CS FOR SENATE BILL NO. 60(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered: 4/17/09
Referred: Judiciary

Sponsor(s): SENATOR MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to the Uniform Probate Code, including wills, trusts, nonprobate transfers, augmented estates, personal representatives, and trustees; and amending Rules 3 and 8, Alaska Rules of Civil Procedure, Rule 1, Alaska Rules of Probate Procedure, and Rule 37.5, Alaska Rules of Administration."

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

*** Section 1.** AS 13.06.120 is amended to read:

Sec. 13.06.120. Pleadings; when parties bound by orders; notice. In any proceedings involving trusts, nonprobate assets, or estates of decedents, minors, protected persons, or incapacitated persons brought under AS 13.06 - AS 13.36 or AS 13.38, including any judicially supervised settlements and any nonjudicial proceedings and settlements, the following apply:

(1) interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;

(2) persons are bound by orders binding others in the following cases:

(A) orders binding the sole holder or all co-holders of a power of revocation or a general or nongeneral power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power;

(B) to the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal; if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child;

(C) an unborn person, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding;

(D) with regard to interests given upon the happening of a certain event to persons who comprise a certain class, orders binding the living persons who would constitute the class, if the event had happened immediately before the commencement of the proceeding, bind all members of the class;

(E) with regard to an interest given to a living person when the same interest or a share of the interest is to pass to the surviving spouse or to persons who are or might be the distributees, devisees, heirs, or issue of the living person upon the happening of a future event, orders binding the living

person bind the surviving spouse, distributees, devisees, heirs, or issue of the living person;

(F) with regard to interests given to a person or a class of persons, or to both, upon the happening of a future event, if the same interest or a share of the interest is to pass to another person or class of persons, or to both, upon the happening of an additional future event, orders binding the living person or class of persons who would take the interest upon the happening of the first event bind the persons and classes of persons who might take on the happening of the additional future event;

(G) if a person is designated by a trust instrument to represent and bind a born or unborn beneficiary of the trust and receive a notice, information, accounting, or report for the beneficiary, then the beneficiary is bound by an order binding the designated person; in this subparagraph,

(i) the settlor may make the designation in the trust instrument, in a separate document, or by a trust protector authorized in the trust instrument to make the designation;

(ii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind a beneficiary while the designated person is serving as trustee;

(iii) except as otherwise provided in this subparagraph, a person designated under (i) of this subparagraph may not represent and bind another beneficiary if the designated person also is a beneficiary, unless the designated person was named by the settlor, is the beneficiary's spouse, or is a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse; in this sub-subparagraph, "spouse" means the individual to whom the beneficiary is married and with whom the beneficiary is living, and a physical separation primarily for education, business, health, and similar reasons does not

prevent the individual from being considered to be living with the beneficiary;

(3) **a person representing another person under (2)(A) - (F) of this section and a person designated under (2)(G)(i) of this section are not liable to the beneficiary whose interests are represented, or to a person claiming through that beneficiary, for an action or omission to act made in good faith;**

(4) notice is required as follows:

(A) notice as prescribed by AS 13.06.110 shall be given to every interested person or to one person who can bind an interested person as described in (2)(A), (B), or **(D) - (G)** [(D) - (F)] of this section; notice may be given both to a person and to another person who may bind the person;

(B) notice is given to unborn persons, a minor, an incapacitated person, or a person whose identity or location is unknown or not reasonably ascertainable, and persons who are not represented under **2(A), (B), or (D) - (G)** [(2)(A) OR (B)] of this section, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn persons, the minor, the incapacitated person, or the person whose identity or location is unknown or not reasonably ascertainable;

(5) [(4)] at any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of an unborn person, a minor, an incapacitated person, or a person whose identity or address is unknown or not reasonably ascertainable, if the court determines that representation of the interest otherwise would be inadequate; if not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests; the court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

*** Sec. 2.** AS 13.12.201(b)(9) is amended to read:

(9) "transfer," as it relates to a transfer by or of the decedent, includes

(A) an exercise or release of a presently exercisable general power of appointment held by the decedent;

(B) a lapse at death of a presently exercisable general power of appointment held by the decedent; and

(C) an exercise, release, or lapse of

(i) a general power of appointment that the decedent created in **<u>the decedent</u>** [SELF]; and

(ii) a power described in **<u>AS 13.12.205(a)(2)(B)</u>** [AS 13.12.205(2)(B)] that the decedent conferred on a nonadverse party.

