

ASSET PROTECTION TRUSTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Derek E. Brown

Senate Sponsor: John L. Valentine

LONG TITLE

General Description:

This bill removes the requirement that the trustee be a trust company.

Highlighted Provisions:

This bill:

- ▶ allows an individual to be a trustee.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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 amended to read:

25-6-14. Restricting transfers of trust interests.

(1) (a) For trusts created on or after December 31, 2003, a settlor who in writing irrevocably transfers property in trust to a trust ~~[having as trustee a company defined in Subsection 7-5-1(1)(d) who holds some or all of the trust assets in this state in a savings account described in Subsection 7-1-103(29), a certificate of deposit, a brokerage account, a~~



28 ~~trust company fiduciary account, or account or deposit located in this state that is similar to~~
29 ~~such an account]~~ may provide that the income or principal interest of the settlor as beneficiary
30 of the trust may not be either voluntarily or involuntarily transferred before payment or delivery
31 to the settlor as beneficiary by the trustee. The provision shall be considered to be a restriction
32 on the transfer of the settlor's beneficial interest in the trust that is enforceable under applicable
33 nonbankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code or
34 successor provision.

35 (b) This Subsection (1) applies to:

36 (i) any form of transfer into trust including:

37 (A) conveyance; or

38 (B) assignment; and

39 (ii) transfers of:

40 (A) personal property;

41 (B) interests in personal property;

42 (C) real property; or

43 (D) interests in real property.

44 (2) (a) Except as provided in Subsection (2)(c), if a trust has a restriction as provided in
45 Subsection (1)(a), a creditor or other claimant of the settlor may not satisfy a claim, or liability
46 on it, in either law or equity, out of the settlor's transfer or settlor's beneficial interest in the
47 trust.

48 (b) For the purposes of Subsection (2)(a), a creditor includes one holding or seeking to
49 enforce a judgment entered by a court or other body having adjudicative authority as well as
50 one with a right to payment, whether or not reduced to judgment, liquidated, unliquidated,
51 fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or
52 unsecured.

53 (c) A restriction provided under Subsection (1) does not prevent a creditor or person
54 described in Subsection (2)(a) from satisfying a claim or liability out of the settlor's beneficial
55 interest in or transfer into trust if:

56 (i) the claim is a judgment, order, decree, or other legally enforceable decision or ruling
57 resulting from a judicial, arbitration, mediation, or administrative proceeding commenced prior
58 to or within three years after the trust is created;

59 (ii) the settlor's transfer into trust is made with actual intent to hinder, delay, or defraud
60 that creditor;

61 (iii) the trust provides that the settlor may revoke or terminate all or part of the trust
62 without the consent of a person who has a substantial beneficial interest in the trust and the
63 interest would be adversely affected by the exercise of the settlor's power to revoke or
64 terminate all or part of the trust;

65 (iv) the trust requires that all or a part of the trust's income or principal, or both must be
66 distributed to the settlor as beneficiary;

67 (v) the claim is for a payment owed by a settlor under a child support judgment or
68 order;

69 (vi) the transfer is made when the settlor is insolvent or the transfer renders the settlor
70 insolvent;

71 (vii) the claim is for recovery of public assistance received by the settlor allowed under
72 Title 26, Chapter 19, Medical Benefits Recovery Act;

73 (viii) the claim is a tax or other amount owed by the settlor to any governmental entity;

74 (ix) the claim is by a spouse or former spouse of the settlor on account of an agreement
75 or order for the payment of support or alimony or for a division or distribution of property;

76 (x) (A) the settlor transferred assets into the trust that:

77 (I) were listed in a written representation of the settlor's assets given to a claimant to
78 induce the claimant to enter into a transaction or agreement with the settlor; or

79 (II) were transferred from the settlor's control in breach of any written agreement,
80 covenant, or security interest between the settlor and the claimant; or

81 (B) without limiting the claimant's right to pursue assets not held by the trust, a
82 claimant described in Subsection (2)(c)(x)(A) may only foreclose or execute upon an asset in
83 the trust listed in the written representation described in Subsection (2)(c)(x)(A)(I) or
84 transferred in breach of a written agreement, covenant, or security interest as provided in
85 Subsection (2)(c)(x)(A)(II) to the extent of the settlor's interest in that asset when it was
86 transferred to the trust or the equivalent value of that asset at the time of foreclosure or
87 execution if the original asset was sold or traded by the trust; or

88 (xi) the claim is a judgment, award, order, sentence, fine, penalty, or other
89 determination of liability of the settlor for conduct of the settlor constituting fraud, intentional

90 infliction of harm, or a crime.

