of**  
 3     **appointment.** (a) An exercise of the power to invade trust principal under  
 4     AS 13.36.157 is the exercise of a special power of appointment.

5             (b) The appointed trust to which an authorized trustee appoints the assets of  
 6     the invaded trust under AS 13.36.157 may have a duration that is longer than the  
 7     duration set out in the invaded trust.

8             (c) If an authorized trustee has unlimited discretion to invade the principal of a  
 9     trust and if the same trustee or another trustee has a power, not dependent on unlimited  
 10    discretion, to invade principal under the trust instrument, the authorized trustee having  
 11    unlimited discretion may exercise the power of appointment under AS 13.36.157(a) -  
 12    (c).

13            (d) An authorized trustee may exercise the power to appoint in favor of an  
 14    appointed trust under AS 13.36.157 whether or not there is a current need to invade  
 15    principal under the terms of the invaded trust.

16            (e) An authorized trustee exercising the power under AS 13.36.157 -  
 17    13.36.159 has a fiduciary duty to exercise the power in the best interests of one or  
 18    more proper objects of the exercise of the power and as a prudent person would  
 19    exercise the power under the prevailing circumstances. The authorized trustee may not  
 20    exercise the power under AS 13.36.157 - 13.36.159 if there is substantial evidence of a  
 21    contrary intent of the settlor and it cannot be established that the settlor would be  
 22    likely to have changed this intention under the circumstances existing at the time the  
 23    trustee exercises the power. The provisions of the invaded trust may not be viewed  
 24    alone as substantial evidence of a contrary intent of the settlor unless the invaded trust  
 25    expressly prohibits the exercise of the power in the manner intended by the authorized  
 26    trustee.

27            (f) The provisions of AS 13.36.157 - 13.36.159 may not be construed to  
 28    abridge the right of a trustee to appoint property further in trust under the terms of the  
 29    governing instrument of a trust, another provision of law, or common law, or as  
 30    directed by a court having jurisdiction over the trust.

31            (g) Nothing in AS 13.36.157 - 13.36.159 creates or implies a duty to exercise

1 a power to invade principal. An inference of impropriety may not be made, and  
2 liability is not incurred, as a result of an authorized trustee not exercising the power  
3 conferred under AS 13.36.157.

4 (h) A power authorized by AS 13.36.157 may be exercised, subject to the  
5 provisions of AS 13.36.159(a), unless expressly prohibited by the terms of the  
6 governing instrument. A general prohibition against amending or revoking the invaded  
7 trust and a provision that constitutes a spendthrift clause do not preclude the exercise  
8 of a power under AS 13.36.157.

9 (i) An authorized trustee may not exercise a power authorized by  
10 AS 13.36.157 to

11 (1) reduce, limit, or modify a beneficiary's current right to a mandatory  
12 distribution of income or principal, a mandatory annuity or unitrust interest, a right to  
13 withdraw a percentage of the value of the trust, or a right to withdraw a specified  
14 dollar amount, if the mandatory right has come into effect with respect to the  
15 beneficiary, but the mandatory right may be reduced, limited, or modified during any  
16 extended duration of the trust; however, notwithstanding the other provisions in this  
17 paragraph, but subject to the other limitations in AS 13.36.157 - 13.36.159, an  
18 authorized trustee may exercise a power authorized by AS 13.36.157 to appoint to an  
19 appointed trust that is a special needs trust, a pooled trust, or a third-party trust;

20 (2) decrease or indemnify against a trustee's liability or exonerate a  
21 trustee from liability for failure to exercise reasonable care, diligence, and prudence  
22 unless the court having jurisdiction over the trust specifies otherwise;

23 (3) eliminate a provision granting another person the right to remove  
24 or replace the authorized trustee exercising the power under AS 13.36.157 unless a  
25 court having jurisdiction over the trust specifies otherwise;

26 (4) fix as binding and conclusive the value of an asset for purposes of  
27 distribution, allocation, or otherwise; or

28 (5) jeopardize

29 (A) the deduction or exclusion originally claimed with respect  
30 to a contribution to the invaded trust that qualified for the annual exclusion  
31 under 26 U.S.C. 2503(b), the marital deduction under 26 U.S.C. 2056(a) or 26

1 U.S.C. 2523(a), or the charitable deduction under 26 U.S.C. 170(a), 26 U.S.C.  
2 642(c), 26 U.S.C. 2055(a), or 26 U.S.C. 2522(a) (Internal Revenue Code);

3 (B) the qualification of a transfer as a direct skip under 26  
4 U.S.C. 2642(c) (Internal Revenue Code);

5 (C) the election to treat a corporation as a subchapter S  
6 corporation under 26 U.S.C. 1362 (Internal Revenue Code); or

7 (D) another specific tax benefit for which a contribution  
8 originally qualified for income, gift, estate, or generation-skipping transfer tax  
9 purposes under 26 U.S.C. (Internal Revenue Code).

