ASSET PROTECTION PLANNING WITH TRUSTS: PART I

CURRENT DEVELOPMENTS UNDER FLORIDA LAW
PLANNING WITH INTER VIVOS QTIP TRUSTS

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Barry A. Nelson, Esq.*

I. Introduction.

In light of differences in state public policy with respect to the ability to create a self-settled trust with asset protection to the settlor, estate planners have many options to assist clients who want a coordinated plan that saves estate, gift, generation skipping transfer and income taxes but also provides asset protection. Seventeen states have enacted broad self-settled asset protection trust statutes.[1] Residents of the 17 states that enacted self-settled asset protection trust legislation can rely on their state's public policy to take advantage of self-settled asset protection benefits. Fifteen states (in addition to Indiana, which is proposed) have enacted statutes that create limited self-settled asset protection for inter vivos QTIP trusts. [2] For those living in states that have not enacted self-settled asset protection trust legislation, alternatives include the use of a domestic asset protection trust in a state that has enacted self-settled asset protection legislation or creation of a foreign self-settled asset protection trust. A number of cases have challenged whether a debtor living in a state that has not enacted self-settled asset protection legislation can use a domestic asset protection trust in a state that has enacted said legislation.[3]

For the year 2017 the unified credit exempts $5.49 million of taxable transfers from gift, generation skipping or estate taxes. Married couples benefit from combined exemptions of $10.98 million.

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[1] ALASKA STAT. §§ 13.36.310, 34.40.110; COLO. REV. STAT. § 38-10-111; DEL. CODE ANN. TIT. 12, §§3570-3576; HAW. REV. STAT. § 554G; Miss. Code Ann. §§91-9-701 – 91-9-723; MO. REV. STAT. §§456.5-505; NEV. REV. STAT. §§116.010-166.170; N.H. REV. STAT. ANN. §564-D:1-18; OHIO LEGACY TRUST ACT, CHAPTER 5816 OF THE OHIO REVISED CODE; OKLA. STAT. ANN. tit. 31, § 10-18; R.I. GEN. LAWS § 18-9.2-1 – 18-9.2-7; S.D. CODIFIED LAWS §§55.16-1–55-16-17; TENN. CODE ANN. § 35-16-101-112 ; UTAH CODE ANN. §25-6-14 (repealed and re-enacted in 2013); VA. CODE ANN. § 64.2-745.1 and 64.2-745.2; W. VA. CODE SECTIONS 44D-5-503A, 44D-5-503B; 44D-5-503C; AND 44D-5-505; WYO. STAT. §§4-10-505 & 4-10-510–523. *See* Exhibit 1 for the "ACTEC Comparison of the Domestic Asset Protection Trust Statutes," updated through September 2016, edited by David G. Shaftel. As noted by the ACTEC Comparison, it is unclear whether Colorado should be considered an asset protection trust jurisdiction.

[2] *See* Exhibit 2 for state statutes that create limited self-settled asset protection for inter vivos QTIP trusts.

[3] *See* In re Mortensen, A09-00565-DMD, 14 (Bankr. D. Alaska May 26, 2011) (an unreported decision); Waldron v. Huber (In re Huber), BK. W.D. Wa Adversary No. 12-04171, Bankruptcy No. 11-41013, Order Granting Trustee Partial Summary Judgement, Doc. 142, May 17, 2013 (the "Order").

Until 2010, if a husband or wife did not take advantage of their respective unified credit amounts, they were wasted. As a result, planning required the creation of trusts upon the death of the first spouse so that the unified credit amount of the first spouse to die could be allocated into a trust, typically referred to as a Bypass Trust or a Credit Shelter Trust. These trusts allowed the surviving spouse access, but if properly drafted, assets in such trusts were not includible in the gross estate of the surviving spouse. In order to be certain the first spouse to die had sufficient assets to take advantage of his/her unified credit amount, clients were advised they needed to divide assets so both husband and wife had sufficient assets in their own name to take advantage of his or her unified credit amount. Couples were then forced to make decisions on occasion to restructure assets previously held by husband and wife as tenants by the entirety, a title that protects the assets against the claims of only one spouse and avoids probate in many jurisdictions,[4] and instead, re-title such assets by placing such assets in the husband's sole name or the wife's sole name or part in each of their sole names or in the names of their respective inter vivos revocable trusts. While this restructuring had potential estate tax benefits, it created asset protection and, if titled in individual names, probate pitfalls. As a result of portability, advisors should review their client's planning to determine if it is safer to hold assets in an asset protected format that avoids probate (e.g. tenants by the entirety for states that recognize such protection or in inter vivos QTIP trusts as described below for states that enacted legislation protecting inter vivos QTIP trusts) rather than have their clients hold significant assets in a husband or wife's sole name, or in their respective revocable trusts.

The analysis is not simple. There are many factors and already much has been written.[5] For those with larger estates (e.g., over $10.98 million), planning with Credit Shelter/Bypass Trusts still provides tax benefits as the assets passing into such trusts upon the death of the first spouse will not be includible in the estate of the surviving spouse regardless of future appreciation. However, for those whose aggregated estates are not likely to exceed $10.98 million plus an inflation factor, it is probably better to have the lifetime benefits of tenants by the entirety ownership (for states that recognize such protection) for greater asset protection and to reduce potential income tax after both parents pass away by gaining a full step up in basis upon the death of the surviving spouse. The reason is that assets owned (outright but not in a Credit Shelter/Bypass Trust) by the surviving spouse

[4] For a comprehensive discussion on tenants by the entirety, see Barry A. Nelson, *Asset Protection & Estate Planning – Why Not Have Both?*, 46 PHILIP E. HECKERLING INSTITUTE ON EST. PLAN. 1704 (Matthew Bender & Co., Inc. Jan. 2012). *See also* Barry A. Nelson, *Tenancy by the Entireties*, *available at* http://www.actec.org/public/Documents/Studies/Nelson_Tenancy_by_the_Entireties_05_01_12.pdf (listing each state and differentiating whether the state recognizes tenants by the entirety). *See* Exhibit 3 for a summary of states having some type of tenants by the entirety protection.

[5] *See* Thomas W. Abendroth, Portability: Now Available in Generic Form, Address at the 48th Annual Heckerling Institute on Estate Planning (Jan. 2014); Jonathan G. Blattmachr, Austin W. Bramwell, & Diana S.C. Zeydel, *Portability or No: The Death of the Credit-Shelter Trust*, J. OF TAX. (May 2013); Howard M. Zaritsky & Diana S.C. Zeydel, *New Portability Temp. Regs. Ease Burden on Small Estates, Offer Planning for Large Ones*, J. OF TAX. (Oct. 2012).

upon death are stepped up to fair market value as of date of death. As a result, if the surviving spouse has an estate of $10.98 million and benefits from portability, then if all assets are sold upon the death of the surviving spouse, no capital gain would be incurred. Instead, if upon the death of the first spouse, assets of $2.5 million were devised to a Credit Shelter/Bypass Trust for the benefit of the surviving spouse and such assets appreciated by $3 million from the death of the first spouse to the death of the surviving spouse, then when the children inherit the Credit Shelter Trust assets, they will only have $2.5 million of income tax basis. As a result, a capital gain of $3 million would be incurred upon the liquidation by the children of assets in the Credit Shelter/Bypass Trust upon the death of the surviving spouse in the example above. At current capital gains rates, combined with the Net Investment Income Tax of 3.8%, income taxes in excess of $700,000 could be incurred upon the sale of the appreciated assets that could have been avoided with planning.

Portability has a number of shortfalls. For example, if the surviving spouse remarries and the new spouse also predeceases him or her, then the availability of the unused applicable exclusion amount is based upon the last deceased spouse. As a result, if the first predeceased spouse (Joan) left all of her assets outright to her husband (Sam), and then Sam remarries a wealthy woman (Mary) who already made full use of her applicable exclusion amount by making gifts to her children, then if Mary predeceases Sam, Sam will not benefit from portability. Sam's last deceased spouse had no unused exclusion amount.

Other shortfalls of portability are that the unused exclusion amount transferred to the surviving spouse is not indexed for inflation, and portability does not apply to the GST exemption.[6] The appreciation in value of assets placed in a credit shelter trust passes tax free to the ultimate beneficiaries. If a surviving spouse lives for an additional ten to twenty years and the assets inherited outright from the first spouse to die significantly appreciate in value, the estate tax on the appreciation upon the death of the surviving spouse could have been avoided if instead the assets were held in a credit shelter trust (to the extent the surviving spouse had other assets available). Credit shelter trusts may also provide asset protection to trust beneficiaries. Thus, by using a credit shelter trust, the first spouse can assure that his or her wealth passes as he or she intends and appreciation on assets, as well as a cumulative increase in the credit shelter trust, may pass estate and generation-skipping transfer tax free to children and more remote descendants. The aforementioned benefits are not possible if portability is relied on and assets are conveyed outright to a surviving spouse.

Those who are willing to rely on portability may decide that owning the entire $10.9 million of assets jointly is a simple plan that avoids probate after the death of the first spouse, especially in states such as Florida that protect assets held by a husband and wife as tenants by the entirety from claims of general creditors that are not joint creditors. However, there are significant risks with the tenants by the

[6] Abendroth, *supra* note 3 at 1-4. *See also* Temp. Reg. § 25.2505-2T.

entireties plan. First, assets are unprotected from creditors of the surviving spouse upon the death of the first spouse. Next, in blended families, there is no assurance the surviving spouse will leave any share to the family of the first spouse to die. In addition, no protection is available through tenancy by the entirety ownership where the entirety holders have joint debt such as loan guarantees signed by husband and wife or joint liability where husband and wife work together in their law or medical practices and both get sued. The same issues apply to same sex couples relying on tenants by the entirety protection. Among the typical suggestions for a couple with a $10.98 million net worth, who prefer not to rely on portability, is to divide assets so both a husband and wife take advantage of their respective $5.49 million exemption. However, holding assets in the individual name of each spouse, in separate revocable trusts for each spouse or holding the entire $10.98 million in joint names, even tenants by the entirety, could create potentially devastating asset protection consequences as described more fully below. Having each spouse create separate non reciprocal inter vivos QTIP trusts provides asset protection and assures the use of each spouse's applicable exclusion amount. If such inter vivos QTIP trusts are created in Arizona, Delaware, Florida, Kentucky, Maryland, Michigan, New Hampshire, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia and Wyoming (referred to hereinafter as the "Inter Vivos QTIP Trust Jurisdictions"), the anticipated tax and asset protection benefits are significantly more likely to be achieved as compared to those inter vivos QTIP trusts created in states that have not modified their spendthrift trust statutes.[7]

II. Planning Using Inter Vivos QTIP Trusts.

The Inter Vivos QTIP Trust Jurisdictions have modified their spendthrift trust statutes to provide that where an inter vivos QTIP election was made, then, after the death of the donor's spouse, any assets passing back into a trust for the initial donor spouse are deemed to have been contributed by the donor's deceased spouse and not by the donor.[8] The creation of inter vivos QTIP trusts thereby allows married couples to take advantage of one another's federal estate tax exemptions and, at the same time, to enhance asset protection planning. These statutes (referred to hereinafter as the "Inter Vivos QTIP Spendthrift Statutes"), coupled with the 2010 Tax Relief Act, provide estate planners with a great planning opportunity.

A. Dennis and Debbie – An Example.

In order to illustrate the planning possibilities of an inter vivos QTIP spendthrift trust plan, a hypothetical example is provided. Dennis and Debbie, both attorneys, are married with children and reside in Florida. Dennis and Debbie have accumulated a net worth of approximately $13.72 million, of which $2.82 million is equity in their Florida homestead, and

[7] *See* Exhibit 2**.**

[8] For example, see FLA. STAT. § 736.0505(3).

$10.9 million is invested in a joint brokerage account (titled "tenants by the entirety"). Dennis and Debbie are willing to rely on estate tax portability to maintain a "simple" estate plan and benefit from asset protection provided by tenants by the entireties ownership. Assuming Debbie dies in July of 2016 and Dennis dies in December of 2016, no estate tax is due upon Debbie's death and the tax upon the death of Dennis, assuming portability, would be $1.128 million (Dennis' taxable estate of $13.72 million - $10.9 million applicable exclusion amount as of 2016 = $2.82 million x 40 percent tax rate = $1.128 million).[9] Although all of their assets are protected from creditors during their joint lifetimes (assuming all debts are owed to individuals as compared to the IRS or SEC, they remain married to one another, had no joint debt, all property was held as tenants by the entirety in a jurisdiction that provides asset protection for tenants by the entirety assets and there was no fraudulent conveyance or fraudulent conversion to the tenancy by the entirety accounts and/or title) upon the death of Debbie, all assets that pass to Dennis by operation of law, other than their Florida homestead (which we assumed qualified for Florida's constitutional unlimited homestead exemption), would be subject to the creditors of Dennis. In order to enhance the amount of assets that can pass free of tax upon the death of the surviving spouse by allowing the assets of the credit shelter trust to grow, their CPA suggests that Debbie's assets be re-titled so the revocable trust created by Dennis owns $5.45 million (as of 2016) (thereby avoiding probate and taking advantage of his estate tax exemption if he dies first), and the revocable trust created by Debbie owns $5.45 million.[10] Each of their revocable trusts creates a testamentary credit shelter trust primarily for the benefit of the surviving spouse of the greatest amount that can pass free of estate tax upon the death of the first spouse, which trust is intended to pass free of estate tax upon the death of the surviving spouse.

Dennis and Debbie's desire is to maintain access to all family wealth until the survivor of them passes away, but they do not mind having a portion of the funds held in trust for the surviving spouse, as long as the surviving spouse can serve as a co-trustee or as sole trustee during his or her lifetime, and as long as distributions can be made to the surviving spouse based upon an ascertainable standard (such as for his or her health, maintenance and support). Assuming they follow their CPA's suggestion and divide their assets so each has $5.45 million in their respective revocable trusts, none of the $10.9 million owned by their trusts would be protected from creditors while both spouses were married and living because assets in a revocable trust are not protected from creditors' claims.[11] Assuming Debbie predeceases Dennis and no claims are made

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[9] *See* Exhibit 4.
[10] *See* Exhibit 5.
[11] *See id*. Most of the Inter Vivos QTIP Trust Jurisdictions provide statutorily that assets in a revocable trust are not protected from creditors' claims, see ARIZ. REV. STAT. § 14-10505(A)(1); DEL. CODE ANN. TIT. 12

against her estate, Debbie's assets can pass into a credit shelter spendthrift trust for Dennis, generally protected from the creditors of Dennis. During the lifetime of Dennis, $5.45 million or more (i.e., the assets held in the credit shelter trust for the benefit of Dennis as well as any growth and accumulated income) is protected from his creditors, but the $5.45 million held in the revocable trust created by Dennis remains subject to his creditors.[12] Based upon the assumptions above, upon his death, Dennis' estate would pay $1.128 million in estate taxes assuming no appreciation on his $5.45 million investments and his $2.82 million residence.[13]

Dennis and Debbie want a second opinion, so they consult with Mike, an attorney whose practice combines estate planning and asset protection. Mike explains that converting $10.9 million of their assets from tenants by the entirety into two $5.45 million revocable trust accounts changes the character of the assets from those that are protected from most potential creditors under applicable state law (as long as the debt was not a joint debt of Dennis and Debbie, and both were living and married to one another in a state that fully protects tenants by the entirety assets), and subjects the entire $10.9 million to claims of their respective creditors because assets in a revocable trust are unprotected.[14] Dennis and Debbie ask for alternatives that would allow each of them to take advantage of their estate tax exemptions while at the same time not subjecting their assets to exposure to the claims of future creditors. They have also heard there may be income tax benefits using certain irrevocable inter vivos trusts.

Mike explains that as a result of the enactment of Florida's inter vivos QTIP spendthrift statute (which has been adopted in various versions but with similar objectives in 15 states, in addition to Indiana, which is proposed), assuming Dennis and Debbie have no existing actual or contingent liabilities,[15] Dennis and Debbie can divide their $10.9 million tenants by the entireties brokerage account equally between them and

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§ 3536(d)(3); FLA. STAT. § 736.0505(1)(a); MICH. COMP. LAWS § 700.7506(1)(a); N.C. GEN STAT. § 36C-5-505(a)(1); OR. REV. STAT. § 130.315(1)(a); S.C. CODE ANN. § 62-7-505(a)(1); VA. CODE ANN. § 64.2-747 (A)(1); WYO. STAT. ANN. § 4-10-506(a)(i).

[12] *See* Exhibit 5.

[13] Dennis' Gross Estate ($8.27 million, $5.45 million of brokerage assets and $2.82 million in equity from homestead) – Applicable Exclusion Amount ($5.45 million) = Dennis' Taxable Estate ($2.82 million). Dennis' Estate Tax is $1.128 million ($2.82 million x 40 percent). *See* Exhibit 5.

[14] FLA. STAT. § 736.0505(1)(a) ("The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor"). *See* Exhibit 5.

[15] While Dennis and Debbie enjoy tenancy by the entireties protection of their jointly owned assets, once Debbie and Dennis separate their tenants by the entirety property so each of them owns one half in their own names, the tenancy by the entireties protection is lost. In the event either Debbie or Dennis had any outstanding creditors at that time, breaking the tenancy by the entirety would subject any assets held in the sole name of Debbie or Dennis to claims of their creditors and a conveyance by them to an inter vivos QTIP trust at a time where either of them is insolvent could be deemed a fraudulent conveyance, thereby subjecting the transfer to attachment or other creditors' remedies. *See* FLA. STAT. §§726.105; 726.108.

create separate inter vivos QTIP trusts, taking care that the trusts are not reciprocal.[16] Inter Vivos QTIP Trust Jurisdictions provide a solution to many of Dennis and Debbie's tax and asset protection objectives. Rather than maintaining the assets in unprotected revocable trusts (and thereby subjecting $10.9 million of assets to potential future creditors), Dennis can create an inter vivos QTIP trust for Debbie and transfer $5.45 million of assets to the trust, and Debbie can do the same for Dennis.[17]

Dennis would only be willing to create the trust for Debbie if he had reasonable assurances that, should Debbie predecease Dennis, he would have access to the $5.45 million (or such other amount as may be held in the trust upon Debbie's death). To maintain flexibility for future planning, the inter vivos QTIP trust can give Debbie a testamentary special power of appointment that could be exercised in favor of one or more of Dennis, their children, or a charity.[18] However, if Dennis wants to be certain that, should Debbie predecease him, the assets would be held in a trust for him, the QTIP trust could provide that if Dennis survives Debbie, assets remaining in Debbie's QTIP trust must pass in trust for the benefit of Dennis during his lifetime. The trust could provide a formula so, to the extent assets that were held in Debbie's trust can pass free of estate tax as a result of Debbie's remaining applicable exclusion amount, they would pass into a credit shelter trust for Dennis with any excess assets passing into a QTIP trust for Dennis so no estate tax would be payable upon Debbie's death.[19] Use of this technique assures that the assets held in the inter vivos QTIP trust for the benefit of Debbie are protected from her creditors during Debbie's lifetime because the QTIP trust is a spendthrift trust. Furthermore, upon Debbie's death, the assets remaining in her QTIP trust will be held in an asset-protected spendthrift trust for the benefit of Dennis (a credit shelter trust and/or a QTIP trust).[20]

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[16] This should only be done if Dennis and Debbie do not have existing debt because once assets held as tenants by the entirety are divided and retitled in their respective names, assets that previously were protected from creditors as tenants by the entirety (assuming no joint debt) would be subject to creditors' claims of Dennis and Debbie since they will have outright ownership of $5.45 million each prior to contributing such assets to the new QTIP trusts. Reciprocal trusts must be avoided. For an excellent article addressing the reciprocal trust issue in great detail, see Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*, 21 PROB. & PROP. 52, 57-62 (July/Aug. 2007).

[17] Even if the amount gifted to the new inter vivos QTIP exceeded $5.45 Million, no gift tax would be payable assuming a gift tax marital deduction is claimed.

[18] A special power of appointment provides the power holder with the right to distribute property, subject to the power, to a limited class of beneficiaries or alternatively to a broad class that excludes the power holder, the power holder's estate, the power holder's creditors, or the creditors of the power holder's estate. *See* I.R.C. § 2041.

[19] The mandatory reversion in favor of Dennis would be even more critical if he had children from a prior marriage and he wanted to be certain that upon Debbie's death the assets would: a) pass for his benefit if he survives Debbie; or b) to his children if he predeceases Debbie or disclaims the interest otherwise passing to him upon Debbie's death.

[20] This article assumes assets in a spendthrift trust are protected from general creditors. Exception creditors, such as the IRS, may circumvent spendthrift protection. *See* FLA. STAT. § 736.0503(2):

Until enactment of the Inter Vivos QTIP Spendthrift Statutes, assets passing from the inter vivos QTIP trust created by Dennis for Debbie back to Dennis at Debbie's death, whether based upon the terms of the original trust or through the exercise of a special power of appointment from Debbie, might have been thought to be subject to the claims of creditors of Dennis because he created the original trust.[21] In his defense against a creditor's challenge to the trust, Dennis would argue that Debbie, and not Dennis, should be considered as the donor of the trust after Debbie's death, so Dennis is not properly considered the donor of the trust passing to him upon Debbie's death. This argument would be consistent with Treas. Reg. § 25.2523(f)-1(f), Example 11, which provides that assets held in an inter vivos QTIP trust for the benefit of the donor after the death of his or her spouse will not be includible in the donor's taxable estate under §§ 2036 and 2038 of the Internal Revenue Code.[22] Thus, Dennis and Debbie would argue that following the reasoning in the Treasury

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> To the extent provided in subsection (3), a spendthrift provision is unenforceable against: (a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance. (b) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust. (c) A claim of this state or the United States to the extent a law of this state or a federal law so provides.

