

HOUSE CS FOR CS FOR SENATE BILL NO. 369(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 5/12/02

Referred: Rules

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to trusts, including trust protectors, trustee advisors, and transfers of**
2 **trust interests, and to creditors' claims against property subject to a power of**
3 **appointment; and providing for an effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** AS 13.36 is amended by adding new sections to read:

6 **Sec. 13.36.370. Trust protector.** (a) Except for a trust created under
7 AS 47.07.020(f), a trust instrument may provide for the appointment of a disinterested
8 third party to act as a trust protector.

9 (b) A trust protector appointed under (a) of this section has the powers,
10 delegations, and functions conferred on the protector by the trust instrument, which
11 may include the power to

12 (1) remove and appoint a trustee;

13 (2) modify or amend the trust instrument to achieve favorable tax
14 status or to respond to changes in 26 U.S.C. (Internal Revenue Code) or state law, or

1 the rulings and regulations under those laws;

2 (3) increase or decrease the interests of any beneficiary to the trust; and

3 (4) modify the terms of a power of appointment granted by the trust.

4 (c) A modification authorized under (b) of this section may not grant a
5 beneficial interest to an individual or a class of individuals unless the individual or
6 class of individuals is specifically provided for under the trust instrument.

7 (d) Subject to the terms of the trust instrument, a trust protector is not liable or
8 accountable as a trustee or fiduciary because of an act or omission of the trust
9 protector taken when performing the function of a trust protector under the trust
10 instrument.

11 **Sec. 13.36.375. Trustee advisor.** (a) A trust instrument may provide for the
12 appointment of a person to act as an advisor to the trustee with regard to all or some of
13 the matters relating to the property of the trust.

14 (b) If an advisor is appointed under (a) of this section, the property and
15 management of the trust and the exercise of all powers and discretionary acts
16 exercisable by the trustee remain vested in the trustee as fully and effectively as if an
17 advisor were not appointed, the trustee is not required to follow the advice of the
18 advisor, and the advisor is not liable as or considered to be a trustee of the trust when
19 acting as an advisor to the trust.

20 * **Sec. 2.** AS 34.40.110(a) is amended to read:

21 (a) A person who in writing transfers [PROPERTY] in trust **real property,**
22 **personal property, or an interest in real or personal property** may provide that the
23 interest of a beneficiary of the trust, **including a beneficiary who is the settlor of the**
24 **trust,** may not be either voluntarily or involuntarily transferred before payment or
25 delivery of the interest to the beneficiary by the trustee. **Payment or delivery of the**
26 **interest to the beneficiary does not include a beneficiary's use or occupancy of**
27 **real property or tangible personal property owned by the trust if the use or**
28 **occupancy is in accordance with the trustee's discretionary authority under the**
29 **trust instrument.** In this subsection,

30 [(1) "PROPERTY" INCLUDES REAL PROPERTY, PERSONAL
31 PROPERTY, AND INTERESTS IN REAL OR PERSONAL PROPERTY;

1 (2)] "transfer" means any form of transfer, including deed,
2 conveyance, or assignment.

3 * **Sec. 3.** AS 34.40.110(b) is amended to read:

4 (b) If a trust contains a transfer restriction allowed under (a) of this section,
5 the transfer restriction prevents a creditor existing when the trust is created, a person
6 who subsequently becomes a creditor, or another person from satisfying a claim out of
7 the beneficiary's interest in the trust, unless [THE]

8 (1) **the** transfer was intended **primarily** [IN WHOLE OR IN PART] to
9 hinder, delay, or defraud creditors or other persons under AS 34.40.010;

10 (2) **the** trust provides that the settlor may revoke or terminate all or
11 part of the trust without the consent of a person who has a substantial beneficial
12 interest in the trust and the interest would be adversely affected by the exercise of the
13 power held by the settlor to revoke or terminate all or part of the trust; in this
14 paragraph, "revoke or terminate" does not include a power to veto a distribution from
15 the trust, a testamentary special power of appointment or similar power, or the right to
16 receive a distribution of income, corpus, or both in the discretion of a person,
17 including a trustee, other than the settlor;

18 (3) **the** trust requires that all or a part of the trust's income or principal,
19 or both, must be distributed to the settlor; **however, this paragraph does not apply**
20 **to a settlor's right to receive**

21 **(A) income or principal from a charitable remainder**
22 **annuity trust or charitable remainder unitrust; in this subparagraph,**
23 **"charitable remainder annuity trust" and "charitable remainder**
24 **unitrust" have the meanings given in 26 U.S.C. 664 (Internal Revenue**
25 **Code) as that section reads on the effective date of this bill section and as**
26 **it may be amended;**

27 **(B) a percentage of the value of the trust each year as**
28 **determined from time to time under the trust instrument, but not**
29 **exceeding the amount that may be defined as income under AS 13.38 or**
30 **under**

31 **(i) 26 U.S.C. 643(b) (Internal Revenue Code) as that**

1 subsection reads on the effective date of this bill section and as it
 2 may be amended; or

3 (ii) the permanent or temporary regulations adopted
 4 under 26 U.S.C. 643(b); [OR]

5 (4) at the time of the transfer, the settlor is in default by 30 or more
 6 days of making a payment due under a child support judgment or order; or

7 (5) the creditor is seeking to satisfy a claim for child support.

