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ASSET PROTECTION TRUSTS (APTs): NON-TAX ISSUES

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Exhibits

A Overview of Selected [Offshore] Jurisdictions
By Duncan E. Osborne, Esq. and Mark E. Osborne, Esq., of Austin, Texas reprinted with consent

B Comparison of Domestic Asset Protection Trust Statutes, updated through June 30, 2012, edited by David G. Shaftel, Esq., of Anchorage, Alaska, with contributions by lawyers in all 15 states, as listed, reprinted with consent

C Local Counsel and Representative Banks and Trust Companies in Certain Offshore Jurisdictions

1 Affidavit of Solvency (Sample)

2 "What ACTEC Fellows Should Know About Asset Protection, by Duncan E. Osborne and Elizabeth M. Schurig, reprinted from the ACTEC Journal.

3 No U.S. Connections Allowed With an Offshore Trust?
Wrong! Use Onshore Contracts "by Frederick J. Tansill," reprinted From the Journal of Asset Protection

4 Letter of Wishes (Sample)

5 "Litigation Boom Spurs Efforts to Shield Assets" by Rachel Emma Silverman, reprinted from the Wall Street Journal

6 "Shelter from the Storm" by Russ Alan Prince and Richard L. Harris, reprinted from Trusts and Estates.

OFFSHORE ASSET PROTECTION TRUSTS:
NON-TAX ISSUES

I. BRIEF SUMMARY OF TAX TREATMENT OF A TYPICAL ASSET PROTECTION TRUST[1]

A. Typical Design.

For purposes of this discussion I assume that the typical design of an asset protection trust is an irrevocable discretionary trust established by a U.S. citizen or resident alien settlor in a jurisdiction whose law recognizes "self-settled" spendthrift trusts (i.e., for the benefit, inter alia, of the settlor), under and subject to the laws of that jurisdiction, with an institutional trustee which will have authority to make most substantial decisions. (There is an alternative scenario, not infrequently used, especially by non-resident aliens: the offshore bank serves as settlor and trustee. The name of the real settlor and principal beneficiary may appear nowhere in the body of the trust for extreme confidentiality.) The beneficiaries of the trust will include beneficiaries who are citizens of or resident in the U.S., i.e., members of the settlor's family, including the settlor. (However, in this practice area a U.S. lawyer may be asked by a non-resident alien to establish such a trust, and in this case the trust may be established in a U.S. asset protection jurisdiction or offshore. If such a trust for a non-resident alien is established offshore, there will be no U.S. nexis at all unless trust funds are invested in the U.S. Wealthy foreigners may come to U.S. lawyers simply because the U.S. has a reputation for producing sophisticated, scrupulous trust lawyers. Unless there are U.S. investments such an engagement raises no U.S. tax issues.) The trust will frequently hold its assets in an offshore LLC or corporation owned and controlled by the trust, maybe established in the jurisdiction in which the trust is established. In turn, that LLC or corporation will often create subsidiary LLCs to hold assets in any other jurisdiction in which trust assets are located, e.g., London or Zurich, Singapore or Wilmington.

B. Income Tax Treatment.

If the trust is established offshore ("OAPT" -- offshore asset protection trust), because the trust is designed so that no U.S. court will exercise primary jurisdiction over the administration of the trust, and because U.S. trustees do not have authority to control all substantial decisions of that trust (which are reserved to offshore trustees), the trust will be considered a "foreign" trust for U.S. tax purposes. Internal Revenue Code ("Code") Section 7701(a)(30)(E) and (31)(B).

If the foreign trust will have U.S. beneficiaries, under Code § 679 the trust is treated as a grantor trust for U.S. income tax purposes. All income is taxed to the grantor.

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[1] The tax issues with respect to foreign trusts are covered comprehensively in seminar outlines of Henry Christensen III, Michelle B. Graham, Carolyn S. McCaffrey, Jr. and Ellen K. Harrison. This brief summary is included in the interest of clarity and completeness of this outline.

If the trust is established in the U.S. ("DAPT" -- domestic asset protection trust) in a jurisdiction which recognizes asset protection trusts, such as Delaware or Alaska, it will normally be designed to be "defective" for income tax purposes, i.e., a grantor trust under Code §§ 671-678. Here again all income will be taxed currently to the settlor.

C. Tax Reporting Requirements of an Offshore Trust.

The creation and continued existence of an offshore trust must be reported to the IRS on Form 3520 within 2-1/2 months of the end of the first trust tax year (normally by March 15, as grantor trusts share the calendar year of settlors) following --

- the creation of the trust;
- the funding of the trust during settlor's life or at settlor's death;
- the death of the settlor;
- the immigration to the U.S. of a person who transferred property to a foreign trust within five years of establishing U.S. residency.

The trust must file an annual return/accounting on Form 3520-A within 3-1/2 months of the end of each trust tax year (normally by April 15).
NOTE: the difference between the dates represents a trap for the unwary, who may assume April 15 is the deadline for both filings.

Offshore asset protection trusts created by U.S. taxpayers have to be reported to the IRS on Form TDF 90-22.1 Report of Foreign Bank and Financial Accounts (commonly referred to as the "FBAR form") annually as will be more fully explained in the outlines of John Staples, Scott Michel and John McDougal. In addition, beginning in 2011, grantors of grantor trusts are treated as owning the foreign financial assets of the trust and must file IRS Form 8938, Statement of Specified Foreign Financial Assets, with their annual income tax returns.

The new regime under the Foreign Account Tax Compliance Act (FATCA) is dealt with comprehensively in John Staples' outline.

I really want to emphasize that very substantial penalties are imposed for failure to comply with the tax reporting requirements. NOTE -- this is unusual, even unprecedented in the tax law for large penalties to be imposed without respect to whether tax is due.

D. Estate Tax Treatment.

Because asset protection trusts, domestic and offshore, are typically designed under the estate and gift tax law so that transfers to such trusts will not be completed gifts (the settlor will retain a power, such as the power with the consent of the Protector to

name new beneficiaries or a special testamentary power of appointment), assets held in asset protection trusts are typically included in the taxable gross estate of the U.S. settlor at death, and the assets held in the trust at that time will receive a tax-free step up in basis. Therefore, normal U.S. testamentary estate tax planning will be included in an OAPT and DAPT for a U.S. settlor: (1) bypass trust planning to shelter the applicable credit amount; (2) marital deduction planning; and (3) generation-skipping transfer tax (GST) planning. The dispositive provisions effective at the settlor's death will look like those in a typical revocable trust in the U.S.

E. 2004 Article and 2013 ALI-ABA Program.

The July 2004 issue of Trusts and Estates contains a helpful article by Alexander A. Bove, Jr., "Drafting Offshore Trusts." Also see ALI-ABA's program materials for the Asset Protection Trust Planning outline presented by Duncan Osborne in Scottsdale, Arizona on April 17-19, 2013 at the program Planning Techniques for Large Estates.

SUMMARY

There is no tax "angle" when a U.S. citizen or resident establishes a typical asset protection trust. Its income is included in the Settlor's taxable income; its assets are included in the Settlor's gross taxable estate. Such a transaction is tax neutral. The crackdown by the IRS on tax fraud through undisclosed offshore accounts which began with Present Obama's election, and particularly the attack on UBS leading to a settlement in which the names of more than 4,000 U.S. taxpayers holding non-compliant accounts in Switzerland were disclosed, clearly indicate the increased enforcement of offshore tax fraud that may be anticipated by the Obama administration.

II. SELECTING A SITUS FOR THE FOREIGN ASSET PROTECTION TRUST -- ISSUES OTHER THAN ASSET PROTECTION

A number of factors must be considered in selecting the situs for a foreign trust, which is frankly more of an art than a science.

A. Developed and Favorable Trust Law.

To belabor the obvious, it is impossible to establish a foreign trust in a nation which does not recognize the concept of a trust, which is a creature of British common law. Most civil law countries -- most countries in which English is not the official language -- do not recognize trusts as legal entities. This includes almost all of South and Central America, non-English speaking Europe, most of Asia and Africa. While some civil law countries have adopted the trust concept by statute, e.g., Liechtenstein which has "issues," one should not necessarily equate the mere statutory adoption of the common law concept of a trust with the existence of a mature and

developed law of trusts. Even if a prospective situs nation has a well-developed law of trusts, it is necessary to examine those aspects of its trust law that may be particularly important to the ease of management and the financial success of a trust with U.S. beneficiaries. Asset preservation issues will be discussed below. Even countries with strong common law ties may differ with respect to their perpetuities and accumulation rules, which may determine the trust's ability to establish a desired sequence of interests or to make the accumulations necessary for the financial success of the trust.

Certain civil law countries have ratified the Hague Convention on the Law Applicable to Trusts and on Their Recognition: Italy, Luxembourg, and Switzerland. Residents in such countries should be able to transfer domestic assets to trusts. Switzerland hosts more than 6,000 private trust companies, and under provisions of the Hague Convention, as adopted in Switzerland, trust settlors may invoke the law of another country, such as an asset protection jurisdiction, while utilizing the services of a Swiss trustee. (See "Achieving Asset Protection with the Swiss Hybrid Trust," IFC Review, 2012).

B. Burden of Taxes and Administrative Costs.

It is important to examine the tax burden of the prospective situs jurisdiction of the foreign trust. Of course, no general statement may be made with respect to the taxation of foreign trusts by the many jurisdictions around the world which recognize some version of a trust. For purposes of this section, which emphasizes foreign trusts which are grantor trusts for U.S. income tax purposes and therefore subject to income tax in the U.S., it should be sufficient to observe that the only attractive foreign jurisdictions to U.S. grantors will be the so-called "tax havens" which impose no material taxes on such trusts. In this sense Delaware is a tax haven; it imposes no trust income tax. In examining the local taxes, one should be aware that foreign jurisdiction may impose taxes, such as documentary or stamp taxes, which are unusual from the perspective of the U.S. practitioner. Normally, such taxes will be relatively nominal.

Typically a U.S. grantor will select an institutional foreign trustee, and the prospective institutional trustee's fees for establishing and maintaining the trust should be reviewed. The Trustee may charge a "set-up" fee, pass through legal fees from its outside counsel to review a draft trust and charge the annual trustee's fee in advance. If there is an outside investment manager, that fee will be in addition.

Unless U.S. counsel either has experience with drafting documents in the foreign jurisdiction or is comfortable reviewing, revising and editing sample documents that the foreign fiduciary provides, it may be necessary to incur the costs of engaging local counsel (possibly in addition to paying the bank trustee's counsel) for assistance on behalf of the U.S. grantor and his counsel.

C. Currency and Controls/U.S. Affiliates.

Careful consideration should always be given to the selection of the currency in which the trust will hold its assets and pay its expenses. Currency stability is important. If the trust will have U.S. beneficiaries, consideration must be given to the complicated rules adopted under the Tax Reform Act of 1986 for determining gains and losses on transactions involving foreign currency.

Some countries impose significant restrictions on the investment of U.S. dollars within the country. Other nations may impose restrictions on currency withdrawals, which could limit payments to U.S. beneficiaries or the repatriation of trust assets.

If the trust is established in Europe, e.g. in Gibraltar, the Isle of Man, the Channel Islands of Guernsey or Jersey, or in Liechtenstein, will the investments be denominated in euros rather than in dollars?

Consider also that in 1989, a New York state court froze the account of a European bank at its New York correspondent (Goldman v. Goldman, New York Supreme Court, unreported decision). The foreign bank held an account in the name of a U.S. customer at its foreign headquarters. A third party who had brought a claim against such customer was able to successfully argue that since the customer's account was denominated in U.S. dollars, the depository bank's dollar funds held by its New York correspondent should be frozen until they were turned over to the U.S. state court in which the claim against the bank's customer was pending. Even though the petition for the injunctive order was made on an ex parte basis, and even though the underlying claim had not been reduced to judgment or even tried in court, the New York court granted the request. Because an appeal of the court's order would have taken several months, the plaintiff, whose claim was later determined in the underlying action to be wholly without merit, was able to achieve the upper hand in negotiating a settlement, and this probably wrong court decision ultimately cost the defendant/depositor millions of dollars.

Though most U.S. lawyers who review this case are in general agreement that the New York court's action described above was beyond the scope of applicable law and would have been overturned on appeal, this fact would provide cold comfort to the individual whose assets were improperly frozen. The case is illustrative of the belief of segments of the U.S. judiciary as to the extraterritorial reach of their judicial powers. Thus, the prudent planner would be wise to consider avoiding trustees and depository institutions with U.S. subsidiaries, branches or other affiliates, at least beginning with any point in time that the first hint of "trouble" in the form of a potential claim looms on the horizon. As the case described above demonstrates, it may even be prudent to avoid holding deposits in U.S. dollars.

D. Investment Media.

Related to the question of currency is the question of investment media for the foreign trust. On the one hand, the foreign trustee may maintain a general account with a New York institution through which the assets of numerous foreign trusts which it administers may be invested in publicly-traded American securities. (See the author's article, *No U.S. Connections Allowed with an Offshore Trust? Wrong! Use Onshore Contacts*, Journal of Asset Protection, Vol. 1, No. 5, May/June 1996, Exhibit 3) More typically, the offshore trustee may use an intermediary institution to hold assets on its behalf in the U.S., e.g., an offshore corporation and/or a U.S. LLC, e.g., a Bahamian Trust establishes a Bahamian IBC (International Business Corporation) which establishes a subsidiary U.S. LLC. On the other hand, in view of the global approach more and more Americans are taking to securities investment, it might make sense to take advantage of the foreign trustee's experience in foreign securities markets to invest at least some of the trust's assets offshore. In that case the intermediary entity owned by the trust will establish the investment account in London, Zurich, Honk Kong, or Singapore. Large foreign trust institutions may have more experience in investing in European Community and Pacific Rim securities and exchanges than their American counterparts, and consideration should be given to using that expertise. The grantor may rely on the foreign institutional trustee for investment management, and some such institutions have performance records comparable to the best U.S. trust companies and investment managers. This approach has the additional virtue of providing a non-creditor-avoidance business purpose, which, in turn, will be useful in defeating a fraudulent conveyance claim. Or the grantor may direct or request that the foreign trustee engage the services of a U.S. or offshore investment manager trusted by the grantor for investment choices. The typical offshore institution is very comfortable with either arrangement, and may have a bifurcated fee schedule depending on the scope of investment responsibilities it will be asked to assume. This is a difficult concept to grasp, because the typical U.S. trust company will generally insist on managing the assets. But the growing popularity of "open architecture" in U.S. trust companies is a step in this direction. Where the client has a need to preserve U.S. real estate from prospective future creditors, the foreign trust may hold title to the property, or more likely hold a 99% limited partnership interest in the property, with the grantor holding the 1% general partnership interest and thereby retaining management control. (See discussion at III. B.(3) below.) Or the foreign trust bank may loan the Settlor the equity in the U.S. real estate, taking a deed of trust or mortgage on the U.S. property. The Settlor will then reinvest the equity removed in the OAPT, perhaps putting the cash right back into the bank trustee in the form of a C.D. issued by the trustee bank held by the trust. Large international financial institutions will be much more comfortable holding in trust only liquid investment assets. It may be difficult to persuade such established institutions to hold such exotic assets as limited partnership interests in partnerships holding U.S. real estate, at least unless it is also holding substantial liquid investment assets. Whenever the foreign trustee is asked to hold exotic or illiquid assets, the trustee's fees with respect to such assets must be explicitly addressed in advance. Smaller boutique trust companies may be more likely to be willing to hold illiquid interests such

as partnerships.

E. Stability/Reputation.

In a world of political, economic and social instability, the stability of the situs nation is an important factor. Consider that Lebanon, Cyprus, and Panama were once known as investment havens for their favorable tax and non-tax laws. Today jurisdictions like Bermuda, The Bahamas, the Cayman Islands, Gibraltar, the Isle of Man and Jersey and Guernsey in the Channel Islands exemplify the desired stability. The Cook Islands and Liechtenstein will be seen by some to have a somewhat "shady" reputation.

F. Availability of Competent Trustees.

The financial success of any trust depends in large part upon the competence of the trustee chosen. This may be particularly true in the case of foreign trusts because of the general desire to direct trust investments towards growth at the expense of current income and because of the risk that injudicious actions of a trustee could cause the trust to become a U.S. trust. Obviously consideration should be given to the age and general reputation of the institution in the financial and legal communities, the amount of assets the institution has under management and the institution's historic performance. Coutts & Company, the world's oldest trust company, now owned by the Royal Bank of Scotland, Queen Elizabeth's trust company, was founded in the 1780's. Southpac Trust Company in the Cook Islands has not been around quite that long. Caribbean and other offshore law firms often have their own trust companies and most typically those "captive" trust companies will use outside investment managers. A listing of selected trust companies and trust counsel in seven jurisdictions with asset protection trust statutes is found in Part II of this Outline. Sometimes a large institution, such as Swiss-based UBS, Credit Suisse, and EFG Bank, or France-based SG Hambros, or JP Morgan or HSBC, will have small outposts in jurisdictions known for favorable law regarding asset protection trusts, such as The Cook Islands. The sophistication of the home office may reassure potential customers anxious about the meager local presence.

G. Changing Situs, Governing Law, Institutional Trustee,
Force Majeure Clause.

For various reasons, it may become desirable or necessary to change the situs and/or governing law and/or Trustee of a foreign trust -- e.g., to avoid deteriorating political stability or unfavorable legal developments -- by moving it to another country or repatriating it to the U.S. Therefore it is important to avoid being locked into any jurisdiction or governing law (or any trustee for that matter). The possible need for a future change of situs raises a number of tax and non-tax issues that should be considered in drafting the trust instrument and before making any such change. It has been previously noted that civil, economic and political stability should be considered in

selecting the initial situs for a foreign trust. However, there is always the possibility that problems may arise in the future that would make the host country an undesirable situs for the trust. This possibility makes it important that the trust be able to alter its situs when necessary. Absent such a provision, known as a force majeure clause when it applies to dramatic unforeseen events such as political revolution or a devastating hurricane wiping out the banking infrastructure, the beneficiaries and trustee would always face the latent threat of unexpected developments such as an attempt to seize trust investments in the wake of civil disturbances.

Beware of the effect of an automatic flight clause under the U.S. tax rules, especially as they apply to non-grantor offshore trusts. Care should be taken to ensure maximum flexibility in the change of jurisdiction/change of trustee clause because of the potentially adverse income tax consequences in the event of an injudicious change in the situs of a foreign trust. The trust instrument should expressly permit a change to another offshore situs for the trust either by the trustee, with or without requiring the trustee's resignation, or by a "trust protector" named in the instrument. The instrument should also permit the trust's situs to be shifted to the U.S., but only if the trustee finds compelling reasons for such a change. The trust instrument might enumerate the factors that should be considered in determining whether to change the situs of the trust.

A trust's transfer to the U.S. may give rise to significant U.S. income, estate and gift tax consequences. Again this issue particularly applies to non-grantor offshore trusts. Generally the tax consequences of repatriation of a foreign trust depend on the form of domestication and how the I.R.S. or the courts view the transaction.

There are at least four methods for relocating a foreign trust.

(1) The trust can be liquidated, its assets distributed to the beneficiaries, and a new trust established in another jurisdiction.

(2) The trust may establish a subsidiary entity in another jurisdiction and transfer all or some portion of its assets to the subsidiary. This is sometimes accomplished by granting the transferee entity a protective option to acquire the assets of the foreign trust under certain circumstances.

(3) Another trustee may be appointed for the trust in a different country and the administration of the trust shifted to that new country with a wire transfer of title to securities.

(4) Using a "decanting" provision thoughtfully drafted into the original trust, the trustee may resettle some or all of the trust assets into one or more new trusts which may have a different trustee in a different jurisdiction with different governing law.

Normally the Trust Protector in an asset protection trust is given the authority to –

- change trustees
- change jurisdictions
- change governing law.

H. Consider the Impact of OECD, FATF, FSC on Choice of Jurisdiction[2].

Anti-tax haven initiatives emanating from the Organization for Economic Cooperation and Development (OECD) and the Financial Action Task Force (FATF) must bear on a practitioner's advice to his client on choice of jurisdiction within which to establish an asset protection trust. Issues relating to the matters may also bear on the practitioner's evaluation of the motive of his client under the "know-your-client" principles that should guide even careful practitioners in this area.

The OECD has identified particularly "uncooperative tax havens," and cautious practitioners should be particularly careful about encouraging a client to engage in any kind of banking or trust arrangement in these jurisdictions, not the least because these jurisdictions are red flags in a governmental review or reporting of client accounts.

The FATF seeks to inhibit money laundering, and identifies "Non-Cooperative Countries and Territories" ("NCCTs") which refuse to comply with its recommended standards. Since its first listing of such countries in 2000 and 2001, when 23 NCCTs were listed, all have through improved practices found themselves removed from the list. Lately the NCCT evaluation process has been dormant, but it could restart.

For some time the FATF has been working on draft "Guidance for Designated Legal Professionals on Implementing a Risk-Based Approach" to anti-money laundering. The merits review by a practitioner consider about the motivations of clients or prospective clients. Lawyers and accountants and others are characterized in these guidelines as "Gatekeepers." The FATF in 2006 released a report on the "Misuse of Corporate Vehicles, Including Trust and Company Service Providers" which is worth reviewing by the scrupulous practitioner.

While Senator in 2007, Barack Obama introduced the Stop Tax-Haven Abuse Act, and his Treasury Department has clearly followed up on the initiative with its pursuit of disclosure from and recent settlement with UBS regarding offshore accounts of U.S. taxpayers. It is clear that one way this administration plans to close the huge budget deficit is to crack down on tax avoidance by U.S. taxpayers using offshore trusts, corporations, foundations, etc., and much closer scrutiny of offshore arrangements by American taxpayers may be expected in the future.

The OECD maintains a "grey list" of countries that have committed to meet OECD standards on tax information sharing but have not fully implemented the rules.

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[2] This material is dealt with comprehensively in the outline of Bruce Zagaris, "Ethical Issues in Offshore Planning" presented at this same program. Brief treatment is included here for clarity and completeness of this outline.

III. ADVANTAGES OF FOREIGN ASSET PROTECTION TRUSTS OVER U.S. TRUSTS ESTABLISHED UNDER GENERAL U.S. TRUST LAW

A. Advantages Of Foreign Asset Preservation Trusts

(1) Characteristics of Favorable Asset Preservation Jurisdictions.

A person concerned about potential future claims or creditors may arrange to transfer or establish the situs for some of his or her assets in another country, for instance through an asset preservation trust in that jurisdiction. While the location of the assets and the existence of the trust will be discoverable in a creditor collections proceeding or in bankruptcy (unless the grantor is prepared to perjure or expatriate himself or herself -- and under the 2010 tax law changes expatriation has its own tax consequences), a state court in which a judgment is awarded against the grantor has no jurisdiction to enforce the judgment against assets in another jurisdiction. And while a federal bankruptcy court has national jurisdiction, it cannot enforce its judgments in an overseas jurisdiction. The judgments of U.S. courts will have to be perfected and enforced, if that is possible, in the foreign jurisdiction where the assets are located, which will involve time delay, trouble and expense in the form of local counsel fees, among others. Although a U.S. court may exercise jurisdiction over a U.S. grantor, the grantor, having established an irrevocable discretionary trust with an independent institutional trustee offshore, will be powerless to regain control of the assets which he or she has placed in trust. But see the Anderson and Lawrence cases discussed below.

A favorable foreign asset preservation jurisdiction will have three particular characteristics: (1) it will not recognize or enforce U.S. judgments, or it will be reluctant to; (2) it will countenance spendthrift trusts for the benefit of a grantor; and (3) it will have less stringent fraudulent conveyance laws than the U.S. Elaborate summaries of the laws of ten offshore asset protection jurisdictions -- Bahamas, Bermuda, Cayman Islands, Cook Islands, Guernsey, Gibraltar, Jersey, the Isle of Man, Liechtenstein, and Nevis -- and comparisons of their virtues are found in Exhibit A of this Outline (courtesy of Duncan and Mark Osborne). It is virtually impossible to stay current on the laws of multiple offshore jurisdictions, or even one, because these laws are constantly evolving and changing to seek competitive advantage over rival jurisdictions. So you really need to rely on local counsel for the current state of the law.

To further assist you in Exhibit C is a listing of what I understand to be competent and honest and sophisticated lawyers and trust companies in certain offshore jurisdictions.

(a) An Asset Preservation Jurisdiction Does Not Recognize or Enforce U.S. Judgments, or Is Reluctant To.

The courts of many foreign jurisdictions recognize U.S. judgments obtained by U.S. creditors against U.S. debtors and, as a matter of comity, will permit such judgments to be filed, recorded and enforced against assets of the U.S. debtor located in the foreign jurisdiction. In such a jurisdiction the U.S. creditor will not have to prove his case again in the foreign jurisdiction. The only action necessary in such a foreign court is, in effect, a collection action on debt which is deemed by the foreign court to have been finally established. Assets held by a U.S. debtor in his own name in such a foreign jurisdiction may be seized by the U.S. creditor if it succeeds in the prosecution of the collection action, which should not be difficult. Normally the creditor's biggest problem will be locating the foreign assets, not obtaining the foreign court order to seize them.

Examples of such a jurisdiction are Bermuda, The Bahamas, the Cayman Islands, which recognize U.S. judgments but requires a local action to enforce them. The creditor will, however, have to raise any claim to the assets in a trust sitused in such jurisdiction in the courts of such jurisdiction. For instance, if the creditor wants the trustee to disburse assets to the creditor, and the trustee refuses -- e.g., because the trust is an irrevocable discretionary spendthrift trust -- or if the creditor argues that assets in the trust were transferred to the trustee in fraud of such creditor's rights, the creditor will have to file suit against the trust or trustee in the court of the host jurisdiction. The host jurisdiction will apply its own trust law -- e.g., regarding the effectiveness of a spendthrift trust held for the benefit of the grantor and the use of a trust protector to delete the grantor from the class of permissible beneficiaries of the trust -- and its own law of fraudulent conveyance and its own burden of proof.

It should also be recognized that jurisdictions that theoretically will enforce foreign judgments may in practice be reluctant or slow to do so and reluctant to let foreign creditors successfully attack trusts in their jurisdictions. And even these jurisdictions usually have "firewall" provisions that limit the

enforcement of foreign judgments in relation to trusts governed by local law. For example, in Cayman Islands and many other jurisdictions, such as the Bahamas, Bermuda, Isle of Man, and the Channel Islands, foreign court orders concerning rights arising out of a "personal relationship" to the settlor, e.g. marriage or forced heirship, will not be enforced. See "Defending Offshore Trusts from Foreign Attack," by Rachael Reynolds, Trusts & Estates, November 2011.

In certain other jurisdictions, like Cook Islands, Nevis and Colorado, the local courts by law will not recognize foreign judgments in general, so that a judgment obtained in a U.S. court against a U.S. debtor has no legal consequence in such jurisdictions. In such jurisdictions there would have to be two legal proceedings, one to prove the Settlor of the trust had a liability to the creditor, and a second to prove that the transfer to the trust was a fraud on the creditor under local law, so that the creditor should have access to trust assets to satisfy the liability. If the U.S. debtor (or a trust established by the debtor) has assets in the foreign jurisdiction which the U.S. creditor wants to attach, the creditor must bring the entire principal case de novo in the courts of the foreign jurisdiction. In other words, the creditor must engage local counsel, file suit on the merits, bring evidence and witnesses to the foreign jurisdiction, and deal with the procedural rules and substantive laws of the foreign jurisdiction, for instance as to causes of action and burden of proof, possibly deal with a foreign language and unfamiliar legal system, which may make it much more difficult to obtain the desired judgment against the debtor than it was or would have been in the U.S. This burden is in addition to whatever further problems the creditor will have in collecting on the judgment against assets in the foreign jurisdiction in the event he is able to obtain a favorable judgment from the foreign court on his underlying theory of claim.

Bringing the cause of action in a foreign jurisdiction obviously presents a daunting financial burden. In addition to other difficulties, there may be language barriers, concern over hostile judicial attitudes to foreign plaintiffs, and an exotic -- i.e., non common law -- legal system. For example, the Channel Islands, Jersey and Guernsey, to some extent recognize "Norman" law, which is observed nowhere else in the world. Liechtenstein is a civil law jurisdiction with statutory trust law written in a foreign language. In the Caribbean, a judge may be inclined to discourage

foreign litigants by his desire that his descendants may have the opportunity to be international bankers rather than cabana boys, waiters, black jack dealers or lifeguards.

Needless to say, the intimidating burden of having to bring a cause of action de novo in a foreign jurisdiction may give the debtor much greater leverage in dealing with the creditor to avoid the claim altogether or compromise the claim favorably.

Examples:

Bermuda, The Bahamas, Cayman Islands. While Bermuda, The Bahamas and Cayman Islands are hospitable to asset preservation trusts in that they recognize spendthrift trusts for the benefit of the grantor and have Asset Preservation Trust ("APT") laws which impose less strict fraudulent conveyance standards than the U.S., these jurisdictions do recognize and will enforce most types of U.S. judgments (not family law judgments).

Cook Islands, Nevis, Barbados, Belize, Liechtenstein and Colorado. These jurisdictions do not recognize or enforce foreign judgments at all. The Isle of Man will not recognize or enforce U.S. judgments, but it will enforce judgments obtained in certain other countries.

(b) An Asset Preservation Jurisdiction Countenances Spendthrift Trusts for the Benefit of the Grantor.

Some foreign jurisdictions, including virtually all English common law jurisdictions other than the U.S., permit a grantor to establish a spendthrift trust for a class of beneficiaries including the grantor which is immune from claims of the grantor's future creditors. The formerly universal public policy of the United States -- Alaska, Delaware, Rhode Island, Utah, Oklahoma, Missouri, Nevada, South Dakota, Tennessee, Wyoming, New Hampshire, Hawaii, Virginia, and Ohio, are now exceptions -- supported by statutory and case law, is that a grantor may not establish a revocable or irrevocable trust of which he is a permissible beneficiary which is effective to insulate the trust assets from the grantor/beneficiary's creditors. In Virginia, for example, with respect to whose law I will allude because it is typical of most U.S. jurisdictions, unless the asset protection trust

meets the strict tests of the new statute, a transfer by a grantor of non-qualified assets to a non-qualified "spendthrift" trust of which he is a possible beneficiary is void vis-a-vis his existing creditors. Code of Va. § 64.2-747.

(i) General U.S. Law/Virginia Law

Putting aside for the moment the states which have adopted asset protection statutes in the last few years, including Delaware, Virginia, and Alaska, whose laws are discussed below, the general rule in the U.S. (and we will examine Virginia's general law for non-qualified assets in non-qualified trusts in some detail as an example of typical state law) if a grantor is a permissible beneficiary of a trust he created, is that his creditors may reach the maximum amount the trust could pay to him or apply for his benefit. Restatement (Second) of Trusts, § 156(2). This is true even though the trustee in the exercise of his discretion wishes to pay nothing to the grantor or his creditors and even though the grantor could not compel the trustee to pay him anything. Vanderbilt Credit Corp. v. Chase Manhattan Bank, 100 A.2d 544 (1984). The same rule should apply if the grantor procured the creation of a trust for himself, e.g., by creating reciprocal trusts with a family member. Bogert, The Law of Trusts and Trustees, § 223 (1979). Similarly, creditors may reach trust assets which are subject to a general power of appointment created by the donor in favor of himself. Restatement (Second) of Property, Donative Transfers, § 13.3. (1984). Because it is against public policy to allow a grantor to create an interest for his own benefit in his own property that cannot be reached by his own creditors, it is immaterial whether there is intent to defraud creditors or not. Petty v. Moores Brook Sanitarium, 10 Va. 815, 67 S.E. 355 (1910); In re O'Brien, 50 Bankr. 67 (Bankr. E.D. Va. 1985). See generally Scott and Fratcher, The Law of Trusts, § 156 (4th ed. 1987).

Under earlier case law courts generally would not automatically require a grantor of a revocable trust for the benefit of persons other than the grantor to revoke it for the benefit of his creditors or treat the grantor as the owner of such a revocable trust so his creditors could reach it. Scott, The Law of Trusts, § 330.12 (3rd ed. 1967). But some

recent cases have recognized the rights of the grantor's creditors to reach trust assets following the grantor's death where the grantor held a right of revocation at death. See State Street Bank & Trust Co. v. Reiser, 389 N.E. 2d 768 (Mass. App. Ct. 1979). And the trend in the law may be to permit the grantor's creditors to assert rights against revocable trusts during the grantor's life on the theory that a power of revocation is a form of general power of appointment. Restatement (Second) of Property, Donative Transfers, § 11.1 comment C. (1984).

For the same public policy reasons, if the grantor of an irrevocable spendthrift trust is also a beneficiary of that trust, it is ineffective to insulate the trust assets from the grantor/beneficiary's creditors. Where a grantor having current creditors makes a transfer to a spendthrift trust of which he is either sole beneficiary or one of several beneficiaries, the transfer is void.

If the grantor of an irrevocable trust is a beneficiary of the trust, his creditors may reach any amount required to be paid to or for the benefit of the grantor as well as the maximum amount the trustee, in the exercise of discretion, could pay to or for the benefit of the grantor. On the other hand, if the grantor's rights as beneficiary are clearly secondary and inferior to those of other beneficiaries, and the trustee has no current discretionary authority to distribute to or for the grantor's benefit, it is possible that courts will not permit post-transfer creditors of the grantor to assail the trust. Of course, such a creditor could obtain any trust assets actually distributed to the grantor.

(ii) Foreign Law

In contrast to the general rule in the United States, some foreign jurisdictions permit a grantor to establish a spendthrift trust for his own benefit which is immune from claims of his creditors. Properly drawn, such a foreign trust may qualify as a U.S. trust for U.S. tax purposes, as a grantor trust, but as a foreign trust for other legal purposes.

Foreign Jurisdictions With Favorable Asset Protection

Trust Legislation: Anguilla, Antigua, Bahamas, Barbados, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Labuan, Marshall Islands, Mauritius, Nevis, Niue, St. Vincent, St. Lucia, Seychelles, Turks and Caicos Islands. These jurisdictions recognize the validity of irrevocable spendthrift trusts of which the grantor is a beneficiary as a shield from creditors of the grantor who did not exist and were not contemplated when the trust was established. The Channel Islands (Jersey & Guernsey) and the Isle of Man have statutes that permit self-settled spendthrift trusts, and are sometimes used, but they do not have elaborate asset protection trust statutes.

(c) An Asset Preservation Jurisdiction Has Less Stringent Fraudulent Conveyance Law

(i) U.S. Law/General Virginia Law of Fraudulent Conveyance

1. Overview.
Except for the new narrowly-defined Qualified Self-Settled Spendthrift Trusts, permitted after July 1, 2012, Virginia is a common law state, and at common law a debtor has the absolute right to pay one creditor in preference to another and can, without the imputation of fraud, secure one creditor to prevent another from getting an advantage. Williams, et al. v. Lord & Robinson, et al., 75 Va. 390 (1881). Therefore, the debtor has the right to prefer one creditor to another in the absence of any state or federal statute prohibiting such a preference. Giving such a preference to a bona fide creditor is not fraudulent, even though the debtor is insolvent and the creditor is aware at the time of the transfer that it will have the effect of defeating the collection of other debts. Such a transfer does not deprive other creditors of any legal right, for they have no right to a priority.

Other sorts of transfers by debtors, including gifts and sales on favorable terms, may trigger objections from creditors. Creditors may take the view that transfers by debtors disadvantageous to such creditors worked a fraud upon them. However, it is a fundamental principle of law that fraud must be alleged and proven, and every presumption of law is in favor of innocence and not guilt.

These principles have long been recognized in Virginia law, see generally Johnson v. Lucas, 103 Va. 36, 48 S.E. 497 (1904), Hutcheson v. Savings Bank, 129 Va. 281, 105 S.E. 677 (1921), and have recently been reaffirmed. Mills v. Miller Harness Company, 229 Va. 155, 326 S.E.2d 665 (1985). In the case of preferring one creditor over another, the key in preserving the transaction is that the creditors preferred be bona fide creditors. Simply because a transaction is completed which is disadvantageous to creditors will not in and of itself cause it to be set aside as long as it was made in good faith, and unsecured creditors, in the absence of fraud, cannot question the contracts of their debtors and undo all that is not beneficial to them. Catron v. Bostic, 123 Va. 355, 96 S.E. 845 (1918).

2. Virginia's Fraudulent Conveyance Statutes.

Virginia has enacted two fraudulent conveyance statutes which are typical of those in many states:

Intentional Fraud.
Every gift, conveyance, assignment or transfer of property, real or personal, made with the intent to delay, hinder or defraud current or anticipated future creditors of the transferor is voidable. Virginia Code § 55-80.

(a) Regardless of the transferor's intent, a bona fide purchaser for value takes good title, assuming the transferee had no notice of the fraudulent intent. On the other hand, if the transferee had notice of the fraudulent intent, the transferor's creditors may attach the property transferred. The transferee will be deemed aware of the fraudulent intent if he or she has knowledge of such facts and circumstances as would have excited the suspicions of a person of ordinary care and prudence.

(b) "Hinder", "delay" and "defraud" are not synonymous. A transfer may be made with intent to hinder or with intent to delay, without any intent absolutely to defraud. Any of the three intents is sufficient.

(c) There may be a fraudulent transfer even if fair consideration is paid.

Donative Transfer by Insolvent Transferor.
As to existing creditors, gift transfers are voidable without any finding of intent to delay, hinder or defraud, but the attacking creditor must prove that the transferor was insolvent or was rendered insolvent by the transfer. Virginia Code § 55-81.

(a) Creditors of the transferor may have no claim under this section --

- if they were not creditors at the time of the transfer.
- if fair consideration was paid.
- if the transferor was solvent after the transfer.

(b) NOTE: This section did not have an insolvency test until a relatively recent amendment.

3. Voiding the Transfer.
A creditor's suit is necessary to void the conveyance (Virginia Code § 55-82), the burden of proof is upon the one attacking the conveyance and the fraud must be proved by evidence that is clear, cogent and convincing, McClintock v. Royall, 173 Va. 408, 4 S.E.2d 369 (1939). Although the fraud must be proven and is never to be presumed, Land v. Jeffries, 26 Va. (5 Rand) 599 (1827), the evidence necessary to satisfy the court may be and generally is circumstantial, Witz, Biedler & Co. v. Osburn, 83 Va. 227, 2 S.E. 33 (1887), and courts have frequently held that there are certain indicia or "badges of fraud" from which fraudulent intent may be inferred, prima facie.

4. Badges of Fraud. These include:
   (a) retention of an interest in the transferred property by the transferor;
   (b) transfer between family members for allegedly antecedent debt;
   (c) pursuit of the transferor or threat of litigation by his creditors at the time of the transfer;
   (d) lack of or gross inadequacy of consideration for the conveyance;
   (e) retention of possession of the property by

the transferor;

(f) fraudulent incurrence of indebtedness after the conveyance.

(g) secrecy about the transfer;

(h) deviation from normal activities;

(i) transfer of all (or substantially all) of debtor's property; and

(j) transfer to family members (but cases of family transfers are surprisingly unpredictable, depending on the "flavor" of the facts).

Badges of fraud will inevitably be present in asset protection situations.

Hyman v. Porter, 37 Bankr. 56 (Bankr. E.D. Va. 1984), Hutcheson v. Savings Bank, 129 Va. 281, 105 S.E. 677 (1921). When the proof shows a prima facie case of fraud, i.e., where there are sufficient badges of fraud, the burden of proof shifts to the upholder of the transaction to establish that he or she intended to accomplish bona fide goals as a result of the transfer. If a conveyance is set aside under Section 55-82, the court will attempt to put the parties to the conveyance in the same position as if the conveyance had never taken place. Judgment creditors may interrogate the debtor under oath about all matters involving assets. Virginia Code § 8.01-506, et seq.

5. Definition of Insolvency.

Virginia Code § 55-81, supra, uses the word insolvent, but does not define it. The Uniform Fraudulent Conveyance Act (which Virginia has not adopted) provides that a person is deemed insolvent if, at the time of a transfer, the present fair salable value of the transferor's non-exempt assets is less than the amount required to pay his liabilities on existing debts. The Bankruptcy Code defines insolvency of an individual as the financial condition in which the sum of the person's debts is greater than all of the person's property, at fair valuation, exclusive of property transferred, concealed or removed with intent to hinder, delay or defraud creditors, and property that may be exempted from property of the estate under the Bankruptcy Code. 11 U.S.C. § 101(31). This is generally known as the "balance sheet test." Insolvency is generally presumed if the debtor

is not paying debts as they come due.

