

1 **ASSET PROTECTION TRUST AMENDMENTS**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Gene Davis**

5 House Sponsor: Brian S. King

7 **LONG TITLE**

8 **General Description:**

9 This bill amends the provisions of an asset protection trust.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ provides that a security interest is not nullified or impaired by the provisions of this
- 14 bill;
- 15 ▶ allows a settlor to substitute assets from an asset protection trust;
- 16 ▶ amends the notification requirements for a trustee regarding a distribution;
- 17 ▶ requires a settlor to sign an affidavit at the time of each transfer of assets to an asset
- 18 protection trust;
- 19 ▶ modifies the requirements included in an affidavit of a settlor;
- 20 ▶ provides that if certain requirements are not met, the property transferred to the
- 21 asset protection trust is not protected from certain persons;
- 22 ▶ changes the burden of proof for certain requirements;
- 23 ▶ modifies the provisions that are allowed to apply to an asset protection trust,
- 24 including provisions relating to a settlor;
- 25 ▶ describes the types of causes of action or claims for relief that may be brought;
- 26 ▶ amends the notice requirements that a settlor must give a creditor;
- 27 ▶ provides that failure to give notice to a creditor does not restart the notice period to



28 another creditor; and
29 ▶ makes technical and conforming changes.

30 **Money Appropriated in this Bill:**

31 None

32 **Other Special Clauses:**

33 None

34 **Utah Code Sections Affected:**

35 AMENDS:

36 **25-6-502**, as renumbered and amended by Laws of Utah 2017, Chapter 204



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

39 Section 1. Section **25-6-502** is amended to read:

40 **25-6-502. Asset protection trust.**

41 (1) As used in this section:

42 (a) "Creditor" means:

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

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

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

49 (B) one with a right to payment.

50 (b) "Domestic support obligation" means:

51 (i) a child support judgment or order;

52 (ii) a spousal support judgment or order; or

53 (iii) an unsatisfied claim arising from a property division in a divorce proceeding.

54 (c) "Insolvent" means:

55 (i) having generally ceased to pay debts in the ordinary course of business other than as
56 a result of a bona fide dispute;

57 (ii) being unable to pay debts as they become due; or

58 (iii) being insolvent within the meaning of federal bankruptcy law.

59 ~~(b)~~ (d) (i) "Property" means real property, personal property, and interests in real or
60 personal property.

61 (ii) "Personal property" includes intangible and tangible personal property.

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

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

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

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

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

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

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

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

77 (4) Notwithstanding Subsection (3), nothing in this section:

78 (a) prohibits a creditor from satisfying a claim or liability from the distribution once it
79 has been paid or delivered by the trustee to the settlor, as beneficiary[-]; or

80 (b) nullifies or impairs a security interest that was granted by a settlor or a trustee with
81 respect to property that is transferred to the trust.

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

86 (a) An agreement or understanding, express or implied, between the settlor and the
87 trustee that attempts to grant or permit the retention by the settlor of greater rights or authority
88 than is stated in the trust instrument is void.

89 ~~(a)~~ (b) The trust instrument shall provide that the trust is governed by Utah law and is

90 established pursuant to this section.

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

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

99 ~~[(d)]~~ (e) The settlor may not have the ability under the trust instrument ~~[to revoke;~~
100 ~~amend, or terminate all or any part of the trust, or to withdraw property from the trust]~~, without
101 the consent of a person who has a substantial beneficial interest in the trust, which interest
102 would be adversely affected by the exercise of the power held by the settlor:

103 (i) to revoke, amend, or terminate all or any part of the trust; or

104 (ii) to withdraw any property from the trust, except that the settlor, without the
105 approval or consent of any person, may be given the power, under the trust agreement, to
106 substitute assets of substantially equivalent value.

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

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

113 (g) (i) The trust instrument shall require that, at least 30 days before ~~[making]~~ paying
114 and delivering any distribution to the settlor, as beneficiary, the trustee notify in writing every
115 person who has a ~~[child support judgment or order]~~ domestic support obligation against the
116 settlor.

117 (ii) The trust instrument shall require that the notice state the date the distribution will
118 be ~~[made]~~ paid and delivered and the amount of the distribution.

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

121 support obligation.

