

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 15, 2008

1:35 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Lesil McGuire
Senator Bill Wielechowski
Senator Gene Therriault

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 211

"An Act relating to an aggravating factor at sentencing for crimes directed at a victim because of the victim's homelessness."

MOVED SB 211 OUT OF COMMITTEE

HOUSE BILL NO. 197 am

"An Act relating to the issuance of shares of professional corporations to a trust, to trusts, to trustees, to the removal of a trustee, to the compensation of a trustee and a person employed by a trustee, to a trustee's accepting or rejecting a trusteeship, to co-trustees, to a vacancy in a trusteeship, to the resignation of a trustee, to delivery of trust property by former trustees, to the reimbursement of trustee expenses, to the certification of a trust, to the suitability of a trustee, to the place of administration of a trust, to a trustee's power to appoint property to another trust, to a change of the percentage of trust property to be considered principal, to the determination of the value of a trust, and to a settlor's intent when transferring property in trust; amending Rules 54 and 82, Alaska Rules of Civil Procedure; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 211

SHORT TITLE: AGGRAVATING FACTOR: HOMELESSNESS

SPONSOR(s): SENATOR(s) DAVIS

01/16/08 (S) PREFILE RELEASED 1/4/08
01/16/08 (S) READ THE FIRST TIME - REFERRALS
01/16/08 (S) JUD
02/01/08 (S) JUD AT 1:30 PM BELTZ 211
02/01/08 (S) -- MEETING CANCELED --
02/11/08 (S) JUD AT 1:30 PM BELTZ 211
02/11/08 (S) Heard & Held
02/11/08 (S) MINUTE(JUD)

BILL: HB 197

SHORT TITLE: TRUSTS

SPONSOR(s): JUDICIARY

03/14/07 (H) READ THE FIRST TIME - REFERRALS
03/14/07 (H) JUD, FIN
04/04/07 (H) JUD AT 1:00 PM CAPITOL 120
04/04/07 (H) Moved Out of Committee
04/04/07 (H) MINUTE(JUD)
04/05/07 (H) JUD RPT 4DP 2NR
04/05/07 (H) DP: GRUENBERG, LYNN, HOLMES, RAMRAS
04/05/07 (H) NR: COGHILL, SAMUELS
04/05/07 (H) FIN REFERRAL REMOVED
04/05/07 (H) L&C REFERRAL ADDED AFTER JUD
04/20/07 (H) L&C AT 3:00 PM CAPITOL 17
04/20/07 (H) Scheduled But Not Heard
04/30/07 (H) L&C AT 3:00 PM CAPITOL 17
04/30/07 (H) Moved Out of Committee
04/30/07 (H) MINUTE(L&C)
05/02/07 (H) L&C RPT 3DP 3NR
05/02/07 (H) DP: GARDNER, RAMRAS, OLSON
05/02/07 (H) NR: LEDOUX, NEUMAN, GATTO
05/04/07 (H) TRANSMITTED TO (S)
05/04/07 (H) VERSION: HB 197 AM
05/07/07 (S) READ THE FIRST TIME - REFERRALS
05/07/07 (S) JUD
02/15/08 (S) JUD AT 1:30 PM BELTZ 211

WITNESS REGISTER

REPRESENTATIVE RAMRAS
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Sponsor of HB 197.

DOUGLAS J. BLATTMACHR, President and CEO

Alaska Trust Company
Anchorage, AK

POSITION STATEMENT: Spoke in support of HB 197.

BETH CHAPMAN, Attorney at Law
Faulkner Banfield PC
Juneau, AK

POSITION STATEMENT: Provided sectional analysis of HB 197.

JONATHAN BLATTMACHR, Attorney at Law

POSITION STATEMENT: Spoke in support of HB 197.

LINDA HOLBERG, Agent
New York Life
Fairbanks, AK

POSITION STATEMENT: Spoke in support of HB 197.

DAVE SHAFTEL, Attorney at Law
Anchorage, AK

POSITION STATEMENT: Spoke in support of HB 197.