8 * **Sec. 4.** AS 34.40.110(c) is amended to read:

9 (c) The satisfaction of a claim under (b)(1) - (5) [(b)(1) - (4)] of this section is
 10 limited to that part of the trust for [TO] which a transfer restriction is not allowed
 11 under (b)(1) - (5) [(b)(1) - (4)] of this section, and an attachment or other order
 12 may not be made against the trustee with respect to a beneficiary's interest in the
 13 trust or against property that is subject to a transfer restriction, except to the
 14 extent that a transfer restriction is determined not to be allowed under (b)(1) - (5)
 15 of this section [APPLIES].

16 * **Sec. 5.** AS 34.40.110(d) is amended to read:

17 (d) A cause of action or claim for relief with respect to a fraudulent transfer of
 18 a settlor's assets under (b)(1) of this section [,] or under other law [,] is extinguished
 19 unless the action under (b)(1) of this section is brought by a creditor [AS TO A
 20 PERSON] who

21 (1) is a creditor before the settlor's assets are transferred to the
 22 trust, and the action is brought [WHEN THE TRUST IS CREATED,] within the
 23 later of

24 (A) four years after the transfer is made; or

25 (B) one year after the transfer is or reasonably could have been
 26 discovered by the creditor [PERSON]; or

27 (2) becomes a creditor subsequent to the transfer into trust, and the
 28 action is brought within four years after the transfer is made.

29 * **Sec. 6.** AS 34.40.110 is amended by adding new subsections to read:

30 (g) An action or claim under (d)(1) of this section is limited to a cause of
 31 action or claim for relief where the creditor

1 (1) can demonstrate, by a preponderance of the evidence, that the
2 creditor asserted a specific claim against the settlor before the settlor transferred assets
3 to the trust; or

4 (2) files an action against the settlor within four years after the settlor
5 transferred assets to the trust, and the action asserts a specific cause of action based on
6 an act or omission of the settlor that occurred before the transfer.

7 (h) A transfer restriction allowed under (a) of this section applies to a settlor
8 who is also a beneficiary of the trust even if the settlor serves as a co-trustee or as an
9 advisor to the trustee under AS 13.36.375 if the settlor does not have a trustee power
10 over discretionary distributions.

11 (i) A transfer restriction allowed under (a) of this section applies to a
12 beneficiary who is not the settlor of the trust, whether or not the beneficiary serves as a
13 sole trustee, a co-trustee, or an advisor to the trustee under AS 13.36.375.

14 (j) A transfer restriction is allowed under (a) of this section even if a settlor
15 has the authority under the terms of the trust instrument to appoint a trust protector
16 under AS 13.36.370 or an advisor to the trustee under AS 13.36.375.

17 (k) A settlor whose beneficial interest in a trust is subject to a transfer
18 restriction that is allowed under (a) of this section may not benefit from, direct a
19 distribution of, or use trust property except as may be stated in the trust instrument.
20 An agreement or understanding, express or implied, between the settlor and the trustee
21 that attempts to grant or permit the retention of greater rights or authority than is stated
22 in the trust instrument is void.

23 * **Sec. 7.** AS 34.40 is amended by adding a new section to read:

24 **Sec. 34.40.115. Powers as subjecting property to creditors.** The property
25 that a donee of a power of appointment is authorized to appoint is not subject to the
26 claims of the creditors of the donee except to the extent that

27 (1) a donee of an inter vivos or testamentary power of appointment

28 (A) is permitted by the donor of the power to appoint the
29 property to the donee's estate or to the creditors of the donee's estate; and

30 (B) effectively exercises the power of appointment in favor of
31 the donee's estate or the creditors of the donee's estate; or

1 (2) the creditor is seeking to satisfy a claim for child support.

2 * **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to
3 read:

4 **APPLICABILITY.** This Act applies to a trust regardless of whether the trust was
5 created before, on, or after the effective date of the applicable section of this Act.

6 * **Sec. 9.** AS 34.40.110(b), as amended by sec. 3 of this Act, takes effect immediately under
7 AS 01.10.070(c).