

DOMESTIC ASSET PROTECTION TRUST AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Derek E. Brown

Senate Sponsor: _____

LONG TITLE

General Description:

This bill creates a domestic Asset Protection Trust statute.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides a framework for an Asset Protection Trust in this state;
- ▶ requires that the majority of the assets be in this state;
- ▶ excludes the trust assets from the settlor's estate for federal estate tax purposes;
- ▶ establishes a two year statute of limitations for bringing a fraudulent transfer claim;

and

- ▶ requires notification to a child support judgment holder before a distribution is

made.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

REPEALS AND REENACTS:

25-6-14, as last amended by Laws of Utah 2004, Chapter 89



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

29 Section 1. Section **25-6-14** is repealed and reenacted to read:

30 **25-6-14. Asset Protection Trust.**

31 (1) As used in this section:

32 (a) "Creditor" means:

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

34 (ii) a person who subsequently becomes a creditor, including, whether or not reduced

35 to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

36 undisputed, legal, equitable, secured, or unsecured:

37 (A) one holding or seeking to enforce a judgment entered by a court or other body

38 having adjudicative authority; or

39 (B) one with a right to payment.

40 (b) "Property" means real property, personal property, and interests in real or personal
41 property.

42 (c) "Settlor" means a person who transfers property in trust.

43 (d) "Transfer" means any form of transfer of property, including gratuitous transfers,
44 whether by deed, conveyance, or assignment.

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

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

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

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

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

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

57 (4) Notwithstanding Subsection (3), nothing in this section prohibits a creditor from
58 satisfying a claim or liability from the distribution once it has been paid or delivered by the

59 trustee to the settlor, as beneficiary.

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

64 (a) At least one trustee shall be a Utah resident or a trust company, as the term "trust
65 company" is defined in Section 7-5-1.

66 (b) At all times, trust assets with a value equal to at least 80% of the value of all trust
67 assets shall be held in this state. An asset is held in this state if it:

68 (i) is real property located in this state; or

69 (ii) is held in this state in a savings account described in Section 7-1-103, a certificate
70 of deposit, a brokerage account, a trust company fiduciary account, or an account or deposit
71 located in this state that is similar to any of the accounts described above.

72 (c) The trust instrument shall provide that neither the interest of the settlor, as
73 beneficiary, nor the income or principal of the trust may be voluntarily or involuntarily
74 transferred by the settlor, as beneficiary. The provision shall be considered to be a restriction
75 on the transfer of the settlor's beneficial interest in the trust that is enforceable under applicable
76 nonbankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code.

77 (d) The settlor may not have the ability under the trust instrument to revoke, amend, or
78 terminate all or any part of the trust, or to withdraw property from the trust, without the consent
79 of a person who has a substantial beneficial interest in the trust, which interest would be
80 adversely affected by the exercise of the power held by the settlor.

81 (e) The trust instrument may not provide for any mandatory distributions of either
82 income or principal to the settlor, as beneficiary, except as provided in Subsection (7)(f).

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

87 (g) The trust instrument shall require that, at least 30 days before making any
88 distribution to the settlor, as beneficiary, the trustee notify every person who has a child support
89 judgment or order against the settlor. The notice shall state the date the distribution will be

90 made and the amount of the distribution.

91 (h) At least 30 days before making any distribution to the settlor, as beneficiary, the
92 trustee shall in fact notify every person who has a child support judgment, or order against the
93 settlor, of the date the distribution will be made and the amount of the distribution.

94 (i) At the time that the settlor transfers any assets to the trust, the settlor may not be in
95 default of making a payment due under any child support judgment or order.

96 (j) No transfer of assets to the trust may render the settlor insolvent.

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

101 (l) At the time that the settlor transfers any assets to the trust, the settlor may not be
102 contemplating filing for relief under the provisions of the Bankruptcy Code.

103 (m) Assets transferred to the trust may not be derived from unlawful activities.

104 (n) At the time the settlor transfers any assets to the trust, the settlor shall sign a sworn
105 affidavit stating that:

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

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

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

110 (iv) there are no pending or threatened court actions against the settlor, except for those
111 court actions identified by the settlor on an attachment to the affidavit;

112 (v) the settlor is not involved in any administrative proceedings, except those
113 administrative proceedings identified on an attachment to the affidavit;

114 (vi) at the time of the transfer of the assets to the trust, the settlor is not in default of a
115 child support obligation;

116 (vii) the settlor does not contemplate filing for relief under the provisions of the
117 Bankruptcy Code; and

118 (viii) the assets being transferred to the trust were not derived from unlawful activities.

119 (6) Failure to satisfy the requirements of Subsection (5) shall result in the
120 consequences described in this Subsection (6).

