

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9183 HOUSE JUDICIARY

# Alaska State Legislature



House of Representatives  
House Judiciary Committee

State Capitol, Room 120  
Juneau, Alaska 99801-1182  
(907) 465-4990

## MEMORANDUM

**Date:** April 9, 1997  
**To:** House Judiciary Committee Members  
**From:** Representative Joe Green  
**Re:** HB 95--Mandatory Insurance

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I know that there has been some confusion about the mandatory insurance provisions in existing law, the penalties associated with them and HB 95's effect on existing law.

As the mandatory insurance section now exists, it requires insurance unless you live in an area that is unconnected to state highways or any highway with an average daily traffic volume greater than 499. You may still be required to have insurance, even though you don't drive on State highways, if you have had violations with six points in the last five years. AS 28.22.011.

### **Violations of Mandatory Insurance Laws:**

A violation of this section can be cited either as a criminal misdemeanor (under 28.40.050--\$500/90 days) or it can proceed as an administrative action under 28.22.041. The penalty in the administrative action is license revocation. The minimum suspension

is 90 days. If there has been a prior revocation in the last ten years, the minimum increases to one year.

**Additional Criminal Penalties:**

If the violator falsifies insurance information they are guilty of a class A misdemeanor under 28.22.051 (maximum of \$5,000/one year). If a person drives without a license they violate AS 28.15.011 and are subject to criminal sanctions under AS 28.40.050 (B Misdemeanor).

**How HB 95 affects existing law:**

HB 95 does not change the existing insurance requirements, administrative penalties or criminal penalties. What the bill does is create the database that allows the DMV and police to verify insurance quickly and easily. It also includes moving violations as a trigger for law enforcement to check for insurance in addition to the existing requirement to check when an accident occurs.

The confidentiality of the database is protected at the DMV by existing law regarding DMV information and records. AS 28.15.151. There are exceptions, including those that allow the DMV to disclose information to the police, other agencies. AS 28.10.505. A driver's information may also be disclosed at the request of the individual driver. The confidentiality of the database with the contractor who prepares the database for the DMV is protected by the new section 28.35.320 in the bill. Each name disclosed in violation of this section would be a separate offense and would be charged as a misdemeanor under AS 28.40.050.

# Alaska State Legislature



House of Representatives  
House Judiciary Committee

State Capitol, Room 120  
Juneau, Alaska 99801-1182  
(907) 465-4990

## MEMORANDUM

**Date:** April 17, 1997  
**To:** Committee Members  
**From:** *LJK* Lisa Kirsch, House Judiciary Committee Counsel  
**Re:** HB 95--Constitutional Issues

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There is a letter from the insurer USAA which you may have seen circulating the capitol. This letter raises the legal argument that the insurance information to be disclosed under HB 95 is a trade secret of the insurance companies. The insurer further argues that the requirement to report this information to the DMV is an unconstitutional "taking" of the insurer's property.

I have researched these legal claims and found them to be without merit. Mike Ford, Legislative Counsel, concurs with my legal analysis. In the attached memo, he concludes that there is no unconstitutional "taking" of a trade secret because the insurance information more likely belongs to the policyholder who agrees to disclose the information when they register their car.

I have also enclosed a letter from Insure-Rite, a database provider, that explains the safeguards they use to ensure confidentiality of the database which has been in use in Utah.

Please feel free to contact me if you have any further questions regarding the legal or factual issues raised in USAA's letter.

# LEGAL SERVICES

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## MEMORANDUM

April 14, 1997

**SUBJECT:** Motor vehicle insurance - (CSHB 95(JUD))

**TO:** Representative Joe Green  
Attn: Lisa

**FROM:** Michael F. Ford   
Legislative Counsel

You have asked if CSHB 95(JUD) violates AS 45.50.910, relating to protection of trade secrets, or constitutes a taking of property in a manner that is prohibited by the state or U.S. constitutions. As explained in this memo, we do not believe that either of these issues creates a legal problem in relation to CSHB 95(JUD).

Under AS 45.50.910, a court may enjoin actual or threatened misappropriation of a trade secret. For purposes of CSHB 95(JUD), I believe the argument is that requiring insurers to report data on their issuance or cancellation of automobile liability insurance to a third party agent of the state constitutes misappropriation of a trade secret. The flaw in this argument is that no misappropriation is occurring. Assuming that the information is a trade secret, which is not entirely clear, the law is only directed to misappropriation of a trade secret. Under the definition of "misappropriation" in AS 45.50.940, the state is not prohibited from requiring this data to be reported by an insurer. In short, the trade secret statutes are simply not relevant to the provisions in CSHB 95(JUD).

The second argument goes to whether the required reporting by insurers in sec. 1 of CSHB 95(JUD) constitutes a constitutionally prohibited "taking" of property. The case law concerning this issue do not support such a contention.

In Loretto v. Teleprompter, 458 U.S. 419 (1982), the U. S. Supreme Court examined the issue of when government action constitutes a compensable taking. This holding found that a permanent, physical invasion of a party's property, such as the installation of cables and equipment on the roof of an apartment building, did constitute a compensable taking of property.

The insurance companies are in a different situation. This is not a case of physical invasion of the insurer's property. As contemplated by CSHB 95(JUD) the third party contractor will not invade the insurer's office, occupy their office, or regularly use the insurer's database.

The insurer is not deprived of the use of its property, as it would be if the government physically invaded its property. Neither does the state restrict the insurer's use of their property.

The insurer will simply be periodically required to provide a tape or diskette with the insurance information on it. This is the same information that they would be required to provide under existing law when an insured was in an accident. The primary difference is that instead of paper, which is inefficient, they would use electronic media. The bill simply requires the insurer report the information that the registered owner of the vehicle is already required by law to provide and in some cases has already provided.

Under Loretto, if a permanent, physical occupation is not involved, whether a public action works a taking depends upon three factors:

1. the economic impact of a regulation;
2. the extent it interferes with investment backed expectations; and
3. the character of the government action.

As to the first element, it does not appear that the economic impact of CSHB 95(JUD) will be significant. Certainly the insurers will have costs for providing the policyholder information. However, the data entry costs should be minor. The claim that a loss of market share will result if the third party contractor who prepares the data for the DMV illegally sells the data to a competitor seems unlikely at best. The argument that the third party provider will reap substantial financial benefit from the data with no compensation to the insurance company is based on an assumption that a criminal act will occur. The economic value of the database to competitors and direct mailers will only be realized if the data is sold illegally.

As to the second element, an insurer might claim that it has an investment backed expectation that the policyholder information remains secret. But, how can an insurer expect that this information is secret when they know that their clients must provide it to the DMV under existing law? As to the third element, the character of the governmental action, this bill provides for a limited government action that requires the insurer to provide certain insurance information on their clients. It is designed to achieve an important public benefit-- a reduction of the number of uninsured motorists.

The question of impermissible taking was also addressed in Ruckelshaus v. Monsanto, 467 U.S. 986 (1984). In this case Monsanto challenged a requirement that their chemical formulas for pesticides (among other information) be released to the EPA. The EPA could then release that information to competitors to speed the research process.

Representative Joe Green

April 14, 1997

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The first question the court resolved was whether Monsanto had a property interest protected by the Fifth Amendment in the data. Monsanto argued that the information was property in the form of a trade secret. An insurer could also argue that the compilation of the effective dates of the policy, combined with the other policyholder information, is also a trade secret which has significant value. The extent of a trade secret property right is defined by the extent to which the owner protects it from disclosure to others. Monsanto at 467 U.S. 1002. The right to exclude others from knowledge of the information is not present in the case of insurance policy information. The information that an insurer wishes to protect has already been released to the policyholder and by registering a vehicle in Alaska the policyholder has agreed to release the information to the DMV. The insurance information has already been disclosed or is already subject to disclosure under existing law. The insurer does not have the exclusive right to possess, use and dispose of the information--that is more likely the policyholder's right.

In conclusion, there appears to be no "taking," in the constitutional sense, regarding insurance policy data.

Please contact me if you have further questions.

MFF:pl:jr  
97-099.plm

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IN REPLY REFER TO:

Salt Lake City

April 10, 1997

The Honorable Joseph P. Green  
Chairman, House Judiciary Committee  
ALASKA HOUSE OF REPRESENTATIVES  
Capital Building, Room 118  
Juneau, AK 99801

Dear Representative Green:

We are counsel to Insure-Rite<sup>®</sup>, Inc. We have been furnished by our client a copy of the letter to you dated April 2, 1997, from James R. Jinks, Senior Legislative Counsel of USAA. We thought that you might appreciate the benefit of some additional information as you evaluate House Bill 95. Our client serves as the agent for the State of Utah in the uninsured motorist identification program. Our experience with USAA may be interesting to you.

USAA also opposed the Utah legislation. In fact, they sent a letter to each of their insureds requesting contact with State Legislators in an attempt to defeat this legislation. They were the only insurance company to go to that extreme to our knowledge. USAA filed action against the State of Utah and Insure-Rite<sup>®</sup>, Inc. as agent after the legislation was passed. The litigation raised similar issues to those mentioned in Mr. Jinks' letter. We are happy to report that the State of Utah and Insure-Rite were able to satisfy USAA's concerns and the litigation was dismissed without any change in the legislation or in the procedures under which Insure-Rite<sup>®</sup>, Inc. operated and without any payment.

Insure-Rite<sup>®</sup>, Inc. did agree to an inspection by officials of USAA as to its procedures and safeguards. Insure-Rite<sup>®</sup>, Inc. received very favorable comments from USAA as a result of that inspection. We have no question about the sensitivity of the insurance records of USAA and all other insurance companies, of which USAA is less than 3%. We believe the legislation and the procedures established do safeguard the confidentiality of the information. One of the most important safeguards is the procedures used by Insure-Rite<sup>®</sup>, Inc. to erase the tapes or disks once the data is transmitted and entered in the computer. Therefore, there is no chance for information to be obtained off of tapes or disks that have been furnished to Insure-Rite<sup>®</sup>, Inc.

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Mr. Jinks argues that the legislation would violate Alaska's trade secret law and the U.S. Constitutional Prohibition on a taking as it relates to trade secrets. There is nothing about the database program which takes any proprietary information from the insurance companies. First of all, it is a violation of the law to utilize the information in a competitive way. Secondly, the information is available through other sources such as the Motor Vehicle database and elsewhere. Thirdly, once the information is placed in the database, it is very difficult, if not impossible, to retrieve in the same form it was entered in. Thus, a person who attempted to assemble a list of USAA insured customers would not be able to compose that list without a great deal of difficulty, since that information is not maintained in the database by company but by a code. USAA's name does not appear except by code as to an individual insured. Mr. Jinks speaks of the disparate burden on USAA members who are on active duty and may be stationed elsewhere. While it is possible that a service person who has a car registered in Alaska but who keeps the car elsewhere will have to verify insurance coverage, it is a very small burden if, in fact, the insurance is in place. The chance that a USAA insured who keeps his car elsewhere will be asked by a law enforcement officer in Alaska to verify insurance is very remote.

Mr. Jinks argues that the public policy which creates the act is morally flawed because it creates a presumption of guilt until proven innocent. The states have long held the police power to require that those who own and operate vehicles have public liability insurance. Normally, owners are required to establish that they have insurance in the licensing process. This creates the presumption that they have insurance. It is only after they are identified by records from the Motor Vehicle side when matched up with the records on the insurance side showing no insurance that the presumption changes. We believe there is a presumption of insurance until records show otherwise. Mr. Jinks makes the point that the uninsured motorist percentage can be greatly reduced by the involvement of large staffs and cites the example of North Carolina and Pennsylvania. The fact of the matter is, without any staff other than peace officers, the experience in the state of Utah has been very favorable. Uninsured motorists have been reduced from approximately 23% to 12% over a two year period. We agree that the percentage of uninsured motorists in Utah could be reduced further with the involvement of more manpower or with more enforcement. Certainly, the accurate identification is the lynch pin to any successful program. We believe your legislation will provide for accurate identification.

Mr. Jinks cites the experience with the Utah program. He cites rising uninsured motorist claims in Utah. We understand that a small sample of 200 accidents was taken from the top five insurance companies: State Farm Allstate, Farmers, Bear River and Farm Bureau, which showed a one-half of 1% increase in uninsured motorist claims. This was done during the height of the tourist season and did not distinguish between Utah and non-Utah vehicles.

The Honorable Joseph P. Green  
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Mr. Jinks also mentions the new Utah law which opens the way for a legislative audit of the designated agent. In Utah, Insure-Rite<sup>®</sup>, Inc., as designated agent, supported the legislation and welcomes the audit. He also mentioned that a data tape was misdelivered to his insurance company. He failed to note that the data had been erased from the tape and that even if there had been an attempt by USAA to read the tape, which there had not been, there would have been no information on it. This incident demonstrates that the security measures are effective in compensating for human error. Insure-Rite<sup>®</sup>, Inc. continues to work on procedures and practices which will provide further assurance of the safeguarding of information and the confidentiality of the data. This isolated error by the Post Office, after literally thousands of pieces of media, again showed the effectiveness of security measures.

We are happy to report that the relationship of Insure-Rite<sup>®</sup>, Inc. with USAA concerning the Utah program has been very satisfactory. Not only have they inspected the premises and the procedures under which Insure-Rite<sup>®</sup>, Inc. operates, but they have been invited to make a return visit. They continue to provide data in a prompt and accurate way. We are confident that they can also meet the requirements of House Bill 95 and that they will have very few, if any, complaints from their customers with respect to the operation of the program outlined in that legislation.

Yours very truly,



Randon W. Wilson

RWW/m

Representative Eric Croft

4/16/97

REP. GREEN,

ENCLOSED PLEASE FIND A  
LETTER FROM INSURANCE INTERESTS  
TO ME OPPOSING YOUR HB95.  
THE LEGAL ARGUMENTS MADE IN  
THE LETTER & THE ATTACHED MEMO  
APPEARED FALSE TO ME. I THEREFORE  
ASKED MIKE PORTO FOR HIS ANALYSIS.  
A COPY OF THIS ANALYSIS IS  
ALSO ENCLOSED.

IN SHORT, USAA IS SIMPLY &  
COMPLETELY WRONG. THIS IS NEITHER  
A TAKING NOR A PROTECTED TRADE  
SECRET.

