

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

February 21, 2018

2:06 p.m.

**MEMBERS PRESENT**

Senator John Coghill, Chair  
Senator Mia Costello  
Senator Pete Kelly  
Senator Bill Wielechowski  
Senator Click Bishop

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

HOUSE BILL NO. 208

"An Act relating to trusts and powers of appointment; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 151

"An Act relating to the number of superior court judges in the first judicial district; and providing for an effective date."

- MOVED SB 151 OUT OF COMMITTEE

**PREVIOUS COMMITTEE ACTION**

BILL: SB 151

SHORT TITLE: NUMBER OF SUPERIOR COURT JUDGES

SPONSOR(s): RULES BY REQUEST

01/22/18	(S)	READ THE FIRST TIME - REFERRALS
01/22/18	(S)	JUD
02/19/18	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/19/18	(S)	Heard & Held
02/19/18	(S)	MINUTE(JUD)
02/21/18	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: HB 208

SHORT TITLE: TRUSTS; COMM PROP TRUSTS; POWERS OF APPT  
SPONSOR(s): JOHNSON

03/31/17	(H)	READ THE FIRST TIME - REFERRALS
03/31/17	(H)	JUD
04/10/17	(H)	JUD AT 1:00 PM GRUENBERG 120
04/10/17	(H)	Scheduled but Not Heard
04/12/17	(H)	JUD AT 1:00 PM GRUENBERG 120
04/12/17	(H)	Heard & Held
04/12/17	(H)	MINUTE(JUD)
04/14/17	(H)	JUD AT 1:00 PM GRUENBERG 120
04/14/17	(H)	Moved HB 208 Out of Committee
04/14/17	(H)	MINUTE(JUD)
04/15/17	(H)	JUD RPT 2DP 5NR
04/15/17	(H)	DP: KOPP, CLAMAN
04/15/17	(H)	NR: EASTMAN, FANSLER, KREISS-TOMKINS, LEDOUX, REINBOLD
05/10/17	(H)	TRANSMITTED TO (S)
05/10/17	(H)	VERSION: HB 208
05/11/17	(S)	READ THE FIRST TIME - REFERRALS
05/11/17	(S)	L&C, JUD
01/30/18	(S)	L&C AT 1:00 PM BELTZ 105 (TSBldg)
01/30/18	(S)	Moved HB 208 Out of Committee
01/30/18	(S)	MINUTE(L&C)
01/31/18	(S)	L&C RPT 2DP 2NR
01/31/18	(S)	DP: COSTELLO, MEYER
01/31/18	(S)	NR: MICCICHE, GARDNER
02/19/18	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/19/18	(S)	Heard & Held
02/19/18	(S)	MINUTE(JUD)
02/21/18	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

#### **WITNESS REGISTER**

ANDREW EVENS, Staff  
Representative DeLena Johnson  
Alaska State Legislature  
**POSITION STATEMENT:** Juneau, Alaska

BETH CHAPMAN, Attorney  
Faulkner Banfield PC  
Juneau, Alaska  
**POSITION STATEMENT:** Provided supporting testimony on HB 208.

DAVID G. SHAFTEL, Attorney  
Shaftel Law Offices, P.C.  
Anchorage, Alaska

**POSITION STATEMENT:** Testified in opposition to HB 208 as currently drafted.

ABIGAIL O'CONNOR, Attorney  
Holland & Knight LLP  
Anchorage, Alaska

**POSITION STATEMENT:** Stated support for HB 208.

#### **ACTION NARRATIVE**

[2:06:21 PM](#)

**CHAIR JOHN COGHILL** called the Senate Judiciary Standing Committee meeting to order at 2:06 p.m. Present at the call to order were Senators Bishop, Costello, and Chair Coghill. Senator Kelly joined during the introduction and Senator Wielechowski arrived soon thereafter.

#### **HB 208-TRUSTS; COMM PROP TRUSTS; POWERS OF APPT**

[2:07:16 PM](#)

CHAIR COGHILL announced the consideration of HB 208.

[2:08:56 PM](#)

ANDREW EVENS, Staff, Representative DeLena Johnson, Alaska State Legislature, Juneau, Alaska, recapped that the Alaska Trust Act passed in 1997, broadening the flexibility of managing trusts. At that time Alaska was among the top three jurisdictions for placing trusts, but it has since slipped to number eight. The primary purpose of the bill is to restore Alaska to its former position as a premiere situs for trusts. HB 208 updates, clarifies, and increases the flexibility of trust law while maintaining the current protections.

He listed the things HB 208 does for Alaska. First, it promotes increased investment in Alaska and opportunities for growth in the financial services sector. Second, it expands an industry that is not natural resource dependent by attracting non-resident trust business. Third, trust administration creates higher paying jobs for accountants, attorneys, and other trust professionals. Finally, it is revenue positive. Registration fees and life insurance premium taxes from trusts are expected to bring in between \$7 million and \$12 million annually.