ROBERT MANLEY, Attorney at Law
Anchorage, AK

POSITION STATEMENT: Spoke in support of HB 197.

ACTION NARRATIVE

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at [1:35:00 PM](#). Present at the call to order were Senators French, McGuire, and Wielechowski. Senators Therriault and Huggins arrived soon thereafter.

SB 211-AGGRAVATING FACTOR: HOMELESSNESS

[1:35:21 PM](#)

CHAIR FRENCH announced the consideration of SB 211. He explained that the bill was held over so the committee could consider whether or not to define the term "homelessness" in the bill. He is personally convinced that there isn't a need; juries will understand what the term means. He noted that good points were raised about potential difficulties in prosecuting this crime but the paradigmatic case - the paintball attacks in Anchorage - is one that everyone can understand. This is a good surgical approach for getting at the problem, he said. Finding no further discussion, he asked for a motion.

[1:36:27 PM](#)

SENATOR WIELECHOWSKI motioned to report SB 211 from committee with individual recommendations and attached fiscal note(s).

CHAIR FRENCH announced that without objection SB 211 is moved from committee.

HB 197 am -TRUSTS

1:36:50 PM

CHAIR FRENCH announced the consideration of HB 197 am.

REPRESENTATIVE RAMRAS, sponsor of HB 197 said this bill will make Alaska more attractive to take on unique trust issues. The bill proposes a number of default provisions for trustees that are new to Alaska statutes.

1:39:55 PM

SENATOR THERRIAULT joined the committee.

DOUGLAS J. BLATTMACHR, President and CEO, Alaska Trust Company, said that over the last 18 months his company has done extensive work on HB 197. We support the bill and know of no opposition to it, he said. HB 197 will continue to move Alaska forward as a premier trust jurisdiction.

1:40:56 PM

BETH CHAPMAN, Attorney at Law, Faulkner Banfield PC, said she has practiced in the area of trusts and estates for 20 years and she was principally involved in drafting HB 197. The bill has been discussed statewide by estate planning attorneys and has been the subject of vigorous discussion. From various perspectives many issues have been vetted and compromises have been reached to protect the interests of all the parties to a trust. She will discuss the bill section by section.

MS. CHAPMAN said Section 1 relates to revocable trusts. These are established by an individual who for a variety of purposes puts their assets in a trust. In the event the person becomes disabled, the trustee can handle the trust assets. Also, the assets can be passed without need of probate upon the person's death. These trusts may be revoked. Many professionals who own shares in a professional corporation use revocable trusts and this would clarify that those professional corporation shares can be held by a revocable trust. It would not affect any creditor's ability to access those shares because a revocable trust does not in and of itself provide creditor protections.

The ability of those shares to be subject to a debt or liability of the professional would not be changed.

[1:42:42 PM](#)

SENATOR WIELECHOWSKI asked for a simple explanation of the real implication of Section 1.

MS. CHAPMAN explained that a professional who wants to set up a revocable trust for estate planning purposes can not currently hold their professional corporation shares in a revocable trust. This would allow that to occur so if the professional becomes incapacitated somebody could handle their affairs including winding up the professional corporation without the need to go to court for a conservator, and liquidating and passing to the heirs without the need for a probate. That's why most people use revocable trusts, she added.

SENATOR WIELECHOWSKI asked if there would be liability issues in the circumstance where someone establishes a professional corporation and then gives most of the shares to a revocable trust.

MS. CHAPMAN replied not at all; the shares would still be subject to the creditors of the owner of the professional corporation. Providing creditor protection is not the purpose of a revocable trust. This absolutely does not set up any type of shield.

[1:45:12 PM](#)

MS. CHAPMAN said Sections 2-8 are the provisions that address trustees. Currently Alaska doesn't have any rules for removal of trustees, replacement of trustees, compensation of trustees, or how co-trustees are supposed to act. These default provisions would be read into the trust in the event a person drafts a trust that doesn't contain these provisions. This provides more efficient administration of the trust.