SINCERELY, *mi wof*



April 2, 1997

The Honorable Eric C. Croft  
House Judiciary Committee  
Alaska House of Representatives  
Capitol Building, Room 430  
Juneau AK 99801-1182

Post-it* Fax Note	7671	Date	4/14	# of pages	7
To	MIKE FORD	From	ROXANNE		
Co./Dept.	LEG. LEGAL	Co.	REP. CROFT		
Phone #	2450	Phone #	X 4998		
Fax #	2029	Fax #			

Dear Representative Croft:

On behalf of USAA and more than 11,000 USAA members in Alaska, I am writing you to express strong opposition to House Bill 95 and ask your assistance in preventing the bill from becoming law. USAA is a member-owned company providing insurance and financial services to military families worldwide. Preserving the confidentiality of membership data is an essential part of USAA's relationship with its members.

USAA insures over 90 percent of the active duty military officers in all branches of the U. S. armed forces, as well as a large portion of the nation's foreign service officers and many other federal government officials. It provides coverage in fifty-two (52) jurisdictions within the United States and other locations throughout the world. Consequently, its records routinely reflect the current stationing addresses of military and foreign officers who rely upon USAA to maintain the confidentiality of the identities, addresses, drivers license information, vehicles and related information pertaining to them and their dependents. Any breach of that confidentiality would adversely affect USAA's fiduciary relationship with their members. We believe House Bill 95 (hereafter referred to as "the Act") will force USAA to violate the members' expectations of confidentiality and privacy of the information they have entrusted to the company.

I believe the Act violates Alaska's trade secret laws and the U. S. Constitutional prohibition on a taking as it relates to trade secrets. Specifically, the bill requires insurers to periodically divulge customer lists, which have been developed at considerable expense, to a private vendor designated agent of the State. The agent receives a windfall in that it is able to establish a commercially valuable database from the confidential and proprietary customer information exacted from insurers. Insurers receive no compensation from the agent or the state for the information or the costs incurred in providing the information. To the contrary, insurers will have to bear the substantial expense of providing the data.

Beyond question, the Act will impose a disparate burden on USAA members and others who are active duty members of the U. S. Armed Forces. Such persons are permitted by federal statute to maintain certain privileges of their home of record without regard to where they may be stationed. This includes registering their automobiles in the home of record state. The insurance policy, however, is issued to satisfy the laws of the state where the automobile is

The Honorable Eric C. Croft  
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garaged, not where it is registered and will not appear in the Alaska database. The many Alaska service men and women who keep their cars registered there but are stationed elsewhere will frequently be identified by the designated agent as not having insurance. This is an unfair burden to add to those who have already made the sacrifices inherent in choosing to serve in the Armed Forces of their country.

The public policy that would be created by the Act is morally flawed. Essentially, it proposes that a private vendor knowingly create an incomplete list of persons within the state who have automobile insurance. The State of Alaska will then operate from the premise that, until that person can prove their innocence, anyone whose name does not appear on that list is in violation of the state's financial responsibility laws. This is a radical departure from the traditional presumption of innocence.

Database verification programs have been enacted by numerous states throughout the nation, but only Utah mandates a designated vendor agent to operate the program. In January, 1993, the state of Connecticut examined eighteen (18) such programs nationwide. In reviewing the results of that study, it is clear that one common aspect for all programs is that effectiveness in reduction of the uninsured motorist rate is directly related to the human resources devoted to enforcement of the program. For example, North Carolina, with a population of approximately six million vehicles, achieved an uninsured motorist rate of 3% with a full-time staff of 177 to handle letters and sanctions. Pennsylvania achieved a 2.5% UM rate with a full time staff of 59. In those states which have achieved very low uninsured motorist rates, there have generally been well-defined and well-staffed enforcement programs to utilize the information developed from the database verification program. Any efforts to create a verification program within a state should be accompanied by a review of the enforcement provisions for that state's mandatory insurance/ financial responsibility laws. If, as in the case of Utah, there is no mechanism for enhanced enforcement, the result is a creation of a database with nothing to follow.

Since the Act proposes a program that is modeled on the Utah program, I believe this Legislature should take a closer look at the total experience there instead of accepting at face value unsubstantiated claims of program success. Rising uninsured motorists claims in Utah belie the assertions of a declining uninsured motorist population. The Utah Governor recently signed into law a bill which opens the way for a legislative audit of the program following complaints by citizens erroneously accused of being uninsured. Last year, USAA's strong concerns with the confidentiality of its data were underscored when the agent, instead of returning our data tapes, returned those of a competitor to us.

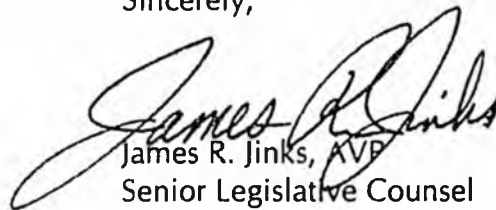
For your consideration, I am enclosing an analysis of why we believe the Act violates Alaska's Trade Secret laws and the U. S. Constitutional Fifth Amendment protection of property rights. While USAA recognizes Alaska's interest in dealing with the uninsured motorist

The Honorable Eric C. Croft  
April 2, 1997  
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problem, we believe House Bill 95 would force upon USAA the unwelcome role of becoming a part of the law enforcement process while imposing a substantial financial burden as well. While reversing the long-standing presumption of innocence, it would also have a disparate impact on our members and those similarly situated.

For the reasons expressed above and in the attached analysis, I am respectfully asking for your assistance in defeating legislation which burdens so many and benefits only the designated agent.

Sincerely,



James R. Jinks, AVP  
Senior Legislative Counsel

JRJ:djn  
Attachment

## THE ACT CONSTITUTES A TAKING UNDER STATE AND FEDERAL LAW

### I. STATE CLAIM TAKING

#### The Act Would Constitute A Taking Of Property Protected Under The Uniform Trade Secrets Act

Alaska is among the 35 states and other jurisdictions which have adopted the Uniform Trade Secrets Act. Generally, a trade secret is:

"information including a formula, pattern, compilation, program, device, method, technique, or process, that (emphasis added):

- (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

The membership data which the Act requires USAA to disclose to a third party agent is confidential, proprietary, and a valuable trade secret. The data reflecting the identities, addresses, driver's license information, birth dates, vehicles, policies and policy expiration dates of USAA's members has substantial economic value. That information derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by competitors, direct mailers and other persons who could obtain economic value from its disclosure or use.

USAA has always closely guarded their membership data and has never used sales agents for sold customer information as other insurers do. To the contrary, it has established specific written corporate policies and rigorous security procedures to maintain the secrecy of membership information. USAA's rigorous internal policies, procedures, confidentiality agreements and database security certainly constitute "efforts that are reasonable under the circumstances to maintain (the) secrecy" of their membership data.

Essentially, the Act seizes the USAA's membership data without reasonable provisions to maintain its secrecy and authorizes the designated agent to establish a commercially valuable database from confidential and proprietary customer information exacted from USAA and other insurers without compensation. The very purpose of the Act is to disclose the USAA's membership information through the state computer system to all law enforcement personnel and numerous state and local government employees. Although it limits release or disclosure of information in the database for unauthorized purposes or persons, the Act fails to establish any security procedures to prevent unauthorized releases and disclosures. In fact, it appears to provide statutory immunity for the state and the designated agent, and does not even require the return of insurers' customer data.

## II. FEDERAL CLAIM TAKING.

The United States Supreme Court has established that trade secrets are protected by the taking clause of the Fifth Amendment [*Monsanto*, 467 U. S. at 1002-03, 103 S. Ct. at 2872. See also *Noranda Exploration*, 335 N. W. 2d at 603 (holding that proprietary information is entitled to protection as property under the Federal and Wisconsin taking clauses)]. The threatened appropriation of USAA's trade secret clearly constitutes an uncompensated taking in violation of the Fifth Amendment.

### The Appropriation Is A Categorical Violation of the Fifth Amendment

The United States Supreme Court has established two categories of *per se* takings: physical appropriations and deprivations of all beneficial use of property. Plaintiffs can establish a *per se* violation under both of those categories.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 434 - 35, 102 S. Ct. 3164, 3175 (1982), the Supreme Court reiterated the well-established rule that any governmental action that effects a permanent physical occupation of property is a compensable taking, regardless of its purpose or economic impact. This *per se* rule is based on the recognition that a physical taking deprives a property owner of the essential right to exclusive possession, use and control over its property (*Loretto*, 485 U.S. at 433, 102 S. Ct. at 3175). Whenever the government deliberately causes its agents or the public at large to regularly use or permanently occupy something which was previously under private ownership, there is an incontestable case for compensation under the Federal takings clause [Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967)].

The Act requires USAA to surrender physical possession of their trade secret membership data to the designated agent on magnetic tape. It authorizes the designated agent to invade USAA's database electronically and use it continuously in the operation of the agent's business. The designated agent's physical possession, electronic invasion and continual use of USAA membership data will deprive it of exclusive possession and control over its property the same way the physical installation of cable television equipment deprived apartment owners of exclusive possession and control over their buildings in *Loretto*. In both cases, the physical appropriation allows third parties continuing access and use of private property on an indefinite basis. Under these circumstances, the appropriation is a *per se* violation of the Fifth Amendment.

### The Act Also Constitutes A Fifth Amendment Taking Under The Traditional Three-Prong Test.

The traditional three-prong test for a violation of the Federal taking clause involves three factors: (a) the character of the governmental action, (b) its interference with reasonable, investment-backed expectations, and (c) its economic impact. Any one of those factors can be determinative in a particular case.

### Alaska Has No Valid Governmental Interest In Appropriating USAA Trade Secrets

It is settled that there must be an "essential nexus" between a "legitimate state interest" and the challenged condition; that is, between the legislative end and the legislative means. In addition, there must be a reasonable relationship between the challenged requirement and the property owner's proposed development; that is, between the burden and the benefit to the property owner. The burden is on the government to establish that the challenged requirement is reasonably related or "roughly proportional" in nature and extent to the benefit conferred on the property owner.

The taking provision of the Act cannot meet this strict constitutional standard. There is no essential nexus between Alaska's interest in identifying uninsured motorists and the appropriation of USAA's trade secret membership data for the benefit of a third party who will reap substantial commercial benefit from it.

Alaska's interest in identifying uninsured motorists can be addressed by less confiscatory means than the appropriation of USAA's trade secrets to a designated agent without compensation. In fact, many other states have adopted measures to identify uninsured motorists, but only one state, Utah, has appropriated insurers' proprietary data for the benefit of a third party without compensation.

### USAA Has A Reasonable, Investment-Backed Expectation That Their Trade Secret Will Not Be Stripped Away To Benefit A Third Party

USAA has a reasonable, investment-backed expectation that they will maintain exclusive use and control of their trade secret membership data. The Association has never released that membership information without extensive safeguards to preserve its secrecy.

In *Monsanto*, the Supreme Court held that Monsanto had a reasonable investment backed expectation that data it submitted to the EPA under statutory guarantees preserving its trade secret protection would not be disclosed under subsequent statutory amendments (*Monsanto*, 467 U.S. at 1012, 104 S. Ct. at 2877). The Court held that Monsanto was entitled to compensation for the disclosure of that data under the Fifth Amendment. USAA's reasonable, investment-backed expectation in their property interest is similarly protected (*Monsanto*, 467 U.S. at 1001-03, 104 S. Ct. at 2872-73).

### The Threatened Taking Has A Substantial Economic Impact

The Act gives the state's designated agent a valuable capital asset at the expense of USAA and other insurers. USAA's membership data has substantial monetary value not only for the agent's current business operations, but also for USAA's competitors, direct mailers, and others who might obtain it from the agent. The mere preparation of the initial records required by the Act will impose a significant economic burden on USAA's members.

The threatened injury to USAA is, however, much greater than the benefit to the designated agent and the state. The potential loss of its trade secret protection and damage to its customer relations is incalculable.

*The Taking Is Clearly For A Public Use And Without Compensation*

The "public use" requirement of the Federal Taking Clause is "coterminous" in scope with the police power (*Monsanto* 467 U.S. at 1012-13, 104 S. Ct. at 2878). As long as taking has a conceivable public character, it meets the "public use" requirement (*Monsanto*, 467 U.S. at 1014-15, 104 S. Ct. at 2879). Under this broad standard, the taking effected by the Act is clearly a taking for a public use.

Nor can there be any dispute that the Act does not adequately provide for just compensation. It provides no compensation at all. This is not a case where a nominal or inadequate compensation is provided in the statutory scheme (Compare *Monsanto*, 467 U.S. at 994, 104 S. Ct. at 2868-69; *Loretto*, 458, 102 S. Ct. at 3169)). This is a case in which USAA's private property is being appropriated for public use at great expense to the Association with no compensation whatsoever.

Although Alaska may have a legitimate interest in identifying uninsured motorists, the legislative end of identifying uninsured motorists and the legislative means of forcing USAA to surrender their trade secret membership data to Alaska's designated agent without compensation do not constitute an "essential nexus." Moreover, the state's end and its means are not reasonably related. The taking does not insure effective identification of uninsured motorists. Certainly, it does not constitute the least intrusive means of identifying uninsured motorists. Therefore, the Act's taking provision is a violation of due process.

**HB**

**101**

# Alaska State Legislature



## House of Representatives House Judiciary Committee

State Capitol, Room 120  
Juneau, Alaska 99801-1182  
(907) 465-4990

Date: February 11, 1997  
To: David Shaftel  
Fax: 278-6015  
From: Lisa Kirsch  
House Judiciary Committee Aide  
Fax: 465-4316 Phone: 465-4990  
Subject: **HB 101**

I have attached a bill for your consideration. Any input you may have as to the effects or potential pitfalls of this legislation would be appreciated.

If you have no interest, would you be so kind as to direct me to an estate planning organization or other entities that might be able to help us evaluate this bill.

