SB
369

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: May 11, 2002 **FURTHER REFERRALS:**

Date of Committee Action: 5.11.02

The JUDICIARY Committee considered: **CSSB 369(RLS)**

CS FOR SENATE BILL NO. 369(RLS) **POWERS OF APPOINTMENTS/TRUSTS/CREDITORS**

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

Recommends it be replaced with H **CS** FOR CSSB 369 (~~RLS~~ JUD) [✓] **Same Title** [ ] **New Title**
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR______

[ ] attach amendments
[ ] add new referral to ______ Committee
[ ] Letter of Intent ______ Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES
*For Chief Clerk's Office Use Only

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	Coghill			✓	
[signature]	Meyer			✓	
[signature]	JAMES	✓			
Chair: [signature]	ROKEBERG	✓			
Chair:					

Adopted As Amended

Conceptual
AMENDMENT #1

OFFERED IN THE HOUSE   OFFERED BY
TO: CSSB 369 (RLS)

Page 4, Line 4:

Delete: "or"

Insert: [or]

Page 4, Line 6:

Delete: [.]

Insert; ;

Page 4, Line 7:

Insert: **(5) the creditor is seeking to satisfy a claim for child support.**

Page 5, Line 25, after "except," through line 30:

Delete all material.

Insert:
(a) to the extent that a donee of an inter vivos or testamentary power of appointment
(1) is permitted by the donor of the power to appoint the property to the donee's estate or to the creditors of the donee's estate; and
(2) effectively exercises the power of appointment in favor of the donee's estate or the creditors of the donee's estate; or
(b) ~~when~~ to the extent that the creditor is seeking to satisfy a claim of child support.

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

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Heather M. Nobrega
Counsel to Committee

MEMORANDUM

To: House Judiciary Members

From: Heather M. Nobrega, Counsel HMN
House Judiciary Committee

Date: May 11, 2002

Re: Changes in SB 369 from HB 316

The following are the differences between SB 369 and HB 316:

Page 1, Lines 6-8:

HB 316

> **Sec. 13.36.370. Trust protector.** (a) A trust instrument may provide for the appointment of a disinterested third party to act as a trust protector.

SB 369

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

Page 1, Lines 9 and 10:

HB 316

> ...trust instrument, including the power to

SB 369

> ...trust instrument, which may include the power to

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 369
(S) Publish Date: 5/2/02

Revision Date/Time (Note if correction):
Title "An Act relating to trusts, including trust protectors, trustee advisors, and transfers of trust interests, . . ."
Sponsor Senate Judiciary Committee
Requester Senate Judiciary Committee

Dept. Affected: Law
BRU Civil Division
Component Commercial
Component No. 2211

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal: [ ]

POSITIONS

POSITIONS	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

SB 369 rovides for the appointment of a trust protector and a trust advisor. The bill also prevents creditors of beneficiaries from attaching assets transferred into a trust unless certain conditions are met by all parties, and establishes a statute of limitations regarding when creditors must bring an action for a fraudulent transfer claim.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Division: Attorney General's Office
Phone (907) 465-5370
Date/Time 4/30/02 4:20 PM

Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Agency: Department of Law
Date 4/30/2002

(Revised 9/2001 OMB)

House JUDICIARY Minute

Apr 08, 2002

HB 316 - POWERS OF APPOINTMENTS/TRUSTS/CREDITORS

Number 2129

CHAIR ROKEBERG announced that the last order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 316, "An Act relating to trusts, including trust protectors, trustee advisors, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment; and providing for an effective date."

Number 2092

REPRESENTATIVE LESIL McGUIRE, Alaska State Legislature, sponsor, said that SSHB 316. Representative McGuire informed the committee that in 1997 the legislature passed the Alaska Trust Act which has been a tremendous success by all accounts. Representative McGuire noted that last year she brought a bill before the committee that did more fine tuning to the 1997 legislation. This area of law is continual changing and thus [SSHB 316] is before the committee today. Representative McGuire highlighted that SSHB 316 makes changes to the "spend thrift" area of the law, and adds the ability to have a trust protector and a trust advisor. She pointed out that the ability to have a trust protector and trust advisor has been codified in Delaware, which is what is being attempted [with SSHB 316] in order to allow the settlor to have as much control as possible when the decision to give money is made.