MS. CHAPMAN said that Section 2--Effect of failure to register-- is a reference that if a trustee is going to be removed for failing to register a trust, it would be done under the new removal procedures. Section 3 is a cross reference that the court has the jurisdiction to appoint and remove a trustee. It would reference the new procedure. Section 4 does the same thing. It's a reference to what is now AS 13.36.076.

MS. CHAPMAN said Section 5 is the start of the new provisions. AS 13.36.055 has always allowed a trustee to be reasonably

compensated. This provision provides that if the trust specifies how compensation is to be determined, that will be presumed to be reasonable. That's what the person who established the trust indicated they wanted. That doesn't mean that a beneficiary who believes it's unreasonable can't go to court to try and reduce or eliminate that compensation. They would have to prove that the compensation is unreasonable by a preponderance of the evidence.

CHAIR FRENCH asked if this is based on model legislation.

MS. CHAPMAN replied some is based on model legislation and some is based on a compilation of other state laws. "The bulk of these default provisions came from the Uniform Trust Code, with some modifications - after looking at what other states had done with the Uniform Trust Code as well."

CHAIR FRENCH said he was specifically referring to Section 5.

MS. CHAPMAN relayed that Section 5 was drafted by Alaska attorneys.

SENATOR WIELECHOWSKI questioned how the beneficiaries would be impacted if a trustee were to be compensated at an outrageous amount, say \$1,000 or \$2,000 per hour. That would use up the trust funds yet it would be presumed to be reasonable. He asked if there had been discussion or concern about that.

MS. CHAPMAN acknowledged that there was discussion on that. The only time it's presumed to be reasonable is if the person who established the trust specifically said they wanted to pay a trustee a particular amount. When the person who established the trust sets out their intent that is what is presumed to be reasonable. If a trust says nothing about compensation or simply says it must be reasonable, then there would be no presumption. "There's only a presumption as to what the settlor may have put in that trust." Again, she said it can be overturned by a preponderance of the evidence standard.

[1:49:43 PM](#)

MS. CHAPMAN said Section 6 lays out procedures for how someone agrees to serve as a trustee. One method is by accepting the property. Another method is by notifying the beneficiary in writing that they accept the duties of trusteeship. Also this allows a designated trustee to investigate trust property regarding potential liabilities without actually accepting the duties of the trusteeship. This comes up when certain assets are

placed in trusts. For example a property that has a liquor store or underground oil tanks. This allows a potential trustee to make a reasonable determination about whether or not they want to accept the role of a trustee. This is a new provision and does not amend current statute.

SENATOR WIELECHOWSKI asked what would happen in the event that a designated trustee takes no action at all.

MS. CHAPMAN said that is addressed in a subsequent section. There's a procedure for appointing a successor trustee. That includes court action, if necessary, if nobody is in line to accept the role.

SENATOR WIELECHOWSKI asked how long that might take since there could be liability issues.

MS. CHAPMAN said the statute uses the term "reasonable time" because it may take time to locate the individual. "They want to have the ability to investigate the assets and the circumstances to make sure they want to do so."

MS. CHAPMAN said Sec. 13.36.072 addresses co-trustees. It is not uncommon for a trust to appoint more than one person to act as co-trustees but it won't say whether they must act by unanimous consent or by majority decision. This allows co-trustees to decide to act by majority decision rather than by unanimous decision. Also it allows a co-trustee to delegate their authority to another trustee. This can be important if there are individual trustees rather than corporate trustees and they're going to be out of town or if the other co-trustee has particular expertise.

MS. CHAPMAN said Sec. 13.36.073 is a new provision regarding vacancy in trusteeship and appointing a successor. It sets out the circumstances under which a new trustee would have to be appointed when there's a vacancy. That includes rejecting the trusteeship, not being able to identify the trustee, the trustee resigning, the trustee being disqualified, the trustee dying, and when a guardian or conservator is appointed for an individual who is serving as a trustee. Under Alaska law it's been unclear what happens if the trustee becomes incapacitated and the guardian steps in. "I think it's very important that the fact that they're appointed should cause a vacancy because the settlor didn't appoint the guardian." She described that as an important clarification of the law. This also clarifies how the vacancy will be filled. An overriding consideration in the bill

is that you first look to the terms of the trust. "What the settlor puts in the trust is going to govern." If that's not the case, qualified beneficiaries can appoint the trustees, but they can't appoint one of themselves as a trustee. If that's not the case, the court will appoint an individual or corporate trustee.

