CS FOR SENATE BILL NO. 63(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 3/30/10
Referred: Finance

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to transfer restrictions on trust interests."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 34.40.110(b) is amended to read:

(b) If a trust contains a transfer restriction allowed under (a) of this section, the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the beneficiary's interest in the trust, unless the creditor is a creditor of the settlor and

(1) **<u>the creditor establishes by clear and convincing evidence that</u>** the settlor's transfer of property in trust was made with the intent to defraud that creditor, and a cause of action or claim for relief with respect to the fraudulent transfer complies with the requirements of (d) of this section; however, a settlor's expressed intention to protect trust assets from a beneficiary's potential future creditors is not evidence of an intent to defraud;

(2) the trust, except for an eligible individual retirement account trust, provides that the settlor may revoke or terminate all or part of the trust without the

consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; in this paragraph, "revoke or terminate" does not include a power to veto a distribution from the trust, a testamentary nongeneral power of appointment or similar power, [OR THE RIGHT TO RECEIVE A DISTRIBUTION OF INCOME, PRINCIPAL, OR BOTH IN THE DISCRETION OF A PERSON, INCLUDING A TRUSTEE, OTHER THAN THE SETTLOR,] or a right to receive a distribution of income or principal under (3)(A), (B), (C), or (D) of this subsection;

(3) the trust, except for an eligible individual retirement account trust, requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor; however, this paragraph does not apply to a settlor's right to receive the following types of distributions, which remain subject to the restriction provided by (a) of this section until the distributions occur:

(A) income or principal from a charitable remainder annuity trust or charitable remainder unitrust; in this subparagraph, "charitable remainder annuity trust" and "charitable remainder unitrust" have the meanings given in 26 U.S.C. 664 (Internal Revenue Code) as that section reads on October 8, 2003, and as it may be amended;

(B) a percentage of the value of the trust each year as determined from time to time under the trust instrument, but not exceeding the amount that may be defined as income under AS 13.38 or under 26 U.S.C. 643(b) (Internal Revenue Code) as that subsection reads on October 8, 2003, and as it may be amended;

(C) the transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of 26 U.S.C. 2702(c) (Internal Revenue Code) as that subsection reads on September 15, 2004, or as it may be amended in the future; or

(D) income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under 26 U.S.C. 2702 (Internal Revenue Code) as that section reads on September 15, 2004, or as it may be

amended in the future; or

(4) at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support judgment or order.

*** Sec. 2.** AS 34.40.110(h) is repealed and reenacted to read:

(h) A transfer restriction is allowed under (a) of this section and is enforceable under (b) of this section even if the settlor has the authority under the terms of the trust instrument to

(1) appoint a trustee, a trust protector under AS 13.36.370, or an advisor under AS 13.36.375;

(2) remove a trustee or trust protector and appoint a replacement trustee or trust protector who is not a related or subordinate party; in this paragraph, "related or subordinate party" has the meaning given in 26 U.S.C. 672(c) (Internal Revenue Code); or

(3) remove an advisor and appoint a replacement advisor.

*** Sec. 3.** AS 34.40.110 is amended by adding a new subsection to read:

(n) If a trust contains a transfer restriction allowed under (a) of this section, the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the interest of a beneficiary, including a beneficiary who is the settlor of the trust, even if

(1) the beneficiary has the right to receive through the exercise of a person's discretion, whether or not the exercise of the discretion is governed by a standard, a distribution of income, principal, or both principal and interest, from the trust; in this paragraph, "person" includes a trustee who is the settlor, unless the settlor is the beneficiary; or

(2) the settlor potentially will receive or actually receives income or principal to pay, in whole or in part, income taxes due on the income of the trust, if the potential or actual receipt of income or principal will be or is made under a provision in the trust instrument that expressly provides for the payment of the taxes and if the potential or actual receipt of income or principal would be the result of a trustee's acting in the trustee's discretion or under a mandatory direction in the trust instrument; a distribution to pay income taxes that is made under a discretionary or mandatory

1 provision in a governing instrument under this paragraph may be made by direct
2 payment to a taxing authority.