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

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

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

129 [(+) (k) Assets transferred to the trust may not be derived from $\hat{S} \rightarrow$ [f] $\leftarrow \hat{S}$ **unlawful**
129a **activities $\hat{S} \rightarrow$ [f-a**
130 **eriminal-activity] $\leftarrow \hat{S}$.**

131 [~~(m)~~ At the time the settlor transfers any assets]

132 (l) With respect to each transfer of assets to the trust, the settlor shall sign a sworn
133 affidavit stating that at the time of the transfer of the assets to the trust:

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

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

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

138 (iv) there ~~[are]~~ is no pending or threatened court ~~[actions]~~ action against the settlor,
139 except for ~~[those]~~ a court ~~[actions]~~ action identified by the settlor on an attachment to the
140 affidavit;

141 (v) the settlor is not involved in ~~[any]~~ an administrative ~~[proceedings]~~ proceeding that
142 is reasonably expected to have a material adverse effect on the financial condition of the settlor,
143 except ~~[those]~~ an administrative ~~[proceedings]~~ proceeding identified on an attachment to the
144 affidavit;

145 (vi) at the time of the transfer of the assets to the trust, the settlor is not in default of a
146 ~~[child]~~ domestic support obligation;

147 (vii) the settlor does not contemplate filing for relief under the provisions of ~~[the~~
148 ~~Bankruptcy Code]~~ United States Code, Title 11, Bankruptcy; and

149 (viii) the assets being transferred to the trust were not derived from $\hat{S} \rightarrow$ [f] $\leftarrow \hat{S}$ **unlawful**
150 **activities $\hat{S} \rightarrow$ [f-a-eriminal-activity] $\leftarrow \hat{S}$.**

151 (6) Failure to satisfy the requirements of Subsection (5) shall result in the

152 consequences described in this Subsection (6).

153 (a) If any requirement of Subsections (5)~~(a)~~(b) through (g) is not satisfied, none of the
154 property held in the trust will at any time have the benefit of the protections described in
155 Subsection (3).

156 (b) If the trustee does not send the notice required under Subsection (5)(g), the court
157 may authorize any person with a ~~child~~ domestic support ~~[judgment or order]~~ obligation
158 against the settlor to whom notice was not sent to attach the distribution or future distributions,
159 but the person may not:

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

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

163 (c) If any requirement ~~[set forth]~~ described in Subsections (5)~~(h)~~(i) through ~~(m)~~ (l)
164 is not satisfied, the property transferred to the trust that does not satisfy the requirement may
165 not have the benefit of the protections described in Subsection (3).

166 (d) If the requirement described in Subsection (5)(h) is not satisfied, the property
167 transferred to the trust that does not satisfy the requirement does not have the benefit of the
168 protections described in Subsection (3) with respect to any person with a domestic support
169 obligation.

170 (e) A creditor of the settlor has the burden of proving that the requirement in
171 Subsection (5)(i) or (j) is not satisfied by clear and convincing evidence.

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

173 (a) the settlor serves as a cotrustee or as an advisor to the trustee, ~~[provided]~~ except that
174 the settlor may not ~~[participate in the determination as to]~~ determine whether a discretionary
175 distribution will be made;

176 (b) the settlor participates in a determination regarding whether a discretionary
177 distribution is made to the settlor by:

178 (i) requesting a distribution from the trust;

179 (ii) consulting with the trustees regarding whether a discretionary distribution will be
180 made;

181 (iii) exercising a right to consent to or veto the distribution under a power described in
182 Subsection (7)(e);

183 (iv) signing documentation in the settlor's capacity as a cotrustee that implements a
184 distribution when the other trustees use discretionary power to independently authorize a
185 distribution; or

186 (v) participating in an action authorizing a distribution if the other trustees can
187 authorize the distribution without the settlor's participation.

188 [~~(b)~~] (c) the settlor has the authority under the terms of the trust instrument to appoint a
189 nonsubordinate [~~advisors~~] advisor or a trust [~~protectors~~] protector who can remove and appoint
190 trustees and who can direct, consent to, or disapprove distributions;

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

193 [~~(d)~~] (e) the trust instrument gives the settlor the power to consent to or veto a
194 distribution from the trust;

195 [~~(e)~~] (f) the trust instrument gives the settlor an inter vivos or a testamentary
196 nongeneral power of appointment or similar power;

197 [~~(f)~~] (g) the trust instrument gives the settlor the right to receive the following types of
198 distributions:

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

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

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

204 (iv) a percentage of the value of the trust each year as determined under the trust
205 instrument, but not exceeding the amount that may be defined as income under 26 U.S.C. Sec.
206 643(b);

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

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

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

214 ~~[(g)]~~ (h) the trust instrument authorizes the settlor to use real or personal property
215 owned by the trust[-]; or

216 (i) with respect to the property held in the trust, the settlor may:

217 (i) give a personal guarantee on a debt or obligation secured by the property;

218 (ii) make payments, directly or indirectly, on a debt or obligation secured by the
219 property;

220 (iii) pay property taxes, casualty and liability insurance premiums, homeowner
221 association dues, maintenance expenses, or other similar expenses on the property; or

222 (iv) pay income tax on income attributable to the portion of property held in the trust,
223 of which the settlor is considered to be the owner under 26 U.S.C. Secs. 671 through 678,
224 which payments will not be considered additional transfers to the trust for purposes of this
225 section.