See also Exhibit 8 Barry A. Nelson, *Protecting Trusts From Claims of Alimony or Child Support*, Trusts & Estates Magazine (March 2014), where a third party created Florida trust could be subject to garnishment as to former spouse with judgment against spouse in the form of support.

[21] *See* ARIZ. REV. STAT. § 14-10505(A)(2), N.C. GEN STAT. § 36C-5-505(a)(2), VA. CODE ANN. § 64.2-747(A)(2) ("with respect to an irrevocable trust…, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."); DEL. CODE ANN. TIT. 12 § 3536(a)

> A creditor of a beneficiary of a trust shall have only such rights against or with respect to such beneficiary's interest in the trust or the property of the trust shall be expressly granted to such creditor by the terms of the instrument that creates or defines the trust or by the laws of this State.

Id.; FLA. STAT. § 736.0505(1)(b) ("With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit"). If the original donor of an inter vivos QTIP trust is also treated as the donor of the trust for his or her benefit after the death of the initial beneficiary spouse, under Florida law prior to § 736.0505(3), the donor's creditors could reach the trust assets in satisfaction of their claims; MICH. COMP. LAWS § 700.7506(1)(c) ("With respect to an irrevocable trust, a creditor or assignee of the settlor may reach no more than the lesser of the following:(i) The claim of the creditor or assignee. (ii) The maximum amount that can be distributed to or for the settlor's benefit exclusive of sums to pay the settlor's taxes during the settlor's lifetime"); OR. REV. STAT. § 130.315(1)(b) ("Whether or not the terms of a trust contain a spendthrift provision:… A creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit."); S.C. CODE ANN. § 62-7-505(a)(2) ("Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:… With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."); WYO. STAT. ANN. § 4-10-506(a)(ii) ("With respect to an irrevocable trust without a spendthrift provision, a creditor or assignee of the settlor may attach the maximum amount that can be distributed to or for the settlor's benefit").

[22] Treas. Reg. § 25.2523(f)(1)(f), Ex. 11.

Regulation, the trust created for Dennis upon Debbie's death should not be considered settled by Dennis.[23]

However, if Dennis retained the right to the assets remaining in Debbie's trust upon her death should Debbie predecease Dennis, Dennis' creditors would argue such assets should be subject to the creditors of Dennis because he was the initial donor of the trust. Furthermore, even if the trust created by Dennis did not reserve an interest in favor of Dennis as described above, should Debbie predecease him, if Debbie had a testamentary special power of appointment that allows her to direct assets back to Dennis, those assets may be subject to his creditors as a result of the Relation Back Doctrine.

B. The Effect of the Relation Back Doctrine.

If, upon her death Debbie exercises a special power to create a credit shelter or QTIP trust for Dennis (the original donor), the trust assets appointed to Dennis may be considered as if Dennis created his own trust rather than Debbie being treated as the creator of such trust. The creditor under the Relation Back Doctrine could argue: (i) the exercise of a special power of appointment constitutes a transfer "from the donor of the power, not from the donee"[24] and (ii) the power of appointment is "conceived to be merely an authority to the power holder to do an act for the creator of the power."[25] "The appointment is said to 'relate back' to the time of the creation of the power and to operate as if it had been originally contained in [the creator of the power's] will."[26] Cases involving the Relation Back Doctrine have typically been in conjunction with whether trust assets subject to a general power of appointment should be considered when determining fiduciary fees upon the death of the donee spouse who exercised such power.

In *In re Estate of Wylie*, a husband created a testamentary trust for his wife. At his death, wife received all the income from the trust for her life and had a general power of appointment over the corpus of the trust at her death.[27] The issue on appeal was whether the value of the husband's trust was includible in wife's estate for purposes of determining fiduciary fees because she exercised her general power of appointment by her last will and codicil in favor of her testamentary trustees, and the assets were distributed and paid to the trustees.[28] The court found the determinative

[23] *Id.*
[24] In re Estate of Wylie, 342 So.2d 996, 998 (Fla. 4th DCA 1977) (quoting RESTATEMENT (FIRST) OF PROPERTY § 318 comment (b) (1940)).
[25] American Law Institute, *Donative Transfers* vol. 2 §§ 11.1-24.4, *in* RESTATEMENT (SECOND) OF PROPERTY 4 (1986).
[26] *Id.*
[27] In re Estate of Wylie, 342 So.2d at 996-97.
[28] *Id.* at 998.

question to be whether the power of appointment should be characterized as an interest in property or merely a mandate or authority to dispose of property.[29] The court noted that:

> The doctrine of relation back, minimizing as it does the importance of the donee of the power, is the mainstay for that rule of law which treats the donee as a mere agent with no property interest. Although under attack by many commentators in the field of future interests, the prevailing view still remains that a general power of appointment is a mere mandate or authority to dispose of property and not an interest in property itself.[30]

In keeping with the historical origin of powers of appointment and the "spirit of the law," the court in *Wylie* held that the power of appointment was an authority to dispose of property and not an interest in property.[31]

Although none of the reported cases regarding the Relation Back Doctrine address its application to the donor of a QTIP or credit shelter trust who receives trust assets upon the death of the donee spouse through the exercise of a special power of appointment, Inter Vivos QTIP Trust Jurisdictions provide greater protection for inter vivos QTIP trust donors by avoiding any possible Relation Back Doctrine attack.

C. Can an Inter Vivos Credit Shelter Trust Plan Provide Better Overall Results?

The inter vivos QTIP trust plan has limitations when compared to a similar plan using an inter vivos credit shelter gift to freeze estate tax values. For example, some attorneys have suggested planning to take advantage of the existing $5.45 million gift exemption. By making gifts in 2015 to an inter vivos credit shelter trust using a taxpayer's remaining gift and estate tax exemption, the growth on any assets remaining in the inter vivos credit shelter trust will pass estate tax-free upon the death of the beneficiary spouse, even if the estate tax exemption amount was reduced by Congress upon the date of death of the beneficiary spouse and even if the initial $5.45 million gift grew to significantly more within the credit shelter trust. The problem with using the inter vivos QTIP plan rather than a gift into a credit shelter type trust is that most Inter Vivos QTIP Trust Jurisdictions (i.e., Arizona, Arkansas, Delaware, Florida, Indiana (proposed), Kentucky, Maryland, Michigan, New Hampshire, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia and Wyoming) require that a gift tax QTIP election be made to obtain the asset protection benefit (that the beneficiary spouse is considered the donor and not the initial donor of the

[29] *Id.* at 999.
[30] *Id.* at 998.
[31] *Id.*

inter vivos QTIP) upon the death of the initial donee spouse.[32] As a result, if the plan is to make the inter vivos credit shelter trust assets available for the surviving spouse who created the initial trust, there is a possibility such assets will be subject to inclusion in the estate of such spouse under §§ 2036 or 2041 of the Internal Revenue Code, as the creditors of the initial donor spouse may be able to reach such assets upon the death of the first spouse. While Treas. Reg. § 25.2523(f)- 1(f), Example 11, provides that assets held in an inter vivos QTIP trust — for the benefit of the donor after the death of his or her spouse — will not be includible in the donor's taxable estate under §§ 2036 and 2038, no similar regulation exists for an inter vivos credit shelter trust. It would appear that the favorable treatment is provided by said Regulation based upon the fact that such assets are includible in the estate of the donee spouse under § 2044 of the Internal Revenue Code which is not the case with a credit shelter trust. Accordingly the tax treatment of assets reverting back to the original donor of a credit shelter trust may be subject to estate tax but see discussion in Paragraph D immediately below.

D. Arizona, Kentucky, North Carolina, Tennessee and Texas' Unique Statute May Create Asset Protection and Estate Tax Benefits (but it may not!).

Arizona Statutes § 14-10505(E) states:

> E. For the purposes of this section, amounts and property contributed to the following trusts are not deemed to have been contributed by the settlor, and a person who would otherwise be treated as a settlor or a deemed settlor of the following trusts shall not be treated as a settlor:
>
> 1. An irrevocable inter vivos marital trust that is treated as qualified terminable interest property under section 2523(f) of the internal revenue code if the settlor is a beneficiary of the trust after the death of the settlor's spouse.
>
> 2. An irrevocable inter vivos marital trust that is treated as a general power of appointment trust under section 2523(e) of the internal revenue code if the settlor is a beneficiary of the trust after the death of the settlor's spouse.

[32] *See* ARIZ. REV. STAT. ANN. § 14-10505(E); ARK. CODE ANN. § 28-73-505(C); DEL. CODE ANN. TIT. 12 § 3536(c); FLA. STAT. § 736.0505(3); INDIANA STAT.(PROPOSED) § I.C. 30-4.2.1-18; KY. REV. STAT. ANN. § 386B.5-020(8)(A); MD. EST. & TR. CODE ANN. § 14.5-1003(a)(1)-(2); MICH. COMP. LAWS § 700.7506(4); New Hampshire Chapter 564-B:5-505(a)(2)(C)-(D); N.C.GEN. STAT. § 36C-5-505(C); OR. REV. STAT. § 130.315(4); S.C. CODE ANN. § 62-7-505(b)(2); TENN. CODE ANN. § 35-15-505(D); TEX. PROP. CODE ANN. § 112.035(G); VA. CODE ANN. §64.2-747.B.3; WYO. STAT. ANN. § 4-10-506(f).

> 3. An irrevocable inter vivos trust for the settlor's spouse if the settlor is a beneficiary of the trust after the death of the settlor's spouse.
>
> *4. An irrevocable trust for the benefit of a person, the settlor of which is the person's spouse, regardless of whether or when the person was the settlor of an irrevocable trust for the benefit of that spouse.*[Emphasis Added.]
>
> 5. An irrevocable trust for the benefit of a person to the extent that the property of the trust was subject to a general power of appointment in another person.[33]

North Carolina, N.C. Gen Stat. § 36C-5-505(c) states:

> Subject to Article 3A of Chapter 39 of the General Statutes, for purposes of this section, if the settlor is a beneficiary of the following trusts after the death of the settlor's spouse, the property of the trusts shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor:
>
> (1) An irrevocable intervivos marital trust that is treated as a general power of appointment trust described in section 2523(e) of the Internal Revenue Code.
>
> (2) An irrevocable intervivos marital trust that is treated as qualified terminable interest property under section 2523(f) of the Internal Revenue Code.
>
> (3) *An irrevocable intervivos trust of which the settlor's spouse is the sole beneficiary during the lifetime of the settlor's spouse but which does not qualify for the federal gift tax marital deduction.* [Emphasis added.]
>
> *(4) Another trust, to the extent that the property of the other trust is attributable to property passing from a trust described in subdivision (1), (2), or (3) of this subsection.* [Emphasis added.]
>
> For purposes of this subsection, *the settlor is a beneficiary whether so named under the initial trust instrument or through the exercise of a limited or general power of appointment*, and the "settlor's spouse" refers to the person to whom the settlor was married at the time the irrevocable

[33] ARIZ STAT. § 14-10505(E). *See also* TEX. PROP. CODE § 112.035(g)(3)(A).

intervivos trust was created, notwithstanding a subsequent dissolution of the marriage. [Emphasis added.][34]

Unlike the above mentioned states that enacted inter vivos QTIP statutes, Arizona, Kentucky, North Carolina, Tennessee and Texas provide that the initial donor of an inter vivos irrevocable trust created for the donor's spouse will not be deemed to have been contributed by the donor if the donor is the beneficiary of the trust after the death of the donor's spouse, even if there is no QTIP election.[35] As a result, under Arizona, Kentucky, North Carolina and Texas, Debbie, in the example, above, could have created an inter vivos credit shelter trust for Dennis and even if the trust assets reverted to Debbie in a credit shelter trust, upon the death of Dennis, those assets would not be deemed to have been contributed by Debbie. As such, the assets should retain protection from Debbie's creditors during her lifetime despite the fact that she created the initial trust and was the beneficiary of the trust upon the death of Dennis.

While at first glance the Arizona, Kentucky, North Carolina, Tennessee and Texas statutes appear to create great asset protection and the possibility of enhanced estate tax benefits that are afforded to credit shelter trusts as compared to an inter vivos QTIP Trusts (i.e., all appreciation of assets in the credit shelter trust would avoid future estate taxes and regardless of whether the applicable exclusion amount is reduced the assets in a credit shelter trust should not be subject to estate tax inclusion), there are two potential pitfalls to the Arizona, Kentucky, North Carolina and Texas statutes: (1) the trust needs to have their situs in Arizona, Kentucky, North Carolina, Tennessee and/or Texas and be subject to income tax there; and (2) there is no provision similar to IRS Treas. Reg. § 25.2523(f)-1(f), Example 11 that assures that the initial donor will not be subject to tax under §§ 2036 or 2038 of the Internal Revenue Code. As a result, the IRS could take the position that despite state law, the initial donor has an interest under §§ 2036 and 2038 of the Internal Revenue Code, resulting in estate tax inclusion.

Providing the initial donee of a credit shelter trust a special power of appointment to direct the credit shelter assets back to the initial donor, as compared to retaining a reversion in the credit shelter trust in favor of the donor, may not change the estate tax consequences to the donor due to the Relation Back Doctrine described above.[36] As a result, assets passing from an inter vivos credit shelter trust back to a credit shelter trust for the initial donor may be considered to be held in a self-settled trust and therefore subject to estate tax inclusion.

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[34] N.C. GEN STAT. § 36C-5-505(c). *See also* KY. REV STAT ANN § 386B.5-020(8)(a)(1)-(3).
[35] ARIZ STAT. § 14-10505(E); KY. REV STAT ANN § 386B.5-020(8)(a)(1)-(3); N.C. GEN STAT. § 36C-5-505(c); TENN. CODE ANN § 35.15-505(f); TEX. PROP. CODE § 112.035(g).
[36] *See* In re Estate of Wylie, 342 So.2d at 998.

Some have suggested the creation of the initial credit shelter trust in a jurisdiction that recognizes and protects self-settled asset protection trusts.[37] The IRS has ruled favorably for a trust created under Alaska law.[38] A thorough analysis of this issue is beyond the scope of these materials. However, creation of a credit shelter trust, in one of the sixteen states that have enacted self-settled asset protection trusts,[39] does not assure that trust assets will be excluded from the initial donor's gross estate if they are appointed back to the initial donor, especially if there was an implied agreement that the assets would revert to the donor and there is a pattern of distributions to the donor. For example PLR 2009440002, which is frequently cited as support that the creation of an irrevocable Trust in a self-settled asset protection jurisdiction such as Alaska is a completed gift and assets will not be included in the Grantor's gross estate says: "We are specifically not ruling on whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under § 2036."[40] My concern is since IRS Treas. Reg. § 25.2523(f)-1(f), Example 11 assures that the trust reverting to the original donor from an inter vivos QTIP trust created for the donee spouse is protected from estate tax inclusion under Code §§ 2036 or 2038 (and further protected in states such as Florida and Arizona with a state statute that says the donor's spouse is deemed the donor when assets pass back to the donor spouse), that the inter vivos QTIP result is as close as definite as you get that such assets will not be includible in the gross estate of the original donor spouse. The credit shelter trust approach does not have a Treasury Regulation that says the original donor will not be taxed under Code §§ 2036 or 2038. Further, most inter vivos QTIP statutes (such as Florida's) specifically say the initial donee's spouse is deemed to be the donor when trust assets revert in trust for the original donor spouse, only if a QTIP election was made.[41] If a state statute does not shift donor status to the original donee spouse from the original donor spouse, then assets may be includible in the gross estate of the original donor under Code § 2036 if the IRS successfully asserts there was an understanding or pre-existing arrangement regarding the trustee's exercise of discretion in favor of the original donor spouse.

Based upon most clients' objective of obtaining the anticipated tax and asset protection results, the author prefers the Inter Vivos QTIP Trust

[37] *See* Carol G. Kroch et al., *Taking a Fresh Look at Lifetime Gift Planning Opportunities*, 38 EST. PLAN. 3, 14 (Sept. 2011); Gans, Blattmachr & Zeydel, *supra*, note 14, at 59.
[38] *See* Gideon Rothschild et al., *IRS Rules Self-Settled Alaska Trust Will Not Be In Grantor's Estate*, 37 EST. PLAN 3, 13 (Jan. 2010).
[39] *See* Exhibit 1.
[40] PLR 200944002.
[41] FLA. STAT. § 736.0505(3)(a).

Jurisdictions, or use of a combination of an inter vivos QTIP trust created by one spouse and a credit shelter trust created by another spouse where the QTIP assets will revert to the initial donor upon the death of the initial donee spouse and the assets of the credit shelter trust pass to children (and not in trust for the initial donor spouse) upon the death of the donee spouse. Life insurance could be purchased on the life of the donee spouse of the credit shelter trust to replace assets that will pass to children upon the death of the donee spouse beneficiary of the credit shelter trust.

E. Benefits of Supercharging[sm42] an Inter Vivos QTIP Trust

A number of articles have been written about the use of "supercharging" to achieve enhanced growth of assets in a credit shelter trust for the benefit of the surviving spouse.[43] The term refers to a credit shelter trust that is taxed to the trust beneficiary as a grantor trust whether or not distributions are made from the trust. Upon creation of an inter vivos QTIP trust, the trust is created as a grantor trust with respect to the donor spouse (assuming the donee spouse is a beneficiary with respect to both trust income and principal).[44] Following the donee spouse's death, the assets in the inter vivos QTIP trust are includible in the donee spouse's gross estate.[45] Estate tax is avoided to the extent of the donee spouse's remaining unified credit amount. The inter vivos QTIP trust can be drafted to either: (i) provide that if the donor spouse survives the original donee spouse, assets are held in trust for the original donor spouse; or (ii) provide the original donee spouse with a special power of appointment in favor of the original donor spouse and lineal descendants. Even if the credit shelter trust created upon the death of the original donee spouse is drafted to permit distributions to the donor spouse, upon the death of the original donee spouse, it will not be includible in his or her gross estate.[46]

For income tax purposes, the trust created for the original donor spouse upon the death of the original donee spouse can continue to be treated as the donor spouse's grantor trust after the donee spouse's death, provided the trustee has discretion to make distributions of income and principal to the donor spouse.[47] The trust's taxable income will continue to be

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[42] Gans, Blattmachr & Zeydel, *supra*, note 14.
[43] Gans, Blattmachr & Zeydel, *supra*, note 14; Diana S.C. Zeydel, *Cutting Edge Estate Planning Techniques: What Have I Learned From My Colleagues?*, NAEPC J. OF EST. & TAX PLAN. at 29 (2012), *available at* http://www.naepc.org/journal/issue13c.pdf; Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust[sm]: A Super Idea for Married Couples Especially in Light of the 2010 Tax Act*, ALA. TR. CO. NEWSL. (May 2011), *available at* http://www.alaskatrust.com/assets/files/newsletters/Newsletter-2011-05.pdf.
[44] Gans, Blattmachr & Zeydel, *supra*, note 14 at 55. *See* I.R.C. §§ 676, 677, 2523(i).
[45] I.R.C. § 2044.
[46] *See* Treas. Reg. § 25.2523(f)-1(f), Ex. 11 (explaining that assets held in an inter vivos QTIP trust for the benefit of the donor after the death of his or her spouse will not be includible in the donor's taxable estate under Code §§ 2036 or 2038).
[47] Gans, Blattmachr & Zeydel, *supra*, note 14 at 55.

attributed to the donor spouse under the grantor trust rules by reason of the donor spouse's discretionary interest in trust income and principal.[48] The donor spouse is viewed as remaining the grantor of the trust for income tax purposes, and his or her payment of the tax on the trust's income does not constitute a taxable gift.[49] Assuming the trustee accumulates the income of the credit shelter trust or distributes it to the descendants (as long as they are also discretionary beneficiaries of the credit shelter trust), the donor spouse is required to pay the income tax and is not treated as making a taxable gift when he or she does so, hence why the credit shelter trust is "supercharged."[50]

When the asset protection and "supercharged" gift tax benefits of inter vivos QTIP trust planning are combined, the technique is one that is worthy of consideration for those with a combined family estate from $5 million to $50 million or more.

F. States Where Dennis and Debbie Could Create an Inter Vivos QTIP Trust Plan Without Concern of Relation Back or Self-Settled Trust Issues.