10 (j) Before exercising the power under AS 13.36.157, an authorized trustee  
11 shall consider the tax implications of the exercise of the power.

12 (k) An authorized trustee may not exercise a power described in AS 13.36.157  
13 - 13.36.159 in violation of the limitations on validity in AS 34.27.051 or 34.27.100, or  
14 the restrictions on exercising certain powers in AS 13.36.153 by trustees who are not  
15 independent. A violation voids the entire exercise of the power unless the exercise is  
16 modified to correct the violation.

17 (l) Unless a court having jurisdiction over the trust directs otherwise, an  
18 authorized trustee may not exercise a power authorized by AS 13.36.157 to change the  
19 provisions regarding the determination of the compensation of a trustee. The  
20 commissions or other compensation payable to the trustees of the invaded trust may  
21 continue to be paid to the trustees of the appointed trust during the term of the  
22 appointed trust and shall be determined in the same manner as for the invaded trust.

23 (m) A trustee may not receive a payment, a commission, or other  
24 compensation for appointing property from the invaded trust to an appointed trust  
25 under AS 13.36.157. However, a trustee may be compensated at an hourly rate for the  
26 time spent considering and implementing the exercise of a power to appoint.

27 (n) Unless the invaded trust expressly provides otherwise, the provisions in  
28 AS 13.36.157 - 13.36.159 apply to

29 (1) a trust, whether testamentary or inter vivos, governed by the laws  
30 of this state, including a trust whose governing law has been changed to the laws of  
31 this state; and

1                   (2) a trust that has a trustee who is an individual domiciled in this state,  
 2 or a trustee that is an entity having an office in this state, if a majority of the trustees  
 3 select this state as the location for the primary administration of the trust and the  
 4 selection is made by an instrument in writing that is signed and acknowledged by a  
 5 majority of the trustees; the instrument exercising this selection shall be kept with the  
 6 records of the invaded trust.

7                   (o) A power to pay principal that includes words such as "best interests,"  
 8 "welfare," "comfort," or "happiness" is not considered a limitation or modification of  
 9 the right to distribute principal.

10                  (p) In this section, "internal revenue code" means the Internal Revenue Code of  
 11 the United States (26 U.S.C.) as it exists on the effective date of this Act and as it is  
 12 amended from time to time;

13                  **Sec. 13.36.159. Implementation of power of appointment.** (a) Unless the  
 14 authorized trustee provides otherwise, the appointment of

15                         (1) all of the assets comprising the principal of the invaded trust to an  
 16 appointed trust includes subsequently discovered assets of the invaded trust and  
 17 undistributed principal of the invaded trust acquired after the appointment to the  
 18 appointed trust;

19                         (2) a part but not all of the assets comprising the principal of the  
 20 invaded trust to an appointed trust may not include subsequently discovered assets  
 21 belonging to the invaded trust or principal paid to or acquired by the invaded trust  
 22 after the appointment to the appointed trust; those subsequently discovered assets  
 23 remain the assets of the invaded trust.

24                  (b) The exercise of the power to appoint to an appointed trust under  
 25 AS 13.36.157 shall be evidenced by an instrument in writing that is signed, dated, and  
 26 acknowledged by the authorized trustee. The exercise of the power is effective 30 days  
 27 after the date of service of the instrument as specified in (d) of this section, unless the  
 28 persons entitled to notice consent in writing to a sooner effective date.

29                  (c) An authorized trustee may exercise the power authorized by AS 13.36.157  
 30 without the consent of the settlor or a person interested in the invaded trust and  
 31 without court approval. However, an authorized trustee may seek court approval for

1 the exercise. When seeking court approval, notice shall be sent to all qualified  
2 beneficiaries.

3 (d) A copy of the invaded trust, the appointed trust, and the instrument  
4 exercising the power shall be delivered to

5 (1) the settlor, if living, of the invaded trust;

6 (2) a person having the right, under the terms of the invaded trust, to  
7 remove or replace the authorized trustee exercising the power under AS 13.36.157;  
8 and

9 (3) a qualified beneficiary or a person who may represent and bind the  
10 qualified beneficiary under AS 13.06.120.

