

HB

220

FISCAL NOTE No. 2

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Bill Version: SB 166
(S) Publish Date: 1-18-00

Revision Date/Time (Note if correction) 1/12/00, 5:13 PM Dept. Affected Law
 Title "An Act relating to the amendment and revocation of spouses' community property agreements and ..." BRU Civil Division
 Sponsor Senate Judiciary Committee by Request Component Commercial
 Requester Senate Rules Committee Component Serial No. 2211

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

SB 166 makes technical corrections to the Community Property Act passed in 1998. The bill relates to amending the community property agreement with regard to disposition of the surviving spouse's property after the death of the first spouse.

This bill will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson *Joan M. Kasson* Phone 465-5370
 Division Attorney General's Office Date/Time 1/12/00, 5:13 PM
 Approved by Commissioner *Bruce M. Botelho* Date 1/12/00
 Agency Department of Law

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Alaska State Legislature



House of Representatives House Judiciary Committee

EXPLANATION OF PROPOSED AMENDMENTS TO ALASKA COMMUNITY PROPERTY ACT HB 220

- The Alaska Community Property Act is based upon the Uniform Marital Property Act (UMPA). One of the many features shared by both Acts is a provision enabling a married couple to make a non-testamentary disposition under a community property agreement or trust.
- Although the Alaska Community Property Act (ACPA) has successfully enabled many Alaska spouses to form community property agreements and trusts, there is a glitch in the current language of the Act that must be amended to ensure that its purposes are not thwarted.
- Currently, the language in ACPA provides that community property instruments may not be amended or revoked unless the agreement or trust itself provides for revocation "on a particular date or on the occurrence of a particular event," or unless the agreement or trust is amended or revoked by a later community property agreement or trust.
- This language is not only awkward, but may lead to a result that is in opposition to the intent of the married couple who has created the community property instrument.
- The problem is that the above-described provision may create an argument that the surviving spouse does not have the power to amend the agreement. The Act's restrictive language regarding the power to amend only on a particular date or upon the occurrence of a particular event could be interpreted to mean that the surviving spouse really has no meaningful power to amend the agreement.
- In turn, the IRS would then have the power to assess a gift tax on the surviving spouse based on the assets that will go on the agreement's beneficiaries after the surviving spouse's death. This flows from the notion that without any power to amend the instrument, the surviving spouse has, in fact, made a completed taxable gift at the first spouse's death.
- This concern is real and has already been guarded against in the State of Wisconsin through the enactment of an amendment virtually identical to that of HB 220. The Uniform Marital Property Act (UMPA), was also enacted in Wisconsin. In fact, Wisconsin and Alaska are the only two states that have enacted UMPA. Accordingly, Wisconsin also had the same

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awkward, overly-restrictive language that we currently have regarding amending community property agreements and trusts.

- The reality that this language could be misinterpreted to mean that the surviving spouse made a completed taxable gift to the agreements beneficiaries, stemmed from a decision that was handed down by the Seventh Circuit Court of Appeals.
- In *Pyle v. United States*, the Court held that after the death of the first spouse, the surviving spouse did not have the ability to meaningfully change the will. Therefore, the Court reasoned, at that time of the first spouse's death, the surviving spouse made a taxable gift to the residuary beneficiaries who would inherit after the surviving spouse's death. As a result, gift tax was payable at the death of the first spouse, which otherwise would have been deferred until the death of the surviving spouse.
- Wisconsin practitioners became concerned and the Wisconsin legislature amended its community property statute to create a default rule that a surviving spouse may unilaterally amend a community property agreement with respect to property to be disposed of at the death of the surviving spouse. Such a provision would prevent application of the decision of *Pyle v. United States* because the amendment would prevent the gift from being completed until the death of the surviving spouse.
- The proposed amendments to A.S. 34.75.090 and .100 are virtually identical to the amendments enacted by the Wisconsin Legislature.
- The amendments state that if a community property agreement or trust provides for the non-testamentary disposition of property, without probate, at the death of the second spouse, at any time after the death of the first spouse the surviving spouse **may amend** the community property agreement or trust with respect to property to be disposed of at his or her death unless the community property agreement or trust provides otherwise.
- The purpose of this language is to prevent a community property agreement or trust from inadvertently creating a completed gift at the death of the first spouse which would require the payment of federal gift tax, which otherwise would be deferred until the death of the surviving spouse.