[1:54:33 PM](#)

MS. CHAPMAN said if it's a charitable trust the provision allows the charitable organizations that are designated to receive distributions to be involved in deciding who would be the successor trustee. Most trusts name successors in the document but a lot of individuals write their own trusts based on forms so these provisions will be particularly helpful to those individuals when the trust is interpreted.

MS. CHAPMAN said that Sec. 13.36.074 establishes that a trustee who wants to resign must give 30 days written notice or receive approval of the court. Importantly, a trustee who resigns is not discharged from their obligations and liabilities. They have to go through the normal course of wrapping up the trust responsibilities.

MS. CHAPMAN said that Sec. 13.36.076 dealing with removal of a trustee was one of the most controversial provisions, but it does work to protect the settlor's intent of who they wanted to be the trustees. It also protects the trustees so they aren't continually threatened with removal by beneficiaries who are unhappy with their decisions. The provision also protects beneficiaries so that if there are serious issues, they have rights to remove a trustee. There are two procedures for removing a trustee - by decision of a trust protector and by invoking the court's jurisdiction. A trust protector is an individual who is appointed to oversee the trustee. If there is a trust protector, they are first in line to decide about a removal. Notwithstanding a trust protector, a trustee may be removed by invoking the court's jurisdiction if it's necessary.

[1:56:39 PM](#)

MS. CHAPMAN said that Sec. 13.36.077 establishes that the trustee who resigns or is removed must deliver the trust property as soon as possible to a co-trustee or a successor trustee.

Sec. 13.36.078 regarding reimbursement of expenses came directly from the Uniform Trust Code. A trustee who spends his or her own funds on behalf of a trust is entitled to reimbursement for those reasonable and proper expenditures. Subparagraph (B) says

that even if a court were to find that the expenses were not properly incurred, the trustee is to be reimbursed "to the extent necessary to prevent unjust enrichment of the trust." The trust beneficiaries are not supposed to benefit from what might be a mistake in the way expenses were incurred.

[1:57:57 PM](#)

CHAIR FRENCH asked for an example.

MS. CHAPMAN described a circumstance where a trustee used his or her own funds to purchase a piece of property on behalf of the trust and had the title put in the name of the trust. But pursuant to the terms of the trust, the trustee wasn't supposed to be able to buy that particular piece of property. The trustee made a mistake and the result is that the trust owns the property and the trustee is out the money. This provision says that the trustee is to be reimbursed from the trust otherwise the trustee's mistake enriches the trust.

[1:58:47 PM](#)

SENATOR HUGGINS joined the meeting.

MS. CHAPMAN said Sec. 13.36.079 relates to certification of trust. She explained the provision as follows:

Those of us who work with banks, brokerage houses or even real estate title companies many times we have to demonstrate that the trustee has the authority to take the action that they are going to take. But the trust also contains people - the settlor's dispositive provisions. What's going to happen when they die. They don't want people to know that. They don't want to share that information. This provision would allow us to instead furnish a certification of the trust - which we all do in practice anyways. And that certification would highlight what the powers are of the trustee, who's the trustee, who's the settlor, the tax identification number, and would allow us to give excerpts of those provisions alone. But would prevent some brokerage house or title company from saying 'I want the entire trust.' Even though many of the provisions will become effective at the death of the settlor and can be changed because it's a revocable trust and they'd want that to be kept private just like they would with their last will and testament. This has been the practice and has been accepted by most banks and brokerage houses - but not by all. And

so we thought it would be very important along the lines of the Uniform Trust Code to have on the books, statutory authority to use trust certifications.