6. Limitations of Action/Statutes of Limitation.
In Virginia a creditor may generally bring an action for damages from fraud under Virginia Code § 55-80 (for transfers with the intent to hinder, delay or defraud) for two (2) years from the date the cause of action accrues under Virginia Code § 8.01-243(a). In the case of a donative transfer by an insolvent donor as described in Virginia Code § 55-81, a creditor may bring an action for damages from fraud for five (5) years from the date of the gift's recordation; or, if not recorded, within five (5) years from the time the transfer was or should have been discovered under Virginia Code § 8.01-253.

7. Federal Law.
The scope of this article does not permit any sort of detailed discussion of Federal bankruptcy law or Federal banking law, both of which have provisions forbidding fraudulent conveyance to defeat creditors' claims.

Suffice it to say that if fraudulent conveyance is proven, the bankruptcy discharge will be disallowed and the creditor will be free to pursue his lawsuit. In a recent case in Virginia, the court invoked the crime/fraud exception to the attorney-client privilege in a case where it found a prominent estate planning partner in a very reputable firm – a former chairman of the ABA Taxation section -- to have assisted in a fraudulent conveyance, disallowed the discharge in bankruptcy and caused the attorney to turn over his entire estate planning file, including his hand-written notes, to the creditor's attorney. It is not surprising that this led to a post-bankruptcy settlement between creditor and debtor. In re John Andrews, Memorandum Opinion, U.S. Bankr. E.D.VA., Adv. Pro. No. 93-1012, 7/8/96, and associated cases.

(ii) Foreign Law of Fraudulent Conveyance.
Modern fraudulent conveyance laws in English common jurisdictions, including Virginia, have their origin in 16th Century England, in the Statute of 13 Elizabeth (13 Elizabeth. Ch. 5 (1571)). Most common law jurisdictions have adopted either the Statute of Elizabeth or the concepts

embodied therein. However, while virtually all foreign jurisdictions (even non-common law) recognize the concept of fraudulent conveyances as against public policy and to some extent susceptible to nullification, the general British common law view of fraudulent conveyance is broader than the U.S. view, is that a conveyance may be set aside even if it defrauds only potential future creditors. (This serves as a counterpoint to permitting spendthrift trusts for the grantor.) See Re Butterworth (1882) 19 Ch.D. and Cadogan v. Cadogan (1977) All E.R. 200. However, a number of small island jurisdictions take a more narrow view of what is a fraudulent conveyance than do U.S. jurisdictions and use certain objective tests to cut off rights of certain parties alleging fraudulent conveyance. These jurisdictions have adopted since 1989 asset protection trust statutes.

For example, the law of the Bahamas permits allegedly defrauded creditors to assail a trust for only two years after the trust's creation. U.S. statutes of limitation are generally longer than those in offshore asset protection trust jurisdictions. It will normally take a creditor more than two years to find out the debtor has put any money in a Bahamian trust. The laws of the Cook Islands in the South Pacific (near New Zealand) and Nevis in the Caribbean permit creditors to allege fraudulent conveyance, but impose a criminal burden of proof -- beyond a reasonable doubt (prosecutors of O.J. Simpson for Nicole Simpson's murder and of George Zimmerman for Trayvon Martin's murder could not meet this burden) on the creditors to show that the trust was funded or established with principal intent to defraud that creditor and that the establishment of or disposition to the trust made the settlor insolvent or without property by which that creditor's claim (if successful) could have been satisfied. Nevis also requires every creditor initiating proceedings against a trust to deposit a $25,000 bond with the Ministry of Finance. Nevis law prohibits contingency fees and requires all legal proceedings to be undertaken by counsel licensed in Nevis. Nevis law is virtually identical to Cook Islands law. Interestingly SouthPac, one of the best known Cook Islands Trust Companies, also has a Nevis trust license and will serve as trustee of a Nevis trust, and the fees are cheaper than for a Cook Islands trust. And Nevis is not on any "watch" lists. Gibraltar has adopted legislation encouraging asset

preservation trusts of which the grantor may be a beneficiary, and permits no challenge after recordation of the fact of the trust by creditors alleged to have been defrauded so long as the grantor who established the trust was not insolvent immediately after the transfer to the trust. (However, to date only 27 APTs have been "registered" in Gibraltar, although many more have been created).

Asset preservation trusts, whereby the grantor irrevocably transfers assets to an independent fiduciary under the laws of the foreign jurisdiction, may be particularly immune from creditor claims of fraudulent conveyance. Foreign jurisdictions seek to establish a hospitable environment for asset protection trusts with U.S. and other foreign-domiciled grantors by enacting specific Asset Preservation Trust ("APT") legislation, the principal precepts of which may include:

1. allowance of recovery by a creditor only if the creditor's obligation existed at or before the time of the grantor's absolute disposition in trust;

2. creation of a malicious intent (to defeat creditors) test with respect to the debtor grantor;

3. elimination of the void ab initio concept with respect to the insolvent grantor's trust in favor of a voidable concept;

4. preservation of the rights of trustees and non-collusive beneficiaries to costs and benefits enjoyed in advance of a set-aside; provided, in the case of the trustee, that it acted prudently in establishing the solvency of the grantor; and

5. limitation of any set-aside to the amount of the debtor's disposition necessary to satisfy the obligation of the petitioning creditor.

In 1989 the Cook Islands adopted the world's first APT Statute. While it was apparently drafted by John McFadzien, then of SouthPac Trust (now practicing law on his own in the Cook Islands), many people believe (although Mr. McFadzien firmly denies it) with the assistance of or encouragement by Barry Engel, a prominent attorney of Colorado, specializing in offshore asset protection planning whom many credit with "inventing" this practice in the U.S. (Incidentally, at one time a substantial portion of

Barry Engel's firm's practice evolved into helping creditors attack offshore arrangements and eventually Ron Rudman left his firm, presumably recognizing the impossible conflict, to establish his own law firm specializing in representing creditors attacking offshore trust arrangements.) Since the Cook Islands first exploited the growing market for asset preservation spurred by the impact of U.S. recession and the U. S. tort award explosion, a number of foreign jurisdictions have adopted statutory schemes particularly tailored for asset preservation. Some are rather broad, others rather narrow. There are now more than 60 offshore jurisdictions which have adopted some sort of asset protection trust statute.

Examples: Cayman Islands, Bahamas, Bermuda, Gibraltar, Turks and Caicos Islands, Belize, Cyprus, Labuan, Nevis and Mauritius.

Numerous other jurisdictions are considering such legislation.

SUMMARY: The evaluation of the attractiveness of a situs as an asset preservation jurisdiction must take into account not only the existence of the three factors discussed above and whether, and to what extent, the jurisdiction has asset preservation trust legislation. One must also consider the general factors which make an offshore jurisdiction an attractive trust situs discussed in Section II. above. For instance, the Channel Islands, Jersey and Guernsey, and the Isle of Man have many general virtues as situses for asset protection trusts, but none of them has an asset protection trust statute. Perhaps perversely, some practitioners like to establish asset protection trusts in the Channel Islands or the Isle of Man for just that reason. If challenged, they are in a position to argue that they had no intent to defraud creditors, and as proof of their clean heart note that they could have established the trust in a jurisdiction with an asset protection trust statute, but chose not to. And specific consideration must be given to the type of liability sought to be avoided and the contemplated means of avoidance.

A February 6, 2006 article in the Wall Street Journal highlighted Singapore's almost overnight move into the stratosphere of offshore tax and trust havens, now being Credit Suisse's largest private banking center after Switzerland. Singapore serves as a tax haven for both Europeans fleeing the stricter tax regimes imposed by the EU and Asia's booming economy and demand for private banking services. In December 2004 Singapore adopted new trust laws permitting the avoidance of forced heirship regimes in other countries, such as EU jurisdictions. By 2004 over $50 billion was held in Singapore Trusts. See "Swiss Fight Against Tax Cheats Aids Singapore's Banking Quest," WSJ February 6, 2006.

Choose the jurisdiction considering the type of creditor sought to be avoided. For example, if avoidance of a forced heirship statute in the domiciliary jurisdiction is the motive, and assets are to be moved offshore for sophisticated management, Barbados, Bermuda or Jersey may be suitable. If the creditor to be avoided is a malpractice plaintiff and the asset to be preserved is a U.S. office building, the best strategy may be to put the office building into a U.S. family limited partnership with the grantor/debtor being a one

percent (1%) general partner with management authority and a Cook Islands or Nevis Trust having the ninety-nine percent (99%) limited partnership interest. Or pledge the U.S. real estate as collateral for a loan from the offshore bank trustee, and invest the borrowed capital in the offshore trust. An entrepreneur who has sold a business and has no current liabilities but wishes to protect himself from a "buyer's regret" lawsuit may want to put the proceeds of sale into a Bahamian or Gibraltar Trust.

Characteristics of the asset protection trust statutes of 10 offshore jurisdictions - Bahamas, Bermuda, Cayman Islands, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Liechtenstein and Nevis - are summarized in detail in Exhibit A to this outline, which was prepared by Duncan E. Osborne (President of the American College of Trust and Estate Counsel – ACTEC) and Mark E. Osborne and published as part of their handout for the Asset Protection Trust Planning program for ALI-ABA of April 17, 2013 in Scottsdale, Arizona's Seminar "Planning Techniques for Larger Estates" and is published with their consent. The full outline is available from ALI-ABA. The author of this outline gratefully expresses his appreciation to them for permitting him to use these materials. (deosborne@ohkdlaw.com, meosborne@ohkdlaw.com).

Please see also "Asset Protection and Jurisdiction Selection." by Duncan E. Osborne, 33rd Heckerline Institute on Estate Planning.

To reiterate, the selection of the "right" offshore jurisdiction in which to establish an asset protection trust in a given set of circumstances is an art, not a science. In practice, US professionals typically get comfortable with two or three jurisdictions, perhaps with different virtues, with their laws, their lawyers, their banks and trust companies, and use and re-use those jurisdictions, lawyers and banks, over and over. This pattern of usage is subject, however, to the point made above: the need to vary the jurisdiction based on the type of creditor being avoided.

NOTE: An Isle of Man lawyer predicted at a June 2009 conference that no more that twelve (12) offshore international financial centers will survive the current crackdown by the OECD and European and American governments. He predicted many weaker offshore jurisdictions may not survive as viable financial centers. So pick a jurisdiction you believe is strong enough to survive. The current economic crisis has empowered wealthy nations to accuse tax haven jurisdictions of undermining global financial transparency and stability (notwithstanding any evidence of a causal connection).

B. <u>How a Settlor Retains Elements of Control Over a Foreign Asset Protection Trust</u>.

Common sense tells us that no settlor of an offshore trust is going to completely give up control of that trust and the property in it. There are two principal mechanisms whereby the settlor maintains "control" over assets in an offshore asset protection trust.

(1) Letter of Wishes.

The Settlor or the Settlor's attorney will typically give the trustee of the Foreign asset protection trust a non-binding precatory letter of wishes which might crudely be paraphrased as follows:

> "Dear Trustee:
>
> While of course the trust which I have established is irrevocable and may not be amended or revoked by me, and recognizing, of course, that you have complete unfettered discretion to accumulate or distribute income or principal from time to time, and if you distribute it, you may or may not distribute any to me, nevertheless I thought you might find it helpful if I expressed to you in writing some thoughts I had on how you might administer the trust. Of course, my suggestions are precatory only, as you may do as you wish.
>
> a. Under no circumstances should you give a dollar to any alleged creditor of mine;
> b. If I do not have creditor problems, please give me whatever I want when I ask;
> c. If I have creditor problems, give me nothing, but provide for me and my family and pay our expenses.
> d. I may send you a new letter of wishes from time to time."

An example of an actual Letter of Wishes is attached as Exhibit 4. Alexander A. Bove, Jr. recently authored a useful article, "The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts?" published in the ACTEC Journal Volume 35, No. 1, Summer 2009. See article in STEP Journal September 2009 by Morven McMillan "Friend or Foe," considering the pros and cons of letters of wishes.

To Americans and American lawyers obsessed with enforceable contract rights, reliance on a precatory letter of wishes seems "loosey-goosey," but offshore bankers have a strong tradition of scrupulously honoring letters of wishes and their business is built on trust that they will do so.

(2) Trust Protector.

The Settlor will typically appoint in the document a trust protector with absolute authority to change trustees, change jurisdictions, and change governing trust law. Bluntly, if the trustee does not do what the Settlor wants, e.g., if the trustee fails to follow the letter of wishes, the Settlor will whisper in the protector's ear, and, lo and behold, a new trustee will be appointed. If a creditor claim arises in the U.S., it is probably best if the Protector is not in the U.S. so the trust should contain a mechanism to replace the U.S. Protector and appoint one

offshore in the event a U.S. claim looms on the horizon. Alexander Bove recently debunked "The Case Against the Trust Protector" in ACTEC Journal Vol. 37, Number 1, summer 2011. Also, "Solving the Mystery of the Trust Protector" by the same author in the September 2009 STEP Journal.

(3) Family Limited Partnership ("FLP") of Which Settlor is Managing Partner.

The Settlor may establish a FLP (or FLLP) to hold assets, retaining the 1% managing general partner's interest and all authority over the partnership and conveying to the foreign asset protection trust the 99% limited partnership interest. The Settlor then may convey to the FLP real estate, tangibles, cash, securities, etc.

If creditor problems loom on the horizon, the Settlor may first of all have normal creditor protection benefits of a partnership under U.S. law, i.e., a creditor's only remedy is a charging order, creditor gets partnership K-1 for partnership income interests with respect to which he has a charging order. As a second alternative, the Settlor as general partner will have authority to liquidate the FLP, leaving himself with a 1% interest in partnership assets as tenant in common with the foreign asset protection trust, which holds the other 99% interest in what had formerly been partnership assets as tenant in common. The portable assets representing 99% of what were formerly partnership assets may then be moved offshore into the direct control of the foreign Trustee. The Settlor may also resign in favor of a third party as managing general partner.

(4) Retained Powers Authorized by Statute.

As noted below in IV, Delaware and Alaska law expressly authorize certain powers to be retained by the Settlor without risk of forfeiting the asset protection features of the trust. Similarly, certain foreign jurisdictions expressly sanctioning foreign asset protection trusts authorize the Settlor to retain certain powers. For instance, Cook Islands law provides that a Settlor of an asset protection trust may retain (a) power to revoke, (b) power to appoint, (c) power to amend, (d) power to retain a beneficial interest, (e) power to remove or appoint trustees and trust protectors, (f) power to direct a trustee or protector on any matter.

(5) Domestic Trustee and Foreign Trustee.

One model has a U.S. Trustee, typically a non-beneficiary individual, family member, friend or attorney, as Co-Trustee with a Foreign Trustee, typically an institution, presumably on the assumption that the U.S. Settlor would appoint someone as U.S. Trustee over whom he felt he or she had more influence. However, the tax issues raised by having a U.S. Co-Trustee and the authority of

the U.S. Co-Trustee must be carefully considered.

(6) (a) Selection of Cooperative Trustee/Trust Protector.

Typically in an OAPT the U.S. Settlor appoints a party he completely trusts, not infrequently his attorney, as Trust Protector with power to discharge a trustee, move the trust to another jurisdiction, and hire a new trustee and adjust the law of the new jurisdiction as the governing law of the trust. If trouble looms in the horizon for the Settlor in the U.S., the Trust Protector should be outside of the U.S.

See Exhibit 3, *No U.S. Connections Allowed With An Offshore Trust? Wrong! Use Onshore Contacts*, by Frederick J. Tansill.

(b) For further control, the settlor may require the trustee to use an investment manager/asset custodial known to and trusted by the settlor.

(7) Tension Between Protection and Control.

It is worth recalling the truism of asset protection planning: the more control a Settlor retains, the more vulnerable is the trust to the Settlor's creditors. This principle resonates through all of the "bad" cases cited below.

C. Multiple Structures.

To further discourage potential future creditors, multiple foreign asset protection trusts may be established with different, more and less safe structures, in different jurisdictions with different laws, with different trustees. "Hot" liability attracting assets -- Lear Jets, office buildings -- may be segregated from each other and from liquid investment assets. Trusts may hold as "subsidiaries" corporations, LLCs and partnerships established under the same or different laws than the trust holding various assets and types of assets in different jurisdictions.

IV. COMPARISON OF FOREIGN ASSET PROTECTION TRUST TO TRUSTS ESTABLISHED UNDER DELAWARE OR ALASKA OR SIMILAR U.S. ASSET PROTECTION STATUTE

Recent legislation in Alaska and Delaware (1997) and, more recently, in Rhode Island and Nevada (1999), Utah and Oklahoma (effective 2004), Missouri and South Dakota (effective 2005), Wyoming (effective July 1, 2007) and Tennessee (effective July 1, 2007), New Hampshire (effective 2009), Hawaii (effective July 2011), Virginia (July 1, 2012) and Ohio (March 27, 2013) has modified two common law rules, the Statute of Elizabeth (regarding fraudulent conveyance) and the Rule Against Perpetuities. Undoubtedly more states are coming.

In the January 2012 issue of Trusts & Estates, David G. Worthington and Mark Merric evaluated 28 domestic jurisdictions for general appeal as potential situses for trusts, considering asset protection planning and many other characteristics, with a very helpful chart, "Which Situs is Best in 2012?"

NOTE: With fifteen of the fifty states (Shaftel counts one state – Colorado – which some other commentators do not) having passed trust statutes encouraging the protection of assets from prospective future creditors, it would seem to this author that public policy in the U.S. has shifted, at least slightly, in favor of debtor defendants, who might expect a more sympathetic hearing from judges than before this trend started in 1997. The trend will likely continue.

This trend should also cause lawyers who at one time believed that asset protection planning was "shady" to ask themselves this question: If 15 state legislatures and governors representing all areas of the country have effectively encouraged asset protection planning, how shady can it be? More than 30% of the states have officially sanctioned asset protection planning as appropriate public policy.

As previously noted, the Statute of Elizabeth (regarding fraudulent conveyance) is the source of modern fraudulent conveyance rules, and under the rule a creditor of a settlor of a trust may reach the trust property to the maximum extent that the trustee may distribute such property to the settlor. Most states limit the term of a trust so that it cannot continue to exist beyond 21 years after the death of the last individual in a designated class living at the inception of the trust.

The Alaska Law, effective April 2, 1997, is found in Alaska Statutes §§13.12.205(2)(A); 13.36.035(a)(c); 13.36.045(a)(2); 13.36.310; 13.36.390; 34.27.050(a)(3); 34.40.010.

The Delaware law, effective July 1, 1997, is found in Del. Code, Title 12, §§3570-3576, amended to repeal §3573(b) retroactively, and Title 25, §503(a). The current State of Delaware's asset protection trust statute is summarized and analyzed in detail in Part II hereof. Delaware's legislative history states that the aim of the statute is to "maintain Delaware's role as the most favored jurisdiction for the establishment of trusts." Delaware's law has been amended (and improved) almost annually to address areas of concern which have arisen based on experience with the statute.

One purpose of these 15 relatively new domestic statutes is to provide creditor protection for certain self-settled spendthrift trusts that permit purely discretionary income and principal distributions to the settlor.

Characteristics of the laws of all 15 U.S. jurisdictions are summarized in detail in Exhibit B to this outline, which was edited by David G. Shaftel of Anchorage, Alaska with contributions by lawyers in all 15 states, and is published with David's consent. (dshaftel@shaftellaw.com). The author of this outline gratefully expresses his

appreciation to David G. Shaftel and his contributors (who are listed) for permitting him to use these materials.

Wilmington Trust publishes an annually updated book, the latest Delaware Trust 2012 by Richard Nenno which is subtitled "Asset Protection: Domestic and International Law and Tactics," which also appears as a chapter in Duncan Osborne's and Elizabeth Schurig's treatise Asset Protection: Domestic and International Law and Tactics published by West, probably the best treatise in the asset protection area. (Mr. Nenno is taking a hiatus and is not publishing a 2013 edition.)

A. Irrevocable Trusts.

Both Delaware and Alaska asset protection trust statutes apply only to irrevocable trusts.

B. Retained Powers.

Both statutes provide that certain powers retained by the settlor will not cause the trust to be deemed revocable, including:

(1) a settlor's power to veto a distribution from the trust

(2) a testamentary special power of appointment or similar power

(3) a settlor's potential or actual receipt of a distribution of income, principal or both in the sole discretion of a trustee who is neither the settlor nor a related or subordinate party within the meaning of I.R.C. §672(a) (in the case of the Delaware statute) or in the discretion of a trustee who is someone other than the settlor (in the case of the Alaska statute).

(4) Alaska permits the Settlor to retain the rights (a) to income distributions of charitable remainder trusts in the DAPT, (b) to receive distributions from a GRAT or GRUT in the DAPT, (c) the right to use real estate held in a QPRT, (d) an interest in an IRA.

C. Specific Incorporation of State Law.

Both statutes require a trust instrument to expressly incorporate the relevant state law to govern the trust's validity, construction and administration.

D. Spendthrift/Anti-Alienation Provision.

Both statutes require a trust instrument to contain a spendthrift or anti-alienation provision.

E. Resident Trustee.

Both statutes require a resident trustee, either a natural person resident in the state or a bank or trust company authorized to act as a trustee in the state.

F. Administrative Activities in State.

Both statutes require that certain administrative activities be performed in the relevant state including:

(1) custody of some or all trust assets

(2) maintenance of trust records on an exclusive basis

(3) preparation or arrangement for preparation of fiduciary income tax returns; and

(4) other material participation in the administration of the trust.

G. Exceptions to Creditor Protection.

Both statutes generally prohibit legal actions against trust property that is subject to the statutes, with several exceptions.

(1) Fraudulent Conveyances. The asset protection trust statutes do not override the state's fraudulent conveyance statutes. Alaska's law has recently been amended to provide that a transfer may be set aside if the transfer has been proven to have been motivated by the intent to defraud a current or contemplated creditor, but it will NOT be sufficient to prove intent to hinder or delay, which are considered equivalent in general fraudulent conveyance statutes. Delaware law provides that the burden of proving fraudulent conveyance in connection with a Delaware asset protection trust is clear and convincing evidence.

As to pre-transfer creditors, actions must be brought within the later of (a) 4 years after the transfer was made, or (b) one year after the transfer is or reasonably could have been discovered by the creditor.

As to post-transfer creditors, actions must be brought within 4 years after the transfer in trust is made.

(Nevada has the shortest statute of limitations -- two years after the

transfer or, if later, 6 months after transfer reasonably should have been discovered. If the claim arose after the transfer, the two-year limit is absolute. As in Delaware, in Wyoming the creditor must prove fraud by clear and convincing evidence.)

(2) Child Support Claims. The Alaska (and Utah) statute provides that trust assets will not be protected from child support claims if, at the time of the transfer, the settlor was in default by 30 days or more in making child support payments, but otherwise such a trust can avoid child support claims that arise in the future, a surprising public policy for a "family values" state such as Utah?

The Delaware (and Rhode Island) statute also provides that trust assets will not be protected against child support claims, with no express requirement comparable to the Alaska/Utah requirement that the transferor be delinquent in payments at the time of the transfer. (Nevada has no spendthrift trust exception for child support.)

(3) Spousal Claims. The Delaware (and Rhode Island and Utah) statute excepts marital property divisions or distributions from protection, again with no express limitation to outstanding divisions or distributions at the time of the transfer to the trust.

Alaska (and Nevada) has no exception for spousal claims, but the surviving spouse's statutory right to elect against Settlor's Will might apply in Alaska to DAPT assets.

(4) Tort claims from Injuries Occurring On or Before the Date of Transfer to the Trust.

The Delaware statute does not insulate trust property from a person who suffers tort injuries (death, personal injury, or property damage) on or before the date of the transfer to the trust, in cases where the injury or damage is caused in whole or in part by an act or omission of the transferor or by someone for whom transferor is or was vicariously liable.

The Alaska statute does not have a comparable provision.

(5) Claims Arising from Reliance Upon the Settlor's Written Representation that Trust Assets Were Available to Satisfy Claims.

In original form, the Delaware statute provided that its creditor protection should not apply to any creditor who became a creditor of the settlor in reliance upon an express written statement that the trust property remained the settlor's property following the transfer and was available to satisfy any debt of the settlor to the creditor. As discussed below, this provision raised potential transfer tax problems. It has been repealed in a bill signed by Delaware Governor Carper on March 30, 1998.

The Alaska statute does not have a comparable provision.

NOTE: As with an offshore asset protection trust, pick your state in which to establish a DAPT based on the type of creditor and claim you are worried about.

H. Jurisdictional Issues.

The Alaska statute provides that for trusts qualifying for the statute's protections, Alaska courts will have exclusive jurisdiction over and will apply Alaska law in proceedings regarding the internal affairs of trusts.

The Delaware statute provides that for trusts qualifying for the statute's protections, no action can be brought to attach or otherwise reach trust property, and that Delaware will not enforce other state's judgments on such actions.

I. Transfer Tax Issues.

(1) Completed Gift: Whether a settlor makes a completed gift in funding a trust of which the settlor is a beneficiary depends upon: (i) the extent of the settlor's retained interest in the trust; and (ii) the extent to which the settlor's creditors can reach the trust property.

Purely discretionary interest in trust. If the settlor's only interest or power under a trust is to receive purely discretionary distributions of income or principal from a third party trustee, then the settlor's gift to the trust will be complete. Treas. Reg. §25.2511-2(b).

Creditor access to trust. To the extent the settlor's creditors can reach the trust assets because of the settlor's retained interest, then the gift will be incomplete.

> Where "...the [settlor] cannot require that the trust's assets be distributed to the [settlor] nor can the creditors of the [settlor] reach any of the trust's assets..." the settlor has parted with

dominion and control sufficient to have made a completed gift of the assets transferred to the trust." Rev. Rul. 77-378, 1977-2 C.B.347.

"If and when the [settlor's] dominion and control of the trust assets ceases, such as by the trustee's decision to move the situs of the trust to a state where the [settlor's] creditors cannot reach the trust's assets, then the gift is complete for federal gift tax purposes under the rules set forth in §25.2511-2 of the Regulations." Rev. Rul. 76-103, 1976-1 C.B.293.

Because under the common law rule of many states, as restated in the Restatement (Second) of Trusts §156(2), a settlor's creditors can reach trust property to the maximum extent that the trustees may distribute the property to the settlor, a settlor in those states will be deemed to have rights to the property within the meaning of I.R.C. §2511. See Outwin v. Commissioner, 76 T.C. 153(1981) and Paolozzi v. Commissioner, 23 T.C. 182(1954). This would be the result in Virginia by virtue of the law cited above.

(2) Removal of Assets from Estate.

(a) Avenues for Estate Inclusion.

1. I.R.C. §2036. I.R.C. §2036(a)(1) provides that a transferor's gross estate includes the value of any transferred property over which the transferor retained the right to possession, enjoyment or income for life or for a period not ascertainable without reference to the transferor's death. Does the discretionary power of a trustee to distribute income to the grantor create a potential rationale for the IRS to argue for including the assets of a Delaware or Alaska Trust in the grantor's taxable estate? Professor Jeffrey Pennell argues maybe yes. (Pennell, 2 Estate Planning, §§7.3.4.2 and 7.345 (Aspen 2003)) Mal Moore, on the other hand, argues that "the proponents of non-inclusion have the better part of the argument." ("Comments on Alaska/Delaware Trusts," Malcolm A. Moore, ALI-ABA Video Law Program, May 20, 1998.) Dick Covey is reported to agree with Mal Moore's position.

2. I.R.C.§2038. I.R.C. §2038(a)(1) provides that a transferor's gross estate includes the value of any transferred property over which the transferor, at the time of his death, had a power (in any capacity) to change the enjoyment, through a power to alter, amend, revoke or terminate.

(b) Cases and Rulings. A number of cases and rulings have been cited for the proposition that the transferred assets may be removed from the estate for estate tax purposes. See, e.g., Estate of German v. United States, 85-1 U.S.T.C. (CCH) ¶13,610 (Ct.Cl. 1985); Estate of Paxton v. Commissioner, 86 T.C. 785 (1986); Estate of Wells v. Commissioner, 42 T.C.M. (CCH) 1305 (1981); Estate of Skinner v. United States, 316 F.2d 517 (3d Cir. 1963); Estate of Uhl v. Commissioner, 241 F.2d 867 (7th Cir. 1957); Private Letter Ruling 9332006; Private Letter Ruling 8829030; Technical Advice Memorandum 8213004; Private Letter Ruling 8037116; Private Letter Ruling 7833062.

(c) Facts and Circumstances. Many of the above cited cases are clear in outcome if not always in reasoning. The courts looked at all facts and circumstances surrounding the creation and administration of the trusts. Facts and circumstances helpful to the desired estate tax result (exclusion of the trust assets from the estate) include: the absence of any pre-arrangement that all trust income be paid to the settlor; the absence in fact of payment of all trust income to settlor; the failure of the settlor to place all of his or her assets in the trust; and the reporting of the creation of the trust as a gift for gift tax purposes.

(d) Delaware Statute. The Delaware statute in its original form had a fatal transfer tax defect. Because Section 3572(b) originally allowed the transferor to make the transferred property subject to the claims of the transferor's creditors by means of an express written statement to that effect, this would appear to have prevented a completed gift and triggered includability under I.R.C. §2038(a)(1), as it would amount to a retained right to indirectly terminate the trust by giving creditors recourse to it for payment of claims. This problematic section has been repealed retroactive to the effective date of the Act.

David Shaftel in the article cited in the ACTEC Journal has a helpful analysis of the transfer tax issues.

(e) Recent Tax Developments in DAPT - - Estate Inclusions? The American Taxpayer Relief Act of 2012 (ATRA), setting the transfer tax exemption at $5,120,000 indexed for inflation ($5,250,000 in 2013), has focused renewed attention on whether it is possible to create a "Completed Gift Asset Protection Trust" in a domestic (DAPT) or offshore (OAPT) jurisdiction to accept a $5.25 million (or lesser) gift. The benefits, if they may be achieved, would be to permit a donor to put up to $5 million into an irrevocable self-settled spendthrift/asset protection trust which includes the settlor among the class of potential beneficiaries. The settlor donor would allocate gift tax exemption and, especially if establishing a perpetual trust, e.g., under Delaware Law, allocate GST exception, to the trust.

Under Revenue Ruling 77-378 it is possible to make a gift to such a trust which is a completed gift for federal gift tax purposes. See also PLR 9837007 relating to gifts to an Alaska Trust. This PLR found the transfer to such a DAPT with the settlor among the class of discretionary beneficiaries to be a completed gift for federal gift tax purposes, but expressly did <u>not</u> rule on whether the assets would be included in the settlor's estate for federal estate tax purposes.

Revenue Ruling 2004-64 indicated that applicable local law subjecting the trust assets to the claims of settlor's creditors may cause the inclusion of trust assets in the settlor's gross estate for federal estate trust purposes.

In a very interesting PLR 200944002 the settlor created an Alaska APT for a class of beneficiaries including himself. The PLR concurred with the above authorities that the gift was a completed gift, but also concluded that the trustee's discretionary authority to distribute income or principal to the settlor did not, by itself, cause the trust to be included in the settlor's estate under code section 2036 (a) (1). However, neither this PLR nor Revenue Ruling 2004-64 addressed whether Code Sections 2036 (a) (2) or 2038 will cause the inclusion of assets held in a self-settled DAPT in the settlor's estate for federal estate tax purposes.

All states that have DAPT statues other than Alaska and Nevada allow certain creditors to access the trust. Is this access fatal to the issue of estate inclusion, or do transfers to Alaska and Nevada DAPTs enjoy uniquely favorable tax treatment. Michael M. Gordon of Gordan, Fournaris & Mammarella, P.A. in Wilmington, Delaware argued in a paper presented to STEP (Society of Trust and Estate Practitioners) on June 1, 2011 that because of the doctrine of "acts of independent significance," Delaware (and other DAPT jurisdictions) should have as good an argument as Alaska and Nevada to estate exclusion.

Jonathan G. Blattmachr also argues (e.g. in a presentation made to Wells Fargo contacts attending a Washington DC forum in June 2011) that estate exclusion is possible for settlors of self-settled DAPTs with some creative drafting tips to help secure the goal.

Of course these analyses are motivated by the temptation/risk of giving away $5.25 million in 2013 but retaining potential access to it ... a Holy Grail if it may be achieved.

The tax problem with this objective is that there is no statuary authority, no case law, only a half-way helpful Revenue Ruling and some half-way helpful PLRs, all of which expressly refuse to hold that transfers to DAPTS of which the settlor is in the class of beneficiaries will not be included in the settlor's gross estate for the estate tax purposes.

(f) Recent Tax Developments in DAPTs -- Incomplete Gift to Non- Grantor Trust? Michael Gordon in the same STEP outline discussed above indicates possible means for a settlor to establish a DAPT which will be treated as a non-grantor trust for income tax purposes and as an incomplete gift for transfer tax purposes (DING Trust - - Delaware Incomplete Gift Non-Grantor Trust). The perceived opportunity is for domiciliaries of high income tax states, such as New York, New Jersey, Massachusetts and California, to minimize or avoid state income tax on assets held in Delaware APTs. The federal tax authorities are inconsistent and confusing, and one can only imagine the vigor with which tax-starved states with huge budget deficits would fight this attempt to avoid state income tax.

J. The Enforceability of Foreign Judgments.

(1) Jurisdiction of Out-of-State Courts.

(a) The Issue. Despite Alaska's statutory announcement of exclusive jurisdiction over self-settled spendthrift trusts created under its statute, and despite Delaware's statutory prohibition against actions attaching assets in self-settled spendthrift trusts created under its statute, can a non-Alaska or non-Delaware court obtain jurisdiction over the trust and decide the validity of the spendthrift provisions? For a thorough analysis of this and related jurisdictional issues, see Cannon, *The New Self-Settled Trust Statutes*, California Trusts and Estates Quarterly, Vol. 3, Number 4 (Winter 1997) and Giordani and Osborne, *Will the Alaska Trusts Work?* Journal of Asset Protection (September/October 1997).

(b) The Authorities.

1. Statutory extra-territorial impact. A state statute that purports to have extra-territorial impact outside of that state may not be effective to prevent another state from deciding a matter in which that state has an interest. See generally Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Alaska Packers Association v. Industrial Accident Commissioner of California, 294 U.S. 532 (1935); Tennessee Coal, Iron & Railroad Co. v. George, 233 U.S. 354 (1914). Hence, it is unclear that either the Alaska statute, which purports to give Alaska exclusive jurisdiction over trusts created under its statute, or the Delaware statute, which prohibits actions to attach or otherwise reach the property of a trust created under its statute, is effective to prevent another state from ruling on the validity of the trust spendthrift provisions when that other state has an interest in the trust and a basis for jurisdiction

over the trust.

2. Jurisdictional bases for non-Alaska or non-Delaware forum courts over Alaska or Delaware trusts.

(i) The due process clause of the 14th Amendment to the U.S. Constitution in general requires a forum court to have either personal jurisdiction over the trustee of the trust or in rem jurisdiction over the trust assets. See Hanson v. Denkla, 357 U.S. 235 (1958).

(ii) Presumably, so long as a trust has exclusively Alaska or Delaware trustees, those trustees have no contacts in the forum state, and all of the trust assets are held in Alaska or Delaware, a non-Alaska or non-Delaware forum state would fail to have jurisdiction over the trust. A national corporate trustee with offices in many states may effectively be subject to the jurisdiction of the courts of each of those states.

(iii) Note that a forum court that could legitimately exercise jurisdiction may decline to do so, either because the forum is not convenient or because the court does not want to interfere with the courts of another state.

(2) Conflicts of Laws.

(a) The issue: can a non-Alaska or non-Delaware forum court which has jurisdiction over the settlor of an Alaska or Delaware self-settled spendthrift trust created under one of these statutes, apply the law of the forum state rather than that of Delaware or Alaska? Consider In re Brooks, 1998 Bkrptcy, LEXIS 60, 1998 WL 30018 (B. Conn. 1998) discussed infra at VI under Conflict of Laws Issues. See the 2013 Washington State Bankruptcy court decision In Re Huber, discussed below.

(b) The Authorities.

1. As a general rule, a settlor of an inter vivos trust may create a spendthrift trust in another state and take advantage of that state's spendthrift trust laws. See Fratcher, Scott on Trusts §626 (1989) and Restatement (Second) of Conflict of Laws §273(b) (1971).

2. Note that the common law underlying the Scott and Restatement authority likely dealt with non-self-settled spendthrift trusts, as most states traditionally did not permit self-settled spendthrift trusts.

3. In at least one case, In re Portnoy, 201 B.R. 685 (S.D.N.Y. 1996), a U.S. court has ignored the foreign law (Jersey) incorporated into an offshore self-settled asset protection trust and instead applied New York law.

NOTE: There are dark clouds over DAPTS – There is no case law on critical Constitutional issues. However, with 11 states having such statutes and more on the way, full faith and credit and conflict of laws challenges are less likely in the future.

(3) Full Faith and Credit.

(a) The issue: if a non-Alaska or non-Delaware forum court which has jurisdiction over an Alaska or Delaware trust created under one of the statutes applies the forum state's own law and finds the spendthrift provisions invalid, must Alaska or Delaware recognize that judgment?

(b) The Authority.

1. The full faith and credit clause of Article IV of the U.S. Constitution requires that each state give full faith and credit to the judicial proceedings of every other state.

2. However, whether assets are exempt from the claims of creditors is determined by the law of the state where the assets are located. See Restatement (Second) of conflict of Laws §132 (1971). Therefore, when a creditor asks an Alaska or Delaware court to enforce a sister state judgment against the trust assets, the Alaska or Delaware court would use Alaska's or Delaware's exemption laws.

3. Note that in theory an Alaska or Delaware court could, under general conflicts of laws principles, decide that a sister state has a greater interest in the trust and apply that state's law, but query how likely this is given the clear legislative purposes of these statutes.

(4) "Supremacy Clause" Concerns.

Under the U.S. Constitution's Supremacy Clause, in Article VI, Section 2, federal courts are not bound by state laws. Accordingly there is a risk that if a judgment creditor is able to obtain jurisdiction over a judgment debtor or the debtor's assets in a DAPT by virtue of federal question jurisdiction or diversity jurisdiction, the creditor will have the opportunity to avoid the debtor-friendly provisions of the DAPT laws. The harsh provisions of the new federal bankruptcy laws discussed in K.(1)(a)(2) below are a particular threat to DAPTs.

(5) "Contract Clause" Concerns.

The Constitution prohibits states from enacting any law that impairs the obligation of contracts (in Article I, Section 10), and this clause was particularly intended to prevent states from enacting extensive debtor relief laws.

(6) Sham or Alter Ego.

A court outside the DAPT venue could invalidate the DAPT on the grounds that it is a "sham" or the "alter ego" of the Settlor, under legal precedents for such attacks.

K. Advantages and Disadvantages of Offshore Trusts Versus Alaska or Delaware Trusts.

(1) Advantages of Offshore Trusts.

(a) Legal.

1. Absence of full faith and credit. Some foreign jurisdictions will not honor judgments of United States courts, thereby forcing a creditor to relitigate its claims in the offshore jurisdiction. In contrast, Alaska and Delaware are required by the full faith and credit clause of Article IV of the U.S. Constitution to honor valid judgments of other states.

2. Shorter statutes of limitations for fraudulent conveyances. Some foreign jurisdictions have statutes of limitations for fraudulent conveyances of two years or less. In contrast, the Alaska and Delaware (and Utah and Rhode Island) statutes do not disturb the four year statutes of limitations for fraudulent conveyances generally applicable

in those states. The Nevada statute of limitations is two years. And generally these states have a "discovery exception" which allows a creditor to assert a fraudulent transfer attack after the expiration of the general statute of limitations for attacks "within one year (six months in Nevada) after the transfer was or could reasonably have been discovered by the claimant." But Alaska in 2003 adopted a statute that should curtail this exception and more certainly cut off claims four years after the transfer.

3. Offshore trusts are beyond the jurisdiction of U.S. bankruptcy courts and bankruptcy law. NOTE: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8) ("BAPCPA") substantially amended the Bankruptcy Code. Relevant to state asset protection trust statutes, the new Bankruptcy Act gives the bankruptcy trustees a 10 year look-back period in connection with alleged fraudulent transfers to self-settled trusts and "other similar devices," presumably including GRITS, GRATS, GRUTS, QPRTS, CRTS, and CLTS. Accordingly, whatever statute of limitation period Delaware, Alaska and other U.S. asset protection trusts jurisdictions adopt to limit challenges to the trust, the federal government has preempted state law with a federal 10-year statute of limitations. This development certainly damages U.S. APTs in a comparative analysis vis a vis offshore APTs, because U.S. courts would have to enforce the federal limit, while offshore courts might not.

Battley v. Mortensen, Adv. D. Alaska, No. A09-90036_DMD (2011). In this case in the U.S. Bankruptcy Court for Alaska, the judge set aside a transfer of real property to an Alaska asset protection trust as a fraudulent conveyance, even though the transferor Mortensen was solvent at the time of the transfer and even though Alaska's 4-year statute of limitations for reaching assets transferred to an Alaska asset protection trust had run. Needless to say the case has received a great deal of attention because of the cloud it casts over the effectiveness of DAPTs generally.