226 (8) If a trust instrument contains the provisions described in Subsections ~~[(5)(a)]~~ (5)(b)
227 through (g), the transfer restrictions prevent a creditor or other person from asserting any cause
228 of action or claim for relief against a trustee of the trust or against others involved in the
229 counseling, drafting, preparation, execution, or funding of the trust for conspiracy to commit
230 fraudulent conveyance or another voidable transfer, aiding and abetting a fraudulent
231 conveyance or another voidable transfer, participation in the trust transaction, or similar cause
232 of action or claim for relief. For purposes of this subsection, counseling, drafting, preparation,
233 execution, or funding of the trust includes the preparation and funding of a limited partnership,
234 a limited liability company, or other entity if interests in the entity are subsequently transferred
235 to the trust. The creditor and other person prevented from asserting a cause of action or claim
236 for relief may assert a cause of action against, and are limited to recourse against, only:

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

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

239 (9) (a) A cause of action or claim for relief under Subsection (5)(i) or (j) is a cause of
240 action or claim for relief under Section [25-6-202](#) or [25-6-203](#).

241 (b) Except as provided in Subsection (9)(a), a cause of action or claim for relief under
242 this section is not a cause of action or claim for relief under Sections [25-6-101](#) through
243 [25-6-407](#).

244 ~~[(9) A]~~ (c) Notwithstanding Section [25-6-305](#), a cause of action or claim for relief

245 regarding a fraudulent conveyance or other voidable transfer of a settlor's assets under
 246 [~~Subsection (5)(j)~~] this section is extinguished unless the action [~~under Subsection (5)(j)~~] is
 247 brought by a creditor of the settlor who was a creditor of the settlor before the assets [~~referred~~
 248 ~~to in Subsection (5)(j)~~] in question were transferred to the trust and the action [~~under~~
 249 ~~Subsection (5)(j)~~] is brought within the earlier of:

250 [(a)] (i) the later of [~~(i)~~] two years after the transfer is made[;], or [~~(ii)~~] one year after
 251 the transfer is or reasonably could have been discovered by the creditor if the creditor:

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

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

258 [~~(b)(i)~~] (ii) (A) with respect to a creditor known to the settlor, 120 days after the date
 259 on which notice of the transfer is mailed to the creditor, which notice shall state the name and
 260 address of the settlor or the settlor's representative, the name and address of the trustee or the
 261 trustee's representative, and also describe the assets that were transferred, but does not need to
 262 state the value of those assets if the assets are other than cash, and which shall inform the
 263 creditor that [~~he~~] the creditor is required to [~~present his~~] bring the creditor's cause of action or
 264 claim [~~to both~~] for relief against the settlor and the trustee within 120 days from the mailing of
 265 the notice or be forever barred; or

266 [(ii)] (B) with respect to a creditor not known to the settlor, 120 days after the date on
 267 which notice of the transfer is first published in a newspaper of general circulation in the
 268 county in which the settlor then resides, or is published on a public legal notice website as
 269 defined in Section 45-1-101, which notice shall state the name [~~and~~] of the settlor or the
 270 settlor's representative, the address of the settlor or the settlor's representative, the name [~~and~~]
 271 of the trustee or the trustee's representative, the address of the trustee or the trustee's
 272 representative, and also describe the assets that were transferred, but does not need to state the
 273 value of those assets [~~if the assets are other than cash~~].

274 (10) (a) The notice required in Subsection [~~(9)(b)~~] (9)(c)(ii)(B) shall be published in
 275 accordance with the provisions of Section 45-1-101 for three consecutive weeks and inform

276 creditors that they are required to [~~present claims~~] bring a cause of action or claim for relief
277 within 120 days from the first publication of the notice or be forever barred.

278 (b) Failure to give the notice required in Subsection (9)(c)(ii) to a creditor does not
279 prevent the shortening of the limitations period under Subsection (9)(c)(ii) with respect to
280 another creditor who properly received notice by mail or publication.

281 (11) (a) A trust is subject to this section if it is governed by Utah law, as provided in
282 Section [75-7-107](#), and if it otherwise meets the requirements of this section.

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

285 (12) (a) With respect to a trust that is subject to this section, a claim brought by a
286 creditor of a beneficiary who is not the settlor is subject to Section [75-7-501](#) et. seq.

287 (b) With respect to an irrevocable trust that is not subject to this section, a claim
288 brought by a creditor of a beneficiary who is the settlor is subject to the provisions of
289 Subsection [75-7-505\(2\)](#).

290 (13) If a provision in this section conflicts with a provision in Sections [25-6-101](#)
291 through [25-6-407](#), the provision of this section shall supersede the conflicting provision in
292 Sections [25-6-101](#) through [25-6-407](#).

293 (14) Nothing in this section alters rights vested or created under this section before
294 May 14, 2019.