[2:01:07 PM](#)

MS. CHAPMAN said that Section 8 corrects a reference to the removal procedure. Section 9 amends AS 13.36.157(b), which allows a trustee who has the discretion to distribute assets out of a trust to put those assets into another trust instead of giving them to the beneficiary outright. This is used when a trust is going to terminate and it wouldn't be in the beneficiary's best interest to receive the assets outright. The assets are moved to a new trust that has the same terms and conditions. What the amendment does is allow individuals from outside Alaska to move trusts to Alaska by having an Alaska trustee. It's a provision that is likely to bring more trust business to the state.

[2:02:28 PM](#)

MS. CHAPMAN said Section 10 references the removal procedure. If a trustee violates any of the statutory requirements, they could be removed under the procedure outlined in Sec. 13.36.076.

Section 11 provides the definition of "qualified beneficiary" for all the trustee provisions. It means a beneficiary who is entitled or eligible to receive a distribution of trust income or principal. Or it's a beneficiary who would be entitled to receive a distribution of the trust income or principal if the event causing the trust termination occurs. For example, if there's a trust for the mother and at her death it goes to the children, those children would have the same rights as the mother under the statute.

MS. CHAPMAN said that Section 12 deals with charitable trusts. In 2003 the Uniform Principal and Income Act was adopted. At the same time a provision for charitable and other trusts was adopted to be able to define income by reference to a percentage of the value of the trust rather than what would normally be considered income. "So when we consider income, we look at what's the interest earned on bank accounts, what are the dividends on the stock account. And that's what's going to be distributed to the beneficiaries." As a result, trustees who have to distribute what is known as "traditional incomes" have to invest very conservatively. They can't look to grow the trust because they have to generate income. In particular charitable trusts are perpetual and they only benefit charities. When there is only income distributions to charities, they're getting very

little because the trustees aren't able to grow the principal. Thus it becomes less beneficial to the charitable organization.

SENATOR WIELECHOWSKI observed that this looks like a significant change moving from what is probably a conservative approach to one that potentially allows a lot of change. He asked if this is from the model statute or if it's in line with what other states have done.

MS. CHAPMAN replied this is very much in line with what other states have done. There's been a move in trust investments from the traditional investment policy to a total return investment strategy. This accommodates income beneficiaries who want income and remainder beneficiaries who want growth. Several years ago the uniform prudent investor rule was adopted and it allows the value of the trust to be expressed as a percentage rather than in terms of traditional income. In most circumstances this allows more investment opportunity, more growth, and more income.

[2:07:35 PM](#)

MS. CHAPMAN said that she worked with trustees of a Sitka charitable trust who wanted to do total return investing. Although statute has allowed this since 2003, the trustees were restricted to looking at the investments just once every ten years. That was challenged in court and the court agreed the limitation was not reasonable. This will allow trustees to look at their investment strategies and distributions more often and respond to changes in circumstance.

CHAIR FRENCH asked if this is the same concept as the prudent investor rule that was adopted by the Permanent Fund.

MS. CHAPMAN replied it's the same concept.

[2:08:34 PM](#)

SENATOR WIELECHOWSKI asked if she is aware of any negative experience with this kind of language. "It's just a big change and I want everyone to make sure we understand what we're getting ourselves into."

MS. CHAPMAN explained that the change is designed to take into account the fact that there could be a fluctuation in the stock market. You're basing this on the value of the trust averaged over three years. That takes ups and downs in the stock market into consideration. "I believe it's actually the more prudent

way and the better way to protect trust assets than the traditional investing and distribution methods."

[2:09:46 PM](#)

CHAIR FRENCH added that the statute says that the percentage of the value of the trust that will be considered income can't be less than 2 percent or more than 7 percent per year.

MS. CHAPMAN agreed.

MS. CHAPMAN said Section 13 is about value determination. The value of the trust may be averaged over three or more preceding years. If the trust has been in existence less than three years and the trustee wants to average the value, then the average is taken over the period during which the trust has been in existence.

MS. CHAPMAN said that Section 14 addresses a court case from the Ninth Circuit Court of Appeals. Currently Alaska has uniform fraudulent conveyance laws meaning that the intent to defraud creditors is unlawful. "If you set up a trust with the intent to defraud your creditors, they can come and attack the trust and possibly reach the assets." The Ninth Circuit said that expressing the intent to do asset protection could be equivalent to intent to defraud. This provision makes it clear that asset planning protection in and of itself is not inappropriate. For example, if a parent sets up a trust for a child because they're worried that their spendthrift child might in the future run up huge credit card bills, that in itself is not intent to defraud.