There are tradeoffs that a client must consider to obtain greater certainty as to tax and asset protection results. Inter Vivos QTIP Trust Jurisdictions provide certainty that the anticipated asset protection results will be effectuated because these statutes explicitly provide that assets reverting to the initial donor as a result of the death of the initial donee are considered to have been contributed by the donor's spouse and not the donor. Under such statutes, if the inter vivos QTIP trust is properly drafted — and assuming the initial transfer to the trust was not a fraudulent conveyance — it is clear that the assets of the inter vivos QTIP trust described in the example above will be considered as if contributed to the trust by Debbie (the initial trust beneficiary) and not Dennis (the initial donor) and therefore, will not be subject to Dennis' creditors upon the death of Debbie. As long as the assets in the trust created by Dennis are not subject to the creditors of Dennis when such assets revert to Dennis, such assets should not be includible in the taxable estate of Dennis.[51] Thus using the inter vivos QTIP plan, $0 of assets will be subject to creditors' claims while both spouses are married and living, and $0 of assets should be subject to creditors upon death of first spouse or divorce.[52] Similar results may be available, using the seventeen states that have self-settled asset

[48] I.R.C. §§ 676, 677.
[49] *See* Treas. Reg. § 1.671-2(e)(5).
[50] *See* Gans, Blattmachr & Zeydel, *supra*, note 14.
[51] *See* Treas. Reg. § 25.2523(f)-1(d); Howard M. Zaritsky, Tax Planning for Family Wealth Transfers: Analysis With Forms ¶ 6.03[3][a], 6-12 (Thompson Reuters/WG/L, 4th ed. 2002 & Supp. Aug. 2011).
[52] The tax is similar to the CPA Tax Savings plan with the exception of the assets subject to creditors. Dennis' Gross Estate ($8.27 million, $5.45 million of brokerage assets and $2.82 million in equity from homestead) – Applicable Exclusion Amount ($5.45 million) = Dennis' Taxable Estate ($2.82 million) Dennis' Estate Tax is $1.128 million ($2.82 million x 40 percent). *See* Exhibit 6.

protection trust legislation, but only the Inter Vivos QTIP Trust Jurisdictions assure favorable results.[53] The same issues that have been argued when a trust settlor of a state that has a public policy against creation of self-settled asset protection trusts attempts to benefit from another state's domestic self-settled asset protection laws and are challenged as to applicable law are likely to arise if a person whose domicile state is not one of the inter vivos QTIP trust jurisdictions creates an inter vivos QTIP trust in an inter vivos QTIP trust jurisdiction.[54]

G. Issues Requiring Analysis When Implementing an Inter Vivos QTIP Trust Plan.

1. Net Worth — Clients who are domiciled in inter vivos QTIP trust jurisdictions will appreciate the certainty of tax and asset protection results of creating an inter vivos QTIP trusts in their home state. However, for wealthier clients, creating an inter vivos credit shelter trust for a spouse could provide significant estate tax benefits because the assets held in an inter vivos credit shelter trust (including appreciation) will not be subject to tax upon the death of the donee spouse, whereas the inter vivos QTIP trust assets are subject to estate tax upon the death of the donee spouse based upon date of death values. If the inter vivos QTIP trust assets, when combined with the other assets of the donee spouse, exceed the available estate tax exemption for the year of death, additional estate taxes will be incurred. Wealthier clients may be willing to each create trusts for their children with their $5.49 million gifting exemption (or such lesser amount based upon prior taxable gifts). Alternatively, couples with children who are not willing to lose the ability to benefit from $10.98 million of gifts may consider the creation of one inter vivos credit shelter trust that could benefit the donee spouse during his or her lifetime (at the discretion of the trustee) and allow for invasions for children and grandchildren, and one inter vivos QTIP trust. The credit shelter trust assets can pass to children or grandchildren upon the death of the donee spouse. The donee spouse of the credit shelter trust could create an inter vivos QTIP trust for the other spouse, thereby reserving a remainder interest in trust in an Inter Vivos QTIP Trust Jurisdiction. Both spouses will benefit from at least $5 million held in trust until they both have passed away (i.e., the QTIP assets will benefit the donee spouse during the lifetime of the donee spouse and then pass, in trust, to the initial donor of the inter vivos QTIP trust for the lifetime of such donor).

[53] *See* Kroch et al., *supra* note 34; Gans, Blattmachr & Zeydel, *supra*, note 14.
[54] *See* In re Mortensen, A09-00565-DMD, 14 (Bankr. D. Alaska May 26, 2011) (an unreported decision) and Waldron v. Huber (In re Huber), BK. W.D. Wa Adversary No. 12-04171, Bankruptcy No. 11-41013, Order Granting Trustee Partial Summary Judgement, Doc. 142, May 17, 2013 (the "Order").

2. Jurisdiction — The trust should be created in an Inter Vivos QTIP Trust Jurisdiction or possibly in a state that recognizes self-settled asset protection trusts assuming the structure complies with the self-settled asset protection trust statutes. Based upon challenges for those who create trusts outside of their state of domicile as discussed in Paragraph II.F above, the safest approach is to create the trust in the settlor's home state if such state is an inter vivos QTIP trust jurisdiction or self-settled asset protection trust state.

3. Reciprocal Trusts — If both spouses create an inter vivos QTIP trust, there is a possibility that the IRS could take the position that they were reciprocal.[55] Avoidance of reciprocal trust attacks may be accomplished by allowing a considerable amount of time lapse between the creation of the husband's inter vivos QTIP trust and the wife's inter vivos QTIP trust, and by having different dispositive provisions in the trusts, for example: providing for different trustees, different beneficiaries upon the death of the donee spouse, a special power in favor of certain beneficiaries in each trust, or not providing a special power upon the death of the donee spouse at all in one of the trusts.[56] Arizona, Kentucky, North Carolina and Texas have addressed the reciprocal trust dilemma by enacting Arizona Revised Statutes § 14-10505(E)(4), Kentucky Revised Statutes Annotated § 386B.5-020(8)(a)(3), North Carolina General Statutes § 36C-5-505(c)(3) and Texas Property Code § 112.035(g)(3)(A) that, in conjunction with §§ 14-10505(E), 386.5-020(8), 36C-5-505(c) and 112.035(g), attempts to provide protection from a reciprocal trust attack when spouses create irrevocable trusts for one another.[57] Planners need to review the reciprocal trust issues carefully if they intend to create similar irrevocable trusts for both a husband and a wife, and state laws such as Arizona, Kentucky, North Carolina and Texas should be reviewed to see whether other states should consider similar enactments.

4. Divorce General — The donor of an inter vivos QTIP trust typically understands that under the grantor trust rules provided in Code Sections 671 and 677(a) he or she will be taxed on all trust income. However, the donor may be surprised that for the reasons discussed below, grantor trust status may continue with respect to undistributed capital gains post-divorce during the remaining lifetime of the donee spouse. In such event the donor spouse will be subject to income taxes, post-divorce, on capital gains retained

[55] For a thorough analysis of reciprocal trusts, see Gans, Blattmachr & Zeydel, *supra*, note 14.
[56] *Id.*
[57] ARIZ. REV. STAT. § 14-10505(E); KY. REV STAT ANN § 386.5-020(8); N.C. GEN STAT. § 36C-5-505(c); TEX. PROP. CODE § 112.035(g).

in the inter vivos QTIP trust during the remaining lifetime of the former spouse. Numerous articles and presentations have extolled the many benefits of inter vivos QTIP trusts including asset protection, creation of estate tax discounts and "Supercharging^{sm}."[58] However, donors and their advisors may not focus on the fact that the donor of an inter vivos QTIP trust may have continuing obligations to pay income taxes on trust capital gains post-divorce, notwithstanding that the donor may have no right to trust distributions or access to trust assets to pay such taxes. For a discussion of the tax issues see "Barry A. Nelson & Richard Franklin: Inter Vivos QTIP Trusts Could Have Unanticipated Income Tax Results to Donor Post-Divorce" published in Steve Leimberg's Estate Planning Email Newsletter, Archive Message #2244 on September 15, 2014 attached as Exhibit 9.

5. Divorce S Corporation Traps — If S corporation stock is to be conveyed to an Intervivos QTIP Trust it is important to ensure that the S election will be maintained. During the lifetime of the settlor of the QTIP Trust, providing the settlor with a substitution power exercisable in a non-fiduciary capacity under Code Section 675(4)(c) and Regulation Section 1.675-1(b)(4)(iii) creates a fully grantor trust and the settlor, not the QTIP Trust, is considered the S corporation shareholder. Pursuant to Code Section 677(a), Grantor Trust status also applies during such time that income and principal may be paid to the donee spouse from the Intervivos QTIP Trust. In both instances, the Trust settlor is treated as the owner of the QTIP Trust. However, upon divorce or legal separation, "under a decree of divorce or of separate maintenance" or under a written separation agreement, Code Section 682(a) provides that any distributions to the donee spouse (or ex-spouse) will cause the QTIP Trust no longer to be a fully grantor trust under Code Section 682(a) and action must be taken to be certain the Trust will remain a qualified S corporation shareholder. As a result, it is critical for those creating QTIP Trusts with S corporation stock to be aware that upon divorce or legal separation, either the S corporation stock is removed from the Trust, possibly through the exercise of a substitution power retained by the settlor of the Trust, or that an electing small business trust election is made by the Trustee of the Trust within two months and 15 days of the date of divorce or legal separation.

[58] *See* Barry A. Nelson, Lester Law & Richard S. Franklin, Seeking and Finding New Silver Patterns in a Changed Estate Planning Environment: Creative Inter Vivos QTIP Planning, Address at the ABA Section of Real Property, Trust and Estate Law Spring Symposia (May 2, 2014) (and accompanying materials); Jonathan G. Blattmachr, Mitchell M. Gans & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*^{sm} *versus Portability*, 28 PROB. & PROP. 10 (Mar./Apr. 2014).

Although the S corporation issues can be resolved with timely planning, the concern is that during divorce proceedings, the parties and their advisors will be unaware of the S corporation issues and a timely electing small business trust election will not be made. Estate planners should caution their clients upon creation of Intervivos QTIP Trusts of the S corporation consequences. Also, counsel for an S corporation asked to approve such trusts might want to suggest that an ESBT election be made up front so that the corporation does not need to keep track of whether its shareholders are separated or divorced.[59]

III. Conclusion.

While many questions exist, there is no question that clients should be advised of the benefits of restructuring their assets to maximize asset protection and use of the currently available applicable exclusion amount. Inter vivos QTIP trust planning in an Inter Vivos QTIP Trust Jurisdiction is one alternative that should be considered.

* * *

These materials are intended to assist readers as a learning aid but do not constitute legal advice and, given their purpose, may omit discussion of exceptions, qualifications, or other relevant information that may affect their utility in any planning situation. Diligent effort was made to insure the accuracy of these materials, but Nelson & Nelson, P.A. assumes no responsibility for any reader's reliance on them and encourages all readers to verify all items by reviewing all original sources before applying them. The reader should consider all tax and other consequences of any planning technique discussed. Anyone reviewing these materials must independently confirm the accuracy of these materials and whether any cases or ruling have been superseded. An attorney in the state of domicile of any potential debtor should be engaged for any individual planning.

[59] *See* Exhibit 9 for other income tax issues and suggestions on how to plan for divorce. For more information on S corporation and other privately owned business issues see: Steven B. Gorin, “Structuring Ownership of Privately-Owned Businesses: Tax and Estate Planning Implications,” over 900 pages in a fully searchable PDF available by emailing Steve at sgorin@thompsoncoburn.com. Please put “Business Structuring Materials” in the subject line, include your email and physical mailing address, and indicate whether you would like to receive the latest version quarterly through his newsletter. Steve does not charge for this service.

EXHIBIT 1
ACTEC Comparison of the Domestic Asset Protection Trust Statutes

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ACTEC COMPARISON
OF THE
DOMESTIC ASSET PROTECTION TRUST STATUTES

UPDATED THROUGH SEPTEMBER 2016

EDITED BY DAVID G. SHAFTEL

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This September 2016 version of the chart updates the prior September 2015 chart.

This chart includes a new addition to the DAPT community, West Virginia, which enacted its statute effective June 8, 2016. This new statute is relatively thorough, but commentators have pointed out that in its present form a grantor does not have the right to disapprove distributions from the trust. As a result, a West Virginia DAPT cannot be formed for incomplete gifts. Future amendments may remedy this problem and perhaps also add other useful DAPT provisions.

This 2016 chart includes clarifications and expanded information for Delaware, Mississippi, and Missouri. Also included below are brief discussions of "Inter Vivos QTIP Trust," which is a partial DAPT, and the proposed Uniform Voidable Transfers Act and its comments relating to DAPTs.

The following ACTEC 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); **Leonard C. Martin** (Mississippi); **Steven B. Gorin** (Missouri); **Layne T. Rushforth** (Nevada); **Amy K. Kanyuk** (New Hampshire); **Bowen Loeffler**, **Michael J. Stegman**, and **Brian Layman** (Ohio); **Amy J. Sine** (Oklahoma); **John Harpootian** (Rhode Island); **Daniel P. Donohue** (South Dakota); **Bryan Howard** (Tennessee); **Thomas Christensen, Jr.** (Utah); **Howard M. Zaritsky** (Virginia); **John F. Allevato and Christopher J. Winton** (West Virginia); and **Robert H. Leonard** (Wyoming).

Similarly, the following attorneys generously reviewed and contributed to the preparation of this chart: **John Roth** (Hawaii) and **Evan Chambers** (Oklahoma).

NOTE: West Virginia became the 16th state to enact DAPT Statues effective on June, 8, 2016.

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, two 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 seventeen years since, thirteen other states have followed suit. There are now seventeen states that allow for the formation of DAPTs.

Ohio's 2013 statute, Mississippi's 2014 statute, and West Virginia's 2016 statute are the most recently enacted additions to our chart.

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. Often a state's enactments have followed a "camel's nose in the tent" approach. The first statute may only provide minimal asset protection. Then, several years later the state legislature and interest groups become more comfortable with the DAPT approach, and more comprehensive provisions are enacted.

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 seventeen 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.

A new type of partial DAPT statute has emerged and has been referred to as the "Inter Vivos QTIP Trust." These are statutes which specifically abrogate the rule against self-settled spendthrift trusts for lifetime QTIP trusts. These states include Arizona, Delaware, Florida, Indiana (proposed), Kentucky, Maryland, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, and Wyoming.[1] In essence, these statutes provide that the assets of an inter vivos QTIP trust are not to be considered assets contributed by the settlor.

[1] Ariz. Rev. Stat. Ann. § 14-10505(E); Del. Code Ann. Tit. 12, § 3536(c); Fla. Stat. § 736.0505(3); Indiana Stat. § I.C. 30-4-2.1-18; Ky. Rev. Stat. Ann. § 386B.5-020(8)(a); Md. Code Ann., Est. & Trusts § 14.5-1003; Mich. Comp. Laws § 700.7506(4); N.H. Rev. Stat. Ann. § 564-B:5-505; N.C. Gen. Stat. § 36C-5-505(c); Or. Rev. Stat. § 130.315(4); S.C. Code Ann. § 62-7-505(b)(2); Tenn. Code Ann. § 35-15-505(d); Tex. Prop. Code Ann. § 112.035(g); V.A. Code Ann. § 64.2-747.B.3; Wyo. Stat. Ann. § 4-10-506(f).

As a result, the assets cannot be reached by creditors of the donor spouse after the death of the donee spouse.[2]

Another way in which some states have "placed their toe in the water" with respect to self-settled trust asset protection is to enact 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. These states include Arizona, Florida, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Oregon, New York, and Texas. Similarly, Arizona and New Hampshire protect the assets in a supplemental needs trust from the settlor's creditors.

Enactment of asset protection for self-settled interests such as the "Inter Vivos QTIP Trust," tax reimbursement, and supplemental needs trust, 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.

Reference to the map illustration on the last page of the chart illustrates that now more than half of the fifty states are either DAPT states or Inter Vivos QTIP Trust states.

In 2014, the Uniform Law Commission adopted amendments to the Uniform Fraudulent Transfer Act, including new comments. The Act was renamed the Uniform Voidable Transfers Act, and the comments state that a transfer to a self-settled spendthrift trust is a voidable transfer per se. Further, the comments state that an individual who lives in a state that does not recognize DAPTs cannot protect assets by creating a DAPT in a state that does recognize DAPTs. Recent attempts by ACTEC fellow Richard W. Nenno to correct these comments were unsuccessful.[3] Therefore attorneys who represent clients who are residents of non-DAPT states will want to research whether that state has enacted the above-described amendments and comments.

In 2015 the DAPT chart introduced three new subjects which are designed to summarize developing case law dealing with DAPTs. At present, DAPT cases are few. However, it is inevitable that the courts will be asked to resolve controversies involving the interpretation and application of DAPT laws. So far, there are only three DAPT cases, two involving Alaska's statute, and one involving Delaware's. The Alaska cases were mixed with fraudulent transfers, and the creditors prevailed. The Delaware case involved the application of a statute of limitations to bar the creditors, and the debtor prevailed. These cases can be found in Item 35 and Item 36 of the chart for those states.

Planners will want to carefully review the DAPT cases which have been rendered. These cases will provide

[2] Franklin, *Lifetime QTIPs—Why They Should be Ubiquitous in Estate Planning*, 50th Annual Heckerling Institute on Estate Planning; Nelson, *Seeking and Finding New Silver Patterns in a Changed Estate Planning Environment: Create Inter Vivos QTIP Planning*, ABA RPTE Section Spring Symposium (Chicago May 2014).
[3] Richard Nenno and Dan Rubin, *Uniform Voidable Transfers Act: Are Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Voidable Transfers Per Se?*, Steve Leimberg's Asset Protection Planning E-mail Newsletter—Archive Message 327, dated August 15, 2016.

guidance concerning how courts are interpreting a particular state's DAPT law. In addition, often these cases will illustrate implementation errors which need to be avoided.

There are no known federal gift or estate tax cases involving DAPTs. However, the Service has issued two private letter rulings: PLR 9837007 (which held that contributions to an Alaska DAPT were completed gifts) and PLR 200944002 (which held that the assets of an Alaska DAPT would not be includible in the settlor's gross estate). Revenue Ruling 2004-64, 2004-2 C.B. 7, held that a trustee's discretion to reimburse the settlor for income tax paid with respect to DAPT income would not alone cause inclusion of the trust assets in the settlor's estate. This revenue ruling is instructive of the Service's attitude with respect to DAPTs.[4]

The DAPT chart below is designed to give the reader an easy and quick comparison of the various DAPT statutes. The intent of this chart is to provide an unbiased, objective, and non-marketing analysis. A "ranking" of the statutes is deliberately omitted in order to avoid any "marketing" taint.

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.

The publication and dissemination of this Chart does not constitute the rendering of legal, accounting, or other professional advice. The editors disclaim any liability with respect to the use of this Chart.

[4] A thorough discussion of the tax consequences of DAPTs may be found in Shaftel, "IRS Letter Ruling Approves Estate Tax Planning Using Domestic Asset Protection Trust," J. Taxation, Apr. 2010.

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII Page No.	MISSISSIPPI MISSOURI NEVADA NEW HAMPSHIRE Page No.	OHIO OKLAHOMA RHODE ISLAND SOUTH DAKOTA Page No.	TENNESSEE UTAH VIRGINIA WEST VIGINIA WYOMING Page No.
1.	What requirements must trust meet to come within protection of statute?	1	10	21	32
2.	May a revocable trust be used for asset protection?	1	10	21	33
3.	Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	1	10	22	33
4.	What contacts with state are suggested or required to establish situs?	2	11	22	33
5.	What interests in principal and income may settlor retain?	2	11	23	34
6.	What is trustee's distribution authority?	2	12	23	34
7.	What powers may settlor retain?	3	12	24	35
8.	Who must serve as trustee to come within protection of statute?	3	13	24	35
9.	May non-qualified trustees serve?	3	13	24	36
10.	May trust have distribution advisor, investment advisor, or trust protector?	3	13	25	36
11.	Are fraudulent transfers excepted from coverage?	4	14	25	36
12.	Fraudulent transfer action: burden of proof and statute of limitations.	4	14	26	37
13.	Does statute provide an exception (no asset protection) for a child support claim?	4	15	26	37
14.	Does the statute provide an exception (no asset protection) for alimony?	5	15	27	37

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ALASKA COLORADO DELAWARE HAWAII | MISSISSIPPI MISSOURI NEVADA NEW HAMPSHIRE | OHIO OKLAHOMA RHODE ISLAND SOUTH DAKOTA | TENNESSEE UTAH VA / W.VA WYOMING

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII Page No.	MISSISSIPPI MISSOURI NEVADA NEW HAMPSHIRE Page No.	OHIO OKLAHOMA RHODE ISLAND SOUTH DAKOTA Page No.	TENNESSEE UTAH VIRGINIA WEST VIGINIA WYOMING Page No.
15.	Does statute provide an exception (no asset protection) for property division upon divorce?	5	15	27	38
16.	Does statute provide an exception (no asset protection) for tort claims?	5	15	27	38
17.	Does statute provide other express exceptions (no asset protection)?	5	15	27	38
18.	Does statute prohibit any claim for forced heirship, legitime or elective share?	5	16	28	39
19.	Are there provisions for moving trust to state and making it subject to statute?	6	16	28	39
20.	Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	6	16	28	40
21.	Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	6	16	28	40
22.	Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	6	16	28	40
23.	Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	6	16	28	40
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?	6	17	29	40

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ALASKA COLORADO DELAWARE HAWAII | MISSISSIPPI MISSOURI NEVADA NEW HAMPSHIRE | OHIO OKLAHOMA RHODE ISLAND SOUTH DAKOTA | TENNESSEE UTAH VA / W.VA WYOMING

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII Page No.	MISSISSIPPI MISSOURI NEVADA NEW HAMPSHIRE Page No.	OHIO OKLAHOMA RHODE ISLAND SOUTH DAKOTA Page No.	TENNESSEE UTAH VIRGINIA WEST VIGINIA WYOMING Page No.
25.	May a trustee pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor?	6	17	29	41
26.	Is a non-settlor beneficiary's interest protected from property division at divorce?	7	17	29	41
27.	Are due diligence procedures required by statute?	7	17	29	41
28.	Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	7	17	29	41
29.	Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	7	18	30	42
30.	Is the trustee given "decanting" authority to modify the trust?	7	18	30	42
31.	What is allowable duration of trusts?	7	18	30	42
32.	Does state assert income tax against DAPTs formed by non-resident settlors?	8	18	30	42
33.	Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	8	18	30	43
34.	What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	8	19	30	43
35.	Are there cases that have occurred in this state's courts which involve DAPT statutes (regardless of the DAPT state law involved)?	9	19	30	44

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NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII Page No.	MISSISSIPPI MISSOURI NEVADA NEW HAMPSHIRE Page No.	OHIO OKLAHOMA RHODE ISLAND SOUTH DAKOTA Page No.	TENNESSEE UTAH VIRGINIA WEST VIGINIA WYOMING Page No.
36.	Are there cases involving this state's DAPT law (regardless of the state court where the case was heard)?	9	20	31	44
37.	Are there cases that involve this state's asset protection laws which may affect the implementation of a DAPT?	9	20	31	44

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SUBJECT	ALASKA	COLORADO[2]	DELAWARE	HAWAII
	Citation: Alaska Stat. §§ 13.36.310, 34.40.110	Citation: Colo. Rev. Stat. §§ 38-10-111	Citation: Del. Code Ann. tit. 12, §§ 3570-3576	Citation: H.R.S. 554G
	Effective Date: April 2,1997	Effective Date: 1861	Effective Date: July 1, 1997	Effective Date: July 1, 2011
	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/hrscurrent
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. AS 34.40.110(a).	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.
2. May a revocable trust be used for asset protection?	No. AS 13.36.368.	No	No	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes, amendments enacted in: 2014, 2013, 2010, 2008, 2006, 2004, 2003, 2001, 2000, and 1998.	No amendments	Yes, amendments enacted in: 2015, 2014, 2013, 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.

