

**16<sup>th</sup> ANNUAL  
SOPHISTICATED TRUSTS AND ESTATE LAW INSTITUTE  
NEW YORK STATE BAR ASSOCIATION**

**ASSET PROTECTION PLANNING:**

**DOMESTIC AND OFFSHORE PLANNING STRATEGIES**

**FOR THE PROTECTION OF FAMILY ASSETS**

**FROM CLAIMS**

**OF CREDITORS AND OTHER PREDATORS**

**HOT TOPICS**

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# WHY ASSET PROTECTION PLANNING

- Inevitable Periodic Events in the Macro-Economy  
Make Clients Feel Vulnerable
  - Latest -- Great Recession 2008-2010
  - Periodic Collapse of Residential and Commercial Real Estate
  - Periodic Crash of Tech Stocks
  - International Policy Crises and Terror Events



# WHY ASSET PROTECTION PLANNING

- Ever-Expanding Theories of Civil Liability, Explosion of Litigation
  - The average American will be sued 5 times
  - The increasing prevalence of litigation to gain leverage in negotiation; because of the cost of defending, to be sued is to lose
  - Tendency of juries to make unreasonably large awards against defendants perceived to have deep pockets or presumed to be insured
  - Inadequacy, expense of liability insurance, worries that insurer will refuse to cover

# WHY ASSET PROTECTION PLANNING

- Desire to isolate hazards of one business or investment from unrelated assets and activities
- A means to rebuild wealth free from past or current problems
- An alternative to a prenuptial agreement
- Desire to provide assets for family members which are not susceptible to claims of family member's spouse (in divorce) or other creditors



# APPROPRIATE CANDIDATES FOR ASSET PROTECTION

- Macroeconomic developments periodically create new classes of asset protection clients, e.g.,
  - Enron, MCI Directors
  - Arthur Anderson Partners
  - Dewey & Le Boeuf Partners
  - Commercial real estate developers & lenders
  - Wall Street wizards
  - Leveraged and margin investors
  - North Dakota oil-boom investors
  - Harvey Weinstein, Les Moonves
  - Asset Protection Lawyers

# APPROPRIATE CANDIDATES FOR ASSET PROTECTION

- Specific circumstances put client in jeopardy
  - Claim-prone line of business, e.g., obstetrician
  - Contract or loan commitment may not be able to be met in the future
  - Concerned about possible future divorce
  - HNWI concerned that his wealth and/or notoriety makes him a target for claims



# APPROPRIATE CANDIDATES FOR ASSET PROTECTION

- Entrepreneur who has or will sell the shares of his business to a larger company, whose contract will require exhaustive warranties and representations worried about:
  - Buyer mismanagement
  - Buyer regret
  - Macroeconomic factors that may cause sold business to underperform
  - Buyer's huge law firm, which may try to bury him in legal fees to recover price paid for alleged breach of warranty or representation

# INAPPROPRIATE CANDIDATES FOR ASSET PROTECTION

- Insolvent (liabilities greater than assets)
- Bankrupt or on the verge
- Sued for material damages or judgment entered against him



## ASSET PROTECTION SHOULD BE AN INTEGRAL AND INTEGRATED PART OF THE OVERALL ESTATE AND FINANCIAL PLAN

- Common Sense
- Provides best argument to rebut the suggestion that the planning was motivated by intent to hinder, delay, or defraud creditors
- Be prepared to offer a justification OTHER THAN asset protection
- Purpose should be to plan against a possible future event that would result in financial devastation to client's estate

# OTHER BUSINESS PURPOSES FOR ASSET PROTECTION STRATEGIES EXAMPLES:

- Probate Avoidance
- Minimization of Income or Estate Taxes
- Confidentiality of Value and Nature of Assets,  
Dispositive Plan
- Management of Affairs in the Event of Disability
- Preservation of Assets for Dependent Family  
Members



# WHAT IS FRAUDULENT CONVEYANCE

- State laws and Federal Bankruptcy law recognize that a transfer of assets made with intent to hinder, delay, or defraud existing or anticipated future creditors of the transferor may be disregarded and voidable.
- However, the law recognizes the right of individuals to arrange their affairs to limit their possible liability to unanticipated future creditors, e.g., prophylactic transfers to protect against a potential future hazard.
- States -- 18 at last count -- have been passing a new uniform law to replace fraudulent conveyance statutes: The Uniform Voidable Transactions Act. It is controversial, especially the official comments to it.



