

CS FOR SENATE BILL NO. 163(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 4/15/03

Referred: Rules

Sponsor(s): SENATOR SEEKINS

A BILL

FOR AN ACT ENTITLED

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

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) A trust instrument may provide for the
7 appointment of a disinterested third party to act as a trust protector.

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

11 (1) remove and appoint a trustee;

12 (2) modify or amend the trust instrument to achieve favorable tax
13 status or to respond to changes in 26 U.S.C. (Internal Revenue Code) or state law, or
14 the rulings and regulations under those laws;

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

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

3 (c) A modification authorized under (b) of this section may not

4 (1) grant a beneficial interest to an individual or a class of individuals
5 unless the individual or class of individuals is specifically provided for under the trust
6 instrument;

7 (2) modify the beneficial interest of a governmental unit in a trust
8 created under AS 47.07.020(f).

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

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

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

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

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

1 (1) "property" includes real property, personal property, and interests
2 in real or personal property;

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

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

6 (b) If a trust contains a transfer restriction allowed under (a) of this section,
7 the transfer restriction prevents a creditor existing when the trust is created or [,] a
8 person who subsequently becomes a creditor [, OR ANOTHER PERSON] from
9 satisfying a claim out of the beneficiary's interest in the trust, unless the **creditor is a**
10 **creditor of the settlor and**

11 (1) **the settlor's** transfer **of property in trust** was **made with the**
12 **intent** [INTENDED IN WHOLE OR IN PART] to [HINDER, DELAY, OR] defraud
13 **that creditor** [CREDITORS OR OTHER PERSONS UNDER AS 34.40.010];

14 (2) **the** trust provides that the settlor may revoke or terminate all or
15 part of the trust without the consent of a person who has a substantial beneficial
16 interest in the trust and the interest would be adversely affected by the exercise of the
17 power held by the settlor to revoke or terminate all or part of the trust; in this
18 paragraph, "revoke or terminate" does not include a power to veto a distribution from
19 the trust, a testamentary **nongeneral** [SPECIAL] power of appointment or similar
20 power, or the right to receive a distribution of income, **principal** [CORPUS], or both
21 in the discretion of a person, including a trustee, other than the settlor, **or a right to**
22 **receive a distribution of income or principal under (3)(A) or (B) of this**
23 **subsection;**

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

27 **(A) income or principal from a charitable remainder**
28 **annuity trust or charitable remainder unitrust; in this subparagraph,**
29 **"charitable remainder annuity trust" and "charitable remainder**
30 **unitrust" have the meanings given in 26 U.S.C. 664 (Internal Revenue**
31 **Code) as that section reads on the effective date of this bill section and as**

1 it may be amended;

2 (B) a percentage of the value of the trust each year as
 3 determined from time to time under the trust instrument, but not
 4 exceeding the amount that may be defined as income under AS 13.38 or
 5 under 26 U.S.C. 643(b) (Internal Revenue Code) as that subsection reads
 6 on the effective date of this bill section and as it may be amended; or

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

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

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

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

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

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

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

26 (B) one year after the transfer is or reasonably could have been
 27 discovered by the creditor if the creditor

28 (i) can demonstrate, by a preponderance of the
 29 evidence, that the creditor asserted a specific claim against the
 30 settlor before the transfer; or

31 (ii) files another action, other than an action under

1 **(b)(1) of this section, against the settlor that asserts a claim based**
 2 **on an act or omission of the settlor that occurred before the**
 3 **transfer, and the action described in this sub-subparagraph is filed**
 4 **within four years after the transfer** [PERSON]; or

5 (2) becomes a creditor subsequent to the transfer into trust, **and the**
 6 **action under (b)(1) of this section is brought** within four years after the transfer is
 7 made.

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

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

13 (h) A transfer restriction allowed under (a) of this section and enforceable
 14 under (b) of this section applies to a beneficiary who is not the settlor of the trust,
 15 whether or not the beneficiary serves as a sole trustee, a co-trustee, or an advisor to the
 16 trustee under AS 13.36.375.

17 (i) A transfer restriction is allowed under (a) of this section and is enforceable
 18 under (b) of this section even if a settlor has the authority under the terms of the trust
 19 instrument to appoint a trust protector under AS 13.36.370 or an advisor to the trustee
 20 under AS 13.36.375.

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

27 (k) A settlor who creates a trust that names the settlor as a beneficiary and
 28 whose beneficial interest is subject to a transfer restriction allowed under (a) of this
 29 section shall sign a sworn affidavit before the settlor transfers assets to the trust. The
 30 affidavit must state that

31 (1) the settlor has full right, title, and authority to transfer the assets to

1 the trust;

2 (2) the transfer of the assets to the trust will not render the settlor
3 insolvent;

4 (3) the settlor does not intend to defraud a creditor by transferring the
5 assets to the trust;

6 (4) the settlor does not have any pending or threatened court actions
7 against the settlor, except for those court actions identified by the settlor on an
8 attachment to the affidavit;

9 (5) the settlor is not involved in any administrative proceedings, except
10 for those administrative proceedings identified on an attachment to the affidavit;

11 (6) at the time of the transfer of the assets to the trust, the settlor is not
12 currently in default of a child support obligation by more than 30 days;

13 (7) the settlor does not contemplate filing for relief under the
14 provisions of 11 U.S.C. (Bankruptcy Code); and

15 (8) the assets being transferred to the trust were not derived from
16 unlawful activities.

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

18 **Sec. 34.40.115. Subjecting appointed property to claims of donee's**
19 **creditor.** The property that a donee of a power of appointment is authorized to
20 appoint is not subject to the claims of the creditors of the donee except to the extent
21 that a donee of an inter vivos or testamentary power of appointment

22 (1) is permitted by the donor of the power to appoint the property to
23 the donee, the creditors of the donee, the donee's estate, or the creditors of the donee's
24 estate; and

25 (2) effectively exercises the power of appointment in favor of the
26 donee, the creditors of the donee, the donee's estate, or the creditors of the donee's
27 estate.

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

30 **APPLICABILITY.** (a) Except as provided by (b) of this section, this Act applies to a
31 trust regardless of whether the trust was created before, on, or after the effective date of the

1 applicable section of this Act.

2 (b) AS 34.40.110(k), enacted by sec. 6 of this Act, applies to a trust only if the trust is

3 created on or after the effective date of this Act.