[2] 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), *In Re Gary Lee Bryan*, 415 B.R. 454 (Bankr. D. Colo. 2009) and *In re the Estate of Sheldon K. Beren*, 2013 Colo. App. LEXIS 1874, P42 (Colo. Ct. App. 2013). *See also*, Rothschild and Rubin, 810-3rd T.M. *Asset Protection Planning*, and Nenno and Sullivan, 868 T.M., *Domestic Asset Protection Trusts.*

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
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. AS 13.36.035(c).	Not addressed by statute.	Required: (1) some or all of trust assets held in custody 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.
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. AS 34.40.110(b)(3).	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) principal, if paid pursuant to trustee's discretion, a standard or an advisor's direction; (3)CRT; (4) up to 5% interest in total return trust; (5) GRAT or GRUT; (6) QPRT; (7) qualified annuity interest; (8) ability to be reimbursed for income taxes attributable to trust; and (9) 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.)
6. What is trustee's distribution authority?	Discretion whether or not governed by a standard. AS 34.40.110(m)(1)	Not addressed by statute.	(1) Discretion; (2) pursuant to a standard; or (3) pursuant to the direction of an advisor who in turn is acting pursuant to the advisor's discretion or a standard.	Discretion to distribute any amount of principal to settlor if trust agreement so authorizes.
	ALASKA	COLORADO	DELAWARE	HAWAII

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general lifetime and testamentary powers of appointment; (3) right to appoint and remove trustees, trust protector, and advisors; and (4) right to serve as a co-trustee or advisor. AS 34.40.110(b)(2) and (f).	Not addressed by statute.	Settlor may retain: (1) power to veto distributions; (2) non-general lifetime and testamentary powers 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.
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. AS 13.36.390(3).	Not addressed by statute.	Resident individual or a corporation whose activities are subject to supervision by Delaware Bank Commissioner, FDIC, or Comptroller of Currency.	Individual HI resident(s), other than the transferor, and/or a bank or trust company that has HI as its principal place of business.
9. May non-qualified trustees serve?	Yes. AS 34.40.110(f),(g).	Not addressed by statute.	Yes, as a co-trustee.	Yes, as long as there is a permitted trustee.
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have trust protector and trustee advisor. Settlor may be advisor if does not have trustee power over discretionary distributions. AS 13.36.370, .375; AS 34.40.110(f),(g),(h).	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.
	ALASKA	COLORADO	DELAWARE	HAWAII

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
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. AS 34.40.110(b)(1).	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	As to creditors whose claims arise after the qualified disposition, only if an action is brought within four years of such qualified disposition and only if the qualified disposition was made with actual intent to defraud. UTFA applies to creditors whose claims exist at time of qualified disposition.	Creditors can set aside only transfers made with actual intent to hinder, delay, or defraud.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. Existing creditors: 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. Future creditors: Four years after transfer. AS 34.40.110(b)(1); AS 34.40.110(d).	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.	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).
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. AS 34.40.110(b)(4).	No	Yes	Yes. Protection is not available regarding family court-supervised agreement or order for child support.
	ALASKA	COLORADO	DELAWARE	HAWAII

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
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-supervised agreement or order for support or alimony to the transferor's spouse or former spouse.
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. AS 34.40.110(l).	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-supervised agreement or order for a division or distribution of property to the transferor's spouse or former spouse.
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	Yes, but only 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.
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.
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. AS 13.12.205(b).	No	Yes	Yes
	ALASKA	COLORADO	DELAWARE	HAWAII

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
19. Are there provisions for moving trust to state and making it subject to statute?	Yes AS 13.36.035; AS 13.36.043.	No	Yes	Yes
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes AS 34.40.110(a).	No	Yes	Yes
21. Does statute provide that trustee automatically ceases to act if court has jurisdic- tion and determines that law of trust does not apply?	No	No	Yes	Yes
22. Does statute provide that express/implied understand- ings regarding distributions to settlor are invalid?	Yes AS 34.40.110(i).	No	Yes	Yes
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. AS 34.40.110(e).	No	Yes	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 AS 34.40.110(a).	No	Yes	Yes
25. May a trustee pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor?	Yes AS 34.40.113.	No	Yes. 12 Del. Code Ann. § 3536(a); 12 Del. Code Ann. § 3570(11)b.9.	No
	ALASKA	COLORADO	DELAWARE	HAWAII

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, and may not be considered in property division. AS 34.40.110(l).	Increases in value of and income from separate property after marriage are marital property. Some interests in trusts are considered to be the separate property of a non-settlor beneficiary. See *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001).[3]	Yes, but may be considered in property division in certain instances.	Yes, but may be considered in property settlement.
27. Are due diligence procedures required by statute?	Yes; affidavit required. AS 34.40.110(j).	No	No	No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes AS 13.36.310(c).	No	Yes	Yes, if the trustee has not acted with intent to defraud, hinder, or delay the creditor.
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	Yes AS 13.36.330.	No	Yes	No
30. Is the trustee given "decanting" authority to modify the trust?	Yes AS 13.36.157, .158, .159.	No	Yes	No, but trustee of trust or holder of a non-conforming power of appointment may conform to the statute.
31. What is allowable duration of trusts?	Up to 1,000 years. AS 34.27.051.	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 years for real property.	No limitation. Rule against perpetuities does not apply to qualifying trusts.

[3] 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
32. 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.
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy. AS 10.50.380; AS 32.11.340.	No. In addition to a charging order, other remedies are also available to a creditor, such as the appointment of a receiver, foreclosure of the member-ship or partnership interest charged and sale of the interest directed by the court. See §7-60-128, C.R.S., §7-61-123, C.R.S., §7-64-504, C.R.S., and §7-80-703, C.R.S.	Yes, charging order is only remedy. Del. Code Ann. tit. 6, § 18-703.	No
34. 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. AS 13.36.100.	Six months after trustee provides report that adequately discloses claims, and shows termination of the trust relationship between the trustee and the beneficiary.	Judicial accountings are not required unless the governing instrument so provides or ordered by a court. Accountings are not res judicata except as to matters actually contested. A trustee will be discharged two years after a statement is sent to the beneficiary as to matters disclosed in the statement. Otherwise, claims against the trustee are barred five years after i) the death, resignation or removal of the trustee, ii) the termi-nation of the claimant beneficiary's interest or iii) the termination of the trust.	Trustee filing and court discharge.

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII
35. Are there cases that have occurred in this state's courts which involve DAPT statutes (regardless of the DAPT state law involved)?	Yes. *Battley v. Mortensen*, 2011 WL 5025288 (Bankr. D.C. Alaska 2011), decided May 26, 2011, by the Alaska Bankr. Ct. This was the first reported case to deal with a DAPT. The court held that Mortensen's funding of the trust fell under Sec. 548(e) of the Bankruptcy Code as a fraudulent transfer to a self-settled trust made within 10 years prior to his bankruptcy filing.	See footnote 1 on page 1.	Yes. *TrustCo Bank v. Matthews*, C.A. No. 8374-VCT (Jan. 22, 2015). The Delaware Court of Chancery dismissed as time-barred most of the creditor plaintiffs' claims against three Delaware asset protection trusts. The court applied a conflict of laws analysis to determine the appropriate state of limitations.	No
36. Are there cases involving this state's DAPT law (regardless of the state court where the case was heard)?	Yes. *Waldron v. Huber (In re Huber)*, 493 B.R. 798, decided by the Bankr. Ct. for the W.D. Wash. on May 17, 2013. The court held the Alaska DAPT invalid under a conflict of laws analysis and concluded that Washington had a strong public policy against asset protection for self-settled trusts.	No	No	No
37. Are there cases that involve this state's asset protection laws which may affect the implementation of a DAPT?	No	No	No	No
	ALASKA	COLORADO	DELAWARE	HAWAII

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
	Citation: Miss. Code Ann. §§ 91-9-701—91-9-723	Citation: Mo. Rev. Stat. §§ 456.5-505	Citation: Nev. Rev. Stat. §§ 166.010-166.170	Citation: N.H. Rev. Stat. Ann. § 564-D:1-18
	Effective Date: July 1, 2014	Effective Date: 1989	Effective Date: Oct. 1, 1999	Effective Date: Jan. 2, 2009
	URL: http://www lexisnexis.com/hottopics/mscode	URL: http://www.moga.mo.gov	URL: http://www leg.state nv.us	URL: http://www.gencourt.state.nh.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state MS law governs validity, construction and administration of the trust; (3) contain a spendthrift clause	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.	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. NRS 166.040.	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.
2. May a revocable trust be used for asset protection?	No	No, except for a "qualified spousal trust" (QST), giving tenants by the entirety protection to certain trusts created by spouses. R.S.Mo. § 456.950. *In re Brewer*, 544 B.R. 177 (W.D. Mo. 2015), held that certain language disqualified a trust from QST status, which bar-sponsored legislation is expected to overturn at some point (presumably in 2017).	No NRS 166.040(1)(b).	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	No amendments.	Yes, amendments enacted in 2004, 2006, 2009, 2011, 2012, and 2014.	Yes. The Nevada Legislature approved amendments in 2007, 2009, 2011, and 2015.	Yes. Amendments enacted in 2011 and 2014.
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
4. What contacts with state are suggested or required to establish situs?	Required: (1) some or all of trust assets deposited in state; (2) MS 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.	Principal place of business or residence of trustee in designated jurisdiction, or presence of all or part of the administration in designated jurisdiction; statute includes procedure for transfer of principal place of business. RSMo § 456.1-108. Identifying a corporate trustee's branch in a particular state was sufficient to designate that state as the situs. *Hudson v. UMB Bank, N.A.*, 447 S.W.3d 714 (W.D. Mo. App. 2014).	Required: (1) all or part of assets are in state; (2) NV trustee whose powers include: (a) maintaining records, (b) preparing income tax returns; (3) all or part of administration in state. NRS 166.015. Identifying a corporate trustee's branch in a particular state was sufficient to designate that state as the situs. *Hudson v. UMB Bank, N.A.*, 447 S.W.3d 714 (W.D. Mo. App. 2014)	At least one trustee must be either: (1) an individual who is a NH resident; or (2) a state or federally chartered bank or trust company that has a principal place of business in NH and is authorized to engage in trust business in NH. The trustee must either: (a) keep some trust assets in state; (b) maintain trust records in state; (c) prepare trust's income tax returns in state; or (d) otherwise materially participate in the administration of the trust in state.
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 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 be one of a class of beneficiaries of a trust discretionary as to income or principal. RSMo § 456.5-505.3.	Nevada law allows the settlor to have a lead interest in a CRT, the right to minimum required distributions under a retirement or deferred-compensation plan, the lead interest in a GRAT, the lead interest in a QPRT, the right to receive distributions in the discretion of another person, and the right to use real or personal property owned by the trust [NRS 166.040(2)(c), (d), (e), (f), (g), and (h)].	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.
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
6. What is trustee's distribution authority?	(1) Absolute discretion; (2) pursuant to a standard.	(1) Discretion; or (2) pursuant to a standard. RSMo § 456.8-814. Creditor may not compel exercise of discretion. RSMo § 456.5-504. 1, relied upon by *In re Reuter*, 499 B.R. 655 (W.D. Mo. 2013).	As provided in the trust agreement, which may include absolute discretion or discretion limited by an ascertainable standard, and it may be subject to approval or veto powers retained by the settlor or given to the trust protector or other advisor. NRS 166.090 (support); 166.100 (income); 166.110 (discretionary).	(1) Discretion; or (2) pursuant to an ascertainable standard.
7. What powers may settlor retain?	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 a testamentary limited power of appointment. RSMo § 456.5-505.4. Settlor may serve as trustee without negating spendthrift protection. RSMo § 456.5-504.1.	Nevada law allows the settlor to have a veto power over distributions, a limited lifetime or testamentary power of appointment [NRS 166.040(2)(a) and (b)]. In addition, the power to remove and replace a trustee, direct trust investments, and "other management powers" (except for the power to make distributions without the consent of another person). [NRS 166.040(3)].	Settlor may retain any power except: (1) the power to revoke the trust without the consent of the qualified trustee or any person holding an adverse interest, if upon revocation, the settlor would be a distributee of the trust property; or (2) a general power of appointment. Settlor's powers may include, inter alia, the power to veto distributions, and a limited power of appointment (inter vivos or testamentary).
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
8. Who must serve as trustee to come within protection of statute?	Resident individual, or is authorized by MS law to act as a trustee and whose activities are subject to supervision by the Mississippi Dept. of Banking and Consumer Finance, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto.	Not addressed by statute. RSMo § 456.1-107 describes when MO law controls	Resident individual or trust company or bank that maintains office in Nevada. NRS 166.015(2).	Resident individual or a state or federally chartered bank or trust company having a place of business in New Hampshire.
9. May non-qualified trustees serve?	Yes	Not addressed by statute.	Only one trustee must meet the requirements of NRS 166.015(2). There are no restrictions on co-trustees.	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	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. RSMo § 456.8-808. A trust protector is a person other than the settlor, a trustee, or a beneficiary. The statute is flexible regarding powers.	Yes NRS 163.553 et seq. [directed trusts]; NRS 163.5553 [trust protectors].	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.

	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

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SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
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 actual intent to defraud the 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. RSMo § 456.5-505.3(1).	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. NRS 166.170(3). See also NRS Chapter 112 [Fraudulent Transfers Act] and NRS 163.5559(2).	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with actual intent to hinder, delay or defraud, and constructively fraudulent transfers.
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 claim based upon intent to hinder, delay or defraud with actual intent to defraud the creditor. <u>Future creditors</u>: Two years after transfer if claim based upon intent to hinder, delay or defraud with actual intent to defraud the creditor.	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. RSMo § 428.049.	Clear and convincing evidence. <u>Future creditors</u>: Two years after transfer. <u>Existing creditors</u>: 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. NRS 166.170.	<u>Case law</u>: Actual fraud must be proved by clear and convincing evidence; constructive fraud by a preponderance of the 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.

	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

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SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes	Yes, subject to equitable interests of other permissible distributees. RSMo § 456.5-503.2	No	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, subject to equitable interests of other permissible distributees. RSMo § 456.5-503.2	No	Yes, but only 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?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	No	No	Yes, but only if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.
16. Does statute provide an exception (no asset protection) for tort claims?	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, but only 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)?	Yes. Claim not extinguished (1) if creditor is state of Mississippi or any political subdivision thereof, (2) for any creditor in an amount not to exceed $1,500,000 if the settlor failed to maintain a $1,000,000 general liability policy.	Yes, regarding governmental claims, if another governing law supersedes. RSMo § 456.5-503.3	No	No. 2014 amendments make it clear that if a beneficiary's interest is subject to a spendthrift clause, a creditor's exclusive remedy is attachment of distributions. RSA 564-B:5-503(c).
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes	No	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.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes	No	Yes. NRS 166.180	Yes
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	No	No	Yes
21. Does statute provide that trustee automatically ceases to act if court has jurisdic-tion and determines that law of trust does not apply?	Yes	No	No	No
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	Irrelevant, if the trust complies with RSMo § 456.5-505.3	Yes. NRS 166.045	Yes
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes	No	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. NRS 166.170(5) and (6).	Yes
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
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, but a creditor may not force a trustee to exercise discretion, and an interest in a trust does not constitute a property interest. RSMo § 456.5-504.1	Yes. NRS 166.040(2)(b).	Use of QPRT residence specifically authorized. Use and occupancy of other property not addressed in the statute.
25. May a trustee pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor?	No	Yes RSMo § 456.5-504.1	Yes. NRS 166.120(3).	No
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	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; however, 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.	Yes, if property is retained in a spendthrift trust for the beneficiary [NRS 166.120]. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property [NRS 123.130]; however, trust income and assets can be considered a resource for purposes of determining alimony and child support [NRS 125.150(4) and (7); 125B.070(1)(a)].	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).
27. Are due diligence procedures required by statute?	Yes; affidavit required.	No	No	No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	Yes RSMo § 456.7-709.	No	Yes
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No	No. RSMo § 456.4-420 provides, "an interested person may file a petition to the court for an interlocutory determination whether a particular motion, petition, or other claim for relief by the interested person would trigger application of the no-contest clause or would otherwise trigger a forfeiture that is enforceable under applicable law and public policy."	No. NRS 163.00195.	Yes. RSA 564-B:10-1014.
30. Is the trustee given "decanting" authority to modify the trust?	No	Yes RSMo § 456.4-419	Yes.NRS163.556 and 166.170(a).	Yes. RSA 564-B:4-418.
31. What is allowable duration of trusts?	Rule against perpetuities.	Abolished; generally applicable only after August 28, 2001. RSMo § 456.025.1	Up to 365 years. NRS 111.1031(2)(b).	Perpetual. New Hampshire abolished the rule against perpetuities in 2004. RSA 564:24.
32. Does state assert income tax against DAPTs formed by non-resident settlors?	No, if it is a grantor trust.	Yes, but only if from real estate, business, etc., sources within MO. RSMo §§ 143.181, 143.331, 143.371, 143.391, focusing on RSMo §§ 143.181.2.	No. Nevada State Constitution, Article 10, Section 1, clause 9.	No. New Hampshire does not impose any income tax on trusts.
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Charging order is only remedy.	No.	Charging order is exclusive remedy for a creditor of an owner [NRS 86.401 as to LLCs, 87.4342 as to partnerships, and 87A.480 or 88.535 as to limited partnerships].	Yes, charging order is only remedy.
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
34. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	One year after trustee provides report that adequately discloses claims.	RSMo § 456.10-1005.1 provides either (1) a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the last to occur of the date the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and the date the trustee informed the beneficiary of the time allowed for commencing a proceeding, or (2) within five years after the first to occur of: (1) the removal, resignation, or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust. trust. See *Gould v. Gould*, 280 S.W.3d 137 (W.D. Mo. App. 2009) re pre-1/1/2005 claims.	NRS 165.139 mandates an annual trustee's account upon a beneficiary's request, but NRS 165.145 permits an account to be provided confidentially 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.	Either: (1) one year after trustee provides report that adequately discloses the existence of a potential claim and informs the beneficiary of the time allowed for commencing a proceeding, or (2) three years after trustee provides report that adequately discloses the existence of a potential claim. Limitations period cannot be tolled except by agreement of trustee and beneficiaries or by court order. RSA 564-B:10-1005.
35. Are there cases that have occurred in this state's courts which involve DAPT statutes (regardless of the DAPT state law involved)?	No	See, *In re Reuter*, 499 B.R. 655, 678 (Bankr. W.D. Mo. 2013). This 2013 bankruptcy court opinion upheld the protection of the Mo. spendthrift statute with respect to a debtor who settled an irrevocable trust jointly with his wife and remained a beneficiary of the trust.	No	No
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

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SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
36. Are there cases involving this state's DAPT law (regardless of the state court where the case was heard)?	No	No	No	No
37. Are there cases that involve this state's asset protection laws which may affect the implementation of a DAPT?	No	No	No	No
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMSHIRE

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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
	Citation: Ohio Legacy Trust Act, Chapter 5816 of the Ohio Revised Code	Citation: Family Wealth Preservation Act (the "Act"). Okla. Stat. tit. 31 § 10-18	Citation: R.I. Gen. Laws §§ 18-9.2-1 - 18-9.2-7	Citation: S.D. Cod. Laws §§ 55-16-1 - 55-16-17
	Effective Date: March 27, 2013	Effective Date: June 9, 2004	Effective Date: July 1, 1999	Effective Date: March 2, 2005
	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	URL: http://www.legis.state.sd.us
1. What requirements must trust meet to come within protection of statute?	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 that includes the interest of the settlor; (4) appoint at least one qualified trustee. § 5816.02(K)	Trust instrument may be revocable or irrevocable. 31 O.S. § 13. 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. 31 O.S. § 11.	Trust instrument must: (1) be irrevocable; (2) expressly state RI law governs validity, construction, and administration of trust; (3) contain spendthrift clause.	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).
2. May a revocable trust be used for asset protection?	No	Yes. Settlor may revoke or amend trust and take back assets. No court or other judicial body may compel such revocation or amendment. 31 O.S. § 16.	No	No
	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA

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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	The vote on the Legacy Trust Act in the 129th Ohio General Assembly was unanimous in both houses, boding well for continued support.	Yes. Most sections of the Act were last amended and superseded effective June 8, 2005. Substantial amendments were also made effective in 2015.	Yes, amendment enacted in 2007.	Yes. Amendments enacted in 2011, 2010, 2009, 2008, 2007, 2006, 2012, 2014 and 2015.
4. What contacts with state are suggested or required to establish situs?	Required. OH qualified trustee who maintains or arranges for custody in OH of some or all of the trust estate and whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; or (c) otherwise materially participates in the administration of the trust. § 5816.02(S)	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. An OK asset includes an equity interest in an OK-based company regardless of whether the assets owned by the company are located in OK.	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 administration of the trust.	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).
	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA

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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
5. What interests in principal and income may settlor retain?	Settlor may retain any one or more of these beneficial interests: (1) current income; (2) CRAT or CRUT; (3) beneficiary of distributions of income and principal in discretion of trustee or advisor or according to a standard; (4) use of real or tangible personal property of trust, including QPRT; (5) a qualified interest under I.R.C. § 2702(b), including GRAT, GRUT, CRAT, CRUT or back-end of CLAT OR CLUT; (6) ability to be reimbursed for income tax attributable to trust; (7) ability to have debts, expenses and taxes of settlor's estate paid from trust; and (8) pour-back to estate or trust. § 5816.05.	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. 31 O.S. § 13.	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.	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.
6. What is trustee's distribution authority?	Except as provided in trust instrument, trustee or advisor has greatest discretion permitted by law. § 5816.05(G): distributions to settlor may be purely discretionary or according to a standard in the trust instrument (not limited to an ascertainable standard). § 5816.12.	Irrevocable trusts: Not addressed by the Act. Revocable trusts: see Item 5, above	Discretion, or pursuant to a standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard.

