

1                   **DOMESTIC ASSET PROTECTION TRUST AMENDMENTS**

2                                   2013 GENERAL SESSION

3                                   STATE OF UTAH

4                                   **Chief Sponsor: Derek E. Brown**

5                                   Senate Sponsor: John L. Valentine

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7                   **LONG TITLE**

8                   **General Description:**

9                   This bill creates a domestic Asset Protection Trust statute.

10                  **Highlighted Provisions:**

11                  This bill:

- 12                  ▶ defines terms;
- 13                  ▶ provides a framework for an Asset Protection Trust in this state;
- 14                  ▶ requires that the majority of the assets be in this state;
- 15                  ▶ excludes the trust assets from the settlor's estate for federal estate tax purposes;
- 16                  ▶ establishes a two year statute of limitations for bringing a fraudulent transfer claim;

17                  and

- 18                  ▶ requires notification to a child support judgment holder before a distribution is

19                  made.

20                  **Money Appropriated in this Bill:**

21                  None

22                  **Other Special Clauses:**

23                  None

24                  **Utah Code Sections Affected:**

25                  REPEALS AND REENACTS:

26                  **25-6-14**, as last amended by Laws of Utah 2004, Chapter 89

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28                  *Be it enacted by the Legislature of the state of Utah:*

29                  Section 1. Section **25-6-14** is repealed and reenacted to read:

30 **25-6-14. Asset Protection Trust.**

31 (1) As used in this section:

32 (a) "Creditor" means:

33 (i) a creditor or other claimant of the settlor existing when the trust is created; or

34 (ii) a person who subsequently becomes a creditor, including, whether or not reduced  
35 to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,  
36 undisputed, legal, equitable, secured, or unsecured:

37 (A) one holding or seeking to enforce a judgment entered by a court or other body  
38 having adjudicative authority; or

39 (B) one with a right to payment.

40 (b) "Property" means real property, personal property, and interests in real or personal  
41 property.

42 (c) "Settlor" means a person who transfers property in trust.

43 (d) "Transfer" means any form of transfer of property, including gratuitous transfers,  
44 whether by deed, conveyance, or assignment.

45 (e) "Trust" has the same meaning as in Section 75-1-201.

46 (2) "Paid and delivered" to the settlor, as beneficiary, does not include the settlor's use  
47 or occupancy of real property or tangible personal property owned by the trust if the use or  
48 occupancy is in accordance with the trustee's discretionary authority under the trust instrument.

49 (3) If the settlor of an irrevocable trust is also a beneficiary of the trust, and if the  
50 requirements of Subsection (5) are satisfied, a creditor of the settlor may not:

51 (a) satisfy a claim or liability of the settlor in either law or equity out of the settlor's  
52 transfer to the trust or the settlor's beneficial interest in the trust;

53 (b) force or require the trustee to make a distribution to the settlor, as beneficiary; or

54 (c) require the trustee to pay any distribution directly to the creditor, or otherwise  
55 attach the distribution before it has been paid or delivered by the trustee to the settlor, as  
56 beneficiary.

57 (4) Notwithstanding Subsection (3), nothing in this section prohibits a creditor from

58 satisfying a claim or liability from the distribution once it has been paid or delivered by the  
59 trustee to the settlor, as beneficiary.

60 (5) In order for Subsection (3) to apply, the conditions in this Subsection (5) shall be  
61 satisfied. Where this Subsection (5) requires that a provision be included in the trust  
62 instrument, no particular language need be used in the trust instrument if the meaning of the  
63 trust provision otherwise complies with this Subsection (5).

64 (a) The trust instrument shall provide that the trust is governed by Utah law and is  
65 established pursuant to this section.

66 (b) The trust instrument shall require that at all times at least one trustee shall be a  
67 Utah resident or Utah trust company, as the term "trust company" is defined in Section 7-5-1.

68 (c) The trust instrument shall provide that neither the interest of the settlor, as  
69 beneficiary, nor the income or principal of the trust may be voluntarily or involuntarily  
70 transferred by the settlor, as beneficiary. The provision shall be considered to be a restriction  
71 on the transfer of the settlor's beneficial interest in the trust that is enforceable under applicable  
72 nonbankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code.

73 (d) The settlor may not have the ability under the trust instrument to revoke, amend, or  
74 terminate all or any part of the trust, or to withdraw property from the trust, without the consent  
75 of a person who has a substantial beneficial interest in the trust, which interest would be  
76 adversely affected by the exercise of the power held by the settlor.