*NOTE: BILL IS TWO-SIDED.  
YOU WILL RECEIVE ODD NO. PAGES  
& THEN I WILL RELOAD THE  
EVEN NO. PAGES.*

*The University of Michigan  
Law School*

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LAWRENCE W. WAGGONER  
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May 21, 1996

BY TELEFAX

Diane L. Wendlandt  
Assistant Attorney General  
Alaska Department of Law  
1031 West 4th Ave., Suite 200  
Anchorage, AK 99501-1994

Re: Alaska Family Trust Act , HB 459(JUD)

Dear Diane:

The governor should veto the above referenced bill. It is ambiguous in part, and, more importantly, is against public policy.

1. *Asset Protection Trusts Jeopardize Marital and Other Rights Relating to Family Obligations, As Well as Legitimate Creditor Rights, Sections 4 and 7.* Section 4 adds 13.36.310 and section 7 revises 34.40.110. Both sections jeopardize marital and other rights relating to family obligations, and are against public policy. 13.36.310 (line 12) explicitly protects these trusts from claims by way of a marital or similar right. 34.40.110 (line 11) refers to a creditor "or another person" (i.e., this includes the spouse of the settlor or the spouse or minor child of a beneficiary), and disallows such person from satisfying a claim out of the beneficiary's interest in the trust. There are three exceptions: a transfer in fraud of creditors, a revocable trust, and a trust where the trustee *must* distribute income or principal to the settlor. The exceptions do not go nearly far enough. The limited nature of these exceptions opens up a gap in spousal protection laws (such as the elective share of the surviving spouse) that any lawyer could maneuver through with ease. Notice that the third exception relates to a trust in which the trustee *must* distribute income or principal to the settlor. How easy it would be just to set up a trust with a friendly trustee, and instead of requiring the trustee to distribute income to the settlor, give the trustee "discretion" whether to distribute income to the settlor. (The plan would of course be that the friendly trustee would always decide to distribute income to the settlor.) Such trusts are called discretionary trusts, and American law in general holds that a settlor cannot avoid his/her own creditors or claims of his/her own spouse by establishing such a trust for himself/herself. The American rule is a sound one in policy, and HB 489(JUD) would reverse that rule.

Insofar as marital rights are concerned, HB 489(JUD) is actually inconsistent with the spousal protection provisions in a bill enacting the Uniform Probate Code that passed the Alaska legislature this very session.

2. *Perpetuities, Sections 5 and 6.* The proposed amendment to the Uniform Statutory Rule Against Perpetuities is not sanctioned by the Uniform Law Commission. The amendment is ambiguous. Subsection (3) says that a nonvested future interest cannot be invalid under the Rule Against Perpetuities (in other words, the nonvested future interest is exempt from the Rule Against Perpetuities) if it is in a trust in which the trustee has discretion to distribute income or principal to a person who is living when the trust was created. Does this mean that such a trust continues to be exempt forever, even after the person dies, or does it lose its exemption once the person dies? The language is unclear, and would surely lead to unnecessary litigation.

I have reason to believe that the intention is that the trust will continue to be exempt forever. If this is so, the bill sets up a situation in which a wealthy person, whether an Alaskan or a resident of another state, can set up a so-called "dynasty trust" in Alaska, a trust that lasts perpetually.

Why do the promoters of this bill want Alaska to allow perpetual dynasty trusts? The apparent purpose is purely commercial (to manipulate state law in order to give Alaska banks a competitive advantage over banks in nearly all other states). The public policy against dynasty trusts (trusts that last longer than a life in being plus 21 years or 90 years) is lost in the wake of these commercial interests. Ironically, the genesis is the federal generation-skipping tax (GST tax), which imposes high costs for creating trusts that persist through more than one generation. The GST tax would therefore seem to discourage long-term trusts. But the GST tax also contains a \$1 million per donor GST exemption that relies only on state perpetuity law to control the length of exempt trusts. The apparent purpose of this bill is to abolish the Rule Against Perpetuities for Alaskan trusts in order to give Alaskan banks a competitive advantage in attracting out of state \$1 million (\$2 million for married donors) GST-exempt trusts. There are a few other states that have, in effect, abolished the Rule Against Perpetuities for trusts—Wisconsin, Idaho, South Dakota, and Delaware. But I am in touch with people at the IRS and the U.S. Treasury Department, and on the basis of what they tell me, it is only a matter of time before Congress or the Treasury Department by regulation puts a stop to this, for it is an unintended loophole in the GST tax. Once the loophole is closed, the tax incentive for creating perpetual or dynasty trusts will disappear, but trusts created before the loophole is closed will continue to exist. Does Alaska want to be known as the home of the dynasty trust?

Sincerely yours,



Lawrence W. Waggoner

Larry Wagoner, Loyola Law School, LA; commissioner on the Uniform Probate Code --  
213-736-8168

Richard Wellman, University of Georgia Law School; former commissioner on the Uniform  
Probate Code -- 706-542-5174

Jeffrey Schoenblum, Vanderbilt Law School -- 615-322-2668

The first two are people the sponsors of the bill like to quote. Letter from Wagoner re HB 459  
attached. All three have copies of HB 101.

*Marilyn  
spoken to all 3  
from info  
from others.*

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

May 23, 1996

The Honorable Gail Phillips  
Speaker of the House  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear Speaker Phillips:

Under the authority of art. II, sec. 15 of the Alaska Constitution, I have vetoed the following bill:

CSHB 459(JUD) am

“An Act relating to the jurisdiction governing a trust, to challenges to trusts or property transfers in trust, to the validity of trust interests, and to transfers of certain trust interests.”

While this Administration applauds innovation and imaginative efforts to attract business opportunities, I am concerned that the potential benefits of this bill are outweighed by its inadvertent consequences to the people of Alaska. Therefore, I find it necessary to veto this bill.

This legislation would make a dramatic change in our trust laws and policy. In fact, these changes to Alaska law would make this the only state to espouse such public policy. The bill raises many questions and concerns which require a level of consideration and analysis that, frankly, was not received with just one hearing before each body of the Legislature.

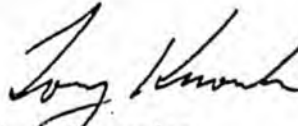
Specifically, one of the chief concerns I have about this bill is that it would shift the burden of proving intent to defraud onto creditors, spouses, and children of the settlor. Currently, if one transfers assets into a trust of which the settlor is a beneficiary, the trust is void as to present or future creditors. Under the terms of this bill, the burden of proof is shifted so that a creditor or a spouse in a divorce setting would have to litigate to prove the settlor's fraudulent intent before the trust assets could be invaded to meet those interests.

Another important concern is the bill's provision that a trust cannot be set aside on the grounds it defeats an interest conferred by a marital or similar relationship. Thus, a settlor could disinherit his or her spouse. Upon the settlor's death, the spouse would be unable to obtain the normal elective share (usually one-third) of the estate. The same would be true for surviving children who would be unable to reach these assets in payment of child support arrears. This provision contradicts the legislature's action on another bill passed this year updating Alaska's probate code.

I realize this trust law is meant to mirror laws common in some offshore jurisdictions, such as Bermuda and the Cayman Islands. However, parts of this bill, particularly the provision to prevent the spousal elective share of a trust, go even further than the offshore trust laws.

There may be aspects of this proposal that could benefit Alaska's economy by attracting financial investments without harming the public good. I would welcome further work in this area with the understanding that any future changes in our trust laws undergo thorough scrutiny and public hearings.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tony Knowles".

Tony Knowles  
Governor

# Alaska State Legislature



Official Business  
Fax: (907) 465-3472

State Capitol  
Juneau, AK. 99801-1182  
(907) 465-3720  
(907) 465-2689

Speaker of the House of Representatives

DATE: December 5, 1996

TO: Representative Joe Green

FROM: Speaker Gail Phillips *Gail*

RE: Alaska's Family Trust Act -- HB 459 from 19th Legislature

*LISA as I put it, our estate law needs amending to*

- AVOID OLD COMMON LAW PITFALL*
- ENCOURAGE EST PLANNING IN ALASKA*

*Pls review & lets get this old man up to speed.*

*Thanks*

*per*

Enclosed is a letter from Robert Manley and a proposed draft substitute for HB 459 on the Alaska Family Trust Act from last session. This bill was vetoed by the Governor; and Mr. Manley's suggestions regarding the need for further revisions to the bill are well taken.

After reviewing the enclosure, I would appreciate the opportunity to talk with you regarding Mr. Manley's suggestions as soon as possible.

GP:jmj

Enclosure



**HUGHES THORSNESS POWELL  
HUDDLESTON & BAUMAN LLC**

ATTORNEYS AT LAW

*Judi - P's review  
& respond  
Send copy of  
this whole  
packet to  
Rep. Green and  
let him know I  
want to discuss  
this w/him as soon  
as he's had a chance  
to go through it.*

Direct Dial:  
**(907)263-8251**

November 21, 1996

Gail Phillips  
P. O. Box 3304  
Homer, AK 99603

Re: Alaska Family Trust Act  
Committee Substitute for House Bill 459 (JUD am)  
Our File No. 2270-72

Dear Representative Phillips:

As you know, the above referenced bill passed both houses in the legislature but was vetoed by Governor Knowles. The Governor's veto message contained numerous factual and legal errors. However, he was correct that under some circumstances, a trust under the act could have limited collection of child support. In addition, the Governor was correct when he stated that the trust could have been used to defeat the forced elective share of one-third of the augmented estate in the event a spouse dies and fails to adequately provide for his or her surviving spouse.

In response, bill proponents have redrafted a new version of the bill addressing the Governor's stated concerns and improving the bill in several regards including the adding of provisions facilitating Alaska Native Claim Settlement Act trusts. Enclosed for your reference is a copy of a September 26, 1996 letter from Jonathan Blattmachr to Fran Ulmer detailing these matters.

At a recent meeting of the Alaska Bar Association Section on probate and estate planning, it was suggested that the new legislative majority might re-introduce all bills vetoed in the last legislature and pass them through without hearing under a veto proof majority. That may be appropriate in most cases, however given the proposed revisions to the Alaska Family Trust Act. It might be better to review the proposed modifications in the normal legislative process rather than simply reenacting the bill.

I think the more measured approach will get us a better overall result. If the old version of the bill is passed, we will lose much of the interest in momentum in getting the other modifications and improvements through.

Gail Phillips  
November 21, 1996  
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HUGHES THORSNESS POWELL  
HUDDLESTON & BAUMAN LLC  
ATTORNEYS AT LAW

Accordingly, I suggest that you give serious consideration to waiting for the new version of the bill rather than simply pushing the old one through.

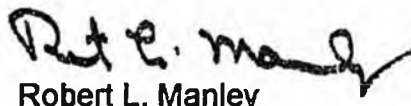
I am copying this letter to Representative Porter because as Chairman of the House Judiciary Committee, he was instrumental in reviewing and securing passage of the bill during the last legis'ature.

If you have any questions, please let me know.

Very truly yours,

HUGHES THORSNESS POWELL  
HUDDLESTON & BAUMAN LLC

By

  
Robert L. Manley

RLM:kao:46580

Enc.

cc: Representative Brian Porter w/enc.

# Alaska State Legislature



Official Business  
Fax: (907) 465-3472

State Capitol  
Juneau, AK. 99801-1182  
(907) 465-3720  
(907) 465-2689

Speaker of the House of Representatives

December 5, 1996

Mr. Robert L. Manley  
Hughes Thorsness Powell  
Huddleston & Bauman LLC  
550 West 7th Avenue, Suite 1100  
Anchorage, AK 99501-3563

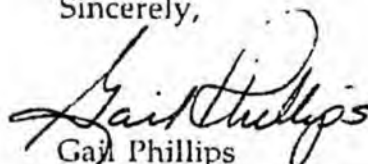
Dear Mr. Manley:

Thank you for your letter regarding the Alaska Family Trust Act (HB 459). Your points regarding the Governor's veto of this bill, and the advisability of the legislature's holding hearings on this issue before overriding his veto, are well taken.

With that in mind, I have forwarded a copy of your letter and its enclosures to Representative Green who will be the Chair of the House Judiciary Committee throughout the upcoming Legislature. In addition, I have asked that Rep. Green contact me after he has had a chance to review your letter and enclosures. During my talk with him, it is my intention to emphasize the need for the changes which the new draft proposes.

Again, I appreciate hearing from you and look forward to your continued participation in revising the Alaska Trust Act.

Sincerely,

  
Gail Phillips  
SPEAKER OF THE HOUSE

GP:jmj

cc: Representative Joe Green



# ALASKA STATE LEGISLATURE

SPEAKER OF THE HOUSE GAIL PHILLIPS

TO: Friday FAX: 258-0226  
 FROM: Sai Jordan PHONE: \_\_\_\_\_  
 DATE: 12/6/96  
 RE: Family Trust letter  
 COMMENTS: enclosure

NUMBER OF PAGES (Including Cover) 25

MILBANK, TWEED, HADLEY & McCLOY  
1 CHASE MANHATTAN PLAZA, NEW YORK, 10005-1413

COPY

*from  
person who  
drafted the  
bill*

September 26, 1996

BY EXPRESS MAIL

The Honorable Fran Ulmer  
Lieutenant Governor  
State of Alaska  
P.O. Box 110015  
Juneau, Alaska 99811-0015

Re: Alaska Trust Act of 1997

Dear Fran:

Thank you so much for taking your valuable time to meet with Linda Hulbert and me on September 6 in Anchorage. I greatly enjoyed the meeting and I hope it was informative.

As promised, I am enclosing a copy of a tentative draft of a new proposed bill which is based, in large part, on the bill entitled the "Alaska Family Trust Act of 1996," which, as you are aware, was passed by the Legislature but vetoed by the Governor. Please let me know if you would like me to prepare a "blacklined" version to show the changes from the 1996 bil. We anticipate that the proposed new bill will be called the "Alaska Trust Act of 1997." As discussed in more detail below, it would repeal Alaska's rule against perpetuities, permit individuals to create

Honorable Fran Ulmer

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September 25, 1996

certain trusts for their benefit and enact legislation which, with the other provisions of the bill, would facilitate the creation of so-called "settlement trusts" by Regional Corporations. The primary purpose of the bill is to increase trust and related financial businesses in Alaska by providing Americans an opportunity to enhance legitimate lifetime estate and related planning by using Alaska trusts rather than trusts created in certain foreign jurisdictions,

Repeal of the Ancient Rule Against Perpetuities

The proposed new bill would repeal the rule against perpetuities (which limits how long trusts can stay in existence) in Alaska. Four states, South Dakota, Delaware, Wisconsin and Idaho, have already repealed theirs. South Dakota and Delaware have received considerable trust business as a result. In fact, Citibank, N.A., one of the nation's largest banks, has now acquired a trust company in South Dakota and the business it has attracted is considerable according to its officers I have discussed it with. South Dakota and Delaware have received most of the business because no state income tax is imposed on the trusts situated there. Although Delaware has an income tax, it imposes the tax only if the trust has Delaware beneficiaries.