The Court applied the 10-year look-back rule and found intent to hinder, delay or defraud creditors.

A consolation and lesson taken from the case is that had Mortensen not voluntarily filed in bankruptcy, he would not have exposed himself to the federal 10-year look-back. So clients and planners should be cautioned over improvidently filing bankruptcy petitions when assets are protected by a DAPT.

In re Huber, 201 B.R. 685 (Bankr. W.D. Wash., May 17, 2013) is a very recent U.S. Bankruptcy Court decision which held that an Alaska self-settled trust essentially was invalid with respect to claims of the settlor's creditors in bankruptcy. See "Avoiding the Adverse Effects of Huber," by Jonathan D., Jonathan G., and Matthew D. Blattmachr, July 2013 Trusts & Estates.

The Court refused to apply Alaska law but instead applied the law of Washington, where the settlor lived, finding the contacts with Alaska so minimal and the contacts with Washington so substantial that Washington law applied. In Washington the Court found a strong public policy against self-settled spendthrift trusts.

The Court also permitted the bankruptcy trustee to invoke the 10-year look-back provision of Section 548(e)(1) of the Bankruptcy Code in light of the "badges of fraud." The Court also found under the authority of Bankruptcy Code Section 544 that transfers to the trust were invalid fraudulent conveyances under the state law of Washington.

Messrs. Blattmachr have elaborate suggestions for drafting and administering Alaska self-settled spendthrift trusts to avoid the result in Huber.

BAPCPA also limits generous "homestead" exemptions in Florida and Texas law to $125,000 if the debt in question arises from –

- violation of federal securities laws
- RICO civil penalties
- criminal acts
- intentional, willful or reckless torts
- misconduct causing serious bodily injury or death

But consider that many debtors do not file for bankruptcy, and do not need to, so the 10 year look-back rule in bankruptcy does not apply.

It is worth noting that Senator Schumer proposed an amendment to this Bankruptcy Act which would have imposed a limit of $125,000 on transfers to offshore or domestic asset protection trusts, but Senator Hatch of Utah, whose state has a new asset protection statute, opposed the amendment and it was defeated. This was a positive development for APTs, but especially for OAPTs.

4. Child support claims may not be avoided under certain circumstances in Delaware or Alaska, and spousal claims and certain tort claims may not be avoided in Delaware.

(b) Practical. A creditor's practical difficulties in both discovering the existence of a trust and its underlying assets and instituting legal proceedings against it are far greater with offshore trusts than with Alaska or Delaware trusts.

(2) Disadvantages of Offshore Trusts

(a) Concerns about economic stability of the selected jurisdiction.

(b) Concerns about political security of the selected jurisdiction.

(c) Substantial IRS-mandated reporting requirements for foreign trusts with U.S. beneficiaries.

(d) Cost vs. Benefit – It is probably not worth establishing an OAPT to hold less than $1-$2 million. The set-up and maintenance fees will be too expensive.

(e) With the IRS crackdown on tax fraud through OAPTs and the consequent elaborate reporting requirements by both settlors and trustees (FATCA), many offshore trust companies are wary of establishing trusts for US taxpayers, or refuse to, or if they will, must pass through in increased fees the cost of compliance with US

government reporting.

L. Potential Uses for Alaska or Delaware Self-Settled Spendthrift Trusts.

(1) Encourage Lifetime Gifting Programs. Although the transfer tax benefits of lifetime gifting programs are well documented, even very wealthy individuals may be reluctant to part with assets in the face of uncertain future needs. If it is possible for a donor to create an irrevocable trust, make a completed gift to the trust for gift and estate tax purposes, and nevertheless retain the possibility of receiving distributions from an independent trustee at the trustee's discretion in the event of financial need -- and this tax issue is not free from doubt -- this may help motivate the donor to make additional gifts in a more traditional fashion. If the donor becomes comfortable with the idea that this trust could be a safety net in the event of financial need, the donor may be less reluctant to make additional gifts for traditional estate planning purposes. If such a result becomes confirmed in tax law, Delaware and Alaska would have a very powerful attraction in offering the possibility of (a) transferring property out of the grantor's taxable estate, (b) while retaining the grantor as a discretionary beneficiary, (c) while protecting the assets from the grantor's creditors.

(2) Possible Coupling with Traditional Irrevocable Trusts. The statutes may prove useful not only with perpetual dynasty trusts but also with, for example, Crummey trusts, grantor retained annuity trusts after the annuity interest expires or charitable lead trusts after the charitable interest ends.

(3) Possible Legitimate Protection from Certain Future Creditors. Because the statutes permit a trust to be irrevocable but not necessarily a completed gift for gift tax purposes (when, for example, the settlor retains a limited testamentary power of appointment), these trusts could be used as asset protection vehicles apart from estate planning vehicles, subject to the general U.S. asset protection limitations discussed above. An individual seeking professional investment management may see a benefit to hiring a Delaware or Alaska corporate fiduciary to manage assets as trustee of an irrevocable trust, and obtaining possible protection from future creditors that would be unavailable were the individual's account managed outside of those states which have adopted DAPT statutes.

(4) Perpetual Duration. The fact that trusts may be established in Delaware and Alaska for perpetual duration offers an opportunity that even most offshore jurisdictions do not afford.

(5) For Foreigners. See page 70 below and the article by Mark Holden cited there.

(6) If a debtor in trouble has used a U.S. asset protection trust, he might consider moving to the state of trust situs in hopes of receiving a more sympathetic hearing from local judges.

M. Continuing Evolution of U.S. Asset Protection Statutes. It must be said that with the continuing evolution of DAPTs, each year new states adopting DAPT statutes more aggressively pro-debtor than those which have gone before and with older statutes constantly evolving to be more pro-debtor, more serious consideration should be given to DAPTs, particularly where offshore trusts are for whatever reason not to be considered. But the almost total lack of case law on the efficacy of DAPTs continues to discourage reliance on them where OAPTs may be used.

V. IS IT WISE FOR THE FOREIGN ASSET PROTECTION TRUST TO HAVE U.S. CONTACTS?

See Exhibit 3 attached, the author's article from the Journal of Asset Protection, May/June 1996, "No U.S. Connections Allowed With an Offshore Trust? Wrong! Use Onshore Contacts."

VI. HOW CREDITORS ATTACK FOREIGN ASSET PROTECTION TRUSTS AND THOSE WHO ESTABLISH THEM: HOW TO PROTECT AGAINST SUCH ATTACKS

As a preliminary matter keep in mind Gideon Rothschild's reassuring words in the June 16, 2005 ALI-ABA Program: "There never has been a successful seizure of assets held in an offshore asset protection trust." So far as the author is aware, that statement continues to be accurate.

U.S. creditors and U.S. courts are not without recourse when it comes to attacking offshore trusts and those who create, or seek to create, them. Interestingly, Ron Rudman, who with his partner in the law firm of Engel and Rudman invented the U.S. law practice of offshore asset protection trusts when they were involved with the drafting of the first such statute for the Cook Islands in 1989, later separated his practice from Engel and concentrated his practice on the representation of creditors seeking to recover assets offshore. He admitted that his livelihood depends on clients and lawyers who try to do effective offshore asset protection trust planning but either do not know how to or fail to attend to all details.

The following are some instructive case citations with brief comments. Notice that almost every celebrated case in this area reflects a combination of bad facts and terrible lawyering.

U.S. v. Matthewson, 93-1 U.S.T.C., CCH ¶ 50, 152, wherein the court injunctively

restrained the defendant from leaving the U.S., in effect holding him under "house arrest" in the U.S. to keep him from moving himself and his assets to the Caymans. He owed $5 million in back taxes to the I.R.S. The Court upheld a writ of Ne Exeat Republica, which Latin scholars will recognize as a writ to detain a resident from leaving the U.S. to enable the Government to have discovery, both on issues of liability and with respect to the location, value and legal status of taxpayer property.

Securities and Exchange Commission v. Giuseppe B. Tone, et al. and Certain Purchasers of the Common Stock of St. Joe Minerals, 638 F. Supp. 596 (S.D.N.Y. 1986), aff'd 638 F. Supp. 629 (2d Cir. 1987), and S.E.C. v. Certain Unknown Purchasers of Common Stock of Santa Fe Resources, Fed. Sec. L. Rep. (CCH) p. 99, 424 (1983), and S.E.C. v. French, et al., 817 F.2d 1018 (2d Cir. 1987). These are related cases wherein a federal judge ordered that all accounts held by a Swiss bank in the U.S. be frozen pending disclosure of information from the Swiss bank. The judge also ordered substantial daily fines pending disclosure of the information.

S.E.C. v. Levine, 1986 U.S. Dist. LEXIS 24576; Hercules Incorporated v. Leu Trust and Banking Limited, a Bahamian Corporation, and Bank Leu, a Swiss Corporation, 611 A.2d 476 (Del. 1992); and Litton Industries, Inc. V. Dennis Levine, et al., 767 F. Supp. 1220 (S.D.N.Y. 1991). American authorities were able to persuade the American branch of a Swiss bank parent corporation to provide information on Mr. Levine's large bank account with a Bahamian subsidiary of the Swiss bank, notwithstanding Bahamian bank secrecy law.

U.S. v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984). The Miami branch of the Bank of Nova Scotia suffered daily fines of $25,000 pending receipt of information from the Bahamian branch of the same bank. The Miami branch cooperated.

Orange Grove, in the High Court of the Cook Islands. In this case in which Barry Engel characterized the decision as an example of "bad facts make bad law," creditors obtained a California judgment against a debtor and made an application in the Cook Islands for a Mareva Injunction (which is like a Temporary Restraining Order in the U.S.) to restrain parties from removing the administration of the trust and any property from the jurisdiction of the Cook Islands. The Court granted a temporary Mareva Injunction. The initial Mareva Injunction was set aside as not having been brought timely. On appeal the Mareva Injunction was reinstated and the creditors were permitted to proceed against the international trust. The Court made a controversial ruling on when the creditors' cause of action accrued for purposes of determining the statute of limitation, after which, a Cook Islands trust cannot be assailed.

The creditors were still left with the burden of proving beyond a reasonable doubt that the trust was created with intent to defraud them.

The funding of the trust left the settlors insolvent.

Barry Engel pledged to amend Cook Islands law to clarify the issue which he believed the Court misconstrued, but I am not sure whether that has ever happened.

Brown v. Higashi, U.S. Bankr. Court for the District of Alaska, No. 95-3072 (1996). The bankrupt had set up an offshore trust in Belize. The case considered whether the assets in the offshore trust were included in the debtor's bankruptcy estate. The Court concluded that the trust was a sham, and the assets of the trust were found to be part of the bankrupt's estate. This was another case with very bad facts for the bankrupt.

In re Portnoy, 201 Bankr. 685, 1996 Bankr. LEXIS 1392. The debtor Portnoy transferred virtually all of his assets into an irrevocable offshore trust in Jersey at a time when he knew his personal guaranty was about to be called. The party to whom the guaranty was given brought a New York lawsuit against Portnoy. Portnoy was the "principal beneficiary" of the trust. The Court cited numerous occasions on which Portnoy and his wife were not truthful or credible in their dealings with creditors and the Court. These facts were viewed by the Court as being indicia that Portnoy was intentionally attempting to hinder and delay his creditors. The Court denied his discharge in bankruptcy. There is no indication that the creditors ever pursued the assets in Jersey. See also in re Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998).

Grupo Torras, S.A. v. S.F.M. Al-Sabh, Chemical Bank & Trust (Bahamas) and Private Trust Corp., (Sawyer, J.) (Sup. Ct. of the Bahamas, Sept. 1, 1995). Kuwaiti Sheikh Fahad obtained assets through illegal means and then transferred those assets to Bahamian trusts. Creditors sought to set aside the transfers to these trusts. The Court emphasized that the protections to a settlor made available through the use of Bahamian trusts would not apply to assets that the settlor did not legitimately own at the time of the transfer to trust.

In a recent outline on "international asset recovery" Ronald L. Rudman makes the following observation:

"In cases involving claims brought against American settlors or debtors, there may be no necessity to resort to foreign courts in the event the planner and settlor have selected a major international bank as the trustee of the trust or the depository for trust assets. This is due to the increasingly extraterritorial reach of the U.S. courts. A growing body of law in the United States now clearly provides that a foreign parent or affiliate of a bank or other entity operating within the U.S. must disclose any information in its possession outside of the United States, pursuant to a U.S. court proceeding, even if such disclosure would constitute a criminal violation of the confidentiality or other laws of the foreign parent or affiliate's domicile. This is true even though the domestic U.S. entity is not even a party to the subject litigation. This trend creates the potential for extension to

the compulsion of further acts, beyond the mere disclosures of information."

He cites Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522, 107 S. Ct. 2542 (1987), United States v. First National City Bank, 379 U.S. 378 (1965), United States v. Vetco, 691 F.[2d] 1281 (9th Cir. 1981), and Richmark v. Timber Falling Consultants, 959 F.[2d] 1476, in addition to United States v. Bank of Nova Scotia, cited above.

Conflict of Laws Issues.

Offshore trusts denominate the law of the trust's domicile as governing the interpretation and administration of the trust. Such a provision may not be given effect by courts of other jurisdictions, or even courts of the trust's domicile, with respect to issues relating to the funding of the trust, particularly where fraudulent conveyance is alleged. The Hague Convention dealing with the recognition of foreign trusts treats the funding of the trust as a preliminary matter outside the scope of the Convention and therefore a matter of local law.

In the U.S., courts hearing a creditor claim will apply public policy tests to apply the law least offensive to U.S. public policy, which will invariably be U.S. law. In Dearing v. McKinnon Dash & Hardware Co., 165 N.Y. 78, 58 N.E. 773 (1900), the New York court stated:

"Judicial comity does not require us to enforce any clause of the [trust] instrument, which even if valid under the lex domicili, conflicts with the policy of our state relating to property within its borders, or impairs the rights or remedies of domestic creditors ..."

In a very recent case, In re Brooks, 1998 Bkrptcy., LEXIS 60, 1998 WL 35018 (C. Conn. 1998), the Connecticut bankruptcy court held that certain assets transferred by the debtor to his wife, which she in turn transferred to offshore trusts, naming the debtor as the beneficiary, were property of the debtor's bankruptcy estate. In 1990, in an alleged estate planning exercise, debtor transferred corporate stock certificates to his wife who, within days, transferred them to offshore trusts in Jersey (Channel Islands) and Bermuda. The trusts designated Jersey and Bermuda law as controlling, contained spendthrift clauses and named the debtor sole beneficiary. In 1991 an involuntary Chapter 7 bankruptcy petition was filed against debtor, which was converted to a Chapter 11.

The court concluded that the trusts were self-settled by the debtor. The court dismissed the ideas that the wife settled the trusts and that they were motivated by estate planning considerations, not asset protection. The wife was viewed as debtor's agent in a scheme to protect the assets from creditors but leave the debtor with the income.

Importantly, the court determined the enforceability of the spendthrift provision

under Connecticut law and found that Connecticut law did not acknowledge the validity of self-settled spendthrift trusts. Should the court have applied Jersey and Bermuda law, which recognize self-settled spendthrift trusts? Would a Connecticut court take a similar view of Delaware or Alaska self-settled spendthrift trusts? Were the facts just too bad?

One may not even assume the law of the situs of real estate will govern where fraudulent conveyance is alleged. In James v. Powell, 19 N.Y. 2d 249, 225 N.E. 2d 741 (1967) a New York court warned that "if, in exploring the law of Puerto Rico [regarding the transfer of land situated in Puerto Rico], it were to be found that it was specifically designed to thwart public policy of other states ... by denying a remedy to all judgment creditors ... in order to attract foreign investment in real estate, the courts of this State would be privileged to apply the law of New York rather than that of Puerto Rico."

As noted above in citing In re Portnoy, the bankruptcy courts will apply a similar standard. In Hong Kong and Shanghai Banking Corp., Ltd. v. HFH USA Corp., 805 F. Supp 133 at 140 (W.D.N.Y. 1992), a Federal District Court applied the law most favorable to the creditor, remarking that a choice of law provision "will not be regarded where it would operate to the detriment of strangers to the agreement, such as creditors or lienholders." See also Broadcasting Rights Int'l Corp. V. Societe du Tour de France, 675 F. Supp. 1439 (S.D.N.Y. 1987), Carlson v. Tandy Computer Leasing, 803 F.[2d] 391 (8th Cir. 1986) and Ferrari v. Barclays Business Credit (In re Morse Tool, Inc.), 108 B.R. 384 (Bankr. D. Mass. 1989).

The Anderson Case and Its Progeny.

Federal Trade Commission v. Affordable Media, LLC, and Denyse and Michael Anderson, 179 Fd 1228 (9th Cir., 1999) (commonly referred to as the "Anderson" case), is a very important case for the lawyer practicing in the area of asset protection planning and the client considering implementing an asset protection strategy.

In 1995 Mr. and Mrs. Anderson established an irrevocable Cook Islands trust, with Asiaciti Trust Limited as the foreign situs trustee. The original beneficiaries of the trust were their children, but some six months after establishing the trust the Andersons were added as beneficiaries. This was their first major mistake. The Andersons initially served as co-trustee and as trust protector. This was their second major mistake. The trust contained "event of duress provisions." According to the General Manager of Asiaciti Trust, it conducted "its usual due diligence procedures to ensure that the property being settled on the trust was neither the result of a fraudulent conveyance nor derived from any illegal activity." (See Anderson Case - The Offshore Trustee's Perspective, by Adrian L. Taylor, Esq., in the May/June 2000 issue of the Journal of Asset Protection, hereinafter cited as "Mr. Taylor's article."

The property settled in the trust included a nominal amount of cash and a 98%

interest in a U.S. corporation, The Anderson Family LLC (Anderson LLC). Anderson LLC carried on business in the U.S. as a telemarketer. From 1995 through May 1997 Anderson LLC made regular distributions to the trust in accordance with the operating agreement.

Sometime after April 1997, two years after the Cook Islands trust was created, Mr. and Mrs. Anderson became involved in a telemarketing venture that offered investors the "opportunity" to invest in $5,000 "media units," each of which consisted of 201 commercials to be aired on late night television. Investors were to receive a share of each product sold as a consequence of the commercials composing their media units, and extraordinary returns were described. In fact, the investments were simply a Ponzi scheme. According to the FTC, in its enforcement action brought in April of 1998, investors lost some $13 million and the Andersons pocketed $6.3 million in commissions. Further distributions to the Cook Islands Trust were made by Anderson LLC from June 1997 to February 1998 and it is these later distributions that the FCC challenged, for in April 1998 the FTC obtained an ex parte temporary restraining order (TRO) against the Andersons. The TRO had the effect of freezing all assets owned by the Andersons and required the Andersons to repatriate to the U.S. all assets held by them outside of the U.S. A federal district court incorporated the terms of the TRO into a preliminary injunction in May 1998, prior to any judgment in regard to the alleged wrongdoing against the Andersons, and through the end of 1999, according to Mr. Taylor's article, no judgment had been entered against the Andersons.

The Andersons faxed the TRO/Preliminary Injunction to Asiaciti Trust demanding repatriation as required. In May 1998 Asiaciti Trust, on advice of counsel, refused because --

- the TRO constituted "duress" under the terms of the trust;

- under the trust duress automatically triggered removal of the Andersons as trustees, leaving Asiaciti Trust the sole trust;

- because the Andersons' children were also beneficiaries, Asiaciti refused to disburse, viewing its responsibilities as running impartially to all beneficiaries. The District Court ordered the incarceration of the Andersons for civil contempt in June, 1998, rejecting their defense of impossibility of performance. The Andersons appealed, and their appeal from the finding of civil contempt was the issue before the 9th Circuit. The Court of Appeals affirmed the District Court.

The Court of Appeals described three issues for its review of the contempt finding: 1) it reviewed the civil contempt order for abuse of discretion; 2) it reviewed the trial court's findings of fact for clear error; and 3) it reviewed the trial court's rejection of an impossibility defense proffered by the Andersons for clear error. The third issue was

pivotal and the Court of Appeals held that the defendants had not satisfied their burden of proving the affirmative defense.

The court cited precedent that stated that the party claiming impossibility as a defense to civil contempt must show "categorically and in detail" the nature of the alleged impossibility. The appellate court cited the fact that the Andersons were protectors of their own trust, standing alone, as an appropriate basis for a finding that they had not satisfied their burden of proof, and the West Publishing key number system cites the case under "Trusts key number 153" for the proposition that "A protector of an offshore trust can be compelled to exercise control over the trust to repatriate assets if the protector's powers are not drafted solely as the negative powers to veto trustee decisions or if the protector's powers are not subject to the anti-duress provisions of the trust." But the court's holding extends beyond that relatively narrow issue of drafting.

The court held that in the asset protection context, the burden of proof for the party asserting the impossibility defense is "particularly high," at least in part because of what the court characterized as a "likelihood" that any attempted compliance with court orders will be a mere charade. Together, the requirement that impossibility be proved "categorically and in detail" and the "particularly high" burden of proof give a trial court considerable latitude in which to reject the impossibility defense. Because of the limited ability of parties to appeal a trial court's finding of fact, assuming the trial court applied the correct standard, beneficiaries of offshore protection trusts may have considerable difficulty in avoiding contempt, at least in the 9th Circuit, even if the trust avoids the particular drafting pitfalls present in the Anderson case.

Although arguably *dicta*, the Court of Appeals expressed "skepticism" that a rational person would send millions of dollars overseas and retain absolutely no control over the assets, and it cited the fact that the Andersons were able to obtain approximately $1 million to pay taxes as evidence that they retained some measure of control.

In *dicta*, the court went considerably further and speculated that a "self-induced" impossibility might not be a defense at all. Although it left that "more difficult question" for another day, because it was able to dispose of the appeal on the grounds that the defendants had not met their burden of proof, the court suggested that it would not regard such self-induced impossibility to be a defense. Obviously, such a finding would vitiate one of the key defense strategies touted for offshore asset protection planning.

Three points should be noted. First, the fact that the Andersons established their offshore asset protection trust approximately two years before the conduct that gave rise to the claim against them and the fact that the court does not mention any evidence suggesting that the creation of the trust otherwise made them insolvent indicates that conventional fraudulent conveyance theory played <u>no</u> part, explicit or implicit, in the outcome. Second, building on the court's analysis regarding payment by the trust of the

Andersons' tax liability, so long as the judgment creditor could show evidence of payments for the benefit of the judgment debtor after the event of duress, it would seem that a trial court could always find evidence tending to refute the affirmative defense of impossibility that would justify a finding that the proponent of the defense failed to meet his burden of proof. Thirdly, it was a mistake for the Andersons (or anyone under their control) to serve as Trustee or Protector, and it gave a bad flavor to the facts that the Andersons themselves were added as beneficiaries after the trust was executed.

Subsequently the Andersons were released from jail on the condition that they would appoint a new trustee and new protector of the Cook Islands trust. They attempted to do so. However, the Cook Islands High Court refused to recognize the Anderson's appointed -- and FTC-controlled -- trustee and protector. (See Butterworths International Trust and Estate Law Reports at 2 ITELR 482.) The Court's rejection of the new trustee was mandatory under the terms of the trust documents. The High Court determined that the FTC was an "excluded person" and therefore its nominee was also. Undoubtedly at least in part because of the High Court decision in the Cook Islands, and upon motion of the FTC, the preliminary injunction was amended to keep funds under the control of the foreign court except for the payment of legal fees and administrative costs. Additionally, the registrar of the High Court of the Cook Islands was made a signatory on the trust account.

The FTC also initiated proceedings in the Cook Islands, but ruling that the statute of limitations under Cook Islands law had expired, the FTC was denied recourse and assessed costs. The FTC appealed again, and High Court in the Cook Islands in December of 2001, following English common law, refused to enforce what it considered a "penal" law of the U.S., which was the basis of a monetary judgment against Settlors for false representations and deceptive practices under the FTC Act. Interestingly, the Court cited two U.S. cases in support. It is understood that a settlement has recently been reached in the Anderson case for $4 million.

Summary

Although the procedural posture of the Anderson case somewhat limits the actual holding, both the District Court and the Court of Appeals demonstrated considerable antipathy to offshore asset protection planning. In its holding, the court stated that the burden of proof to assert impossibility as a defense to civil contempt is "particularly high" in asset protection cases and found that the defendants failed to meet it. In dicta, the court challenges the fundamental premises of asset protection planning by suggesting that an impossibility defense to a charge of civil contempt (for failure to repatriate assets held overseas) may be unavailable when the alleged impossibility is "self-induced," and the court's opinion expresses skepticism generally about allegations of impossibility.

Cases Subsequent to Anderson.

Two cases in 2000 purportedly follow Anderson--one in the 8th Circuit and one in the 11th. Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing, 207 F.3d 500 (8th Cir. 2000) cites Anderson for the proposition that a party asserting an inability to comply with a court order as a defense to civil contempt must show (1) "categorically and in detail" the nature of the inability and (2) the inability must not be self-induced. The court cited a line of cases from 1991 and earlier for the second proposition, e.g., In Re Power Recovery Systems, Inc., 950 F.2d 768 (1st Cir. 1991), at 803. Chicago Truck Drivers Union is not an asset protection planning case; rather the judgment debtor was basically arguing that he could not pay because he spent all the money.

The second case in 2000 citing Anderson is an asset protection planning case. In In Re Lawrence, 238 B.R. 498 (U.S. Bankruptcy Ct., S.D. Florida 1999) the debtor failed to comply with a "Turnover Order" entered by the court and the Trustee sought civil contempt. Much like the Anderson case, the trust -- in this case a Mauritian Trust -- appears to have been inartfully drafted, and the debtor was apparently as bad a witness as it is possible to imagine, so the case is not one that the asset protection planning bar would choose to showcase. The court characterized Mr. Lawrence's sworn testimony as "shockingly less than candid." That said, the court found that the debtor failed to carry his burden of proof regarding impossibility and it expressly based its finding on the entire record, including the court's refusal to believe that the debtor would give up control over 90% of his liquid assets to a stranger on the far side of the earth. The court cites Anderson for the "particularly high" burden of proof in such cases and Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510 (11th Cir. 1986) for the proposition that impossibility is not recognized when the impossibility is self created. *The court appears to hold as a matter of law that impossibility is unavailable because the trust was the debtor's own, voluntary creation. Lawrence, at 501.* In this case the court hammered the debtor--$10,000/day fine (beginning immediately) and incarceration in approximately two weeks if he did not turn the money over. Unlike Anderson, the bankruptcy context does not appear to leave any question as to the substantive merits of the underlying "turnover order." Mr. Lawrence's most obvious problem with the Court was that the Court concluded that he systematically and shamelessly lied throughout the proceedings. So far as the author has been able to determine, there has been no recovery of assets by creditors from Mr. Lawrence's Trust in Mauritius. However, Mr. Lawrence apparently spent at least 27 months in jail for contempt, and may still be there. See Lawrence v. Goldberg, 279 F.3rd 1294 (11th Cir. 2002).

The July 2004 issue of Trusts & Estates contained a very interesting article by Wendy Davis on "Asset Protection's Bad Boy," who is this Stephen Jay Lawrence. He has been in jail for contempt of court in a bankruptcy case because of planning he did involving a Mauritius asset protection trust he created and funded with $7 million in 1991, Bear Sterns obtaining a $20 million judgment against him in 1991. Lawrence

battled against the judgment until 1997 when he filed for bankruptcy. In 1993 he had amended the trust to add a "duress" clause, directing the Trustee to ignore all instruction from him made under coercion, including "from a process of law for the benefit of his creditors." In 2002 the Eleventh Circuit Court of Appeal ruled Lawrence's "impossibility of performance" defense to contempt of court findings for not repatriating the trust was invalid, because he created the impossibility when he amended the trust. All courts involved in his case also expressed the belief that he could repatriate the funds if he wished to.

He apparently is relying on the Elizabeth Morgan precedent that he will eventually be released. Elizabeth Morgan went to jail for years for hiding her daughter (in New Zealand it turned out) in a child custody dispute case.

The article's author quotes a critic of offshore trusts, Jay Adkisson, as reporting that about six contempt cases in OAPTs have gotten to court in the U.S. and "no court has ever denied to hold a debtor in contempt for [ignoring] a repatriation order. Creditors are batting 1,000." Contrast this with Gideon Rothschild's quote on page 44. This is a classic example of the adage that the glass is either half full or half empty depending on your perspective. This is frankly an anomaly: there are many harsh US judicial decisions attacking offshore asset protection trusts, but in no case has there been a recovery from the offshore trust by the US creditor except by voluntary settlement with the debtor. Consequently it may be said that even fraudulent transfers to offshore asset protection trusts "work."

MOST RECENT CASES

The Brennan Case

Robert Brennan, who frequently appeared in TV ads for his brokerage firm, First Jersey Securities, in the 1980's, has had ongoing legal battles with the SEC and other federal and state regulators for more than a decade. The SEC has charged him with fraud civilly and criminally and has attempted to have him held in contempt. The U.S. Government has admitted to spending over $1 million in costs in its effort to trace any attempt to recover $45 million Brennan allegedly transferred to offshore trusts and "various tax havens."

The first SEC action for fraud was filed in 1985, and after trial in 1994 it obtained a judgment against Brennan in the amount of $75 million. In 1993-1995 Brennan established three offshore trusts in Gibraltar with a total value of some $25 million. Brennan's sons and his charitable foundation were beneficiaries of the trusts. Brennan himself has a reversion after 10 years, or later if the Trustee determines. Under the flight clause the trust was subsequently moved first to Mauritius, then to Nevis.

Brennan's bankruptcy trustee has filed suit in Nevis, so far without success.

In 2000 state and federal prosecutors brought criminal fraud charges against Brennan, for which he went to trial in 2001. The charges were bankruptcy fraud and theft, money laundering and obstruction of justice. He was convicted and was given a five-year sentence without parole and the obligation to make $4.6 million in restitution payments.

Brennan's lawyers have denied fraud in the establishment of the trusts, defending them as legitimate estate planning devices in light of Brennan's family circumstances.

An interesting feature of the Brennan case was the cooperation received by the U.S. attorney prosecuting the case from Isle of Man authorities, who were described by the prosecutor as "quite helpful." A Manx court ordered Peter Bond, who managed Brennan's offshore companies through Valmet in the Isle of Man, to give evidence. His testimony in a New Jersey courtroom helped convict Brennan. The Bank of Scotland, which claimed it was an "unwilling conduit" for the sale of $4 million in hidden bearer bonds by Brennan, also cooperated with prosecutors.

On the other hand, in 2000 a U.S. federal appeals court held that one of Brennan's overseas asset protection trusts could not be invaded by creditors, and a jury failed to convict him on another count of bankruptcy fraud relating to his failure to disclose over $500,000 of Mirage casino chips. Brennan has apparently agreed to repatriate another $20 million in a Gibraltar asset protection trust, but that agreement may or may not be approved by a Gibraltar court. The author understands that this case has recently settled under confidential terms and that most of Brennan's secreted assets remain protected offshore.

At least three important points should be gleaned from Brennan and Anderson: (1) all bets are off if the creditor sought to be avoided is the U.S. government, and most bets are off if the creditor is a powerful and motivated corporate entity, like a U.S. bank, as in the Weese case cited below. These have resources, tenacity and influence other creditors do not; and (2) even in those cases, the government's vast efforts apparently did not yield complete recovery, so the Trusts "worked," at least to some extent, as the debtors hoped; and (3) bad facts made "bad law" in all of these cases.

Other Cases

In Re Coker, 251 B.R. 902 (Bankr. M.D. Fla. 2000). Prior to filing bankruptcy Cokers established an OAPT. The Court ruled that OAPT funds should be turned over to trustee. Cokers cite impossibility. Citing Lawrence and Affordable Media (Anderson) the court held the Cokers could not use the defense of impossibility when the impossibility was self-created. Debtors held in contempt. (The creation of the OAPT was done at the "11th Hour.")

SEC v. Bilzerian, 112 F. Supp. 2d.12 (DC 2000). Mr. Bilzerian was convicted of

securities fraud and conspiracy to defraud the U.S. SEC filed civil suit, obtained judgment and an order in 1993 forcing Bilzerian to disgorge $33 million. Two years after disgorgement order he established a Cook Islands Trust and transferred $15 million to it. He was a beneficiary but removed as beneficiary by trust protector in 1998. He argued "financial inability" to meet the disgorgement order. The court held Mr. Bilzerian to an "especially high" standard in his impossibility defense. When he failed to provide the court with a copy of the trust, the court questioned whether he held an indirect beneficial interest. The District Court found him in contempt and incarcerated him. The trust was not repatriated.

Eulich v. U.S. (N.D. Tax Case No. 99-CV-01843, August 18, 2004) In the early 1990s Mr. Eulich established an OAPT in The Bahamas with $100 million (possibly to avoid U.S. taxes). IRS asked for information, he said he could not obtain information. Court refused to accept impossibility as a defense because it was self created and required the Settlor to sue for the information in Bahamian Courts. Eventually fine of $10,000/day imposed for failure to produce documents.

Federal Trade Commission v. Ameridebt, 373 F. Supp. 2d 558 (D. Md. 2005) There was an FTC investigation of Ameridebt and Mr. Pukke, its controlling shareholder, for allegedly defrauding consumers. After learning of the FTC investigation in 2002, Pukke made transfers to friends and relatives and established trusts in Delaware, Nevis and Cook Islands. Court required defendants to turn over assets to a receiver during pendency of investigation to avoid prejudicing FTC's ability to recover. A federal district court stated that plaintiff FTC could move for contempt if the defendant failed to comply with a repatriation order, allowing that the defendant would be free to argue an impossibility defense.

U.S. v. Grant, 2013 WL 1729380 (S.D. Fla. April 22, 2013). In this case, an 84-year-old widow was held in contempt for receiving money indirectly from her offshore trusts in Bermuda and Jersey while she was subject to a US tax deficiency. Each trust provided for the annual payment of trust income to her. Before he died, she and her husband had incurred a $36 million tax liability to the IRS. The IRS doggedly pursued her and her trusts without success until it discovered that trust funds were flowing through US bank accounts of her children to fund her living expenses. The court found her in contempt and ordered her to request and turn over income distributions from the trusts, forbidding anyone in her family from communicating to the trustee that her requests for distributions were made under duress.

This case reaffirms two realities: (1) even the IRS cannot get at offshore trust assets directly; and (2) that the US federal government is a "super creditor" with powers to compel payments that no other creditors have.

Morris v. Wroble, Case No. CIV-06-80479 (S.D. Fla.) aff'd. Appeal No. 06-80452-CV-

DTKH (11th Cir. Nov. 16, 2006) Mrs. Morris executed a post-nuptial agreement with her husband which provided for a $1.5 million payment and contained an non-contestability clause providing that she would forfeit the payment if she ever contested the agreement. In 2001 they divorced, and she received a $1.5 million payment. In 2003 she brought an action which she claimed was not a contest, but the court determined it was a contest and ordered her to repay $1.5 million plus costs and attorneys' fees. While appealing she transferred most of her assets to a Cook Islands Trust. Court found the transfer fraudulent and ordered her to repatriate. When she refused to appear and fled the jurisdiction, she was found in criminal contempt and her appeal was dismissed.

The Weese/Bibelot vs. Allfirst Bank and Bank of America Case in Baltimore

In the spring of 2001 Allfirst Bank and Bank of America, claiming they were owed millions of dollars by the owners of the bankrupt Bibelot Bookstores in Baltimore, the Weeses (heirs to the Rite-Aid fortune), filed suit to recover the debts and an injunction seeking to force the Weeses to give creditors access to an estimated $25 million in assets in offshore trusts. The claim by the banks was that the Weeses, in transferring assets to a Cook Islands asset protection trust, had committed a fraudulent conveyance with intent to hinder, delay or defraud their creditors. The banks' claim was that the Weeses had assets to pay their debts when they fell due.

In 2000 a $17 million promissory note by Bibelot personally guaranteed by the Weeses fell due. Subsequently a judgment was entered against the Weeses for repayment of the loan. Months later Bibelot filed for bankruptcy. After the Bank of America note was due the Weeses borrowed another $1.6 million from Allfirst. Within a month thereafter, in July of 2000, Bank of America initiated arbitration proceedings. On the day they entered into arbitration proceedings with the Bank the Weeses created a Cook Islands trust with Cook Islands Trust Ltd. and Mrs. Weese's father as Co-Trustees and transferred $25 million of assets to it. Among the assets transferred to the trust were a Baltimore house appraised at $3 million, which was transferred in consideration of a $10 payment. At the time the house was security for a $1.7 million loan from Wachovia. The Weeses subsequently consented to the entry of an arbitration award for $17.6 million.

The Weeses were apparently represented in the creation of the trust by Allan Gibber, a well-known, respected practitioner and author of the definitive treatise on Maryland probate law. Mr. Gibber, in turn, apparently engaged the services of Barry Engel as special counsel to assist in the creation and funding of the Cook Islands trust.

The bank creditors pursued litigation in both Maryland and overseas. In fact, trial was scheduled in New Zealand for February 2003 in the Cook Islands case. The debtors defended the establishment and funding of the Cook Islands trust by general and vague allusions to "estate planning" and "providing for the children." The trusts are grantor trusts includible in the Grantor's estate. Settlor Elizabeth Weese's father was initial Co-Trustee with Cook Islands Trust Company, and as between the two, his authority was

governing. Elizabeth Weese was initial protector with authority to veto any decision of the Trustee.

In the past year there were two important decisions in the Weese case, both going against the Settlors. First, the High Court in the Cook Islands rejected the Trustees' and Settlors' claim that the privacy provisions of the International Trust Act prevented a plaintiff from obtaining discovery of documents. Second the Court of Appeals upheld the High Court's denial of a claim of attorney-client privilege attaching to certain specified documents because it ruled a prima facie case of fraud had been established. Apparently a Mareva injunction was obtained freezing the trust assets.

A settlement was ultimately reached in this case in which substantial funds were paid to the creditor bank by Settlor's father, who apparently purchased his daughter's note at a discount. Again, at least to some extent, the trust "worked."

Interestingly, the Settlor of the Weese Trust is the daughter of former Rite-Aid CEO Martin Grass, who recently plead guilty to what the Wall Street Journal characterized a "massive accounting fraud." Reportedly Martin Grass bought the bank note due from his daughter for a very substantial payment to settle this matter.

Also very interesting is the fact that the Plaintiff U.S. bank creditors who brought suit in the Cook Islands applied for discovery of certain documents in the drafting attorney's file which the defendant and counsel tried to protect as privileged. The Court refused to uphold the attorney-client privilege of the documents because it found that the client's interest in seeking legal advice was to further a crime or fraud. The Court found that it was not relevant to its ruling on the privilege issue whether or not the attorney was cognizant of the client's nefarious purposes. In effect, the Court invoked the crime/fraud exception to the attorney-client privilege, taking in fact an expansive view that there is no privilege not only where there is fraud, but even "where there are commercial practices or business dealings that would readily be described as dishonest to the point of fraud by a reasonable businessman." The Court did require a "strong prima facie case of fraud or dishonest purpose or a strong probability there was fraud" and found that test met in this case. The Court found that the asset protection trust statute did not modify this privilege rule and quoted with approval another Cook Island case: "It should not be lightly assumed that Parliament intended to defeat the claims of creditors by allowing international trusts to be used to perpetuate a fraud against a creditor."

Weitz v. Weitz, 2012 NY Slip Op. 30767 (U), N.Y. Sup. Ct No. 016811-08 (March 22, 2012). In a divorce proceeding that involved fraudulent transfer allegations, a New York court held that it had jurisdiction over the offshore trustee of a Cook Islands asset protection trust because it had participated in a fraudulent conveyance to avoid the satisfaction of a judgment in New York. The trustee, Southpac Trust, had no other contact with New York. The case seems likely to be appealed, but the case certainly had bad facts: apparently a transfer by

husband of $7 million of assets to a Cook Islands trust for his fiancé in the midst of divorce proceedings.

Sec. & Exch. Commis v. Solow, 2010 WL 303959 (S.D. Fla. Jan. 15, 2010) The defendant was jailed for civil contempt for failing to satisfy the government's judgment from assets held in an OAPT, the court rejecting his impossibility defense on the ground that it was self-created.

Actions in Foreign Courts.

The general rule of international law is that countries will grant comity to the courts of other countries such that one country will enforce the judgments and find orders of the courts of other countries provided that certain minimal "due process" standards are met, e.g., notice, jurisdiction, fundamental fairness, etc. Therefore, it may be a mistake to assume that a foreign trust will not be bound by a domestic judgment in favor of creditors.

