

Sec. 34.40.110. Restricting transfers of trust interests.

(a) A person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust, may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. Payment or delivery of the interest to the beneficiary does not include a beneficiary's use or occupancy of real property or tangible personal property owned by the trust if the use or occupancy is in accordance with the trustee's discretionary authority under the trust instrument. A provision in a trust instrument that provides the restrictions described in this subsection is considered to be a restriction that is a restriction on the transfer of the transferor's beneficial interest in the trust and that is enforceable under applicable nonbankruptcy law within the meaning of 11 U.S.C. 541(c)(2) (Bankruptcy Code), as that paragraph reads on September 15, 2004, or as it may be amended in the future. In this subsection,

(1) "property" includes real property, personal property, and interests in real or personal property;

(2) "transfer" means any form of transfer, including deed, conveyance, or assignment.

(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) the creditor establishes by clear and convincing evidence that 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 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 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.

(c) The satisfaction of a claim under (b)(1) - (4) of this section is limited to that part of the trust for which a transfer restriction is not allowed under (b)(1) - (4) of this section, and an attachment or other order may not be made against the trustee with respect to a beneficiary's interest in the trust or against property that is subject to a transfer restriction, except to the extent that a transfer restriction is determined not to be allowed under (b)(1) - (4) of this section.

(d) A cause of action or claim for relief with respect to a fraudulent transfer of a settlor's assets under (b)(1) of this section is extinguished unless the action under (b)(1) of this section is brought by a creditor of the settlor who

(1) is a creditor of the settlor before the settlor's assets are transferred to the trust, and the action under (b)(1) of this section is brought within the later of

(A) four years after the transfer is made; or

(B) one year after the transfer is or reasonably could have been discovered by the creditor if the creditor

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

(ii) files another action, other than an action under (b)(1) of this section, against the settlor that asserts a claim based on an act or omission of the settlor that occurred before the transfer, and the action described in this sub-subparagraph is filed within four years after the transfer; or

(2) becomes a creditor subsequent to the transfer into trust, and the action under (b)(1) of this section is brought within four years after the transfer is made.

(e) 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, a person who subsequently becomes a creditor, or another person from asserting any cause of action or claim for relief against a trustee of the trust or against others involved in the preparation or funding of the trust for conspiracy to commit fraudulent conveyance, aiding and abetting a fraudulent conveyance, or participation in the trust transaction. Preparation or funding of the trust includes the preparation and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the trust. The creditor and other person prevented from asserting a cause of action or claim for relief are limited to recourse against the trust assets and the settlor to the extent allowed under AS 34.40.010 .

(f) A transfer restriction allowed under (a) of this section and enforceable under (b) of this section applies to a settlor who is also a beneficiary of the trust even if the settlor serves as a co-trustee or as an advisor to the trustee under AS 13.36.375 if the settlor does not have a trustee power over discretionary distributions.

(g) A transfer restriction allowed under (a) of this section and enforceable under (b) of this section applies to a beneficiary who is not the settlor of the trust, whether or not the beneficiary serves as a sole trustee, a co-trustee, or an advisor to the trustee under AS 13.36.375.

(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.

(i) A settlor whose beneficial interest in a trust is subject to a transfer restriction that is allowed under (a) of this section may not benefit from, direct a distribution of, or use trust property except as may be stated in the trust instrument. An agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant or permit the retention of greater rights or authority than is stated in the trust instrument is void.

(j) A settlor who creates a trust that names the settlor as a beneficiary and whose beneficial interest is subject to a transfer restriction allowed under (a) of this section shall sign a sworn affidavit before the settlor transfers assets to the trust. The affidavit must state that

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

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

(3) the settlor does not intend to defraud a creditor by transferring the assets to the trust;

(4) the settlor does not have any pending or threatened court actions against the settlor, except for those court actions identified by the settlor on an attachment to the affidavit;

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

(6) at the time of the transfer of the assets to the trust, the settlor is not currently in default of a child support obligation by more than 30 days;

(7) the settlor does not contemplate filing for relief under the provisions of 11 U.S.C. (Bankruptcy Code); and

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

(k) Notwithstanding another provision of the law of this state, an action, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may not be brought at law or in equity for an attachment or other provisional remedy against property of a trust subject to this section or to avoid a transfer of property to a trust that is the subject of this section unless the action is brought under (b)(1) of this section and within the limitations period of (d) of this section. A court of this state has exclusive jurisdiction over an action brought under a cause of action or claim for relief that is based on a transfer of property to a trust that is the subject of this section.

(l) If a trust has a transfer restriction allowed under (a) of this section, in the event of the divorce or dissolution of the marriage of a beneficiary of the trust, the beneficiary's interest in the trust is not considered property subject to division under AS 25.24.160 or 25.24.230 or a part of a property division under AS 25.24.160 or 25.24.230. Unless otherwise agreed to in writing by the parties to the marriage, this subsection does not apply to a settlor's interest in a self-settled trust with respect to assets transferred to the trust

(1) after the settlor's marriage; or

(2) within 30 days before the settlor's marriage unless the settlor gives written notice to the other party to the marriage of the transfer.

(m) In this section,

(1) "eligible individual retirement account trust" means an individual retirement account under 26 U.S.C. 408(a) or an individual retirement plan under 26 U.S.C. 408A(b) (Internal Revenue Code), as those sections read on September 13, 2006 or as they may be amended in the future, that is in the form of a trust, if a trust company or bank with its principal place of business in this state is the trustee or custodian;

(2) "settlor" means a person who transfers real property, personal property, or an interest in real or personal property, in trust.

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