There are a few academics who have a vested interest in seeing that the rule against perpetuities is maintained. Some are reporters on the Uniform Statutory Rule Against Perpetuities. Perhaps, some honestly feel that the time trusts can last should be limited. They have argued with me that 90 or 100 years ought

Honorable Fran Ulmer

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to be enough. (If 100 years is okay, why not 101? If 101, why not 102? As you know, it is, in any case, a hopelessly complex and misunderstood law.) That is their opinion. Maybe, they feel the same way about corporations. However, I am unaware of anyone who deals regularly with trusts in the real world, such as practicing lawyers and trust officers, who sees any reason to keep the rule against perpetuities in force. In fact, I am aware of movements of several bar groups to have the rule repealed in their state.

In any case, because Alaska currently has no income tax, it should experience an increase in trust business, just as South Dakota and Delaware have. (Also, like Delaware and New York, Alaska could prevent any state income tax being imposed on trusts created in its state by non-residents if it does eventually adopt an income tax.) I think it is appropriate to mention that avoiding state income tax is not the reason why Americans throughout the country are creating trusts in South Dakota and Delaware. Rather, the reason is to accomplish more effective estate planning because trusts there can be perpetual, providing the potential for greater ultimate estate tax savings. Once a decision is made to create a perpetual trust for that reason, individuals typically choose the most favorable income tax jurisdiction. If income tax savings were the only consideration, New Yorkers would create trusts in New Jersey and vice versa. Although each of those states imposes an income tax, they impose them only on trusts created by their own residents.

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Creation of Trusts for One's Own Benefit

The second change which the proposed bill would make would, in my judgment, bring even more trust and related financial business to Alaska than the repeal of the rule against perpetuities would alone. That change would be to permit an individual to create a trust of which he or she is eligible (but not entitled) to receive distributions without automatically and permanently subjecting the trust assets to attachment by the individual's creditors unless the transfer to the trust is in fraud of creditors.

In addition to making a few stylistic and clarification changes, the proposed new bill has been redrafted to address the concerns which we understand the Governor expressed as the reasons for vetoing the bill.

1. Possible Use to Disinherit a Spouse. The Governor apparently was concerned that one spouse could "disinherit" his or her surviving spouse from the minimum or elective share to which the surviving spouse would be entitled from the "augmented estate" by creating a trust for his or her own benefit. To address this concern, Section 1 of the proposed new bill would amend AS 13.12.205(2)(A) by adding the parenthetical material so that the deceased spouse's augmented estate automatically would include a trust described in AS 34.40.110 (i.e., one from which the deceased spouse was eligible, even if not entitled, to receive distributions). As with other predeath transfers, such a trust created before the marriage or one with respect to which

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the surviving spouse had in writing expressly waived his or her right of election would not be included in the augmented estate.

2. Possible Use to Avoid Child Support Payments.

Apparently, the Governor also was concerned that a parent might make transfers of property to a trust described in AS 34.40.110 (i.e., one from which the parent is eligible to receive distributions) to avoid having that property seized to satisfy child support payments. The proposed bill addresses that concern in three provisions ways. First, under Section 9 of the bill, at AS 34.40.110(b)(1), the transfer to the trust would be void if it was intended in whole or in part to hinder, delay or defraud creditors or other persons under AS 34.40.010. (As mentioned at our meeting, Alaska appears to have a six-year statute of limitations on fraudulent transfers; I do not believe any state has a longer one.) Presumably, a transfer to avoid making child support payments is a fraudulent transfer. Second, Section 9 at AS 34.40.110(b)(4) would, in effect, make the trust void if the settlor were in default on child support payments by 30 or more days. Third, Section 9 at AS 34.40.110(d) would make a distribution declared to the settlor, or any other beneficiary, attachable by the Child Support Enforcement Division. We hope and believe these three provisions adequately address the Governor's concern with respect to child support. We believe these changes will not adversely affect using Alaska trusts for estate planning purposes, discussed below.

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I think it also is appropriate to mention that, perhaps, the best thing that could happen from a child support enforcement viewpoint would be for a parent to create an Alaskan trust. The trust assets then would be directly under the jurisdiction of an Alaska court. As a result, I think it is extremely unlikely that a parent would even consider creating an Alaskan trust if the parent were trying to avoid making child support payments. If anything, the parent would hide assets, transfer them directly to someone else (such as a "new" spouse) or create an asset protection trust outside of the United States, so no U.S. court would have jurisdiction over its assets.

In any case, we hope these changes will allow the Knowles administration enthusiastically to support the proposed new bill. Please contact me at your most early convenience if these changes do not accomplish that.

No Change in Burden of Proof

We understood that there was some question raised as whether the Alaska Family Trust Act of 1996 would have changed the burden of proof on a transfer which allegedly was made in defraud of creditors. It would not do so. As mentioned above, under Section 9 of the bill, transfers to the trust are void if made in defraud of creditors under AS 34.40.010 just as other fraudulent transfers are.

The Bill Would Not Permit or Enhance Fraudulent Transfers

Under American law, transfers made to defraud known or anticipated creditors are void. But under every state, transfers

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can be made to immunize assets from claims of future unknown creditors. For example, one spouse can transfer assets to or in trust for the other spouse (or anyone else) and immunize them from claims of future unknown creditors. As I mentioned at our meeting, I have placed a portion of my assets in trust for my wife and children precisely for that reason. Nonetheless, under an ancient English law, known as the Statute of Elizabeth, which probably persists throughout the country, except perhaps Missouri, Indiana and Maryland, assets transferred to an irrevocable trust, even if not made in defraud of creditors, remain permanently subject to the claims of the transferor's creditors, even future unknown and unanticipated ones, if the transferor is merely eligible to receive assets back from the trust. Among other things, this frustrates legitimate estate planning for Americans in using American trusts, as will be explained in more detail later.

As indicated, the law of Alaska and all other states permits individuals, although not in defraud of known or anticipated creditors, to take legitimate action to immunize their personal assets from claims of unknown future creditors. These actions include making gifts to or creating trusts for others, placing money in qualified retirement plans and IRAs, and operating business through corporations, limited partnerships and limited liability companies. Many states permit an individual to immunize assets from future creditors in ways which Alaska does not permit. Several jurisdictions, for example, exempt without

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limit cash in a life insurance policy or in an annuity contract from claims of creditors. That is the case in New York. Other states, such as Florida, provide complete immunity for homes, regardless of their value. Alaska does not immunize life insurance policies, annuity contracts or homes from creditor claims. But, as mentioned above, Alaska, and all other states, permit an individual to immunize assets from claims of his or her creditors by transferring them into trust for other people, such as other family members. The Alaska Trust Act of 1997 would make one relatively minor change by maintaining the immunization for trust assets from claims of future unknown creditors where the transferor is eligible but not entitled to receive property from the trust, but only if the transfer to the trust is not in defraud of creditors. Although this is a minor change in creditor rights, it will result in a major change in opportunities in estate and financial planning.

In our meeting, you raised the question about whether the bill would send the wrong "message" about Alaska as being a place where one could defraud creditors. If anything, I think it would send the opposite message. Something like 17 countries (and the list appears to be growing) permit U.S. persons to create trusts to defraud creditors. Under their laws, it does not matter whether the trust is for the benefit of the settlor or someone else. Basically, once the property gets into a trust under the jurisdiction of that country it is immunized from the claims of the transferor's creditors. As a practical matter,

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these countries do not have real fraudulent transfer rules. I know that because clients of ours have been defrauded by transfers to such trusts. That could not happen under Alaska Trust Act of 1997.

Under Alaska law, there is a very long-term fraudulent transfer statute of limitations, six years. AS 09.10.050. Clearly, no one is going to try to transfer assets in defraud of creditors by creating an Alaskan trust.

Alaska Trusts Would Enhance Estate Planning for All Americans

Nonetheless, as we discussed, Americans will be able to use Alaskan trusts to enhance estate planning opportunities. As you know, the most effective estate planning almost always involves transferring assets well before death. Individuals, however, very often hesitate in doing that because, to be effective, there usually must be no way the property can ever be returned to the individual. Under the law of virtually all states, creditors can attach assets transferred to a trust even if not transferred in defraud of creditors if the transferor is merely eligible to receive the property in the discretion of an independent trustee. The ability of creditors to attach the property means the transfer is incomplete for estate and gift tax purposes. That is one of the ways foreign trusts can be legitimately used. A recent article written by Joseph Kartiganer, Esq., one of the nation's leading estate planning lawyers, discussing the use of foreign trusts for estate planning purposes, is enclosed. Under the proposed bill, this type of

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estate planning could be done in Alaska. We believe Americans would prefer to create trusts in Alaska rather than in foreign countries for estate planning purposes.

As mentioned at our meeting, under the bill, individuals could create trusts in Alaska to immunize assets from claims of future, unknown creditors. This can be done today anywhere in the United States. As mentioned, I have done it by transferring assets to a trust here in New York for my wife and children. But such a transfer cannot be done, except perhaps in Missouri, Indiana and Maryland, if the person who created the trust is eligible to receive property back from the trust. Under the bill, Alaska law would be changed so one could create a trust (provided it is not done in defraud of creditors) including himself or herself. According to one U.S. government report, nearly one-half trillion dollars has been transferred by Americans to foreign asset protection trusts. Some of these transfers are in defraud of creditors, and, hence, would not have been created in Alaska, even under the bill, or anywhere else in America. But many of the transfers to foreign trusts by Americans are not in defraud of creditors. These latter transfers are being made for estate planning reasons or to protect assets from future unknown creditors only, something permitted under the law of all states. Under the bill, these non-fraudulent transfers could be made to Alaska trusts rather than to foreign trusts and we believe most would choose Alaskan

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trusts. This would, in our judgment, substantively benefit the trust and financial industries in the state.

ANCSA Settlement Trusts

The proposed new bill contains a new section (Section 10) which expressly deals with "settlement trusts" created by Regional Corporations under Section 39(a) of the federal law, the Alaska Native Claims Settlement Act (ANCSA). Although we have been advised by legal counsel to certain of the Regional Corporations that the Alaska Family Trust Act of 1996 would have facilitated the creation of settlement trusts under Section 39(a) of ANCSA, it was recommended that additional changes be made to Alaska trust law with respect to settlement trusts, and we have done so.

\* \* \*

Thank you again for meeting with me. It is an honor to be dealing with you about this important matter. I look forward to hearing from you.

Sincerely yours,

Jonathan G. Blattmachr

JGB:agw  
Enclosure

cc: Ms. Linda Hulbert  
Fax No.: 907-479-6536

bcc: Richard Thwaites, Jr., Esq.  
Fax No.: 907-274-1126

Richard Hompesch, Esq.  
Fax No.: 907-456-5693

Mr. Douglas Blattmachr  
Fax. No. 406-791-7385

112634

**THE FOLLOWING PAGES MAY  
NOT FILM LEGIBLY BECAUSE OF  
THE POOR QUALITY OF THE ORIGINAL**

# Completed Gifts to Offshore Trusts and the Three-Year Rule

Joseph Kartiganer, Pamela L. Rollins, and Abraham D. Piontzeu

*Transfers to an irrevocable offshore trust where the settlor remains a potential beneficiary of the trust requires careful planning.*

In recent years, the offshore asset protection trust has gained popularity as an estate planning tool. Unlike trusts established in most domestic jurisdictions, the offshore trust permits settlors to protect themselves from future creditors without having to give up completely the benefit of the transferred assets.

Commentators generally have assumed that transfers to the offshore trust will be structured so that they will be wholly incomplete for Federal gift tax purposes and be includible in the settlor's gross estate for Federal estate tax purposes.<sup>1</sup> Frequently overlooked are significant potential gift and estate tax benefits that are available to a settlor who instead makes a completed gift to an irrevocable offshore trust of which he is a discretionary beneficiary, structured so that the trust assets will be excluded from his gross estate. The decision whether to use such a structure should take into account the fact that many foreign jurisdictions have a waiting period during which creditors whose claims arise after the creation of such a trust may reach the assets of the trust thereafter "subsequent creditors"; this waiting period will delay completion of the gift and may trigger the three-year rules of Sections 2035(d)(2) or 2038(a) of the Internal Revenue Code of 1986 (IRC), thereby extending the period during which the trust assets will be includible in the settlor's estate.

## Creditor Protection

A primary reason for creating an offshore trust is its usefulness in protecting assets from creditors' claims.<sup>2</sup> In most cases, the settlor may retain an interest in the offshore trust as a discretionary beneficiary without giving up this asset protection.<sup>3</sup> By contrast, domestic courts have refused to extend such protection to a settlor-beneficiary of a domestic self-settled trust.<sup>4</sup>

## Benefits of Completed Gift Structure

For a settlor willing to give up a certain measure of control over assets and to pay any applicable gift tax, an irrevocable offshore trust can provide the estate planning benefits associated with domestic completed gifts in addition to asset protection.

A completed gift is designed to exclude the trust assets and any gift tax paid thereon from the settlor's gross estate. In addition, estate and gift taxes are avoided with respect to any post-transfer income and appreciation of the transferred assets. Furthermore, because the offshore trust is a grantor trust for income tax purposes,<sup>5</sup> the trust will grow on a tax-free basis, with the grantor paying the income taxes (without gift tax consequences).<sup>6</sup>

*Joseph Kartiganer, Esq., is a Partner in the New York law firm of Simpson Thacher & Bartlett and specializes in the area of personal planning. Pamela L. Rollins, Esq., is Counsel in the same firm. Abraham D. Piontzeu, Esq., is an associate at the firm. All three specialize in the area of personal planning.*

## COMPLETED GIFTS TO OFFSHORE TRUSTS

EXHIBIT 1  
Statutory Authority

IRC Section 2501 imposes a tax on the transfer of property by gift by an individual. IRC Section 2511 provides that the tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the gift is real or personal, tangible or intangible.