[2:12:16 PM](#)

BETH CHAPMAN, Attorney, Faulkner Banfield PC, Juneau, Alaska, stated that she has practiced in the trust and estates area of

law for the past 30 years. She said HB 208 modernizes provisions in Title 13 (the Uniform Probate Code (UPC)) and clarifies areas where questions have arisen. She opined that this bill continues to improve the law and decreases the potential for litigation.

CHAIR COGHILL asked Mr. Evans to go through the sectional analysis focusing on the changes, the section in which it appears, and the reason for the change.

MR. EVANS provided the following sectional review of HB 208.

Section 1 adds new subsections (b) through (f) to AS 13.12.704 to clarify the powers of appointment.

Subsection (b) states that a power of appointment will be considered to be held as a nonfiduciary power of appointment unless granted to a trustee or other fiduciary as a trustee or other fiduciary.

He deferred to Ms. Chapman for explanation.

MS. CHAPMAN explained that a power of appointment might give a beneficiary the right to decide who gets the assets when a trust ends. This subsection clarifies that this is an individual right that is not subject to review by the court or anybody else. This protects beneficiaries and avoids disputes going forward.

[2:15:56 PM](#)

SENATOR WIELECHOWSKI joined the committee.

MR. EVANS said Section 2 amends AS 13.36.109 relating to specific powers of trustees. It gives a trustee the power to buy liability insurance to protect the trustee against beneficiaries of the trust.

CHAIR COGHILL observed that the largest change appears on page 4, lines 4-5.

MS. CHAPMAN said this clarifies that when trustees purchase insurance for the trust it can include liability insurance for the trustee for claims brought by beneficiaries.

MR. EVANS read:

Section 3 adds a subsection to AS 13.36.109 (trustee's specific powers). Allows a trustee to charge against

trust property the cost incurred to perform an action authorized by (a) of the section.

This essentially allows the trust to pay for activities that are necessary to the trust.

He said Sections 4-22 relate to the increased flexibility of decanting.

[2:18:35 PM](#)

SENATOR WIELECHOWSKI referenced the communication from Shaftel Law Offices, P.C. that expressed concern with HB 208. He read the following that Mr. Shaftel articulated about Section 4.

Under the bill, an unlimited authorized 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).

CHAIR COGHILL asked Mr. Shaftel to speak to his concerns.

[2:20:05 PM](#)

DAVID G. SHAFTEL, Attorney, Shaftel Law Offices, P.C., Anchorage, Alaska, stated that he has been practicing in the estate planning area of law since the 1980s and is a member of a group of attorneys and trust officers who have worked with the legislature to improve Alaska's trust and estate laws since the late 1990s. He participated in drafting the existing decanting provision and is opposed to those provisions in HB 208 as currently drafted.

He said decanting is a useful tool for modifying trust provisions, but it must strike a balance between allowing needed changes and protecting the settlors' intent. He maintained that the current draft of the proposed decanting provisions is significantly out of balance and does not have adequate safeguards. He warned that these provisions would apply to all trusts that now exist in Alaska.

MR. SHAFTEL said the key premise in HB 208 is that very broad new powers are given to any trustee who is not a settlor or a beneficiary of the trust. If a manipulating beneficiary can get a friendly trustee appointed, then this friendly trustee can really do just about anything to the dispositive provisions of

the trust. He provided a hypothetical example of a wife with two children from a prior marriage. She leaves her assets in trust for her new husband, and at his death the assets are to go to her two children. The husband names a friend as trustee and under HB 208 the trustee can direct that after the husband's death the wife's assets go to his children, not hers. He said this can be done under Section 4 of the bill.

He provided a second hypothetical example where a couple created wills and a trust for the benefit of their three children. The couple gave the trustee directions to hold the assets in trust until a certain age but to make distributions according to an ascertainable standard for health, education, maintenance, and support. If one child is manipulative and has the power to change trustees and he names a friend who will accommodate his wishes. Under HB 208, that trustee then can change the standard for health, education, maintenance, and support to one of absolute discretion and distribute assets as he/she sees fit. The trustee could give the manipulative child the power to appoint the assets to anyone, not necessarily a family member.

He provided a third hypothetical example that applies to both irrevocable and revocable trusts. A person is using a revocable trust instead of a will as the center piece of their estate planning and they become incapacitated. The trustee can appoint a friendly trustee who can change the whole dispositive plan, even though the person who created the will is still alive.

MR. SHAFTEL maintained that under HB 208, a person who wants to manipulate a trust to change the dispositive plan, simply has to get a friendly trustee appointed. Many existing trusts in Alaska have a child or spouse named as trustee and they have the right to name a successor. As long as the trustee is not the settlor or beneficiary, that trustee has very broad powers. Section 20 of HB 208 provides that only one beneficiary needs to be notified if a trust is decanted. Further, the fiduciary duty under HB 208 is limited to the best interest of one beneficiary. Section 14 of the bill eliminates language which refers to and asks for consideration of the settlor's intent.