Certain jurisdictions have by statute provided that foreign judgments against trusts domiciled in such jurisdiction will not be recognized or enforced, but these jurisdictions are relatively few and obscure: Belize, the Cook Islands, Labuan, Nevis, Niue and St. Vincent and the Grenades. Other jurisdictions may have court decisions in which comity was refused, as the Isle of Man is reported to have, but it may be perilous to rely on local common law in the absence of an express statute.

In the courts of English common law jurisdictions a U.S. or other foreign judgment for a liquidated claim may be recognized pursuant to summary proceedings provided that certain standards are met:

- foreign court must have been a court of competent jurisdiction
- foreign judgment must be final and conclusive
- the judgment must be for a fixed and definite sum of money
- judgment must not have been obtained by fraud
- judgment must not be contrary to public policy of the host court

In order to keep the assets from disappearing once proceedings are commenced in an English common law jurisdiction, a remedy similar to a temporary restraining order may be obtained. Following the name of a 1975 English case, Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., 2 Lloyd's Rep. 509, this remedy is commonly referred to as a Mareva injunction. Such an injunction allows the freezing of assets on an

ex parte basis pending the outcome of other ancillary proceedings either in the courts of the jurisdiction in which relief is sought or in another jurisdiction. The injunction may be sought and granted either before or after a judgment on the merits has been obtained.

See "Mareva Mechanics" by Andrew Rogerson in the June 2013 STEP Journal.

Bankruptcy Law Considerations.

Where a debtor is foolish enough to settle an offshore asset protection trust and then file for bankruptcy or immediately before being involuntarily forced into bankruptcy, a bankruptcy trustee steps into the debtor's shoes and may exercise all of his rights, including any over the administration of the offshore trust. In some jurisdictions however, such as the Cook Islands, there is no recognition of bankruptcy decrees of foreign courts.

Contempt of Court.

While impossibility of performance is a defense to a contempt of court citation, where an obviously fraudulent conveyance has very recently been made the defense will not serve. A typical offshore trust will instruct a trustee to ignore instructions given under the compulsion of court order. But where the settlor's defense of impossibility of performance was caused by the settlor/debtor's actions shortly before the court order, impossibility of performance is no defense.

Flight Clause Issues.

A typical offshore asset protection trust contains a provision granting the trustee or others the power to take action to defeat the impact of adverse court orders in the trust's domicile by various evasive maneuvers such as changing the trust's domicile or governing law or the appointment of new trustees in a new jurisdiction.

A Mareva order, as noted above, may render such a flight clause nugatory. Upon a prima facie showing of a fraudulent conveyance or similar claim against a trustee, the judgment creditor or claimant may be able to obtain a court order barring the trustees from moving assets any further anywhere in the world, resigning or appointing new trustees, surrendering or distributing trust assets, or changing the governing law of the trust.

No case comes to mind with sympathetic facts for the debtor which received harsh judicial treatment in the U.S. Like family LLP/LLC tax cases, bad facts for the debtor (taxpayer) lead to adverse decisions against the debtor (taxpayer). By and large offshore asset protection trusts cases, like FLP/FLLC cases, have been handled by US courts as they should have been handled.

Conclusion.

Not surprisingly, careful lawyers and well-advised clients will be rewarded, careless lawyers and foolish and unscrupulous clients will be punished. A properly chosen strategy carefully and thoughtfully implemented will effectively shield assets from claims of future creditors. The wrong choice of trust domicile, bad timing in making transfers to the trust, the wrong choice of a third country in which to hold trust assets, the wrong choice of trustees, trust protectors, investments or depositary institutions can leave offshore trust assets vulnerable to attack by creditors of beneficiaries.

As general guidelines, move only liquid assets to an OAPT and less than 50% of net worth, use independent trustees and protectors, make adequate provision from U.S. assets or from OAPT assets to pay successful claims by the U.S. government, maybe by large corporate creditors.

VII. HOW TO USE AN OFFSHORE ASSET PROTECTION TRUST TO HOLD U.S. REAL ESTATE OR OTHER U.S. ASSETS WHICH ARE NOT LIQUID[3]

A U.S. citizen concerned about potential future creditors and wishing to protect a valuable real estate holding or other U.S. assets faces an obvious dilemma if he wants to maintain some kind of control over the property. If he retains an interest in or control over the property, any domestic conveyance is unlikely to be effective. On the other hand, he obviously cannot physically transfer real estate overseas and outside of the jurisdiction of the local courts, and he may simply be unwilling to transfer more liquid assets out of his control.

One approach is for the U.S. domiciliary to establish a U.S. family limited partnership to hold such U.S. assets, real or personal, retaining one percent (1%) general partnership interest which has all management rights, and conveying the ninety-nine percent (99%) limited partnership interest to a foreign asset protection trust. The trust may create a "subsidiary" controlled foreign corporation of which the grantor and those beholding to him are directors.

In the event of a suit against the grantor, he will disclose on his balance sheet the existence of the trust and his one percent (1%) interest. He will explain to his creditor that the other ninety-nine percent (99%) interest is owned by the offshore Asset Protection Trust, under which the trustees have complete discretion to distribute income or principal or neither to him or his spouse or his descendants. He will explain the trust is irrevocable so he cannot dissolve it or get at the assets; that the jurisdiction does not

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[3]See *Asset Protection Aspects of Art*, Peter Spero, Journal of Asset Protection, January/February 1998, Vol. 3, No. 3.

recognize foreign judgments, that the creditors must prove fraudulent conveyance beyond a reasonable doubt and that the suit must be brought within two years of the creation of the trust; that the jurisdiction is 9,000 miles away; and that the partnership has been liquidated and the limited partner's interest as 99% tenant in common has been distributed to the foreign corporation.

The local court will have no jurisdiction over the foreign trustee who owns ninety-nine percent (99%) of the real estate. For this purpose one only uses foreign trustees with no U.S. nexus which might support jurisdiction in the U.S. of a law suit. That portion of the real estate or other assets owned overseas should therefore remain immune to creditor claims.

VIII. WHAT YOU SHOULD HOPE TO ACCOMPLISH USING A FOREIGN ASSET PROTECTION TRUST

A. Scope and Focus of Asset Preservation.

The foreign situs trust is best seen as facilitating accomplishment of the following goals vis-a-vis creditors:

- Deter Litigation.
- Provide Incentive for Early and Inexpensive Settlement.
- Level the Litigation Playing Field.
- Enhance Bargaining Position.
- Provide Options if the Claim/Litigation is Pursued.
- To Completely (if possible) or Partly (at least) Defeat the Claim.

The grantor of such an APT and his attorney will frankly disclose the existence and character of the foreign trust to any creditors who materialize, to discourage the creditors from bringing or pursuing a claim or to foster settlement.

Barry Engel claims to have settled claims against his clients with offshore APT arrangements at an average of fifteen percent (15%) of the initial claim. This figure highlights the important point that offshore APTs are best viewed as a way to minimize, rather than to eliminate, exposure to claims.

Consider why a lawyer advises corporations operating exclusively in Kansas to incorporate in Delaware:

- The law of Delaware is more protective of management, and management is the lawyer's client.
- Delaware law is clear and established with respect to the rights and duties of corporations, their officers, directors and shareholders.
- Delaware Chancery Courts hear exclusively corporate law cases, and the judges of that court understand the law they are interpreting.

The same approach would guide an estate planning attorney to suggest the appropriate foreign jurisdiction as a situs for a trust intended to shelter assets from possible future creditors.

If an appropriate trust is established in an appropriate jurisdiction in a timely fashion and especially if multiple tiers of complex foreign entities are used, trusts and corporations in different jurisdictions, as a practical matter attachment may be impossible. See Suyfy v. U.S., 818 F.2d 1457 (9th Cir. 1987) for an example of intriguing planning ideas. To the extent that the creditor or his attorney lacks cleverness, money, staying power or tenaciousness, foreign situs asset preservation planning may prove effective.

IX. APPROPRIATE CANDIDATES FOR FOREIGN ASSET PROTECTION TRUSTS/INAPPROPRIATE CANDIDATES

One of the fascinating aspects of asset protection practice that one comes to notice is that every new economic crisis, every new economic cycle in the US, creates new classes of potential asset protection clients. New classes of prospective clients were created by the Great Recession, the economic crisis which began with the collapse of Lehman Brothers in September 2008, including anyone in residential or commercial real estate, banking, or fiduciaries whose investment strategies blew up, etc.

Those debtors who have thoughtfully and aggressively pursued asset protection strategies, even late-in-the-day "uglification" strategies, were rewarded and retained more assets and repaid less of their debts.

Reciprocally, those debtors who were not proactive in protecting themselves retained less of their assets and income and repaid a greater percentage of their debts.

A. Examples of Appropriate Candidates:

Highlighted By Recent Events

(1) Those adversely affected by the currently slow economic environment, including
  - (a) partners in large law firms facing layoffs
  - (b) physicians facing shrinking revenues resulting from Obamacare

(c) hedge fund and private equity professionals being laid off as funds under perform

(d) owners and senior executives of government contracting in the defense industry whose businesses are suffering from the sequester

(e) founders/key executives/directors of companies which may go public or involved with a public company with a speculative run-up, who may be concerned about shareholder derivative suits and SEC suits if the stock price collapses.

NOTE: Be on the lookout – who will be tomorrow's debtors? Clearly investigation and pursuit of high-net worth individuals committing tax fraud with elaborate over-the-line tax shelters and particularly offshore trusts and corporate and foundation accounts is going to be targeted and aggressively pursued by the IRS under President Obama's IRS. Under Bush's IRS, offshore tax fraud was not aggressively pursued. But query, how much can we do for someone with this sort of tax problem?

Generally

(2) (a) A physician concerned that he or she cannot have enough malpractice liability insurance to protect himself or herself from potential future claims, or who is considering going partially or totally "naked" (without liability insurance coverage) because of the prohibitively high cost of the premiums.

(b) Another professional, such as an accountant, lawyer, architect or engineer, who has similar concerns.

(c) A present or former outside member of a corporate board of directors who is concerned about potential directors' liability for which he or she may not be adequately insured or indemnified.

(d) An individual with substantial net worth or notoriety who is concerned that his or her wealth or notoriety may make him or her a target for vexatious claims in our litigious environment.

(e) A person engaged in a business from which personal liability could arise, or in a business representing the greater part of his or her net worth, where the inherent nature of the business is such that the potential for serious future claims is sufficient.

(f) Someone seeking to avoid forced heirship provisions of state law, e.g., to limit the rights of a surviving spouse to inherit.

(g) A married person concerned he or she may someday be facing divorce or alienation from his or her current spouse, seeking to posture his or her assets to limit his or her exposure to an expensive divorce property settlement in the event he or she may someday divorce.

(h) An entrepreneur who has recently sold or expects to sell a closely-held business who is concerned to preserve the proceeds of sale from potential claims for indemnification by the buyer, who may be disappointed with the performance of the business.

(i) Someone who presently owns or previously owned real estate with potential environmental liability associated, who is concerned that some day there could be a gigantic environmental liability imposed upon him or her.

(j) Wealthy East Asians, e.g., Chinese and Indians, who will seek the benefits of these arrangements. To Wit: At the November 2009 STEP Conference on international trusts scheduled for Singapore, a Hong Kong trust banker from JP Morgan is scheduled to speak on asset protection trusts. What does JP Morgan's interest in touting this in the East Asian market say?

B. Inappropriate Candidates for Use of Foreign Asset Preservation Trusts: There are many of these after the Great Recession.

(1) Individuals for whom the financial picture is bleak: where there are substantial loan defaults, contract defaults with severe potential penalties, apparent business tort liabilities.

(2) Individuals who are, for all practical purposes, insolvent.

(3) A lawsuit has been threatened or filed against the individual or his or her business, or an adverse judgment against the individual or his or her business is threatened.

(4) Bankruptcy of the individual or his or her business appears imminent.

(5) The individual's net worth is negative.

(6) A substantial judgment has been entered against the individual or his or her business.

(7) The individual or his or her business is bankrupt.

Even the offshore centers which have recent statutes tailored to attract APT

business want "clean business," and subject potential grantors of such trusts to substantial due diligence screening to determine their current solvency and the status of any current creditor problems. For example, despite numerous petitions, as of a year ago Gibraltar had cleared and approved fewer than twenty (20) APTs.

X. PROPERLY USED, FOREIGN ASSET PROTECTION TRUSTS ARE AN INTEGRAL AND INTEGRATED PART OF THE OVERALL ESTATE AND FINANCIAL PLAN

Asset Preservation Planning with foreign APTs should be integrated into the overall financial and estate planning for the client, and should complement it. Structuring such planning in this manner is not only sensible, it provides the best argument possible to rebut the suggestion that the planning was motivated by intent to defraud, hinder or delay creditors. Be prepared to offer some justification for establishing the foreign APTs in the nature of a business purpose OTHER THAN asset protection. Its purpose should be to plan against a possible future event that would result in economic and financial devastation to the grantor's estate.

The law recognizes the right of individuals to arrange their affairs to limit their liability to potential future creditors. <u>In re Heller</u>, 613 N.Y.S. 2nd 809 (N.Y. Sur. Ct. 1994) This is analogous to Learned Hand's famous opinion that everyone has a right to organize his affairs to minimize his taxes.

Foreign situs asset preservation planning can and should foster accomplishment of the following general estate planning and financial planning goals, which would constitute other business purposes:

- Probate Avoidance.
- Confidentiality of Value and Nature of Assets.
- Vehicle for Global Investing.
- Ease in Transferring Assets to Family Members.
- Avoidance of Possible Monetary Exchange Controls.
- Will Substitute/Avoid Multiple Wills in Various Jurisdictions Where Assets Are Held.
- Privacy for Estate Plan.
- Facilitate Handling of Affairs in the Event of Disability or Unavailability.

- Flexibility.
- Minimization of Taxes
- Preservation of Assets for Dependent Family Members
- Diversification of Asset Management by Using Offshore Trust Company
- Diversification of Investments into Overseas Securities Markets

To do this sort of asset preservation planning the lawyer must know his clients, screen them with some level of due diligence investigation,[4] and obtain Affidavits of Positive Net Worth/Solvency with satisfactory disclosure of details to ensure that the grantor is not engaged in a fraudulent conveyance.

XI. OAPTs and DAPTs ARE USEFUL OTHER THAN FOR ASSET PROTECTION: FOR CENTRALIZED, CONFIDENTIAL, TAX-HAVEN MANAGEMENT FOR INTERNATIONAL CELEBRITIES, ATHLETES AND OTHER FAMOUS HNWIs

An APT should not simply be considered for use in the narrow circumstances of a U.S. citizen or resident seeking protection from potential future creditors.

An asset protection trust may have the following benefits which should attract the wealthy, including entertainment, sports and other celebrities from around the world.

- Confidentiality. In many OAPT jurisdictions it is a criminal offense for a bank officer or court official to disclose even the existence, let alone the particulars, of a local trust arrangement. For obvious reasons the rich and famous will appreciate the discreetness of such arrangements, particularly from the prying eyes of criminals, business rivals, spouses, ex-spouses, lovers, ex-lovers, children, alleged children, media, those with a grudge or claim. Even, perhaps especially, as to family member beneficiaries, many Settlors would like to keep the existence, text and operation of a trust confidential, and while that is virtually impossible under general common law fiduciary principals, it is permitted in OAPT jurisdictions. For a view that this is bad public policy, see Professor Robert Whitman's article "Full Disclosure is Best" in the July 2004 issue of Trusts & Estates. In support of

[4]See *Steps in Investigating Potential Asset Protection Clients*, James Mintz, Journal of Asset Protection, January/February 1998, Vol. 3, No. 3 and May/June 1998, Vol. 3, No. 5., and *Completing a Due Diligence Investigation on a Potential Client*, John W.M. Chaud, Journal of Asset Protection, September/October 1997, Vol. 3, No.1.

the value of confidentiality, see "Go Offshore to Avoid Transparency" by Ian Marshand, Michael Ben-Jacob in the March 2004 issue of Trusts & Estates.

- Non-Susceptibility to Spouse's or Child's Claim at Divorce or Death/Alternative to Prenuptial Agreement. Many OAPT jurisdictions do not recognize or enforce spousal claims arising out of divorce, "palimony" claims, paternity claims or marital or child's claim for forced heirship. Such claims are chronic concerns of the rich and famous. An OAPT may serve as a substitute for a Pre- or Post-Marital Agreement.

- Tax Haven. The U.S. is said to be the only country on earth which imposes income tax and transfer tax on the worldwide income and assets of its citizens and residents. In contrast, citizens and residents of many countries may legally avoid income or transfer tax by their jurisdiction of domicile by using appropriate structures in tax haven jurisdictions. In other countries tax enforcement is lax or corrupt permitting the shrewd and well-informed to avoid carelessly or randomly enforced tax laws. Many OAPT jurisdictions expressly refused to recognize tax avoidance in another jurisdiction as criminal or penalties or remedies for tax avoidance as enforceable.

- Centralized Financial Coordination/De-Centralized Investment and Management/Global Accessibility. In the global electronic financial network of 2010, communication, investment commitment, management, record keeping and reporting are virtually instantaneous. The local branch of a sophisticated global financial institution in an APT jurisdiction may serve as "host" for the locally sitused OAPT which serves as the quarterback/general partner of the estate plan/financial plan/investment plan/asset protection plan/tax plan of the High Net Worth Individual (HNWI), which through local and multinational subsidiary LLCs, corporations, trusts and foundations manages the wealth using various other institutions for the skill and expertise and various other jurisdictions for the specialized advantages. Each of the various entities may be managed for its idiosyncratic advantage while each serves as a bulkhead which will contain "trouble" in any one venture within that entity, protecting the HNWI and his other investments from ancillary liability of any kind. Consider the opportunities now available to do this in one corporate entity, for example SG Hambros, the trust arm of Societé Generale, HSBC, JPMorgan, Goldman Sachs, UBS, EFG Bank, all with offices on every continent. Through this sort of global conglomerate HNWIs have access to the best investment advice available globally and trust and corporate and foundation entity management around the world.

Moreover, the tiering and layering of various types of entities in various jurisdictions under various sets of laws around the world may serve it the further purposes of advancing the confidentiality which may be so important

in our litigious world, making the structure and the assets virtually impenetrable to outside scrutiny.

- Asset Protection Planning. Add to all of these virtues the asset protection planning inherent in an OAPT, and these structures should have an irresistible appeal to HNWIs around the world. For U.S. HNWIs, the arrangement is tax neutral and no less attractive for its non-tax charms.

- Foreigners Are Using DAPTs in the U.S. Certain foreign countries, including Mexico, Venezuela, Argentina and Brazil, have blacklisted certain traditional tax havens such as Cayman Islands, Channel Island and Cook Islands and forced their citizens to disclose offshore structures in such jurisdictions. This has had the curious result of making U.S. DAPTs in Delaware, Alaska etc. attractive hosts for offshore structures from citizens of such countries. The U.S. is not "blacklisted" by any of these countries. Typically these customers are looking to the estate planning, avoidance of forced heirship and possibly tax shelter advantages. See the article by Mark G. Holden, "Surprise: The U.S. is the New Tax Haven" in the December 2003 issue of Trusts & Estates.

XII. USE OF AFFIDAVIT OF SOLVENCY

Attorneys consulting with and advising clients with regard to asset protection planning in general, and foreign APTs in particular should consider the use of an Affidavit of Solvency. Where the issue of asset protection arises in an engagement, obtain such an Affidavit from the client. In the Affidavit the client should represent, state and affirm that he or she has no pending or threatened claims; that he or she is not presently under any investigation of any nature, and that he or she is not involved in any administrative proceedings; that no situation has occurred which the client has reason to believe will develop into a legal problem in the future; that following any transfers the client intends to remain solvent and able to pay his or her reasonably anticipated debts as they become due; and that none of the assets which the client may transfer were derived from any of the "specified unlawful activities" under the Money Laundering Control Act of 1986. To the extent any legal disputes or other problems exist, they should be disclosed in the Affidavit and the Affidavit should provide that either sufficient assets will be retained with which to satisfy any liability arising from the problem, or the documents should be drafted with provisions requiring that any liability resulting from the disclosed problem(s) be satisfied by the foreign APT if the liability is finally and legally established and not otherwise satisfied.

The internet affords the opportunity for lawyers to do additional due diligence investigation of new asset protection clients, for instance lexis searches for judgments, liens, pending litigation.

The asset protection lawyer should maintain a file containing a memorandum explaining the facts of each case which the lawyer has refused to take. This may prove helpful someday if the integrity of the lawyer and the types of cases accepted are challenged. A sample Affidavit of Solvency is attached as Exhibit 1.

The recent Florida bankruptcy case of Goldberg v. Rosen (in re Akram Nirromand), 493, Fed. Appx. 11 (11th Circ. Fla. 2012) indicated the self-defense effectiveness for a planning attorney of obtaining an Affidavit of Solvency. The Bankruptcy trustee Alan Goldberg sued debtor's lawyer, Howard Rosen, to recover attorney's fees and costs as fraudulent transfers, on the theory that Mr. Niroomand was insolvent when he paid the fee for an offshore asset protection trust drafted by Mr. Rosen. He also sued Rosen for legal malpractice and unjust enrichment. The Bankruptcy Court ruled in favor of Mr. Rosen because the Trustee did not prove insolvency, the only evidence of which was debtor's testimony. Mr. Rosen impeached that testimony with an Affidavit of Solvency sworn to by debtor obtained by Mr. Rosen before he undertook the legal work.

XIII. DISTINGUISH LEGITIMATE ASSET PROTECTION PLANNING FROM ASSET PROTECTION RELYING ON BANK SECRECY OR PERJURY, OR RELATING TO TAX FRAUD OR OTHER CRIMINAL ENTERPRISE

Foreign Asset Preservation Trusts should NOT be seen as a means or excuse to defraud creditors, hide assets or evade U.S. or foreign taxes.

The grantor of an offshore APT will happily acknowledge the existence of the foreign trust and details about it in interrogatories, depositions and in sworn testimony. The grantor will pay U.S. tax on all income of the trust. It will be a grantor trust under Code § 679.

Liechtenstein and UBS have paid the price for helping clients commit tax fraud.

The grantor will be very careful to avoid transfers to foreign trusts which could be seen to be a fraudulent conveyance under state, Federal Bankruptcy, or foreign situs law. Failure to fully disclose and turn over all assets belonging to the grantor is a ground for not obtaining a bankruptcy discharge. 11 U.S.C. § 727.

In any context in which a Federally chartered bank is a potential creditor, the grantor must be mindful of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, which imposes severe criminal penalties for concealment of assets owed to the Federal Deposit Insurance Corporation or the Resolution Trust Corporation.

Grantors also should be aware of the Money Laundering Control Act of 1986,

which imposes severe criminal penalties where funds involved in a financial transaction -- e.g., offshore deposits -- represent proceeds of certain unlawful activities if the intent is to promote the unlawful activity or evade income tax.

2008-2013 Scandals Highlight Risks of Attempting to Commit Tax Fraud Using Offshore Jurisdictions: UBS, Credit Suisse, Wegelin, Etc.

UBS Problems – UBS (Union Bank of Switzerland), one of the world's largest wealth managers, has a huge problem with the U.S. tax authorities. It recently became public that UBS was actively soliciting U.S. clients touting the virtues of "secret" offshore arrangements. UBS' problems came to light when Bradley Birkenfeld, a former UBS private banker, pleaded guilty on June 20, 2008, acknowledging that he and other UBS colleagues helped wealthy Americans hide money abroad, advising them, among other schemes, to put cash and jewelry in Swiss safe deposit boxes, buy or trade art and jewels using offshore accounts and setting up accounts in the names of others. Mr. Birkenfeld is expected to tell federal prosecutors what he knows in hope of lenient sentencing. Mr. Birkenfeld's boss, Martin Liechti, former head of UBS wealth management business for the Americas, has been detained in connection with the investigation. Another co-conspirator appears to be Mario Staggli, a Liechtenstein financial advisor, who owned New Haven Trust Company in that country.

U.S. prosecutors in late June 2008 asked a federal judge in Miami to let the IRS issue a summons to Zurich-based UBS for client information. Very recently the U.S. government, which had sought to obtain information on 52,000 Americans with UBS Swiss bank accounts, informed the judge it had settled with UBS in exchange for information on some 4,500, probably figuring that was enough to worry all 52,000 and cause many of them to turn in themselves under an amnesty program which expires in September of 2009. Under the amnesty program taxpayers who admit to the IRS information on previously undisclosed offshore accounts can limit their exposure to criminal penalties. If granted, this would be the first ever summons issued by the U.S. against an offshore bank. This case is a very ominous warning for U.S. tax cheats and other violators of federal law who have long attempted to hide assets in secret offshore trust and other accounts.

UBS clients caught in this dragnet may get off by paying back taxes, interest and penalties if they come forward early and voluntarily to the IRS. Those who do not will risk criminal prosecution, and any outside advisors in the U.S. who facilitated the secret, fraudulent offshore arrangements may face consequences from the IRS.

The U.S. is seeking to have UBS produce records identifying U.S. taxpayers with UBS accounts in Switzerland from 2002-2007 not declared to the IRS. Mr. Birkenfeld, cooperating with the U.S. Government as part of his plea arrangement, has told U.S. prosecutors that UBS held $20 billion in assets for U.S. clients in undeclared accounts.

In 2001 UBS entered into an agreement with the IRS to identify U.S. citizens among its account holders and to withhold taxes on their behalf. Subsequently UBS flaunted the agreement and bragged to the U.S. clients that "information relating to your Swiss banking relationship is as safe as ever." Reportedly as many as 20,000 UBS clients may be involved. Sources indicate that UBS frequently worked in tandem with a Liechtenstein bank, LGT Group to hide U.S. funds. Typically these arrangements involved offshore corporations and occasionally trusts.

In August the Wall Street Journal reported the guilty plea of Swiss-American lawyer Edgar Paltzer to helping wealthy Americans hide millions of dollars from the IRS overseas for more than a decade. His cooperation with the IRS is "complete and without limitation." His principal platform was Zurich's Bank Frey.

QUERY: As a result of this new aggressiveness of the U.S. government towards offshore tax cheats and the greatly increased scrutiny by the U.S. government of tax haven accounts, will such offshore centers be more reluctant to establish even legitimate tax-compliant trusts and accounts for U.S. clients, wary of the hassle "factor?" Apparently yes according to anecdotal information I have heard from offshore bankers. Offshore trust companies may well insist on proof from Settlor of U.S. tax compliance and may charge more for the burdens of dealing with U.S. clients.

Swiss/Cayman Banker Hands Over Data to WikiLeaks. A former Swiss Banker who headed Julius Baer's Cayman operation turned over data on hundreds of offshore account holders to WikiLeaks founder Julian Assange in 2011.

After dealing with UBS, the IRS went after at least 11 more Swiss Banks, including Credit Suisse. Wegelin, a 270-year-old Swiss private bank, which brazenly pursued UBS American customers, went out of business under pressure from the US government when it acknowledged its participation in tax fraud. A former Swiss banker was said to be cooperating with the IRS.

BVI, Cook Islands, Singapore Accounts Disclosed. On April 5, 2013 the New York Times reported the intentional leak of 2.5 million files relating to offshore accounts made to the International Consortium of Investigative Journalists, relating to assets estimated at $21 trillion held in offshore havens, particularly BVI, Cook Islands, and Singapore, including accounts beneficially owned by the Budget Minister of France.

European Crackdown. Since President Obama took office more than 39,000 U.S. taxpayers have stepped forward to pay back taxes and stiff penalties on undeclared offshore accounts, the Wall Street Journal reported in May of this year. The taxpayers have paid more than $5.5 billion to resolve their cases, with another estimated $5 billion more to come.

And European countries are following suit. In April of this year, Germany, France, Britain, Italy and Spain agreed to develop an information-sharing system that would make it easier to clamp down on tax evasion by their citizens and residents using tax haven jurisdictions. For example, Luxembourg, sometimes seen as a place to hide money, has agreed to exchange information with the rest of the European Union.

The UK government in particular is aggressively cracking down on offshore tax fraud, and has recently negotiated tax disclosure agreements with Switzerland, Liechtenstein, Jersey, Guernsey, and the Isle of Mann. See "No Safe Havens" by Ronnie Pannu and Iain Sanderson in the July 2013 STEP Journal.

Caribbean Crackdown. The IRS announced in April of this year that it is going after Canadian Imperial Bank of Commerce First Caribbean International Bank with offices in 18 Caribbean nations pursuing tax fraud. An Irish journalist got his hands on a purloined hard drive containing the names of holders of some 130,000 Caribbean accounts.

Asia Crackdown. In March 2013 the Wall Street Journal reported that the IRS was pursuing tax fraud by US taxpayers using banks in India, Israel, Hong Kong, and Singapore.

Rand Paul's View. It is interesting that Senator Rand Paul has assailed the U.S. government's attempts to get access to Swiss banking records of Americans and tried to slow down treaty negotiations, saying "There needs to be some constitutional protections to your banking records."

Liechtenstein Connections.

At least seven other countries investigated their own citizens for allegedly hiding assets in Liechtenstein using the services of the same LTG Bank which worked with UBS as described above. This investigation began when data from LGT Truehand AG, which sets up "foundations" (frequently used like trusts with non-charitable beneficiaries) was stolen, apparently by Heinrich Kieber, a former employee of LGT. Mr. Kieber, now apparently living in Australia, has offered confidential client data to tax authorities on several continents. Reports say that about 100 Swedes, 100 Canadian, 20 Australians, several hundred French and about 1,400 Germans had such accounts reflected in Mr. Kieber's data. Apparently Germany paid Mr. Kieber $6-$7.5 million for the data.

LGT is owned by Liechtenstein's ruling family.

Tax cheats should be aware that a law enacted in 2006 authorizes the IRS to pay sharply higher rewards to informants in large cases, as high as 30% of what the IRS

collects.

XIV. ETHICAL AND MALPRACTICE ISSUES FOR THE ATTORNEY; THE ATTORNEY'S EXPOSURE TO CIVIL LIABILITY AND CRIMINAL PROSECUTION

The general ethical rules governing lawyers practicing in asset protection follow the law of fraudulent conveyance: if a client has no current or "contemplated" creditors (he is not known to intend shortly to enter into a transaction which will create creditors), but is only concerned about potential future creditors, it is clearly perfectly ethical to assist.

Examples: An obstetrician concerned that she will eventually deliver a sick baby and will inevitably be sued.

A board member of a startup company or even a public company concerned that if the stock price collapses (after public offering in the case of a start-up), he will be liable. Consider that all the board members of MCI, including the impecunious Dean of Georgetown Law School, were "fined" by the SEC 10% of their net worths for negligence in overseeing the activities of Bernie Ebbers.

What is an example of a perfectly clean asset protection endeavor? Consider almost any kind of entrepreneur who sold the stock of his small company to a big public company for $50 million right before the collapse of Lehman and the economy and the stock market in the Fall of 2008. He would have been required to provide contractual representations and warranties with a duration of 4 years.

When the economy collapsed, and the value of the acquisition was seen to be much less than what was paid, probably many buyers referred the representations and warranties to their 1,000-lawyer Wall Street law firms with instructions: find a breach and get our money back. In such a situation, it does not matter what the facts or law are, the buyer's larger firm can bully the seller into a large settlement. But if the proceeds were protected before there was any problem, for instance in an offshore APT, the seller would have been safe. There could be no question of challenging the ethics of a lawyer who suggested such a prophylactic strategy.

Evolution of Perception of Legal Ethics in Asset Protection

The legal practice of asset protection arose out of the nationwide collapse of the value of commercial real estate in 1989-1992. When Denver real estate collapsed, a Denver lawyer with clients in trouble, Barry Engel approached the Cook Islands and suggested the adoption of the world's first asset protection trust statute. When it was adopted in the Cook Islands, Mr. Engel set up trusts for many of his clients, and other

offshore jurisdictions soon followed suit and developed similar statutes.

Initially most lawyers were very uncomfortable with the ethics of helping clients "hide" assets from creditors.

Over the years, 40 plus offshore jurisdictions and some 15 US states have adopted such statutes and it seems indisputable that a concept so widely endorsed and enacted into law by so many legislatures is now comfortably within the public policy mainstream and can hardly in that light be seen as unethical.

Moreover, such luminaries as Duncan Osborne, who is the current President of the American College of Trust and Estate Counsel (ACTEC), and Gideon Rothschild, who has chaired the ABA Special Committee on Asset Protection, have authored articles suggesting not only is it not unethical to do asset protection planning, but it may also be civilly negligent --i.e. legal malpractice --NOT to recommend asset protection planning to clients for whom it is obviously appropriate.

So while you may be damned if you do asset protection planning -- it is a grey, subtle area without bright ethical lines -- you may be damned if you do not.

Certain areas of asset protection planning are certainly thorny and require close examination and analysis. If a client asks you to help him avoid a child support claim, are you comfortable assisting, morally or ethically? Some states permit it under certain circumstances. What about helping a client protect assets in the event of future divorce? Consider has the other spouse been a client of yours? Is the property sought to be protected community property? Has a divorce action been filed or is filing contemplated? What if the assets sought to be protected were earnings during the marriage in a non-community property state, where the non-earning spouse's interest is inchoate? These are dangerous, reef-filled waters in which to sail.

BEWARE: In the case of insolvent clients or clients with a clear intent to hinder, delay or defraud existing creditors, it may be unethical for an attorney to counsel or assist a client in a conveyance which perpetrates a fraud on the client's creditors. As an example, See Virginia Code of Professional Responsibility, Canon 1 generally, and Disciplinary Rule 1-102(A)(4) and 7-102(A)(7), Ethical Considerations 1-5, 7-3, 7-4, 7-5, 7-6, and 7-8, Virginia Legal Ethics Opinion 1140 (October 18, 1988).

A. Virginia Ethics Rules as an Example.

According to Disciplinary Rule 7-102(A)(7), a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. To do so would not only expose the attorney to censure or disbarment, but also to suit for fraud as a co-conspirator or in malpractice.

Canon 4 deals with the obligation of the lawyer to preserve the confidences and secrets of the client. A "confidence" generally refers to information protected by the attorney-client privilege under applicable law, and a "secret" generally refers to other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or detrimental to the client. In actual practice the attorney-client privilege is not as protective as attorneys tend or want to believe. Courts seem increasingly willing to find a means, basis or exception to compel disclosure.

Moreover, according to Disciplinary Rule 4-101(D), a lawyer <u>must</u> reveal the intention of his client, as stated by his client, to commit a crime or information which clearly establishes that his client has perpetrated a fraud related to the subject matter before the tribunal with respect to which the lawyer is representing the client. If the client acknowledges to the attorney that he has committed a fraud, that clearly establishes it. Not to make the required revelation could subject the attorney to censure or disbarment.

Under Disciplinary Rule 4-101(C)(3) a lawyer <u>may</u> reveal information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation. Recognizing the risk that the lawyer may well be sued as a co-conspirator in the fraud or for malpractice, the lawyer may want to avail himself of this opportunity, in which he is excused from breaching the attorney-client privilege.

If a client has committed a fraud using his attorney's services without the attorney's prior knowledge, the attorney <u>may</u> reveal his client's fraud to a damaged third party without breach of attorney-client privilege to protect himself from implication.

On the other hand, if a client consults with his attorney for advice as to whether an activity he engaged in without the attorney's involvement was illegal or fraudulent, and the attorney advises him that it was, and he thanks the attorney and terminates the professional engagement, the attorney's advice is clearly privileged, and the attorney may not disclose any information obtained in the engagement. The attorney is not thereby implicated in the illegal or fraudulent act.

B. <u>Ethical Rules in Other States</u>.

In South Carolina Bar Ethics Advisory Committee Opinion 84-02 it was held that unless there is an immediate reasonable prospect of a judgment being entered against the client, particularly one that would render him insolvent, the attorney can participate in a transfer of the client's property where the sole purpose of the transfer would be to avoid the possibility that a creditor would recover a deficiency judgment against the property conveyed. On the other hand, <u>In re Pamphilis</u>, 30 N.J. 470 (1959), is an example of a case where an attorney was disciplined for suggesting transfers of property to a relative in

satisfaction of a non-existent debt prior to filing bankruptcy. See also Townsend v. State Bar of California, 197 P.2d 326 (1948). In re Greene, 557 P.2d 644 (Ore. 1976) sets forth the principle that if an attorney assists a client in making a transfer that any reasonably competent attorney should have recognized as fraudulent, or if the attorney should have reasonably discovered facts that would manifest the transfer as fraudulent, the attorney may have violated his or her ethical duty to provide competent representation. Cincinnati Bar v. Wallace, 700 N.E. 2d. 1238 (1998), In re Kenyon and Lusk, 491 S.E. 2d 252 (1997), and In re Hackett, 734 P. 2d 877 (1987, Oregon).

C. Planning Attorney's Liability.

Attorneys engaging in asset protection planning have certain unique liability issues of which they must at all times be mindful.[5] Would it not be wise, as Duncan Osborne has suggested, to require a retainer to cover the time and cost of a due diligence background check to confirm the bona fides of asset protection clients, to back-up the Affidavit of Solvency?

(1) Civil Liability

In a federal case applying New Jersey law, Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F. 3rd 406 (3rd Circuit 2003) the Court held that persons -- lawyers -- who assist fraudulent transfers may have liability for various common law wrongs, even if they do not receive the property in question, and even if they commit no overt acts in support of the conspiracy. These common law liabilities may include the tort of creditor fraud, aiding and abetting, civil conspiracy to commit creditor fraud.

(a) And consider McElhanon v. Hing, 151 Az. 386, 728 P.2d 256 (Ct. App. 1985), aff'd. in part and vacated in part, 151 Az. 403, 728 P.2d 273 91986), cert. denied 107 S. Ct. 1956 (1987), which involved an attorney who was held liable ($286,120 in damages) for participating in a conspiracy to defraud a client's judgment creditor. The facts of this case are rather egregious and illustrate the point made above that while attorneys have the ethical obligation to zealously represent their clients, they should not be foolish. A disgruntled creditor may very well allege fraud by the planning attorney for a number of reasons, including as a means of obtaining discovery from the attorney. Lawyers in the Weese case were very fortunate not to be sued as co-conspirators in fraud by creditors. The good news for lawyers engaged in asset protection planning today is that creditors have historically been reluctant to sue planning attorneys. Sooner or later that may

[5]See *Minimizing Attorney Liability in Asset Protection Representation*, Parts 1, 2 and 3, William L. Siegel, Journal of Asset Protection, September/October 1997, Vol. 3, No. 1, and January/February 1998, Vol. 3, No. 3, and March/April 1998, Vol. 3, No. 4.

change. But see Bosak v. McDonough, 549 N.E.2d 643 (Ill.App. 1st Dist. 1989), in which the Court found that absent evidence that the attorney counseled the debtor to defraud the lender or agreed to participate in any fraud, the attorney is not liable for conspiracy. Another "good" case refusing to find a lawyer liable is Nastro v. D'Onofrio, 263 F. Supp 2d 446 (D. Conn. 2003), in which a Court refused to hold a lawyer civilly liable to a creditor of a client for whom the lawyer created an offshore spendthrift trust, citing the strong public policy of Connecticut in not imposing a liability on lawyers to third parties. As to a claim that an estate planning lawyer might have "aided and abetted" a tort, the seminal case is Haberstam v. Welch, 705 F. 2d 472 (D.C. Cir 1983, decided by a 3-judge panel including Judges Scalia and Bork).

(b) The other extreme involves the possibility of an attorney being sued by an estate planning client, or his heirs, successors and beneficiaries, after his death, when the client or his estate subsequently suffers a judgment. The claim might be asserted that the attorney was delinquent in that techniques were in fact available to protect the estate during the client's lifetime, but the attorney negligently failed to raise or otherwise explore them with the client in the estate planning process. See Duncan Osborne's article cited on page 81. You may be damned if you do asset protection planning for your clients, and damned if you refuse to. See also Gideon Rothschild's article in the September 2003 issue of Trusts & Estates, "Asset Protection Planning Ethical? Legal? Obligatory?"

(c) Consider also F.D.I.C. v. Porco, 552 N.Y.S. 2d 910 (Ct. App. 1990), wherein the New York Court of Appeals held that "under long-standing New York law, a creditor has no cause of action against a party who merely assists a debtor in transferring assets where, as here, there was neither a lien on those assets nor a judgment on the debt."

(d) Goldberg v. Rosen, 2012 WL 4933299 (11th Circ., Unpublished, October 17, 2012). In a bankruptcy case, the trustee in bankruptcy sought to recover as a fraudulent conveyance the legal fees paid to a well-known Florida asset protection attorney Howard Rosen who created an OAPT for the bankrupt. The attorney vigorously defended and produced the Affidavit of Solvency he had obtained from the bankrupt and relied upon. The court held for the attorney, finding no evidence of fraudulent transfer, malpractice, or unjust enrichment.