## INTENT TO DEFRAUD IS PRESUMED AND NEED NOT BE PROVEN

- If the transfer is a gift (for no consideration) and the transfer renders the donor insolvent.

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Interesting recent New York case, Schwartz v. Bourque, 2017 NY Slip Op. 31621 (U) (Sur. Court Nassau County, June 14, 2017). Court vacated a deed from grandmother to granddaughter as a fraudulent conveyance, where the property was subject to a pre-existing contract to make a testamentary disposition in favor of daughter.



# FRAUDULENT CONVEYANCE IN BANKRUPTCY

- A bankruptcy trustee may generally challenge as fraudulent transfers within 2 years of the filing.
- There is an extended 10-year look-back period for a bankruptcy trustee to challenge transfers to self-settled spendthrift trusts (of which seller is among the class of beneficiaries), i.e., all domestic asset protection trusts in the 17 states that recognize them.
- States have varying look-back periods which may apply; 4 years in Delaware.

# EXEMPTIONS FROM CREDITOR CLAIMS: STATE LAW

- Every state has different exemptions, e.g.,
  - Florida and Texas exempt the “homestead”
  - Retirement plans: some exempt IRAs, some not, some exempt IRAs only to the limit in Federal Bankruptcy
  - Tenants by the Entirety property, if claim is against only one spouse
  - Partnership and multi-member LLC interests



# STATE ASSET PROTECTION TECHNIQUES

- The American College Trust and Estate Counsel (ACTEC) has put together a state-by-state chart of Asset Protection Techniques.
- If you are or know an ACTEC Fellow you may be able to put your hands on a copy.
- The local reporters for ACTEC were:
  - Jefferey A. Galant, New York
  - Jordan S. Weitberg, New Jersey
  - John R. Irimey, Connecticut
- Hot new topic: creditor protection for assets presently subject to general powers of appointment/crummey withdrawal powers. There is a state-by-state ACTEC chart.

# STATE ASSET PROTECTION TECHNIQUES

- Those asset protection techniques considered are ---
  - Homestead
  - Retirement Plan Assets
  - Inherited Retirement Plan Assets
  - Cash Value of Life Insurance/Proceeds (Broad protection in NY)
  - Annuities
  - Tenants by the Entirety in Real and Personal Property
  - Inter Vivos QTIP Trusts
  - 529 College Savings Plans



# EXEMPTIONS FROM CREDITOR CLAIMS: FEDERAL LAW/BANKRUPTCY

- All ERISA plans
- IRAs to \$1 million, indexed for inflation, presently \$1,283,025
- Rollovers from ERISA plans
- State homestead exemption limited to \$125,000 if home purchased within 40 months of bankruptcy (except to the extent value was derived from sale of prior home in same state)
- Inherited IRAs maybe susceptible to claims of creditors of the inheriting party. Clark v. Rameker, 134 S.Ct. 2242 (June 12, 2014) But see In re Andolina, 525 B.R. 588 (Bankr D. NJ 2015) which found inherited IRA not part of bankruptcy estate under NJ law. In other states inherited IRAs are protected. ACTEC has another state-by-state chart as of September 2018 on the exposure of inherited IRAs to creditors.

# ASSET PROTECTION TECHNIQUES

- Tenancy by the Entirety Property
  - In some states, including New York, only real property
  - In other states also intangible personal property, i.e., cash and securities
  - In some states -- DC, Maryland and Virginia -- creditors of one spouse cannot attach T by E property



# ASSET PROTECTION TECHNIQUES

- Outright Gifts
  - Beware of federal gift tax
  - Removes assets from donor's income and estate tax returns; also removes future appreciation
- For Minors consider
  - Paying tuition
  - UTMA accounts
  - Section 529 plans

# ASSET PROTECTION TECHNIQUES

- Creation and Transfers of Interests in Family LLCs (and Partnerships)
  - Perfect for pre-IPO stock and predevelopment real estate with low gift tax valuations
  - Transfers of minority interests subject to further gift tax valuation discounts (maybe 30%), permitting leveraged gifts
  - Multi-Member LLC and partnership interests are creditor-protected, cannot be attached, only remedy of creditors is charging order



# ASSET PROTECTION TECHNIQUES

- FAMILY LLCs (Continued)

- Creditor with charging order may receive K-1 and have to pay tax on undistributed income (Rev.Rul. 77-13)
- Even majority interest held at death by donor eligible for estate tax valuation discount (maybe 20%)
- Certain states have LLC statutes which afford more protection against creditors of a member, e.g. Delaware, Virginia, New Jersey.

