

DOMESTIC ASSET PROTECTION TRUST AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Earl D. Tanner

Senate Sponsor: _____

LONG TITLE

General Description:

This bill creates a new asset protection trust framework.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ creates a new type of asset protection trust;
- ▶ requires the asset protection trust to be registered with the Division of Corporations;
- ▶ allows the trust to be revocable or irrevocable;
- ▶ allows trusts created under the current asset protection trust statute to register and back-date the assets; and
- ▶ makes technical and conforming amendments.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a special effective date.

Utah Code Sections Affected:

AMENDS:

75-2-205, as last amended by Laws of Utah 2003, Second Special Session, Chapter 3

75-7-107, as renumbered and amended by Laws of Utah 2004, Chapter 89

75-7-301, as repealed and reenacted by Laws of Utah 2004, Chapter 89



28 [75-7-501](#), as repealed and reenacted by Laws of Utah 2004, Chapter 89

29 [75-7-505](#), as enacted by Laws of Utah 2004, Chapter 89

30 [75-7-816](#), as enacted by Laws of Utah 2004, Chapter 89

31 ENACTS:

32 [25-7-101](#), Utah Code Annotated 1953

33 [25-7-102](#), Utah Code Annotated 1953

34 [25-7-103](#), Utah Code Annotated 1953

35 [25-7-104](#), Utah Code Annotated 1953

36 [25-7-105](#), Utah Code Annotated 1953

37 [25-7-106](#), Utah Code Annotated 1953

38 [25-7-107](#), Utah Code Annotated 1953

39 [25-7-108](#), Utah Code Annotated 1953

40 [25-7-109](#), Utah Code Annotated 1953

41 [25-7-110](#), Utah Code Annotated 1953

42 [25-7-111](#), Utah Code Annotated 1953

43 REPEALS:

44 [25-6-14](#), as repealed and reenacted by Laws of Utah 2013, Chapter 284



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

47 Section 1. Section [25-7-101](#) is enacted to read:

48 **CHAPTER 7. UTAH ASSET PROTECTION TRUST ACT**

49 **25-7-101. Title.**

50 This chapter is known as the "Utah Asset Protection Trust Act."

51 Section 2. Section [25-7-102](#) is enacted to read:

52 **25-7-102. Definitions.**

53 As used in this chapter:

54 (1) (a) "Asset protection trust" means any trust, whether or not administered in Utah,

55 which is registered in accordance with this chapter:

56 (i) in which the settlor is an actual or potential beneficiary; and

57 (ii) that claims a creditor of that settlor may not reach any of its assets that would be

58 available to that creditor under Section [75-7-505](#).

59 (b) A trust whose assets consist solely of assets that are exempt from the settlor's
60 creditors under Title 78B, Chapter 5, Part 5, Utah Exemptions Act, is not an asset protection
61 trust.

62 (2) "Beneficiary" means a person who has a present interest or, under the terms of the
63 trust, may have a future beneficial interest in a trust, vested or contingent.

64 (3) "Creditor" means a person:

65 (a) whose claim against the settlor arises before the trust is created; or

66 (b) who subsequently becomes a creditor of the settlor, whether or not the claim is
67 reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,
68 undisputed, legal, equitable, secured, or unsecured.

69 (4) "Insured or bonded claims" means claims for which the settlor is required by law to
70 be insured or bonded but only to the extent of the required insurance or bond.

71 (5) "Property" means real property, personal property, and interests in real or personal
72 property.

73 (6) "Settlor" means a person who creates a trust and a person who contributes to a trust.

74 (7) "Social welfare program" means any state or federal entitlement program providing
75 benefits to the settlor, the settlor's spouse, or the settlor's dependants, including, without
76 limitation, Medicaid, unemployment, and disability programs.

77 (8) "Trust" means the same as that term is defined in Section [75-1-201](#).

78 Section 3. Section **25-7-103** is enacted to read:

79 **25-7-103. Date of contribution -- Source of expenditure and distribution.**

80 For purposes of this chapter:

81 (1) Unless otherwise provided, the date of a contribution to a registered trust is the date
82 it is received by the trust.

83 (2) When a trust is registered, all of the trust assets at the time of registration are
84 considered to be contributed at the time of registration.

85 (3) When a registered settlor is added to a registered trust, all of the trust assets at the
86 time of the addition are considered to be contributed to the trust at the time of the addition.

87 (4) There is a rebuttable presumption that the expenditures and distributions of a
88 registered trust are made from the most recent contributions to the trust and the proceeds from
89 those contributions.