	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA

SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) power to invade trust principal up to 5% annually; (3) non-general power of appointment (lifetime or testamentary); (4) power to remove and replace a trustee or advisor. § 5816.05	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.	Settlor may retain: (1) power to veto distributions; (2) non-general lifetime power of appointment (3) testamentary power of appointment (general or non-general); (4) 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 (5) serve as investment trust advisor.
8. Who must serve as trustee to come within protection of statute?	Qualified Trustee: resident individual or corporation with trust powers under OH law and whose activities are subject to Ohio Superintendent of Banks, FDIC, Comptroller of Currency, or Office of Thrift Supervision. § 5816.02(S)	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. 31 O.S. § 11.	Resident individual (other than the transferor) or corporation whose activities are subject to supervision by RI Dept. of Business Regulation, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	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.
9. May non-qualified trustees serve?	Yes, but must have at least one qualified trustee. § 5816.02(K)	Yes	Yes	Yes

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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
10. May trust have distribution advisor, investment advisor, or trust protector?	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 only. §§ 5816.02(A) & 5816.11	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 distributions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a 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.
11. Are fraudulent transfers excepted from coverage?	Yes. Creditor may avoid a transfer made with the specific intent to avoid the specific creditor. Only the portion of the qualified disposition necessary to satisfy the creditor's claim is avoided, and the avoided portion is subject to the fees and costs incurred by a trustee in defending the claim (so long as the trustee has not acted in bad faith). §§ 5816.07(A) & 5816.08	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. 31 O.S. § 17.	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. Sets aside transfers with intent to defraud specific creditor.
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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. Future creditors: 18 months after qualified disposition. Existing creditors: Later of 18 months after qualified disposition or 6 months after qualified disposition was or could have been discovered, with the limitation that the creditor must make demand on its claim within 3 years after the qualified disposition. The maximum combination of the 3-year demand limitation and the 6-month filing limitation provide an absolute 3.5 year bar. § 5816.07(B) & (C). Furthermore, Ohio Rev. Code § 1301.401 contains a personal property recording mechanism that serves as notice to the world.	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. 24 O.S. § 121.	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.	Clear and convincing evidence. Existing creditors: 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. Future creditors: Two years after transfer.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes § 5816.03(C)	Yes. 31 O.S. § 12.	Yes, if at the time of transfer a court order for child support existed.	Yes, but only "to the extent of the debt" existing "at the time of transfer." See SDCL § 55-16-15.
	OHIO	**OKLAHOMA**	**RHODE ISLAND**	**SOUTH DAKOTA**

SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
14. Does the statute provide an exception (no asset protection) for alimony?	Yes, if spouse was married to settlor on or before the date of the qualified disposition. §§ 5816.03(C) & 5816.02(U)	No	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, but the exception applies only "to the extent of the debt" existing "at the time of transfer." See SDCL § 55-16-15.
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if spouse was married to settlor on or before the date of the qualified disposition. §§ 5816.03(C) & 5816.02(U)	No	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, but the exception applies only "to the extent of the debt" existing "at the time of transfer." Further: (i) a settlor's separate property is protected in a divorce, regardless of the date of marriage; and (ii) any marital property transferred to an APT is also protected if the settlor's spouse either receives a specified statutory notice, or provides written consent after having received the information required by the notice. See SDCL § 55-16-15.
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
17. Does statute provide other express exceptions (no asset protection)?	No	No	No	No
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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes § 5816.03(D)	No	No	Yes, for forced heirship and legitime. Silent with respect to elective share.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes § 5816.10(C)(D) & (E)	No	No	Yes
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes § 5816.03(B)	Yes. 31 O.S. § 16.	Yes	Yes
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	Yes. § 5816.09. Furthermore, to maximum constitutional extent, Ohio court shall exercise jurisdiction over case brought before it and shall not decline adjudication because a court of another state has acquired jurisdiction. § 5816.10(H)	No	Yes	DAPT statute does not have any such specific provision, but SDCL § 55-3-47 applies such a rule to all South Dakota trusts.
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes § 5816.04	No	Yes	Yes
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes, and also provides protection relating to forming and funding entities that become part of the trust estate. § 5816.07(D),(E)&(G)	No	Yes	Yes
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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
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?	Allowed as a reserved interest of the settlor (not in trustee's discretion. § 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.	Yes
25. May a trustee pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor?	Yes. Ohio Rev. Code § 5815.24(D)	No	No	Yes. SDCL § 55-1-42 & SDCL § 55-1-43
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, a beneficiary does not have a property interest in the property of the trust. § 5816.13	Yes. The Act does not address, but if property is retained in a spendthrift trust for the beneficiary it is protected. 31 O.S. § 12. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property. 43 O.S. § 121. However, trust income and assets can be considered a resource for purpose of determining alimony and child support.	Yes, but may be considered in property division.	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).
27. Are due diligence procedures required by statute?	Yes, affidavit required. § 5816.06	No	No	No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes § 5816.08(A)(3)(a)	No	Yes	Yes
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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	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	No, but see SDCL §§ 55-1-46, et seq.
30. Is the trustee given "decanting" authority to modify the trust?	Yes. Ohio Rev. Code § 5808.18.	No	No	Yes
31. What is allowable duration of trusts?	Allows opting out of the rule against perpetuities. Ohio Rev. Code § 2131.09	Rule against perpetuities. Abolished rule against perpetuities for trust property when the power of alienation is not suspended. 60 O.S. § 175.47.	Abolished rule against perpetuities.	Abolished rule against perpetuities.
32. Does state assert income tax against DAPTs formed by non-resident settlors?	No, unless the settlor later becomes resident in Ohio and the trust has at least one beneficiary resident in Ohio. Ohio Rev. Code § 5747.01(I)(3)(a)(ii).	Yes. 31 O.S. § 11.	No	No
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy. Ohio Rev. Code § 1705.19	Yes, charging order is only remedy. 18 O.S. § 2034.	Yes, charging order is only remedy.	Yes; charging order is only remedy. Other legal and equitable remedies expressly barred.
34. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	Discharge occurs 2 years after delivery of statement that discloses the facts giving rise to the claim. Ohio Rev. Code § 5810.05	Two years after trustee provides report that adequately discloses claims. 60 O.S. § 175.57.	Trustee application and court discharge.	180 days after trustee provides accounting, or by order of court for supervised trusts.
35. Are there cases that have occurred in this state's courts which involve DAPT statutes (regardless of the DAPT state law involved)?	No	No	No	No
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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
36. Are there cases involving this state's DAPT law (regardless of the state court where the case was heard)?	No	No	No	No
37. Are there cases that involve this state's asset protection laws which may affect the implementation of a DAPT?	No	No	No	No
	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
	Citation: Tenn. Code Ann. § 35-16-101	Citation: Utah Code Ann. § 25-6-14 (repealed and re-enacted in 2013)	Citation: Va. Code §§ 64.2-745.1 and 64.2-745.2 (amended 2012)	Citation: W.Va. Code Sections 44D-5-503a, 44D-5-503b, 44D-5-503c and 44D-5-505.	Citation: Qualified Spendthrift Trust (QST): Wyo. Stat. §§ 4-10-50[illegible] and 4-10-510 – 523 Discretionary Asset Protection Trust (Discretionary APT): Wyo. Stat. §§ 4-10-504 and 4-10-506(c)
	Effective Date: July 1, 2007	Prior Effective Date: December 31, 2003 New Effective Date: March 28, 2013	Effective Date: July 1, 2012	Effective Date: June 8, 2016	Effective Date: QST: July 1, 2007 Discretionary APT: July 1, 2013
	URL: http://www.legislature.state.tn.u-s	URL: http://www.le.utah.gov	URL: http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=SB11&Submit2=Go	Pending	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 TN law governs validity, construction and administration of the trust; (3) contain a spendthrift clause; (4) must have at least one "qualified trustee".	Trust instrument must; (1) be irrevocable; (2) contain spendthrift clause; (3) state that the trust is governed by UT law; and (4) must require that at least one trustee be resident of UT or UT trust company.	(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 § 64.2-745.2.	(1) The trust is irrevocable; (2) the trust is created during the grantor's lifetime; (3) the trust instrument expressly incorporates the laws of WV; (4) the trust instrument includes a spendthrift provision; (5) the grantor does not have the right to disapprove distributions from the trust; (6) the grantor executes a "qualified affidavit", essentially certifying that the transfer of property to the trust will not make the grantor insolvent and the transfer is not defrauding any creditor; and (7)there is, at all times when distributions could be made to the grantor at least one beneficiary other than the grantor who can receive income, principal, or both income and principal. W.Va. Code §44D-5-503b(d).	QST: Trust instrument must: (1) state that trust is a "qualified spendthrift trust" under § 4-10-510 of WY statutes; (2) be irrevocable; (3) expressly state WY 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. Discretionary APT: Trust instrument must: (1) provide for discretionary distributions of trust income and/or principal to the settlor; (2) trust must be governed by WY law.
	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
2. May a revocable trust be used for asset protection?	No	No	No, Va. Code §§ 64.2-745.2(A) and 64.2-747(A)(1).	No	OST and Discretionary APT: No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. Amendments enacted in 2008, 2010, and 2013.	Yes. Repealed and re-enacted in 2013.	This statute is the first enactment for broad approval of self-settled spendthrift trusts.	2016 statute is the first enactment for broad approval of self-settled spendthrift trusts.	OST and Discretionary APT: Yes. Amendments enacted in 2005, 2007, 2008, 2011, 2013, and 2015.
4. What contacts with state are suggested or required to establish situs?	Required: (1) some or all of trust assets deposited in state; (2) TN 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: UT resident or UT trust company as trustee or co-trustee.	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 § 64.2-745.2(A).	WV qualified trustee must be (1) a natural person who is a resident of WV or an entity that can engage in trust business in WV and (2) must maintain custody within WV of property in the trust, maintain records in WV, prepare fiduciary income tax returns in WV, or materially participate in administration in WV. W.Va. Code §44D-5-503b(a).	OST: Required: WY 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. Discretionary APT: Required: At least one WY 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.
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SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST 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 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, GRAT, GRUT, QPRT and use of real or personal property of trust.	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 §§ 64.2-745.2(A) and 64.2-745.2(D).	In addition to the grantor's qualified interest in the trust, grantor may retain: (1) the right to receive income or principal pursuant to an ascertainable standard; (2) interest in CRUT or CRAT; (3) up to 5% interest in total-return trust; (4) interest in QPRT; (5) a qualified annuity interest under IRC § 2702; (6) ability to have debts, expenses, and taxes of the grantor's estate paid from the trust; and (7) ability to be reimbursed for income taxes attributable to trust. W.Va. Code §44D-5-503c(c).	OST: 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) principal distributions, (7) ability to be reimbursed for income taxes attributable to trust, (8) ability to have debts, expenses and taxes of the settlor's estate paid from the trust. Discretionary APT: Settlor may retain ability to receive discretionary distributions of trust income and principal.
6. What is trustee's distribution authority?	(1) Absolute discretion; (2) pursuant to a standard.	As provided in the trust agreement, which may include absolute discretion or discretion limited by an ascertainable standard, and it may be subject to approval or veto powers retained by the settlor or given to the trust protector or other advisor.	Absolute discretion. Va. Code § 64.2-745.2(A).	Sole discretion. W.Va. Code §44D-5-503b(c).	OST and Discretionary APT: (1) Absolute discretion; (2) pursuant to a standard.
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SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
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 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; (3) power to appoint nonsubordinate advisors/ protectors; (4) right to serve as investment advisor; (5) right to receive principal of trust subject to ascertainable standard; and (6) use real or personal property of trust.	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 § 64.2-745.2(A), (D).	Settlor may retain: (1) a testamentary special power of appointment, exerciseable by will or lifetime instrument; (2) a right to remove a trustee and to appoint a new trustee; (3) a right to receive income or principal pursuant to an ascertainable standard; (4) A right to receive each year from the trust a percentage of principal, up to 5%, as specified in the trust instrument <u>Note</u>: The settlor may NOT have the right to disapprove distributions from the trust. W.Va. Code §44D-5-503c; W.Va. Code §44D-5-503b(d)(7).	<u>QST</u>: 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. <u>Discretionary APT</u>: Settlor may retain same powers as for QST, except power to veto distributions.
8. Who must serve as trustee to come within protection of statute?	Resident individual, or is authorized by TN 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.	At least one trustee must be UT resident or UT trust company. Settlor can be co-trustee.	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 § 64.2-745.2(A).	There must always be at least one "qualified trustee," who must be a natural person residing in WV or a legal entity authorized to engage in trust business in WV. W.Va. Code §44d-5-503b(d)(4).	<u>QST</u>: Resident individual or a person authorized by Wyoming law to act as trustee or a regulated financial institution. <u>Discretionary APT</u>: At least one trustee must be resident individual or a person authorized by WY law to act as trustee or a regulated financial institution. Trustee with authority to make distributions to settlor cannot be a trust beneficiary, related to settlor, or subordinate to settlor under I.R.C. § 672(c).
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9. May non-qualified trustees serve?	Yes	Yes.	Yes. See Va. Code § 64.2-745.2(A) (using nonexclusive terminology for the requirement of a qualified trustee).	Yes, but the trust must also have at all times at least one other "qualified trustee". <u>Id.</u>	<u>QST</u>: Yes <u>Discretionary APT</u>: Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	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 § 64.2-745.2(A).	Not addressed expressly, but 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. The statute protects trust adviser, trust director, or any person involved in the counseling, drafting, preparation or execution of, or transfers to, the trust. W.Va. Code §44D-5-503a(e).	<u>QST</u> and <u>Discretionary APT</u>: 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.
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. [Statute needs clarification with respect to actual intent amendment in 2013.]	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 § 64.2-745.1(C).	Yes. W.Va. Code §44D-5-503a(c).	<u>QST</u> and <u>Discretionary APT</u>: Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
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SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. Existing creditors: Two years after transfer, or six months after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Two years after transfer if claim based upon constructive fraud. Future creditors: Two years after transfer. [See Item 11]	Burden not addressed by statute. Existing creditors: (a) 120 days after notice to known or unknown creditors of settlor of transfer to trust; or (b) without notice then two years after transfer, or one year after transfer was or could reasonably have been discovered.	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 § 64.2-745.1(D).	Clear and convincing evidence. *Board of Trustees v. Blair*, 45 W. Va. 812 (1899)("strictly and clearly proved"); *Kesling v. Mick*, 103 W. Va. 485, 138 S.E. 386 (1927). Suit must be brought within four (4) years after the date of the transfer to the trust. W.Va. Code §44D-5-503a(d)	QST: Clear and convincing evidence. Discretionary APT: Clear and convincing evidence.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes	No, but before distribution to settlor, trustee must give 30 days advance notice to child support creditor. However, even if notice not given, child support creditor cannot force distribution from trust or attach trust assets	Yes. Va. Code § 64.2-744(A) protecting rights of a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance).	Yes. The spendthrift provision is unenforceable against a beneficiary's child who has a judgment or court order against the beneficiary for child support. Also, grantor's "qualified affidavit" must identify any agreement or order of court for support in favor of the transferor's children. W.Va. Code §44D-5-503b(e)(7).	QST: Yes. Discretionary APT: No
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.	No	No	No, but grantor's "qualified affidavit" must identify any agreement or order of court for support or alimony in favor of the transferor's spouse or former spouse. Id.	QST and Discretionary APT: No

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST 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.	No	No	No, but grantor's "qualified affidavit" must identify any agreement or order of court for a division or distribution of property incident to a judicial proceeding with respect to a divorce or annulment in favor of the transferor's spouse or former spouse. Id.	QST and Discretionary APT: No
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	No	No	QST and Discretionary APT: No
17. Does statute provide other express exceptions (no asset protection)?	No	No	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 § 64.2-744(B). (B) the United States, the Commonwealth, any city, county, or town. Va. Code § 64.2-744(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 § 64.2-745(A).	Yes. The spendthrift provision is unenforceable against (1) judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; (2) claim of State of WV to the extent a statute so provides; and (3) claim of the United States to the extent federal law so provides. W. Va. Code 44D-5-503(b).	QST: Yes. (1) Financial institution with which the settlor has listed qualified trust property on the financial institution's application or financial statement used to obtain or maintain credit from the financial institution 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. Discretionary APT: No.