# ASSET PROTECTION TECHNIQUES

- FAMILY LLCs (continued)

- Consider family partnership tax rules, IRC Section 704(e) and estate freeze rules, IRC Sections 2701-2704
- Only way to give away asset for transfer tax purposes but retain practical control (as manager)
- If it holds only liquid investment assets modest valuation discount for minority interests
- For all of these advantages, “Holy Grail” of Family Estate Planning



# ASSET PROTECTION TECHNIQUES

- Gifts to Irrevocable “Spendthrift” Trust
  - Subject to gift tax
  - Annual exclusion available if Crummey withdrawal powers granted and administered properly
  - Removes income from donor's income tax return
  - Removes assets from donor's estate
  - Protects assets from creditors' claims unless proven to be fraudulent conveyance
  - Affords management by trustees of assets gifted



# ASSET PROTECTION TECHNIQUES

Gifts to Irrevocable “Spendthrift” Trust (continued)

Modification/Decanting of Existing Irrevocable Trust for Asset Protection:

- See interesting Connecticut case that involved decanting for asset protection: Ferri v. Powell-Ferri, Supreme Court of Connecticut, SC 19432, August 8, 2017.
- For New York Trusts, consider re Joseph Heller Inter Vivos Trust, 613 N.Y.S. 2d 809 (Surr.Ct, NY Co. 1994)
- [Is this the Joseph Heller who wrote Catch 22?] where a trustee was allowed to modify a trust for the express purpose of asset protection after reassuring the court that there were no current, threatened or anticipated claims. The court recognized the right of individuals to arrange their affairs to limit liability.



# ASSET PROTECTION TECHNIQUES

- Gifts to Irrevocable “Spendthrift” Trust (continued)
  - May be used to protect cash value of life insurance in insurance trusts
  - May be used to protect transferred assets from creditors of trust beneficiary, e.g., from spouse in divorce
- Gifts to Revocable Trusts
  - Ineffective for asset protection

# ASSET PROTECTION TECHNIQUES

- Gifts to Charity

- Creditors cannot reclaim unless fraudulent conveyance
- Charities will fight creditor claims
- But annuity on CRT may be attached
- Remainder of CLT may be attached



# ASSET PROTECTION TECHNIQUES

- Life Insurance

- If premiums are paid with intent to defraud creditors of the insured, the premiums may be recovered by creditors.

- If a policy is transferred with intent to defraud creditors of the insured, the cash value of the policy may be liable to creditors' claims.

- In general and in Virginia, upon the demise of the insured, even if fraudulent conveyance of premium payments is proven, creditors have no claim to death benefits except to recover premiums paid.

# ASSET PROTECTION TECHNIQUES

- Life Insurance (continued)
  - Some state statutes exempt life insurance cash value from bankruptcy creditors, e.g., in Maryland when paid to spouse and/or children.
  - It is possible to purchase life insurance in certain offshore jurisdictions, such as The Bahamas and Cayman Islands, where the cash value is expressly not subject to claims of creditors.



## SALE OF ASSETS TO A CHILD OR TO A TRUST FOR A CHILD

- If for full and adequate consideration, difficult to show fraudulent intent
- Useful technique for
  - Pre-development real estate
  - Early stage tech investment
  - Family business to protect future appreciation from creditor claims
- Use of long-term installment sale further frustrates creditors

# "UGLIFICATION" OF ASSETS

- It is frequently a more subtle, difficult-to-attack means of asset protection to RETAIN an asset but make it UNAPPEALING to creditors.

- **EXAMPLES:**

- QPRT: a grantor parent retains the right to use a personal residence for a period of years, after which title jumps to children. While a creditor of parents may get at the retained term interest, that is not particularly attractive, and the creditor cannot defeat the reversion unless it can show a fraudulent conveyance. What a creditor wants to do is seize and sell the real estate.



