

Alaska State Legislature

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Representative Lesil McGuire
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Sponsor Statement HB 212

“An Act relating to trusts, including trust protectors, trustee advisors, transfers of property in trust, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment.”

Alaska was once in the lead in the development of trust law. However, since that time other states have not only enacted similar legislation, but have improved on it. Delaware has amended its statute six times since the date of enactment. The last time we amended our trust statutes, and in particular our spendthrift statute, was in 1998 and as a result, our laws are viewed as being deficient in many respects. This not only places our trust companies in an uncompetitive position, but also places Alaska residents at a disadvantage when compared to the citizens of our competitor states. This bill rectifies many of these shortcomings.

[This bill](#) provides statutory authority to provisions commonly found in trust instruments. For instance, Section 1 of the bill specifically provides for the position of a trust advisor and trust protector and clarifies the manner in which these positions relate to the administration of a trust. Delaware, South Dakota and Idaho has similar legislation. Many trust instruments allow a trustee to make trust assets available for the use of a beneficiary. Section 2 allows trusts assets consisting of real property and tangible personal property to be used by a beneficiary without the use being considered a distribution, which could in turn be subjected to the claims of a beneficiary's creditors. For example, a trustee could exercise its discretion and permit a beneficiary to reside in a family home. Were it not for this provision the settlor's intention that a family homestead be made available for future generations might be defeated.

Other sections contained in the bill codify a number of matters which have always been accepted by Alaska trust practitioners as being the common law of this state, but for which there has been no statutory counterpart. Section 4 provides that trust assets can not be attached by a beneficiary's creditor until such time that trust assets are actually distributed to a beneficiary, nor can there be a continuing order against the trustee with respect to future distributions that a trustee would choose to make. Section 6 adds a new subsection (i) to AS 34.40.110 which clarifies that the statute affording spendthrift protection for beneficial interests applies not only to trusts in which a settler may have a retained interest, but also to the very common third party settled trust where a beneficiary might be serving as sole trustee.

Sections 3, 5 and 6 make amendments or adds subsections to AS 34.40.110 which will assist a future court in the interpretation of our spendthrift statute, something an Alaska court has yet to do. Section 3 clarifies that a trust can be set aside only if a creditor is able to successfully assert by a preponderance of the evidence that the settlor's transfer of property in trust was made with the primary intent to defraud that creditor. In so doing, the finder of fact must weigh all the circumstances surrounding the transfer before making that determination. Section 5 clarifies that a fraudulent conveyance action may only be brought against a settlor of a trust and then only as to a specific transfer of assets, which are, determined to be fraudulent as to that creditor. Section 6, also clarifies the definition of a preexisting creditor who can avail themselves of the time period found in AS 34.40.110(d)(1) for bringing a fraudulent conveyance action against the settlor of a self-settled trust. Subsection (h) as found in Section 6 provides a transfer restriction will be valid with respect to a beneficial interest retained by a settlor even though the settlor serves as a co-trustee, provided the settlor doesn't have the control over the manner in which distributions may be made to the settlor. Subsection (k) invalidates any unwritten agreement or understanding between a settlor who is a beneficiary and a trustee which gives the settlor rights greater than those which are permitted to be expressed in the trust instrument.

Last, there are several provisions contained in this bill which have their counterpart in the laws of other states. Section 3 provides the circumstances in which a transfer restriction will continue to be valid even though a settlor retains a unitrust or annuity in the trust. These provisions presently exist in Delaware. Section 7 of the bill clarifies when property subject to a power of appointment can be subjected to the claims of a donee's creditors and codifies the common law as enunciated in the Restatement 2nd of Property and has its genesis in a comparable Rhode Island statute. All the provisions found in this bill are necessary additions not only if Alaska residents are to have benefits comparable to those of citizens in other states.

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