90 Section 4. Section **25-7-104** is enacted to read:

91 **25-7-104. Rights of settlor's creditors.**

92 (1) A creditor of a settlor of a registered trust has the same rights against the trust and
93 its assets that the creditor would have against an unregistered trust, except as set forth in this
94 chapter.

95 (2) A registered trust may assert exemptions as set forth in this chapter against the
96 collection of the trust's obligations to pay creditors of the registered settlors of the trust. The
97 exemptions may only be asserted to prevent the taking of:

98 (a) contributions to the trust that were made at least four years prior to the date the
99 creditor's claim was first presented to the trust;

100 (b) proceeds traceable to contributions described in Subsection (2)(a); and

101 (c) other trust assets when there is an agreement between the settlor and the creditor in
102 which the creditor was advised in writing of the existence of the registered trust and relied
103 upon a written disclosure of assets outside of the trust.

104 (3) The exemptions set forth in this chapter may not be asserted against the following
105 claims against a registered settlor:

106 (a) a secured claim but only to the extent of the security held by the trust;

107 (b) child support and alimony obligations;

108 (c) property division under domestic orders;

109 (d) damages caused by the intentional torts of the settlor;

110 (e) court ordered fines, penalties, and criminal restitution;

111 (f) taxes and associated interest and penalties;

112 (g) reimbursement of social welfare programs; and

113 (h) insured or bonded claims.

114 (4) Exemptions set forth in this chapter may not be asserted by a registered trust if any
115 registered settlor is a settlor and beneficiary of any other asset protection trust.

116 Section 5. Section **25-7-105** is enacted to read:

117 **25-7-105. Exemptions.**

118 (1) A trust registered under this chapter may assert two of the following exemptions
119 against a claim by a creditor of a registered settlor as set forth in Section [25-7-104](#).

120 (a) The Median Exemption is an amount equal to the sum of the median value of a

121 Utah owner occupied housing unit and the median Utah household income as determined in the
122 most recent American Community Survey conducted by the United States Census Bureau.

123 (b) The 50% Exemption is determined on a claim by claim basis and is an amount
124 equal to the sum of the following reduced by the Median Exemption:

125 (i) the amount available under an insurance policy of which the settlor is an insured to
126 satisfy the creditor's claim against the settlor;

127 (ii) the amount available from surety bonds, property bonds, cash deposited with the
128 court, or any other security approved by the court to satisfy the creditor's claim against the
129 settlor; and

130 (iii) the amount paid to the creditor on the claim by or for the settlor after the claim is
131 presented to the trust.

132 (c) The Contract Exemption is equal to the value of all assets in the registered trust less
133 the Median Exemption. This exemption is an alternative to the 50% Exemption and may only
134 be asserted when the claim against the registered settlor arises from an agreement between the
135 settlor and the creditor in which the creditor was advised in writing of the existence of the
136 registered trust and relied upon a written disclosure of assets outside of the trust.

137 (2) No exemption may be asserted to protect an asset or the proceeds of an asset that,
138 prior to the date the claim is presented to the trust:

139 (a) was identified in writing by the settlor to the creditor as being outside the registered
140 trust; and

141 (b) was relied upon by the creditor in entering into an agreement with the settlor, which
142 agreement has a material, equitable connection to the claim.

143 (3) No exemption is available to the trust against the creditors of a registered settlor
144 after the death of that settlor.

145 (4) For purposes of determining these exemptions and the value of trust assets:

146 (a) a Utah primary residence occupied by a settlor shall be valued at its most recent
147 assessed value for property tax, less encumbrances;

148 (b) value for good will may not be given in determining the value of a privately held
149 business; and

150 (c) partial interests in assets that are not publicly traded securities shall be valued as a
151 portion of the whole without discount.

152 (5) The burden shall be on the trust to prove by a preponderance of the evidence that
153 exemptions prevent the taking of a trust asset.

154 Section 6. Section **25-7-106** is enacted to read:

155 **25-7-106. Utah Exemptions Act.**

156 The assets of a registered trust that are available to the settlor are owned by the settlor
157 for purposes of Title 78B, Chapter 5, Part 5, Utah Exemptions Act. The settlor or the trust may
158 assert the settlor's exemption rights against a claim of the settlor's creditor.

159 Section 7. Section **25-7-107** is enacted to read:

160 **25-7-107. Liens and security interests.**

161 (1) Liens and security interests that have attached to an asset before it is transferred to a
162 registered trust continue as liens upon and security interests in that asset.