*** Sec. 3.** AS 13.12.205 is amended to read:

Sec. 13.12.205. Decedent's nonprobate transfers to others. The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under AS 13.12.204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death; property included under this category consists of

(A) property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment; the amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, default, or otherwise, to or for the benefit of a person other than the decedent's estate or surviving spouse;

(B) the decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship; the amount included is the value of the decedent's fractional interest, to the extent that the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse;

(C) the decedent's ownership interest in property or accounts held in pay on death, transfer on death, or co-ownership registration with the right of survivorship; the amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of a person other than the decedent's estate or surviving spouse;

(D) proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds; the amount included is the value of the proceeds, to the extent the proceeds were payable at the decedent's death to or for the benefit of a person other than the decedent's estate or surviving spouse;

(2) property transferred in any of the following forms by the decedent during marriage:

(A) an irrevocable transfer [, INCLUDING AN IRREVOCABLE TRANSFER IN TRUST WITH A TRANSFER RESTRICTION UNDER AS 34.40.110(a),] in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property, if and to the extent the decedent's right terminated at or continued beyond the decedent's death; the amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of a person other than the decedent's estate or surviving spouse;

(B) a transfer in which the decedent created a power over the income or property, exercisable by the decedent alone or in conjunction with another person, or exercisable by a nonadverse party, to or for the benefit of the decedent, the decedent's creditors, the decedent's estate, or creditors of the decedent's estate; the amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of a person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, default, or otherwise, to or for the benefit of a person other than the decedent's estate or surviving spouse; if the power is a power

over both income and property and the preceding provision defining the amount included produces different amounts, the amount included is the greater amount; and

(3) property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(A) property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under (1)(A), (B), or (C) or (2) of this section, if the right, interest, or power had not terminated until the decedent's death; the amount included is the value of the property that would have been included under (1)(A), (B), or (C) or (2) of this section, if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of a person other than the decedent or the decedent's estate, spouse, or surviving spouse; as used in this subparagraph, termination, with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in (1)(A) of this section, termination occurs when the power terminated by exercise or release, but not otherwise;

(B) a transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under (1)(D) of this section had the transfer not occurred; the amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of a person other than the decedent's estate or surviving spouse;

(C) a transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse; the amount included is the value of the property

transferred to a person to the extent that the aggregate transfers to that person in either of the two years exceeded $10,000.

*** Sec. 4.** AS 13.12.205 is amended by adding a new subsection to read:

(b) Notwithstanding the other provisions of this section, the augmented estate does not include property transferred to an irrevocable trust with a transfer restriction under AS 34.40.110(a) if

(1) the settlor is a discretionary beneficiary of the trust; and

(2) the transfer was made more than 30 days before the marriage, or the decedent's spouse consented to the transfer under AS 13.12.208(a)(2).

*** Sec. 5.** AS 13.12.206(3) is amended to read:

(3) all other property that would have been included in the augmented estate under **AS 13.12.205(a)(1) or (2)** [AS 13.12.205(1) OR (2)] had it passed to or for the benefit of a person other than the decedent's spouse, the decedent's surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

*** Sec. 6.** AS 13.12.207(b) is amended to read:

(b) Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of (a)(1)(A) and (B) of this section, the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of (a)(2) of this section, proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under **AS 13.12.205(a)(1)(D)** [AS 13.12.205(1)(D)] are not valued as if the spouse were deceased.

*** Sec. 7.** AS 13.12.209(b) is amended to read:

(b) If, after the application of (a) of this section, the elective share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under **AS 13.12.205(a)(3)(A) or (C)** [AS 13.12.205(3)(A) OR (C),] are applied first to satisfy the unsatisfied balance of the elective share amount or the supplemental elective share amount. The decedent's probate estate and that portion of the decedent's

nonprobate transfers to others shall be applied so that liability for the unsatisfied balance of the elective share amount or for the supplemental elective share amount is equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of the recipients' interests in the decedent's probate estate and that portion of the decedent's nonprobate transfers to others.

*** Sec. 8.** AS 13.12 is amended by adding new sections to read:

Article 5A. Establishment of Will and Trust Validity before Death.

Sec. 13.12.530. Establishment of will validity before death. A testator, a person who is nominated in a will to serve as a personal representative, or, with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will subject only to subsequent revocation or modification.