(e) Do U.S. Attorneys Have An Ethical Duty With Respect to Non-U.S. Law? France in 2011-2012 adopted new rules subjecting to inheritance and gift tax all transfers of French-situated property held in a trust or by a trust of which a French tax resident is a settlor, deemed settlor, or beneficiary. Do non-French attorneys assisting French residents have a duty to (1) know about this law and advise their clients about it; or (2) help the French government enforce it. See "French Traps"

by Sophie Berenstein, STEP Journal December 2012.

(2) Criminal Liability

It goes without saying that an attorney assisting a client in asset preservation planning must scrupulously avoid conduct which could implicate the attorney himself in possibly criminal activity. See, for example, 11 USC Section 152, the Crime Control Act of 1990, Bankruptcy Crimes, and Internal Revenue Code Section 7206, as well as:

- Racketeering Influenced and Corrupt Organization ("RICO") statute, 18 U.S.C. section 1961 et seq.

- Bankruptcy Crimes --

    - 18 U.S.C. Section 152 for anyone "knowingly and fraudulently concealing from a trustee ... any property belonging to the estate of a debtor."

    - 18 U.S.C. Section 157 for anyone "having devised, or intending to devise, a scheme or artifice to defraud and for the purpose of executing or concealing such scheme files a [bankruptcy petition] or makes a fraudulent representation in a [bankruptcy] proceeding."

    This risk suggests that the wise strategy is never to counsel a voluntary bankruptcy filing. Avoiding bankruptcy also avoids the 10-year look-back risk.

- Internal Revenue Code Section 7212(a) for anyone who "corruptly endeavors to ... impede any officer of the United States or obstructs or impedes the administration [of the tax law.]" See United States v. Popkin, 943 F.2d 1535 (11th Cir. 1991) in which Mr. Popkin, an attorney, was convicted for assisting a client in disguising the source of undeclared funds being repatriated from offshore.

- Money Laundering Control Act, 18 U.S.C. sections 1956 and 1957.

- Conspiracy to Defraud the U.S., 18 U.S.C. Section 371.

- Mail and Wire Fraud, 18 U.S.C. Section 1341.

- The Patriot Act signed into law by President Bush on October 25, 2001

designed to thwart the financial underpinning of terrorism. See the June 3, 2002 article in *The Washington Post* Exhibit 5 regarding developing technology for tracing and monitoring illicit funds developed partly as a result of The Patriot Act.

(3) No Available Malpractice Insurance.

Attorneys should be advised that virtually every legal malpractice policy excludes fraud from the scope of its coverage. If a lawyer knowingly gives advice that assists his client in perpetrating a fraud, he is liable to suit for fraud or malpractice without benefit of insurance coverage.

(4) Planner Due Diligence is Required to Avoid Civil, Criminal or Ethical Liability. See Mr. Zagaris' outline.

See "What ACTEC Fellows Should Know About Asset Protection" (An article by Duncan Osborne and Elizabeth M. Schurig, published in 25 ACTEC NOTES at p.367 (2000, published with consent) (Exhibit 2). At least six other articles have suggested that a lawyer engaged in estate planning may have a duty to clients to advise on asset protection planning in addition to more traditional trust and estate and tax planning advice. While there are risks in giving asset protection advice, you may be "damned if you do, damned if you don't." Duncan Osborne framed the matter in this way:

> "The debate between advocates of creditors' rights and advocates of asset protection cannot ... turn on whether asset protection planning is proper. Rather, the only meaningful debate is the determination of the lawful and proper scope of asset protection planning ... Nowhere is it written that an individual must preserve his assets for the satisfaction of unknown future claims and claimants. The focus on causality -- a causal link between an asset transfer and the injury allegedly suffered by a creditor -- provides a means to distinguish between the actions that operate directly to prejudice a particular creditor and those actions that in some remote, not foreseeable way, have after the passage of time or the occurrence of an intervening cause, compromised a creditor's financial interest."

XV. CLIENTS WANT ASSET PROTECTION PLANNING

Two recent surveys, one reported in the Fall of 2003 in The Wall Street Journal, "Litigation Boom Spurs Efforts To Shield Assets," by Rachel Emma Silverman, and

another reported in the September 2003 issue of Trusts & Estates in an article entitled "Shelter From the Storm," by Russ Alan Prince and Richard L. Harris, document the rapidly increasing interest in and demand for asset protection expertise in their professional advisors by HNWI. With the phase-out of the importance of estate tax planning with the dramatic recent and scheduled increases in the estate tax exemption, trust and estate planning lawyers and other financial service providers -- accountants, financial planners, investment advisors, trust bankers -- have a strong motivation to increase their expertise in the asset protection area as the opportunity presents itself to find other profit centers in their practices. According to a survey, 69% of investors holding $5 - $25 million are fearful of being targeted by an unfounded lawsuit. 1.8 million Americans were sued in 2004, the most recent year for which figures are available.

These two articles are attached as Exhibits 5 and 6.

According to the Trusts & Estates article, while less than 28% of lawyers agreed strongly with the assertion that "Asset protection is legal and should be discussed with most wealthy clients," 55% of high net worth clients were reported as "very" or "extremely" interested in asset protection planning. Interesting, more successful lawyers were more in tune with their clients' sensitivity to asset protection. Fewer than 13% of wealthy investors have any type of asset protection planning. Clients need asset protection planning. Clients want asset protection planning. Yet many estate planning lawyers are not providing this service to their clients. With the opportunities for tax-oriented estate planning shrinking, estate planning lawyers have an opportunity to grow their practices into asset protection planning.

EXHIBIT A

EXHIBIT A

Prepared by
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as part of their materials for an ALI-ABA Program
"ASSET PROTECTION: TRUST PLANNING"
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Planning Techniques for Large Estates
(The entire outline is available from ALI-ABA)
These materials are republished here with
the consent of the authors.

VII. OVERVIEW OF SELECTED JURISDICTIONS

A. Introduction

Selection of a jurisdiction presents a challenge. Due to the logistical difficulties of having reliable contacts in every possible country and the burden of trying to follow changes in the laws and the political/economic climates of many jurisdictions, it is very tempting for an asset planner to focus on a single country and then do "cookie-cutter" structures for all clients in that particular jurisdiction. The attorney practicing in this arena should resist that inclination and become knowledgeable about the legal and non-legal issues relevant to various jurisdictions. There are important differences among jurisdictions and the scene is not static. What works for one client may not be best for another. Similarly, what works best this year may not work best next year. Trustees and lawyers in many jurisdictions are marketing their respective countries as being optimal for asset protection. Like marketing materials of any salesman, the information is helpful, but requires careful scrutiny. The following presents an overview of certain offshore jurisdictions. The

jurisdictions presented are representative of the types previously discussed (aggressive vs. nonaggressive legislation) and of various geographical locations.

B. Bahamas

1. GENERAL CHARACTERISTICS. The Bahamas is located in the western Atlantic Ocean off the coast of Florida. The capital and financial center of the Bahamas is Nassau on the main island of New Providence. There is excellent airline service from the United States and a modern communications system. The Bahamas is an English-speaking country with a common law legal system. Although completely independent of the United Kingdom, the Bahamas is still a member of the British Commonwealth. The official currency in the Bahamas is the Bahamian dollar, the value of which is equal to the U.S. dollar and is expected to remain so. The Bahamas enjoys a fair degree of political stability, but suffers from poverty and unemployment.

2. CONFIDENTIALITY. The Bahamas has strict bank secrecy laws which were modeled after the Cayman Islands secrecy statute. The Bahamian secrecy laws are codified at Section 10 of the Bank and Trust Company Regulation Act of 1965, as amended in 1980. However, the IRS has been successful in penetrating Bahamian bank secrecy in certain covert investigations.[463] Under Bahamian secrecy laws, it is a crime for a banker or another person who, in a professional capacity, has acquired information about the identity, assets, liabilities, transactions, or accounts of a customer, to reveal such information to another person unless such disclosure is required by Bahamian law or by the Bahamian courts, or unless the customer consents to the disclosure.

The Bahamas requires reporting of large currency transactions in certain situations. However, exceptions to the reporting requirements exist. For example, the requirement does not apply to customers who have an existing relationship with a Bahamian bank, and it also does not apply to transactions by customers who have the recommendation of a "reputable" party.[464]

3. TAXES. The Bahamas is essentially a no-tax jurisdiction. It has no personal income tax, corporate income tax, value added tax, capital gains tax, withholding tax, gift tax, estate tax, or employment tax. Property taxes are imposed on both developed and undeveloped real estate. There are stamp duties on the sale of property and on most documents. Businesses and professionals operating in the Bahamas are subject to a business turnover tax on gross receipts from local sources.[465]

4. FRAUDULENT DISPOSITION. Fraudulent dispositions are addressed in the Fraudulent Dispositions Act, 1991. Under the statute, dispositions are voidable by a creditor prejudiced by the disposition if the transferor made the disposition with an intent to defraud. The statute defines "intent to defraud" as an intention of the transferor to defeat willfully an obligation owed to a creditor, and the burden of proof for establishing such intent is on the creditor. The statute of limitations is two years from the date of the applicable disposition.[466]

5. TRUSTS AND OTHER ENTITIES.

a. Trusts Act. The Trusts (Choice of Governing Law) Act, 1989 affords trusts protection from forced heirship laws in the settlor's home country and contains provisions addressing inbound and outbound redomiciliation. If Bahamian law is designated as the trust's governing law, such designation is binding and effective.

b. Trustee Act. The Trustee Act, 1998 liberalizes the rules applicable to Bahamian trustees. For instance, trustees are now held to an "ordinary person" standard of care.[467] Furthermore, a trustee may now delegate any power or discretion vested in him as trustee to another person.[468] Finally, the new law gives trustees discretion not to inform even vested beneficiaries of the existence of the trust.[469]

c. International Business Company. Bahamian legislation also provides for the formation of an International Business Company (an "IBC"). By combining an IBC with a trust, one achieves a double layer of confidentiality, and the structure provides a simple distribution mechanism at the death of the settlor, because only shares in the IBC (and not trust assets) are distributed to the heirs.

6. OTHER CONSIDERATIONS.

a. U.S. Influence. Because the Bahamian economy is heavily dependent on U.S. tourism, there exists the potential for U.S. influence on the treatment of legal entities established there by U.S. citizens. While there does not appear to be any current movement in this direction, it should be considered in the selection of a jurisdiction.

b. Grupo Torras S.A. et al v. S.F.M. Al-Sabah et al.[470] In this case, a Bahamian lower court judge determined that the Fraudulent Dispositions Act, 1991 would not insulate the defendant-trustee from a claim against the assets of the trust even if the two-year statute of limitations for fraudulent conveyance claims had passed. The ruling, issued in 1995, generated considerable controversy about the continued validity of asset protection trusts in the Bahamas.

The case presented important issues of retention of control over the trust and/or its assets by the settlor. However, the court's failure to apply the Fraudulent Dispositions Act, 1991 (leaving the defendant-trustee without a statute of limitations defense) turned on the court's finding that the assets were not actually owned by the settlor at the time he transferred them to the trust because the assets were acquired by the settlor by fraud.

In 1997, the Bahamas Court of Appeal limited the *Grupo Torras* ruling to the specific facts of that case, thereby severely narrowing its legal precedential value. However, the existence of this case in the jurisdiction should somewhat diminish the attractiveness of the Bahamas as an asset protection trust venue.

C. Bermuda

1. GENERAL CHARACTERISTICS. Bermuda is located in the Atlantic Ocean approximately 600 miles due east from the North Carolina shoreline. It has regular air service with daily flights from New York, Boston, Atlanta, Philadelphia, Baltimore, and Toronto, and it also has a state of the art communications system. Bermuda, an English-speaking country, is a common law jurisdiction. Bermuda is an old British "Overseas Territory" (former colony) and is part of the British Commonwealth. Bermuda may opt for independence from Britain, but in a 1995 referendum Bermudans rejected this direction. The United Kingdom is responsible for defense and foreign relations; however, economically, Bermuda is more closely linked to the United States. Bermuda has a long tradition of stability and conservative government. The island has a balanced budget, is well-administered, and has a highly educated populace. Strict regulations and a conservative approach to business and socio-economic problems have resulted in the virtual absence of poverty, unemployment, and homelessness in Bermuda.

2. CONFIDENTIALITY. There are no bank secrecy laws in Bermuda, but banking information is not readily available to third parties under English common law protection. Bermuda and the United States have a tax treaty that serves to implement some exchange of tax information provisions. However, Bermuda's Attorney General must consult with an investigative committee before providing any information to foreign regulatory authorities.

3. TAXES. Bermuda is virtually tax-free. It does not have an income tax, gift tax, estate tax, business or value added tax, capital gains tax, sales tax, withholding tax, or accumulated profits tax. Approximately 32% of the government's revenue is earned from customs duties. Additional forms of taxation in Bermuda include a payroll tax, a departure tax, a motor vehicle fee, and a betting tax that is set at 20%.[471] Foreign ("exempted") companies incorporating in Bermuda can receive a guarantee exempting them from taxes until 2016.[472]

4. FRAUDULENT DISPOSITION. Fraudulent dispositions are addressed in several Bermuda statutes.[473] In particular, Sections 36A-36G of the Conveyancing Act of 1983 (as amended in 1994), must be considered in the context of trusts established for the purpose of protection from future creditors. Under Section 36C, a disposition with "requisite intent" is voidable by the affected creditor. However, under Bermuda law, "requisite intent" does not necessarily involve deceit or dishonesty; rather, the dominant purpose of the disposition must be to deprive present or potential creditors of assets which otherwise would have been available to them. Insolvency of the settlor at the time the trust is established is a badge of fraud. Furthermore, the provisions of Section 36C might apply to future creditors arising within two years after the relevant disposition if the requisite intent is present.[474] If it is clear that the primary purpose of establishing a Bermuda trust is something other than creditor protection (*e.g.*, estate, financial, or tax planning), Bermuda's fraudulent disposition law should not pose a problem, but caution is advised in this area.

5. TRUSTS. Bermuda is a good situs for the establishment of a trust, revocable or irrevocable, for the benefit of the settlor or his beneficiaries. Bermuda passed

specific laws governing trusts in 1989, particularly the Trusts (Special Provisions) Act (the "Bermuda Act"). Among other provisions, the Bermuda Act contains language regarding a settlor's capacity to create a trust, provides for redomiciliation of a trust, addresses jurisdiction of the Supreme Court of Bermuda in trust matters, and provides for selection of the trust's governing law. Additionally, Section 11 of the Bermuda Act provides that in the absence of other Bermuda law or Bermuda public policy considerations to the contrary, a Bermuda trust cannot be altered or set aside by a Bermuda court pursuant to a law of another country regarding the effect of marriage, forced heirship, or insolvency of the settlor and creditor protection.

Part II of the Bermuda Act has recently been amended to streamline Bermuda trusts for non-charitable purposes ("purpose trusts"). The Bermuda Act now clarifies the conditions for the objectives of a purpose trust (sufficiently certain, lawful, and not contrary to public policy), and does away with the requirement for a "designated person trustee" (*i.e.*, a Bermuda lawyer, accountant, or licensed trust company).

Development of trust law in Bermuda continues to keep pace with modern trends and provides flexibility in private and commercial contexts. Notably, the Perpetuities and Accumulations Act, 2009 abolished the rule against perpetuities for trusts created on or after August 1, 2009 (with the exception of trusts holding Bermuda land).

7. <u>ENFORCEMENT OF FOREIGN JUDGMENT</u>. A Bermuda court will generally only assume jurisdiction with respect to a foreign judgment if the judgment debtor is a resident of Bermuda or the judgment debtor has agreed to or has voluntarily submitted to the jurisdiction of Bermuda courts (*e.g.*, by visiting Bermuda). It is unlikely that a Bermuda court would entertain an action to enforce a judgment against a U.S. settlor of a Bermuda trust. However, a judgment creditor or trustee in bankruptcy could attempt to bring an action against a Bermuda trustee on the grounds that the trustee holds property on "constructive trust" for the creditor (*i.e.*, the trust arrangement is a sham). To prove a constructive trust, the creditor would have to show either that the original trust fails wholly or partially or that the trustees hold the property as agents of the settlor.

8. <u>PRIVATE TRUST COMPANIES</u>. Bermuda offers the incorporation and use of private trust companies to act as trustee of a group of trusts. Private trust companies are commonly employed in family contexts. This structure involves the incorporation of a Bermuda exempt company for the purpose of acting as trustee of family trusts, so long as the family members are related. A settlor can maintain control of the trust company by acting as director or shareholder. If the settlor does not want to (or should not) own shares in the company, the shares can be placed in a purpose trust (*i.e.*, for the purpose of holding and voting shares in the private trust company). Alternatively, a private trust company can be established as a company limited by guarantee (*i.e.*, without share capital).

D. Cayman Islands

1. <u>GENERAL CHARACTERISTICS</u>. The Cayman Islands is located in the western Caribbean. There is regular air service to multiple U.S. cities and modern

communication systems. The capital and main business center is George Town on the island of Grand Cayman. The Cayman Islands, an English-speaking, British Overseas Territory, is a common law jurisdiction, is largely self-governing, and quite stable. Its economy is generally healthy despite feeling the effects of the global recession. The official currency is the Cayman Islands dollar.

2. CONFIDENTIALITY. The Cayman Islands has strict bank secrecy laws which impose substantial penalties for revealing confidential information. However, this legislation provides a mechanism for disclosure of information in limited circumstances (*e.g.*, in the course of a criminal investigation or when a bank must protect its own interests). If the person who is required to give evidence or make a disclosure resides in the Cayman Islands, that person must receive permission for such disclosure from the Cayman Grand Court.[475] By and large, a foreign government cannot obtain assistance in pursuing criminal matters unless the offense is an offense under Cayman law. However, in 1988 the United States, the United Kingdom, and the Cayman Islands entered into a Mutual Legal Assistance Treaty under which the parties will give each other information in certain drug investigations and white-collar crimes, including bank fraud, and in 2001 these three nations agreed to the exchange of information regarding enforcement of U.S. income tax laws and the prosecution of criminal tax evasion. Additionally, the Cayman Islands has given effect to the European Union Savings Tax Directive, meaning that relevant payments by Cayman entities to European Union citizens are reported to Cayman Islands authorities, who in turn must share this information with European Union countries.

3. TAXES. The Cayman Islands has no corporation, income, capital gains, profits, gift, estate or inheritance taxes. Certain guarantees against further taxes are available.

4. FRAUDULENT DISPOSITION. In 1989, the Cayman Islands passed the Fraudulent Disposition Law, 1989. Under this law (revised in 1996), a disposition is voidable by a creditor prejudiced by the disposition if the disposition was made at an undervalue and with an intent to defraud. "Intent to defraud" is defined as an intention of the transferor to willfully defeat an existing obligation owed to a creditor, and the burden of proof for establishing such intent is on the creditor. The statute of limitations is six years from the date of the applicable disposition.[476]

5. TRUSTS. There are three basic types of trusts available under Cayman law: ordinary, exempted, and Special Trusts (Alternative Regime) [a "STAR" trust]. An ordinary trust parallels the general common law trust concept and may exist for up to 150 years. An exempted trust has the added benefits of a 50-year government guarantee against taxation and is also limited to a duration of 150 years. The STAR law establishes an alternative trust regime which applies to a trust if the trust instrument so provides. The Cayman Trusts Law refers to a trust to which STAR applies as a "special trust."[477] STAR trusts have several special features (*e.g.*, their objects may include non-charitable purposes, and it is up to the settlor to say who may have standing to enforce the trust). Additionally, the rule against perpetuities does not apply, which makes it possible to have a STAR trust with an unlimited life.[478]

Cayman Islands trust law recognizes the choice of governing law expressed in the trust instrument and the ability to change the governing law of a trust instrument. No Cayman Islands trust may be set aside simply because the laws of a foreign jurisdiction prohibit or do not recognize the concept of a trust, or because the trust defeats rights conferred by a foreign law. Accordingly, with respect to certain property owned by a trust, Cayman law may override the law of the settlor's jurisdiction, including forced heirship requirements.

7. OTHER CONSIDERATIONS. Cayman law is designed to attract business from individuals located outside its jurisdiction. In recent years, however, the Cayman Islands has come under pressure to address the issue of money laundering. In response, the Cayman Islands enacted counter-money laundering legislation and regulations in September, 2000 and is viewed as a leader in developing anti-money laundering programs in the Caribbean.

E. Cook Islands

1. GENERAL CHARACTERISTICS. The Cook Islands are located in the South Pacific Ocean, east of Australia and south of Hawaii. The capital is Rarotonga, with a modern international airport and regular air service to Los Angeles, Tahiti, and Auckland. The islands are remote from the world's major financial centers but have modern communication systems. Although an independent country, the Cook Islands has links with New Zealand and uses New Zealand's currency. English is the official language, and there is a common law legal system.

2. CONFIDENTIALITY. The Cook Islands banking laws mandate secrecy about client information, and violators face a penalty of one year imprisonment. In certain situations however, the Cook Islands' courts may obtain access to protected documents, and Cook Islands bank secrecy provisions are in some cases overridden by money laundering legislation.[479]

3. TAXES. So long as an international trust ("IT") organized in the Cook Islands does not conduct business there, it is exempt from tax. The Cook Islands permits a trust's affairs to be administered by a Cook Islands trustee company, and this does not constitute "carrying on business" for tax purposes.

4. FRAUDULENT DISPOSITION/TRUSTS. The Cook Islands enacted comprehensive trust legislation in the International Trusts Amendment Act 1984 (the "International Trusts Act"). The legislation addresses ITs and the effect thereon of fraudulent dispositions and bankruptcy. Section 13B of the International Trusts Act provides that a creditor seeking to set aside a disposition must prove beyond a reasonable doubt that the disposition was made with an intent to defraud that particular creditor and the transferor was rendered insolvent by the transfer. If the fair market value of the settlor's property after the transfer to the trust exceeds the value of the creditor's claim at the time of the transfer, there is no intent to defraud.

Even if the creditor meets this burden of proof, the transfer is not void or voidable. Instead, the transferor must pay the creditor's claim from property which would have been subject to its claim but for the transfer.

Section 13A of the International Trusts Act expressly states that an IT will not be void by virtue of the settlor's bankruptcy. The International Trusts Act also contains limitations provisions. If a creditor's cause of action accrues more than two years before a transfer to an IT, the transfer will not be deemed fraudulent (unless proceedings in respect of that cause of action had been commenced at the date of the relevant transfer). Also, if a creditor fails to bring an action within one year from the date the transfer to an IT occurs, the action is barred. Furthermore, a transfer to an IT will not be fraudulent as to a creditor if the transfer occurs before the creditor's cause of action accrues, where "cause of action" is defined as the first cause of action capable of assertion against a settlor.[480] Finally, an Amending Act provides that for redomiciled trusts, the limitations period commences at the time of the original transfer, even when the transfer was to an offshore center other than the Cook Islands.

Section 13B of the International Trusts Act also sets forth circumstances that will not be deemed badges of fraud. Fraudulent intent cannot be imputed from a transfer to an IT within two years of the accrual of a creditor's cause of action, from retention of powers or benefits by the settlor, or by virtue of the designation of the settlor as a beneficiary, trustee, or protector.

5. <u>TRUSTS</u>. Retained powers and benefits are explicitly addressed by statute. An IT cannot be "declared void or be affected in any way" because the settlor:

a. has the power to revoke or amend the trust, to dispose of trust property, or to remove or appoint a trustee or protector;

b. retains, possesses or acquires any benefit, interest, or property from the trust; or

c. is a beneficiary, trustee, or protector.[481]

The rule against perpetuities has been repealed, but an IT may use a perpetuities period if the settlor so desires. Other provisions of the International Trusts Act make selection of Cook Islands law binding and conclusive, ensure that an IT is not subject to forced heirship laws of other countries, and require non-recognition of a foreign judgment against an IT, its settlor, trustee, and protector. An Amending Act also provides that community property transferred to an IT retains its character as community property.

With respect to litigation, the International Trusts Act provides that a plaintiff may not obtain interlocutory relief—including discovery, interrogatories, and injunctions—without filing an affidavit that satisfies the court that the plaintiff will be able to meet various time limits and other presumptions.[482] As a consequence, this requirement may have the practical effect of deterring litigation.

6. <u>OTHER CONSIDERATIONS</u>.

a. <u>Insularity</u>. Unlike other offshore centers, the economies of which are tied closely to the United States or the United Kingdom, the Cook Islands presumably would

not be subject to economic or political pressure to relax its bank secrecy provisions or reduce the benefits of entity formation for protective purposes.

b. Comprehensive Statutory Scheme. Based upon the authors' review of commonly selected offshore jurisdictions, the Cook Islands has one of the most comprehensive bodies of statutory law governing trusts and fraudulent conveyances. The level of comfort one obtains with such statutory certainty should be a factor to weigh against the inconvenience of traveling to this venue.

c. 515 South Orange Grove Owners, et al. v. Orange Grove Partners.[483] In a 1995 decision appealing the issuance of a Mareva injunction against the trustees of an asset protection trust, the Court of Appeals in the Cook Islands found that a judgment creditor's action was not time-barred on the basis that the two-year statute of limitations on fraudulent conveyances in the International Trusts Act began to run on the date of the judgment against the settlor-transferor and did not commence when the cause of action accrued. Proponents of the International Trusts Act argued that the court misinterpreted the statute and rendered its judgment based on "bad facts."

As a result of this ruling, the International Trusts Act was amended in 1996 to cure a possible ambiguity in the statute. Accordingly, while settlors can take comfort in knowing that the statute of limitations will begin when a potential judgment creditor's cause of action accrues, there remains at least some doubt as to which other International Trusts Act provisions might be susceptible to an adverse ruling the next time a court is presented with "bad facts."

d. Federal Trade Commission v. Affordable Media, Inc. (also referred to as "the *Anderson* case").[484] (See discussion at Part VI.F.)

e. Bank of America v. Weese[485] (See discussion at Part VI.F.)

F. Gibraltar

1. GENERAL CHARACTERISTICS. Gibraltar is located off the southern coast of Spain. It has regular air service from London and modern communication systems. Gibraltar is a colony of the United Kingdom, and its constitution ensures that sovereignty will never be passed to another country against the will of the people of Gibraltar. The currency of Gibraltar is the Gibraltar pound, which is pegged to the British pound. English is the official language, but most inhabitants also speak Spanish. Gibraltar has a common law legal framework.

2. CONFIDENTIALITY. As more fully discussed below, trusts are subject to a limited disclosure requirement when seeking the protection of Gibraltar's fraudulent disposition statute, the Bankruptcy (Amendment) Ordinance, 1990; however, the disclosed information is confidential. The Banking Ordinance, 1992 imposes strict requirements of bank secrecy.

3. TAXES. Gibraltar allows the formation of "exempt companies" which can conduct business anywhere but Gibraltar. These companies pay no income tax and can transact business from Gibraltar, but in order to maintain exempt status, cannot do business with citizens or residents of Gibraltar. Similarly, income of a Gibraltar trust that is paid to a nonresident beneficiary is not subject to income tax.

4. FRAUDULENT DISPOSITION. Existing legislation addresses dispositions by nonresident settlors, and disposition of assets by a settlor into a trust is not voidable by a creditor if:

a. the settlor is an individual;

b. the settlor is not insolvent at the time of the disposition;

c. the settlor did not become insolvent as a result of the disposition; and

d. the trust is registered in accordance with the Bankruptcy (Register of Dispositions) Regulations, 1990.[486]

Under the legislation, the registration process excludes those with actual knowledge of a contingent or prospective liability.

The Statute of Elizabeth governs non-registered trusts.

5. TRUSTS. The Bankruptcy (Amendment) Ordinance, 1990 and the Bankruptcy (Register of Dispositions) Regulations, 1990 expressly establish the concept of an asset protection trust. An asset protection trust must be registered as described above, and the trustee must affirm that (i) the settlor has completed forms establishing his or her financial position and revealing contingent or prospective liability, (ii) the trustee has taken reasonable steps to substantiate the information received from the settlor, and (iii) the settlor has given the trustee an affidavit of solvency.[487] The registry is not open to public inspection and any information delivered to it is kept secret and confidential. The common law rule against perpetuities has been replaced by a 100-year limitation. Furthermore, Gibraltar law allows easy redomiciliation, and Gibraltar common law does not recognize forced dispositions from other jurisdictions.

6. TRUSTEESHIP. The Bankruptcy (Register of Dispositions) Regulations, 1990 defines a trustee as "a company with a permanent place of business in Gibraltar and authorised by the Commissioner to act as a trustee."[488] The regulations provide that the Registrar shall register a disposition of assets only when the trustee making the application:

a. is the sole corporate trustee of the disposition;

b. is judged by the government (the Financial and Development Secretary) to have adequate financial and administrative resources to act as trustee in relation to the disposition;

c. has obtained the government's prior written approval of the inquiry forms administered to the settlor; and

d. has indemnity insurance in an amount exceeding 1 million pounds.[489]

Thus, it would appear that a corporate trustee with a Gibraltar situs is required with respect to Gibraltar trusts.

7. ENFORCEMENT OF FOREIGN JUDGMENTS. Judgments may be registered under specific reciprocal enforcement agreements with the United Kingdom, other Commonwealth countries, and the European Union. Judgments from other jurisdictions are not enforceable in Gibraltar. Claimants must sue under Gibraltar law.

8. HESS V. LINE TRUST CORP., LTD. It this case, the court refused to hear the claim of a divorcing wife that a Gibraltar asset protection trust was established with intent to defraud her.[490]

G. Guernsey

1. GENERAL CHARACTERISTICS. Guernsey is one of the Channel Islands, located in the English Channel off the Normandy Coast of France. English and French are the official languages. Guernsey is reachable by air from London and other European cities. It is a dependent territory of the British Crown with considerable political stability due in part to the lack of political parties.

2. CONFIDENTIALITY. Guernsey does not have a statutory law of secrecy or confidentiality. However, the Royal Court has held that banks have a contractual duty of privacy to their customers.[491] Notable exceptions to the general rule of bankers' confidentiality include situations involving serious or complex fraud, suspicion that funds are derived from or used in connection with drug trafficking, terrorism or money laundering, the need to protect depositors or the public interest, or potential insider dealing. Additionally, courts have the discretionary power to grant disclosure of otherwise confidential information in cases before any Guernsey court and in proceedings in other jurisdictions.

3. TAXES. Guernsey does not impose a tax on capital gains, capital transfers, inheritance, or estate duties, nor is there a wealth tax, a purchase tax, or a value added tax. With respect to income tax, as long as all of a trust's income is payable to beneficiaries outside of Guernsey, the only trust income subject to Guernsey income tax is Guernsey-source income other than bank interest.

4. FRAUDULENT DISPOSITION. Under the 1929 Law Relating to Debtors and Renunciation, a transfer by an insolvent party is considered fraudulent and void if made within three months before an application for a declaration of insolvency and with the intent of giving the transferee a preference over the insolvent party's other creditors.

5. TRUSTS. Guernsey trusts are governed by the Trusts (Guernsey) Law, 2007 (the "Trust Law"). According to the Trust Law, a trust is invalid and unenforceable if it promotes action contrary to Guernsey law, lacks an identifiable beneficiary, or

the Royal Court declares that –

a. it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty,

b. it is immoral or contrary to public policy,

c. its terms are so uncertain that its performance is rendered impossible, or

d. the settlor was, at the time of its creation, incapable of creating such a trust.[492]

The Trust Law does not specifically recognize asset protection trusts beyond permitting a beneficiary's interest in a trust to be "subject to a restriction on alienation ... or subject to diminution or termination in the event of the beneficiary becoming bankrupt or any of his property becoming liable to arrest, saisie, or similar process of law."[493] Guernsey courts have not yet considered the issue of whether assets in a Guernsey trust are protected from present or future creditors of the settlor.

6. ENFORCEMENT OF FOREIGN JUDGMENTS. Guernsey recognizes registered judgments from reciprocating countries as carrying the authority of a judgment from the Royal Court of Guernsey. A judgment creditor may seek injunctive relief from a Guernsey court and may also pursue postjudgment discovery in order to force the trustee to disclose information about the trust. If the judgment debtor has an enforceable interest in the trust, the trustee will be required to disclose whether the debtor's interest in the trust comprises sufficient assets to satisfy the judgment. If the judgment debtor is a discretionary beneficiary, the trustee could avoid making such a disclosure, but the judgment creditor would be entitled to seek an injunction requiring disclosure of the debtor's interest in the trust.

7. RULE AGAINST PERPETUITIES. The Trust Law abolished the rule against perpetuities for trusts created on or after March 17, 2008. Pre-existing trusts are subject to the old rule against perpetuities, which requires that noncharitable trusts terminate on the expiration of 100 years after creation.

H. Isle of Man

1. GENERAL CHARACTERISTICS. The Isle of Man is a British crown dependency situated in the Irish Sea which can be readily reached by air from London. English is the official language and the island has modern communication systems. It is a common law jurisdiction and considered to be very stable.

2. CONFIDENTIALITY. There is a strong tradition of confidentiality in the Isle of Man. Contractual agreements for the maintenance of a bank account generally prohibit the bank from divulging information regarding the client's affairs except by order of a Manx court or with the client's consent.

3. TAXES. There is no wealth tax, gift tax, estate tax, or capital gains tax in the Isle of Man. The Isle of Man does not tax nonresidents upon bank interest or income arising outside the island. This principle extends to companies which are beneficially owned abroad and trusts with nonresident settlors and beneficiaries.

4. FRAUDULENT DISPOSITION. The Manx government is reluctant to introduce specific statutes for the encouragement of asset protection trusts, believing that frivolous claims would be dismissed under existing law and fearing to disadvantage legitimate claimants. Currently, fraudulent dispositions are covered by the general law of the Isle of Man (*e.g.*, the Companies Act, 1931, the Bankruptcy Code, 1892, and the Theft Act, 1981).

5. TRUSTS. The law of trusts is governed by the Isle of Man Trustee Law of 1961. Provisions found in this legislation are similar to those contained in English statutory and case law regarding trusts. The Isle of Man Trustee Law of 1961 governs the powers and duties of trustees, provides for the distribution of capital and income to beneficiaries, and governs the appointment and retirement of trustees. Other pertinent Manx legislation includes the Variation of Trusts Act of 1961, the Manx Perpetuities and Accumulations Act of 1968, and the Foundations Act 2011.

6. ENFORCEMENT OF FOREIGN JUDGMENTS. While U.S. judgments are not recognized, the Isle of Man recognizes judgments from the following countries: Guernsey, Israel, Italy, Jersey, the Netherlands, Sumatra, and the United Kingdom.

7. IN THE MATTER OF HEGINBOTHAM. In this case, the court held that a transfer into trust can only be voided if the transfer was made in an attempt to defraud present creditors. Present debts are defined as "known and associated debts which are to fall due in the future."[494] Debts which may be incurred in the future are not protected. In short, the Statute of Elizabeth is not part of Manx law.

8. RULE AGAINST PERPETUITIES. The Trustee Act, 2001 extended the maximum perpetuities period from 80 to 150 years.[495]

I. Jersey

1. GENERAL CHARACTERISTICS. Jersey is a British crown dependency located in the English Channel near the Normandy coast. In 933 the island became part of the area now known as Normandy, which today is a *département* of northern France. In 1204 the United Kingdom lost control of mainland Normandy, but Jersey remained loyal to the United Kingdom and has been ever since. During the 20th century, a Jersey constitutional convention declared that the United Kingdom will not interfere in Jersey matters of purely domestic concern or taxation. Nevertheless, the United Kingdom retains responsibility for Jersey's relations with

foreign countries and its defense. Externally, Jersey's political stability benefits from its geographical location and its settled links with the United Kingdom and the European Union. Internally, political life is marked by the absence of political parties with candidates for the parliament almost invariably standing as independent candidates on the basis of local issues. The local economy is based mainly on finance, tourism, and agriculture. Although the official language of the Jersey court system is French, the use of English is permitted and adopted in almost all proceedings. There is no currency exchange control in Jersey. Monies in any currency may flow into and out of the island.

2. CONFIDENTIALITY. The Jersey courts have indicated that the rule laid down by the English Court of Appeal in *Tournier v. National Provincial and Union Bank of England*—declaring that a banker owes his customer a contractual duty of confidentiality, subject to certain limited exceptions—is applicable to banking matters in Jersey. Any breach of this duty could give rise to a claim for damages.[496]

The duty of confidentiality arises with the opening of an account, and thereafter information about the customer should not be released by the bank. This duty goes beyond the status of the account and beyond the time that the account is closed. It extends to all transactions through the account and to information obtained from other sources resulting from the banking relations of the bank and the customer.

The circumstances in which disclosure can or must be made without the customer's consent pursuant to the *Tournier* decision have been modified and extended by statute.[497] For example, provisions in the Banking Business Law enable the Jersey Financial Services Commission to obtain information from Jersey banks for the purpose of their supervisory functions.

3. TAXES. The administration of income tax is in the hands of the Comptroller of Income Tax. Both the comptroller and the staff of the comptroller are required to take an oath of secrecy before the Royal Court and are bound by the oath not to disclose information about taxpayers to anyone except to the extent required in the event of a prosecution for an offense under the tax laws.[498]

The only Jersey tax that is significant for the purposes of tax planning is the income tax, with a standard rate of 20% that does not apply to most corporations. As a general rule, a nonresident of Jersey is only liable for income tax on income arising in Jersey excluding Jersey bank interest.[499] In 2008, Jersey adopted a 0% corporate tax rate and initiated a phase-out of the exempt company regime.[500]

There are no capital taxes or inheritance taxes. Persons owning or occupying Jersey realty are liable to pay rates administered by the parishes of Jersey. Other sources of revenue include a stamp duty payable in respect of transfers involving Jersey realty. In Jersey, the mechanism of withholding tax on certain payments is used not only as a means of tax collection but also, in some cases, as a means of giving tax relief. Nonresidents of Jersey are not normally required to withhold tax on payments.

4. FRAUDULENT DISPOSITION. Because Jersey law has its roots in Norman customary law, the Statute of Elizabeth has never been in effect on the island. Thus, the Jersey position with regard to fraudulent disposition is largely nonstatutory. With respect to dispositions which are governed by Jersey law, *Golder v. Sociétédes Magasins Concorde Limited* is the leading case.[501] The court in that case found that in order to set aside a disposition, the creditor has to prove the debtor's intention to defeat creditors and their actual defeat by showing that the debtor is insolvent and that his insolvency was a result of the act being challenged.

Dispositions by transferors resident or carrying on business in Jersey are also covered by the Bankruptcy (Désastre) (Jersey) Law 1990 under which certain dispositions (which might include a disposition to a trust) may be unwound by the Royal Court if they are made at an undervalue. Under this law, when a person enters into a transaction at an undervalue within five years prior to a declaration of bankruptcy (where the debtor is insolvent at the time of or becomes insolvent as a consequence of the transaction), the Viscount (the court officer charged with the administration of the bankruptcy proceedings) may apply to the Royal Court for such order as it thinks fit for restoring the parties' positions to what they would have been if the debtor had not entered into the transaction.[502]

5. TRUSTS AND OTHER ENTITIES. Since 1984 the existence of trusts has been governed on a statutory basis with the enactment of the Trusts (Jersey) Law of 1984 (the "Jersey Trust Law"), which was amended most recently in 2007. A central provision of the Jersey Trust Law is that a valid trust is created wherever a trustee-beneficiary relationship exists for a charitable or, subject to the requirements of the Trust Law, noncharitable purpose.[503] The Jersey Trust Law draws a fundamental distinction between Jersey trusts and foreign trusts.[504] The Jersey Trust Law has only a few provisions that relate specifically to foreign trusts, providing simply that they are governed by and interpreted in accordance with the relevant proper law subject only to certain exclusions as to legality and public policy.[505] Some provisions of the Jersey Trust Law relate to both foreign and Jersey trusts. These include the rule that the trust property is not available to the trustee's personal creditors,[506] some protection for third parties dealing with a trustee,[507] and the three-year period of limitation of actions.[508] With regard to Jersey trusts, the Jersey Trust Law generally restates traditional trust principles as understood in English law, although there are some differences. Most importantly, Jersey trusts are generally valid and enforceable in accordance with whatever lawful terms the settlor chooses to establish.[509] As such, the provisions of a trust may be written in almost any way, and may provide any degree of flexibility from completely fixed trusts, where the interest of the beneficiaries is decided at the outset, to totally discretionary trusts.

No particular formality is required for the creation of a Jersey trust. The trust property must only be held by the trustee, and the terms of the trust must be lawful and clear. The beneficiaries of a trust must be identifiable by name or ascertainable by reference to a class or relationship with some person. An express power may be included in the trust for the addition or exclusion of persons to or from the class of beneficiaries.[510] Beneficiaries may disclaim their interests under the trust.[511] Any property except Jersey realty may be held in a Jersey trust.[512] Jersey realty may, however, be held indirectly in trust (*e.g.*, through a holding company). Subject to the terms of the trust, after provision of the initial assets, further assets may be added to the same

trust. Indeed, the most common arrangement is to start with a purely nominal initial trust fund and to add the "real" assets later.