163 (2) A judgment against a registered trust for claims against the registered settlor does
164 not create a lien or security interest in any asset of the trust. Writs of replevin, attachment,
165 garnishment, and execution may be issued against a registered trust to satisfy a judgment.

166 (3) No interest of a registered settlor as beneficiary of a registered trust is subject to
167 voluntary or involuntary transfer even if the registered settlor is the trustee or cotrustee of the
168 registered trust.

169 Section 8. Section **25-7-108** is enacted to read:

170 **25-7-108. Trust registration.**

171 (1) Any trust may be registered under this chapter.

172 (2) To be registered, a trust shall record all of the following information with the
173 Division of Corporations:

174 (a) the name of the trust, which shall end with the phrase "asset protection trust";

175 (b) the names and addresses of all settlors of the trust whose creditors may be barred
176 from trust assets by the exemptions in this chapter;

177 (c) the names and addresses of all trustees; and

178 (d) the name and a Utah address of a current agent for service of process on the trust.

179 (3) Registered settlors:

180 (a) shall be natural persons 18 years of age or older;

181 (b) are persons registered with the trust under Subsection (2)(b); and

182 (c) enjoy the protections of this chapter to the extent of their contributions to the trust.

183 Section 9. Section **25-7-109** is enacted to read:

184 **25-7-109. Trust registry.**

185 (1) Trusts registered in accordance with this chapter shall be listed on a public registry
186 created by the Division of Corporations.

187 (2) The registry shall be capable of reporting the date and information in the initial
188 registration and the date and substance of each subsequent amendment to a trust registration.

189 Section 10. Section **25-7-110** is enacted to read:

190 **25-7-110. Fees.**

191 Unless otherwise provided by statute, the Division of Corporations shall collect fees for
192 its services in amounts determined by the Department of Commerce in accordance with the
193 provisions of Section [63J-1-504](#).

194 Section 11. Section **25-7-111** is enacted to read:

195 **25-7-111. Provisions for trusts created under former Section [25-6-14](#).**

196 Asset protection trusts created under former Section [25-6-14](#) may date contributions to
197 the trust, for the purposes of this chapter, four years prior to the date of registration if the trust
198 is registered under the provisions of this chapter before January 1, 2017.

199 Section 12. Section **75-2-205** is amended to read:

200 **75-2-205. Decedent's nonprobate transfers to others.**

201 Unless excluded under Section [75-2-208](#), the value of the augmented estate includes the
202 value of the decedent's nonprobate transfers to others, not included under Section [75-2-204](#), of
203 any of the types described in this section, in the amount provided respectively for each type of
204 transfer:

205 (1) Property owned or owned in substance by the decedent immediately before death
206 that passed outside probate at the decedent's death. Property included under this category
207 consists of the property described in this Subsection (1).

208 (a) (i) Property over which the decedent alone, immediately before death, held a
209 presently exercisable general power of appointment.

210 (ii) The amount included is the value of the property subject to the power, to the extent
211 the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise,
212 to or for the benefit of any person other than the decedent's estate or surviving spouse.

213 (b) (i) The decedent's fractional interest in property held by the decedent in joint

214 tenancy with the right of survivorship.

215 (ii) The amount included is the value of the decedent's fractional interest, to the extent
216 the fractional interest passed by right of survivorship at the decedent's death to a surviving joint
217 tenant other than the decedent's surviving spouse.

218 (c) (i) The decedent's ownership interest in property or accounts held in POD, TOD, or
219 co-ownership registration with the right of survivorship.

220 (ii) The amount included is the value of the decedent's ownership interest, to the extent
221 the decedent's ownership interest passed at the decedent's death to or for the benefit of any
222 person other than the decedent's estate or surviving spouse.

223 (d) (i) Proceeds of insurance, including accidental death benefits, on the life of the
224 decedent, if the decedent owned the insurance policy immediately before death or if and to the
225 extent the decedent alone and immediately before death held a presently exercisable general
226 power of appointment over the policy or its proceeds.

227 (ii) The amount included:

228 (A) is the value of the proceeds, to the extent they were payable at the decedent's death
229 to or for the benefit of any person other than the decedent's estate or surviving spouse; and

230 (B) may not exceed the greater of the cash surrender value of the policy immediately
231 prior to the death of the decedent or the amount of premiums paid on the policy during the
232 decedent's life.

233 (2) Property transferred in any of the forms described in this Subsection (2) by the
234 decedent during marriage:

235 (a) (i) Any irrevocable transfer in which the decedent retained the right to the
236 possession or enjoyment of, or to the income from, the property if and to the extent the
237 decedent's right terminated at or continued beyond the decedent's death.

