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April 12, 2017

VIA EMAIL: Senator.Mia.Costello@akleg.gov

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

Re: SUPPORT for SB 94

Dear Madam Chair Costello and Members of the Senate Labor and Commerce Committee:

This letter is written in support of SB 94. I am also writing to respond to the letter written by Dave Shaftel and dated April 3, 2017 in opposition to Senate Bill 94, and specifically the decanting provisions contained therein.

Although Mr. Shaftel is an older and respected attorney, his views on SB 94 are in the extreme minority, and do not represent real world application of how the decanting statutes are used or benefit so many people.

Since 1995, a group of us have been working very hard with the legislature to make Alaska's will, trust and probate laws better and the best in the nation. Mr. Shaftel has been part of this working group and SB 94 is what is today in part because of Mr. Shaftel's input. This same group composed the pieces of the bill before you. Unfortunately, Mr. Shaftel does not like part of SB 94, and for the first time in the group's history, the majority felt it was necessary to proceed without his agreement and over his objections and threats to testify against SB 94.

Trustees, by virtue of being a trustee, are given very broad authority and discretion to exercise their duties. Most of my clients carefully chose a trusted family member or friend to step into their shoes to care for and "trustee" the assets of a trust for the benefit of children, aged-parents, and others. In discussing who is the most appropriate person

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to serve as a trustee, the primary questions is: "Do you trust him/her to be trustee and carry out your intent and wishes?"

Of course, when any power is given, there is the potential for abuse. To combat this abuse, all trustees are held to what is known as a fiduciary standard. The fiduciary standard is the highest under the law. A trustee has the duties of good faith, loyalty, impartiality, and investing the assets properly.

The duty of loyalty is considered the cardinal principal of a fiduciary's powers. This duty requires one to act *solely* in the *best interests of the beneficiaries*, without regard to the trustee's self-interests. This duty is owed to all beneficiaries and cannot be exercised in to sole consideration of only one. The idea that a trustee might arbitrarily exercise discretion in favor of one beneficiary, with no regard for others, goes against this duty.

It is possible that a trustee may not understand the duties or possibly choose to ignore their duties. *For example*: I am working on a case now where a trustee resigned as trustee and appointed a person who is now the ex-spouse of the trust's beneficiary. The trustee (the ex-spouse) is not doing his job, investing poorly (buying high risk stocks), taking title to trust assets in his own name, and refusing to make distributions to his ex-wife and disabled child until they agree to pay him more for his services. We could go to court to remove and replace the trustee, but we are confident the ex-spouse would fight back, using the meager remaining trust assets (less than $450,000) to fight the action. Thus, under the present facts, decanting is the most economical option to remove and replace this very bad trustee.

It is very important to understand that, while decanting is an out-of-court method for changing the provisions of a trust document, it is not done so without legal counsel/representation.

Mr. Shaftel has suggested that a trustee will abuse the decanting statute. He beehives that a trustee may appoint the original trust's assets to a new trust for the benefit of only one beneficiary, and to the exclusion of others. A trust may in fact grant a trust this power – and if so, then the trust is acting appropriately. If a trustee took action to appoint the assets to one beneficiary, and to the exclusion of others, then his actions would be wrong. We cannot prevent a bad person from doing bad things. But a bad trustee would just take action; he would not go hire and attorney to go through the technical and time-consuming process of decanting. Mr. Shaftel's example is not realistic. I also doubt that Mr. Shaftel has any real world evidence that such abuse of the decanting statutes has ever taken place.

Next, Mr. Shaftel suggests that a trustee could thwart the intent of a grantor by decanting to a trust that cuts out the grantors children from a previous marriage. As previously discussed, a trustee is held liable for every action or inaction. Unless the trustee

has sufficient justification, they would not undertake such an action. Additionally, no ethical lawyer would engage in such a process with a trustee.[1]

Mr. Shaftel has suggested that a trustee could decant a trust and change the distribution standard in a document. For background, three of the most common distribution methods or standards are: (i) income-only; (ii) health, education, maintenance and support[2]; and, (iii) discretionary standard. An "income standard" is where the trustee is allowed to distribute income only to the beneficiary. The "HEMS" standard is where the trustee is allowed to make distributions of income or principal to a beneficiary for the health, education, maintenance and support of that beneficiary. The "discretionary standard" is where the trustee is permitted to make distributions only in his sole and absolute discretion.[3]

Unless otherwise required by the trust, none of these standards require the trustee to make any distributions. In fact, Alaska law states that a beneficiary does not have a legal right, unless provided in the document, to the trust, its assets or distributions. Under Alaska law, a beneficiary has a mere expectancy interest in the trust.