Amendments to the Jersey Trust Law have given the settlor the ability to reserve certain powers and have strengthened the protection against forced heirship claims and judgments of foreign courts.[513] A further amendment permits Jersey trusts for beneficiaries, Jersey purpose trusts, and Jersey hybrid trusts to exist for an unlimited period, replacing the previous rule against perpetuities, which imposed a 100-year limitation.[514]

6. ENFORCEMENT OF FOREIGN JUDGMENTS. No direct enforcement of a judgment of a foreign court can occur until the judgment is registered in Jersey. Foreign judgments may be registered in Jersey if they fall within the Judgments (Reciprocal Enforcement) (Jersey) Law, 1960. Jersey can direct to which country the 1960 Law applies, and these include England, Wales, Scotland, Northern Ireland, the Isle of Man, and Guernsey. The judgment must be (i) from a superior court, (ii) final and conclusive, (iii) for the payment of a liquidated sum of money not with respect to taxes, fines, or penalties, and (iv) not entered prior to 1960.[515] The law provides that the registration of a foreign judgment may be set aside if the court considers, among other things, that the foreign court had no jurisdiction to hear the original action.

Registration of a judgment will also be set aside (i) if the foreign judgment does not fall within the 1960 Law, (ii) if the defendant was not given due notice of the foreign proceedings, (iii) if the foreign judgment was obtained by fraud, (iv) if the enforcement of the foreign judgment would be contrary to Jersey public policy, or (v) if the rights under the foreign judgment are not vested in the applicant.

Once validly registered, a foreign judgment has the same force and effect for the purposes of execution as a judgment given by the Royal Court itself. If a foreign judgment cannot be registered, the judgment creditor will have to sue on the judgment debt, in a similar manner to any other creditor suing on an ordinary debt, in order to be able to enforce it in Jersey.

7. IN RE ESTEEM SETTLEMENT. In a 2003 ruling, the Royal Court upheld a trust against an attack by creditors of the settlor-beneficiary.[516] Plaintiff attempted to reach the assets of the trust on five separate theories. The court found that the trust was not a sham and further found that the settlor-beneficiary had not retained sufficient control over the trust to support a finding that the trust should be voided. The court also declined to apply corporate law's "piercing" doctrine to trusts and refused to adopt the concept of a remedial constructive trust, notions foreign to Jersey law. Finally, the court found that the trust did not violate public policy.

Plaintiff's case against the trust was thorough and aggressive, and the court dealt extensively with all of plaintiff's evidence and legal theories. Sheikh Fahad, a notorious fraudster, was an unsympathetic defendant. Despite these factors, the trust was upheld and its assets were not reached by the creditors. Assuming no fraud on creditors at the trust's

inception, the case appears to be a ringing endorsement of Jersey as an asset protection jurisdiction.[517]

J. Liechtenstein

1. GENERAL CHARACTERISTICS. Liechtenstein is a small principality located between Switzerland and Austria. It is necessary to fly to Zurich and then drive or take a train to reach Liechtenstein. Liechtenstein is a very stable, civil law country, with strong ties to Switzerland. The Swiss franc is the legal tender of Liechtenstein. The official language is German, though English is often used. The capital of Liechtenstein is Vaduz.

2. CONFIDENTIALITY. Liechtenstein's enforcement of bank secrecy is even greater than that of Switzerland, providing heavy sanctions for breach of professional secrecy. Attorney/client and fiduciary/beneficiary privileges are very strong in Liechtenstein. Liechtenstein has recently concluded numerous tax information exchange agreements with other countries. While previously Liechtenstein had only a tax treaty with Austria and a customs union with Switzerland, Liechtenstein now has entered into tax information exchange agreements with the United States, the United Kingdom, Luxembourg, Germany, Andorra, Monaco, France, San Marino, St. Vincent and the Grenadines, Ireland, Belgium, the Netherlands, Antigua and Barbuda, and St. Kitts and Nevis.

3. TAXES. The former Liechtenstein Tax Act dated back to 1961. It was completely revised and a new tax act entered into force on January 1, 2011 ("New Tax Act"). Pursuant to the New Tax Act, Private Asset Structures ("PVS") benefit from a minimum corporate income tax of CHF 1,200.00 per annum. Any Liechtenstein legal entity can qualify as a PVS upon application. Such status will be granted if an entity does not pursue economic activities, in particular if it only holds "bankable assets" (shares, bonds, other securities, etc.) as defined by the EU Markets in Financial Instruments Directive (MiFID). It can also keep other assets, such as gold, art collections, liquid funds or participations if the PVS or its shareholders or beneficiaries do not exert actual control on the management of such entities by means of direct or indirect influence. The shares or ownership interests (if any) in a PVS may not be publicly placed or traded, and its articles must provide for its treatment as a PVS and accord with the relevant restrictions.

A trust is like a PVS exclusively subject to the minimum corporate income tax of CHF 1,200.00, if the trust is domiciled or actually managed in Liechtenstein or receives earnings in Liechtenstein.

Liechtenstein entities are also subject to value added tax ("VAT") of 8%. VAT is imposed on services provided in Liechtenstein and in Switzerland, including legal services, but does not affect assets held in trust.

4. FRAUDULENT DISPOSITION. A Liechtenstein statute regarding claims by creditors provides that creditors of a settlor can only bring a claim against trust property under fraudulent conveyance law or in accordance with the law of donations or succession.

Liechtenstein law defines a fraudulent disposition as one made with the intention to harm the creditor in question.

A creditor with a foreign judgment must bring the action anew in a Liechtenstein court, which requires, among other things, a deposit in order to cover potential attorneys fees accruing to the defendant. Liechtenstein law expressly disallows contingent fee contracts and punitive or exemplary damage awards, and the losing party must pay its own costs as well as a part of the costs of a successful counterparty. Liechtenstein joined the New York Convention on the Recognition and Enforcement of Foreign Arbital Awards in 2011.

Liechtenstein law provides that a creditor must bring a claim within five years of the establishment of a trust in order to contest the trust. If, however, a creditor serves a brief on the trustee via the Liechtenstein court system informing the trustee of its intention to set aside the transfer, and does so within the five-year statutory period, the limitations period begins to run from the time of service.

5. TRUSTS. Notably, Liechtenstein is the only civil law jurisdiction in mainland Europe to have adopted in codified form the Anglo-American common law trust. However, the Liechtenstein trust is not a wholesale adoption of the Anglo-American common law trust, as the Liechtenstein trust has some unique characteristics. Liechtenstein law contains neither a restriction on the accumulation of income nor a rule against perpetuities. Thus, a Liechtenstein trust may be established for an indefinite duration. Redomiciliation is very easy in Liechtenstein. Purpose trusts may be created for any purpose that is not considered illegal, immoral, or impossible.

6. RECENT CASE STUDY. A United States settlor recently used a Liechtenstein trust to prevent the attachment of assets after a New Jersey court entered a judgment against her. The trust was settled after the prospect of litigation arose but before the New Jersey court entered a final judgment. The plaintiffs paid the required deposit for costs and fees, brought suit against the trustee as a third party debtor, and obtained an injuction from a Liechtenstein District Court. However, the trustee successfully appealed the injunction on the basis that Liechtenstein courts did not have jurisdiction. The Liechtenstein Court of Appeals and Supreme Court reasoned that an interest in a discretionary trust, with the settlor having no enforceable claim in respect of such interest, does not qualify as an asset and thus does not suffice for Liechtenstein jurisdiction.[518]

K. Nevis

1. GENERAL CHARACTERISTICS. The Island of Nevis is located in the eastern Caribbean, 225 miles southeast of Puerto Rico, and is in the Atlantic Time Zone, which is an hour ahead of the eastern United States. Nevis does not observe Daylight Savings Time. The Island was sighted by Christopher Columbus on his second voyage in 1493, but was settled under British rule in 1793. Since 1983, Nevis and the nearby island of Saint Kitts achieved independence from the United Kingdom and now comprise a single sovereign nation known as the Federation of Saint Kitts-Nevis (the "Federation"). Under the Federation's Constitution,

Nevis is allowed to have its own legislation which has been used to establish an offshore financial services sector. Rated among the world's most stable countries, the Federation has exhibited a vibrant multi-party political system and deep-seated respect for human and property rights. The economy of the Federation, which is based on offshore financial services and tourism, enjoys low unemployment and one of the fastest growing per capita incomes in the Caribbean. The official language of the Federation is English. The currency of the Federation is the Eastern Caribbean Dollar, which is fixed at a rate of 2.7 to 1 to the United States Dollar, and there are no exchange controls applicable to offshore businesses.

2. CONFIDENTIALITY. The Confidential Relationship Act of 1985 applies to all those in the financial community, including but not limited to banks. Anyone disclosing banking, financial, and trust documents without court order is subject to criminal penalties, including fines or imprisonment.

3. TAXES. While Nevis collects several taxes from businesses engaged in business on the island, offshore trusts, offshore corporations, and offshore limited liability companies are tax exempt so long as they do not transact business on the island.[519] These entities only pay an annual government fee of US $220. Nevis has a narrow definition of what constitutes doing business in Nevis. Maintaining bank accounts in Nevis, holding board meetings in Nevis, maintaining corporate or financial records in Nevis, maintaining an administrative or managerial office in Nevis with respect to assets and activities outside of Nevis, being a partner in a Nevis partnership, or acquiring real property in certain industrial or tourist facilities in Nevis approved by the government, will not constitute doing business in Nevis.[520]

Nevis offshore trusts are not permitted to own property on the island. Both of the political parties in Nevis have expressed the intention of enacting no future taxation of offshore trusts and companies.

4. FRAUDULENT DISPOSITION. The Statute of Elizabeth was specifically repealed in Nevis for international trusts.[521] Instead, Nevis adopted the Nevis International Exempt Trust Ordinance (the "Ordinance") which provides that:

a. a creditor must prove beyond a reasonable doubt that the trust was settled or established, or property was disposed to a trust, with the principal intent to defraud creditors; and

b. a creditor must prove beyond a reasonable doubt that the settlement, establishment, or disposition rendered the settlor insolvent.

If both of these elements are established by the plaintiff, the trust shall only be liable to the extent that the settlor had an interest in the contributed property prior to the settlement, establishment or disposition.[522]

These remedies in the Ordinance are the exclusive remedies that a creditor (defined as any person who alleges a cause of action) has against the settlor, a trust, or any person who transfers property to a trust on behalf of a settlor.[523]

5. TRUSTS AND ENTITIES. The Ordinance provides for spendthrift trusts, overrides the common law rule against perpetuities, overrides forced heirship, repeals the Statute of Elizabeth, and prohibits the enforcement of foreign judgments.

A company formed under the Nevis Limited Liability Company Ordinance, 1995, as amended (the "NLLCO") provides its members with full protection from company obligations, similar to a corporation, while simultaneously permitting them to contractually form a company that is best tailored to fit each situation, similar to a partnership.[524] Unique among offshore LLC statutes, the NLLCO provides asset protection through an exclusive charging order remedy[525] and estate planning opportunities through strict valuation provisions in compliance with IRS dictates.[526] Also unique to the NLLCO is the ability to form an LLC with only one member.[527]

Known in the vernacular as NBCs (reflecting the name of the authorizing legislation—the Nevis Business Corporation Ordinance, 1984), Nevis's offshore corporations are tax exempt, provided that they do not carry on business with any person in the Federation. An NBC may be used as a private trust company to be the trustee of a Nevis trust or as an open end investment company.

6. ENFORCEMENT OF FOREIGN JUDGMENTS. Foreign judgments are not recognized if the judgment is based upon law that is not consistent with Nevis law.

7. CONWAY V. QUEENSWAY. In response to a preliminary motion, the High Court of the Federation upheld the validity of a trust registered under the Ordinance in the face of an attack by a U.S. Trustee in Bankruptcy, refusing to grant the plaintiff-creditor an injunction to prevent the trustee from distributing, disposing or dissipating the assets.[528]

EXHIBIT B

COMPARISON

OF THE

DOMESTIC ASSET PROTECTION TRUST STATUTES

UPDATED THROUGH JUNE 30, 2012

EDITED BY DAVID G. SHAFTEL

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This June 30, 2012, version of the chart updates the prior December 2011 chart. Included is Virginia's new enacted statute, Ohio's pending statute, and changes to, or further explanation of, the laws of Alaska, Missouri, Nevada, and South Dakota. Also included are comments relating to relevant self-settled provisions in Arizona, Florida, North Carolina, and New York.

The following state editors generously contributed, reviewed and edited their state's subjects for accuracy: **David G. Shaftel** (Alaska); **Marc A. Chorney** (Colorado); **Richard G. Bacon** (Delaware); **Prof. Randall W. Roth** (Hawaii); **Steve Gorin** (Missouri); **Layne T. Rushforth** (Nevada); **Amy K.Kanyuk** and **William Zorn** (New Hampshire); **Brian Layman** and **Michael Stegman** (Ohio); **Jon H. Trudgeon** (Oklahoma); **John Harpootian** (Rhode Island); **John H. Raforth** (South Dakota); **Bryan Howard** (Tennessee); **Thomas Christensen, Jr.** (Utah); **Howard M. Zaritsky** (Virginia); and **Robert H. Leonard** (Wyoming). Similarly, the following attorneys generously reviewed and contributed to the preparation of this chart: **John Roth** (Hawaii); **Bo Loeffler** (Ohio); and **John E. Sullivan III** (reviewed South Dakota).

INTRODUCTION

A domestic asset protection trust (hereinafter referred to as a "DAPT") is generally an irrevocable trust with an independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor. The primary goals of DAPTs are asset protection and, if so designed, transfer tax minimization.

Prior to 1997, several states had statutory provisions which appear to support the formation of DAPTs. In 1997, Alaska was the first state to enact a usable DAPT statute. In the thirteen years since, ten other states have followed suit. There are now thirteen (arguably, fourteen, if Colorado is included) states that allow for the formation of DAPTs.

Legislatures have taken different approaches. The original statutes are terse and only indicate a public policy (Missouri and Colorado). Some of the new statutes amend existing statutes, and others enact new "Acts". Interest groups within the various states have influenced the extent of the asset protection provided by the statutes.

If implemented correctly, the DAPT approach may be used successfully by residents of states with DAPT statutes. An interesting issue remains whether nonresidents of DAPT states may form a DAPT under one of the DAPT state's laws and obtain the desired asset protection and tax benefits. The analysis of this issue involves the conflict of laws. The most likely test is whether the nonresident's domiciliary state has a "strong public policy" against DAPT asset protection. The fact that fourteen states now have DAPT statutes moves this approach from the eccentric anomaly category to an accepted asset protection and transfer tax minimization planning technique. As more and more states enact DAPT statutes, the conclusion that a non-DAPT state has a "strong public policy" against a DAPT trust seems less likely.

Virginia's statute is the most recently enacted addition to our chart. This act is effective as of July 1, 2012. Ohio has pending DAPT provisions. We have included the Ohio provisions in case they are enacted this year.

A number of states which have not enacted full DAPT statutes have "placed their toe in the water". Arizona, Florida, North Carolina, and New York all have enacted statutes which protect the assets in an irrevocable grantor trust from a creditor claim even though an independent trustee, in such trustee's discretion, may reimburse the settlor for income tax resulting from assets in the trust. Colorado, Kentucky, New Jersey, and Ohio have pending legislation which would provide the same protection. Arizona and New Hampshire protect the assets in a supplemental needs trust from the settlor's creditors. Arizona, Delaware, Florida, and Virginia have all enacted statutes clarifying that the assets of an inter vivos QTIP trust cannot be reached by the creditors of a donor spouse after the death of the donee spouse. Enactment of protection for self-settled interests like these provides weight to the argument that those states do not have a "strong public policy"

against self-settled trust asset protection, and therefore residents could form a DAPT under another state's law. The same reasoning applies to residents of DAPT states who conclude their state's DAPT statute is not as desirable as the statute of another DAPT state.

The DAPT chart below is designed to give the reader an easy and quick comparison of the various DAPT statutes. A chart, by its very nature, is an oversimplification. The reader is urged to carefully analyze the provisions of a statute before implementing a DAPT.

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII MISSOURI Page No.	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND Page No.	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING Page No.
1.	What requirements must trust meet to come within protection of statute?	1	9	19
2.	May a revocable trust be used for asset protection?	1	10	20
3.	Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	1	10	20
4.	What contacts with state are suggested or required to establish situs?	2	10	20
5.	What interests in principal and income may settlor retain?	2	11	21
6.	What is trustee's distribution authority?	2	11	21
7.	What powers may settlor retain?	3	11	21
8.	Who must serve as trustee to come within protection of statute?	3	12	22
9.	May non-qualified trustees serve?	3	12	22
10.	May trust have distribution advisor, investment advisor, or trust protector?	3	12	22
11.	Are fraudulent transfers excepted from coverage?	4	12	23
12.	Fraudulent transfer action: burden of proof and statute of limitations.	4	13	23
13.	Does statute provide an exception (no asset protection) for a child support claim?	4	13	23
14.	Does the statute provide an exception (no asset protection) for alimony?	4	13	23
15.	Does statute provide an exception (no asset protection) for property division upon divorce?	5	13	24
		ALASKA COLORADO DELAWARE HAWAII MISSOURI	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII MISSOURI Page No.	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND Page No.	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING Page No.
16.	Does statute provide an exception (no asset protection) for tort claims?	5	14	24
17.	Does statute provide other express exceptions (no asset protection)?	5	14	24
18.	Does statute prohibit any claim for forced heirship, legitime or elective share?	5	14	25
19.	Are there provisions for moving trust to state and making it subject to statute?	5	14	25
20.	Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	6	14	26
21.	Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	6	15	26
22.	Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	6	15	26
23.	Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	6	15	26
24.	Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	6	15	26
25.	Is a non-settlor beneficiary's interest protected from property division at divorce?	7	16	27
26.	Are due diligence procedures required by statute?	7	16	27
27.	Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	7	16	27
28.	Is there statutory authority supporting a trust's non-contestability clause even if probable causes exists for contest?	7	17	27
		ALASKA COLORADO DELAWARE HAWAII MISSOURI	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII MISSOURI Page No.	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND Page No.	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING Page No.
29.	Is the trustee given "decanting" authority to modify the trust?	7	17	27
30.	What is allowable duration of trusts?	7	17	28
31.	Does state assert income tax against DAPTs formed by non-resident settlors?	7	17	28
32.	Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	8	18	28
33.	What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	8	18	28

SUBJECT	ALASKA	COLORADO*	DELAWARE	HAWAII	MISSOURI
	Citation: Alaska Stat. § 34.40.110	Citation: Colo. Rev. Stat. §§ 38-10-111	Citation: Del. Code Ann. tit. 12, §§ 3570-3576	Citation: H.R.S. 554G	Citation: Mo. Rev. Stat. §§ 456.5-505
	Effective Date: April 2,1997	Effective Date: 1861	Effective Date: July 1, 1997	Effective Date: July 1, 2011	Effective Date: 1989
	URL: http://www.legis.state.ak.us	URL: http://www.state.co.us	URL: http://www.delcode.state.de.us	URL: http://capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1447&year=2011	URL: http://www.moga.mo.gov
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state AK law governs validity, construction, and administration of trust (unless trust is being transferred to AK trustee from non-AK trustee); (3) contain spendthrift clause.	In trust, limited to future creditors.	Trust instrument must: (1) be irrevocable; (2) expressly state that DE law governs validity, construction, and administration of trust (unless trust is being transferred to DE trustee from non-DE trustee); (3) contain spendthrift clause.	Trust must be irrevocable and expressly incorporate HI law covering the validity, construction, and administration of the trust.	Trust instrument must: (1) be irrevocable; (2) contain a spendthrift clause; (3) have more than the settlor as a beneficiary; (4) settlor's interest must be discretionary.
2. May a revocable trust be used for asset protection?	No	No	No	No	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes, amendments enacted in: 2010, 2008, 2006, 2004, 2003, 2001, 2000, . and 1998.	No amendments	Yes, amendments enacted in: 2011, 2010, 2009, 2008, 2007, 2006, 2005, 2003, 2002, 2001, 2000, and 1998.	Statute did not provide an attractive option when first enacted in 2010. As of July 2011, however, the statute is much stronger, reflecting considerable legislative support for DAPTs.	Amendments enacted in 2004.

* It is unclear whether Colorado's statute qualifies as a DAPT statute and assertion of the statute as such is typically made only defensively. Compare *In Re Baum*, 22 F.3d 1014 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999), and *In Re Gary Lee Bryan*, 415 B.R. 454 (Bankr. D. Colo. 2009). See also, Rosen and Rothschild, 810 3rd T.M. Asset Protection Planning, VII A.2d and Nenno & Sullivan, 868 T.M. Domestic Asset Protection Trusts, I C. As to Subject 25, see Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop., Probate and Trust J. 1 (2005).

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
4. What contacts with state are suggested or required to establish situs?	Suggested: (1) some or all of trust assets deposited in state; (2) AK trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns (can be non-exclusive); (3) part or all of the administration occurs in state, including maintenance of records.	Not addressed by statute.	Required: (1) some or all of trust assets deposited in state; (2) DE trustee whose powers include (a) maintaining records (can be nonexclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	There must be at least one trustee who is a HI resident, or a bank or trust company that has HI as its principal place of business, and such trustee must materially participate in administering the trust.	Principal place of business or resi-dence of trustee in designated jurisdiction, or presence of all or part of the administration in designated jurisdiction; statute inclu-des procedure for transfer of principal place of business. RSMo § 456.1-108
5. What interests in principal and income may settlor retain?	Settlor may retain interests in: (1) CRT; (2) total-return trust; (3) GRAT or GRUT; (4) QPRT; (5) IRA; and (6) ability to be reimbursed for income taxes attributable to trust.	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total return trust; (4) GRAT or GRUT; (5) QPRT; (6) qualified annuity interest; (7) ability to be reimbursed for income taxes attributable to trust; and (8) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust.	Right to current income; up to 5% of principal annually; reimbursement for income taxes on trust income; ability to receive discretionary distributions in any amount. (Settlor may also serve as investment advisor.)	Settlor may be one of a class of beneficiaries of a trust discretionary as to income or principal. RSMo § 456.5-505.3
6. What is trustee's distribution authority?	Discretion whether or not governed by a standard.	Not addressed by statute.	(1) Discretion; or (2) pursuant to a standard.	Discretion to distribute any amount of principal to settlor if trust agreement so authorizes.	(1) Discretion; or (2) pursuant to a standard. RSMo § 456.8-814
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) right to appoint and remove trustees, trust protector, and advisors.	Not addressed by statute.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/ advisor.	Veto power over distributions; non-general testamentary power of appointment; power to remove and replace trustees and advisors; testamentary power of appointment for debts, administration expenses, and estate/ inheritance taxes.	Settlor may retain a testamentary limited power of appointment.
8. Who must serve as trustee to come within protection of statute?	Alaska trustee not required, but suggested to establish situs. Resident individual or trust company or bank that possesses trust powers and has principal place of business in Alaska.	Not addressed by statute.	Resident individual or corporation whose activities are subject to supervision by Delaware Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	Individual HI resident(s), other than the transferor, and/or a bank or trust company that has HI as its principal place of business.	Not addressed by statute.
9. May non-qualified trustees serve?	Yes	Not addressed by statute.	Yes, as a cotrustee.	Yes, as long as there is a permitted trustee.	Not addressed by statute.
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have trust protector (who must be disinterested third party) and trustee advisor. Settlor may be advisor if does not have trustee power over discretionary distributions.	Not addressed by statute.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a protector.	Yes. Settlor may appoint one or more trust advisors or protectors, including advisors with power to (i) remove and appoint trustees, advisors, trust committee members, or protectors, (ii) direct, consent to, or disapprove of distributions from the trust, and (iii) serve as investment advisor.	Yes (pending at RSMo § 456.8-808)
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
11. Are fraudulent transfers excepted from coverage?	Yes. Alaska has not adopted Uniform Fraudulent Transfer Act. Alaska statute sets aside transfers made with intent to defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with actual intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. However, future creditors may set aside transfer only if transfer made with intent to defraud.	Creditors can set aside only transfers made with actual intent to hinder, delay, or defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. RSMo § 456.5-505.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convinc-ing evidence. <u>Existing creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered, but future creditor must establish claim within four years after transfer. <u>Future creditors</u>: Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convinc-ing evidence. <u>Existing creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors</u>: Four years after transfer.	Claims must arise before the transfer is made and be brought within two years. See #16 regarding certain tort victims. Creditor has burden to show actual fraudulent intent by preponderance of evidence (or clear and convincing evidence in limited circumstances).	Clear and convincing evidence. <u>Existing creditors and future creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes, if settlor was 30 days or more in default of making payment at time of transfer of assets to trust.	No	Yes	Yes. Protection is not available regarding family court-super-vised agreement or order for child support.	Yes RSMo § 456.5-503.2
14. Does the statute provide an exception (no asset protection) for alimony?	No	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes. Protection is not available regarding family court-super-vised agreement or order for support or alimony to the transferor's spouse or former spouse.	Yes RSMo § 456.5-503.2
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if assets were transferred to trust during or less than 30 days prior to marriage. Otherwise, assets are protected.	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes. Protection is not available regarding family court-super-vised agreement or order for a division or distribution of property to the transferor's spouse or former spouse.	No
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No. But statute does not provide asset protection if the plaintiff suffered death, personal injury, or property damage on or before date of permitted transfer.	No
17. Does statute provide other express exceptions (no asset protection)?	No	No	No	Yes, secured loans to the transferor based on express or implied representations that trust assets would be available as security in the event of default; also, the transferor's tax liabilities to the State of Hawaii.	Yes if another governing law supersedes.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes, assets excluded from augmented estate if transfer made more than 30 days before marriage or with spouse's consent.	No	Yes	Yes	No
19. Are there provisions for moving trust to state and making it subject to statute?	Yes	No	Yes	Yes	No
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	No	Yes	Yes	No
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No	No	Yes	Yes	No
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	No	Yes	Yes	No
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes, and also provides protection for funding limited partnerships and LLCs.	No	Yes	Yes	No
24. Does statute authorize a beneficiary to use or occupy real property or tangible personal property owned by trust, if in accordance with trustee's discretion?	Yes	No	No, except for QPRT residence.	Yes	No
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, and may not be considered in property division.	Increases in value of and income from separate property after marriage are marital property.	Yes, but may be considered in property division in certain instances.	Yes, but may be considered in property settlement.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	Yes; affidavit required.	No	No	No	No
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	No	Yes	Yes, if the trustee has not acted with intent to defraud, hinder, or delay the creditor.	Yes RSMo § 456.7-709.
28. Is there statutory authority support-ing a trust's non-contestability clause even if probable cause exists for contest?	Yes	No	Yes	No	No
29. Is the trustee given "decanting" authority to modify the trust?	Yes AS 13.36.157	No	Yes	No, but trustee of trust or holder of a non-conforming power of appointment may conform to the statute.	Yes RSMo § 456.4-419
30. What is allowable duration of trusts?	Up to 1,000 years	Up to 1,000 years	No limit for personal property, including LLC and LP interests, even if LLC or LP owns real property; otherwise, 110 yrs for real property.	No limitation. Rule against perpetuities does not apply to qualifying trusts.	Abolished; generally applicable only after August 28, 2001. RSMo § 456.025.1
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No	Yes	No. However, does impose its income tax upon trusts that accumulate income for Delaware residents.	Trust is subject to HI income taxes generally, but not on income and capital gains accumulated for the benefit of non-residents.	Yes, if from sources within Missouri. Probably no if from marketable securities.
	ALASKA	**COLORADO**	**DELAWARE**	**HAWAII**	**MISSOURI**

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy. Del. Code Ann. tit. 6, § 18-703	No	Although charging order is only remedy, foreclosure is not expressly precluded. RSMo §§ 347.119, 359.421.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	(1) Trustee petition and court discharge; or (2) six months after trustee provides report that adequately discloses claims.	Six months after trustee provides report that adequately discloses claims, and shows termination of the trust relationship between the trustee and the beneficiary.	Trustee filing and court discharge. Discharge occurs two years after delivery of statement that discloses the facts *giving rise to the claim.* (Accountings do not have *res judicata* effect in Delaware except as to matters actually contested in the accounting proceeding.)	Trustee filing and court discharge.	One year after trustee provides report that adequately discloses claims. RSMo § 456.10-1005.

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
	Citation: Nev. Rev. Stat. §§ 166.010-166.170	Citation: N.H. Rev. Stat. Ann. § 564-D:1-18	Citation: Proposed Chapter 5816 of the *Ohio Revised Code* HB 479	Citation: Family Wealth Preservation Act (the "Act"). Okla. Stat. tit. 31 § 11, et seq.	Citation: R.I. Gen Laws §§ 18-9.2-1 - 18-9.2-7
	Effective Date: Oct. 1, 1999	Effective Date: Jan. 2, 2009	Effective Date: [PENDING]	Effective Date: June 9, 2004	Effective Date: July 1, 1999
	URL: http://www.leg.state.nv.us	URL: http://www.gencourt.state.nh.us	URL: http://www.legislature.state.oh.us/laws.cfm	URL: http://www.lsb.state.ok.us Statute at: //www.oscn.net	URL: http://www.rilin.state.ri.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) all or part of corpus of trust must be located in NV, domicile of settlor must be in NV, or trust instrument must appoint NV trustee; and (3) distributions to settlor must be approved by someone other than the settlor.	Trust instrument must: (1) be irrevocable; (2) expressly state that NH law governs validity, construction, and administration of trust (unless trust is being transferred to NH trustee from non-NH trustee); (3) contain spendthrift clause.	5816.02(K) Trust instrument must: (1) be irrevocable; (2) expressly state that OH law wholly or partially governs validity, construction, and administration of trust; (3) contain spendthrift clause.	Trust instrument may be revocable or irrevocable. Trust instrument must: (1) expressly state OK law governs; (2) have at all times as a trustee or co-trustee an OK-based bank that maintains a trust department or an OK-based trust company; (3) have only qualified beneficiaries [ancestors or lineal descendants of grantor (including adopted lineal descendants if they were under age 18 when adopted), spouse of the grantor, charities, or trusts for such beneficiaries]; (4) recite that income subject to income tax laws of OK; (5) limited to $1,000,000 of assets plus growth.	Trust instrument must: (1) be irrevocable; (2) expressly state RI law governs validity, construction, and administration of trust; (3) contain spendthrift clause.

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
2. May a revocable trust be used for asset protection?	No	No	No	Yes. Settlor may revoke or amend trust and take back assets. No court or other judicial body may compel such revocation or amendment.	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. The Nevada Legislature approved amendments in 2007, 2009, and 2011.	Yes. Amendments enacted in 2011.	Time will tell.	Yes. Most sections of the Act were last amended and superseded effective June 8, 2005.	Yes, amendment enacted in 2007.
4. What contacts with state are suggested or required to establish situs?	Required: (1) all or part of assets are in state; (2) Nevada trustee whose powers include: (a) maintaining records, (b) preparing income tax returns; (3) all or part of administration in state.	Required: (1) some or all of trust assets deposited in state; (2) NH trustee whose powers include (a) maintaining records (can be nonexclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	5816.02(S)—required: (1) some or all of trust assets custodied in state; (2) OH trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or otherwise materially participates in the administration of the trust.	Required: (1) OK-based trustee; (2) majority of value of assets comprised of OK assets defined at 31 O.S. § 11 to include real or tangible personal property or any interest therein having situs in OK and stocks, bonds, debentures, and obligations of the State, OK-based companies, and accounts in OK-based banks.	Required: (1) some or all of trust assets deposited in state; (2) RI trustee whose powers include: (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
5. What interests in principal and income may settlor retain?	The settlor may retain any right except the power to make distributions to himself without the consent of another person. N.R.S. § 166.040(3). The settlor's interest in a QPRT, GRAT, CRT, or a trusteed IRA are also protected. N.R.S. § 166.040(2)(c) through (f), added in 2011.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; (4) QPRT; (5) GRAT or GRUT; (6) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust; (7) ability to be reimbursed for income taxes attributable to trust.	5816.05—Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% annually; (4) QPRT; (5) ability to be reimbursed for income tax attributable to trust; and (6) ability to have debts, expenses and taxes of settlor's estate paid from trust; and (7) pour back to estate or trust.	Irrevocable trusts: not addressed by the Act. Revocable trusts: see Item 7. If settlor revokes or partially revokes the trust, the exemptions provided do not extend to assets received by settlor. The value of the property received by the settlor will increase the amount of future additions the settlor may make to the trust.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; QPRT; ability to be reimbursed for income taxes attributable to trust.
6. What is trustee's distribution authority?	As provided in the trust agreement, which may include absolute discretion or discretion limited by an ascertain-able standard, and it may be subject to approval or veto powers retained by the settlor or given to the trust protector or other advisor.	(1) Discretion; or (2) pursuant to an ascertainable standard.	5816.12 Except as provided in trust instrument, greatest discretion permitted by law.	Irrevocable trusts: not addressed by the Act. Revocable trusts: see Item 5, above.	Discretion, or pursuant to a standard.
7. What powers may settlor retain?	Settlor may retain any power except the power to make distributions to himself without the consent of another person, including: (1) power to veto distributions; and (2) special testamentary power of appointment or other similar power.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to remove and replace trustee/advisor with nonrelated/nonsubordinate party; and (4) right to serve as trust advisor.	5816.05—Settlor may retain: (1) power to veto distributions; (2) non-general power of appointment (lifetime or testamentary); (3) power to remove/replace trustee/advisor.	Irrevocable trusts: not addressed by the Act. Revocable trusts: settlor may revoke or amend, but otherwise powers not addressed by the Act. The Oklahoma Trust Act addresses trustee and co-trustee powers and liabilities. 60 O.S. § 175.1, et seq.	Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
8. Who must serve as trustee to come within protection of statute?	Resident individual or trust company or bank that maintains office in Nevada.	Resident individual or a state or federally chartered bank or trust company having a place of business in New Hampshire.	5816.02(S)—Qualified Trustee: resident individual or corporation whose activities are subject to Ohio Superintendent of Banks, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	At all times, the trustee or co-trustee shall be an OK-based bank or an OK-based trust company chartered under OK law or nationally chartered), and having a place of business in OK	Resident individual (other than the transferor) or corporation whose active-ties are subject to super-vision by RI Dept. of Business Regulation, FDIC, Comptroller of Currency, or Office of Thrift Supervision.
9. May non-qualified trustees serve?	Yes	Yes	5816.02(K)— Yes, but must have at least one qualified trustee.	Yes	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes	Yes. "Trust advisor" includes a trust protector or any other person who holds one or more trust powers. Trust advisor's powers may be defined in the trust agreement and are not limited by the statute. If grantor serves as trust advisor, powers cannot include a general power of appointment.	5816.02(A) & 5816.11. Yes. Trust may have one or more advisors who may remove and appoint trustees or who have authority to direct, consent to, or disapprove investments, distributions or other decisions. The term "advisor" includes a protector. Settlor may be advisor in connection with investments.	Not addressed by the Act. See Oklahoma Trust Act (60 O.S. § 175.1, et seq.) and Oklahoma Prudent Investor Act (60 O.S. § 175.60, et seq., esp. § 175.69, which specifically permits investment advisors. Distribution advisors and trust protectors are permitted.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distribu-tions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a protector.
11. Are fraudulent transfers excepted from coverage?	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with actual intent to hinder, delay or defraud, and constructively fraudulent transfers.	5816.07(A)— Yes. Sets aside transfers with specific intent to defraud specific creditor bringing claim.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
12. **Fraudulent transfer action: burden of proof and statute of limitations.**	Clear and convincing evidence. Future creditors: Two years after transfer. Existing creditors: Two years after transfer, or, if longer, six months after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud (rather than constructive fraud). A transfer is deemed discovered when reflected in a public record.	Case law: Actual fraud must be proved by clear and convincing evidence; constructive fraud by a preponderance of the evidence. Existing creditors: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. Future creditors: Four years after transfer.	5816.07(C)— Clear and convincing evidence. Future creditors: 18 months after transfer Existing creditors: (1) 18 months after transfer or (2) 6 months after transfer was or could have been discovered (recording constitutes constructive notice —see proposed 1301.401).	Clear and convincing evidence. Existing creditors and future creditors: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. Existing creditors: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. Future creditors: Four years after transfer.
13. **Does statute provide an exception (no asset protection) for a child support claim?**	No	Yes	Yes. 5816.03(C).	Yes	Yes, if at the time of transfer a court order for child support existed.
14. **Does the statute provide an exception (no asset protection) for alimony?**	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	5816.03(C). Yes. If ex-spouse was married to settlor on or before qualified disposition.	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.
15. **Does statute provide an exception (no asset protection) for property division upon divorce?**	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Other-wise, assets are protected.	5816.03(C). Yes. If ex-spouse was married to settlor on or before qualified disposition.	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
16. **Does statute provide an exception (no asset protection) for tort claims?**	No	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No	No	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.
17. **Does statute provide other express exceptions (no asset protection)?**	No	No	No	Yes. "Except for any additional property contributed to the preservation trust by the grantor having an aggregate fair market value, determined as of the date of each contribution, minus liabilities to which the property is subject, in excess of One Million Dollars ($1,000,000)." 31 O.S. § 12.	No
18. **Does statute prohibit any claim for forced heirship, legitime or elective share?**	No, but Nevada law does not recognize such claims.	Yes, unless the transferor made the qualified disposition for the purpose of defeating the surviving spouse's elective share rights.	Yes. 5816.03(D).	No	No
19. **Are there provisions for moving trust to state and making it subject to statute?**	Yes. NRS 166.180 (added in 2011).	Yes	Yes. 5816.03(C) and (E).	No	No
20. **Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?**	No	Yes	Yes. 5816.03(B).	Yes. 31 O.S. § 16.	Yes

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No	No	Yes. 5816.09.	No	Yes
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes. NRS 166.045 (added in 2011).	Yes	Yes. 5816.04.	No	Yes
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes. A trustee or an advisor of the settlor or trustee is liable only if it is established by clear and convincing evidence that damages directly resulted from the advisor's violation of the law knowingly and in bad faith. N.R.S. §§ 166.170(5) and (6).	Yes	5816.07(D), (E), and (G). Yes, and also provides protection relating to entity planning to fund trust.	No	Yes
24. Does statute authorize a beneficiary to use or occupy real property or tangible personal property owned by trust, if in accordance with trustee's discretion?	Yes. N.R.S. § 166.040(2)(h), added in 2011.	Use of QPRT residence specifically authorized. Use and occupancy of other property not addressed in the statute.	Yes. 5816.05(J).	No. Not addressed in the Act. Oklahoma Trust Act would allow trust agreements to authorize use and occupancy of property with trustee discretion. 60 O.S. § 175.1, et seq.	No, except for QPRT residence.

