

Representative V. Lowry Snow proposes the following substitute bill:

DOMESTIC ASSET PROTECTION TRUST AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: _____

LONG TITLE

General Description:

This bill amends provisions related to domestic asset protection trusts.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ delineates provisions regarding real property transferred to the trust;
- ▶ clarifies a settlor-trustee's role in determining discretionary distributions;
- ▶ makes clarifying changes to claims for relief for fraudulent transfers; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

25-6-14, as repealed and reenacted by Laws of Utah 2013, Chapter 284

75-7-816, as enacted by Laws of Utah 2004, Chapter 89



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

27 Section 1. Section **25-6-14** is amended to read:

28 **25-6-14. Asset Protection Trust.**

29 (1) As used in this section:

30 (a) "Creditor" means:

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

32 (ii) a person who subsequently becomes a creditor, including, whether or not reduced

33 to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

34 undisputed, legal, equitable, secured, or unsecured:

35 (A) one holding or seeking to enforce a judgment entered by a court or other body

36 having adjudicative authority; or

37 (B) one with a right to payment.

38 (b) "Insolvent" has the same meaning as in Section 25-6-3.

39 ~~[(b)]~~ (c) "Property" means real property, tangible or intangible personal property, and

40 interests in real property or tangible or intangible personal property.

41 ~~[(c)]~~ (d) "Settlor" means a person who transfers property in trust.

42 ~~[(d)]~~ (e) "Transfer" means any form of transfer of property, including gratuitous

43 transfers, whether by deed, conveyance, or assignment.

44 ~~[(e)]~~ (f) "Trust" has the same meaning as in Section 75-1-201.

45 (2) "Paid and delivered" to the settlor, as beneficiary, does not include the settlor's use

46 or occupancy of real property or tangible or intangible personal property owned by the trust if

47 the use or occupancy is in accordance with the trustee's discretionary authority under the trust

48 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) (a) 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 (b) Notwithstanding Subsection (3), nothing in this section may be construed to nullify
61 or impair any security interest that was granted by the settlor with respect to property
62 transferred to the trust.

63 (c) If property contributed to the trust is conveyed to the settlor or to another
64 beneficiary only for the purpose of obtaining a loan secured by a mortgage or deed of trust on
65 the property and is then reconveyed to the trust, the conveyance is disregarded and the
66 reconveyance relates back to the date the property was initially contributed to the trust. The
67 mortgage or deed of trust on the property shall be enforceable against the trust.

68 (5) In order for Subsection (3) to apply, the conditions in this Subsection (5) shall be
69 satisfied. Where this Subsection (5) requires that a provision be included in the trust
70 instrument, no particular language need be used in the trust instrument if the meaning of the
71 trust provision otherwise complies with this Subsection (5). An agreement or understanding,
72 express or implied, between the settlor and the trustee that attempts to grant or permit the
73 retention by the settlor of greater rights or authority than is stated in the trust instrument is
74 void.

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

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

79 (c) The trust instrument shall provide that neither the interest of the settlor, as
80 beneficiary, nor the income or principal of the trust may be voluntarily or involuntarily
81 transferred by the settlor, as beneficiary. The provision shall be considered to be a restriction
82 on the transfer of the settlor's beneficial interest in the trust that is enforceable under applicable
83 nonbankruptcy law within the meaning of [~~Section~~] 11 U.S.C. Sec. 541(c)(2) [~~of the~~
84 ~~Bankruptcy Code~~].

85 (d) The settlor may not have the ability under the trust instrument to revoke, amend, or
86 terminate all or any part of the trust, or to withdraw property from the trust, without the consent
87 of a person who has a substantial beneficial interest in the trust, which interest would be

88 adversely affected by the exercise of the power held by the settlor; provided that the settlor may
89 have the ability to substitute assets of substantially equivalent value.

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

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

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

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

103 ~~[(i)]~~ (h) A transfer of assets to the trust may not render the settlor insolvent.

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

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

110 ~~[(l)]~~ (j) Assets transferred to the trust may not be derived from ~~[unlawful]~~ criminal
111 activities.

112 ~~[(m)]~~ (k) At the time the settlor transfers any assets to the trust, the settlor shall sign a
113 sworn affidavit stating that:

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

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

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

118 (iv) there are no pending or threatened court actions against the settlor, except for those

119 court actions identified by the settlor on an attachment to the affidavit;

120 (v) the settlor is not involved in any administrative proceedings that would reasonably
121 be expected to have a material adverse financial effect on the settlor, except those
122 administrative proceedings identified on an attachment to the affidavit;

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

125 (vii) the settlor does not contemplate filing for relief under the provisions of [~~the~~
126 ~~Bankruptcy Code~~] 11 U.S.C. Sec. 101, et seq.; and

127 (viii) the assets being transferred to the trust were not derived from [~~unlawful~~] criminal
128 activities.

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

131 (a) If any requirement of Subsections (5)(a) through [~~(g)~~] (f) is not satisfied, none of
132 the property held in the trust will at any time have the benefit of the protections described in
133 Subsection (3).