In the specific example cited in Mr. Shaftel's letter, there may be a very good reason why a trustee would want to change this standard. For example, a trust that allows distributions for HEMS, may cause adverse or unneeded funds being distributed to a beneficiary. Or, if it is an income only standard, and the child has been in horrific accident and is need a of a "better house" to accommodate his or her needs.

There is a concern that a trustee could eliminate a beneficiary's mandatory right to a distribution of principal. While this would be an ability if this bill were enacted, it would only be done for proper reasons. For example, perhaps this beneficiary has developed a substance abuse problem which was unforeseen when the trust was drafted. In this instance, the trustee would want to change this mandatory right to protect the beneficiary.

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[1] Selecting the right trustee is very important. Personally, if have chosen "Paul" as my trustee, then I have done so because I trust him. If he determines that my children are "bad" and Paul believes that it would be my intent/wish that my children get less because they are bad (or given to them differently), then I do want Paul to act. The key is always to pick the correct person as trustee. Yes, a trustee can go "bad," but that is the exception and not the rule.

[2] This is also know by the initials "HEMS" or under the Internal Revenue Code and regulations as an "ascertainable standard."

[3] Most of my clients make the choice to grant the trust the full and complete discretion to make distributions solely based on what they believe to be appropriate under the circumstances based on the needs and wants of the beneficiary.

After all, trustees are given the duty to act in the best interests of a beneficiary. In this example, taking away this right would be in the beneficiary's best interest.

Mr. Shaftel also suggests that he has a concern that there could be manipulation by a beneficiary, second spouse or bad-trustee to achieve the above actions. This potential already exists under not only Alaska law, but the laws of other jurisdictions. Bad people do bad things. Good people follow the law. So a bad-trustee with the intent on doing bad things will act irrespective of this law.[4] Further, a trustee has already been granted such right under the laws of a number of other states, such as Nevada and South Dakota. Not that Alaska should follow in the footsteps of others, but why limit our residents ability to engage in important or needed planning because someone might potentially do something illegal?

Mr. Shaftel argues that there is not "adequate fiduciary duty imposed on the trustee." This statement is simply not true. Trustees must weight their actions against the benefit of all beneficiaries. However, this is not to say that proper facts and circumstances may warrant the exercise of action that limits a particular beneficiary's interests. Again, a trustee would only take this action with adequate rationale and proper care, skill and caution as required by law.

Mr. Shaftel has stated that SB 94 does not follow along and copy the Uniform Trust Decanting Act (2015). That is correct, and we are very proud of that fact. Uniform laws are good if you want to be uniform and just like everyone else. But Alaskans have always prided ourselves to be independent. As Alaskans, we have *never* wanted to follow in the mold of California and other states just to be like them. That is why we live in Alaska. Alaskans are not just a bunch of dumb sheep without independent thought, following the herd. That is why we as Alaskans have worked so hard to make Alaska the best state to use for will and trust planning. It should be offensive to every Alaskan to have some Uniform Law Commissioner to tell us we have to adopt a uniform law "because everyone else is doing it."

Please understand, that we have worked on various drafts and forms of this law for over three years. We have carefully considered Mr. Shaftel's positions, and we have adopted some of his ideas, but I also do not think that one person with a minority view should sink great legislation that will make decanting in Alaska better for all of us. It is regrettable that Mr. Shaftel has decided that he needed to speak out against the rest of us who support the legislation. Having worked on this legislation with others, I believe that adequate safeguards are in place in both Alaska law and Federal law to limit the potential

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[4] Example: We have laws that make it illegal to drive while under the influence. Sadly, that does not stop DUI-actions. Bad people will chose to do bad things. Mr. Shaftel is wrong to suggest that this law will enable bad people to do bad things.

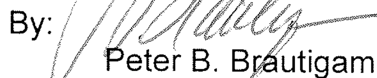
for abuse to the greatest extent possible without constraining planning flexibility for Alaskans. Furthermore, for any person who wishes, he or she may prohibit decanting in general, or specific actions, when drafting their trust.

I am a member of ACTEC like Dave. I have been practicing in the area wills, trust and estate planning for over 32 years. As a drafter, I try to plan for every contingency for my clients, but facts and circumstances change — that is life.[5] And the terms established in a trust 25-35years ago just may not be the correct thing today. Thus decanting is may be required. I ask for you support of SB 94.

Thank you for your consideration of this matter.

Sincerely,

MANLEY & BRAUTIGAM, P.C.



By: Peter B. Brautigam

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[5] Think of how life has changed for you and/or your family over the past 30-50 years. The perfect child at 16, who now has drug or gambling problem. The child at 21 who was drug addict, but at 42, now has been sober for 10 years. The child who married the "perfect spouse," but that spouse is now abusive. The person who was healthy, now is paraplegic with special needs and care requirements. Who would not want their trust to be modified to accommodate for these life changing and unpredicted life events?