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, if property is retained in a spendthrift trust for the beneficiary. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	Yes. Under the NH Uniform Trust Code, if a beneficiary is eligible to receive distributions in the trustee's discretion (regardless of whether there is a standard to guide the trustee), the beneficiary's interest is neither a property interest nor an enforceable right but a mere expectancy. *See* RSA 564-B:8-814 and *Goodlander v. Tamposi*, 161 N.H. 490 (2011).	Yes. 5816.13.	Yes. The Act does not address, but if property is retained in a spendthrift trust for the beneficiary it is protected. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; how-ever, trust income and assets can be considered a resource for purposes of determining alimony and child support.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	No	No	5816.06. Yes, affidavit required.	No	No
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	No	Yes	Yes. 5816.08(A)(3)(a).	No	Yes

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	N.R.S. 163.00195 requires a court to enforce a no-contest clause contained in a trust, but there is a statutory exception for a legal action challenging the validity of the trust document (or any trust-related document) where the "*legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the trust, any document referenced in or affected by the trust, or other trust-related instrument is invalid.*"	Yes. RSA 564-B:10-1014.	Case law, not statutory: *Bradford v. Bradford*, Ex'r, 19 Ohio St. 546 (1869); *Irwin v. Jacques*, 71 Ohio St. 395 (1905); *Kirkbride v. Hickok* (1951), 155 Ohio St. 293.	No	No
29. Is the trustee given "decanting" authority to modify the trust?	Yes. N.R.S. §§ 163.556 and 166.170(a).	Yes. RSA 564-B:4-418.	Yes. 5808.18 (effec. 3/22/12).	No	No
30. What is allowable duration of trusts?	Up to 365 years	Abolished rule against perpetuities. RSA 564:24.	2131.09. Opt-out and 1,000 years for exercise of nongeneral power of appointment (included in OAMMA).	Rule against perpetuities.	Abolished rule against perpetuities.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No. Nevada has no state income tax.	No.	5747.01(I)(3)(a)(ii). No, unless the settlor later domiciles in Ohio and the trust has at least one beneficiary domiciled in Ohio.	Yes	No

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy, even as to one-member LLCs and small corporations.	Yes, charging order is only remedy.	1705.19. LLC statute amended to provide that charging order is only remedy (effec. 5/4/12)	Yes, charging order is only remedy. 18 O.S. § 2034.	Yes, charging order is only remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	N.R.S. 165.139 mandates an annual trustee's account upon a beneficiary's request, but N.R.S. 165.145 permits an account to be provided confiden-tially to a third-party "reviewer" where the trust directs or permits a trustee not to give an account to a beneficiary. Unless the trust instrument provides for a shorter period, a trustee's account is deemed approved if no written objection is given within 120 days or when a petition for approval is granted by court order after notice and hearing.	One year after trustee provides report that adequately discloses claims. Limitations period cannot be tolled except by agreement of trustee and benefi-ciaries or by court order. RSA 564-B:10-1005.	5810.05. Discharge occurs two years after delivery of statement that discloses the facts giving rise to the claim.	Two years after trustee provides report that adequately discloses claims.	Trustee application and court discharge.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
	Citation: S.D. Codified Laws §§ 55-16-1 - 55-16-17	Citation: Tenn. Code Ann. § 35-16-101	Citation: Utah Code Ann. § 25-6-14	Citation: Va. Code § 55-545.05 (amended 2012), §§ 55-545.03:2 and 55-545.03:3	Citation: Wyo. Stat. §§ 4-1-505 and 4-10-510 - 523
	Effective Date: March 2, 2005	Effective Date: July 1, 2007	Effective Date: December 31, 2003	Effective Date: July 1, 2012	Effective Date: July 1, 2007
	URL: http://www.legis.state.sd.us	URL: http://www.legislature.state.tn.us	URL: http://www.le.utah.gov	URL: http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=SB11&Submit2=Go	URL: http://legisweb.state.wy.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state that SD law governs validity, construction, and administration of trust (unless trust is being transferred to SD trustee from non-SD trustee); (3) contain spendthrift clause; (4) must have a "qualified person" as a trustee. See SDCL §§ 55-16-1(6) (defining "qualified disposition"), 55-16-2 (defining "trust instrument"), 55-16-3 (defining "qualified person" by cross-reference to other statutes), and 55-16-4 (more regarding qualified persons).	Trust instrument must: (1) be irrevocable; (2) expressly state TN law governs validity, construction and administration of the trust; (3) contain a spendthrift clause.	Trust instrument must: (1) be irrevocable; (2) contain spendthrift clause.	(1) The trust is irrevocable; (2) There must be, at all times when distributions could be made to the settlor pursuant to the settlor's qualified interest, at least one beneficiary other than the settlor; (3) The trust must have at all times at least one qualified trustee, who may be, but need not be, an independent qualified trustee; (4) The trust instrument must expressly incorporate the laws of the Commonwealth to govern the validity, construction, and administration of the trust; (5) The trust instrument must include a spendthrift provision. Va. Code 55.545.03:3(A).	Trust instrument must: (1) state that trust is a "qualified spendthrift trust" under § 4-10-510 of Wyoming statutes; (2) be irrevocable; (3) expressly state Wyoming law governs validity, construction and administration of the trust; (4) contain a spendthrift clause; (5) settlor must have personal liability insurance equal to lesser of $1,000,000 or value of trust assets.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
2. May a revocable trust be used for asset protection?	No	No	No	No. Va. Code § 55-545.03:3(A).	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. Amendments enacted in 2011, 2010, 2009, 2008, 2007, 2006, and 2012.	Yes. Amendments enacted in 2008 and 2010.	No amendments	This statute is the first enactment for broad approval of self-settled spendthrift trusts.	Yes. Amendments enacted in 2008 and 2011.
4. What contacts with state are suggested or required to establish situs?	Suggested: (1) some or all of trust assets deposited in state; (2) SD trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or otherwise materially participates in the administration of the trust. See also SDCL § 55-3-39 (dealing with minimum contacts needed to justify choice of law).	Required: (1) some or all of trust assets deposited in state; (2) Tennessee trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	Required: (1) Utah trust company; (2) some or all of the assets held in certain types of accounts in state.	Required: The VA qualified trustee must (1) maintain or arrange for custody within the Commonwealth of some or all of the property that has been transferred to the trust by the settlor, (2) maintain records within the Commonwealth for the trust on an exclusive or non-exclusive basis, (3) prepare or arrange for the preparation within the Commonwealth of fiduciary income tax returns for the trust, or (4) otherwise materially participate within the Commonwealth in the administration of the trust. Va. Code § 55-455.03(A).	Required: Wyoming trustee who: (a) maintains custody of some or all of trust assets in state; (b) maintains records (can be non-exclusive); (c) prepares or arranges for the preparation of income tax returns; (d) or, otherwise materially participates in the administration of the trust.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
5. **What interests in principal and income may settlor retain?**	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest annually; (4) GRAT or GRUT; (5) QPRT; and (6) pour back to estate or trust.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT; (5) ability to be reimbursed for income taxes attributable to trust, and (6) ability to have debts, expenses and taxes of the settlor's estate paid from the trust.	Settlor may retain interest in CRT.	Settlor may retain any interests in: (1) CRT; (2) up to 5% interest in total-return trust; (3) QPRT; (4) GRAT; (5) ability to have debts, expenses and taxes of the settlor's estate paid from the trust; and (6) ability to be reimbursed for income taxes attributable to trust. Va. Code § 55-545.03:3(D).	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT, (5) GRAT or GRUT.
6. **What is trustee's distribution authority?**	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to a standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard. Va. Code § 55-545.03:3(A), (D).	(1) Absolute discretion; (2) pursuant to a standard.
7. **What powers may settlor retain?**	Settlor may retain: (1) power to veto distributions; (2) non-general power of appointment (lifetime or testamentary); (3) power to replace trustee/advisor with anybody, except that a trustee must not be related or subordinate within the meaning of I.R.C. § 672(c); and (4) serve as investment trust advisor.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to replace trustee/ advisor with non-related/nonsubordinate party; and (4) serve as an investment advisor.	Settlor may retain: (1) power to veto distributions; (2) testamentary special power of appointment; and (3) power to appoint nonsubordinate advisors/ protectors.	Settlor may retain: (1) A testamentary special power of appointment; (2) A right to remove a trustee and to appoint a new trustee. <u>Note</u>: The settlor may NOT have the right to disapprove distributions from the trust. Va. Code §§ 55-545.03(A), (D).	Settlor may retain: (1) power to veto distributions; (2) *inter vivos* or testamentary general or limited power of appointment; (3) power to add or remove a trustee, trust protector, or trust advisor; (4) serve as an investment advisor.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
8. Who must serve as trustee to come within protection of statute?	Resident individual or corporation whose activities are subject to supervision by SD Division of Banking, FDIC, Comptroller of Currency, or Office of Thrift Supervision. SD trustee automatically ceases to serve if it fails to meet these requirements.	Resident individual, or is authorized by Tennessee law to act as a trustee and whose activities are subject to supervision by the Tennessee Dept. of Financial Institutions, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto.	Institution authorized to engage in trust business in Utah, including Utah depository institutions, non-Utah depository institutions authorized to do business in Utah, and certain other institutions.	There must always be at least one "qualified trustee," who must be a natural person residing within the Commonwealth or a legal entity authorized to engage in trust business within the Commonwealth. Va. Code § 55-545.03(A).	Resident individual or a person authorized by Wyoming law to act as trustee or a regulated financial institution.
9. May non-qualified trustees serve?	Yes	Yes	Yes. Individual co-trustees may serve.	Yes. See Va. Code § 55-545.03(B) (using nonexclusive terminology for the requirement of a qualified trustee).	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor.	Yes. Trust may have: (1) advisors who have authority to remove and appoint qualified trustees or trust advisors; (2) advisors who have authority to direct, consent to or disapprove distributions from the trust; and (3) investment advisors. The term "advisor" includes a trust protector.	Yes. Trust may have non-subordinate advisors/protectors who can remove or appoint trustees; direct, consent to, or disapprove distributions; or serve as investment directors. Settlor may be investment director.	Not addressed expressly, but it does state that the discretion of a qualified trustee cannot be subject to the direction of someone who, were that person a trustee, could not be a qualified trustee, and protects trust advisers and trust directors from liability. Va. Code §§ 55-545.03:3(A); 55-545.03:2(E).	Yes. Trust may have trust protector who can remove or appoint trustees; direct, consent to, or disapprove distributions; change governing law; change beneficiary's interests; and grant or terminate powers of appointment. Trust may have advisors. Settlor may be an advisor.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
11. Are fraudulent transfers excepted from coverage?	Yes. Sets aside transfers with intent to defraud specific creditor.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Va. Code § 55-545.03:2(D).	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Existing creditors</u>: Two years after transfer, or six months after transfer was or could reasonably have been discovered if creditor (1) asserted specific claim before transfer; or (2) if creditor files another action within two years that asserts claim before transfer. <u>Future creditors</u>: Two years after transfer.	Burden not addressed by statute. <u>Existing creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors</u>: Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. *Bruce v. Dean*, 140 S.E. 277, 149 Va. 39 (1927); *Mills v. Miller Harness Co., Inc.*, 326 S.E.2d 665, 229 Va. 155 (1985); *In re Coleman*, 285 B.R. 892 (2002). Suit must be brought within five years from recordation of transfer or, if not recorded, within five years from the time the same was or should have been discovered. Va. Code § 55-545.03:2(D).	Burden not addressed by statute. <u>Existing creditors and future creditors</u>: Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes	Yes	Yes	Yes. Va. Code § 55-545.03(B) (protecting rights of a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance).	Yes
14. Does the statute provide an exception (no asset protection) for alimony?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust	Yes	No	No
	SOUTH DAKOTA	**TENNESSEE**	**UTAH**	**VIRGINIA**	**WYOMING**

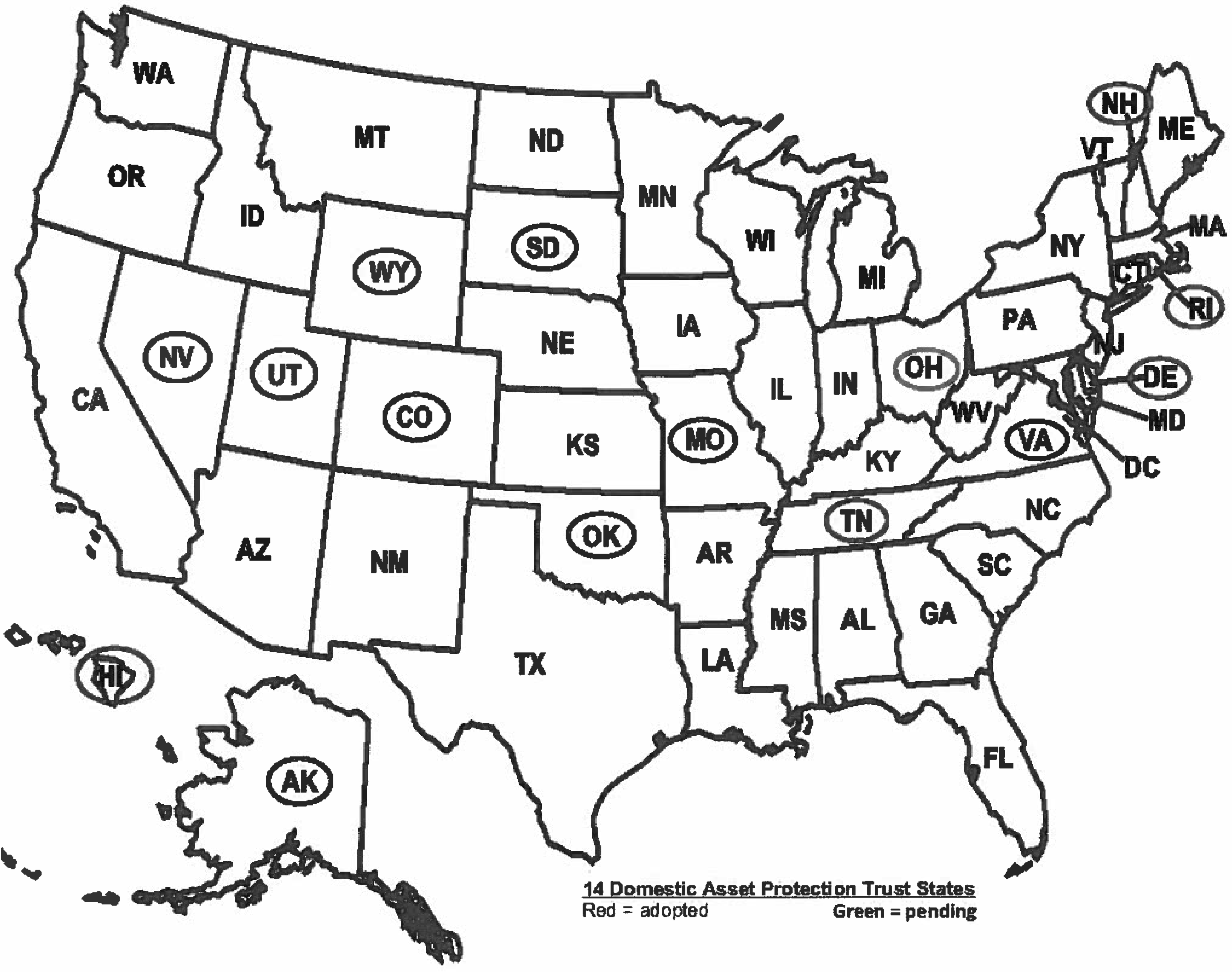
SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes	No	No
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	Yes, see Item 17, below.	No	No
17. Does statute provide other express exceptions (no asset protection)?	No	No	Yes: (1) claim is decision or ruling resulting from judicial, arbitration, mediation, or administrative proceeding commenced prior to or within three years after trust created; (2) public assistance; (3) taxes; (4) violation of certain written representations or agreements; (5) fraud.	Yes. No spendthrift protection against: (A) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust. Va. Code § 55-545.03(B). (B) the United States, the Commonwealth, any city, county, or town. Va. Code § 55-545.03(C). (C) claims under a statute or regulation of the United States or the Commonwealth that requires a beneficiary to reimburse the Commonwealth or any agency or instrumentality thereof, for public assistance. Va. Code § 55-545.03:1.	Yes. (1) Qualified trust property that is listed upon an application or financial statement used to obtain or maintain credit other than for the benefit of the qualified spendthrift trust; (2) property of a qualified spendthrift trust that was transferred to the trust by a settlor who received the property by a fraudulent transfer.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes, for forced heirship and legitime. Silent with respect to elective share.	Yes	No	No	No, but in 2011 the Wyoming Supreme Court held that assets transferred to a trust are not subject to the elective share of a surviving spouse under the Wyoming Uniform Trust Code and Wyoming law does not provide for a forced heirship or legitime. (*In re The Estate of Deanna Bess George*, 2011 WY 157, 265 P.3d 222.)
19. Are there provisions for moving trust to state and making it subject to statute?	Yes	Yes	Yes	Yes. Va. Code § 55-545.03:2(G) states that "The movement to the Commonwealth of the administration of an existing trust, which, after such movement to the Commonwealth, meets for the first time all of the requirements of a qualified self-settled spendthrift trust, shall be treated, for purposes of this section, as a transfer to this trust by the settlor on the date of such movement of all of the assets previously transferred to the trust by the settlor."	Yes, permits transfer of trust property from trust created in another jurisdiction with similar creditor protection for settlor with creditor protection relating back to date of funding of trust created in other jurisdiction. Irrevocable trusts from other states may also elect to become qualified spendthrift trusts if they incorporate law of WY, obtain qualified trustee, and have spendthrift clause.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	Yes	Yes	No	Yes
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	DAPT statute does not have any such specific provision, but SDCL § 55-3-47 applies such a rule to all South Dakota trusts.	Yes	No	No	Yes
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	Yes	No	No	No
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes	Yes	Yes	Yes. Va. Code § 55-545.03:2(E).	Yes
24. Does statute authorize a beneficiary to use or occupy real property or tangible personal property owned by trust, if in accordance with trustee's discretion?	Yes	Yes	No	No	No, except for QPRT residence.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Nothing in DAPT statute. But see SDCL §§ 55-1-43 (discretionary interests are not property), 55-1-26 (powers of appointment are not property), 55-1-27 (certain remainders not property), 55-1-30 (distribution and remainder interests irrelevant to divorce).	Yes	No	Yes. Va. Code §§ 55-545.01 to 55-545.03 (no exception from spendthrift protection for divorces).	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	No	Yes; affidavit required.	No	No	Yes; affidavit required.
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	Yes	Yes	No	Yes
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No, but see SDCL §§ 55-1-46, et seq.	No	No	No	No
29. Is the trustee given "decanting" authority to modify the trust?	Yes	Yes	No	Yes. See Va. Code §§ 55.548.16:1 (effec. July 1, 2012).	No, but trust protector may have a similar power.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
30. What is allowable duration of trusts?	Abolished rule against perpetuities.	Up to 360 years.	Up to 1,000 years.	USRAP adopted. Va. Code §§ 55-12.1 to 55-12.6. Rule does not apply to personal property held in trust if the trust instrument, by its terms, provides that the rule shall not apply to such trust. Va. Code § 55-13.3(C).	Up to 1,000 years, except for real property.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No	No, if the beneficiaries are non-residents. If the beneficiaries are residents, a tax is levied on dividends and interest.	No, except for Utah source income, such as rental income from Utah real property.	Yes. See VA Code Ann. § 58.1-302.	No
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy. Other legal and equitable remedies expressly barred.	Yes for LLCs; charging order is only remedy. No for LPs.	Yes, charging order is only remedy.	Yes. On LLC, see Va. Code §§ 13.1-1041.1(D). On Limited Partnership, see Va. Code §§ 50-73.46:1(D).	Yes; charging order is exclusive remedy for all LPs and LLCs, including single member LLCs.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	180 days after trustee provides accounting, or by order of court for supervised trusts.	One year after trustee provides report that adequately discloses claims.	Six months after trustee provides report that adequately discloses claims.	Rules similar to Sections 411 to 414 of the Uniform Trust Code for termination of trust. See Va. Code §§ 55-544.11 to 55-544.14. No specific procedure for being discharged from liability on a trust.	Two years after trustee provides report that adequately discloses claims.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AK
14 Domestic Asset Protection Trust States
Red = adopted
Green = pending

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Advisors to clients considering establishing asset protection trusts need points of contact to get started in seriously evaluating each jurisdiction. Local trust lawyers, banks, and trust companies are the best place to start. So far as I am able to determine, all of these lawyers and institutions are reputable and knowledgeable, but I must disclaim any imprimatur. The attorneys whose names are followed by an asterisk (*) reviewed the outline or offered comments, but any inaccuracies are the responsibility of Mr. Tansill. Mr. Tansill gratefully acknowledges the generous assistance of these experts who assisted him.

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Form D

AFFIDAVIT OF SOLVENCY

RE: THE [ ] TRUST ("the Trust")

The undersigned,________________________, being first duly sworn upon oath, deposes and states as follows:

1. That to the best of my knowledge and belief the information provided, and any attachments hereto, are true and correct.

2. I am a Settlor of the Trust and I contemplate making transfers of property thereto in addition to my initial nominal contribution thereto.

3. That there are no pending or threatened claims or proceedings that I reasonably anticipate may result in a judgement against me, and I am not a named defendant in any lawsuit or involved in any administrative proceedings as of this date, or a judgement debtor [other than as disclosed in any attached schedule].

4. That I do not anticipate filing for relief under the provisions of the applicable bankruptcy or insolvency laws, nor am I involved in any situation that I reasonably anticipate would cause me to file for relief under the applicable bankruptcy or insolvency laws in the future.

5. That following any transfer of my property to the Trust structure, I will be solvent and able to pay my reasonably anticipated debts (including any claims or lawsuits against me) as they come due from the balance of my property after such transfer.

6. That I have full right, title and authority to transfer the assets to the Trust.

7. That I have read and understood the annexed description of unlawful activities, and confirm and represent that none of the assets which I may transfer to the Trust was derived from any of the activities described therein.

8. That I am not to my knowledge, nor do I reasonably expect to be, under investigation by any federal or state agency, or in violation of any statutes administered by, or empowering, the Internal Revenue Service, the Federal Trade Commission, the Securities Exchange Commission, the United States Postal Service, the Drug Enforcement Agency, or the Federal Bureau of Investigation.

9. That I am not engaged in or about to become engaged in a business or transaction for which remaining assets will be unreasonable in relation to the business or transaction

10. That I do not intend to incur or reasonably believe that I will incur debts beyond my ability to pay as they become due and I do not have the actual intent to hinder, delay, or defraud any creditor.

EXHIBIT 1

SUBSCRIBED AND SWORN before me, a Notary Public in and for the State of

_________________ by ________________________________ this _______ day

of (month) _________________ [1999] / [200__].

Witness my hand and official seal

Notary Public:____ Stamp

My commission expires:____

My address is: ____

ANNEXURE TO AFFIDAVIT OF SOLVENCY CONCERNING UNLAWFUL ACTIVITIES

The law of a jurisdiction may contain legislation (the "legislation") making it criminal for any-one to conduct or attempt to conduct certain financial activities which involve the proceeds of unlawful activities. The transfer of assets into a limited partnership, Trust, or other entity may constitute a criminal activity within the scope of such legislation if the assets transferred to such entities were derived from any of the unlawful activities specified in the legislation.

The unlawful activities under the legislation commonly consist primarily of drug-trafficking offences, financial misconduct and environmental crimes. Drug-trafficking offenses include the manufacture, importation, sale, or distribution of controlled substances; the commission of acts constituting a continuing criminal enterprise; and transportation of drug paraphernalia.

Financial misconduct includes the concealment of assets from a receiver, custodian, Trustee, marshall, or other officer of the court, from creditors in a bankruptcy proceeding, or from a statutory corporation or similar agency or person; the making of a fraudulent conveyance in contemplation of a bankruptcy proceeding or with intent to defeat the bankruptcy law; the giving of false oaths or claims in relation to a bankruptcy proceeding; bribery; the giving of commissions or gifts for the procurement of loans; theft, embezzlement, or misapplication of bank funds or funds of other lending, credit, or insurance institutions; the making of fraudulent bank or credit institution entries or loan or credit applications; and mail, wire, or bank fraud or bank or postal robbery or theft.

Environmental crimes include violations of statutory or regulatory laws Other specified unlawful activities in such legislation could include counterfeiting, espionage, kidnapping or hostage-taking, copyright infringement, entry of goods by means of false statements, smuggling, removing goods from the custody of customs, illegally exporting arms, and trading with a country's enemies.

What ACTEC Fellows Should Know About Asset Protection

*by Duncan E. Osborne and Elizabeth M. Schurig**
Austin, Texas

ACTEC lawyers probably have a duty to engage in asset protection planning for their clients, but if they do not, then to protect themselves from potential malpractice liability, they should clearly communicate to their clients that their representation does not involve any advice regarding asset protection. While this hypothesis may seem outrageous, in a recent article of the *ABA Journal*, Peter Spero argues that, at least under California law, a lawyer engaged in estate planning may well have a duty beyond traditional trust, estate, and tax planning which would, in fact, extend to asset protection planning.[1] Whether or not one agrees with Mr. Spero, the mere fact that he has taken that position and has identified a possible "duty" should send a warning signal. The reality of our litigious society is that once a lawyer argues that a "duty" exists, judges often allow a plaintiff to pursue an argument based on that "duty." If this plaintiff is successful, juries are often quick to award generous damages to the injured party. Indeed, this constant identification of new theories of liability is the very aspect of our legal system which in large measure drives the asset protection industry.

There are certainly ACTEC Fellows who resist the notion that asset protection planning is a part of the service owed to clients. Some argue that the potential for unwittingly assisting a client in defrauding his creditors is enough of a risk that this representation should not be undertaken. Indeed, some argue that this risk may itself serve as the basis for a defense to a malpractice claim founded on a duty to provide asset protection advice. Some would go further and say that under the fraudulent conveyance and fraudulent transfer laws,[2] all potential creditors are protected, no matter how removed in time and events from a transfer, so it is wrong under all circumstances to engage in asset protection planning. In support of such a position, those Fellows might refer to the language of the fraudulent transfer laws dealing with the rights of present and future creditors. They might also cite the recent cases which have held against the debtor and have struck down foreign asset protection trusts and that have, in some cases, subjected the settlors to imprisonment in civil contempt proceedings.[3] Finally, they might argue the long-standing policies of Anglo-Saxon jurisprudence which generally tend to support creditors' rights to access self-settled spendthrift trusts.[4]

The problem with these arguments is that they are superficial and they do not withstand serious analysis

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* Copyright © 1999 by Duncan E. Osborne and Elizabeth M. Schurig. Mr. Osborne is the senior partner of Osborne, Lowe, Helman & Smith, L.L.P. and received his BA from Stanford University and his MA and JD from the University of Texas at Austin. Mr. Osborne is the editor and a contributing author of the four-volume treatise, *Asset Protection: Domestic and International Law and Tactics*, published by Clark Boardman Callaghan in 1995 (updated quarterly). He is a fellow of the American College of Trust and Estate Counsel, an Academician in the International Academy of Estate and Trust Law (member, Executive Committee), and is listed in *Best Lawyers in America*. Ms. Schurig is also a partner of Osborne, Lowe, Helman & Smith, L.L.P. and received her BA from Baylor University and her JD from the University of Texas at Austin. Ms. Schurig practices in the International Estate Planning Section of the firm and is board certified as a specialist in the area of estate planning and probate law. She has written numerous articles and has lectured extensively in the areas of domestic and international estate planning, trust and estate administration and probate. She is a member of the Texas Academy of Probate and Trust Lawyers, and the College of the State Bar of Texas.

[1] Peter Spero, *Search and Rescue Missions*, A.B.A. J. Oct. 1999 at 70; *See also* Samuel I. Braunstein and Carol F. Burger, *Protecting the Wealth*, A.B.A. J., Nov. 1999 at 58.

[2] All states have laws to protect creditors from fraudulent transfers. Thirty-five have some version of the Uniform Fraudulent Transfer Act, six have a version of the Uniform Fraudulent Conveyance Act, and nine have some other statutory or common law derived from the Statute of Elizabeth. *See Duncan E. Osborne, Asset Protection: Domestic and International Law and Tactics* §§2:01-2:06 (1999). In this article, fraudulent transfer and fraudulent conveyance are used interchangeably.

[3] *In re B.V. Brooks*, 217 B.R. 98 (Bankr. E.D. Conn. 1998); *In re Larry Portnoy*, 201 B.R. 685 (Bankr. S.D. N.Y. 1996); *Federal Trade Commission v. Affordable Media, Inc.*, 179 F.3d 1228, 1999 WL 387259 (9th Cir. 1999) (This case is usually referred to as "the *Anderson* case" in asset protection circles); *In re Stephan Jay Lawrence, Debtor, Bankruptcy No. 97-14687-BRC-AJC* (Bankr. S.D. FL. Miami D.V. Sept. 8, 1999). *See also* Duncan E. Osborne and Elizabeth M. Schurig, *Asset Protection Trusts: Impact of Recent Case Law*, 5 J. Asset Prot. No. 2 at 24 (Nov./Dec. 1999).

[4] *See, e.g., In re B.V. Brooks, supra* note 3; *see also In re Larry Portnoy, supra* note 3.

EXHIBIT 2

of the statutes and of the case law Fraudulent transfer law is extraordinarily complex[5] While it is absolutely true that the fraudulent transfer law of any given state may, on its face, appear to be susceptible to the interpretation that future creditors, remote in time and circumstances from the "transfer" are protected, that is not, and never has been, the way in which the courts have interpreted those laws.[6] Courts have always fixed on the relative proximity of the various creditors to the events that led to the insolvency or to the financial injury to the creditors. Indeed, for those who take the time to study the bankruptcy cases, the creditors' rights cases, and the articles written by the creditors' rights bar, it is almost alarming what the courts do permit in relation to the federal fraudulent transfer law applied in a bankruptcy context. There is even an area of the law called pre-bankruptcy planning which allows asset transfers far beyond what these authors have ever advocated[7] In short, a serious legal analysis of what can and cannot be done to protect assets from creditors under both state and federal law reveals wide latitude for asset protection planning.

One reason that there is such wide latitude for protecting assets is that the law (either common law or federal or state statutory law) has never required an individual to preserve his or her assets for the benefit of future creditors Fraudulent transfer statutes focus on "intent" and one cannot "intend" to defraud a creditor who does not exist If the law did require individuals to preserve assets for the benefit of future creditors, then gratuitous transfers of all kinds (to family members, to charities, etc) would be prohibited and the ability to use limited liability entities, e.g., corporations, limited liability partnerships, and limited liability corporations, would not be allowed[8] However, from the earliest times in our history, persons have had the ability to limit their liability, and creditors have had fraudulent transfer laws and bankruptcy laws to protect them.

What has changed, and what has consequently fueled the debate about asset protection planning, is the legislative evolution in jurisdictions in which individuals may legally protect assets from their creditors by establishing and funding trusts for their own benefit, the assets of which are statutorily protected from the settlor's creditors. At least since 1989, when the Cook Islands enacted its asset protection legislation, individuals settling trusts in the Cook Islands or other jurisdictions with similar asset protective legislation have been able to settle assets in trust and benefit from those assets even though such assets were not available to their creditors.[9] Some lawyers and legal scholars argue that this result is a wrenching departure from Anglo-Saxon jurisprudence and simply should not be allowed These authors disagree with those lawyers and scholars Anglo-Saxon jurisprudence simply does not dictate that individuals should not be permitted to settle assets in trust for their own benefit and thereby protect those assets from their creditors

Anglo-Saxon jurisprudence has evolved in much the same way that the use of trusts has evolved into a legal institution.[10] However, the law governing trusts has historically been governed by the courts of equity rather than the courts of law.[11] This is because a trust is not really a legal entity, it is a "trust" relationship and therefore defining the relationship and its legal components historically required the application of conscience rather than strict legal principles that was better accomplished by ecclesiastics than lawyers[12] Though courts of equity do not exist in our country, it is important to remember that a trust is a relationship rather than an entity and that in the absence of a compelling reason to

[5] Confusion results, in part, from the difficulty in understanding the distinction between a fraudulent transfer, which may be grounds for a civil law remedy, and a fraud, which may be a tort or grounds for a criminal proceeding In a way it is unfortunate that the word "fraud" is included in both See also Ronald L Rudman and David L Lockwood, *Asset Protection Planning: Why it Works and Ethical/Liability Considerations for the Practitioner*, Financial and Estate Planning, §31,501 at 25 709 (Commerce Clearing House 1994)

[6] Osborne *supra* note 2, at §20:02 *See also* materials cited at note 7, *infra*

[7] *See* Peter Spero, *Prebankruptcy Planning*, 5 J Asset Prot No 2 at 73 (Nov./Dec 1999) The following articles and speeches by Neal L Wolf, a leading bankruptcy and creditors' rights attorney, are also very helpful in this regard: Neal L Wolf, *Understanding the Uniform Fraudulent Conveyance Act and Its Application in Creditor Attacks*, 1 J. Asset Prot No 4 at 34 (March/April 1996); Neal L Wolf, *Fraudulent Conveyance Law as Contained in the U.S. Bankruptcy Code*, 1 J. Asset Prot No 6 at 25 (July/Aug 1996); Neal L Wolf, *The Right of 'Future Creditors' Successfully to Maintain Actions Under the Fraudulent Conveyance Statutes*, 2 J. Asset Prot No. 5 (May/June 1997); Neal L Wolf, *Fraudulent Conveyance Law: The Tool By Which The Aggrieved Creditor Attacks the Asset Protection Plan* Address before the American Bar Association 9th Annual Spring CLE and Committee Meeting (May 14, 1998)

[8] Osborne, *supra* note 2, at §20:02

[9] *See*, The International Trusts Act (1984), as amended by the International Trusts Amendment Act (1985) the International Trusts Amendment Act (1989), the International Trusts Amendment (No 2) Act (1989) and the International Trusts Amendment Act (1991) (Cook Is)

[10] Austin Wakeman Scott and William Franklin Fratcher, The Law of Trusts, § 1 at 12 (4th ed 1987)

[11] *Id* at 9-11

[12] *Id* at 8-11

disturb this relationship, the relationship should be honored Indeed, trusts (or "uses" as they were originally termed) have been used historically to avoid the application of laws that had become outdated (for example, in the fifteenth century uses were employed to defeat feudal doctrines).[13] While "[t]he use of the trust to evade the claims of creditors has been resorted to for some six hundred years [and such] purpose is to be condemned," the trust has also been an historical "instrument of law reform" when the laws required modernization.[14] While "[t]he trust has often served as a means of evading the law ... [t]he evasion that in the long run proves successful is usually a reform."[15] The evolution of the asset protection trust and its statutory framework is in answer to a shifting legal and economic environment that is demanding change. If the planning is done with due and careful regard for creditors' rights, there is nothing inherent in Anglo-Saxon jurisprudence that necessarily condemns asset protection trusts Planning must be done within the bounds that protect creditors but if those creditors worthy of protection are protected then the asset protection trust should be able to comfortably take its place among the other vehicles available to protect one's assets and limit liability For example, at the core, there is really no distinction between an asset protection trust and an ERISA qualified plan, and no one has seriously condemned ERISA's anti-alienation provisions.

In addition to the fact that there is planning flexibility under creditors' rights law, there are some powerful forces working in favor of asset protection First and foremost is client demand; the interest in protecting assets is not universal, but it is both widespread and incessant, and it is driven in large measure by a serious lack of faith in our legal system to render fair results Many persons of wealth perceive themselves to be at risk no matter what sort of professional, business, or personal activities they undertake They genuinely believe that the plaintiff's bar can make a case and generate liability under the most absurd and unlikely set of facts. This concern reaches across the spectrum of those who have wealth: doctors, lawyers, accountants, architects, entrepreneurs, entertainers, professional athletes, heirs to fortunes, etc Whether the perceptions are well-grounded or not, they are real, and they drive the decisions of these individuals As a result, most wealthy clients are interested in asset protection advice.

Second is legislative reaction In response to these concerns regarding the inability of the legal system to render fair results, beginning in 1989 in the Cook Islands and proceeding apace on a global basis, jurisdictions have enacted laws to compete for and service the asset protection work.[16] In addition to the so-called offshore jurisdictions, no less than four states, Alaska, Delaware, Nevada, and Rhode Island, have now made it possible to settle asset protection trusts in their respective jurisdictions.[17] And finally, while the anti-asset protection advocates have cited with delight the imprisonment of the settlors in the *Anderson* case and the *Lawrence* case, no less an authority than the Supreme Court of the United States has, at a minimum, expressed understanding for and acceptance of, if not actually sanctioned, asset protection planning.[18] All that is to say that while the legal debate about the appropriateness of asset protection planning may rage, neither side has a clear winner, and there is substantial statutory and case law facilitating asset protection planning.

It may well be true that some of the client's concern is paranoia. It may also be that the paranoia is fed by marketers of asset protection structures, both foreign and domestic. Indeed, clients may come to an ACTEC Fellow with an asset protection plan that someone has sold or is trying to sell Lawyers may not be competent to understand, much less evaluate, all the subjective factors that motivate clients, but if an attorney is engaged to provide counsel regarding asset protection planning, that attorney must be prepared to respond to the vagaries of the client's agenda, including the client's perceived asset risk Because so many clients have asset protection high among their priorities, this issue will be even more important in the ACTEC Fellow's practice in the ensuing years

As a practical matter, what does all this mean for the ACTEC Fellow? It is submitted that asset protection advice and asset protection trusts do not inherently violate the foundational principles of Anglo-Saxon jurisprudence and that they will eventually find their place and their boundaries in our current legal system either by virtue of legislative change or judicial recognition. Therefore, the "duty" identified by Mr Spero at the outset of this article is a concern to be taken very seriously The estate planning bar is particularly at risk in terms of a potential duty, because various aspects of the estate planning representation inherently involve asset protection activities, i.e., tax planning, creation of

[13] *Id.* at 16.

[14] *Id.* at 7.

[15] *Id.*

[16] Osborne, *supra* note 2, at §§27:01-47:93.

[17] Alaska Trust Act, Alaska Stat §§ 13 36 105-220 (1997); Qualified Dispositions in Trust Act, Del Code Ann. tit 12, §§3570-3575 (1998); Spendthrift Trust Act, 1999 Nev Stat 299; Qualified Dispositions in Trust Act, 1999 R I Pub. Laws 402.

[18] *See Grupo Mexicano de Desarrolo S.V. v. Alliance Bond Fund, Inc* 119 S Ct 1961 (1999).

trusts for spendthrift children (or spouses) or other beneficiaries who may need assistance with asset management, retirement plan work (ERISA qualified plans under federal law enjoy the best of all asset protection, but some states also protect non-qualified plans) and the inevitable involvement with client's assets and solutions to their problems which produce, for example, limited liability structures such as family limited partnerships What is all this work, if not, at least in part, the exercise of limiting exposure to liability, *i e*, asset protection planning? It would be easy for a creative plaintiff's lawyer to argue that an estate planner has a duty to engage in asset protection planning.[19]

Of course, an ACTEC Fellow may well decide that he or she does not want to do asset protection work. Prudence suggests that in such a case the lawyer should raise the issue with the client and make it clear that this legal service is not being rendered and should articulate that position in conferences and confirm it in writing, preferably in an engagement letter that is acknowledged by the client. If estate planning representation is underway, the ACTEC Fellow should consider modifying the engagement letter to reflect the understanding that asset protection advice is not being rendered.

If the ACTEC Fellow does decide to engage in asset protection planning, he or she must be educated about the fraudulent transfer laws applicable in the jurisdictions in which that person practices At a minimum, the lawyer should have a working knowledge of the statutes and the cases decided under them Knowledge of the federal bankruptcy statutes that protect creditors is also necessary, although as a practical matter, state statutes are usually *more* protective of creditors' rights than the bankruptcy laws If a lawyer plans under the guidance of the state laws, the resulting plan is *generally* more conservative than would be the case under the federal laws. Finally, a lawyer must know the so-called shield laws of his or her state, i e, those laws that exempt certain assets from the claims of creditors.

With respect to any given case, the lawyer should do a serious in depth analysis of the client's solvency[20] This project begins with a listing of all assets, a subtraction of all debts, liabilities, claims, and contingent liabilities *and* a subtraction of assets which are already protected from creditors' claims under applicable state and federal law, *e g*, homestead, ERISA qualified plans, etc Be aggressive about identifying liabilities and contingent liabilities, *i e*, list not only debts, but guarantees, contingent claims, pending lawsuits, and even potential claims In some cases, it may be appropriate to engage a CPA to produce an audited financial statement Also, inquire about the client's business and professional reputation For example, does the physician client have a history of malpractice claims? Does the business client have a history of disputes with creditors, associates, etc ?[21] (The information on the Internet can be tremendously helpful here.) If anything untoward arises in the course of the solvency analysis, the lawyer should secure the relevant facts and evaluate them. If a serious problem appears, the attorney might either withdraw from the representation or retain as co-counsel an attorney with expertise in creditors' rights[22]

Finally, at the end of the solvency analysis, devise a methodology which is sure to protect creditors These authors typically implement a plan with a limited percentage of the solvency figure For example, assume a client with the following:

$ 10,000,000	total assets
- 2,000,000	debts, claims, guarantees, contingent liabilities, threats, etc
- 3,000,000	protected assets, e g., ERISA plan, homestead, annuities, life insurance[23]
$ 5,000,000	SOLVENCY
x 30%	
$ 1,500,000	available for further asset protection planning

There is no magic to the 30% figure shown in the example; it is a matter of subjective judgment However, only in very rare cases do these authors exceed 50%, and the figure is usually less The influencing factors are the size of the assets (*i e*, the absolute dollars involved), the nature of the client's business and professional activities, the potential source of any claims and the additional tools that might be available But the primary point here is: leave something signif-

[19] Braunstein and Burger, *supra* note 1

[20] Duncan E Osborne, *Asset Protection and Jurisdiction Selection* 33 Univ of Miami Philip E Heckerling Institute on Estate Planning 14-1, 14-4 (1999)

[21] As a practical matter, uncovering a serious problem generally occurs within the first client conference and does not take serious digging

[22] These authors have on occasion proceeded with creditors rights co-counsel and completed planning that permitted the implementation of some asset protection tools and rejected others.