134 (b) If the trustee does not send the notice required under Subsection (5)[~~(g)~~](f), the
135 court may authorize any person with a child support judgment or child support order against
136 the settlor to whom notice was not sent to attach the distribution or future distributions, but the
137 person may not:

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

140 (ii) force or require the trustee to make a distribution to the settlor, as beneficiary. No
141 creditor of the settlor other than a person who has a child support judgment or child support
142 order against the settlor shall have a right to relief under this Subsection (6) as a result of the
143 trustee's failure to provide the notice required under Subsection (5)(f).

144 (c) If the requirement set forth in Subsection (5)(g) is not satisfied, the property
145 transferred to the trust that does not satisfy the requirement may not have the benefit of the
146 protections described in Subsection (3) with respect to any person with a child support order or
147 child support judgment against the settlor.

148 [~~(e)~~] (d) If any requirement set forth in Subsections (5)(h) through [~~(m)~~] (k) is not
149 satisfied, the property transferred to the trust that does not satisfy the requirement may not have

150 the benefit of the protections described in Subsection (3). Any claim that Subsection (5)(h) or
151 Subsection (5)(i) is not satisfied shall be established by clear and convincing evidence.

152 (7) [~~The provisions of Subsection (3) may apply to a trust even if~~] The following
153 provisions will not disqualify a trust from the protections described in Subsection (3) if the
154 requirements of this section are otherwise satisfied:

155 (a) the settlor serves as a cotrustee or as an advisor to the trustee, provided that [~~the~~
156 ~~settlor may not participate in the~~] any determination as to whether a discretionary distribution
157 will be made[;] to the settlor shall be made only by trustees other than the settlor. The settlor
158 may not be considered to be involved in the determination as to whether a discretionary
159 distribution was made to the settlor solely because the settlor:

160 (i) requested the distribution from the trust;

161 (ii) consulted with the trustees regarding the distribution;

162 (iii) exercised a right to consent to or veto the distribution pursuant to a power
163 described in Subsection (7)(d); or

164 (iv) signed documentation in a trustee's capacity as a cotrustee implementing the
165 distribution, so long as the other trustees independently authorized the distribution in their
166 discretion;

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

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

172 (d) the trust instrument gives the settlor the power to consent to or veto a distribution
173 from the trust;

174 (e) the trust instrument gives the settlor an inter vivos or a testamentary nongeneral
175 power of appointment or similar power;

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

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

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

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

183 (iv) a percentage of the value of the trust each year as determined under the trust
184 instrument, but not exceeding the amount that may be defined as income under 26 U.S.C.
185 643(b);

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

189 (vi) income or principal from a grantor retained annuity trust or grantor retained
190 unitrust that is allowed under 26 U.S.C. Sec. 2702; [~~or~~] and

191 (vii) income from a trust intended to qualify for the federal estate tax or gift tax marital
192 deduction under 26 U.S.C. Sec. 2056(b)(7) or 26 U.S.C. Sec. 2523(f);

193 (g) the trust instrument authorizes the settlor to use real or personal property owned by
194 the trust[-];

195 (h) (i) the settlor gives a personal guarantee with respect to any debt or obligation
196 secured by property that is held in the trust and the settlor directly or indirectly pays or makes
197 payments on the debt or obligation; or

198 (ii) the settlor directly pays property taxes, casualty and liability insurance premiums,
199 maintenance expenses, homeowners association dues, or other similar expenses with respect to
200 property held in the trust; or

201 (i) the settlor pays income tax with respect to items of income attributable to that
202 portion of the trust of which the settlor is considered to be the owner under 26 U.S.C. Sec. 671
203 through 678, which payments may not constitute additional transfers to the trust for purposes of
204 this section.

205 (8) If a trust instrument contains the provisions described in Subsections (5)(a) through
206 (g), the transfer restrictions prevent a creditor or other person from asserting any cause of
207 action or claim for relief against a trustee of the trust or against others involved in the
208 counseling, drafting, preparation, execution, or funding of the trust for conspiracy to commit
209 fraudulent conveyance or transfer, aiding and abetting a fraudulent conveyance or transfer,
210 participation in the trust transaction, or similar cause of action or claim for relief. For purposes
211 of this subsection, counseling, drafting, preparation, execution, or funding of the trust includes

212 the preparation and funding of a limited partnership, a limited liability company, or other entity
213 if interests in the entity are subsequently transferred to the trust. The creditor and other person
214 prevented from asserting a cause of action or claim for relief may assert a cause of action
215 against, and are limited to recourse against, only:

216 (a) the trust and the trust assets; and

217 (b) the settlor, to the extent otherwise allowed in this section.