Sec. 13.12.535. Establishment of trust validity before death. If at least one of the trustees of a trust is a qualified person, the settlor or a trustee of the trust may petition the court to determine before the settlor's death that the trust is valid and enforceable under its terms, subject only to a subsequent revocation or modification of the trust.

Sec. 13.12.540. Venue. (a) The venue for a petition under AS 13.12.530 is

(1) the judicial district of this state where the testator is domiciled; or

(2) if the person who executed the will is not domiciled in this state, any judicial district of this state.

(b) The venue for a petition under AS 13.12.535 is the judicial district where the trust is registered. The venue for proceedings involving a trust that is not registered in this state is

(1) any place in this state where the trust could have been properly registered; or

(2) the location established by the rules of court.

Sec. 13.12.545. Contents of petition for will validity. A petition under AS 13.12.530 must contain

(1) a statement that a copy of the will has been filed with the court;

(2) a statement that the will is in writing;

(3) a statement that the will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's direction;

(4) in the case of a witnessed will, a statement that the will was signed by at least two individuals, each of whom signed within a reasonable time after witnessing the signing of the will or the testator's acknowledgment of the signature on the will;

(5) in the case of a holographic will, a statement that the signature and material portions of the will are in the testator's handwriting;

(6) a statement that the will was executed with testamentary intent;

(7) a statement that the testator had testamentary capacity;

(8) a statement that the testator was free from undue influence and duress and executed the will in the exercise of the testator's free will;

(9) a statement that the execution of the will was not the result of fraud or mistake;

(10) the names and addresses of the testator, the testator's spouse, the testator's children, the testator's heirs, the personal representatives nominated in the will, and the devisees under the will;

(11) if minors, the ages of the testator's children, the testator's heirs, and the devisees under the will, as far as known or ascertainable with reasonable diligence by the petitioner;

(12) a statement that the will has not been revoked or modified; and

(13) a statement that the testator is familiar with the contents of the will.

Sec. 13.12.550. Contents of petition for trust validity. A petition for trust validity under AS 12.16.535 must contain

(1) a statement that a copy of the trust has been filed with the court;

(2) a statement that the trust is in writing and was signed by the settlor;

(3) a statement that the trust was executed with the intent that it be enforceable in accordance with its terms;

(4) a statement that the settlor had the legal capacity to enter into and establish the trust;

(5) a statement that the settlor was free from undue influence and duress and executed the trust in the exercise of free will;

(6) a statement that execution of the trust was not the result of fraud or mistake;

(7) the names and addresses of the settlor, the settlor's spouse, the settlor's children, the settlor's heirs, and the parties in interest as defined in AS 13.36.390;

(8) the ages of the settlor's children, the settlor's heirs, and the parties in interest as defined in AS 13.36.390 who are minors so far as known or ascertainable with reasonable diligence by the petitioner;

(9) a statement that the trust has not been revoked or modified; and

(10) a statement that the settlor is familiar with the contents of the trust.

Sec. 13.12.555. Declaration by court. The court may declare a will or trust to be valid and make other findings of fact and conclusions of law that are appropriate under the circumstances. After the testator's death, unless the will is modified or revoked after the declaration, the will has full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request.

Sec. 13.12.560. Binding effect of declaration. A person, whether the person is known, unknown, born, or not born at the time of a proceeding under AS 13.12.530 - 13.12.590, including a person who is represented by another person under AS 13.06.120, is bound by the declaration under AS 13.12.555 even if by the time of the testator's death the representing person has died or would no longer be able to represent the person represented in the proceeding under AS 13.12.530 - 13.12.590.

Sec. 13.12.565. Hearing and notice. (a) After the petition under AS 13.12.530 or 13.12.535 is filed, the court shall fix a time and place for a hearing. The petitioner shall notify the spouse, the children, and the heirs of the testator or settlor in the manner established by AS 13.06.110.

(b) In addition to the notice required by (a) of this section, in proceedings

involving a petition under AS 13.12.530, the petitioner shall notify the testator, the personal representatives nominated in the will, and the devisees under the will in the manner established by AS 13.06.110.

(c) In addition to the notice required by (a) of this section, in proceedings involving a petition under AS 13.12.535, the petitioner shall notify the settlor and the parties in interest in the manner established by AS 13.06.110. Notice may be given to other persons. In this subsection, "party in interest" has the meaning given in AS 13.36.390.