[23] States vary in the protection from creditors that is afforded annuities and life insurance, but in many states, the cash surrender value is protected Osborne *supra* note 2, at 8:01- 8:53

icant on the table Such an approach minimizes, if it does not eliminate, the possibility of a fraudulent transfer argument because there are necessarily adequate reserves for all possible claimants

Not all asset protection planners are as conservative as the foregoing example suggests, and many attorneys will go much further and employ *"in toto"* arrangements where virtually all of a client's wealth is placed in one or more asset protection structures. Such plans bring clients to the very brink of solvency and pose risks for the client and his or her attorney The nature and extent of asset protection planning calls for a serious exercise of professional judgment

In summary, what should an ACTEC Fellow know about asset protection planning?

- You may well have a duty to deal with it either by undertaking it or expressly confirming that you are not undertaking it
- Clients want it More and more clients are interested in asset protection counsel There is a demand, and it is being encouraged by marketers of asset protection plans Do not be surprised by clients asking for it
- If you undertake asset protection planning on behalf of a client, educate yourself on the applicable state and federal laws that protect creditors and identify and establish a relationship with a leading creditors' rights attorney in your locale.
- Undertake an in depth solvency analysis of the client's assets, liabilities, and creditor protected assets Make sure you know the extent of your client's real and likely risks
- Educate yourself about the asset protection options in your state Domestic solutions frequently work in debtor friendly states like Texas and Florida, but even in *creditor* friendly states, you may be able to achieve all that is necessary, for example, with a life insurance plan, a retirement plan, and a family limited partnership Offshore trusts and out-of-state trusts can be complex and expensive and may not really be necessary
- Always be aware that you may be at risk for potentially engaging in a conspiracy to commit a fraudulent transfer and plan conservatively
- Remember, in the context of asset protection planning, you are damned if you do (under a potential conspiracy theory) and damned if you don't (under a theory that you have a duty to your client to render asset protection advice). No one ever said the practice of law was not challenging!

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NO U.S. CONNECTIONS ALLOWED WITH AN OFFSHORE TRUST? WRONG! USE ONSHORE CONTACTS
Frederick J. Tansill

CONVERTING NONEXEMPT PROPERTY TO EXEMPT PROPERTY IN PREPARATION FOR BANKRUPTCY
Neal L. Wolf

PROTECTING YOUR ASSETS WHILE SAVING TAXES: CHOOSING THE RIGHT FORM OF BUSINESS
Paul D. Borja

ACHIEVING MAXIMUM PROTECTION BENEFIT FOR BOTH THE LLC AND ITS MEMBERS
Richard M. Horwood

SPECIAL CONSIDERATIONS IN PROTECTING THE MEDICAL PRACTICE
Alan S. Gassman

FINANCIAL OUTLOOK

BUSINESS ENTITIES

EDITORS' COLUMN

SPECIAL BUSINESS ISSUES

RECENT CASES

WG&L

EXHIBIT 3

No U.S. Connections Allowed With an Offshore Trust? Wrong! Use Onshore Contacts

Frederick J. Tansill

Offshore asset protection trusts can be an excellent device for sheltering assets, but many clients worry about not having onshore connections to the trust assets. Various onshore contacts can help alleviate these fears.

It is widely believed and frequently stated that if protection is to be had for a citizen or resident of the United States using an offshore asset preservation trust (OAPT), there must be no connections between that trust and the United States. The concern with onshore connections is that, in the event claims are asserted by U.S. creditors, a U.S. nexus of the trust could provide a basis on which jurisdiction against the trust or its assets could be obtained by U.S. plaintiffs in U.S. courts.

The purpose of this article is to suggest that in many—perhaps even most—circumstances, it is perfectly appropriate and consistent with asset preservation goals for an OAPT to have certain U.S. connections, including any or all of the following:

- Location or custody of assets in the United States;
- Investment management in the U.S.;
- Trust protector domiciled in the U.S.; and
- A corporate affiliate of the offshore trustee may have a permanent establishment in the United States.

To evaluate and understand these issues in context, it is worthwhile to review the basics of asset preservation planning in general and of OAPTs specifically.

Asset Preservation in General

It is legal, moral, and prudent to protect oneself from possible claims by prospective future creditors. Persons with certain profiles and persons in certain lines of business may reasonably anticipate in our litigious society the reasonable possibility of future suits and claims. Under American law, including the U.S. Bankruptcy Code, transfers made with intent to hinder, delay, or defraud present creditors or reasonably anticipated future creditors may be set aside by such creditors as fraudulent transfers. Gratuitous transfers that render a debtor insolvent are typically deemed fraudulent as to creditors regardless of intent. Virtually all states follow the Uniform Fraudulent Conveyance Law or the Uniform Fraudulent Transfer Act or the principles of the Statute of Elizabeth, passed in 1571, all of which disregard either sort of transfer as fraudulent.

On the other hand, American law permits and sanctions transfers intended to protect the transferor's assets from *possible future* creditors.[1] Spendthrift trusts in which the settlor is among the class of potential beneficiaries are generally against public policy, void and ineffective against the settlor's creditors under U.S. law.[2]

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"Other British Common Law jurisdictions generally recognize a spendthrift trust of which the settlor is a beneficiary as perfectly valid."

The following techniques and numerous others are used in the panoply of domestic asset preservation strategies: gratuitous transfers, outright or in trust; estate freezing techniques using partnerships, charitable trusts, and/or personal residence trusts; and titling property in tenancy by the entirety. But OAPTs offer certain advantages that domestic strategies do not.

Offshore Asset Preservation Trusts (OAPTs). OAPTs are usually established in jurisdictions whose laws have one or more of the following characteristics:

- Refusal or reluctance to recognize U.S. judgments as automatically enforceable. Examples of such jurisdictions include the Isle of Man, the Cook Islands, Nevis, Belize, and Liechtenstein.
- Recognition of spendthrift trusts for the benefit of settlor as valid. Examples of these jurisdictions include the Channel Islands (Guernsey and Jersey), Gibraltar, Bahamas, Bermuda, Mauritius, Turks and Caicos Islands, the Cook Islands, Belize, and Cyprus.
- Less stringent fraudulent conveyance law than the United States. All jurisdictions that have adopted asset protection trust legislation (some fourteen at present) have this feature.

If U.S. juries tend to be receptive to plaintiffs with grievances against deep-pocket defendants, courts of many foreign jurisdictions will not give the "full faith and credit" to their verdicts and awards, which other U.S. courts must. It will be difficult to enforce a U.S. judgment in many foreign jurisdictions against assets of the settlor in such jurisdictions, and virtually impossible to enforce a U.S judgement against assets irrevocably conveyed before a creditor problem arose by settlor into a discretionary spendthrift trust administered by an independent institutional trustee domiciled in such jurisdiction.

Unlike the United States, other British Common Law jurisdictions—for example, Belize, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, Turks and Caicos Islands—generally recognize a spendthrift trust of which the settlor is a beneficiary as perfectly valid.[3] To reduce the obvious opportunities for fraud under such a generous régime, other British Common Law jurisdictions generally permit creditors to challenge transfers to such a trust even if such creditors can show that they were potential, albeit unknown, creditors at the time of the transfer to trust.[4]

Ideal asset preservation jurisdictions (those that since 1989 have adopted specific Asset Preservation Trust legislation) have reversed this general Common Law rule permitting potential unknown and unanticipated future creditors to challenge transfers as fraudulent, and no longer sanction such claims. Such laws take various forms in various jurisdictions, but all have the effect of making it more difficult for plaintiffs to bring the cause of action and to prove fraudulent conveyance and attack trust assets.[5] Some jurisdictions impose a heavy burden of proof on the plaintiff (for example, Cook Islands law requires proof "beyond a reasonable doubt") and some have brief statutes of limitations after the creation of the trust within which any challenge must be brought or permanently barred.[6]

Psychological and Chauvinistic Hurdles for U.S. Domicilaries Setting Up OAPTs

To put it bluntly, U.S. citizens rarely trust offshore banks, offshore asset managers, or offshore lawyers. This lack of trust is typically based on lack of familiarity with offshore institutions and professionals. When U.S. citizens are told

that OAPTs are effective only if their assets are held and managed offshore, and that the offshore bank trustee they barely know may only be discharged by an offshore trust protector, presumably an offshore lawyer who is totally unknown to them, they are nonplussed and discouraged from using OAPTs. In that context, OAPTs are too "foreign" in every sense of the word.

At one time, about a decade ago, most Americans believed the United States had the only safe banks in the world. Then, in the recent recession, many U.S. banks struggled mightily, and some failed. That was a blow to the chauvinistic thinking of many Americans. Two other factors in the past decade have opened the minds of U.S. citizens who are candidates to be settlors of OAPTs to possible offshore financial arrangements: (1) more and more of the businesses they own or work for have overseas business dealings with suppliers or customers and (2) most U.S. citizens with substantial investment capital have mutual fund investments in offshore stock.

These developments have raised the comfort level of wealthier, more sophisticated U.S. residents in foreign arrangements of all types and have helped break down psychological and chauvinistic barriers to the establishment of foreign trusts. In the present environment a great deal of interest has been generated in OAPTs, and there is great demand for information on them. Nevertheless, lingering concerns will still discourage most potential U.S. candidates from OAPTs unless some amelioration of the "foreignness" of the OAPT may be offered.

Getting Comfortable With U.S. Connections

To accommodate our clients, we need to offer them options for security and comfort and show them areas of the OAPT we can tailor to provide one or more U.S. connections for their peace of mind.

U.S. Trust Protector. The classic OAPT is an irrevocable discretionary spendthrift trust of which the U.S. settlor and his family members are the beneficiaries. Typically two mechanisms provide the U.S. settlor with a sense of "control" over such a trust: (1) providing the trustee with a non-binding "Letter of Wishes," describing the manner in which he or she "hopes" the trust will be administered, typically and (2) naming in the trust a "Protector." A trust protector has the following authority:

- To discharge the trustee and name a successor trustee at any time and for any reason;
- To change the situs of the trust and its governing law in the event of unexpected developments; and
- To add and delete beneficiaries of the trust or authorized distributions to them.[7]

The role of protector is of critical importance in the settlor's overall comfort with the offshore arrangement. Why should not the protector be the settlor's lawyer, accountant, or trusted friend in the United States? Two prominent commentators—Larry W. Gibbs and Mark A. Schwartzman—serve as protectors of OAPTs they draft and recommend that the U.S. lawyer drafting the OAPT serve as protector to monitor tax planning, tax compliance, and administration at least for the trust's first few years while another suitable protector (for example, the settlor's U.S. accountant) is trained.[8]

"The role of protector is of critical importance in the settlor's overall comfort with the offshore arrangements."

The fear of using a U.S. protector arises from the perceived risk that a U.S. court will obtain jurisdiction over the protector and attempt to compel the protector to exercise his or her authority to relo-

cate the trust assets to the United States, where the creditors may seize them.

However, if we assume that an OAPT will not be used to evade existing creditors, but only to protect from potential future creditors, then we can assume that in the great majority of cases, no creditor problems threatening the OAPT assets will ever, in fact, arise. In that light, the clear priority of the settlor is to be certain that the trust is a sensible estate planning and financial planning vehicle with the flexibility to provide asset protection should the need arise. The settlor will, therefore, want to be certain that the trust will be administered in a professional, capable manner consistent with his or her expectations. A trusted protector will assure that. If a creditor problem ever looms on the horizon, it will probably be desirable for the U.S. protector to resign. The trust may provide for the succession of a protector domiciled offshore in that event. An offshore protector will not be subject to the threat of court order, mandamus, and contempt proceedings by a rogue U.S. judge determined to circumvent the perfectly legal offshore structure and get control of the offshore assets.

"Confidentiality should appertain even though the assets are held and/or managed in the United States."

U.S. Custody/Investment Management. Typically, candidates for OAPTs have substantial liquid assets and U.S. investment managers whom they have come to trust and rely on over time. Moreover, it is those very advisors who are frequently sophisticated enough and in the best position to recommend OAPTs. The use of those advisors to manage OAPT assets would both motivate the advisors to recommend OAPTs to their clients where they are otherwise appropriate, and accommodate the clients' desire to use familiar and trusted advisors to manage the assets held by the OAPTs.

Unlike U.S banks, offshore bank trustees are accustomed to bifurcated fiduciary responsibilities, and are frequently asked to engage the investment advisor of the settlor's choice rather than manage the assets themselves. U.S. settlors often direct or "request" that their offshore trustees to engage their long-standing U.S investment managers. Offshore trustees will often be willing to negotiate reduced trustee fees if they are not obligated to assume day-to-day investment management responsibilities. If the investment advisor is in the United States, the investment assets themselves could remain in the custody of the U.S. investment advisor or the custody of the assets could be offshore. If custody is in the United States, the investment account will not be in the name of the settlor It will be an investment management account bearing only the name of the offshore trustee, and it may be pooled indistinguishably with other funds of such trustee. Therefore, confidentiality should appertain even though the assets are held and/or managed in the United States.

As we assume that the OAPT has been established as a failsafe for an unlikely future threat, it makes sense for the settlor to put a priority on the use of a familiar and trusted investment advisor. If, as, and when the first hint of a creditor problem suggests itself, the assets can be liquidated or wire-transferred overseas, and the investment management shifted offshore with the assets almost instantaneously.

Offshore Trustee With U.S. Affiliates. There are few, if any, very substantial, very sophisticated offshore banks or trust companies that do not have affiliates with a situs in the U.S.. The offshore company might be a parent of the U.S. bank, or a sister corporation or a distant relative sharing a common corporate greatgrandparent. The power and wealth of the U.S. economy is such that virtually all of the important financial institutions in the world want to have a physical presence here. It is perilous to choose as trustee of an OAPT

an entity that has a corporate "relative" in the United States because of the concern that the U.S. affiliate could be served in a U.S. court proceeding brought by a creditor of a customer of its offshore trust affiliate.

Anxiety in this regard is reasonably founded. In *In re Grand Jury Proceedings (Bank of Nova Scotia)*,[9] the U.S. government, pursuing a criminal investigation against a U.S. citizen involving illicit drugs, obtained a grand jury subpoena duces tecum upon a U.S. branch of the Toronto-based Canadian banking corporation. The subpoena required production of financial documents pertaining to two individuals and three companies from the parent bank's branches in the Bahamas, the Cayman Islands, and Antigua. The Southern District of Florida imposed a $25,000/day fine, which eventually amounted to $1,825,000, on the bank for civil contempt of its order to comply with the subpoena and successfully compelled production in the United States of sought-after Bahamian and Cayman assets and information. The case is potentially a nightmare precedent, and one every knowledgeable attorney in this area should be familiar with.

However, a state court might not be as anxious as this federal court was to assist a nongovernmental creditor in a civil case, and that fair consideration of this case does not necessarily lead to the conclusion that OAPTs should only be established with banks and trust companies with no U.S. nexus.

To counter the *Bank of Nova Scotia* case risk, all OAPTs should have a trust protector with power to discharge the serving trustee and engage a new one. (The issues involved with the question of whether such a protector may be a U.S. resident have been discussed previously.) If a creditor problem flickers on the horizon, the protector should immediately discharge a trustee with U.S. nexus and substitute one with no possible grounds for U.S. jurisdiction.

The desirability of using a substantial offshore bank or trust company, which will inevitably have a U.S. presence, derives from the desire of U.S. settlors to avail themselves of well-established, respected institutions with sophisticated trust officers, systems and investment management, and security of custody. In those cases where the asset protection motivation is combined with a motivation to diversify the settlor's investment portfolio to include offshore equities with which such large offshore institutions are more familiar than U.S. investment managers, then the desirability of using a large offshore institution as fiduciary is emphasized.

"Is this foolproof? No."

On the other hand, because any U.S. creditor's first line of attack is likely to be against any affiliate of the trustee in the U.S., the settlor may want to choose a purely foreign trustee. In that case, the risk of dealing with such an entity, which is less "established," may be ameliorated by arranging for onshore custody and investment management of the trust assets. As noted previously, such U.S. assets will be difficult to trace and may be expeditiously removed from the U.S. if U.S. creditor threat looms.

U.S. Real Estate in an Offshore Trust. Trust protectors of OAPTs may be domiciled offshore, the custody and management of OAPT assets may be offshore, a trustee with no U.S. connection may be nominated, but if the assets sought to be protected consist of real estate located in the U.S., the realty cannot be shipped offshore. Or can it?

U.S. real estate can be contributed by the settlor of an OAPT to a limited partnership in exchange for a one percent general partnership interest and a 99% limited partnership interest. The limited partnership interest may, in turn, be contributed to the OAPT by the settlor, who may retain the general partner's interest and thereby retain control. Alternatively, the settlor may arrange for an unrelated party he trusts

to own the one percent general partnership interest and control the partnership. In the event of creditor problems, the limited partnership interests and the underlying real estate should be insulated from seizure and sale.[10]

Is this foolproof? No. American judges have extraordinary authority and discretion, and the underlying property and the settlor, who may also be the general partner, will be within a U.S. court's jurisdiction. If a U.S. state court judge decides to exercise his authority under equitable or legal principles to issue a court order, injunction, mandamus, or contempt citation, he may be able to bully those within his jurisdiction to do what he deems appropriate without regard to what they may view as their legitimate legal rights.

Notwithstanding the risks of this approach, it may be the only strategy available to protect substantial equity in U.S. realty from creditor claims, and, without doubt, putting U.S. real estate into a limited partnership and assigning the 99% limited partnership interest to an offshore trust will "uglify" the realty from a creditor's point of view and set up material hurdles that will improve the debtor's bargaining leverage with the creditor.

U.S. Settlor's Retained Rights. To secure the efficacy of an OAPT, the U.S. resident settlor should not have power to revoke the OAPT. The settlor should not serve as protector of his own trust, even though the laws of Belize and the Cook Islands expressly permit it. Neither should the U.S. settlor or any other U.S. resident party (other than a protector, subject to the cautions outlined previously) have any right to discharge and appoint trustees, to discharge or appoint protectors, to designate custodians or investment advisors, or to change the situs of the trust or its governing law. If the U.S. settlor has no absolute legal rights with respect to the trust, he may not be intimidated in the U.S. legal system.

"The settlor should not serve as protector of his own trust."

Tax Issues

The types of onshore connections discussed herein have no impact on the U.S. tax treatment of OAPT assets. OAPTs are normally structured to be tax neutral. Any offshore trust with U.S. beneficiaries created by a U.S. resident will, by virtue of IRC § 679, be treated for U.S. income tax purposes as a "grantor" trust, and its income will be taxed to the U.S. settlor. This is true regardless of the existence or absence of any other U.S. nexus.

Regarding the estate and gift tax consequences of an OAPT, typically the transfer of assets to such a trust will be structured as an incomplete gift.[11] As a consequence, there would be no current gift or gift tax obligation, but the full value of the trust would be included in the settlor's taxable estate at death.[12]

Conclusion

Offshore asset preservation trusts are friendlier, more useful financial planning vehicles for our U.S. clients if we open our minds to possibilities for onshore contacts for them, such as involving U.S. professionals, using offshore trustees with onshore affiliates, and transferring for protection in OAPTs title to assets located in the United States. ■

[1]See e.g., Wantulok v. Wantulok, 214 P2d 477 (Wyo. 1950); Hurlbert v. Shackelton, 560 So. 2d 1276 (Fla. Dist. Ct. App. 1990).
[2]See Scott and Fratcher, The Law of Trusts, Vol 2A, note 3, § 156 at 167–168; Restatement (Second) of Trusts, § 156.

[3]See Estate of German v. United States, 7 Cl. Ct 641 (1985).

[4]MacKay v. Douglas (1872) LR 14 Equity 106 (UK); Ex Parte Russell in Re Butterworth (1882) 19 Ch. Div. 588 (UK); Re Cadogan v. Cadogan (1977) 1. All ER 200 (UK).

[5]Such jurisdictions include Bahamas, Belize, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, Liechtenstein, Turks & Caicos Islands.

[6]Two years from the date of transfer in Cyprus and the Bahamas, one year under certain circumstances in the Cook Islands.

[7]E Marty-Nelson, "Offshore Asset Protection Trusts: Having Your Cake and Eating It Too," 47 Rutgers L. Rev. 11, 64.

[8]L.W. Gibbs and M.A. Schwartzman, "Tips on International Planning for the U S. Citizen," July 1995 Trusts & Estates 37, at 39 - 40

[9]In re Grand Jury Proceedings (Bank of NS), 740 F2d 817 (11th Cir. 1984), cert. denied, 469 US 1106 (1985); In re Grand Jury Proceedings (Bank of NS), 691 F2d 1384 (11th Cir. 1982), cert. denied, 462 US 1119 (1983). See also United States v. Levine, 951 F2d 1466 (6th Cir. 1991), in which Mr. Levine had an account at a branch of a Swiss bank in the Bahamas, and despite Bahamian bank secrecy laws, U.S. authorities gained access to information about the account by exerting pressure on the U.S. branch of the Swiss bank. In re Marc Rich & Co., AG, 707 F2d 663, 668 (2d Cir. 1983), cert. denied, 463 US 1215 (1983)

[10]B.S. Engel, "Using Foreign Situs Trusts for Asset Protection Planning," Estate Planning July/Aug. 1995, 212

[11]Treas. Reg. § 25.2511-2.

[12]Note, however, PLR 9332006, which describes circumstances in which a transfer to an OAPT was characterized by the IRS as a *completed* gift by the settlor subject to gift tax and excluded from the settlor taxable estate. This may be a trap for the unwary.

SAMPLE LETTER OF WISHES

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June 15, 2010

Trust Officer
__________________ Bank & Trust (Bahamas) Limited
Nassau
The Bahamas

PERSONAL AND CONFIDENTIAL. SUBJECT TO ATTORNEY-CLIENT PRIVILEGE. NOT TO BE DISCLOSED TO ANY PARTY OUTSIDE OF BANK & TRUST

re: Letter of Wishes

Dear (Trust Officer):

The __________ Trust Settlement, between __________ and _________ Bank & Trust, an irrevocable trust, has been created. All terms used and not otherwise defined in this letter shall have the same meanings as in Trust Settlement.

The objectives of the said Settlement are minimization of death tax, particularly U.S. federal estate tax, avoidance of court supervised probate administration, investment management and diversification, including global investing, avoidance of court supervised guardianship, preservation of the confidentiality with respect to the nature of the assets and the dispositive plan, and the security and preservation of the capital contributed thereto. While the Settlor is alive this trust is to be held for the benefit of the Settlor, his spouse and children and more remote descendants (if any)

EXHIBIT 4

(the "Primary Beneficiaries"), and for the benefit of certain more distant relatives, and charitable organizations favored by the Settlor (the "Secondary Beneficiaries"). After the Settlor's death, after the payment of certain estate expenses, debts, devises, bequests, taxes and other charges, it is to be held in continuing trust for the benefit of his spouse for life, with all net income being distributed to her no less often than quarterly for life. Principal should be available to her if she needs it. At his spouse's death, or if she fails to survive, the Trust assets are to be held in lifetime discretionary trusts for his children in equal shares, subject to the exercise of testamentary powers of appointment. If at any time he has no immediate family, the Trust assets are held or are distributed to certain more distant relatives and possibly charitable organizations. The settlement allows __________ Bank & Trust considerable discretion with respect to distributions and administration, particularly while the Settlor is alive. The Settlor has asked me to write to inform the Trustees of his hopes and wishes with respect to the management, investment and distribution of the income and principal of the trust. The Settlor understands that he has no power to request the Trustees to follow his wishes, but he hopes the Trustees may find an expression of his wishes useful in discharging the responsibilities it has accepted as Trustee. This Letter of Wishes as originally drafted or as may be amended from time to time, by the persons authorized to do so, is not intended to be binding nor to grant any rights whatsoever to any persons named herein.

Consistent with that objective, the Settlor wants the Trustees to know that his wishes regarding distributions from the trust are as follows:

- Discretionary distributions of income and/or principal should be made only when such distributions may be enjoyed by the Beneficiaries free of significant legal constraints, such as bankruptcy, injunction, court order, mandamus, contempt of court or similar proceeding. If such distributions may not be so enjoyed, they should generally be deferred until they may be so enjoyed. The Settlor appreciates that the Trustees have full power to make distributions as they see fit and understands that the Trustees may decide that genuine need exists notwithstanding the presence of constraints.

- During his lifetime, while he is not under a disability, the Settlor would hope and expect the Trustees to consider himself as the principal beneficiary of the trust to the exclusion of all others. He would hope and expect the Trustees to consult with him in all matters relating to the investment of the trust funds, minimizing administrative expenses to the trust, and deal with all distributions of income and/or principal in accordance with his wishes. In particular, as the annual net income of the trust will be taxable to the Settlor in the United States, the Settlor would hope and expect that the Trustees would distribute to him annually sufficient funds to pay the U.S. federal and state income tax due on the trust's income, whether on ordinary income or capital gain, long- or short-term, if the Settlor so requests, or pay the tax due directly to U.S. federal and state taxing authorities. The Settlor does, however, express an overriding wish that the Trustees may act in their absolute discretion.

- While the Settlor is alive and not under a disability, if distributions to him are improvident because of unexpected constraints, the Settlor would hope the Trustees would look for opportunities to make distributions:

    - for his benefit, directly to vendors or service providers
    - indirectly for his benefit, to or for the benefit of the other Primary Beneficiaries, e.g., his spouse and his children
    - only if the Settlor suggests, if he is alive, or if his wife suggests, if he is not alive and competent but she is, or if his children unanimously suggest, if neither the Settlor nor his spouse are alive and competent, to the other beneficiaries named, the Secondary Beneficiaries

  as circumstances dictate.

The Settlor would like to see the Trustees handle the investment of the Trust Fund by managing certain assets itself, and with respect to other assets, by engaging, if the Trustees approves, an investment manager to be suggested by him with the advice and consent of you as Trustee. After discussing this matter with you, he will inform you of the assets he would like you to manage yourself, and how, and of his suggestion as investment manager, and your instructions to such manager. Please contact the Settlor with questions regarding any particular proposed investments or the selection of an investment manager.

The Settlor reserves the right to request that I or the Protector or he himself may send the Trustees another letter of wishes signed by him at any time during his life modifying the wishes expressed herein. Other than as stipulated above, while he is alive and not under a disability the Settlor does not wish for any person to have the authority to alter this letter of wishes. After his death or disability, the Settlor intends that his wife and his children who survive and have attained the age of eighteen, acting by majority, may jointly amend this letter, but only if the Protector then serving joins in the amendment of this letter. After the Settlor's death or disability, he wishes that the Protector shall direct the investment of the Trust Fund.

The Trustees should bear in mind at all times that the Settlor's first intention in establishing this trust is to provide for his own financial needs, secondly for the needs of the other Primary Beneficiaries, for his spouse and children and more remote descendants, and finally, only if no spouse and no descendants survive him, for the other Secondary Beneficiaries named in the Trust.

The Settlor asked me to write to the Trustees in this privileged communication to express his wishes. The Trustees may feel free to call the Settlor to confirm the authority of this letter. Because this letter should be free from discovery in any judicial proceeding because of the attorney-client privilege, the Settlor would not want to see the privileged status of this letter jeopardized by having the Trustees produce the letter to any other person for any reason. For the same reason, the Settlor does not wish to correspond with the Trustees directly with respect to these matters.

Respectfully,

FJT/slb

Frederick J. Tansill
Attorney for the Settlor

Enclosures

I have reviewed this letter of wishes and approve it.

____
Date

Settlor

This will evidence receipt of the letter of wishes of the Settlor by the Trustee.

Bank & Trust Co.

By:

Name printed:

Title:

Date:

THE WALL STREET JOURNAL

TUESDAY, OCTOBER 14, 2003 D1

Litigation Boom Spurs Efforts To Shield Assets

Doctors, Executives Turn to Trusts That Are Off-Limits to Creditors; Opting to 'Go Bare' in Florida

By RACHEL EMMA SILVERMAN

THE DRUMBEAT of litigation against doctors, accountants, business executive and other professionals is prompting a growing number of people to play defense: They're putting their money where creditors can't get to it.

A key technique is the so-called asset-protection trust. The idea is to put a big chunk of your money in an irrevocable trust. The trust is run by an independent trustee, who may opt to give you payments from time to time. If done correctly, the trust—which has to be located in a jurisdiction that has passed special laws—generally can't be touched by creditors if you're sued or file for bankruptcy protection.

Doctors have been setting up asset-protection trusts for years to protect themselves from malpractice litigation. But with the latest round of corporate scandals and the passage of the Sarbanes-Oxley Act, which makes top executives and directors accountable for their company's financial results, more executives are seeking asset-protection trusts.

"They don't want to lose everything they've worked hard for," says Gideon Rothschild, a partner at law firm Moses & Singer LLP, in New York.

Nobody tracks exactly how many asset-protection trusts are drafted each year, especially since many are located in exotic offshore jurisdictions. But lawyers and trust companies say interest in them seems to be increasing. National City Corp's Delaware-based trust company, which started only 10 months ago, expects to pull in $200 million in asset-protection trust business in its first two years. John [illegible], a partner at Morrison & Foerster in New York, has seen his asset-protection work increase fourfold since the late 1990s.

Most asset protection trusts are located offshore, in locales like the Cook Islands, Nevis and Gibraltar, which have attracted sizable trust business by enacting laws that protect trusts from U.S. creditor claims.

But the number of U.S.-based trusts is now picking up as states change their laws, partly to lure people who are worried about putting their wealth abroad: Alaska, Delaware, Rhode Island, Nevada, and as of this year, Utah, now permit these trusts for both residents and nonresidents. About 1,500 domestic asset protection trusts holding more than $2 billion in assets have been created since 1997, estimates Richard Nenno, managing director and trust counsel, Wilmington Trust Co., Del.

Rising malpractice insurance rates are a key reason. In Florida, for example, climbing premiums have spurred many physicians to forgo coverage altogether, and instead use other asset-protection techniques. Marc Singer, a partner at Singer

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EXHIBIT 5

Litigation Boom Spurs Efforts to Shield Assets

Continued From Page D1

Xenos Wealth Management, Coral Gables, Fla., says that about 60% of his physician clients "go bare" and drop malpractice insurance because of the high cost and limited coverage of policies. That's a big jump from 10 years ago, when only about 20% of his clients practiced without insurance.

A recent survey of individuals with more than $1 million in assets found that 35% had some form of asset-protection plan, compared with just 17% of respondents in 2000. And more than 61% of the respondents who didn't have an asset-protection plan were interested in creating one, up from only 43% in 2000, found the study by Prince & Associates, Redding, Conn., a market research and consulting firm.

Domestic asset-protection trusts are controversial, because they haven't yet been tested in court and it is still unclear how well they'll hold up. Article IV of the Constitution says that each state should have "full faith and credit" in the legal judgments made in other states. Lawyers, therefore, worry that a plaintiff who wins a judgment in a New York court might be able to enforce the ruling against an asset-protection trust created in Delaware.

"We are very careful to point out that this is not necessarily bulletproof, but that it is the best thing going," says Peter Valente of law firm Blank Rome.

People setting up asset-protect trusts have to pay attention to avoid running afoul of the law. While creating an offshore asset-protection trust may sound sketchy, they're legal as long as they're not used to evade income taxes; you have to disclose the assets and income in the trust to the Internal Revenue Service.

Another caveat: People shouldn't set up an asset-protection trust if you know you have a potential legal action looming on the horizon. Courts are likely to rule against such a trust, calling it a "fraudulent conveyance," if it is set up right before a lawsuit, bankruptcy or divorce.

> Lawyers caution that you shouldn't put all of your assets into these trusts.

Brian D. and Elizabeth G. Weese, the owners of a now-defunct Baltimore bookstore chain, recently faced several lawsuits charging that they fraudulently moved nearly $20 million in assets to a Cook Islands trust called "Book Worm II" to avoid creditors ahead of bankruptcy. Several months ago, the Weeses settled the case for more than $12 million; the money was provided by Ms. Weese's father, Rite Aid Corp. founder Alexander Grass.

Domestic asset-protection trusts also can also be used to ease estate taxes: Because you give your assets to the trust, the funds are out of your estate for estate-tax purposes. However, the trust can't make payments to you on a regular basis, or that would invite the scrutiny of the IRS. "You can't use the trust as a checking account," says Mr. Nenno, of Wilmington Trust.

Asset-protection trusts don't come cheap. Offshore asset-protection trusts can cost anywhere from $20,000 to $50,000 to set up, plus annual administrative fees of $2,000 to $5,000 and asset-management fees of about 1% on the assets placed in the trust. Domestic asset-protection trusts cost less, running anywhere from $3,000 to $10,000 in attorney's fees, plus asset-management fees of roughly 1%.

Because of the high fees, asset-protection trusts generally don't make sense unless you're willing to put at least $1 million in them. Still, a few financial-services companies, like National City Corp., cater to smaller trust accounts of about $500,000, attractive to professionals at earlier stages in their careers.

Lawyers caution that you shouldn't put all of your assets into the trusts, because you're only a so-called discretionary beneficiary. That means you won't have regular access to the trust assets.

EXHIBIT 6

Shelter from the Storm

T&E exclusive: Survey charts the rising importance of asset-protection planning

By Russ Alan Prince, president, Prince & Associates, Shelton, Conn., and Richard L. Harris, managing member, BPN Montaigne LLC, Clifton, N.J.

Wealthy clients want asset-protection plans, and many lawyers, despite doubts about the savoriness of such strategies, are interested in considering them. But they don't because, they admit, they don't quite know how.

These are the findings of a 38-question telephone survey conducted in April by Prince & Associates of 227 private-client lawyers, all of whom derive at least 51 percent of their income from work with individuals (as opposed to institutions).

In asset protection, advisors essentially construct a legal fortress around wealth. This planning is particularly important for high-net-worth clients worried about litigation and divorce possibly endangering their estates. It is, however, sometimes unethical and maybe even illegal for advisors to help clients try to shelter assets from existing and probable creditors. (See "Asset-Protection Planning: Ethical? Legal? Obligatory?" page 42).

The wealthier a client is, the more interested he is in asset-protection planning.

Still, many lawyers have doubts about asset protection. Only 27.8 percent agreed strongly with the assertion, "Asset protection is legal and should be discussed with most wealthy clients." But asset-protection planning has its place.

Certainly clients think so. A majority of the private-client lawyers (55.1 percent) report that their clients are "very" or "extremely" interested in it.

And the more financially successful the survey respondents, the more likely they are to think asset-protection planning is important to clients. That's because the wealthier a client is,

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tive It also would separate the financial and personal aspects of the relationship among the three children and allow for family harmony.

MONKEY WRENCH

Rodney is an unknown factor, as he may want to work for Famco after he graduates from college. If either of the Smiths is living at the time of his decision, they can handle the situation by creating an appropriate position for Rodney and transferring Famco stock to him either during their lifetime or in their wills, somewhat similar to what they decide to do for Sally. They will have to deal with the control of Famco between Sally and Rodney, or treat them equally with the voting stock that could create a deadlock or leave someone else, perhaps David or a trusted outsider, with a tie-breaking vote.

But what if one or more children has not decided whether to enter the family business by the time the last parent dies? One solution: The parents, company and undecided children can enter into an agreement that the children can elect to become an employee of Famco on terms to be subsequently established by the Smiths or by outside directors with or without the entrenched child. Similarly, the same group could allow the undecided children to acquire company stock at a formula or appraisal price payable on an installment method over a reasonable period of time to allow the undecided children to use their earnings for the payments. Thus, the parents would not have to rely on the entrenched child alone to make the decision and establish the terms of undecided children becoming employees and shareholders of the family business.

LOOSE ENDS

If Rodney becomes an employee of Famco or if other family or non-family member employees become Famco shareholders, one question that should be answered in advance is: Should the company have an option to acquire the shares of a departing employee?

If such an option is in place and is exercised, Famco probably will want to prevent the terminated employee from disclosing confidential information, calling on Famco's customers or otherwise competing with Famco for some reasonable period of time All of these stipula-

continued on page 49

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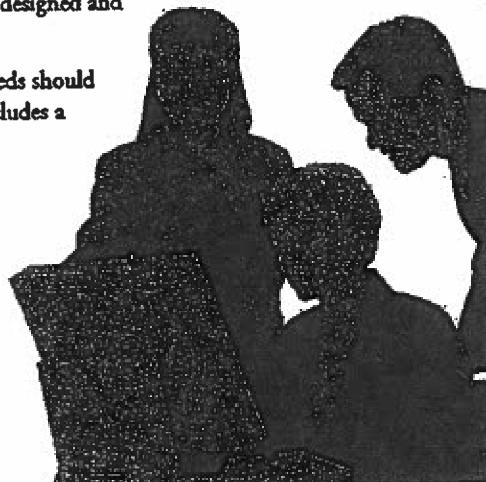

the more interested he is

About half the respondents earn $250,000 or more a year; their clients during the previous two years had an average net worth of $5.3 million. The other half of the lawyers surveyed earned less than $250,000 and, during the same period, had clients with an average net worth of $1.8 million.

A whopping 74.8 percent of the high-income lawyers saw considerable interest in asset-protection planning among their high-net-worth clients. Only 34.8 percent of the lower earning lawyers said asset protection was "very" or "extremely" important to their clients.

All the lawyers say that their wealthiest 20 clients tend to be more interested in asset-protection planning than the rest of their clientele. More than four out of five (84.6 percent) private client lawyers report that their top 20 clients are "very" or "extremely" interested in asset protection planning (90.4 percent of high-income lawyers and 78.6 percent of mid-income lawyers).

SIGN OF THE TIMES

Why has asset protection become such an issue? The respondents (63.4 percent) say it's because people "are just more afraid" (see "Why Asset Protection?" this page).

But a litigious society also makes asset protection planning seem essential to clients, according to 57.3 percent of lawyers. Higher-income lawyers are particularly likely to point to litigiousness (66.1 percent compared to 48.2 percent).

High divorce rates also make clients value asset protection, according to 52.4 percent of those surveyed. For high-income lawyers, this reason is more pressing (58.3 percent compared to 46.4 percent).

Private-client lawyers expect asset protection planning to become more critical in the future. Of those surveyed, 66.1 percent predict asset protection will play a greater role in their practices (See "Crystal Ball," page 40). This is especially true of the more financially successful lawyers (72.2 percent compared to 59.8 percent). A mere 10.1 percent of the total say they don't intend to make asset protection planning a major part of their practices.

LEARNING CURVE

But there is a gap between lawyers' current competency and their ideal skill levels (See "Confessions," page 40). Only 16.3 percent say they are authorities on asset-protection strategies and techniques. The more successful the lawyer, the more likely they are to rate their skills highly (22.6 percent compared to 9.8 percent).

The desire to learn is strong. Overall, 73.6 percent say they need to know more. A slightly higher proportion of the lower-income lawyers feel the need for such education (76.8 percent compared to 70.4 percent).

Where, precisely, are the deficits? A mere 13.2 percent of the total say they are very familiar with the Uniform Fraudulent Transfer Act (19.1 percent of the higher-earning lawyers versus 7.1 percent.)

In addition, many are unfamiliar with some of the strategies and techniques employed in this field (See "Toolbox," page 40). While most are comfortable with commonly used strategies such as corporate structures, outright gifts to family members, partnerships and limited liability companies,

The more financially successful lawyers are better versed in a greater number of asset-protection tactics.

CRYSTAL BALL

Most say asset protection will play a greater role in their practices

PERCENTAGE WHO AGREE WITH STATEMENT	[illegible]	HIGHER EARNING LAWYERS	[illegible]
Asset-protection planning will become increasingly important to my practice	[illegible]	72.2%	[illegible]
[illegible] to make asset-protection planning a major part of my practice	[illegible]	[illegible]	[illegible]

CONFESSIONS

[illegible]

TOOLBOX

[illegible]

few consider themselves experts in such areas as offshore self-settled trusts, life insurance and equity stripping. In general, the more financially successful lawyers are better versed in a greater number of asset-protection tactics.

One such strategy, equity stripping, is a way to protect domestic real estate from creditors. The technique involves the client making an investment in a mortgage company. The investment has little value to creditors. The client will receive a loan secured by a mortgage on the property to be protected. The secured interest passes to an asset-protection structure, such as a trust. The cash the client receives from the mortgage also goes to an asset-protection structure. The result is that the equity in the real estate is no longer directly available to creditors while the underlying assets that represent that equity are protected.

Although state bankruptcy and creditor laws are all different, most protect some of the cash value in a life insurance policy. Florida, for example, exempts all the value in both life insurance and annuities. A properly structured irrevocable life insurance trust also can afford some protection. The trustee could have the power to distribute the principal or income to any party (including the grantor) at the trustee's sole discretion. Additionally, properly drafted ILITs can protect assets for the beneficiaries as long as the assets are not distributed.

For lawyers interested in getting more involved in this area, there are a number of opportunities. The simplest is to work with a lawyer who practices this specialty. But there also are publications, meetings and conferences as well as an asset-protection committee of the American Bar Association. Contacting the ABA is probably a good place to start. ∎