Treasury Regulation Section 25.2511-2 contains the following provisions:

- (b) As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case...
- (c) A gift is incomplete in every instance in which a donor reserves the power to revert the beneficial title to the property in himself.

For settlors who are convinced of the benefits of lifetime giving but are fearful that they may be left with insufficient funds for themselves, the offshore trust provides an opportunity for transfers at gift tax rates (with the benefit of any remaining \$600,000 credit shelter) while retaining beneficiary status.

### Gift and Estate Tax Consequences

**Gift Tax.** Whether a transfer is a completed gift turns on whether the settlor has sufficiently abandoned dominion and control over the property. For discussion of the statutory guidelines on this element, see Exhibit 1. The settlor of an irrevocable offshore trust will not be deemed to have completely parted with dominion and control of property where the settlor could receive the economic benefit and enjoyment of the trust assets by borrowing money or by transferring his inter-

est in the trust fund and relegating his creditors to the trust fund for payment.<sup>9</sup> This applies to the maximum amount the trustee may pay to the settlor or apply for his benefit, even if the settlor is only a discretionary beneficiary and regardless of whether such power is, in whole or in part, actually exercised.

However, a gift, even though initially incomplete, becomes complete when the settlor's actions may no longer affect creditors' rights to reach the trust assets.<sup>10</sup> Accordingly, the gift becomes complete when the period specified under the law of the foreign jurisdiction ends. Indeed, in a private letter ruling, the Internal Revenue Service (IRS), holding that a completed gift was made to an irrevocable offshore trust, relied on the claims of the settlor's representative that under applicable foreign law neither the settlor-beneficiary nor its creditors may compel the trustee to distribute the trust's assets to or for their benefit.<sup>10</sup>

**Estate Tax.** IRC Sections 2036 and 2038 operate to include in a decedent's gross estate transfers that leave the transferor a significant interest in or control over the property transferred during his lifetime, on the theory that the transferor really kept the benefit of the property. These sections differ slightly in their definitions of what is includable in the decedent's gross estate. Section 2036(a) provides that the decedent's gross estate shall include

the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer...under which (the decedent) has retained for his life or for a period not ascertainable without reference to his death, or a period which did not in fact end before his death (1) the possession or enjoyment of, or right to income from the property; or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2038(a)(1) provides that the decedent's gross estate shall include

## COMPLETED GIFTS TO OFFSHORE TRUSTS

the value of all property (to the extent of any interest therein of which the decedent has at any time made a transfer...where the enjoyment thereof was subject at the date of death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent (without regard to when or from what source the decedent acquired such power) to alter, amend, revoke or terminate, or any such power is relinquished during the 3-year period ending on the date of the decedent's death.

Such retained powers exist where the settlor is deemed to retain the economic benefit and enjoyment of the trust assets by being able to incur debt and relegate his creditors to the trust for payment, again as measured by the extent of the trustee's discretion to pay assets to the settlor.<sup>11</sup> However, the settlor will be deemed to have relinquished such powers when his actions may no longer affect creditors' rights,<sup>12</sup> at the same time as the gift is complete (that is, upon the expiration of the period during which the settlor's incurring of debt would allow creditors to reach the trust assets under the foreign law).

### Sections 2035 and 2038 and the Three-Year Rule

Notwithstanding the fact that, once the period during which creditors may reach the trust assets terminates, the gift will be complete and the settlor will no longer be deemed to hold a Section 2036 or 2038 power with respect to the trust, the question remains whether termination of the settlor's powers by operation of law triggers the rules of Section 2035(d)(2) or Section 2038(a)(1) and extends for a further three years, the period in which the trust's assets will be includable in the settlor's gross estate.

Section 2035(d)(2) would include in the decedent's gross estate trust assets as to which a retained interest or power terminat-

ed as a result of a "volitional act or otherwise" within three years of death.<sup>13</sup> Section 2035(a) provides that the gross estate shall include the value of all property interests transferred by the decedent within three years of death. Under Section 2035(d)(1), the provisions of Section 2035(a) are generally not applicable to the estates of individuals dying after December 31, 1981. However, Section 2035(d)(2) provide that Section 2035(d)(1)

shall not apply to a transfer of an interest in property that is included in the value of the gross estate under Sections 2036, 2037, 2038 or 2042 or would have been included under any of such sections if such interest had been retained by the decedent.

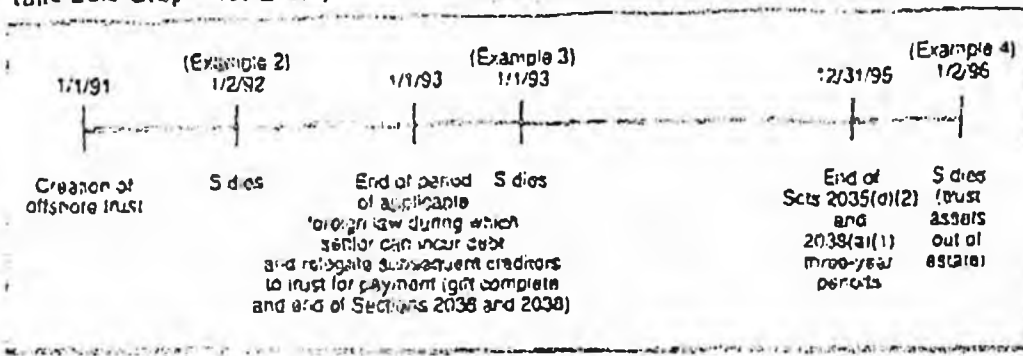
Under Section 2038, the settlor will be deemed to have relinquished a power to alter, amend, or revoke the trust on the date the period under foreign law has run (that is, by allowing the power to borrow money or otherwise incur debt and to relegate his creditors to the trust for payment to expire without action on his part).

In *White v. United States*,<sup>14</sup> the settlor had the power to amend or revoke the terms of a trust requiring mandatory distributions to the beneficiaries prior to the vesting date. The court held that the failure of the settlor to exercise the powers to amend or revoke the trust was a relinquishment of such powers by the settlor, causing all unpaid mandatory distributions vesting within three years of the settlor's death to be includable in the settlor's gross estate pursuant to Section 2038.

In a private letter ruling,<sup>15</sup> the IRS held that assets of a trust were includable in the settlor's gross estate pursuant to Sections 2035 and 2038 where the settlor died within three years of the termination of the trust according to its own terms. The settlor, by allowing his Section 2038 powers, which he could have exercised, to expire without action on his part, was found to have "relinquished" the powers on the date the trust terminated. The IRS further held that because the trust assets would have been includable under IRC Section 2038, it would also be includable under Section 2035.

**"The gross estate shall include the value of all property interests transferred by the decedent within three year of death."**

Time Line Graph (for Examples 2-4)



How is the transfer in the final example treated? The transfer by S will have been deemed a completed gift on January 1, 1993 and no part of the trust income or corpus or gift tax paid will be included in S's gross estate.

the trust. However, the gift will not be deemed to be complete and the assets will be includible in the settlor's gross estate pursuant to Sections 2036 and 2038 until the expiration of the period under foreign law during which the settlor's actions may affect creditors' rights to reach the trust assets. In addition, it is likely that Sections 2035 and 2038 will further extend the period in which the assets will be includible in the settlor's gross estate for three years after the deemed termination of the settlor's Sections 2036 and 2038 powers. ■

Conclusion

A settlor can use an irrevocable offshore trust as an effective estate planning tool while remaining a potential beneficiary of

<sup>1</sup>Osborne, *Asset Protection, Domestic and International Law and Tactics*, Section 24-23; Rosen, 810 TAM, *Asset Protection Planning* at A-22.  
<sup>2</sup>The asset protection afforded settlors of an offshore trust by many foreign jurisdictions is, with respect to creditors of the settlor whose claims arise prior to the creation of the offshore trust, generally limited by the fraudulent conveyance laws of those jurisdictions. Accordingly, unless otherwise provided, references in this article to creditors shall refer to subsequent creditors of the settlor. See Engel, "Using Foreign Situs Trusts for Asset Protection," 20 Est. Plan. 212, 215 (1993), 76 Am. Jur. 2d, *Trusts* § 139; Marry-Nelson, "Offshore Asset Protection Trusts: Having Your Cake and Eating It Too," 47 Rutgers L. Rev. 11, 62 (1994).  
<sup>3</sup>See *Vanderbilt Credit Corp. v. Chase Manhattan Bank*, 473 N.Y.S.2d 242, 245-246 (App. Div. 1983); Marry-Nelson, *supra* note 4 at 31.  
<sup>4</sup>Upon the death of the grantor, one trust seemed to be a grantor trust and there is a chance that an estate tax pursuant to IRC § 1491 may be due. See Rev. Rul. 97-61, 1997-2 CB 219.  
<sup>5</sup>See C.T. Montezano, *Defensive Grantor Trusts: Gift Tax Consequences of Payment of Income Tax Liabilities by Grantor*, 20 Tax Mgmt. Est., Gifts & Tr. J. 183 (Sept. 14, 1992); see also Priv. Ltr. Rul. 9211033 (Nov. 4, 1992).  
<sup>6</sup>Comin's *Vander Weide*, 254 F.2d 895 (6th Cir. 1958); Priv. Ltr. Rul. 9332068 (Aug. 15, 1993); *Estate of Paxton v.*

*Comin*, 96 TC 785, 815 (1991); *Ourwin v. Comin*, 76 TC 153 (1981).  
<sup>7</sup>*Ourwin v. Comin*, 76 TC at 163.  
<sup>8</sup>Rev. Rul. 77-378, 1977-2 CB 347; Rev. Rul. 76-103, 1976-1 CB 374.  
<sup>9</sup>Priv. Ltr. Rul. 9332006 (Aug. 13, 1993).  
<sup>10</sup>*Estate of Lhi v. Comin*, 35 TC 22 (1953), rev'd, 241 F.2d 867 (7th Cir. 1953); *Estate of Paxton*, 96 TC at 814.  
<sup>11</sup>Rev. Rul. 76-103, 1976-1 CB 374.  
<sup>12</sup>IRC § 2035(d)(2). See Priv. Ltr. Rul. 9032002 (Aug. 10, 1990) discussing circumstances under which termination of retained interests or powers in a trust would require inclusion of trust assets in a settlor's gross estate under Section 2035(d)(2), and citing two gift tax cases as examples of what is meant by "a voluntary act or otherwise." See *Webster v. Comin*, 65 TC 968, 979 (1976); *Goreman v. Comin*, 4 TC 191 (1941).  
<sup>13</sup>*White v. United States*, 881 F. Supp. 688 (D. Mass. 1995).  
<sup>14</sup>Priv. Ltr. Rul. 9127008 (July 5, 1991).  
<sup>15</sup>The protector is unique to foreign trusts. The protector may be granted broad powers, including, without limitation, the power to remove and replace trustees and to vary beneficiaries. If the settlor appointed himself as protector, the gift may not be deemed complete and the trust assets may be includible in the settlor's gross estate. See Priv. Ltr. Rul. 9332006.  
<sup>16</sup>Priv. Ltr. Rul. 9332006.

## HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Amended:

Offered:

Sponsor(s): REPRESENTATIVE

## A BILL

## FOR AN ACT ENTITLED

1 "An Act relating to the jurisdiction governing a trust, to challenges to trusts or  
 2 property transfers in trust, to the validity of trust interests, to transfers of  
 3 certain trust interests, and the augmented estate."

4 AS IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 \* Section 1. AS 13.12.205(2)(A) is amended to read:

6 (A) an irrevocable transfer in which the decedent retained the right to  
 7 the possession or enjoyment of, or to the income from, the property, if and to the  
 8 extent the decedent's right terminated at or continued beyond the decedent's death  
 9 (~~including an irrevocable transfer to a trust described in AS 34.40.110~~); the amount  
 10 included is the value of the fraction of the property to which the decedent's right  
 11 related, to the extent the fraction of the property passed outside probate to or for  
 12 the benefit of a person other than the decedent's estate or surviving spouse.

13 \* Section 2. AS 13.36.035(a) is amended to read:

14 (a) The court has exclusive jurisdiction of proceedings initiated by  
 15 interested parties concerning the internal affairs of trust, including trusts  
 16 covered by (c) of this section. Except as provided in (c) - (d) of this

1 section, proceedings that may be maintained under this section are those  
2 concerning the administration and distribution of trusts, the declaration of  
3 rights and the determination of other matters involving trustees and  
4 beneficiaries of trusts. These include proceedings to

5 (1) appoint or remove a trustee;

6 (2) review trustees' fees and to review and settle interim or  
7 final accounts;

8 (3) ascertain beneficiaries, determine any question arising in  
9 the administration or distribution of any trust including questions of  
10 construction of trust instruments, instruct trustees, and determine the  
11 existence or nonexistence of any immunity, power, privilege, duty or right;  
12 and

13 (4) release registration of a trust.

14 \* Section 3. AS 13.36.035 is amended by adding new subsections to read:

15 (c) A provision that the laws of this state govern the validity,  
16 construction, and administration of the trust and that the trust is subject to  
17 the jurisdiction of this state is valid, effective, and conclusive for the  
18 trust if

19 (1) some or all of the trust assets are deposited in this state  
20 and are being administered by a qualified person;

21 (2) a trustee is a qualified person; and

22 (3) part or all of the administration of the trust occurs in  
23 this state.

24 (d) The validity, construction, and administration of a trust with a  
25 state jurisdiction provision are determined by the laws of this state,  
26 including the

27 (1) capacity of the settlor;

28 (2) powers, obligations, liabilities, and rights of the trustees  
29 and the appointment and removal of the trustee; and

30 (3) existence and extent of powers, conferred or retained,  
31 including a trustee's discretionary powers, the powers retained by a  
32 beneficiary of the trust, and the validity of the exercise of a power.

(e) For purposes of subsection (c)

(1) some or all of the trust assets shall be treated as being deposited in this state and being administered by a qualified person if any part of the assets of the trust are held in a checking account, time deposit, certificate of deposit, brokerage account or similar account or deposit within this state.

