

HB0222S01 compared with HB0222

~~deleted text~~ shows text that was in HB0222 but was deleted in HB0222S01.

inserted text shows text that was not in HB0222 but was inserted into HB0222S01.

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Representative Derek E. Brown proposes the following substitute bill:

DOMESTIC ASSET PROTECTION TRUST AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Derek E. Brown

Senate Sponsor: _____

LONG TITLE

General Description:

This bill creates a domestic Asset Protection Trust statute.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides a framework for an Asset Protection Trust in this state;
- ▶ requires that the majority of the assets be in this state;
- ▶ excludes the trust assets from the settlor's estate for federal estate tax purposes;
- ▶ establishes a two year statute of limitations for bringing a fraudulent transfer claim;
- and
- ▶ requires notification to a child support judgment holder before a distribution is made.

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Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

REPEALS AND REENACTS:

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

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

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 Section **25-6-14** is repealed and reenacted to read:

25-6-14. Asset Protection Trust.

(1) As used in this section:

(a) "Creditor" means:

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

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

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

(B) one with a right to payment.

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

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

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

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

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

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

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

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

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

(4) Notwithstanding Subsection (3), nothing in this section prohibits a creditor from satisfying a claim or liability from the distribution once it has been paid or delivered by the trustee to the settlor, as beneficiary.

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

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

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

~~— (b) At all times, trust assets with a value equal to at least 80% of the value of all trust assets shall be held in this state. An asset is held in this state if it:~~

~~— (i) is real property located in this state; or~~

~~— (ii) is held in this state in a savings account described in Section 7-1-103, a certificate of deposit, a brokerage account, a trust company fiduciary account, or an account or deposit located in this state that is similar to any of the accounts described above.}~~

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

(d) The settlor may not have the ability under the trust instrument to revoke, amend, or terminate all or any part of the trust, or to withdraw property from the trust, without the consent

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of a person who has a substantial beneficial interest in the trust, which interest would be adversely affected by the exercise of the power held by the settlor.

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

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

(g) The trust instrument shall require that, at least 30 days before making any distribution to the settlor, as beneficiary, the trustee notify in writing every person who has a child support judgment or order against the settlor. The trust instrument shall require that the notice ~~shall~~ state the date the distribution will be made and the amount of the distribution.

~~{ (h) At least 30 days before making any distribution to the settlor, as beneficiary, the trustee shall in fact notify every person who has a child support judgment, or order against the settlor, of the date the distribution will be made and the amount of the distribution.~~

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

~~{(f)(i) ~~No~~A transfer of assets to the trust may not render the settlor insolvent.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

~~{ (a) If any requirement of either Subsection (5)(a) or Subsection (5)(b) is not satisfied, none of the property held in the trust will have the benefit of the protections described in Subsection (2) during the period that the requirement is not satisfied.~~

~~† (b) If any requirement of Subsections (5)(c), (d), (e), (f), or (g) is not satisfied, none of the property held in the trust will at any time have the benefit of the protections described in Subsection (2).~~

~~(c) If the requirement of trustee does not send the notice required under Subsection (5)(h) is not satisfied, none of the property held in the trust will have the benefit of the protections described in Subsection (2) with respect to the (g), the court may authorize any person with a child support judgment or order referred to in Subsection (2):~~

~~(d) against the settlor to whom notice was not sent to attach the distribution or future distributions, but the person may not:~~

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

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

~~(c) If any requirement set forth in Subsections (5)(h), (i), (k), (l), through (m), or (n) is not satisfied, the property transferred to the trust that does not satisfy the requirement may not have the benefit of the protections described in Subsection (2).~~

(7) The provisions of Subsection (2) may apply to a trust even if:

(a) the settlor serves as a cotrustee or as an advisor to the trustee, provided that the

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settlor may not participate in the determination as to whether a discretionary distribution will be made:

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

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

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

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

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

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

(ii) principal, subject to an ascertainable standard set forth in the trust;

(iii) income or principal from a charitable remainder annuity trust or charitable remainder unitrust, as defined in 26 U.S.C. 664;

(iv) a percentage of the value of the trust each year as determined from under the trust instrument, but not exceeding the amount that may be defined as income under 26 U.S.C. 643(b);

(v) the transferor's potential or actual use of real property held under a qualified personal residence trust, or potential or actual possession of a qualified annuity interest, within the meaning of 26 U.S.C. 2702 and the accompanying regulations; and

(vi) income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under 26 U.S.C. 2702; or

(g) the trust instrument authorizes the settlor to use real or personal property owned by the trust.

(8) If a trust instrument contains the ~~{transfer restrictions}~~ provisions described in Subsections (5) ~~((c))~~, ~~((d))~~, ~~((e))~~, and ~~((f))~~ through (g), the transfer restrictions prevent a creditor or other person from asserting any cause of action or claim for relief against a trustee of the trust or against others involved in the counseling, drafting, preparation, execution, or funding of the

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trust for conspiracy to commit fraudulent conveyance, aiding and abetting a fraudulent conveyance, participation in the trust transaction, or similar cause of action or claim for relief. For purposes of this subsection, counseling, drafting, preparation, execution, or funding of the trust includes the preparation and funding of a limited partnership, a limited liability company, or other entity if interests in the entity are subsequently transferred to the trust. The creditor and other person prevented from asserting a cause of action or claim for relief may assert a cause of action against, and are limited to recourse against, only:

- (a) the trust and the trust assets; and
- (b) the settlor, to the extent otherwise allowed in this section.

(9) A cause of action or claim for relief regarding a fraudulent transfer of a settlor's assets under Subsection (5)(k) is extinguished unless:

~~(a)~~ the action under Subsection (5)(k) is brought by a creditor of the settlor who was a creditor of the settlor before the assets referred to in Subsection (5)(k) were transferred to the trust ~~and~~ and

~~(b)~~ the action under Subsection (5)(k) is brought within the earlier of:

(a) the later of:

- (i) two years after the transfer is made; or
- (ii) one year after the transfer is or reasonably could have been discovered by the

creditor if the creditor:

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

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

~~(10)~~ (b) (i) with respect to a creditor known to the settlor, 120 days after the date on which notice of the transfer is mailed to the creditor, which notice shall state the name and address of the settlor, the name and address of the trustee, and also describe the assets that were transferred, but does not need to state the value of those assets if the assets are other than cash, and which shall inform the creditor that he is required to present his claim to both the settlor and the trustee within 120 days from the mailing of the notice or be forever barred; or

(ii) with respect to a creditor not known to the settlor, 120 days after the date on which

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notice of the transfer is first published in a newspaper of general circulation in the county in which the settlor then resides, which notice shall state the name and address of the settlor, the name and address of the trustee, and also describe the assets that were transferred, but does not need to state the value of those assets if the assets are other than cash.

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

(11) (a) A trust is subject to this section if it is governed by Utah law, as provided in Section 75-7-107.

~~_____ (b) Notwithstanding any other provision of the law of this state, an action, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may not be brought at law or in equity for an attachment or other provisional remedy against property of a trust that, and if it otherwise meets the requirements of Subsection (8) or to avoid a transfer of property to the trust unless the action is brought under Subsection (5)(k) and within the limitations period described in Subsection (9).~~

~~_____ (c) this section.~~

(b) A court of this state has exclusive jurisdiction over an action or claim for relief that is based on a transfer of property to a trust that is the subject of this section.

†

Legislative Review Note

~~_____ as of 2-5-13 7:52 AM~~

~~_____ Office of Legislative Research and General Counsel~~