77 (e) The trust instrument may not provide for any mandatory distributions of either  
78 income or principal to the settlor, as beneficiary, except as provided in Subsection (7)(f).

79 (f) The settlor may not benefit from, direct a distribution of, or use trust property  
80 except as stated in the trust instrument. An agreement or understanding, express or implied,  
81 between the settlor and the trustee that attempts to grant or permit the retention of greater rights  
82 or authority than is stated in the trust instrument is void.

83 (g) The trust instrument shall require that, at least 30 days before making any  
84 distribution to the settlor, as beneficiary, the trustee notify in writing every person who has a  
85 child support judgment or order against the settlor. The trust instrument shall require that the

86 notice state the date the distribution will be made and the amount of the distribution.

87 (h) At the time that the settlor transfers any assets to the trust, the settlor may not be in  
88 default of making a payment due under any child support judgment or order.

89 (i) A transfer of assets to the trust may not render the settlor insolvent.

90 (j) At the time the settlor transfers any assets to the trust, the settlor may not intend to  
91 hinder, delay, or defraud a known creditor by transferring the assets to the trust. A settlor's  
92 expressed intention to protect trust assets from the settlor's potential future creditors is not  
93 evidence of an intent to hinder, delay, or defraud a known creditor.

94 (k) At the time that the settlor transfers any assets to the trust, the settlor may not be  
95 contemplating filing for relief under the provisions of the Bankruptcy Code.

96 (l) Assets transferred to the trust may not be derived from unlawful activities.

97 (m) At the time the settlor transfers any assets to the trust, the settlor shall sign a sworn  
98 affidavit stating that:

99 (i) the settlor has full right, title, and authority to transfer the assets to the trust;

100 (ii) the transfer of the assets to the trust will not render the settlor insolvent;

101 (iii) the settlor does not intend to hinder, delay, or defraud a known creditor by  
102 transferring the assets to the trust;

103 (iv) there are no pending or threatened court actions against the settlor, except for those  
104 court actions identified by the settlor on an attachment to the affidavit;

105 (v) the settlor is not involved in any administrative proceedings, except those  
106 administrative proceedings identified on an attachment to the affidavit;

107 (vi) at the time of the transfer of the assets to the trust, the settlor is not in default of a  
108 child support obligation;

109 (vii) the settlor does not contemplate filing for relief under the provisions of the  
110 Bankruptcy Code; and

111 (viii) the assets being transferred to the trust were not derived from unlawful activities.

112 (6) Failure to satisfy the requirements of Subsection (5) shall result in the  
113 consequences described in this Subsection (6).

114 (a) If any requirement of Subsections (5)(a) through (g) is not satisfied, none of the  
115 property held in the trust will at any time have the benefit of the protections described in  
116 Subsection (3).

117 (b) If the trustee does not send the notice required under Subsection (5)(g), the court  
118 may authorize any person with a child support judgment or order against the settlor to whom  
119 notice was not sent to attach the distribution or future distributions, but the person may not:

120 (i) satisfy a claim or liability in either law or equity out of the settlor's transfer to the  
121 trust or the settlor's beneficial interest in the trust; or

122 (ii) force or require the trustee to make a distribution to the settlor, as beneficiary.

123 (c) If any requirement set forth in Subsections (5)(h) through (m) is not satisfied, the  
124 property transferred to the trust that does not satisfy the requirement may not have the benefit  
125 of the protections described in Subsection (3).

126 (7) The provisions of Subsection (3) may apply to a trust even if:

127 (a) the settlor serves as a cotrustee or as an advisor to the trustee, provided that the  
128 settlor may not participate in the determination as to whether a discretionary distribution will  
129 be made;

130 (b) the settlor has the authority under the terms of the trust instrument to appoint  
131 nonsubordinate advisors or trust protectors who can remove and appoint trustees and who can  
132 direct, consent to, or disapprove distributions;

133 (c) the settlor has the power under the terms of the trust instrument to serve as an  
134 investment director or to appoint an investment director under Section 75-7-906;

135 (d) the trust instrument gives the settlor the power to veto a distribution from the trust;

136 (e) the trust instrument gives the settlor a testamentary nongeneral power of  
137 appointment or similar power;