(2) a qualified person shall be treated as being a trustee if the qualified person is designated as a trustee under or pursuant to the terms of the governing instrument or by any court having jurisdiction over the trust and the powers exercisable by the qualified person as trustee include or are limited to maintaining on an exclusive or non-exclusive basis books and records of and on behalf of the trust and to preparing or arranging on an exclusive or non-exclusive basis for the preparation of any income tax returns which must be filed by the trust.

(3) part or all of the administration of the trust shall be treated as occurring in this state if books and records of the trust are physically maintained in this state.

\*Section 4. AS 13.36.045(a) is amended to read:

(a) The court will not, over the objection of a party, entertain proceedings under AS 13.36.035 involving a trust registered or having its principal place of administration in another state, unless

(1) all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration;

[OR]

(2) the interests of justice otherwise would seriously be impaired; or

(3) the trust contains a state jurisdiction provision; and

(A) some or all of the trust assets are deposited in this state and are being administered by a qualified person; or

(B) a trustee is a qualified person.

\* Section 5. AS 13.36 is amended by adding new sections to read:

1 Section 13.36.310. CHALLENGES TO TRUST. Except as provided in  
2 AS 14.40.110; a trust that is covered by AS 13.36.035(c) or that is otherwise  
3 governed by the laws of this state, or a property transfer in trust that is  
4 covered by AS 13.36.035(c) or that is otherwise governed by the laws of this  
5 state, is not void, voidable, liable to be set aside, defective in any  
6 fashion, or questionable as to the settlor's capacity on the grounds that the  
7 trust or transfer avoids or defeats a right, claim, or interest conferred by  
8 law on a person by reason of a personal or business relationship with the  
9 settlor or by way of a marital or similar right.

10 Section 13.36.390. DEFINITIONS. In AS 13.36.

11 (1) "qualified person" means:

12 (A) an individual who, except for brief intervals, military  
13 service, attendance at an educational or training institution, or for  
14 absences for good cause shown, resides in this state, whose true and  
15 permanent home is in this state, who does not have a present intention  
16 of moving from this state, and who has the intention of returning to  
17 this state when away;

18 (B) a trust company that is organized under AS 06.25 and  
19 that has its principal place of business in this state; or

20 (C) a bank that is organized under AS 06.05, or a national  
21 banking association that is organized under 12 U.S.C. 21 - 216d, if the  
22 bank or national banking association possesses and exercises trust  
23 powers and has its principal place of business in this state;

24 (2) "settlor" means a person who transfers property in trust;  
25 "settlor" includes a person who furnishes the property transferred to a trust  
26 even if the trust is created by another person;

27 (3) "state jurisdiction provision" means a provision that the  
28 laws of this state govern the validity, construction, and administration of a  
29 trust and that the trust is subject to the jurisdiction of this state.

1 • Section 6. AS 34.27.050(a) is amended to read:

2 (a) A nonvested property interest is invalid unless

3 (1) when the interest is created, it is certain to vest or  
4 terminate no later than 21 years after the death of an individual then alive;

5 [OR]

6 (2) the interest either vests or terminates within 90 years  
7 after its creation; or

8 (3) the interest is in a trust and all or part of the income or  
9 principal of the trust may be distributed, in the discretion of the trustee,  
10 to a person who is living when the trust is created.

11 • Section 7. AS 34.27.060 is amended to read:

12 Sec. 34.27.060. REFORMATION. Upon the petition of an interested  
13 person, a court shall reform a disposition in the manner that most closely  
14 approximates the transferor's manifested plan of distribution and is within  
15 the 90 years allowed by AS 34.27.050(a)(2), (b)(2), or (c)(2) if

16 (1) a nonvested property interest or a power of appointment  
17 becomes invalid under AS 34.27.050;

18 (2) a class gift is not but might become invalid under  
19 AS 34.27.050 and the time has arrived when the share of any class member is to  
20 take effect in possession or enjoyment; or

21 (3) a nonvested property interest that is not validated by  
22 AS 34.27.050(a) can vest but not within 90 years after its creation.

23 • Section 8. AS 34.40.010 is amended to read:

24 Sec. 34.40.010. INVALIDITY GENERALLY. Except as provided in  
25 AS 34.40.110, a conveyance or assignment, in writing or otherwise, of an  
26 estate or interest in land, or in goods, or things in action, or of rents or  
27 profits issuing from them or a charge upon land, goods, or things in action,  
28 or upon the rents or profits from them, made with the intent to hinder, delay,  
29 or defraud creditors or other persons of their lawful suits, damages,  
30 forfeitures, debts, or demands, or a bond or other evidence of debt given,  
31 action commanded, decree or judgment suffered, with the like intent, as  
32 against the persons so hindered, delayed, or defrauded is void.

1 Section 9. AS 34.40.110 is repealed and reenacted to read:

2 Sec. 34.40.110. RESTRICTING TRANSFERS OF TRUST INTERESTS. (a) A  
3 person who in writing transfers property in trust may provide that the  
4 interest of a beneficiary of the trust may not be either voluntarily or  
5 involuntarily transferred before payment or delivery of the interest to the  
6 beneficiary or beneficiaries by the trustee. In this subsection,

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

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

11 (b) If a trust contains a transfer restriction allowed under (a) of  
12 this section, the transfer restriction prevents a creditor existing when the  
13 trust is created, a person who subsequently becomes a creditor, or another  
14 person from satisfying a claim out of the beneficiary's interest in the trust,  
15 unless the

16 (1) transfer was intended in whole or in part to hinder, delay,  
17 or defraud creditors or other persons under AS 34.40.010;

18 (2) trust provides that the settlor may revoke or terminate all  
19 or part of the trust without the consent of a person who has a substantial  
20 beneficial interest in the trust and the interest would be adversely affected  
21 by the exercise of the power held by the settlor to revoke or terminate all or  
22 part of the trust; in this paragraph, "revoke or terminate" does not include a  
23 power to veto a distribution from the trust, a testamentary special power of  
24 appointment or similar powers, or the right to receive a distribution of  
25 income and/or corpus in the discretion of a person, including a trustee, other  
26 than the settlor;

27 (3) trust requires that all or part of the trust's income or  
28 principal, or both, must be distributed to the settlor; or

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

1 (c) The satisfaction of a claim under (b)(1)-(3) of this section is  
2 limited to that part of the trust to which (b)(1)-(3) of this section applies.

3 (d) Notwithstanding any provision in the trust instrument, once a  
4 distribution has been declared by and is payable from a settlement trust, the Child  
5 Support Enforcement Division may enforce the support obligations of a beneficiary,  
6 including any settlor of the trust who is a beneficiary, of the trust against the  
7 portion of the distribution which the beneficiary would otherwise be entitled.

8 (e) In this section, "settlor" means a person who transfers real  
9 property, personal property, or an interest in real or personal property, in  
10 trust.

11 \* Section 10. New AS 13.36.310 is added to read:

12 Sec. 13.36.310. Settlement Trust Organized Under Pub L. No. 92-203.

13 (a) In General. Except to the extent that this section provides to the  
14 contrary, the provisions of AS 13.36 and 13.38 apply to any settlement trust  
15 organized under the Alaska Native Claims Settlement Act ("ANCSA"), Pub. L. NO. 92-  
16 203. This section applies to any such settlement trust, regardless of whether such  
17 settlement trust is established before or after the date of enactment of this  
18 section. As used in this section, a "settlement trust" is any trust meeting the  
19 definition of a settlement trust imposed by ANCSA.

20 (b) Dissenter's Rights. Dissenters rights do not apply to (i) any  
21 shareholder vote relative to a settlement trust (including without limitation, any  
22 shareholder vote whether to establish or transfer assets to a settlement trust),  
23 (ii) any actual transfer of corporate assets to a settlement trust, (iii) any action  
24 or activity of the settlement trust.

25 (c) Alaska Securities Laws. None of the following is a sale of a  
26 security under AS 45.55.070 and AS 45.55.110(10): (i) the establishment of a  
27 settlement trust in accordance with the procedures set forth in ANCSA; (ii) the  
28 transfer of assets by a Native corporation to a settlement trust in accordance with  
29 ANCSA; (iii) the transfer of a beneficial interest in a settlement trust, provided  
30 that the transfer would have been permitted under 43 U.S.C. § 1606(h) if the  
31 beneficial interest being transferred had instead been a share of stock in a Native  
32 corporation and the provisions of 43 U.S.C. § 160(h) had applied to such Native

1 corporation. The provisions of AS 45.55.139 shall apply to any settlement trust  
2 having at least 30 Alaska resident beneficiaries, provided that such settlement  
3 trust has total assets exceeding \$100,000 and at least 500 total beneficiaries.

4 (d) Beneficiary Protection. The trust agreement for a settlement trust  
5 may contain one or more provisions restricting or preventing transfer or alienation  
6 of the beneficial interests in such settlement trust, as well as a provision  
7 restricting or preventing anticipatory assignments of the distribution from such  
8 settlement trust. Any such provisions shall be enforceable against all persons,  
9 except as set forth herein. Notwithstanding any such provision in the trust  
10 agreement for a settlement trust, once a distribution has been declared by and is  
11 payable from a settlement trust, the Child Support Enforcement Division may enforce  
12 the support obligations of a beneficiary of the settlement trust against the portion  
13 of such distribution to which that beneficiary would otherwise be entitled in the  
14 same manner as support obligations may be enforced against a distribution which has  
15 been declared and is payable by the ANCSA corporation itself.

16 (e) Trust Registration. Notwithstanding any contrary provision of AS  
17 13.36, the following rules shall apply to a settlement trust.

18 (1) Initial Registration. Upon the shareholder vote establishing  
19 a trust, such settlement trust shall be registered with the Commissioner of the  
20 Department of Commerce and Economic Development or the Commissioner'  
21 s designees. Such initial registration shall be on such forms as the Commissioner  
22 shall provide, and shall set forth the name of the ANCSA corporation establishing  
23 the trust, the date on which the shareholder vote occurred which approves the trust  
24 as a settlement trust within the meaning of ANCSA, the date of the initial trust  
25 agreement establishing the trust, the names of the initial trustees, the actual  
26 street address at which the principal administration of the trust is to occur, and  
27 a person or entity designated to accept process upon such trust. The Native  
28 corporation which established the settlement trust or an officer of such corporation  
29 may be designated to accept process. The trust agreement of settlement trust shall  
30 not be filed.

31 (1) Further Biennial Registration Required. Each settlement  
32 trust shall also file with the Commissioner or the Commissioner's designees a

1 biennial registration statement setting forth the same information described in  
2 (e) (1) above as of the date of such registration statement.

3 (3) Application to Existing Registrations. Any settlement trust  
4 which as of the date of enactment of this section has filed a registration statement  
5 in accordance with AS 13.36.005 et. seq. shall file a registration statement with  
6 the Commissioner or the Commissioner's designee in the form described in (e) (1)  
7 within 180 days of the enactment of this section. Upon such timely filing, such  
8 settlement trust shall be deemed to have been continuously registered under the laws  
9 of Alaska State commencing upon the date of its registration with the Superior  
10 Court.

11 (4) Commissioner As Agent for Process. In addition to any person  
12 or entity designated in the registration statement to accept service of process, the  
13 Commissioner of Commerce and Economic Development or the Commissioner's designee is  
14 also hereby automatically designated to accept process for any settlement trust.  
15 Upon such acceptance of process, the Commissioner or the Commissioner's designee  
16 shall promptly notify the settlement trust of the process which has been accepted.

17 (5) Fees. No fee shall be imposed for any of the registration  
18 statements described in (e) (1) through (3) of this section.

19 \* Section 11. This Act does not apply to a trust unless the trust is created on  
20 or after the effective date of this Act or is a settlement trust created pursuant to  
21 section 39(a) of ACSA.

22 \* Section 12. This Act shall take effect immediately.

HB 101 — (with HB 459)

Crystal Smith

Vince Vera had problems @ spousal support  
Rule agst. perpetuities

[ House Labor & Commerce has  
only referral

Out of committee

lobbying — Joe Hayes — Trust Co  
— Fbks estate planning  
— Ins. — Linda Huribert  
— supports

designed to allow you to set  
up irrevocable trusts

Child support / surviving spousal shares

Gov. vetoed

→ Read across tomorrow

Pat Portio — wants to make it work if possible.

276-6015

## MEMORANDUM

**Date:** February 21, 1997  
**To:** Joe Green  
**From:** Lisa Kirsch  
**Re:** **HB 101--Trust Act**

This is the legislation we talked about earlier that changes the rules governing trusts that people use for estate planning. Those opposing the legislation think it will create a loophole for debtors who want to avoid paying child support or spousal support. See the attached letter from the drafter of the Uniform Probate Code and memo from the Dept. of Law.

The bill also abolishes "the rule against perpetuities." In very simple terms, this rule prevents a person from setting up a trust that continues forever. Ordinarily, the length of time a trust lasts is determined by a person's lifetime plus 21 years or 90 years. A quick example of a trust in compliance with the rule would be a trust that ends by paying out 21 years after the death my daughter (which could be > 90 years) or if I don't want to link it to anyone's lifetime, a trust that terminates in 90 years.

Abolishment of the rule creates a loophole to escape from taxes that would come due when the trust pays out; however, even though this may seem inviting, it may also create headaches for courts for years to come as more and more descendants of the original trustor battle for smaller and smaller shares. Forty-six states have the rule against perpetuities.

Supporters, many of whom want to sell these new types of trusts, say that this bill will bring lots of business to Alaska since few states have laws that allow this type trust. This is uncontested by the opposition. Supporters argue that revenue from the sale of these trusts is now going to foreign banks and trust companies because these trusts are prohibited here.

**This bill comes up on the floor today.**

## Legal Issues Raised by HB 101

- **CHILD SUPPORT:** bill deals with *established* child support arrearage for child of the settlor. Does not provide for support obligation arising after creation of the trust; need to ensure that trust could be invaded to provide for support obligation which arises after creation of the trust. Does not provide for support obligation that may be established for other than the biological child of the settlor; e.g., needs to be equally clear that support obligation ordered for a stepchild or other obligee is covered. We would suggest that this section be amended to provide that non-payment of *any* support obligation established, spousal or child, be grounds to either void or invade the trust.
- **BURDEN OF PROOF Re: INTENT OF SETTLOR:** The burden of proof to establish that trust was created for purpose of hindering or defrauding creditors appears to be shifted to person seeking to void trust. If burden of proof is not a concern for the bill's proponents (as the letter from Blattmachr seems to aver), they should be willing to insert language that provides essentially that, if the trust actually functions to avoid certain obligations - such as spousal and child support, and certain others - that is prima facie evidence of intent, rebuttable by settlor.
- **SPOUSAL INHERITANCE:** The bill's proponents assert this flaw from last year's bill has been fixed. There is no one in the Department sufficiently skilled in this area to confirm that the bill does what it purports to do.