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes	No	No	No. Forced heirship or legitime does not exist under WV law. Spousal elective share may apply against the self-settled spendthrift trust, depending on how established.	QST and Discretionary APT: No, but in 2011 the WY Supreme Court held that assets transferred to a trust are not subject to the elective share of a surviving spouse under the WY Uniform Trust Code and WY 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, under provisions of the Utah Uniform Trust Code.	Yes. Va. Code § 64.2-745.1(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. The movement to WV of the administration of an existing trust, which, after such movement to the state, meets for the first time all of the requirements of a qualified self-settled spendthrift trust, shall be treated as a transfer to this trust by the grantor on the date of such movement of all of the assets previously transferred to the trust by the grantor. W.Va. Code §44D-5-503a(g).	QST: Yes, permits transfer of trust property from trust created in another jurisdiction with similar creditor protection for settlor with creditor protect-tion 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. Discretionary APT: Yes, if trust meets discretionary distri-butions standard and acquires at least one WY qualified trustee.
	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING

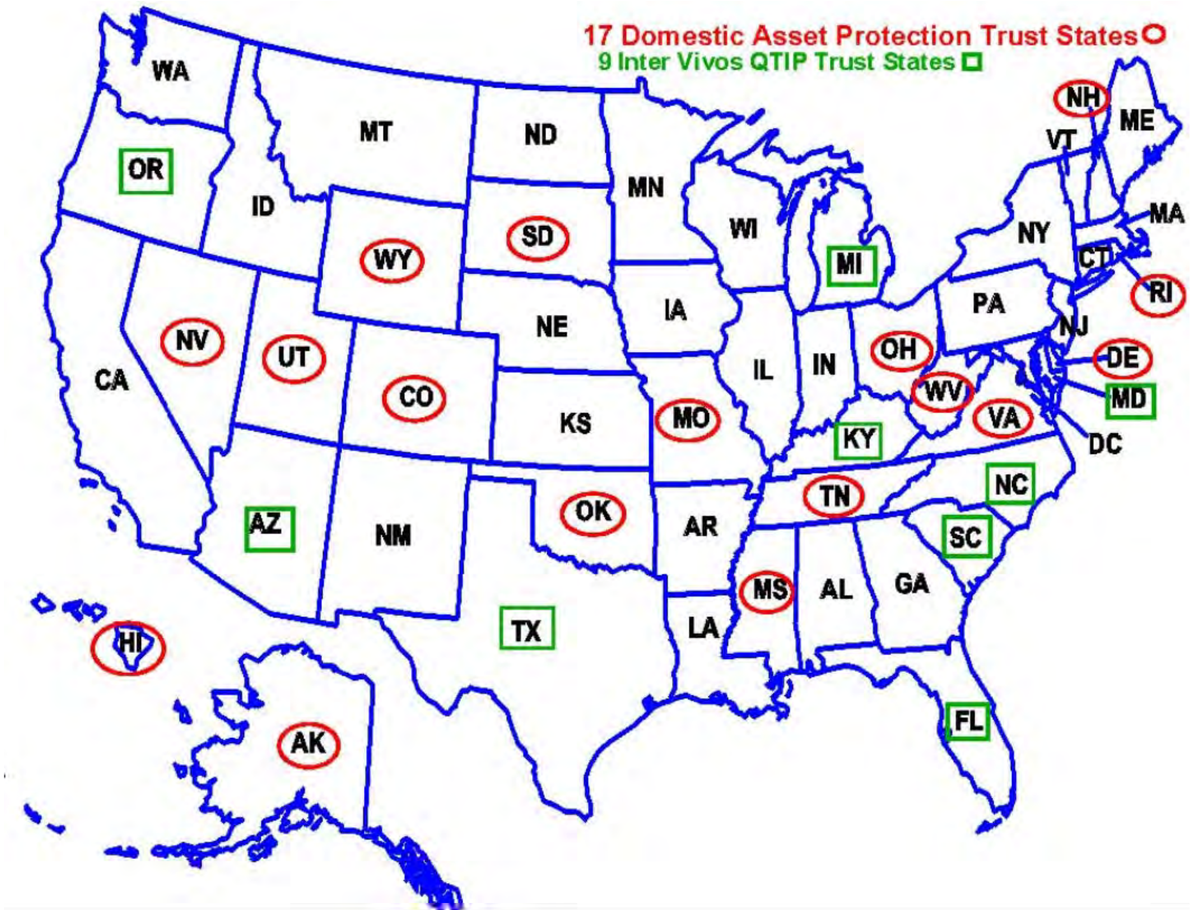
SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	Yes	No	No	QST: Yes Discretionary APT: No. Spendthrift clause is not required.
21. Does statute provide that trustee automatically ceases to act if court has jurisdic- tion and determines that law of trust does not apply?	Yes	No	No	No	QST: Yes Discretionary APT: No
22. Does statute provide that express/implied understand- ings regarding distributions to settlor are invalid?	Yes	Yes	No	No	QST and Discretionary APT: No
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes	Yes	Yes. Va. Code § 64.2-745.1(E).	Yes. The statute pro-tects trust adviser, trust director, or any person involved in the counsel-ing, drafting, prepara-tion or execution of, or transfers to, the trust. W.Va. Code §44D-5-503a(e).	QST: Yes Discretionary APT: 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	Not specifically addressed, but the trust instrument shall not be deemed to be revocable on account of the inclusion of a provision allowing the grantor's potential or actual use of real property held under a personal residence trust (within the meaning of Section 2702(c) of the Internal Revenue Code). W.Va. Code §44-5-503c(c)(7).	QST and Discretionary APT: No, except for QPRT residence.
	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
25. May a trustee pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor?	Yes § 35-15-504	No	No	Yes because not expressly prohibited in statute.	QST and Discretionary APT: Yes Wyo. Stat. § 4-10-504(b)
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes	Yes, UCA § 75-7-502.	Yes. Va. Code §§ 64.2-743 - 64.2-744.	Yes; if settlor's assets are transferred into trust, the non-settlor beneficiary's interest in the trust should be treated as separate property of the non-settlor beneficiary. W. Va. Code §48-1-237(4).	QST and Discretionary APT: Yes, but may be considered in property division.
27. Are due diligence procedures required by statute?	Yes; affidavit required.	Yes, affidavit required.	No	Yes. The grantor must execute a "qualified affidavit", essentially certifying that the transfer of property to the trust will not make the grantor insolvent and the transfer is not defrauding any creditor. W.Va. Code §44D-5-503b(e).	QST: Yes: affidavit required. Discretionary APT: No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	No direct lien, but cost and fees may be paid from trust. See UCA § 75-7-1004.	No	Partially. Any transfer made to the qualified self settled spendthrift trust which may be set aside as a fraudulent conveyance shall be chargeable first with the entire costs and expenses, including attorney's fees, properly incurred by the trustee in the defense of the action or proceeding to set aside the transfer. W.Va. Code §44D-5-503a(c).	QST and Discretionary APT: Yes
	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No	No	No	No	QST and Discretionary APT: No
30. Is the trustee given "decanting" authority to modify the trust?	Yes	No, but procedure for modifying trust available under UT Uniform Trust Code and relatively easy to do if settlor is living.	Yes. See Va. Code § 64.2-778.1 (effec. July 1, 2012).	There is no West Virginia statutory authority to decant. It is unclear whether trustee may have common-law authority to decant if the trust instrument contains appropriate language.	QST and Discretionary APT: Yes, if trustee has authority to make discretionary distributions of trust income and principal, trustee may distribute in further trust. Trust protector may also have power to decant or modify trust.
31. What is allowable duration of trusts?	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).	USRAP adopted.	QST and Discretionary APT: Up to 1,000 years, except for real property.
32. Does state assert income tax against DAPTs formed by non-resident settlors?	No, if the beneficiaries are non-residents. If the beneficiaries are residents, a tax is levied on dividends and interest.	No, except for UT source income, such as rental income from UT real property.	Yes. See VA Code Ann. § 58.1-302.	Yes. W.Va. Code §11-21-7(c).	QST and Discretionary APT: No
	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	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. For LP, court may charge the debtor's partnership interest with the judgment but judgment creditor only has the rights of an assignee which include the entitlement only to the debtor partner's distribution. W. Va. Code § 47-9-41. For an LLC, charging order only constitutes a lien on the debtor's distributional interest. W. Va. Code § 31B-5-504.	QST and Discretionary APT: Yes; charging order is exclusive remedy for all LPs and LLCs, including single member LLCs.
34. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	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 §§ 64.2-729 to 64.2-733. No specific procedure for being discharged from liability on a trust.	Statute of limitations is one (1) year if the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and was informed of the time allowed for commencing a proceeding. W. Va. Code § 44D-10-1005(a). Otherwise, statute of limitations is five (5) years after the first to occur of (1) The removal, resignation or death of the trustee; (2) the termination of the beneficiary's interest in the trust; (3) the termination of the trust; or (4) the time when the beneficiary knew or should have known of the breach of trust. W. Va. Code § 44D-10-1005(b).	QST and Discretionary APT: Two years after trustee provides report that adequately discloses claims.

SUBJECT	TENNESSEE	UTAH	VIRGINIA	WEST VIRGINIA	WYOMING
35. Are there cases that have occurred in this state's courts which involve DAPT statutes (regardless of the DAPT state law involved)?	No	No	No	No	No
36. Are there cases involving this state's DAPT law (regardless of the state court where the case was heard)?	No	No	No	No	No
37. Are there cases that involve this state's asset protection laws which may affect the implementation of a DAPT?	No	No	No	No	No


17 Domestic Asset Protection Trust States
9 Inter Vivos QTIP Trust States
WA
OR
ID
MT
ND
SD
WY
MN
WI
MI
NY
VT
NH
ME
MA
CT
RI
PA
NJ
DE
MD
DC
NE
IA
IL
IN
OH
WV
VA
KY
NV
UT
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KS
MO
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SC
GA
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MS
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FL
HI
AK

EXHIBIT 1.A

States with Similar Domestic Self-Settled Asset Protection Legislation (as of September 2016)

State	Statute
Alaska	ALASKA STAT. §§ 13.36.310, 34.40.110
Colorado	COLO. REV. STAT. § 38-10-111
Delaware	DEL. CODE ANN. TIT. 12, §§3570-3576
Hawaii	HAW. REV. STAT. § 554G
Mississippi	Miss. Code Ann. §§91-9-701 – 91-9-723
Missouri	MO. REV. STAT. §§456.5-505
Nevada	NEV. REV. STAT. §§116.010-166.170
New Hampshire	N.H. REV. STAT. ANN. §564-D:1-18
Ohio	OHIO LEGACY TRUST ACT, CHAPTER 5816 OF THE OHIO REVISED CODE
Oklahoma	OKLA. STAT. ANN. tit. 31, § 10-18
Rhode Island	R.I. GEN. LAWS § 18-9.2-1 – 18-9.2-7
South Dakota	S.D. CODIFIED LAWS §§55.16-1–55-16-17
Tennessee	TENN. CODE ANN. § 35-16-101-112
Utah (repealed and re-enacted in 2013)	UTAH CODE ANN. §25-6-14
Virginia	VA. CODE ANN. § 64.2-745.1 and 64.2-745.2
West Virginia	W. VA. CODE SECTIONS 44D-5-503A, 44D-5-503B; 44D-5-503C; AND 44D-5-505
Wyoming	WYO. STAT. §§4-10-505 & 4-10-510–523

EXHIBIT 2

States with Similar Inter Vivos QTIP Trust Legislation (as of September 2016)

State	Statute
Arizona	Ariz. Rev. Stat. § 14-10505(E)
Arkansas (enacted March 12, 2015)	Ark. Code Ann. § 28-73-505(c)
Delaware	Del. Code Ann. Tit. 12 § 3536(c)
Florida	Fla. Stat. § 736.0505(3)
Indiana (proposed)	Indiana Stat. § I.C. 30-4.2.1-18
Kentucky	Ky. Rev. Stat. Ann. § 386B.5-020(8)(a)
Maryland	Md. Code Ann., Est. & Tr. § 14.5-1003(a)(1)-(2)
Michigan	Mich. Comp. Laws § 700.7506(4)
New Hampshire	New Hampshire Chapter 564-B:5-505(a)(2)(C)-(D)
North Carolina	N.C. Gen Stat. § 36C-5-505(c)
Oregon	Or. Rev. Stat. § 130.315(4)
South Carolina	S.C. Code Ann. § 62-7-505(b)(2)
Tennessee	Tenn. Code Ann § 35-15-505(d)
Texas	Tex. Prop. Code § 112.035(g)
Virginia	Va. Code Ann. § 64.2-747.B.3
Wyoming	Wyo. Stat. Ann. § 4-10-506(f)

EXHIBIT 2.A
Arkansas Bill Enacting Inter Vivos QTIP Approved 3/12/15

Stricken language would be deleted from and underlined language would be added to present law.
Act 396 of the Regular Session

1 State of Arkansas
2 90th General Assembly **A Bill**
3 Regular Session, 2015 SENATE BILL 260
4
5 By: Senator J. Hutchinson
6
7 **For An Act To Be Entitled**
8 AN ACT TO PROTECT THE INTERESTS OF TRUST SETTLORS
9 FROM FEDERAL TAXATION; AND FOR OTHER PURPOSES.
10
11
12 **Subtitle**
13 TO PROTECT THE INTERESTS OF TRUST
14 SETTLORS FROM FEDERAL TAXATION.
15
16
17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
18
19 SECTION 1. Arkansas Code § 28-73-505 is amended to read as follows:
20 28-73-505. Creditor's claim against settlor.
21 (a) Whether or not the terms of a trust contain a spendthrift
22 provision, the following rules apply:
23 (1) during the lifetime of the settlor, the property of a
24 revocable trust is subject to claims of the settlor's creditors<u>. If a trust</u>
25 <u>has more than one (1) settlor, the amount the creditor or assignee of a</u>
26 <u>particular settlor may reach may not exceed the settlor's interest in the</u>
27 <u>portion of the trust attributable to that settlor's contribution</u>; and
28 (2) with respect to an irrevocable trust, a creditor or assignee
29 of the settlor may reach the maximum amount that can be distributed to or for
30 the settlor's benefit. If a trust has more than one (1) settlor, the amount
31 the creditor or assignee of a particular settlor may reach may not exceed the
32 settlor's interest in the portion of the trust attributable to that settlor's
33 contribution.
34 (b) For purposes of this section:
35 (1) during the period the power may be exercised, the holder of
36 a power of withdrawal is treated in the same manner as the settlor of a

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revocable trust to the extent of the property subject to the power; and

(2) ~~upon~~ on the lapse, release, or waiver of ~~the~~ a power~~, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986 or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on January 1, 2005~~ of withdrawal, the holder of a power of withdrawal is not, by reason of any such power of withdrawal, treated as the settlor of the trust.

(c)(1) Subject to § 4-59-204, for the purposes of this section, property contributed to the following trusts is not deemed to have been contributed by the settlor, and a person who would otherwise be treated as a settlor or a deemed settlor of the following trusts shall not be treated as a settlor:

(A) an irrevocable trust that is treated as qualified terminable interest property under section 2523(f) of the Internal Revenue Code of 1986 as in effect on January 1, 2015, if the settlor is a beneficiary of the trust after the death of the settlor's spouse;

(B) an irrevocable trust that is treated as a general power of appointment trust under section 2523(e) of the Internal Revenue Code of 1986 as in effect on January 1, 2015, if the settlor is a beneficiary of the trust after the death of the settlor's spouse; and

(C) an irrevocable trust for the benefit of a person to the extent that the property of the trust was subject to a general power of appointment in another person.

(2) For purposes of this subsection (c), a person is a beneficiary whether named under the initial trust instrument or through the exercise of a limited or general power of appointment by that person's spouse or by another person.

(3) For purposes of subdivision (c)(1)(C) of this section, a general power of appointment means a power of appointment exercisable in favor of the holder of the power, the estate of the holder of the power, a creditor of the holder of the power, or a creditor of the estate of the holder of the power.

APPROVED: 03/12/2015

EXHIBIT 3
Tenancy by the Entireties Statutes

States	Statutes Referencing	Case Law Referencing (If necessary)	Recognize? (Yes or No)
Alabama		*Donegan v. Donegan*, 15 So. 823, 824 (1893) ("...the reason of the rule of the common law, that they should take by entirety,--per tout, not per my,--has ceased to exist."). *First Nat'l Bank v. Lawrence*, 101 So. 663, 663-64 (Ala. 1924) ("As a result of our statutory system joint owners of property, real or personal, including husband and wife, holding by inheritance, grant, devise or gift, become tenants in common, each owning a moiety, which, upon death, passes under the statute of descents and distributions. There is no survivorship as an incident to such estate.").	No
Alaska (1)	ALASKA STAT. § 34.15.140(a)		Yes
Arizona	ARIZ. REV. STAT. ANN. §25-211	*Sigmund v. Rea*, 226 Ariz. 373, 376 (Ariz. Ct. App. 2011) ("The notion that married persons in Missouri hold property as "one person" is wholly different from the model of community property, under which a separate entity -- the community -- owns property, realizes the fruits of the spouses' efforts and bears the burden of the debts they each may incur.").	No
Arkansas (2)		*Ford v. Felts*, 624 S.W.2d 449 (Ark. Ct. App. 1981) ("Arkansas follows the rule that a homestead may be acquired in land held by a husband and wife as tenants by entireties.").	Yes
California		*Tischhauser v. Tischhauser*, 298 P.2d 551, 553 (Cal. App. 2d Dist. 1956) ("At respondent's behest and without knowledge or consent of appellant wife, the title to the ranch was placed in the spouses as tenants by the entirety, a common law	No

States	Statutes Referencing	Case Law Referencing (If necessary)	Recognize? (Yes or No)
		estate recognized by Oregon law, one which does not exist in California.”).	
Colorado	COLO. REV. STAT. § 38-31-201		No
Connecticut	CONN. GEN. STAT. § 47-14a		No
Delaware (3)		*Citizens Sav. Bank, Inc. v. Astrin*, 61 A.2d 419, 421 (Del. Super. Ct. 1948) (“...it appears that the only property involved in this litigation is the real estate owned by the bankrupt and his wife as tenants by the entirely. In Delaware, this type of ownership retains most, if not all, of its common law features.”).	Yes
District of Columbia (x)		*Travis v. Benson*, 360 A.2d 506, 509 (D.C. 1976) (“Although tenancy by the entirety has been eliminated in many states, it is still recognized in the District of Columbia.”).	Yes
Florida (4)	FLA. STAT. § 655.79.	*Beal Bank v. Almand & Assocs.*, 780 So.2d 45 (Fla. 2001).	Yes
Georgia		*State v. Jackson*, 399 S.E.2d 88, 91 (1990) ("While the doctrine of survivorship as applied to joint tenancies has been distinctly abolished and does not exist in this State, there is no law of this State that we are aware of which prevents parties . . . from expressly providing that an interest in property shall be dependent upon survivorship."). *Spurlock v. Commercial Banking Co.*, 227 S.E.2d 790, 794 (Ga. Ct. App. 1976) (“Because of the abolition of joint tenancies, the interest created in a joint account or savings certificate with right of survivorship is a life estate with an alternative contingent remainder in fee simple.”).	No
Hawaii (5)	HAW. REV. STAT. § 509-2		Yes
Idaho		*In re Antonie*, 432 B.R. 843, 851	No

States	Statutes Referencing	Case Law Referencing (If necessary)	Recognize? (Yes or No)
		(Bankr. D. Idaho 2010) ("Debtor does not hold her interest in the mobile home by 'entirety.' And it has long been the law in Idaho that property jointly-owned with another is subject to the claims of the co-owners' creditors.").	
Illinois (6)	750 ILL. COMP. STAT. 65/22		Yes
Indiana (7)	IND. CODE ANN. § 32-17-3-1		Yes
Iowa		*Fay v. Smiley*, 207 N.W. 369, 371 (Iowa 1926) ("Assuming, for the purpose of this division of this opinion, that this deed, in the eyes of the common-law rule, would create an estate in entirety, we have to say that such a construction has never been recognized under the Iowa practice, and when attempts have been made to induce the court to make such construction, it has refused to do so. In the case of Hoffman v. Stigers, 28 Iowa 302, an attempt was made to have this court recognize an estate in entirety, and this was refused.").	No
Kansas	K.S.A. § 58-501		No
Kentucky (8)	KY. REV. STAT. ANN. § 381.050		Yes
Louisiana	LA. C.C. ART. 3526; POWELL ON REAL PROPERTY 7-52, §52.01 (Matthew Bender, Pub., 2011) ("Louisiana. Tenancy by the entirety does not appear in state statutes or cases which, given the state's civil law heritage, is not surprising.").		No
Maine		*In re Peters*, 2003 Bankr. LEXIS 1335 (Bankr. E.D. Pa. Oct. 7, 2003) ("...property may not be owned as tenants by entireties in Maine. Poulson v. Poulson, 145 Me. 15, 70 A.2d 868 (1950) (tenancy by entirety has not existed in Maine since 1844).").	No
Maryland (9)	MD. REAL PROP. CODE ANN § 4-108		Yes
Massachusetts(10)	MASS. ANN. LAWS ch. 209 § 1		Yes

States	Statutes Referencing	Case Law Referencing (If necessary)	Recognize? (Yes or No)
Michigan (11)		*Butler v. Butler*, 332 N.W.2d 488, 490 (Mich. Ct. App. 1983) ("...the common law remains the law of Michigan, stated: "In this State, where the common law is unchanged by statute, a conveyance to husband and wife conveys an estate in entirety, but may create one in joint tenancy or in common, if explicitly so stated in the deed").	Yes
Minnesota		*Wilson v. Wilson*, 45 N.W. 710, 711 (Minn. 1890) ("It would seem as though, the reason for the rule having ceased, and unity, so far as rights of property are concerned, no longer existing, the wife being as capable of taking and holding property as though she were unmarried, and she and her husband being no more considered as one person in the law as to property, there could no longer be any foundation for the rule. And the statute has very clearly abolished that sort of tenancy -- that is, by the entirety.").	No
Mississippi (12)	MISS. CODE ANN. § 89-1-7		Yes
Missouri (13)	MO. REV. STAT. § 442.025		Yes
Montana	MONT. CODE ANNO., § 70-1-306	*Lurie v. Sheriff of Gallatin County*, 999 P.2d 342, 345 (Mont. 2000) ("Accordingly, we hold that the estate by the entireties is not a permissible mode of ownership of property in Montana.").	No
Nebraska		*Sanderson v. Everson*, 141 N.W. 1025, 1026 (Neb. 1913) ("...the law of title by entireties does not exist in this state.").	No
Nevada	NEV. REV. STAT. § 123.030		No
New Hampshire		*Estate of Croteau v. Croteau*, 722 A.2d 464, 466 (N.H. 1998) ("A divorce would automatically sever only a tenancy by the entirety, a form of ownership whose attributes are not recognized in New	No