91 (d) The statute of limitations for actions to satisfy a claim or liability out of the settlor's
92 beneficial interest in or transfer into trust under Subsections (2)(c)(ii), (v), (vii), (viii), (ix), (x),
93 and (xi) is the statute of limitations applicable to the underlying action.

94 (e) For the purposes of Subsection (2)(c) "revoke or terminate" does not include:

95 (i) a power to veto a distribution from the trust;

96 (ii) a testamentary special power of appointment or similar power;

97 (iii) the right to receive a distribution of income, principal, or both in the discretion of
98 another, including a trustee other than the settlor, an interest in a charitable remainder unitrust
99 or charitable remainder annuity trust as defined in Internal Revenue Code Section 664 or
100 successor provision, or a right to receive principal subject to an ascertainable standard set forth
101 in the trust; or

102 (iv) the power to appoint nonsubordinate advisers or trust protectors who can remove
103 and appoint trustees, who can direct, consent to or disapprove distributions, or is the power to
104 serve as an investment director or appoint an investment director under Section 75-7-906.

105 (3) The satisfaction of a claim under Subsection (2)(c) is limited to that part of the trust
106 or transfer to which it applies.

107 (4) (a) If a trust has a restriction as provided under Subsection (1), the restriction
108 prevents anyone, including a person listed in Subsection (2)(a), from asserting any cause of
109 action or claim for relief against a trustee or anyone involved in the counseling, drafting,
110 preparation, execution, or funding of the trust for:

111 (i) conspiracy to commit a fraudulent conveyance;

112 (ii) aiding and abetting a fraudulent conveyance; or

113 (iii) participating in the trust transaction.

114 (b) A person prevented from asserting a cause of action or claim for relief under this
115 Subsection (4) may assert a cause of action only against:

116 (i) the trust assets; or

117 (ii) the settlor or beneficiary to the extent allowed under Subsection 25-6-5(1)(a).

118 (5) In any action brought under Subsection (2)(c), the burden to prove the matter by
119 clear and convincing evidence shall be upon the creditor.

120 (6) For purposes of this section, the transfer shall be considered to have been made on

121 the date the property was originally transferred in trust.

122 (7) The courts of this state shall have exclusive jurisdiction over any action brought
123 under this section.

124 (8) If a trust or a property transfer to a trust is voided or set aside under Subsection
125 (2)(c), the trust or property transfer shall be voided or set aside only to the extent necessary to
126 satisfy:

127 (a) the settlor's debt to the creditor or other person at whose instance the trust or
128 property transfer is voided or set aside; and

129 (b) the costs and attorney fees allowed by the court.

130 (9) If a trust or a property transfer to a trust is voided or set aside under Subsection
131 (2)(c) and the court is satisfied that the trustee did not act in bad faith in accepting or
132 administering the property that is the subject of the trust:

133 (a) the trustee has a first and paramount lien against the property that is the subject of
134 the trust in an amount equal to the entire cost properly incurred by the trustee in a defense of
135 the action or proceedings to void or set aside the trust or the property transfer, including
136 attorney fees;

137 (b) the trust or property transfer that is voided or set aside is subject to the proper fees,
138 costs, preexisting rights, claims, and interest of the trustee and any predecessor trustee if the
139 trustee and predecessor trustee did not act in bad faith; and

140 (c) any beneficiary, including the settlor, may retain a distribution made by exercising a
141 trust power or discretion vested in the trustee of the trust, if the power or discretion was
142 properly exercised before the commencement of the action or proceeding to void or set aside
143 the trust or property transfer.

144 ~~Ĥ→ [(10) If at least one trustee is a trust company as defined in Subsection 7-5-1(1)(d), then~~
145 ~~individuals may also serve as cotrustees.] ←Ĥ~~

Legislative Review Note
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Office of Legislative Research and General Counsel