## POLICY ISSUES

- The bill's primary intent is to allow the formation of trusts which are intended to be able to permit the trustor to "hide" assets from certain creditors, including the IRS. We will express no opinion on this, merely point it out for consideration by the legislature.
- Doing away with the Rule Against Perpetuities has policy implications. On the positive side, it permits a trustor to ensure the preservation/handling of the trust far beyond his/her demise. On the negative, this "dead hand" could prevent alienation of property far into the future, what the Rule was meant to protect against. The prevailing status among the majority of states is to keep the Rule, but with perhaps some modifications.



# The University of Michigan Law School

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February 13, 1997

Ms. Marilyn May  
Assistant Attorney General  
State of Alaska  
Department of Law  
1031 West 4th Ave., Suite 200  
Anchorage, AK 99501-1994

Re: Alaska House Bill No. 101

Dear Marilyn:

Thanks for giving me the opportunity to review and comment on House Bill No. 101, which is a revised version of the Alaska Family Trust Act, HB 459(JUD) upon which I commented last summer. My opinion of this version of the bill has not changed. The legislature should not pass it, and if they do, the governor should veto it. The bill is still ambiguous in part, and, more importantly, is against public policy. *Make no mistake about one thing: This bill is aimed at one type of trust that the out-of-state lawyer who is behind this bill wants to create for his wealthy clients: A discretionary trust (with a friendly trustee) that will protect the client's assets from creditors of all types (including his or her child support obligations) and that will last in perpetuity.*

**Sections 1 and 8, Spousal Elective Share Rights.** The principal change from the prior version appears in the provision concerning the spousal elective share. The promoters of the bill apparently have decided that they overreached last year, and are willing to cut back on protecting discretionary trusts from the spouse's elective share. Hence, section 1 of the new bill adds the underlined clause to 13.12.205(2)(A). However, there may still be an intended or unintended loophole. I would only feel that spousal elective share rights are truly protected if:

(1) the same clause were added to 13.12.205(2)(B); and  
(2) 34.40.110 (added by Section 8) were amended to add at the beginning of subsection (2) the following language: "Except as provided in 13.12.205,".

The reason for adding the "except" clause is that, without it, 34.40.110(b) refers to a creditor "or

Lisa Kirach -  
F-11

another person." a term which includes the spouse of the settlor.

*Other Spousal Rights, Including Rights on Divorce.* What I said above pertains only to spousal *elective share* rights. As I read 34.40.110, a settlor could avoid his or her obligations under the *divorce laws* by setting up a discretionary trust with the proverbial friendly trustee.

*Child Support Obligations.* The bill as revised still allows a settlor to set up a trust and have it immune from child support obligations. 34.40.110(d) provides no protection, because it only applies to distributions out of the trust and in the hands of the beneficiary (the settlor or another beneficiary). This is nothing new in American law. Our law has always provided that all creditors can reach property distributed from a trust and in the hands of the distributee, regardless of any contrary provision in the trust document. This well-accepted principle has never been restricted to child support obligations. In fact, by negative implication, this provision suggests that this well-accepted principle now *only* applies to child support, so that a settlor could provide in the trust document that creditor protection would continue to apply to the property *after* distribution.

*Section 6, Perpetuities.* The proposed amendment to the Uniform Statutory Rule Against Perpetuities is not sanctioned by the Uniform Law Commission. The amendment is ambiguous, and very bad policy. Subsection (3) says that a nonvested future interest cannot be invalid under the Rule Against Perpetuities (in other words, the nonvested future interest is exempt from the Rule Against Perpetuities) if it is in a trust in which the trustee has discretion to distribute income or principal to a person who is living when the trust was created. Does this mean that such a trust continues to be exempt forever, even after the person dies, or does it lose its exemption once the person dies? The language is unclear, and would surely lead to unnecessary litigation.

I have reason to believe that the intention is that the trust will continue to be exempt forever. If this is so, the bill sets up a situation in which a wealthy person, whether an Alaskan or a resident of another state, can set up a so called "dynasty trust" in Alaska, a trust that lasts perpetually.

Why do the promoters of this bill want Alaska to allow perpetual dynasty trusts? The apparent purpose is purely commercial (to manipulate state law in order to give Alaska banks a competitive advantage over banks in nearly all other states). The public policy against dynasty trusts (trusts that last longer than a life in being plus 21 years or 90 years) is lost in the wake of these commercial interests. Ironically, the genesis is the federal generation-skipping tax (GST tax), which imposes high costs for creating trusts that persist through more than one generation. The GST tax would therefore seem to discourage long-term trusts. But the GST tax also contains a \$1 million per donor GST exemption that relies only on state perpetuity law to control the length of exempt trusts. The apparent purpose of this bill is to abolish the Rule Against Perpetuities for Alaskan trusts in order to give Alaskan banks a competitive advantage in attracting out of state \$1 million (\$2 million for married donors) GST-exempt trusts. There are a few other states that have, in effect, abolished the Rule Against Perpetuities for trusts—Wisconsin, Idaho, South Dakota, and Delaware. But I am in touch with people at the IRS and the U.S. Treasury

Department, and on the basis of what they tell me, it is only a matter of time before Congress or the Treasury Department by regulation puts a stop to this, for it is an unintended loophole in the GST tax. Once the loophole is closed, the tax incentive for creating perpetual or dynasty trusts will disappear, but trusts created before the loophole is closed will continue to exist.

On the surface, dynasty trusts might appear attractive to settlors, but will in the end prove to be curses on the settlors' descendants, as they proliferate generation by generation in geometric fashion, some staying in Alaska but some moving far, far away. Such trusts do not preserve family property, but rather divide and subdivide it into shares so that four, five or six generations down the road, each descendant's share represents a smaller and smaller share of the asset. What good is a 1/30th share, or a 1/70th share, or a 1/200th share, or a 1/1000th share?

I have been involved in law reform work at the multi-state level for over ten years, and have been in law teaching at major law schools for over thirty years. I was the Chief Reporter for (author of) the 1990 revisions of the Uniform Probate Code that was recently passed in Alaska. I am also the Reporter for (author of) the Restatement (Third) of Property (Wills and Other Donative Transfers). This is perhaps the most pernicious bill I have ever seen in that time, allowing as it does a wealthy settlor to set up a particular type of trust to skirt his or her obligations to his or her children, spouse, creditors, and in the end to set up a trust that will last so long that its beneficiaries will number well into the hundreds, so that the share of each is nothing more than a nuisance.

Yours sincerely,

*Lawrence W. Waggoner*

**HB**

**1 1 5**

# HOUSE COMMITTEE REPORT

(7)  
Date Referred to Committee: February 5, 1997

FURTHER REFERRALS:

Date of Committee Action: 3/17/97

The JUDICIARY Committee considered:

HB 115

HOUSE BILL NO. 115

1997 REVISOR'S BILL

"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB 115 (JUD)  the same title  a new title

additional referral to \_\_\_\_\_ Committee  
 attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) \_\_\_\_\_

APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note(s) HSS

zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>[Signature]</i>	CROFT				
<i>[Signature]</i>	CROFT	<input checked="" type="checkbox"/>			
<i>[Signature]</i>	ROKEBERG	<input checked="" type="checkbox"/>			
<i>[Signature]</i>	PORTER	<input checked="" type="checkbox"/>			
<i>[Signature]</i>	BUNDE				
<i>[Signature]</i>	BERKOWITZ				

VICE CHAIR'S SIGNATURE *[Signature]*

**FISCAL NOTE**

**STATE OF ALASKA**  
**1997 LEGISLATIVE SESSION**

**BILL NO. HB 115**

Revision Date: \_\_\_\_\_  
 Title: An act making corrective amendments to Alaska Statutes  
as recommended by the revisor of statutes  
 Sponsor: House JUD  
 Requestor: Legislative Council

Dept. Affected: Health and Social Services  
 BRU: Public Assistance  
 Component: ATAP  
 COMPONENT SERIAL NO. 220  
 See also (SN#): \_\_\_\_\_

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
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CHANGES IN REVENUES ( )						
-------------------------	--	--	--	--	--	--

**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: \$0.0

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

This proposed legislation makes technical amendments to the Alaska temporary assistance program. It has no fiscal impact.

5/14/97  
 Prepared by: Jim Nordlund, Director  
 Division: Public Assistance  
 Approved by Commissioner: Karen Perdue, Commissioner  
 Agency: Department of Health & Social Services

Phone: 465-2680  
 Date: 02/12/97  
 Date: 2/17/97

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**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

February 18, 1997

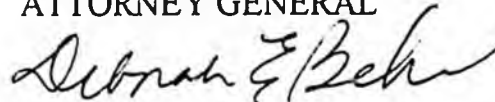
Pam Finley  
Assistant Revisor of Statutes  
Legislative Affairs Agency  
130 Seward Street, Ste. 409  
Juneau, AK 99801-2105

Dear Pam:

On behalf of the Department of Law, I have reviewed HB 115, the 1997 revisor's bill. The Department of Law has no legal problems with this bill. The bill makes appropriate technical improvements to the Alaska statutes.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL



By: Deborah E. Behr  
Assistant Attorney General

DEB:imm

cc: Rep. Joe Green  
Chair  
House Judiciary Committee

Pat Pourchot  
Office of the Governor

Bruce Botelho  
Chrystal Smith

# LEGAL SERVICES

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## MEMORANDUM

February 24, 1997

**SUBJECT:** HB 115 (1997 Revisor's Bill)

**TO:** Representative Joseph Green  
Chair, House Judiciary Committee

**FROM:** Pamela Finley   
Revisor of Statutes

The following is a sectional analysis of HB 115, the 1997 revisor's bill. The bill is prepared under AS 01.05.036, which provides, in part, that the revisor of statutes

...shall prepare for submission to the legislature legislation for the correction or removal of the deficiencies, conflicts, or obsolete provisions, or to otherwise improve the form or substance of...the statute law of this state.

To assist the reader in understanding the bill, I have summarized the contents by listing sections that have similar purposes or effects.

**Sections that delete, repeal, or update obsolete provisions:** Sections 15, 16, 28, 35, 36, and 39 delete, update, or repeal provisions that have become obsolete either through other legislative action or the passage of time.

**Sections that correct errors or oversights:** Sections 2, 3, 5-14, 17, 24, 25, 27, 29, 30, 34, 37, 38, 40 and 41 correct errors or oversights.

**Sections that improve the form or substance of the law:** Sections 1, 4, 18-23, 26, 29, and 31-33, propose amendments to improve the form or substance of the statute law of Alaska.

## SECTIONAL ANALYSIS

**Section 1.** This section corrects the sentence structure of a statute requiring publication of a book containing brands and marks on record.

**Section 2.** This bill section substitutes "employees of one of the municipalities" for "employers of one of the municipalities" in AS 05.15.112(b), relating to charitable gaming. It corrects a typographical error in ch. 70, SLA 1993.

Representative Joseph Green

February 21, 1997

Page 2

Section 3. This bill section amends the definition of "qualified organization" in the charitable gaming statutes by substituting "license or permit" for "license." Qualified organizations apply for permits primarily, although they also can apply for operator's licenses. This corrects an error in ch. 27, SLA 1960.

Section 4. While most occupational regulation is performed by various boards, the Department of Commerce and Economic Development has direct responsibility for certain occupations. See AS 08.01.010. The occupations regulated directly by the department have also been listed at AS 08.01.050(a)(4) and (9), which means that whenever the department is given responsibility for directly regulating an occupation, these two paragraphs must be amended. This is unnecessary since a general reference to occupations or activities that are regulated directly by the department would suffice. This section substitutes that general reference for the existing list.

Section 5. AS 08.02.010(a) requires members of certain occupations to use certain designations. Some of the occupations covered by subsection (a) are regulated directly by the Department of Commerce and Economic Development rather than by a board, *i.e.*, acupuncturists, audiologists, and naturopaths. However, subsection (b), which sets penalties for a violation of subsection (a), refers only to the "appropriate licensing board." This bill section adds a reference to the department so that the department can enforce subsection (a) for those occupations regulated directly by the department.

Sections 6 and 7. These bill sections substitute "commission" for "board" in two statutes relating to the Real Estate Commission. Although real estate brokers were licensed by a board in 1959, a commission was substituted for the board in ch 95, SLA 1964. The amendment to AS 08.88.041(a) corrects an error in ch. 258, SLA 1976. The amendment to AS 08.88.281 corrects an error in ch. 95, SLA 1964.

Section 8. In ch. 119, SLA 1992, AS 09.50.250 (relating to claims against the state) was amended by deleting "superior court" at the end of the first sentence. The purpose was to give the state district court, as well as the state superior court, jurisdiction over claims against the state, except for small claims. The title of ch. 119, SLA 1992 was "Relating to the jurisdiction of the district court and to the district court's ability to hear actions as small claims." The Attorney General's Office has informed me that the deletion of the phrase "in the superior court" has been claimed to authorize claims against the state to be brought in federal court. To return the statute to what was intended in ch. 119, SLA 1992, "in a state court that has jurisdiction over the claim" is added at the end of the first sentence. This amendment was requested by the Attorney General's office.

Section 9. This bill section amends the definition of "serious offense" in AS 12.62.900 by substituting "AS 11.51.130(a)(1)-(3)" for "AS 11.51.130(a)(1),(3), and (5)." AS 12.62.900 was added by ch. 118, SLA 1994. At the time it was drafted, AS 11.51.130(a)(1),(3),and (5) were the only paragraphs in AS 11.51.130(a), paragraphs (2) and (4) having been previously

repealed. However, ch. 33, SLA 1994 redesignated paragraphs (3) and (5) as (2) and (3), respectively, and added new paragraph (4). Therefore the references to former AS 11.51.130(a)(1), (3), and (5) are equivalent to current AS 11.51.130(a)(1)-(3), and that change is made here. ( AS 11.51.130(a)(4), added by ch. 33, SLA 1994 is not included because the legislature has not made the policy choice that (a) (4) should be included in the definition of "serious offense". If the legislature wishes to include (a)(4), that should be done in a different bill.)