138 (f) the trust instrument gives the settlor the right to receive the following types of  
139 distributions:

140 (i) income, principal, or both in the discretion of a person, including a trustee, other  
141 than the settlor;

- 142           (ii) principal, subject to an ascertainable standard set forth in the trust;
- 143           (iii) income or principal from a charitable remainder annuity trust or charitable
- 144 remainder unitrust, as defined in 26 U.S.C. 664;
- 145           (iv) a percentage of the value of the trust each year as determined under the trust
- 146 instrument, but not exceeding the amount that may be defined as income under 26 U.S.C.
- 147 643(b);
- 148           (v) the transferor's potential or actual use of real property held under a qualified
- 149 personal residence trust, or potential or actual possession of a qualified annuity interest, within
- 150 the meaning of 26 U.S.C. 2702 and the accompanying regulations; and
- 151           (vi) income or principal from a grantor retained annuity trust or grantor retained
- 152 unitrust that is allowed under 26 U.S.C. 2702; or
- 153           (g) the trust instrument authorizes the settlor to use real or personal property owned by
- 154 the trust.
- 155           (8) If a trust instrument contains the provisions described in Subsections (5)(a) through
- 156 (g), the transfer restrictions prevent a creditor or other person from asserting any cause of
- 157 action or claim for relief against a trustee of the trust or against others involved in the
- 158 counseling, drafting, preparation, execution, or funding of the trust for conspiracy to commit
- 159 fraudulent conveyance, aiding and abetting a fraudulent conveyance, participation in the trust
- 160 transaction, or similar cause of action or claim for relief. For purposes of this subsection,
- 161 counseling, drafting, preparation, execution, or funding of the trust includes the preparation and
- 162 funding of a limited partnership, a limited liability company, or other entity if interests in the
- 163 entity are subsequently transferred to the trust. The creditor and other person prevented from
- 164 asserting a cause of action or claim for relief may assert a cause of action against, and are
- 165 limited to recourse against, only:
- 166           (a) the trust and the trust assets; and
- 167           (b) the settlor, to the extent otherwise allowed in this section.
- 168           (9) A cause of action or claim for relief regarding a fraudulent transfer of a settlor's
- 169 assets under Subsection (5)(j) is extinguished unless the action under Subsection (5)(k) is

170 brought by a creditor of the settlor who was a creditor of the settlor before the assets referred to  
171 in Subsection (5)(j) were transferred to the trust and the action under Subsection (5)(j) is  
172 brought within the earlier of:

173 (a) the later of:

174 (i) two years after the transfer is made; or

175 (ii) one year after the transfer is or reasonably could have been discovered by the  
176 creditor if the creditor:

177 (A) can demonstrate, by a preponderance of the evidence, that the creditor asserted a  
178 specific claim against the settlor before the transfer; or

179 (B) files another action, other than an action under Subsection (5)(j), against the settlor  
180 that asserts a claim based on an act or omission of the settlor that occurred before the transfer,  
181 and the action described in this Subsection (9) is filed within two years after the transfer.

182 (b) (i) with respect to a creditor known to the settlor, 120 days after the date on which  
183 notice of the transfer is mailed to the creditor, which notice shall state the name and address of  
184 the settlor, the name and address of the trustee, and also describe the assets that were  
185 transferred, but does not need to state the value of those assets if the assets are other than cash,  
186 and which shall inform the creditor that he is required to present his claim to both the settlor  
187 and the trustee within 120 days from the mailing of the notice or be forever barred; or

188 (ii) with respect to a creditor not known to the settlor, 120 days after the date on which  
189 notice of the transfer is first published in a newspaper of general circulation in the county in  
190 which the settlor then resides, which notice shall state the name and address of the settlor, the  
191 name and address of the trustee, and also describe the assets that were transferred, but does not  
192 need to state the value of those assets if the assets are other than cash.

193 (10) The notice required in Subsection (9)(b) shall be published in accordance with the  
194 provisions of Section 45-1-101 for three consecutive weeks and inform creditors that they are  
195 required to present claims within 120 days from the first publication of the notice or be forever  
196 barred.

197 (11) (a) A trust is subject to this section if it is governed by Utah law, as provided in

198 Section 75-7-107, and if it otherwise meets the requirements of this section.

199 (b) A court of this state has exclusive jurisdiction over an action or claim for relief that

200 is based on a transfer of property to a trust that is the subject of this section.