## “UGLIFICATION” OF ASSETS

- GRAT: grantor parent retains the current value of any asset expected to appreciate but gives away the future appreciation. Unless the creditor can show fraudulent conveyance, the future appreciation is protected.

# “UGLIFICATION” OF ASSETS

- Other Examples

- Encumber a property attractive to creditors and reinvest the borrowed equity in a protected structure, e.g. family LLC
- Give cash to family members or a trust for them, from which Settlor could later borrow funds
- Purchase life insurance in an irrevocable trust
- Contribute to a protected retirement plan
- Invest in an offshore asset protection trust
- Invest exposed cash or liquid assets in a protected structure as above or pay down the mortgage on a protected tenants by the entirety property



# QUALIFIED RETIREMENT PLANS

- ERISA plans: defined benefit, defined contribution, e.g., 401(k) plans are COMPLETELY protected from creditor claims, even in bankruptcy, unless fraudulent conveyance may be shown: Patterson v. Shumate (U.S. Supreme Court)
- IRA plans, which are NOT ERISA plans, may be protected
  - fully protected if rolled over from ERISA plan
  - up to \$1,283,025, indexed, under federal bankruptcy law
  - otherwise as provided by state law and state bankruptcy exemptions

# OPERATING BUSINESS

- Incorporation as C or S Corporation or LLC and rigorous observance of corporate formalities should protect shareholders from personal liability on business obligations.
- Directors and officers should seek broad indemnification from the corporation and possibly require D & O liability insurance, or reimbursement for such premiums paid directly by directors or officers. Chubb will sell policies to officers and directors.



# LIABILITY INSURANCE/UMBRELLA

- The first line of defense against creditors should be adequate auto and homeowners liability insurance backstopped by a significant (\$2-\$10 million) umbrella policy from a reputable company.
  - HNWI prefer Chubb. It is known to stand and fight, e.g. Chubb defended Bill Clinton from Paula Jones sexual harassment claim, O.J. Simpson from wrongful death claim of Ron Goldman, under umbrella policies.
- For automobiles, we recommend that husband own and use his auto, wife own and use hers, so if one has an accident, assets of the other spouse and tenants by the entirety should not be exposed.



## AVOIDING INHERITANCE IF FACING POTENTIAL LIABILITY

- If a spouse or child is facing a potential claim, structure estate plan to provide for them via discretionary spendthrift trusts, which are immune to creditor claims.
- A disclaimer of an inheritance by one with creditors may or may not be challenged as fraudulent conveyance, based on state law.



# MARITAL AGREEMENTS AS A SHIELD

- If a spouse wishes to be protected from liabilities arising from other spouse's business – e.g., from liability on performance bond in a construction business or from any kind of obligation to co-sign or co-guarantee a business loan, a pre- or post-nuptial agreement may assure the spouse freedom from such a liability.
  - May also be used to keep the family home free from a business debt related encumbrance.
  - Having such marital agreement in place will often permit the spouse operating the business to secure financing without the other spouse's involvement, whereas a bank or lending company will always try to get a spouse to co-sign.



# PLANNING FOR SPOUSAL CLAIMS IN DIVORCE

- First line of defense: Pre- or post-nuptial agreement
  - Requires (a) full disclosure of balance sheets and income statements of each and (b) separate counsel for each
- Many asset protection engagements focus on potential future divorce claims
- Beware of ethical conflicts and fraud claims: if you have been engaged by both for any purpose, you probably cannot/should not represent or advise either against the other



# PLANNING FOR SPOUSAL CLAIMS IN DIVORCE

- What may a spouse do if no divorce suit is currently anticipated?
  - Offshore asset protection trust with solely owned assets but not community property
  - Keep inherited and gifted assets in separate name (not part of the Marital Estate). Assets earned during marriage are subject to division in divorce.

# PROTECTING FROM SPOUSAL CLAIMS IN DEATH

- Most states protect spouses of decedents by guaranteeing them one-third of predeceased spouse's estate.
- In some states this right applies only to assets passing under the Will, and so may be circumvented by beneficiary designations, joint ownership, or passing assets by revocable trust.
- More states expand the right to non-probate assets.
- Depending on state law there may or may not be any way to circumvent the requirement other than a pre- or -post-nuptial agreement.