Number 1977

STEPHEN E. GREER, Attorney at Law, specified that he was present today solely because he is an attorney interested in ensuring that Alaska has the best trust laws. He noted that although his constituent base is the average Alaskan who wants to protect his/her family, he acknowledged that passage of SSHB 316 will indirectly benefit the trust industry. Mr. Greer explained that in 1977 Alaska was the first to pass trust laws and thus the other states have been able to draft legislation that clarified the intent better than Alaska. Therefore, SSHB 316, while adding a few new provisions, mainly clarifies what those in the estate planning community view the law to be. Mr. Greer pointed out that Sections 1 and 2 provide statutory authority for trust provisions that are commonly found in trusts. The legislation also provides clarity to the existing spend thrift provisions, which are presently found under AS 34.40.110. Furthermore, Section 3 adds two new provisions in Section 3 that pertain to charitable remainder trusts and grantor repaying unit trusts and grant retained for annuity trust. He noted that these provisions are found in Delaware's law. Moreover, this legislation restates the second restatement of law position regarding the power of appointments in the extent to which property subject to a power of appointment should be protected from creditor claims.

CHAIR ROKEBERG asked if [that restatement] is a restatement of property.

MR. GREER replied yes.

Number 1830

REPRESENTATIVE BERKOWITZ turned to Section 1 and asked if that section basically requires the hiring of professional trust protectors because it has to be a disinterested party.

MR. GREER posed a situation in which he established a trust and the Alaska Trust Company is named as the trustee of the trust. However, he wants to ensure that the Alaska Trust Company isn't going to view [the trust] as permanent position of employment for themselves. Therefore, the settlor could name a disinterested party, a trust protector, could be given the authority to remove or replace that [trustee] with the trustee of the [trust protector's] choice. Therefore, the provision is actually meant to protect the settlor's intent in creating the trust.

Number 0761

REPRESENTATIVE BERKOWITZ turned to Section 5, which clarified that fraudulent conveyance actions may only be brought against a settlor of a trust and only [regard to] a specific transfer of assets. This would be a change to current law. Therefore, he inquired as to who else would be subject to fraudulent conveyance actions. Furthermore, he asked what other assets might be consumed.

MR. GREER clarified that this is not a change of existing law. Mr. Greer explained that the novelty of this trust legislation [AS 34.40.110] is that it has really always been the law. For instance, a settlor may decide to give someone money, although the settlor may be uncertain as to how the money will be used. Therefore, the settlor names a trustee. Assuming there is a spend thrift provision attached to the trust, then the beneficiary would have no ability to assign their interest in the trust. Moreover, none of the creditors of the beneficiary would be able to attach the interest. The novelty of the 1997 law is that it allows an individual to create a trust and name a trustee, while the [settlor] can retain discretionary interest in the trust and thus no creditor of the [settlor] can attach these assets. Mr. Greer noted that there other states have passed laws that copy Alaska's trust laws.

MR. GREER explained that Sections 5 and 6 have to be read together. He pointed out that Section 6(g) only deals with the self-settled trust, which is what was just described that allowed for the [settlor] to retain discretionary interest in the trust. Under current law, a preexisting creditor is allowed one year after the trust could have reasonably been discovered by that creditor to bring a fraudulent conveyant action against [the settlor]. If that action was successful, the spend thrift provision would be held null and void. However, the problem is that the statute doesn't contain a definition of a preexisting creditor. Therefore, Section 6(g)(1) and (2) provide the definition of a preexisting creditor. Mr. Greer offered an example of a contractor who builds a building that he believes was built to the specifications. The contractor then decides to do some estate planning and he subsequently transfers some property in trust. Mr. Greer explained that the problem with making a transfer in trust is that without a discretionary interest, the money is gone. Mr. Greer commented that people are hesitant to make such gifts unless they are extremely

wealthy. In this situation the [settlor] maintains a discretionary interest and upon death the property will pass on to the children. However, subsequent to the [settlor's] death there is a lawsuit for the building the settlor built. Assuming "he" is successful in this underlying cause of action, the question is in regard to the point in time the plaintiff has the ability to bring a fraudulent conveyance action against that contractor to attack the transfer in the trust. Mr. Greer related his belief that without the provision in [Section 6(g)(1) and (2)] then there would be an unlimited statute of limitations for bringing a fraudulent conveyance action that the plaintiff must demonstrate that the claim was asserted against the contractor prior to the creation of the trust, in which case the contractor should have had the benefit of unlimited statute of limitations. Alternatively, Mr. Greer posed a situation in which the [settlor] didn't believe anything was wrong with the building and the transfer to the trust is made, and the fraudulent conveyance action is filed within four years of transfer to the trust. Mr. Greer reiterated that the legislation attempts to define a preexisting creditor.

REPRESENTATIVE BERKOWITZ inquired as to the source of the language for this legislation.