11 (e) Notice under (d) of this section to a qualified beneficiary is not required if  
12 the settlor has exempted the authorized trustee from providing notification or  
13 information to beneficiaries under AS 13.36.080(b). Notice under (d) of this section  
14 shall be provided under AS 13.06.110.

15 (f) The instrument exercising the power must state whether the appointment is  
16 of all or part of the assets comprising the principal of the invaded trust and, if a part,  
17 the approximate percentage of the value of the principal of the invaded trust that is the  
18 subject of the appointment.

19 (g) A person entitled to notice under (d) of this section may object to the  
20 trustee's exercise of the power under AS 13.36.157 - 13.36.159 by serving a written  
21 notice of objection on the trustee before the effective date of the exercise of the power.  
22 The failure to object does not constitute consent.

23 (h) The receipt of a copy of the instrument exercising the power does not,  
24 before the expiration of the limitation period in AS 13.36.100 with respect to a report  
25 disclosing the exercise, affect the right of a qualified beneficiary to object to the  
26 exercise of the power under AS 13.36.157 and to request the court to modify or to  
27 reverse the exercise.

28 (i) A copy of the instrument exercising the power shall be kept with the  
29 records of the invaded trust.

30 \* **Sec. 8.** AS 13.36.215 is amended by adding a new subsection to read:

31 (b) In AS 13.36.157 - 13.36.159,

1 (1) "appointed trust" means an irrevocable trust that receives principal  
2 from an invaded trust under AS 13.36.157, including a new trust created by the settlor  
3 of the invaded trust or by the trustees, acting in that capacity, of the invaded trust;

4 (2) "authorized trustee" means, with regard to an invaded trust, a  
5 trustee with the authority to pay trust principal to or for a current beneficiary; in this  
6 paragraph, "trustee" does not include a settlor or a beneficiary to whom income or  
7 principal must be paid, currently or in the future, or who is or will become eligible to  
8 receive a distribution of income or principal in the discretion of the trustee other than  
9 by the exercise of a power of appointment held in a nonfiduciary capacity;

10 (3) "current beneficiary" means a person or, with regard to a class of  
11 persons, a person who is or will become a member of the class, to whom a trustee may  
12 distribute principal when exercising a power under AS 13.36.157;

13 (4) "invade" means pay directly to the beneficiary of a trust or apply to  
14 the benefit of a beneficiary;

15 (5) "invaded trust" means an irrevocable inter vivos or testamentary  
16 trust the principal of which is appointed under AS 13.36.157;

17 (6) "pooled trust" means a trust described in 42 U.S.C. 1396p(d)(4)(C)  
18 that meets the requirements for a pooled trust under the regulations of this state  
19 relating to the Medicaid treatment of trusts;

20 (7) "principal" means the assets of a trust, including accrued and  
21 accumulated income, but excluding income that is currently required to be distributed;

22 (8) "special needs trust" means a trust under 42 U.S.C. 1396p(d)(4)(A)  
23 that meets the requirements for a special needs trust under the regulations of this state  
24 relating to the Medicaid treatment of trusts;

25 (9) "third-party trust" means a trust that is

26 (A) established by a third party with the assets of the third party  
27 to provide for supplemental needs for a person eligible when the trust is  
28 created or at a future time for needs-based public assistance; and

29 (B) exempt from the provisions of the regulations of this state  
30 relating to the Medicaid treatment of trusts;

31 (10) "unlimited discretion" means the unlimited right to distribute



1 principal that is not modified in any manner."

2  
3 Renumber the following bill sections accordingly.

4  
5 Page 27, line 3:

6 Delete "sec. 31"

7 Insert "sec. 34"

8  
9 Page 27, line 5:

10 Delete "sec. 31"

11 Insert "sec. 34"

12  
13 Page 27, following line 13:

14 Insert a new subsection to read:

15 "(b) AS 13.36.157, repealed and reenacted by sec. 6 of this Act, AS 13.36.158 and  
16 13.36.159, enacted by sec. 7 of this Act, and AS 13.36.215(5), enacted by sec. 8 of this Act,  
17 apply to a trust that exists before, on, or after the effective date of this Act."

18  
19 Reletter the following subsection accordingly.

20  
21 Page 27, line 14:

22 Delete "sec. 28"

23 Insert "sec. 31"

24  
25 Page 27, line 20:

26 Delete "sec. 31"

27 Insert "sec. 34"

28  
29 Page 27, line 21:

30 Delete "sec. 35"

31 Insert "sec. 38"