# PROTECTING FROM SPOUSAL CLAIMS IN DEATH

- Civil law jurisdictions – France, Germany, Italy, etc. – frequently negate freedom of testation and require that a certain portion passes to the spouse, the balance to children.
- Sharia law requires more to pass to sons than daughters.
- U.S. or foreign clients may establish trusts offshore in jurisdictions which will not enforce “forced heirship” laws.
- This is a common reason to establish offshore trusts.



## SPENDTHRIFT TRUSTS AVOID CREDITORS OF BENEFICIARIES

- Normally a creditor has no right to get at the assets of a discretionary “spendthrift” trust established for a debtor.
- Such properly drafted trusts are effective against divorce claims, governmental claims for a child eligible for safety-net governmental benefits, and most tort claims.
- Perfect examples are typical credit-shelter trusts fbo surviving spouse and children, then subdividing into perpetual trusts for descendants.



## PLANNING TO MAKE ELDERLY MEDICAID ELIGIBLE

- Highly complex topic, but the endeavor is generally ineffective for the middle class and above.
- To be Medicaid eligible, an elderly person must have virtually no assets: less than \$3,000.
- If they try to give away their assets to their children to become eligible, there is a “look back” period of typically 5 years which will disqualify them from eligibility.
- Spouses are generally required to support a spouse in a nursing home.

# IRS AS A CREDITOR

- Virtually no defense works.

For example, see U.S. v. Gerard (D.C. Ind. 4/9/18)

which held that a tax lien of wife attached to tenants by the entirety property survived the severance of the tenancy by conveyance to the husband alone, and the IRS was deemed entitled to 50% of the value of the asset in husband's hands.



# ASSET PROTECTION TRUSTS (APTs)

- Self-Settled Spendthrift Trusts fbo, inter alia, the Settlor and his family
- OAPT: Offshore Asset Protection Trust
  - generally established in small English-speaking island jurisdictions, generally where APT legislation has been adopted (about 60 jurisdictions)
- DAPT: Domestic Asset Protection Trust
  - established in one of 17 U.S. states which have adopted APT legislation



# OFFSHORE ASSET PROTECTION TRUSTS (OAPTs)

- Irrevocable, discretionary, spendthrift trust established by U.S. citizen or Resident Alien or Non-Resident Alien
- In English common law jurisdiction recognizing self-settled spendthrift trusts fbo Settlor and others
- A few do NOT have specific asset protection legislation, e.g. Isle of Man, Channel Islands (Guernsey and Jersey)
- Most do have specific APT legislation, e.g. The Bahamas, Cook Islands, Nevis, Cayman Islands, Bermuda, Liechtenstein
- Alternate scenario: client asks offshore bank to settle the trust and serve as trustee for greater confidentiality



# OAPTs FOR U.S. SETTLORS/TAXPAYERS

- “Foreign trust” for U.S. tax purposes (IRC §7701(a)(30)(E) and (31)(B))
- Grantor trust tax treatment per IRC §679.
- U.S. Settlor pays income tax
- Transfers to trust “incomplete gifts,” all trust assets subject to U.S. estate tax (“defective” under §2036), so will contain bypass trust/marital trust tax planning. Trust will look like a U.S. revocable trust.
- Perfect tax transparency, numerous filings required: Forms 3520, 3520-A, 8938, FBAR Form TDF-90.221, FATCA disclosures

## OAPTs FOR U.S. SETTLORS/TAXPAYERS

- Will have a “Trust Protector” who may fire and replace trustee, move trust to other jurisdictions
- Settlor will provide Trustee with informal Letter of Wishes
- Assets may be managed in U.S. or offshore, typically in a company or LLC wholly-owned by the trust
- There is no U.S. tax “angle” for U.S. citizens or resident aliens



# OAPTs: SELECTING A JURISDICTION

- Political stability
- Asset protection trust statute
- Shorter statute of limitations to challenge
- Less stringent fraudulent conveyance law than U.S., e.g. heavier burden of proof
- Large, stable trustworthy trust company/experienced and credible trust officer
- Willingness to accept your U.S. client
- Will not recognize or enforce U.S. judgment the client is concerned about, or will be reluctant to
- Countenances self-settled spendthrift trusts
- Selection of jurisdiction is art, not science