MR. SHAFTEL advised that he submitted a memo and attached an email exchange he had with the Reporter for the Uniform Trust Decanting Act. She was commenting on the Senate companion to HB 408 and was very critical of it for the reasons previously mentioned. He also pointed out that the bill has not been reviewed and approved by the Alaska Bar Association's Estate Planning Section.

MR. SHAFTEL summarized that the decanting provisions are not yet ready to be enacted until safeguards are added. Notice should be given to all beneficiaries when changes are made, and the fiduciary duty should be broadened so that the trustee has duty to all the beneficiaries. The fiduciary duties should be stated in the bill so that someone who accepts this role will be advised as to their responsibilities. Finally, there are some confusing and ambiguous provisions in Section 7 and Section 4(b).

[2:31:45 PM](#)

CHAIR COGHILL asked Mr. Evans who would like to respond to Mr. Shaftel's testimony.

MR. EVANS suggested Ms. Chapman respond.

[2:32:40 PM](#)

MS. CHAPMAN said Section 4 addresses the exercise of power of appointment by an authorized trustee, which is a power trustees have under existing law. Right now, a trustee who has the discretion could distribute principal from a trust to one beneficiary or they could distribute it equally. What HB 208 does is clarify that a trustee who has the discretion can take the assets from a trust and put them in a new trust for the current and future benefit of one or more of the current beneficiaries and to the exclusion of the others. This has been the law. What the bill changes is that future beneficiaries may be added. This is not unusual.

MS. CHAPMAN said the protections in this bill are that the assets remain within a legal entity and the trustee continues to be liable to all the beneficiaries until he/she provides an accounting of his/her actions. She described the concern that notice of a distribution to a new trust may be to just one beneficiary as unfounded.

MS. CHAPMAN said she finds that HB 208 balances the ability to be flexible to respond to changed circumstances with protecting beneficiaries. She hasn't seen a case of abuse of the current statute and her firm uses it frequently. In many circumstances it's to help families protect their children, particularly when they have a substance abuse problem, for example. Instead, the assets can be put into a trust that continues to protect the assets. She said the bill is drafted to strike a balance and all the points of view have been considered.

CHAIR COGHILL asked how the Uniform Law factored in this change.

MS. CHAPMAN clarified that this is not based on the Uniform Law. Alaska passed the decanting statute many years before the Uniform Law came into existence. She said the question of whether the Uniform Law is too restrictive or if it's protective can't be answered because people have different opinions. She opined that having some notice requirements and always holding a trustee liable until every qualified beneficiary has been given an accounting is the most protective way to move forward and allow for flexibility.

SENATOR WIELECHOWSKI asked if the Alaska Bar Association has weighed in on the bill.

MS. CHAPMAN said she didn't know the Alaska Bar Association policy on weighing in on legislation. She said she has a lot of respect for Mr. Shaftel, but they disagree on this point. She has used this law many times and it has always been to the benefit of families moving forward without going to court. She described the bill as very balanced.

CHAIR COGHILL asked Ms. O'Connor to provide her testify.

[2:42:40 PM](#)

ABIGAIL O'CONNOR, Attorney, Holland & Knight LLP, Anchorage, Alaska, said she testified on HB 208 several days ago and was reiterating her support today. She said her perspective as a trust and estates attorney who practices in both Alaska and Florida is that Florida's decanting statute is so restrictive it's not used very often. If a Florida trust needs to be decanted, it is easier, although more expensive, to move the situs to Alaska. She agreed with Ms. Chapman that Alaska already has statutory safeguards regarding trust decanting and opined that someone who wants to be nefarious with a trust will do it regardless of the statute. It's a problem, but current law provides that a trustee can appoint all the assets to one beneficiary and the other beneficiaries won't find out until they receive an accounting. "I don't know that we can have a statute that prevents every bad actor from creating every conceivable kind of bad act."

[2:46:41 PM](#)

CHAIR COGHILL held HB 208 in committee.

**SB 151-NUMBER OF SUPERIOR COURT JUDGES**

[2:47:23 PM](#)

CHAIR COGHILL announced the consideration of SB 151.

[2:47:52 PM](#)

NANCY MEADE, General Counsel, Alaska Court System, Anchorage, Alaska, offered to answer questions regarding SB 151.

CHAIR COGHILL found no questions.

[2:48:15 PM](#)

SENATOR COSTELLO moved to report SB 151, version A, from committee with individual recommendations and attached zero fiscal note.

CHAIR COGHILL found no objection and SB 151 was reported from the Senate Judiciary Standing Committee.

[2:49:56 PM](#)

There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at