MR. GREER informed the committee that there was no uniform law back in 1997. Furthermore, Alaska was the first in the country to put such law in effect. As a result, those in the estate planning community who have realized that there are some open-ended questions with regard to the trust law.

Number 1430

DOUG BLATTMACHR, President & CEO, Alaska Trust Company, testified via teleconference in support of SSHB 316 because it makes Alaska competitive with Delaware while clarifying some issues.

CHAIR ROKEBERG asked if Mr. Blattmachr felt that without the changes in SSHB 316, [Alaska trusts] would be in an uncompetitive petition with Delaware trusts.

MR. BLATTMACHR replied yes.

CHAIR ROKEBERG inquired as to what would happen if an income tax was enacted on trust clients.

MR. BLATTMACHR answered that Alaska's trust clients from outside Alaska would leave within one year and go to Delaware, South Dakota, or Nevada because of the lack of an income tax on foreign trusts.

REPRESENTATIVE BERKOWITZ noted that he has cautioned against putting trusts in with an income tax.

Number 1307

REPRESENTATIVE COGHILL asked if there would be any interface problems since SSHB 316 will apply to those already existing trusts.

MR. BLATTMACHR responded that he didn't foresee any problems because [the legislation] merely recognizes things that are already included in the trusts.

MR. GREER clarified that only two provisions would be

prospective, which is the ability for a settlor to create a charitable remainder trust. Everything else is retroactive because these are things commonly done in trust instruments; the desire is to merely have the statutory authority to do so.

CHAIR ROKEBERG noted that it would take an act of the owners of the trust to implement these instruments.

MR. GREER agreed and said that is a very important point. Mr. Greer further agreed with Chair Rokeberg in regard to the settlor's ability to modify an existing trust, assuming that the trust can be amended or modified. Mr. Greer pointed out that there is another provision in Alaska that allows for modifications or amendments if one returns to court, for instance.

REPRESENTATIVE BERKOWITZ asked if there is anything in statute that would preclude the appointment of a trust protector.

MR. GREER replied no.

REPRESENTATIVE BERKOWITZ inquired, then, to what Section 1 does other than codify existing practice.

MR. GREER answered that it merely codifies existing practice.

Number 1189

DAVE SHAFTEL, Estate Planning Attorney, testified via teleconference. He informed the committee that he is a member of the informal group of attorneys that have worked on trusts and related state legislation. Mr. Shaftel said that as a member of the informal group and someone who [deals] with these trusts he wanted to reinforce the already presented testimony. Mr. Shaftel echoed earlier testimony that these are clarifications of various provisions that are already placed in trusts now. "This bill clarifies that if a court ever needs to review these trusts and evaluate these provisions that we have the support of the legislature that they have been statutorily authorized," he explained.

MR. SHAFTEL informed the committee that about a half dozen or so estate planning attorneys [in Alaska] have reviewed SSHB 316 and are in support of it. Therefore, he urged this committee's support.

REPRESENTATIVE BERKOWITZ directed attention to the change on page 3, line 7. He interpreted that to change the burden of proof of creditors. He inquired as to Mr. Shaftel's opinion of that language change.

Number 1053

MR. SHAFTEL answered that discussion of the language change on page 3, line 7, resulted in the determination that if one is going to set aside a transfer, then the motive needs to be significant and substantial. Therefore, the word "**primarily**" was inserted.

REPRESENTATIVE BERKOWITZ remarked that in his mind there is a difference between significant and substantial as opposed to "**primarily**". Significant and substantial could amount to 20-25 percent of the reason, while "**primarily**" would [necessitate] 51 percent of the reason.

MR. SHAFTEL answered, "Your point is accurate; I can't argue with it."

MR. GREER interjected that he would argue that this [change] doesn't change the law because it will always be a question of fact that is decided by a jury. He pointed out that one can always set aside a transfer restriction if one can prove that when the settlor created the trust there was a fraudulent intent behind it. To prove the fraudulent intent, the plaintiff has to show that the primary purpose of the trust was to defraud the creditor. Therefore, Mr. Greer didn't believe this [language change] adds anything. He noted that the main reason people create trusts for estate planning purposes. In order to set aside the trust, the intent to defraud the creditor can't be merely 1 percent of [the trust] but rather has to be to "**primarily**" defraud the creditor. He said he believes that is what the court would've had to find in the past.

Number 0896

REPRESENTATIVE BERKOWITZ related his view that [the language change to "**primarily**"] has added a second element to be proven. The existing statute requires proof of fraud; however, now the requirement is that [the fraud] is the primary intent. Representative Berkowitz said that it seems that the balance has been changed. Therefore, he disagreed with Mr. Greer's assertion that [the language is] the same because [that would mean that] "**primarily**" is equated with the language "in whole or in part".