238 (ii) ~~[An irrevocable transfer in trust which includes a restriction on transfer of the~~
239 ~~decedent's interest as settlor and beneficiary as described in Section 25-6-14. (iii)]~~ The amount
240 included is the value of the fraction of the property to which the right or restriction related, to
241 the extent the fraction of the property passed outside probate to or for the benefit of any person
242 other than the decedent's estate or surviving spouse.

243 (b) (i) Any transfer in which the decedent created a power over income or property,
244 exercisable by the decedent alone or in conjunction with any other person, or exercisable by a

245 nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's
246 estate, or creditors of the decedent's estate.

247 (ii) The amount included with respect to a power over property is the value of the
248 property subject to the power, and the amount included with respect to a power over income is
249 the value of the property that produces or produced the income, to the extent the power in
250 either case was exercisable at the decedent's death to or for the benefit of any person other than
251 the decedent's surviving spouse or to the extent the property passed at the decedent's death, by
252 exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than
253 the decedent's estate or surviving spouse.

254 (iii) If the power is a power over both income and property and Subsection (2)(b)(ii)
255 produces different amounts, the amount included is the greater amount.

256 (3) Property that passed during marriage and during the two-year period next preceding
257 the decedent's death as a result of a transfer by the decedent if the transfer was of any of the
258 types described in this Subsection (3).

259 (a) (i) Any property that passed as a result of the termination of a right or interest in, or
260 power over, property that would have been included in the augmented estate under Subsection
261 (1)(a), (b), or (c), or under Subsection (2), if the right, interest, or power had not terminated
262 until the decedent's death.

263 (ii) The amount included is the value of the property that would have been included
264 under Subsection (1)(a), (b), (c), or Subsection (2) if the property were valued at the time the
265 right, interest, or power terminated, and is included only to the extent the property passed upon
266 termination to or for the benefit of any person other than the decedent or the decedent's estate,
267 spouse, or surviving spouse.

268 (iii) (A) As used in this Subsection (3)(a), "termination," with respect to a right or
269 interest in property, occurs when the right or interest terminated by the terms of the governing
270 instrument or the decedent transferred or relinquished the right or interest, and, with respect to
271 a power over property, occurs when the power terminated by exercise, release, lapse, default, or
272 otherwise.

273 (B) With respect to a power described in Subsection (1)(a), "termination" occurs when
274 the power terminated by exercise or release, but not otherwise.

275 (b) (i) Any transfer of or relating to an insurance policy on the life of the decedent if

276 the proceeds would have been included in the augmented estate under Subsection (1)(d) had
277 the transfer not occurred.

278 (ii) The amount included:

279 (A) is the value of the insurance proceeds to the extent the proceeds were payable at
280 the decedent's death to or for the benefit of any person other than the decedent's estate or
281 surviving spouse; and

282 (B) may not exceed the greater of the cash surrender value of the policy immediately
283 prior to the death of the decedent or the amount of premiums paid on the policy during the
284 decedent's life.

285 (c) (i) Any transfer of property, to the extent not otherwise included in the augmented
286 estate, made to or for the benefit of a person other than the decedent's surviving spouse.

287 (ii) The amount included is the value of the transferred property to the extent the
288 aggregate transfers to any one donee in either of the two years exceeded \$10,000.

289 Section 13. Section **75-7-107** is amended to read:

290 **75-7-107. Governing law.**

291 (1) For purposes of this section:

292 (a) "Foreign trust" means a trust that is created in another state or country and valid in
293 the state or country in which the trust is created.

294 (b) "State law provision" means a provision that the laws of a named state govern the
295 validity, construction, and administration of a trust.

296 (2) If a trust has a state law provision specifying this state, the validity, construction,
297 and administration of the trust are to be governed by the laws of this state if any administration
298 of the trust is done in this state.

299 (3) For all trusts created on or after December 31, 2003, if a trust does not have a state
300 law provision, the validity, construction, and administration of the trust are to be governed by
301 the laws of this state if the trust is administered in this state.

302 (4) A trust shall be considered to be administered in this state if:

303 (a) the trust states that this state is the place of administration, and any administration
304 of the trust is done in this state; or

305 (b) the place of business where the fiduciary transacts a major portion of its
306 administration of the trust is in this state.