# OAPTS: WHY THEY WORK

- U.S. courts (including bankruptcy courts) have no jurisdiction over assets in offshore trust if –
  - No assets in U.S.
  - No trustee in U.S.
  - No trust protector in U.S.
  - See Reichers v. Reichers (NY Supreme Court, Westchester)(New York Law Journal July 1, 1998) for a NY case recognizing the legitimacy of an OAPT
- Most offshore jurisdictions will not enforce domestic/divorce and forced heirship/dower laws of other jurisdictions.
- There has NEVER been a successful forcible repatriation to the U.S. of assets held in an OAPT.
- Vulnerability: Settlor can be held in contempt. This is likely a risk only in domestic disputes with bad facts and when U.S. government is the claimant.



## OAPTs: COST/BURDEN ON TRUST COMPANY

### Impact of FACTA:

- Because of the burden and cost of reporting, offshore financial institutions will be more reluctant to serve, will charge higher fees, and will only handle larger accounts.
- And will rigorously insist on and verify US tax transparency and compliance.
- Accounts under \$1-3 million are probably not viable.

# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- As of January 2018, 18 states recognized the effectiveness of DAPTs, most have adopted DAPT statutes, creating various levels of asset protection for these self-settled trusts
  - Delaware is the only nearby state
  - Among the most celebrated and broadest are Alaska, Nevada and South Dakota



# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- Basic requirements of DAPTs:
  - resident trustee in state
  - some trust assets located in state
  - some trust administration in state
  - transfer of assets to DAPT must not be a fraudulent conveyance/voidable transfer
  - trust must be irrevocable

# DAPTs FOR U.S. SETTLORS/TAXPAYERS

- To date they have not worked. Virtually all recent court cases have refused to respect them
- Theory: as more states adopt, courts in those states which have adopted will respect DAPTs of other states
- Practice: Courts of Delaware and Utah, two states with DAPTs, refused to enforce DAPT statutes of other states
- Alaska, with DAPT statute, would not assert primacy of its laws over those of non-DAPT state.
- Biggest problems are under U.S. Constitution: Full Faith and Credit Clause, Supremacy Clause, Contract Clause; also Conflicts of Law Principles, sham or alter ego arguments, 10-year claw-back rule in bankruptcy
- Generally grantor trusts established with “defective” gifts, so subject to income tax and estate tax to Settlor



# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

Latest – Toni 1 Trust v. Wacker, 2018 WL 1125033 (Alaska, March 2, 2018)

- Key Issue: May a DAPT statute limit the jurisdiction in which a DAPT may be challenged:
  - Plaintiff/Creditor brought suit against alleged debtor in Montana.
  - After suit filed, debtor created Alaska DAPT trust and transferred Montana real estate to it.
  - Creditors alleged fraudulent conveyance under Montana law in Montana Court. Obtained default judgement.

# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- Toni 1 Case (continued)

- Debtor filed for Bankruptcy in Alaska.
- Creditor obtained default judgement in Bankruptcy Court.
- Debtor then filed in Alaska State Court, citing DAPT statutory provision according to Alaska exclusive jurisdictions to determine fraudulent conveyance regarding Alaska DAPT.
- The Alaska Supreme Court recognized that Alaska could not reserve exclusive jurisdictions from other states, citing Full Faith and Credit Clause of the Constitution, or from the Federal government/bankruptcy court (citing Supremacy Clause of the Constitution).

- It also cited a recent Delaware DAPT case to the same effect, IMO Daniel Kloiher Dynasty Trust.



# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- Toni 1 Case (continued)

Noted asset protection legal commentator Jay Adkisson described this case as the “Last Nail in DAPT Coffin for use in Non-DAPT states.”

Yes, bad facts make bad law, but still ...

# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- DAPTs might work if ---
  - The Settlor is domiciled in a DAPT state
  - The property sought to be protected is situated in the DAPT state
  - The action is not in bankruptcy
  - Consider adding Settlor as a beneficiary only after 10 years



# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- DAPTs are unlikely to work if ---
  - Settlor is not domiciled in a DAPT state
  - The property sought to be protected is not in a DAPT state
  - The Settlor is subject to a bankruptcy proceeding and the transfer to the DAPT was within 10 years.

# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- Notwithstanding the bad case law, prominent estate planning lawyers in large firms are encouraging clients residing in non-DAPT states with no current creditors and substantial liquid net worth to establish prophylactic DAPTs to hold liquid assets in the hands of local trustees.
- Anecdotally, many DAPTs are being created, there are relatively few reported cases, so apparently most DAPTs work and/or claims against them are settled.
- Interestingly, the Governor of Georgia recently vetoed a DAPT statute determining that the perceived benefits had been oversold.



# RISKS TO LAWYERS AND OTHER ADVISORS COUNSELING CLIENTS ON ASSET PROTECTION STRATEGIES

- Civil suit as co-conspirator with client in a fraud; malpractice insurance may not cover
- Malpractice claim, e.g. planning did not work, creditor pierced plan
- Ethical complaint
- Contempt of court as co-conspirator
- Criminal fraud charge

# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- The American College of Trust and Estate Counsel (ACTEC), via editor David G. Shaffel, has put together a Comparison Chart as of August 2017 of 17 DAPT Statutes.
- If you are or know an ACTEC Fellow you may be able to lay your hands on this very useful chart.
- Beware: except for Nevada virtually all DAPTs have categories of creditors against whose claims no protection is afforded, e.g., pre-existing tort creditors, divorcing spouses, claims for child support and alimony.
- Something new: a civil law form of asset protection “trust,” a statutory non-charitable foundation, now exists in New Hampshire.



# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- As an alternative consider settling some assets in trust for the benefit of spouse and children if family is cohesive:
  - This works absent fraud
  - Not subject to bankruptcy clawback
  - Settlor can be co-trustee, may fire and replace trustees, -“floating” spouse as a defined term.
  - If Settlor loses his other assets, spouse and children are able to provide for him, trustee may loan him trust funds.
- Risk:
  - Estrangement from spouse and/or children

# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

- Concern that estate/gift tax exemption may shrink by 50% in 2026 motivates tax planning: “use it or lose it”
- Tax motivation may combine with asset protection motivation and provide “business purpose” for intra-family transfers, e.g., not quite reciprocal Spousal Limited Access Trust (SLATs)



# DOMESTIC ASSET PROTECTION TRUSTS (DAPTs)

## Holy Grail

- There is a school of thought that it is possible to establish a DAPT of which the settlor is a potential beneficiary to which transfers are completed gifts, outside of the settlor's estate, protected from the settlor's creditors, but available to the settlor in an "emergency."
- I am very skeptical that all of these objectives may be obtained in one trust.

# CLIENTS WANT ASSET PROTECTION

- All surveys show that asset protection in general is among the highest priorities of high net worth individuals.
- Advisors who can competently counsel clients regarding asset protection strategies are scarce. Take the Seminar "Making Your Client Judgement proof"!
- But I get weekly emails from "asset recovery" firms which work for creditors to find chinks in the supposed armor of asset protection structures and of notice of day-long seminars presented by big firm partners on asset recovery from recalcitrant debtors.
  - So if you are going to advise clients on asset protection, be sure you have a good handle on your clients and a thorough understanding of this practice area.



# EXCELLENT RECENT ASSET PROTECTION OUTLINE BY NEW YORK COUNSEL

- ESTATE PLANNING THROUGH AN ASSET PROTECTION LENS, Gideon Rothschild, Moses & Singer LLP, May 9, 2018 Program Co-Sponsored by ALI and ACTEC: "Estate Planning for Creditor Protection: Using the Tools of Our Trade"

- 
- Includes many citations to New York statutes and case law

## OTHER RESOURCES

For Comprehensive Treatment of General Topic of Domestic and Foreign Asset Protection Trust and Asset Protection Planning Generally, see on

[www.fredtansill.com](http://www.fredtansill.com) under Articles, Speeches, Outlines.

- Asset Protection Trusts: Non-Tax Issues; Presented October 11, 2013, ALI-ABA Course on International Trust and Estate Planning; Boston, Massachusetts.
- Asset Protection Planning: Planning Strategies for the Protection of Family Assets from Claims of Creditors and Other Predators; Presented June, 2010, ALI-ABA Course on Estate Planning in Depth; Madison, Wisconsin.