States	Statutes Referencing	Case Law Referencing (If necessary)	Recognize? (Yes or No)
		Hampshire.”).	
New Jersey (14)	N.J. STAT. ANN. § 46:3-17.4		Yes
New Mexico	N.M. STAT. ANN § 40-3-2		No
New York (15)	NY CLS REAL PROP. § 240-b		Yes
North Carolina (16)	N.C. GEN. STAT §39-13.3		Yes
North Dakota	N.D. CENT. CODE §47-02-08	*Renz v. Renz*, 256 N.W.2d 883, 885 (N.D. 1977) (“...North Dakota estates by the entirety have never been recognized.”).	No
Ohio (17)	OHIO REV. CODE ANN. § 5302.21	*Cent. Benefits Mut. Ins. Co. v. Ris Adm'Rs Agency*, 637 N.E.2d 291, 293 (Ohio 1994) (“Sub.S.B. No. 201, effective April 4, 1985, enacted the current version of R.C. 5302.17 and replaced the tenancy by the entireties with a survivorship tenancy. 140 Ohio Laws, Part I, 545, 556-557. However, Sub.S.B. No. 201 also enacted R.C. 5302.21, which provides that tenancies by the entireties created under former R.C. 5302.17 continue to be valid.”).	Yes
Oklahoma (18)	OKLA. STAT. tit. 60 § 74		Yes
Oregon (19)	OR. REV. STAT § 91.020	*Brownley v. Lincoln County*, 343 P.2d 529, 531 (Or. 1959) (“We have recognized in this state a form of concurrent ownership in real property by husband and wife which we have denominated a tenancy by the entirety...”).	Yes
Pennsylvania (20)	69 PA. STAT. ANN.§ 541		Yes
Rhode Island (21)		*Bloomfield v. Brown*, 25 A.2d 354, 359 (R.I. 1942) (“The possibility of creating an estate by entirety has not been removed by the married women's act, provided that the intention to create such an estate clearly appears in the conveyance.”).	Yes

States	Statutes Referencing	Case Law Referencing (If necessary)	Recognize? (Yes or No)
South Carolina	S.C. CODE ANN. § 27-7-40		No
South Dakota	S.D. Codified Laws § 25-2-3	*Schimke v. Karlstad*, 208 N.W.2d 710, 714 (S.D. 1973) ("With this long-standing history of legislation we conclude that estates by entireties have never been recognized as the law of this state.").	No
Tennessee (22)	TENN. CODE ANN. §66-1-109		Yes
Texas		*In re Garrett*, 429 B.R. 220, 240 (Bankr. S.D. Tex. 2010) ("'Texas does not recognize tenancies by the entirety.'").	No
Utah	UTAH CODE ANN. § 57-1-5 (7)		No
Vermont (23)	VT. STAT. ANN. tit.15 § 67		Yes
Virginia (24)		*Rogers v. Rogers*, 512 S.E.2d 821, 822 (Va. 1999) ("We have stated, clearly and without equivocation, that real property held as tenants by the entireties is exempt from the claims of creditors who do not have joint judgments against the husband and wife.").	Yes
Washington	WASH. REV. CODE ANN. § 64.28.010		No
West Virginia		*Wartenburg v. Wartenburg*, 100 S.E.2d 562, 565 (W. Va. 1957) ("The rights of survivorship do not depend on the continued existence of common law estates by entireties. Such estates were created and existed at common law only by virtue of a fiction, a fiction not recognized in this State... effect of the statutes mentioned, especially Code, 36-1-19, we believe, completely abolishes common law estates by entireties.").	No

States	**Statutes Referencing**	**Case Law Referencing (If necessary)**	**Recognize? (Yes or No)**
Wisconsin		*Estate of Richardson v. Estate of Richardson*, 282 N.W. 585, 587 (Wis. 1938) ("Estates by entirety do not exist under the law of this state.").	No
Wyoming (25)	WYO. STAT. ANN. § 34-1-140		Yes

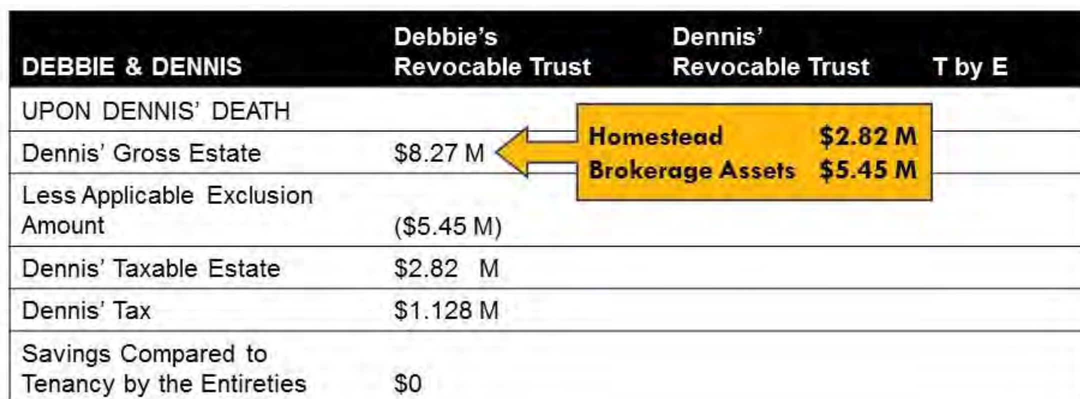
EXHIBIT 4
Debbie and Dennis - Tenancy by the Entireties Plan

DEBBIE & DENNIS	Debbie	Dennis	T by E
Upon Debbie's Death House – Protected Homestead			$ 2.82 M
Brokerage			$10.9 M
TOTAL			$13.72 M
Debbie's Gross Estate Assuming She Dies First			$6.86 M
MARITAL DEDUCTION			$6.86 M
Debbie's Taxable Estate			$0
Debbie's Tax			$0

DEBBIE & DENNIS	Debbie	Dennis	T by E
UPON DENNIS' DEATH			
Dennis' Gross Estate			$13.72 M
Less Applicable Exclusion Amount (assuming portability)			($10.9 M)
Dennis' Taxable Estate			$2.82 M
Dennis' Tax			$1.128 M
Assets subject to creditors while both married and living			$0
Assets subject to creditors upon death of 1st spouse or divorce			$10.9 M
Assets benefitting from step up in basis upon death of surviving spouse			$10.9 M + homestead

EXHIBIT 5
Debbie and Dennis - CPA's Tax Savings Plan

DEBBIE & DENNIS	Debbie's Revocable Trust	Dennis' Revocable Trust	T by E
Upon Debbie's Death House – Protected Homestead			$2.82M
Brokerage	$5.45 M	$5.45 M	
TOTAL	$5.45 M	$5.45 M	$2.82 M
Debbie's Gross Estate Assuming She Dies First	$6.86 M		
Debbie's Share of Homestead to Dennis Outright	($1.41 M)		
MARITAL DEDUCTION	$1.41 M		
Debbie's Taxable Estate	$5.45 M		
Less Applicable Exclusion Amount	($5.45 M)		
Debbie's Tax	$0		



DEBBIE & DENNIS	Debbie's Revocable Trust	Dennis' Revocable Trust	T by E
UPON DENNIS' DEATH			
Dennis' Gross Estate	$8.27 M		
Less Applicable Exclusion Amount	($5.45 M)		
Dennis' Taxable Estate	$2.82 M		
Dennis' Tax	$1.128 M		
Savings Compared to Tenancy by the Entireties	$0		

Assets subject to creditors	
while both married and living	$10.9 M
death of 1st spouse or divorce, assuming assets pass into spendthrift trust for surviving spouse upon death of 1st spouse	$5.45 M

Basis step up	
death of surviving spouse, no GPA	$5.45 M + homestead
death of surviving spouse, GPA	$10.9 M + homestead

EXHIBIT 6
Debbie and Dennis - Inter Vivos QTIP

DEBBIE & DENNIS	Debbie's QTIP	Dennis' QTIP	T by E
Upon Debbie's Death House – Protected Homestead			$2.82 M
Brokerage	$5.45 M	$5.45 M	
TOTAL	$5.45 M	$5.45 M	$2.82 M
Debbie's Gross Estate Assuming She Dies First	$6.86 M		
Debbie's Share of Homestead to Dennis' Marital Deduction	($1.41 M)		
MARITAL DEDUCTION	$ 1.41 M		
Debbie's Taxable Estate	$ 5.45 M		
Less Applicable Exclusion Amount	($5.45 M)		
Debbie's Tax	$0		

DEBBIE & DENNIS	Debbie's QTIP	Dennis' QTIP	T by E
UPON DENNIS' DEATH			
Homestead	$2.82 M		
QTIP Trust from Debbie	$5.45 M		
Dennis' Gross Estate	$8.27 M		
Less Applicable Exclusion Amount	($5.45 M)		
Dennis' Taxable Estate	$2.82 M		
Dennis' Tax	$1.128 M		

Assets subject to creditors	
while both married and living	$0
death of first spouse or divorce	$0 M

Basis step up	
death of surviving spouse, no GPA	$5.45 M + homestead
death of surviving spouse, GPA	$10.9 M + homestead

EXHIBIT 7
Debbie and Dennis - Comparison of Benefits of Inter Vivos QTIP

	Tenancy by the Entirety Plan	Tax Plan	QTIP Plan
Technique	T by E	Tax Savings Plan	Funded Inter Vivos QTIP
Protected While Both Living	$10.9 M	$0	$10.9 M
Protected Upon Death of 1st Spouse	$0	$5.45 M	$10.9 M
Tax Paid Upon Death of Spouse (assuming portability)	$1.128 M	$1.128 M	$1.128 M
Basis step up, no GPA 1st, upon death of surviving spouse	$5.45 M	$5.45 M	$5.45 M
Basis step up, GPA, upon death of surviving spouse	$10.9 M*	$10.9 M**	$10.9 M**

*Full step up of all assets included in estate of surviving spouse.

**Full step up of Code Section 2044 assets but no step up of appreciation of assets in credit shelter trust upon death of first spouse.

EXHIBIT 8

Protecting Trusts From Claims of Alimony or Child Support by Barry A. Nelson

Trusts & Estates Magazine, March 2014

Article originally published in the March 2014 issue of *Trusts & Estates.*
For more information, go to *trustsandestates.com*.

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Dancing Machines—"Deux Danseuses Au Foyer" (20½ in. by 17½ in.) by Edgar Degas, sold for $826,254 at Sotheby's Impressionist, Modern & Surrealist Art Evening Sale in London on Feb. 5, 2014, p. 4.

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FEATURE:
ESTATE PLANNING & TAXATION

By **Barry A. Nelson**

Protecting Trusts From Claims Of Alimony or Child Support

In *Berlinger*, a Florida court ruling updates this issue

Parents who want a child's inheritance to pass into a trust, rather than outright, often seek to prevent the child's former spouse from reaching such assets in the event of divorce. As I noted in my April 2013 article for *Trusts & Estates*,[1] under the laws of some states, regardless of whether a trust has a spendthrift provision or is a discretionary trust (or both), a beneficiary's children and/or a former spouse may have rights to reach trust assets that are otherwise protected from creditors. I expressed concern that discretionary and spendthrift trusts under Article 5 of the Uniform Trust Code (UTC) aren't protected from claims of a former spouse who holds a judgment in the form of support (support judgment). I warned that in some states, such as Florida, it was unclear whether a former spouse with a support judgment could garnish assets held in a discretionary trust. My article stated: "[i]n light of the fact that as many as 30 states provide some type of exception creditor access to spendthrift trusts, it appears that for those beneficiaries known to have exposure, forum shopping for more protective jurisdictions may be advisable."[2]

Since that article was published, there's been a new development on this issue. A Florida court, in *Berlinger v. Casselberry*,[3] ruled that a spouse has the right to garnish assets held in a discretionary trust. Note that as we went to press, the ruling in *Berlinger* hadn't yet been deemed "final" due to a Rehearing Motion filed in December 2013 that's yet to be ruled on. However, I believe that practitioners should still consider whether a trust jurisdiction other than Florida is preferable.

Barry A. Nelson is founder of the Law Offices of Nelson & Nelson, P.A., and is a co-founder of The Victory Center for Children with Autism, both in North Miami Beach, Fla.

Law Before FTC Enacted

Prior to enactment of the Florida Trust Code (FTC) in 2006, the Florida Supreme Court decision in *Bacardi v. White*[4] controlled the rights of a spouse or former spouse holding a support judgment resulting from dissolution of marriage against two types of Florida trusts: (1) spendthrift trusts, in which the trustee has an obligation to make distributions to a beneficiary based on a stated standard; and (2) discretionary trusts, in which the trustee has broader discretion whether to make a distribution. *Bacardi* held that, with respect to spendthrift trusts that weren't discretionary, a spouse or former spouse with a support judgment could seek a court order to obtain distributions otherwise provided to an intended beneficiary. For discretionary trusts, when the trustee wasn't obligated to make present distributions to a beneficiary, *Bacardi* held that a court couldn't direct the trustee to make a distribution. However, if the trustee of a discretionary trust decides to make a distribution to an intended beneficiary, then such beneficiary's former spouse who has a support judgment may petition the court to grant a continuing garnishment. Thus, if the trustee wants to make a distribution to or for the benefit of the beneficiary, under *Bacardi*, the beneficiary's former spouse holding a judgment could cut off the proposed distributions before they reach the hands of the intended beneficiary.[5]

There's no official written indication as to whether the members of the Trust Law committee of the Real Property, Probate and Trust Law Section of the Florida Bar, who wrote the FTC, intended that Florida Statutes Section 736.0504, entitled "Discretionary Trusts; effect of standard," override the *Bacardi* decision.[6]

In an article I wrote in March 2012,[7] "*Bacardi* on the Rocks,"[7] I concluded that Florida law was unclear and, therefore, risky and that, with respect to potential claims of exception creditors (such as a former spouse),

the laws of Nevada and South Dakota were much more clear and protective of discretionary trust beneficiaries who are subject to support judgments resulting from a dissolution of marriage (note, as indicated below, in 2013, Alaska passed legislation that, in my opinion, made its laws comparable with those of Nevada and South Dakota as to protection of intended beneficiaries of discretionary trusts; Delaware is comparable too and also passed more protective legislation in 2013).[8]

Berlinger Facts

After 30 years of marriage, Bruce Berlinger and his wife, Roberta Casselberry, divorced in 2007. Pursuant to a marital settlement agreement ratified by the court and incorporated into the final judgment of dissolution, Bruce agreed to pay Roberta $16,000 a month in permanent alimony. Thereafter, Bruce and his current wife enjoyed a comfortable lifestyle sustained through payments made to them directly or on his behalf by discretionary trusts, including payments of all of his living expenses, mortgage obligations, property taxes, insurance, utilities, food, groceries and miscellaneous living expenses. Although Bruce continued to benefit from substantial distributions from the discretionary trusts, he voluntarily stopped paying alimony in May 2011.

> Remedies provided to exception creditors of spendthrift and discretionary trusts vary from state to state.

When Bruce stopped paying alimony, Roberta filed a motion to enforce and for contempt. Just prior to the hearing, the parties reached a settlement wherein Bruce agreed to satisfy his alimony arrears by liquidating an individual retirement account. After the IRA liquidation, $32,625.54 remained owing on the arrears judgment. The court issued writs of garnishment to SunTrust Bank (SunTrust), as trustee of the discretionary trusts.

Around September 2011, Bruce was provided a Visa card from SunTrust to use for paying expenses not directly paid by the trusts. The trusts paid the Visa credit card bills, including expenses for travel, entertainment, clothing, medical expenses, grooming, gifts and Bruce's current wife's credit card bills.

In January 2012, Roberta filed a second motion for civil contempt and enforcement against Bruce, whereby the trial court issued writs of garnishment against SunTrust.

On April 26, 2012, Roberta filed a motion for continuing writ of garnishment against SunTrust, seeking to attach the present and future distributions made to or for the benefit of Bruce. Roberta alleged that traditional methods of enforcing alimony were insufficient.

On Nov. 5, 2012, one day before the hearing on Roberta's motion for continuing writs of garnishment, a new trustee (who replaced SunTrust) filed an action seeking a declaration that the family trusts at issue were discretionary trusts.

During the Nov. 6, 2012 hearing, the new trustee testified that for the past year, the trustees hadn't made any payments directly to Bruce. Instead, the trustees made payments on behalf of Bruce and his current wife directly for their health insurance and household expenses, including: the mortgage, property taxes, homeowner's insurance, electricity, water, garbage, sewer, telephone, Internet, lawn care, pool care and pest control. The new trustee asserted that the trusts were discretionary and opined that the applicable trust statute, Section 736.0504, prohibited any creditor, including Roberta, from attaching any distributions paid on behalf or for the benefit of Bruce. Neither Bruce nor his current wife were employed, and neither of them intended to look for work.

Evidence regarding the credit card given to Bruce in September 2011 reflected all bills went to the trustee, who paid them from the trust assets. Bruce also took cash advances on the card to pay his maid, provide cash to his current wife and pay her personal expenses.

Bruce argued Florida Statutes Section 736.0504 prohibited Roberta from attaching distributions from a discretionary trust for his benefit. Specifically, Bruce said Florida Statutes Section 736.0504 prohibits creditors from attaching distributions from a discretionary trust, which are afforded greater protection from

creditors under the FTC.

On Nov. 27, 2012, the trial court entered orders granting Roberta's motion for continuing writs of garnishment.

Berlinger Ruling

The opinion in *Berlinger* was quite direct, stating "[w]e conclude that the Florida Supreme Court's decision in *Bacardi v White*, 463 So.2d 218 (Fla. 1985), is still controlling."[9]

The court analyzed Florida Statutes Sections 736.0503 and 736.0504, both enacted as part of the FTC. Because the trust in *Berlinger* was a discretionary trust, the critical section was Florida Statutes Section 736.0504(2), which provides a former spouse may not compel distributions that are subject to a trustee's discretion *or attach or otherwise reach* [emphasis added] the interest, if any, which the beneficiary may have.[10] The opinion states:

> . . . [t]he section does not expressly prohibit a former spouse from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. As a result it makes no difference that the trusts are discretionary.[11]

The opinion notes that the spouse seeking the continuing garnishment wasn't seeking an order to compel the trustee to make a distribution or allowing the creditor to "attach" the beneficiary's interest. "Instead, she obtained an order granting writs of garnishment against discretionary disbursements made by a trustee exercising its discretion."[12]

The *Berlinger* opinion states:

> Sections 736.0503 and 736.0504 codify the Florida Supreme Court's holding in *Bacardi*. Neither section protects a discretionary trust from garnishment by a former spouse with a valid order of support;

It goes on to say that Florida's public policy favoring spendthrift trusts protecting a beneficiary's income "gives way to Florida's strong public policy favoring enforcement of alimony and support orders. *See Gilbert v. Gilbert*, 447 So. 2d 299, 302 (Fla.2d DCA1984)."[13]

Other Jurisdictions

As noted in my two earlier articles on this issue,[14] it was unclear whether the FTC codified or overrode *Bacardi*. Numerous drafting committee members for the FTC who were asked had very different recollections as to whether the FTC's enactment was intended to override *Bacardi* or follow it.[15] In my opinion, there was no consensus on this issue. I suggested this question be addressed legislatively, so those drafting Florida trusts, and their clients, wouldn't get caught unawares. *Berlinger* may have caught not only Bruce by surprise, but also members of the committee that drafted Florida Statutes Sections 736.0503 and 736.0504. Attorneys and politicians can debate whether *Bacardi* should continue to be

> Courts will go out of their way to protect spouses with support judgments if the law isn't absolutely clear.

Florida law or whether parents should be able to fully protect their children's inheritances from claims of former spouses. However, as planners, attorneys drafting trusts for their clients need to advise them as to the state of the law, and clients who believe protecting their intended beneficiaries from situations such as *Bacardi* and *Berlinger* may want to create trusts in states where the law is more favorable to discretionary trust beneficiaries.

Four states—Alaska, Delaware, Nevada and South Dakota—currently appear to provide significantly greater protection for discretionary trust beneficiaries. In light of *Berlinger*, Florida, as well as other states that either: (1) haven't clearly indicated whether a former spouse with a support judgment can reach discretionary trust assets; or (2) provide enhanced protection for exception creditors (such as for those creditors holding child support judgments or support judgments resulting from a dissolution of marriage), should determine if their state statutes need

clarification and if so, what direction their state should go with respect to the conflicting policies of protecting discretionary trust beneficiaries, as compared to favoring enforcement of alimony and support orders.

The Remedy

In light of *Bacardi* and *Berlinger*, practitioners should review state laws to determine whether a former spouse with a support judgment is likely to benefit from a continuing garnishment over assets contained in discretionary irrevocable trusts created by parents for their children. If applicable state law has determined public policy is in favor of the former spouse with the support judgment, then practitioners should advise clients of the potential benefits of moving the situs of the beneficiary's trust to a more protective state.

> Until these issues are resolved, consider disclosing the *Berlinger* case to clients.

Best Option for Florida Residents?

Until Florida law and public policy regarding discretionary trusts and their protection (or lack thereof) from a beneficiary's former spouse who has a support judgment is determined, parents desiring maximum protection for their children should consider creating and administering discretionary trusts in Alaska, Delaware, Nevada or South Dakota. Those clients who've already informed their attorneys of such concerns and objectives should be advised of *Berlinger* and the benefits of updating their estate-planning documents by creating discretionary trusts in these states.