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PROPOSED AMENDMENTS

AS 34.75.090. Community property agreement. ***

1. A community property agreement may not be amended or revoked unless the agreement itself provides for revocation on a particular date or on the occurrence of a particular event, or unless the agreement is amended or revoked by a later community property agreement. To amend or revoke the agreement, the later community property agreement is not required to declare any property of the spouses as community property. The amended agreement or the revocation is enforceable without consideration. **However, if a community property agreement provides for the non-testamentary disposition of property, without probate, at the death of the first spouse the second spouse, at any time after the death of the first spouse the surviving spouse may amend the community property agreement with regard to property to be disposed of at his or her death unless the community property agreement expressly provides otherwise.**

AS 34.75.100. Community property trust. ***

- (e) A community property trust may not be amended or revoked unless the agreement itself provides for revocation on a particular date or on the occurrence of a particular event or unless the agreement is amended or revoked by a later community property trust. To amend or revoke the trust, the later community property trust is not required to declare any property held by the trustee as community property. The amended trust or revocation is amended without consideration. **However, if a community property trust provides for the non-testamentary disposition of property, without probate, at the death of the second spouse, at any time after death of the first spouse the surviving spouse may amend the community property trust with regard to property to be disposed of at his or her death unless the community property trust expressly provides otherwise.**

SPONSOR STATEMENT

EXPLANATION OF PROPOSED AMENDMENTS TO ALASKA COMMUNITY PROPERTY ACT

HB 220

The Alaska Community Property Act is based upon the Uniform Marital Property Act. One new feature added by UMPA is the ability of a couple to make a non-testamentary disposition under a community property agreement. Alaska enacted the same provision which is applicable to both community property agreements and community property trusts. Further, the Alaska Act provides that such instruments may not be amended or revoked unless the agreement or trust itself provides for revocation "on a particular date or on the occurrence of a particular event," or unless the agreement or trust is amended or revoked by a later community property agreement or trust.

The above-described provisions may create an argument that the surviving spouse makes a completed taxable gift at the first spouse's death. The following history explains this issue. The Uniform Marital Property Act was previously enacted in Wisconsin. Subsequently, the decision in *Pyle v. United States*, 766 F.2d 1141 (7th Cir. 1985) was decided. This case involved an Illinois joint will. The court held that after the death of the first spouse, the surviving spouse could not change the will. Therefore, at that time, the surviving spouse made a taxable gift to the residuary beneficiaries who would inherit after the surviving spouse's death. As a result, transfer tax was payable at the death of the first spouse, which otherwise would have been deferred until the death of the surviving spouse.

Wisconsin practitioners became concerned, and the Wisconsin legislature amended its community property statute to create a default rule that a surviving spouse may unilaterally amend a community property agreement with respect to property to be disposed of at the death of the surviving spouse. Such a provision would prevent application of the decision of *Pyle v. United States* because the amendment would prevent the gift from being completed until the death of the surviving spouse.

The proposed amendments to A.S. 34.75.090 and .100 are similar to the amendments enacted by the Wisconsin Legislature. They state that if a community property agreement or trust provides for the non-testamentary disposition of property, without probate, at the death of the second spouse, at any time after the death of the first spouse the surviving spouse may amend the community property agreement or trust with respect to property to be disposed of at his or her death, unless the community property

trust provides otherwise. The purpose of this language is to prevent a community property agreement or trust from inadvertently creating a completed gift at the death of the first spouse which would require the payment of federal transfer tax, which otherwise would be deferred until the death of the surviving spouse.

AS 34.75.090. Community property agreement. ***

- (e) A community property agreement may not be amended or revoked unless the agreement itself provides for revocation on a particular date or on the occurrence of a particular event, or unless the agreement is amended or revoked by a later community property agreement. To amend or revoke the agreement, the later community property agreement is not required to declare any property of the spouses as community property. The amended agreement or the revocation is enforceable without consideration. **However, if a community property agreement provides for the non-testamentary disposition of property, without probate, at the death of the first spouse the second spouse, at any time after the death of the first spouse the surviving spouse may amend the community property agreement with regard to property to be disposed of at his or her death unless the community property agreement expressly provides otherwise.**

AS 34.75.100. Community property trust. ***

- (e) A community property trust may not be amended or revoked unless the agreement itself provides for revocation on a particular date or on the occurrence of a particular event or unless the agreement is amended or revoked by a later community property trust. To amend or revoke the trust, the later community property trust is not required to declare any property held by the trustee as community property. The amended trust or revocation is amended without consideration. **However, if a community property trust provides for the non-testamentary disposition of property, without probate, at the death of the second spouse, at any time after death of the first spouse the surviving spouse may amend the community property trust with regard to property to be disposed of at his or her death unless the community property trust expressly provides otherwise.**

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 220

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 Approved by Commissioner Bruce M. Botelho, Attorney General Date 1/13/00
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