218 (9) ~~[A cause of action or claim for relief regarding a fraudulent transfer of a settlor's~~
219 ~~assets under Subsection (5)(j) is extinguished unless the action under Subsection (5)(j) is~~
220 ~~brought by a creditor of the settlor who was a creditor of the settlor before the assets referred to~~
221 ~~in Subsection (5)(j) were transferred to the trust and the action under Subsection (5)(j) is~~
222 ~~brought within the earlier of]~~ The exclusive remedy for a claim that Subsection (5)(h) or
223 Subsection (5)(i) was not satisfied with respect to the transfer of assets to a trust created under
224 this section shall be a claim under Subsection 25-6-5(1)(a), 25-6-5(1)(b) for the purposes of a
225 claim for reimbursement arising under the Medicaid Benefits Recovery Act, or 25-6-6(1), as
226 applicable. No other cause of action or claim for relief under Sections 25-6-1 through 25-6-13
227 shall apply to the transfer of a settlor's assets to a trust created under this section.

228 Notwithstanding any other provisions of Sections 25-6-1 through 25-6-13 to the contrary, any
229 permissible cause of action or claim for relief for a fraudulent transfer of settlor's assets to a
230 trust created under this section is extinguished unless the action is brought by a creditor of the
231 settlor who was a creditor of the settlor before the assets in question were transferred to the
232 trust and the action is brought within the earlier of:

233 (a) the later of:

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

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

237 (A) can demonstrate, by ~~[a preponderance of the]~~ clear and convincing evidence, that
238 the creditor asserted a specific claim against the settlor before the transfer; or

239 (B) files another action, other than an action ~~[under Subsection (5)(j)]~~ alleging a
240 fraudulent transfer, against the settlor that asserts a claim based on an act or omission of the
241 settlor that occurred before the transfer, and the action described in this Subsection (9) is filed
242 within two years after the transfer~~[-];~~ or

243 (b) (i) with respect to a creditor known to the settlor, 120 days after the date on which
244 notice of the transfer is mailed to the creditor, which notice shall state the name of the settlor,
245 ~~[and]~~ the address of the settlor or the settlor's representative, the name and address of the
246 trustee or the trustee's representative, and also describe the assets that were transferred, but
247 does not need to state the value of those assets if the assets are other than cash, and which shall
248 inform the creditor that he is required to ~~[present his claim to both the settlor and the trustee]~~
249 bring an action or claim for relief within 120 days from the mailing of the notice or be forever
250 barred; or

251 (ii) with respect to a creditor not known to the settlor, 120 days after the date on which
252 notice of the transfer is first published in a newspaper of general circulation in the county in
253 which the settlor then resides or is published on a public legal notice website as required by
254 Section 45-1-101, which notice shall state the name ~~[and]~~ of the settlor, the address of the
255 settlor or the settlor's representative, the name and address of the trustee or the trustee's
256 representative, and also describe the assets that were transferred, but does not need to state the
257 value of those assets ~~[if the assets are other than cash].~~

258 (10) The notice ~~[required in]~~ referred to in Subsection (9)(b) shall be published in
259 accordance with the provisions of Section 45-1-101 for three consecutive weeks and inform
260 creditors that they are required to ~~[present claims]~~ bring an action or claim for relief within 120
261 days from the first publication of the notice or be forever barred. Failure to give the notice
262 referred to in Subsection (9)(b) to one creditor may not prevent the shortening of the limitations
263 period under Subsection (9)(b) with respect to any creditor to whom such notice was properly
264 given, whether by mail or publication.

265 (11) (a) With respect to a trust governed by this section, the rights of the creditors of
266 nonsettlor beneficiaries shall be governed by the provisions of Title 75, Chapter 7, Utah
267 Uniform Trust Code. With respect to an irrevocable trust of which the settlor is a beneficiary
268 that is not governed by this section, the rights of the creditors of the settlor shall be governed
269 by the provisions of Section 75-7-505.

270 (b) To the extent the provisions in this section conflict with the provisions of Sections
271 25-6-1 through 25-6-13, the provisions of this section take precedence.

272 ~~[(H)]~~ (12) (a) A trust is subject to this section if it is governed by Utah law, as
273 provided in Section 75-7-107, and if it otherwise meets the requirements of this section.

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

276 (13) Nothing in this section may be construed to alter any rights that may have vested
277 or been created under this section prior to May 14, 2013.

278 Section 2. Section **75-7-816** is amended to read:

279 **75-7-816. Recitals when title to real property is in trust -- Failure.**

280 (1) When title to real property is granted to a person as trustee, the terms of the trust
281 may be given either:

282 (a) in the deed of transfer; or

283 (b) in an instrument signed by the grantor and recorded in the same office as the grant
284 to the trustee.

285 (2) If the terms of the trust are not made public as required in Subsection (1), a
286 conveyance from the trustee is absolute in favor of purchasers for value who take the property
287 without notice of the terms of the trust.

288 (3) The terms of the trust recited in the deed of transfer or the instrument recorded
289 under Subsection (1)(b) shall include:

290 (a) the name of the trustee;

291 (b) the address of the trustee; and

292 (c) the name and date of the trust.

293 [~~4) Any real property titled in a trust which has a restriction on transfer described in~~
294 ~~Section 25-6-14 shall include in the title the words "asset protection trust."~~]