121 (a) If any requirement of either Subsection (5)(a) or Subsection (5)(b) is not satisfied,
122 none of the property held in the trust will have the benefit of the protections described in
123 Subsection (2) during the period that the requirement is not satisfied.

124 (b) If any requirement of Subsection (5)(c), (d), (e), (f), or (g) is not satisfied, none of
125 the property held in the trust will at any time have the benefit of the protections described in
126 Subsection (2).

127 (c) If the requirement of Subsection (5)(h) is not satisfied, none of the property held in
128 the trust will have the benefit of the protections described in Subsection (2) with respect to the
129 judgment or order referred to in Subsection (2).

130 (d) If any requirement set forth in Subsection (5)(i), (j), (k), (l), (m), or (n) is not
131 satisfied, the property transferred to the trust that does not satisfy the requirement may not have
132 the benefit of the protections described in Subsection (2).

133 (7) The provisions of Subsection (2) may apply to a trust even if:

134 (a) the settlor serves as a cotrustee or as an advisor to the trustee, provided that the
135 settlor may not participate in the determination as to whether a discretionary distribution will
136 be made;

137 (b) the settlor has the authority under the terms of the trust instrument to appoint
138 nonsubordinate advisors or trust protectors who can remove and appoint trustees and who can
139 direct, consent to, or disapprove distributions;

140 (c) the settlor has the power under the terms of the trust instrument to serve as an
141 investment director or to appoint an investment director under Section 75-7-906;

142 (d) the trust instrument gives the settlor the power to veto a distribution from the trust;

143 (e) the trust instrument gives the settlor a testamentary nongeneral power of
144 appointment or similar power;

145 (f) the trust instrument gives the settlor the right to receive the following types of
146 distributions:

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

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

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

152 (iv) a percentage of the value of the trust each year as determined from under the trust
153 instrument, but not exceeding the amount that may be defined as income under 26 U.S.C.
154 643(b);

155 (v) the transferor's potential or actual use of real property held under a qualified
156 personal residence trust, or potential or actual possession of a qualified annuity interest, within
157 the meaning of 26 U.S.C. 2702 and the accompanying regulations; and

158 (vi) income or principal from a grantor retained annuity trust or grantor retained
159 unitrust that is allowed under 26 U.S.C. 2702; or

160 (g) the trust instrument authorizes the settlor to use real or personal property owned by
161 the trust.

162 (8) If a trust instrument contains the transfer restrictions described in Subsections
163 (5)(c), (d), (e), and (g), the transfer restrictions prevent a creditor or other person from asserting
164 any cause of action or claim for relief against a trustee of the trust or against others involved in
165 the counseling, drafting, preparation, execution, or funding of the trust for conspiracy to
166 commit fraudulent conveyance, aiding and abetting a fraudulent conveyance, participation in
167 the trust transaction, or similar cause of action or claim for relief. For purposes of this
168 subsection, counseling, drafting, preparation, execution, or funding of the trust includes the
169 preparation and funding of a limited partnership, a limited liability company, or other entity if
170 interests in the entity are subsequently transferred to the trust. The creditor and other person
171 prevented from asserting a cause of action or claim for relief may assert a cause of action
172 against, and are limited to recourse against, only:

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

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

175 (9) A cause of action or claim for relief regarding a fraudulent transfer of a settlor's
176 assets under Subsection (5)(k) is extinguished unless:

177 (a) the action under Subsection (5)(k) is brought by a creditor of the settlor who was a
178 creditor of the settlor before the assets referred to in Subsection (5)(k) were transferred to the
179 trust; and

180 (b) the action under Subsection (5)(k) is brought within the later of:

181 (i) two years after the transfer is made; or

182 (ii) one year after the transfer is or reasonably could have been discovered by the

183 creditor if the creditor:

184 (A) can demonstrate, by a preponderance of the evidence, that the creditor asserted a
185 specific claim against the settlor before the transfer; or

186 (B) files another action, other than an action under Subsection (5)(k), against the settlor
187 that asserts a claim based on an act or omission of the settlor that occurred before the transfer,
188 and the action described in this Subsection (9) is filed within two years after the transfer.

189 (10) (a) A trust is subject to this section if it is governed by Utah law as provided in
190 Section 75-7-107.

191 (b) Notwithstanding any other provision of the law of this state, an action, including an
192 action to enforce a judgment entered by a court or other body having adjudicative authority,
193 may not be brought at law or in equity for an attachment or other provisional remedy against
194 property of a trust that meets the requirements of Subsection (8) or to avoid a transfer of
195 property to the trust unless the action is brought under Subsection (5)(k) and within the
196 limitations period described in Subsection (9).

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

Legislative Review Note
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Office of Legislative Research and General Counsel