Sec. 13.12.570. Burden of proof. A petitioner under AS 13.12.530 or 13.12.535 has the burden of establishing prima facie proof of the execution of the will or trust. A person who opposes the petition has the burden of establishing the lack of testamentary intent, lack of capacity, undue influence, fraud, duress, mistake, or revocation. A party to the proceeding has the ultimate burden of persuasion as to the matters for which they have the initial burden of proof.

Sec. 13.12.575. Change to will after declaration. After a declaration of the validity of a will under AS 13.12.555, a testator may modify a will by a later will or codicil executed according to the laws of this state or another state, and the will may be revoked or modified under AS 13.12.507, 13.12.508, or another applicable law.

Sec. 13.12.580. Change to trust after declaration. After a declaration of validity under AS 13.12.555, a trust may be modified, terminated, revoked, or reformed under AS 13.36.340 - 13.36.365, or another applicable law.

Sec. 13.12.585. Confidentiality. (a) A notice of the filing of a petition under AS 13.12.530 - 13.12.580, a summary of all formal proceedings under AS 13.12.530 - 13.12.580, and a dispositional order or a modification or termination of a dispositional order relating to a proceeding under AS 13.12.530 - 13.12.580 shall be available for public inspection. Except as provided in (b) and (c) of this section, all other information contained in the court records relating to a proceeding under AS 13.12.530 - 13.12.580 is confidential.

(b) The records that are confidential under (a) of this section may be made available to

(1) the petitioner and the petitioner's attorney;

(2) interested persons who have appeared in the proceedings, interested persons who have otherwise submitted to the jurisdiction of the court, and the attorneys, guardians, and conservators of the interested persons;

(3) the judge hearing or reviewing the matter; and

(4) a member of the clerical or administrative staff of the court if access is essential for authorized internal administrative purposes.

(c) For good cause shown, the court may order the records that are confidential under (a) of this section to be made available to a person who is not listed in (b) of this section.

Sec. 13.12.590. Definitions. In AS 13.12.530 - 13.12.590,

(1) "qualified person" has the meaning given in AS 13.36.390;

(2) "testator" means a person who executes a will as a testator;

(3) "trust" means a revocable or irrevocable trust.

*** Sec. 9.** AS 13.16.055(a) is amended to read:

(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is

(1) in the judicial district where the decedent was domiciled at the time of death; or

(2) if the decedent was not domiciled in this state, in any judicial district where

(A) property of the decedent was located at the time of death**; or**

(B) a fiduciary who is subject to the laws of this state and who comes into the control of property owned by the decedent at the time of death resides or has its principal place of business.

*** Sec. 10.** AS 13.16.410 is amended by adding a new paragraph to read:

(28) consider discretionary distributions to a beneficiary as being made from capital gains realized during the year.

*** Sec. 11.** AS 13.36.109 is amended by adding a new paragraph to read:

(29) to consider discretionary distributions to a beneficiary as being made from capital gains realized during the year.

*** Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 13.16.055(a), as amended by sec. 9 of this Act, has the effect of amending Rule 3, Alaska Rules of Civil Procedure, by establishing a special venue rule for the first informal or formal testacy or appointment proceedings after a decedent's death when the decedent was not domiciled in this state.

(b) AS 13.16.540, enacted by sec. 8 of this Act, has the effect of amending Rule 3, Alaska Rules of Civil Procedure, by establishing special venue rules for a petition under AS 13.12.530 or 13.12.535, enacted by sec. 8 of this Act.

(c) AS 13.12.545 and 13.12.550, enacted by sec. 8 of this Act, have the effect of amending Rule 8, Alaska Rules of Civil Procedure, by establishing special requirements for the contents of petitions under AS 13.12.530 and 13.12.535, enacted by sec. 8 of this Act.

(d) AS 13.12.550, enacted by sec. 8 of this Act, has the effect of amending Rule 1, Alaska Rules of Probate Procedure, by establishing special hearing and notice requirements for a hearing to determine the validity of a will or a trust under AS 13.12.530 and 13.12.535, enacted by sec. 8 of this Act.

(e) AS 13.12.585, enacted by sec. 8 of this Act, has the effect of amending Rule 37.5, Alaska Rules of Administration, by requiring that certain information contained in court records related to a petition under AS 13.12.530 or 13.12.535, enacted by sec. 8 of this Act, be kept confidential and only released as indicated in AS 13.12.585.

*** Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. Section 9 of this Act and AS 13.12.540, 13.12.545, 13.12.550, and 13.12.585, enacted by sec. 8 of this Act, take effect only if sec. 12 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.