CHAIR ROKEBERG asked if "**primarily**" is language that [the trust attorneys] inserted or the drafter.

MR. GREER replied that it was language put in by the group.

REPRESENTATIVE JAMES returned to the earlier example of a contractor who builds a building and is out of business now, and the time period in regard to the contractor's liability hasn't expired. Before the expiration of the [liability time period], the contractor establishes [a trust] not knowing whether there would be a claim, but suddenly there is a claim. Representative James asked whether a fraudulent conveyant action could be made against [the settlor] simply because the trust existed.

MR. GREER replied yes. Mr. Greer posed a situation in which a builder builds a building, which he thinks is fine. Then the builder decides to transfer money to his children. However, a lawsuit is subsequently filed against this individual. Therefore, the question is in regard to whether one can set aside a transfer to one's child for any reason at all. Mr. Greer specified that [the legislation] is saying that a transfer can only be set aside if the individual can show that the primary intent in transferring these assets to the children was to defraud the creditor [or any other creditor that might have brought the case].

Number 0725

MR. SHAFTEL highlighted that all estate planning involves some intent to protect assets, which is an area of concern. Mr. Shaftel related his belief that it would be a flimsy provision if all of these transfers could be set aside with the mere proof of the discussion of asset protection with the attorney. He noted that most all of his clients discuss asset protection to some degree and is part of the normal. Therefore, this

provisions says that if the primary purpose of a transfer was to defraud creditors, then [the transfer] should be set aside. This particular [provision] needed clarification because the language was vague.

REPRESENTATIVE BERKOWITZ agreed that the "in part" language was difficult due to the least scintilla of evidence, which is not appropriate either. Representative Berkowitz remarked that if a "significant and substantial" played into the transfer, then the individual shouldn't be able to benefit. He expressed concern with the requirement for proof of primary intent, which will be difficult.

Number 0505

REPRESENTATIVE JAMES commented that "significant and substantial" versus "primary" relates to intent. Although [protection of the trust] could be a substantial reason [for a transfer], it may not be the primary reason. She said she didn't [believe that "significant and substantial" are [equal] with "primary". "And I think what they're trying to say is this has got to be most of the reason why the did, not necessarily most of the money issue," she said.

REPRESENTATIVE BERKOWITZ agreed, but foresaw "in part" being interpreted as next to nothing, while "primarily" amounts to just over 50 percent of the reason, and "significant and substantial" could be somewhere in between those two.

MR. GREER remarked that the notion is to anticipate future problems. Mr. Greer said that he was unaware of any lawsuit, since 1997, filed under this section. If there is any possibility that a transfer might be set aside, the attorney won't do it. Mr. Greer said, "This has been a statute that certainly has not been abused."

Number 0421

REPRESENTATIVE COGHILL directed attention to Section 5, and remarked that (b)(1) of [AS 34.40.110] is very critical because the cause of action hinges on (b)(1). Therefore, "primary" becomes important to Section 5 in regard to extinguishment of the claim or transfer of assets. He asked if that was correct.

MR. GREER answered that Representative Coghill was correct. He pointed out that a transfer restriction, a spend thrift provision, will only be set aside under the four circumstances listed under [Section 5] (b), (b)(1) specifies that the transfer is primarily shown to be a fraudulent transfer with respect to that creditor. The other circumstances (b)(2)-(4) aren't being changed, although (b)(3) is being added to allow for charitable remainder trusts, grantor retained annuity trusts, and unit trusts. Mr. Greer agreed that in order for the creditor to set aside this transfer restriction, has to establish that the transfer was primarily to defraud the creditor.

MR. SHAFTEL pointed out that Section 6 requires that an action or claim can only be brought when a "preponderance of evidence" has been demonstrated. Generally, when proving fraud, the burden of proof is higher with clear and convincing evidence. By allowing 51 percent [with the use of "primarily"], this statute is protective of a plaintiff who is attempting to set aside a transfer to a trust. Use of the term "primarily" is consistent with the liberal burden of proof. The [trust attorney] group viewed [the use of "primarily"] as a compromise,

and the group agreed upon the preponderance of evidence as the appropriate approach. Mr. Shaftel felt it is a balanced and fair approach.

Number 0111

REPRESENTATIVE JAMES moved to report SSHB 316 out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, SSHB 316 was reported from the House Judiciary Standing Committee.

DRAFT

Bill Root: ______ Display Bill Root

TO REPORT PROBLEMS WITH BASIS INQUIRY

LIVE KTOO STREAMS

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