Sections 10 and 11. Ch. 2, FSSLA 1996 rewrote AS 14.17.021, so that the definition of "basic need" that had previously appeared in subsection (b) now appears in subsection (c). The definition in current subsection (c) is the same as the definition in former subsection (b). However, a reference to "basic need as determined under AS 14.17.021(b)" still appears in AS 14.17.025(a)(2) and (b)(2). Bill sections 10 and 11 make the conforming changes to AS 14.17.025 that should have been made when AS 14.17.021 was amended in ch. 2, FSSLA 1996. Because § 6, ch. 2, FSSLA 1996 made the amendment to AS 14.17.021 retroactive to July 1, 1995, the conforming changes in bill sections 10 and 11 are also made retroactive to that date under bill sec. 40.

Section 12. This bill section amends AS 14.20.020(a), governing teachers certificates. In ch. 105, SLA 1992, an additional requirement for a certificate was added as subsection (h). However, a cross-reference to this requirement was omitted from subsection (a). That oversight is corrected in this bill section.

Section 13. This bill section amends AS 14.20.177(a) ( relating to reductions in force) by substituting "AS 14.17.021(c)" for "AS 14.17.021(b)." See explanation for sections 10 and 11. This change is needed because ch. 31, SLA 1996, which added AS 14.20.177, passed the legislature before ch. 2, FSSLA 1996 amended AS 14.17.021. Because § 6, ch. 2, FSSLA 1996 made the amendment to AS 14.17.021 retroactive to July 1, 1995, the conforming change in bill section 13 is also made retroactive to August 16, 1996 ( the effective date of AS 14.20.177) under bill sec. 41.

Section 14. AS 14.03.160, requiring suspension or expulsion of students for certain weapons violations, was enacted by ch. 33, SLA 1995. At that time, AS 14.30.010(b), which lists exceptions to required attendance at school, should have been amended to include a reference to children suspended or expelled under AS 14.03.160. This section makes that amendment. This section also substitutes "paragraph" for "subsection" in AS 14.30.010(b)(7) and improves the sentence structure in (b)(11).

Section 15. This bill section removes a dated reference from AS 14.36.030(b), which relates to community school program grants.

Representative Joseph Green

February 21, 1997

Page 4

Section 16. This bill section amends AS 14.43.120(b)(2)(B) to give the current name of the Council of Recognition of Postsecondary Accreditation. It was requested by the Attorney General's Office.

Section 17. This bill section amends AS 14.43.140, relating to the enforceability of student loan obligations agreed to by minors 16 years of age or older. The reference to "19" years of age (as the age of majority) is changed to "18" years of age. This change should have been made in 1977 when the age of majority was reduced from 19 years of age to 18 years of age.

Sections 18- 23. These bill sections substitute "division of state libraries, archives, and museums" for "division of state libraries" in several statutes. Although this division has not been established by statute, it is referred to in quite a few statutes and should at least have its current name.

Section 24. AS 21.18.100(h) contains a definition of "plan type" ---a term used in AS 21.18.100(f)--- but subsection (h) indicates that the definition in that subsection applies to "this subsection" when it should apply to "this section". This bill section makes that change.

Section 25. This bill section amends AS 23.30.195(a), relating to workers' compensation, by deleting a reference to AS 23.30.190(a)(20). AS 23.30.190(a)(20) ceased to exist when AS 23.30.190 was amended in ch. 79, SLA 1988.

Section 26. This bill section amends AS 24.05.135(c), relating to tapes of legislative proceedings, by substituting " division of state libraries, archives, and museums" for "division of libraries". See explanation for sections 18-23.

Section 27. This bill section amends AS 28.10.431(b) by substituting "registration fee" for "license fee." The referenced fees are for registration, not licensure.

Section 28. This bill section amends a definition of "department" in AS 30.30.170, relating to abandoned and derelict vessels, to remove a reference to the "division of waters and harbors." This division does not exist in statute or in the state directory.

Section 29. This bill section reorganizes AS 37.05.146, the definition of "program receipts" into two subsections and moves the receipts of certain employee programs from the paragraph listing funds to paragraphs of their own. (The employee programs are not, properly speaking, "funds".) It also substitutes "public school trust fund" for "public school fund" to correct an error in ch. 141, SLA 1988, which changed the name of the fund.

Section 30. This bill section substitutes "public school trust fund" for "public school fund" in AS 37.05.530(g)(2). This amendment should have been made in ch. 141, SLA 1988, when the name of the public school fund was changed.

Section 31. This bill section substitutes "under or subject to AS 14.25.180" for "under AS 14.25.180" in a definition relating to the Alaska State Pension Investment Board. AS 14.25.180 sets out management duties of the Board and is referred to in regard to other funds managed by the Board, e.g., AS 39.35.080. While "under AS 14.25.180" probably would be interpreted as including funds managed by the Board that are not in AS 14.25 but are to be managed in accordance with AS 14.25.180, adding the phrase "subject to" makes that result clearer. Note that the phrase "subject to AS 14.25.180" also appears later in the same definition.

Sections 32-33. These bill sections amend two sections in the Pipeline Act. Bill section 32 corrects a grammatical error and breaks a long sentence into shorter ones. Bill section 33 rewrites another section for clarity.

Section 34. This bill section deletes a reference in the tax code to AS 43.58. The tax under AS 43.58 terminated on December 31, 1977 and AS 43.58 was repealed in 1984.

Section 35. This section substitutes a cross-reference to a section for a cross-reference to a paragraph within that section. The paragraph number has been changed and a reference to the specific paragraph is not necessary.

Section 36. This bill section corrects the name of the Council on Recognition of Postsecondary Accreditation. It was requested by the Attorney General's Office.

Sections 37 and 38. These bill sections amend the Alaska temporary assistance program, which was established by legislation passed last session. The paragraph amended by bill section 37 (AS 47.27.015(a)(1)) contains subparagraphs that establish exceptions to the 5 year maximum period of assistance. Subparagraph (D) contains a general "hardship" exception and also limits the maximum number of families for which an exemption may be in effect under that "paragraph" to 10 percent or the maximum allowed under federal law, whichever is greater. It is my understanding that the limitation was indeed intended to apply to all of the subparagraphs in paragraph (1) so that the reference to "this paragraph" is correct. However, under the drafting style used in the Alaska Statutes, a provision that applies to an entire paragraph should not appear in an indented subparagraph. Accordingly, the limiting language is removed from subparagraph (D) and moved to a new subsection (f), added by section 38. If the legislature will be considering other amendments to the Alaska temporary assistance program, these bill sections could be removed from the revisor's bill and included in the other bill.

Representative Joseph Green

February 21, 1997

Page 6

Section 39. This bill section repeals the definition of "department" in AS 30.15 because the term does not appear in AS 30.15, except in a reference to a different, specified department. The text of the statute being repealed is attached.

Section 40. This bill section makes the amendments in bill sections 10 and 11 to AS 14.17.025(a) and (b) retroactive to July 1, 1995, the date to which the 1996 amendment to AS 14.17.021 was made retroactive. See explanation for bill sections 10 and 11.

Section 41. For the same reason given for section 40, this bill section makes the amendment to AS 14.20.177(a) made by bill section 13 retroactive to August 16, 1996. August 16, 1996 was used rather than July 1, 1995 because AS 14.20.177 did not exist until August 16, 1996. See explanation for bill section 13.

Section 42. This bill section gives the bill an immediate effective date.

Please let me know if you have any questions about the above.

PF:pl

WKP7\054

Representative Joseph Green  
February 21, 1997  
Page 7

**TEXT OF STATUTES BEING REPEALED**

AS 30.15.070(2):

(2) "department" means Department of Transportation and Public Facilities;

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## MEMORANDUM

February 24, 1997

**SUBJECT:** HB 115 (1997 Revisor's Bill) and Proposed amendments B.1 - B.3

**TO:** Representative Joseph Green, Chair  
House Judiciary Committee

**FROM:** Pamela Finley  
Revisor of Statutes

Enclosed is a sectional analysis for HB 115 and three amendments for the committee's consideration. I would appreciate your scheduling the bill for hearing at your earliest convenience. Explanations of the proposed amendments are as follows:

*Yes*  
*Adopted*  
*1/11/97*

**B.1.** This makes an additional change in bill section 1. The term "mailing address" is substituted for "post office address". The former is a more inclusive term. This amendment was recommended by the Attorney General's Office.

*Adopted*  
*retro*  
*to*  
*1/11/97*

**B.2.** This amends AS 13.12.603(a)(1), relating to construction of wills, by adding a "not" that was inadvertently omitted in ch.75. SLA 1996, which enacted a revised version of the Uniform Probate Code. A copy of a letter from Mr. Arthur Peterson, Uniform Law Commissioner for Alaska, requesting and explaining the proposed amendment is attached. As Mr. Peterson points out, the uniform law on which this section is based does contain the "not". In addition, nothing in our files indicates that the omission was intentional. It appears to have been a typographical error.

*Fails*

**B.3.** This amendment would delete retroactivity provisions for bill sections 10, 11, and 13. Bill sections 10, 11, and 13 make conforming changes that should have been made when AS 14.17.021 was rewritten in ch. 2, FSSLA 1996. Because the amendment to AS 14.17.021 was itself made retroactive to July 1, 1995, the conforming changes would also have been made retroactive to that date if they had been included in ch. 2 FSSLA 1996. To alert the legislature to the retroactivity issue, I included bill sections 40 and 41, which would made the conforming changes retroactive. However, in general I prefer to avoid making any part of the revisor's bill retroactive because it is intended to be only a housekeeping measure. Although I am willing to leave the retroactivity provisions in the bill if that is the will of the committee, I would prefer to delete them.

Please call me if you have any questions about the above.

PF:glc  
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Enclosure

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Re: Correction of AS 13.12.603(a)(1) (Anti-lapse Probate Provision) -- Addition to Revisor's Bill

Dear Pam:

As we have discussed, AS 13.12.603(a)(1) needs to be corrected by having the word "not" inserted after "devise is." The first part of that paragraph should read as follows:

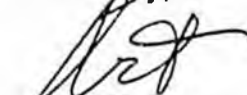
(1) except as provided in (4) of this subsection, if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants....

This provision was enacted by sec. 3, ch. 75, SLA 1996, derived from CSHB 308 (Jud). That bill was, in turn, based on the prior legislature's SSHB 307, introduced in January 1994. It turns out that the missing "not" was dropped as a typographical error back in 1994, and none of us ever caught it until Anchorage Attorney Brian Durrell called it to my attention a couple of weeks ago.

This provision was promulgated by the National Conference of Commissioners on Uniform State Laws as part of its revision of article 2 of the Uniform Probate Code. All of the NCCUSL material (including the official West Publishing Company version) has the "not" in this location. In addition, the NCCUSL's official commentary under its UPC sec. 2-603(b)(1) explains this and related provisions in a way that makes clear that the "not" has to be there. There never was any intent of the legislature or drafters to not have the "not" there.

Thanks for taking care of this correction.

Yours truly,



Arthur H. Peterson  
Uniform Law Commissioner for  
Alaska

cc: Brian W. Durrell, Esq.

Honorable Sean Parnell  
Alaska State Senate

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 115

- 1 Page 1, lines 8 - 9:
- 2 Delete "post office"
- 3 Insert "mailing [POST OFFICE]"

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 115

1 Page 5, following line 22:

2 Insert a new bill section to read:

3 **\*\* Sec. 10.** AS 13.12.603(a) is amended to read:4 (a) If a devisee fails to survive the testator and is a grandparent, a descendant  
5 of a grandparent, or a stepchild of either the testator or the donor of a power of  
6 appointment exercised by the testator's will, the following apply:7 (1) except as provided in (4) of this subsection, if the devise is not in  
8 the form of a class gift and the deceased devisee leaves surviving descendants, a  
9 substitute gift is created in the devisee's surviving descendants; the surviving  
10 descendants take by representation the property to which the devisee would have been  
11 entitled had the devisee survived the testator;12 (2) except as provided in (4) of this subsection, if the devise is in the  
13 form of a class gift, other than a devise to "issue," "descendants," "heirs of the body,"  
14 "heirs," "next of kin," "relatives," or "family," or a class described by language of  
15 similar import, a substitute gift is created in the surviving descendants of a deceased  
16 devisee; the property to which the devisees would have been entitled had all of them  
17 survived the testator passes to the surviving devisees and the surviving descendants  
18 of the deceased devisees; each surviving devisee takes the share to which the  
19 surviving devisee would have been entitled had the deceased devisees survived the  
20 testator; each deceased devisee's surviving descendants who are substituted for the  
21 deceased devisee take by representation the share to which the deceased devisee  
22 would have been entitled had the deceased devisee survived the testator; in this  
23 paragraph, "deceased devisee" means a class member who failed to survive the  
24 testator and left one or more surviving descendants;

25 (3) for the purposes of AS 13.12.601, words of survivorship, as in a

1       devise to an individual "if the individual survives me," or in a devise to "my surviving  
2       children," are not, in the absence of additional evidence, a sufficient indication of an  
3       intent contrary to the application of this section;

4               (4) if the will creates an alternative devise with respect to a devise for  
5       which a substitute gift is created by (1) or (2) of this subsection, the substitute gift is  
6       superseded by the alternative devise only if an expressly designated devisee of the  
7       alternative devise is entitled to take under the will;

8               (5) unless the language creating a power of appointment expressly  
9       excludes the substitution of the descendants of an appointee for the appointee, a  
10       surviving descendant of a deceased appointee of a power of appointment can be  
11       substituted for the appointee under this section, whether or not the descendant is an  
12       object of the power."

13    Renumber the following bill sections accordingly.

14    Page 17, line 30:

15       Delete "10 and 11"

16       Insert "11 and 12"

17    Page 18, line 1:

18       Delete "13"

19       Insert "14"

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 115

- 1 Page 17, line 30, through page 18, line 2:
- 2 Delete all material.
- 3 Renumber the following bill section accordingly.