[2:12:27 PM](#)

SENATOR WIELECHOWSKI asked if a trust beneficiary could also be a potential future creditor. For example, could a child who is a beneficiary of his parent's trust also be a potential creditor.

MS. CHAPMAN said no, he is a beneficiary of the trust.

SENATOR WIELECHOWSKI asked if there could be a circumstance where someone who is a future beneficiary would also be considered a creditor.

MS. CHAPMAN replied she's not aware of that situation.

MS. CHAPMAN said Section 15 repeals the definition of qualified beneficiary in AS 13.36.360(d). Section 16 is the enactment in the indirect court rule change. That's because of the penalties

and potential award of attorney fees if there's a challenge of one of the trust certifications.

[2:14:05 PM](#)

SENATOR WIELECHOWSKI noted that this applies to trusts on or after the effective date of this Act so basically all trusts come under this.

MS. CHAPMAN replied that's correct with some of the sections, most of which are the default provisions.

CHAIR FRENCH opened public testimony.

[2:14:45 PM](#)

JONATHON BLATTMACHR relayed that he was fortunate to have helped in drafting HB 197. He has clients nationwide and most of trusts his clients elect to use are located in Alaska. This bill continues to put Alaska in the forefront of having the best trust system in the country. He hopes the committee approves the bill.

[2:15:32 PM](#)

LINDA HOLBERG, Agent, New York Life, Fairbanks said she's been with New York Life for about 20 years and has had the opportunity to work with Alaska trust ideas and legislation. Alaska trusts have brought jobs, opportunities, and a great deal of money into the state, which has made a lot of other economic development possible. "I'd like to support this bill."

[2:16:16 PM](#)

DAVE SHAFTEL, Attorney at Law, said he along with a number of other attorneys worked on HB 197 but Ms. Chapman has done the brunt of the work to come up with a very practical bill. It provides default provisions if they aren't already included in the trust instrument. These provisions could be included in every trust document but that would lengthen and make more complicated the trust instrument. "We can rely on these provisions when we want to as being inserted by our state statutes and we don't need to cover them in the trust documents." This is an excellent bill that is much needed.

[2:18:08 PM](#)

CHAIR FRENCH asked if he's aware of any opposition to the changes that are incorporated in HB 197.

MR. SHAFTEL replied he's not aware of any opposition.

[2:18:29 PM](#)

ROBERT MANLEY, Attorney at Law, Anchorage, said he practices in the area of trusts and estates. He supports HB 197 not only because it keeps Alaska an attractive environment for trusts that may be funded from outside Alaska, but also because the provisions make it easier and less expensive for Alaskans to carry out their estate plans. "That's why I am supporting the bill."

[2:19:04 PM](#)

CHAIR FRENCH said he wanted to read a letter into the record. It seems to ring of authenticity.

My name is Stephen E. Greer and I am a sole practitioner whose area of practice is exclusively estate planning. I do not represent any of the trust companies and my typical client is the average working Alaska individual and couple. I am particularly sensitive to the needs and concerns of trust beneficiaries. I would like to express my support for HB 197. This bill, even before its introduction in the House, went through a rigorous discussion and drafting process in which the three competing interests: settlors, trustees, and beneficiaries were addressed and resolved. This bill represents a compromise between those interests and an improvement over existing law. Even though I am not able to attend telephonically, if you have any questions I will be more than happy to answer any questions which a member might have.

[2:20:15 PM](#)

SENATOR THERRIAULT relayed that Mr. Greer was instrumental in working on trusts laws that were passed some years ago. "I was glad to see that he's still involved."

CHAIR FRENCH announced he would hold HB 197 am for a future hearing. His expectation is that it will move from committee next week.

There being no further business to come before the committee, Chair French adjourned the meeting at [2:21:05 PM](#).