307 ~~[(5) If a foreign trust is administered in this state as provided in this section, the~~
308 ~~following provisions are effective and enforceable under the laws of this state:]~~

309 ~~[(a) a provision in the trust that restricts the transfer of trust assets in a manner similar~~
310 ~~to Section ~~25-6-14~~;~~]

311 ~~[(b) a provision that allows the trust to be perpetual; or]~~

312 ~~[(c) a provision that is not expressly prohibited by the law of this state.]~~

313 ~~[(6)]~~ (5) A foreign trust that moves its administration to this state is valid whether or
314 not the trust complied with the laws of this state at the time of the trust's creation or after the
315 trust's creation.

316 ~~[(7)]~~ (6) Unless otherwise designated in the trust instrument, a trust is administered in
317 this state if it meets the requirements of Subsection (4).

318 Section 14. Section **75-7-301** is amended to read:

319 **75-7-301. Basic effect.**

320 (1) Notice to a person who may represent and bind another person under this part has
321 the same effect as if notice were given directly to the other person.

322 (2) The consent of a person who may represent and bind another person under this part
323 is binding on the person represented unless the person represented objects to the representation
324 before the consent would otherwise have become effective.

325 (3) Except as otherwise provided in [~~Sections~~] Section 75-7-411 [~~and 25-6-14~~], a
326 person who under this part may represent a settlor who lacks capacity may receive notice and
327 give a binding consent on the settlor's behalf.

328 Section 15. Section **75-7-501** is amended to read:

329 **75-7-501. Rights of beneficiary's creditor or assignee.**

330 To the extent a beneficiary's interest is not protected by a spendthrift provision or
331 [~~Section 25-6-14~~] Title 25, Chapter 7, Utah Asset Protection Trust Act, the court may authorize
332 a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of
333 present or future distributions to or for the benefit of the beneficiary or other means. The court
334 may limit the award to relief as is appropriate under the circumstances.

335 Section 16. Section **75-7-505** is amended to read:

336 **75-7-505. Creditor's claim against settlor.**

337 (1) Whether or not the terms of a trust contain a spendthrift provision, the following

338 rules apply:

339 (a) During the lifetime of the settlor, the property of a revocable trust is subject to the
340 claims of the settlor's creditors. If a trust has more than one settlor, the amount the creditor or
341 assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of
342 the trust attributable to that settlor's contribution.

343 (b) (i) With respect to an irrevocable trust [~~other than an irrevocable trust that meets~~
344 ~~the requirements of Section 25-6-14~~], a creditor or assignee of the settlor may reach the
345 maximum amount that can be distributed to or for the settlor's benefit. If the trust has more
346 than one settlor, the amount the creditor or assignee of a particular settlor may reach may not
347 exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

348 (ii) If marital property has been contributed to the trust, property in the trust equal to
349 the value of the marital property and its proceeds is subject to division by a court in a
350 separation or divorce proceeding.

351 (c) After the death of a settlor, and subject to the settlor's right to direct the source from
352 which liabilities will be paid, the property of a trust that was revocable at the settlor's death, but
353 not property received by the trust as a result of the death of the settlor which is otherwise
354 exempt from the claims of the settlor's creditors, is subject to claims of the settlor's creditors,
355 costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal
356 of remains, and statutory allowances to a surviving spouse and children to the extent the
357 settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

358 (2) For purposes of this section:

359 (a) during the period the power may be exercised, the holder of a power of withdrawal
360 is treated in the same manner as the settlor of a revocable trust to the extent of the property
361 subject to the power; and

362 (b) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of
363 the trust only to the extent the value of the property affected by the lapse, release, or waiver
364 exceeds the greater of the amount specified in Subsection 2041(b)(2), 2514(e), or Section
365 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on May 1, 2004.

366 Section 17. Section **75-7-816** is amended to read:

367 **75-7-816. Recitals when title to real property is in trust -- Failure.**

368 (1) When title to real property is granted to a person as trustee, the terms of the trust

369 may be given either:

370 (a) in the deed of transfer; or

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

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

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

378 (a) the name of the trustee;

379 (b) the address of the trustee; and

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

381 (4) Any real property titled in a trust [~~which has a restriction on transfer described in~~
382 Section 25-6-14] that is registered in accordance with Title 25, Chapter 7, Utah Asset
383 Protection Trust Act, shall include in the title the words "asset protection trust."

384 Section 18. **Repealer.**

385 This bill repeals:

386 Section **25-6-14, Asset Protection Trust.**

387 Section 19. **Effective date.**

388 This bill takes effect on January 1, 2017.

Legislative Review Note
Office of Legislative Research and General Counsel