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April 3, 2017

Honorable Mia Costello  
Chairman, Senate Labor & Commerce Committee  
State Capitol, Room 504  
Juneau, AK 99801

**Re: Opposition to Decanting Provisions of Senate Bill 94**

Dear Chairman Costello and Members of the Senate Labor & Commerce Committee:

I am a member of a group of attorneys and trust officers who have worked with the Legislature since 1998 to improve Alaska's trust and estate statutes. I am an attorney and have been practicing in the estate planning and estate and trust administration area since the early 1980s.

I am opposed to Senate Bill 94's changes to Alaska's decanting statutes. Decanting is an out-of-court method to change the provisions of trusts. The decanting technique is a valuable tool for adjusting a trust's provisions when circumstances change. However, the provisions of Senate Bill 94 give extraordinary powers to an unlimited authorized trustee (a trustee who is not the settlor or a beneficiary of a trust). These powers apply to all trusts that now exist in Alaska and to trusts brought to Alaska from other states. The proposed provisions of Senate Bill 94 fail to provide adequate safeguards against manipulation and abuse.

Such a trustee (who may just be an individual who is a friend of a beneficiary) can appoint an existing trust's assets to a new trust just for the benefit of one current beneficiary, and for the benefit of future beneficiaries who are not even beneficiaries of the invaded trust (see Section 4 of the bill).

For example, consider a wife (W) who has two children from a prior marriage. She remarries. W's new husband (H) has three children from his first marriage. W's intention in her estate planning is that after she dies her assets are to be held in trust for H, and at his death her assets are to go to her two children. H may be able to have a friend appointed as trustee. Under the proposed provisions, the trustee could direct that after H's death the assets go to his children, rather than to W's children.

Also, under Senate Bill 94, an unlimited authorized trustee may change an ascertainable standard to an absolute discretion standard (see Section 11 of the bill).

For example, many clients leave their assets in trust until their children reach a certain age (e.g., 35 years). However, they want to make sure that their children's health, education, maintenance, and support needs are taken care of. This is called an ascertainable standard which, if necessary, can be enforced by a court. Under the proposed provisions, a trustee can change this standard to one of absolute discretion, so that the trustee is not required to make any distributions to a child.

In addition, under Senate Bill 94, an unlimited authorized trustee may eliminate a beneficiary's mandatory right to a distribution of principal (see Section 11 of the bill).

For example, the client in his estate planning may have directed that at age 35 the trust's assets are to be distributed to his child. Under the proposed provisions, the trustee can decide not to distribute any assets to the beneficiary.

All of the consequences described in the above examples may be the result of manipulation by one beneficiary or a second spouse who is able to obtain the appointment of a friendly unlimited authorized trustee.

Under Senate Bill 94, all of the above manipulations can be done by only giving notice to one beneficiary (see Section 20 of the bill). The other beneficiaries will not even know what happened.

In contrast to the proposed provisions, the 2015 Uniform Trust Decanting Act requires that notice be given to "each qualified beneficiary" (see Section 7 of that Act), among others. That uniform Act's Reporter explains in the Act's Comment:

Generally a trustee is not required to provide notice to beneficiaries prior to exercising a discretionary power. This section is not intended to change the law in this regard except with respect to exercises of the decanting power. *Because qualified beneficiaries are entitled to know the terms of the trust, they should receive notice of any change in the terms of the trust. Requiring prior notice seems reasonable, in light of the significant trust modifications that can be made by decanting, and practical, in that it helps determine if any settlor, fiduciary or beneficiary has an objection to or may challenge the decanting. Any person entitled to notice under subsection 7(c) may petition the court under Section 9 for a determination of whether the proposed or attempted exercise of the decanting power is an abuse of discretion or does not otherwise comply with the act.* (Emphasis added)

Decanting powers which accomplish the substantial changes provided by Senate Bill 94 should only be allowed after notice is given to all interested beneficiaries.

There is a lack of adequate fiduciary duty imposed on the trustee under Senate Bill 94. Section 14 of the proposed bill states that “an authorized 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 . . . .” Limiting the trustee’s duty to the best interests of just one beneficiary allows manipulation which favors just one beneficiary, and ignores the interests of the other beneficiaries.

In contrast, Section 4 of the 2015 Uniform Trust Decanting Act provides:

(a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accord with the purposes of the first trust.

The Comment to the above provision of the Uniform Act provides that the fiduciary shall administer the trust in good faith, in accord with the terms and purposes of the beneficiaries. The Comment further describes the fiduciary’s responsibilities to treat the beneficiaries impartially, to administer the trust as a prudent person would, and to exercise reasonable care, skill and caution. Senate Bill 94 should state the fiduciary’s duties using the same language as is used in the Uniform Act. This will provide assurance that these fiduciary duties are construed by the courts with guidance from the Uniform Act.

In summary, the proposed provisions, as they presently exist Senate Bill 94, invite planning manipulation by a beneficiary who desires to shift assets to his or her benefit or to the benefit of his or her descendants or friends. Many existing trusts have methods for replacement of trustees. A manipulative beneficiary need only to have a friend appointed as trustee, and then the assets of the trust can be appointed in a manner favorable to that beneficiary. The presently proposed provisions of Senate Bill 94 do not adequately safeguard Alaska residents who are beneficiaries of trusts. The changes to Senate Bill 94 described above (notice and fiduciary duty) would provide additional safeguards from manipulation and abuse.

Accompanying this letter are the comments of Susan Bart, the Reporter for the Uniform Trust Decanting Act (2015). She is very critical of these proposed changes.

This bill has not yet been reviewed by the Estate Planning Section of the Alaska Bar Association. Such a review and consideration by the Estate Planning Section should be accomplished before the bill proceeds through the legislative process.

Thank you for your consideration of this matter.

Sincerely,

David G. Shaftel

Attachment: Email from Susan Bart