Lessons Learned

Remedies provided to exception creditors of spendthrift and discretionary trusts vary from state to state. For those states that adopt Uniform Trust Code (UTC) Sections 503 and 504 without modification, trusts may be subject to claims of a spouse, former spouse or child. Greater analysis is required for states, such as Florida, that adopted modified UTC Sections 503 and 504. In light of *Berlinger*, it appears that even states that modified the UTC to provide that exception creditors may not attach or otherwise reach discretionary trust assets may find that courts will follow the law existing as of enactment, unless the adoption provides the intent to modify existing law. Courts will go out of their way to protect spouses with support judgments if the law isn't absolutely clear. For these reasons, it's important to consider moving trusts to states such as Alaska, Delaware, Nevada and South Dakota.[16]

Ability to Move Situs

One issue that's beyond the scope of this article but gives reason for concern, is whether the trustee of a discretionary trust in a jurisdiction that would permit a continuing garnishment in favor of a former spouse with a support judgment can move the trust situs, especially when the beneficiary isn't current on alimony or support obligations. In other words, is it possible that such a situs change of the trust could be considered a fraudulent conveyance? Best practice may be to ensure trust settlors are aware of the *Berlinger* and *Bacardi* attacks and leave it up to the settlor of the trust to decide whether to incur the expense and administrative burdens of creating a trust and then administering it in a protective state. Until these issues are resolved, consider disclosing the *Berlinger* case to clients and providing the options described above.

Review State Laws

State laws should be reviewed to see the likelihood that a former spouse could benefit from a continuing garnishment over discretionary trust assets. If so, consider whether a parent or other settlor would be able to create a trust to protect a child or other beneficiary, such that the trust funds are held exclusively to benefit the beneficiary and specifically prohibit any distributions that would benefit a former spouse or any other exception creditor. If so, should the applicable statutes specifically provide that a trustee can make distributions for the benefit of the intended trust beneficiary and that continuing garnishments and other similar remedies are specifically prohibited?

It may be that the facts in *Berlinger* were simply

FEATURE:

too powerful for the Second District Court of Appeal of Florida to ignore; the trust assets allowed the beneficiary to live a luxurious lifestyle while refusing to satisfy his obligation to pay a support judgment held by an ex-spouse. This was a very compelling scenario for the court, and it used the opportunity to state its position on an issue that not all asset protection attorneys even felt was unclear. For better or worse, it's clear now, in Florida … at least until another District Court of Appeal in Florida, presented with a different set of facts, rules otherwise or the legislature changes the law. Well, it's time for a drink. To be continued!

—The author acknowledges and appreciates the assistance of Michael Sneeringer, associate at the Law Offices of Nelson & Nelson, P.A. in North Miami Beach, Fla., in preparation of this article.

Endnotes

1. *See* Barry A. Nelson, "Are Trust Funds Safe From Claims For Alimony or Child Support?" *Trusts & Estates* (April 2013) at p. 15.
2. *Ibid.* at p. 20.
3. *Berlinger v. Casselberry*, Case No. 2D12-6470 (Fla. 2d Dist.Ct.App. Nov. 27, 2013).
4. *Bacardi v. White*, 463 So.2d 218 (Fla. 1985).
5. *Ibid.* ("If disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment.")
6. See Fla. Stat. Section 736.0504:
   (1) As used in this section, the term 'discretionary distribution' means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.
   (2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:
   (a) Compel a distribution that is subject to the trustee's discretion; or
   (b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.
   (3) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.
   (4) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.
7. Barry A. Nelson, "*Bacardi* on the Rocks," 86 *Fla. Bar. J.* 21 (March 2012).
8. For a more detailed discussion on discretionary and spendthrift trusts under Article 5 of the Uniform Trust Code, *see* Nelson, *supra* note 1.
9. *See supra* note 3.
10. Fla. Stat. Section 736.0504(2).
11. *Berlinger, supra* note 3 at 9.
12. *Ibid.*
13. *Ibid.*
14. See Nelson, *supra* note 1 and Nelson, *supra* note 7.
15. See Nelson, *supra* note 7 at pp. 24, 26.
16. For the author's prior commentary on Nevada and South Dakota, *see* Nelson, *supra* note 1 at pp. 20-22. For extensive articles discussing the changes to Alaska law, *see* Jonathan G. Blattmachr, Bethann B. Chapman, Mitchell M. Gans, and David G. Shaftel, "New Alaska Law Will Enhance Nationwide Estate Planning-Part 1," 40 *Est. Plan. J.* 3 (September 2013) and Jonathan G. Blattmachr, Bethann B. Chapman, Mitchell M. Gans, and David G. Shaftel, "New Alaska Law Will Enhance Nationwide Estate Planning-Part 2," 40 *Est. Plan. J.* 20 (October 2013). *See also* 12 Del. Code Section 3536 (2013).

SPOT LIGHT

Dry Wit

"Femme S'Essuyant Les Pieds" (18 in. by 22 7/8 in.) by Edgar Degas, sold for $2,875,167 at Sotheby's recent Impressionist, Modern & Surrealist Art Evening Sale in London on Feb. 5, 2014. By bringing the traditional methods of a history painter to bear on contemporary subject matter, Degas became a classical painter of modern life.

EXHIBIT 9
Steve Leimberg's Estate Planning Email Newsletter – Archive Message #2244 by Barry Nelson & Richard Franklin

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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2244

Date: 15-Sep-14
From: Steve Leimberg's Estate Planning Newsletter
Subject: Barry Nelson & Richard Franklin: Inter Vivos QTIP Trusts Could Have Unanticipated Income Tax Results to Donor Post-Divorce

"Testamentary QTIPs are perhaps the most common form of marital deduction trust. The rules for structuring a QTIP trust upon the settlor's death are generally known and accepted, but the creation of inter vivos QTIP trusts are less common, even though such trusts offer superb estate planning opportunities. While the core principles of testamentary and inter vivos QTIP trusts are exactly the same, inter vivos QTIP trusts require additional considerations that are not as well known to those who may not be using inter vivos QTIP trusts on a regular basis.

Numerous articles and presentations have extolled the many benefits of inter vivos QTIP trusts including asset protection, creation of estate tax discounts and 'Supercharging^{sm}.' However, estate planners and their clients may not focus on the fact that the donor of an inter vivos QTIP trust may have continuing obligations to pay income taxes on trust capital gains post-divorce, notwithstanding that the donor may have no right to trust distributions or access to trust assets to pay such taxes."

Barry A. Nelson and **Richard Franklin** provide **LISI** members with commentary that reviews the potential income tax consequences to the donor of an inter vivos QTIP trust. The authors would like to acknowledge the review of their commentary by **Carlyn S. McCaffrey** and **Bruce Stone**. Their comments were integral to the issues discussed and are integrated herein. The assistance of **Michael A. Sneeringer, Esq.** is also acknowledged and appreciated.

Barry A. Nelson, a Florida Bar Board Certified Tax and Wills, Trusts and Estates Attorney, is a shareholder in the North Miami Beach law firm of **Nelson & Nelson, P.A.** He practices in the areas of tax, estate planning, asset protection planning, probate, partnerships and business law. He provides counsel to high net worth individuals and families focusing on income, estate and gift tax planning and assists business owners to most effectively pass their ownership interests from one generation to the next. He assists physicians, other professionals and business owners in tax, estate and asset protection planning. As the father of a child with autism, Mr.

Nelson combines his legal skills with compassion and understanding in the preparation of Special Needs Trusts for children with disabilities. Mr. Nelson is a Fellow of the American College of Trust and Estate Counsel and served as Chairman of its Asset Protection Committee from 2009 to 2012. Mr. Nelson is named in *Chambers USA: America's Leading Lawyers for Business* as a leading estate planning attorney in Florida. Since 2010, he has been listed as one of less than 10 lawyers receiving their highest rating of "Band 1" in the Florida Estate Planning category. Mr. Nelson has been listed in *the Best Lawyers in America* since 1995 and is a Martindale-Hubbell AV-rated attorney. Mr. Nelson was recently named by Best Lawyers in America as the 2015 Trusts and Estates "Lawyer of the Year" in Miami.

As the Founding Chairman of the Asset Preservation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar from 2004-2007, he introduced and coordinated a project to write a treatise authored by committee members entitled *Asset Protection in Florida* (Florida Bar CLE 2008, 3rd Edition 2013). Mr. Nelson wrote Chapter 5 entitled "Homestead: Creditor Issues." He is a past President of the Greater Miami Tax Institute. Mr. Nelson is a co-founder and current Board Member of the Victory Center for Autism and Behavioral Challenges (a not-for profit corporation) and served as Board Chairman from 2000-2008.

Richard Franklin is a member of **McArthur Franklin PLLC** in Washington, D.C. He focuses on estate planning, trusts and estate administration, and beneficiary and fiduciary representation. Mr. Franklin is a member of the District of Columbia and Florida Bars, is a Fellow of the American College of Trust and Estate Counsel, and is Group Vice-Chair of the ABA RPTE Section's Income and Transfer Tax Planning Group. He serves on the ACTEC Transfer Tax Study Committee and on the Steering Committee for the DC Bar's Estates, Trusts & Probate Law Section. He has spoken at numerous estate planning programs and written on estate planning topics for Actionline, BNA Insights, Estate Planning, Journal of Multistate Taxation and Incentives, Probate & Property, Steve Leimberg's Newsletters, Tax Notes, The Florida Bar Journal, The Washington Lawyer, Trusts & Estates and the BNA Estates, Gifts & Trust Journal. Mr. Franklin is a DC Super Lawyer and is ranked in the 2009 - 2014 editions of the Best Lawyers in America as a leading lawyer in the Trusts and Estates category.

Here is their commentary:

EXECUTIVE SUMMARY:

Testamentary QTIPs are perhaps the most common form of marital deduction trust. The rules for structuring a QTIP trust upon the settlor's death are generally known and accepted, but the creation of inter vivos QTIP trusts are less common, even though such trusts offer superb estate planning opportunities. While the core principles of testamentary and inter vivos QTIP trusts are exactly the same, inter vivos QTIP trusts require additional considerations that are not as well known to those who may not be using inter vivos QTIP trusts on a regular basis. This commentary highlights one of those considerations.

Estate planners typically understand that the donor spouse of an inter vivos QTIP trust will generally be taxed on all trust income under the grantor trust rules provided in Code Sections 672(e) and 677(a).[1] However, the estate planner (and his or her client) may be surprised that for the reasons discussed below, grantor trust status may continue with respect to undistributed capital gains post-divorce during the remaining lifetime of the donee spouse. In such

event the donor spouse will be subject to income taxes, post-divorce, on capital gains retained in the inter vivos QTIP trust during the remaining lifetime of the former spouse.

Numerous articles and presentations have extolled the many benefits of inter vivos QTIP trusts including asset protection, creation of estate tax discounts and "Supercharging^{sm}."[ii] However, estate planners and their clients may not focus on the fact that the donor of an inter vivos QTIP trust may have continuing obligations to pay income taxes on trust capital gains post-divorce, notwithstanding that the donor may have no right to trust distributions or access to trust assets to pay such taxes.

COMMENT:

Code Section 682 Provides Limited Relief Post-Divorce

Code Section 682 provides that upon divorce, the donee spouse pays tax on distributed income from a trust that otherwise was a grantor trust taxed to the donor spouse. Specifically, Code Section 682 provides that "[t]here shall be included in the gross income of a wife who is divorced . . . the amount of the income[iii] of any trust which such wife is entitled to receive[iv] and which, except for this section, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of this subtitle, be includible in the gross income of such husband."

Income Is Taxed to Donee Spouse Post-Divorce

For gift tax purposes, qualified terminable interest property is property in which the donee spouse has a qualifying income interest for life and to which a gift tax QTIP election has been made.[v] The donee spouse's right to income must begin immediately upon establishing the inter vivos QTIP trust and must continue for the donee spouse's life. An interest subject to termination upon the occurrence of a specified event, such as divorce, will not satisfy the qualifying income interest for life requirement.[vi] This means that following divorce, the inter vivos QTIP trust income must continue to be distributed to the donee spouse. Pursuant to Code Section 682, this will be "income" the donee spouse is "entitled to receive." But for Code Section 682, this income would be includible in the gross income of the donor spouse pursuant to Code Section 672(e)(1)(A). Therefore, Code Section 682 operates to override the grantor trust rules and tax the income to the divorced donee spouse.[vii]

Capital Gains

Code Section 682 does not apply to shift income tax on accumulated capital gains from the donor spouse (or the trust itself) to the donee spouse post-divorce. In PLR 200408015,[viii] the Service considered a trust established by the husband incident to divorce to pay the wife an annuity for life.[ix] Following the wife's death, the trust continued for the children. The husband retained no beneficial interest following the wife's death that would attract estate taxation. The husband intentionally retained a non-fiduciary power to reacquire the trust assets by substituting assets of equivalent value, thereby causing grantor trust status pursuant to Code Section 675(4)(C). The Service analyzed the application of Code Section 682 as follows:

> Provided that the circumstances surrounding Trust's administration indicate that the power of administration held by Settlor over Trust (i.e., the power to substitute assets for assets of equivalent value) is exercisable by Settlor in a nonfiduciary capacity without the approval or consent of a person in a fiduciary capacity, Settlor will be treated as the owner of Trust. We further conclude that while both Settlor and Wife are alive, section 682 governs the income taxation of Trust. Accordingly, distributions from Trust to Wife are deductible by Trust and includible

> by Wife in her gross income to the extent provided in sections 661 and 662. Under the terms of Trust, capital gains are not includible in the distributions to Wife. Accordingly, capital gains are not included in the distributions to Wife and are included in the gross income of Settlor under section 675(4) (subject to the conditions noted above regarding section 675(4)).[x]
>
> We further conclude that if Wife predeceases Settlor, upon the death of Wife, section 682 would no longer apply and Trust will be treated as a grantor trust with Settlor as owner, provided that, after the death of Wife, Settlor retains the same powers of administration that cause Trust to be a grantor trust under section 675(4) (subject to the conditions noted above regarding section 675(4)). If Settlor predeceases Wife, section 682 no longer applies and payments to Wife will be deductible to Trust under section 661 and includible in Wife's gross income under section 662. Income allocable to principal will be taxable to Trust. If neither Settlor nor Wife is alive, then the income taxation of Trust is also governed by the rules of subchapter J, other than the grantor trust rules and section 682.

If the inter vivos QTIP trust is a grantor trust as to principal, the donor spouse will generally continue to pay the income taxes on undistributed capital gains post-divorce during the lifetime of the donee spouse. The inter vivos QTIP trust may be a grantor trust as to principal for any number of reasons. It may because the assets revert to the donor upon the death of the donee spouse (i.e., the donor spouse has a backend interest), or as in PLR 200408015, another grantor trust trigger could have been intentionally used. In the context of a lifetime QTIP trust, however, the most obvious way grantor trust status would be applicable as to principal is that the trustees have the discretion to distribute trust principal to the donee spouse.

If capital gains are allocated to income in an inter vivos QTIP trust, Code Section 682 should apply to shift income tax on capital gains from the trust donor to the donee spouse post-divorce.[xi] According to PLR 9235032, if capital gains are properly part of DNI, Code Section 682 operates to switch the income taxation of such amounts from the donor spouse to the donee spouse. Therefore, in the context of an inter vivos QTIP trust, the trust instrument could mandate that capital gains be allocated to income, which then would be distributed pursuant to the "all income" requirement applicable to a QTIP trust, and Code Section 682 would require the donee spouse to include such amounts in gross income, subject to the amounts being included in DNI.[xii] However, this most likely will not be the desired result post-divorce as the donor usually would prefer that the capital gains be accumulated rather than paid to a former spouse.

Flying under the Radar

There are only limited articles that address the post-divorce income tax consequences to the donor of an inter vivos QTIP trust.[xiii] Attorneys and other advisors should be aware of the continuing income tax obligations during divorce negotiations, and the potential continuing income tax burden on the inter vivos QTIP trust donor should be considered as a part of marriage settlement agreements. Possibly the issue could be addressed in the form of a postnuptial agreement executed prior to creation of the inter vivos QTIP trust, but clients are often reluctant to do so. To avoid a surprise in the event of divorce where the donor spouse becomes taxed on undistributed trust capital gains, the issues described herein should be considered in advance of execution of the inter vivos QTIP trust. The planning options described below should be considered.

QTIP Qualifications versus Divorce Consequences

Even if the parties recognize the income tax exposure to the donor spouse post-divorce, there is no ability to provide for a tax reimbursement clause in the inter vivos QTIP trust in favor of the donor spouse, without disqualifying such trust from the gift tax marital deduction. Code Section 2523(f)(3) applies the testamentary definition of a qualifying income interest for life for an inter vivos QTIP trust by reference to Code Section 2056(b)(7)(B)(ii). The donee spouse has a qualifying income interest for life if: (i) the donee spouse is entitled to all the income[xiv] from the property; and (ii) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Some inter vivos QTIP trusts provide that in the event of divorce, the donee beneficiary no longer is entitled to discretionary principal distributions from the inter vivos QTIP trust. This should terminate grantor trust status under Code Section 677(a)(1) based on the discretionary right to distribute principal. In such case, if there is no other trigger creating grantor trust status as to principal, the capital gains allocated to principal should be taxable to the trust post-divorce. As noted above, to qualify for the gift tax marital deduction, the inter vivos QTIP trust income must continue to be paid to the donee spouse for the lifetime of the donee spouse even after divorce, and no distributions can be made to anyone other than the donee spouse.[xv] But, Code Section 682 would switch the taxation of the trust's income post-divorce to the donee spouse.

The Potential Income Tax Surprise for the Donor Spouse Post-Divorce

Typically in the event of a divorce, the donor spouse has lost a portion of marital assets, may have obligations to pay alimony and child support, will no longer have indirect access to the inter vivos QTIP trust income that is payable annually to the donee spouse, and yet may be required to pay capital gains taxes on sales of the assets of the inter vivos QTIP trust where the sales proceeds either are not or may not be distributed to the donee spouse. Possible planning techniques to reduce the unanticipated tax liability for capital gains to the donor spouse post-divorce include:

1. Donor Retains Remainder Interest if Donee Spouse Predeceases Donor. Inter vivos QTIP Trusts can provide excellent asset protection in states that have adopted self-settled asset protection legislation or legislation that provides that if assets held in an inter vivos QTIP trust revert upon the death of the donee spouse back to the donor spouse in trust, that such trust held for the benefit of the donor spouse is deemed to be settled by the donee spouse and not as a self-settled trust of the donor spouse (referred to as "Inter Vivos QTIP Trust Jurisdictions").[xvi] Although there are significant asset protection benefits for those in jurisdictions with either self-settled trust asset protection laws or in Inter Vivos QTIP Trust Jurisdictions where the donor reserves the right to trust assets upon the death of the donee spouse, Code Sections 677(a) and 672(e) result in the donor being subject to income taxes post-divorce on undistributed capital gains. The donor spouse may be willing to assume such a risk or may take advantage of planning to minimize the potential income taxes on such capital gains by, for example, providing the donor spouse with a power to substitute assets of equal value and thereby control the character of assets in the inter vivos QTIP trust so they are unlikely to significantly appreciate or if they do, to acquire the appreciated assets by substituting other assets without appreciation in the trust. If the donor spouse has liquidity to pay potential capital gains taxes, the donor spouse may be willing to do so if the donor and/or the donor's children are the residuary beneficiaries of the inter vivos QTIP trust.

2. Donor does not Retain an Interest in the Inter Vivos QTIP Trust but, the Donor's Spouse is Provided a Testamentary Special Power of Appointment ("SPA") in Favor of the Donor or Donor's Lineal Descendants. If the donor is not designated as a remainder beneficiary under the terms of the inter vivos QTIP trust upon the death of the donee spouse but the donee spouse has a special power of appointment in favor of the donor spouse or the donor's lineal descendants, would the donor still be subject to tax on undistributed capital gains post-divorce under Code Section 677(a), whether or not the power of appointment is in fact exercised in favor of the donor? This issue appears less clear than where the inter vivos QTIP trust provides a reversion back to the donor if the donee spouse predeceases the donor, but it would appear that the IRS could take the position that grantor trust status continues with respect to undistributed capital gains post-divorce if the special power of appointment continues post-divorce. It appears that pursuant to Code Section 674, any special power of appointment held by the donee spouse would be attributed to the donor spouse and likely cause grantor trust status as to principal. Like a discretionary power to distribute principal, a special power of appointment given to the donee spouse could terminate automatically in the event of divorce.

3. Terminate Trust Post Divorce. If upon divorce the assets of the inter vivos QTIP trust are distributed outright to the donee spouse, then the donor spouse is relieved of any obligation to pay income tax on accumulated capital gains under the grantor trust provisions. However, in order to be sure that trust assets pass to the donor's lineal descendants, termination of the trust may be an unacceptable alternative.[xvii] Furthermore, if the inter vivos QTIP trust was initially created as part of an asset protection plan, outright distributions to the donee spouse are unlikely to be an acceptable alternative.

4. Require Reimbursement of Income Taxes Payable by Donor from Other Assets of Donee Spouse. Although the inter vivos QTIP trust cannot permit distributions to anyone other than the donee spouse during the life of the donee spouse, a marital settlement agreement can obligate the donee spouse to reimburse the donor spouse for income taxes paid on accumulated capital gains or enable the donor spouse to setoff alimony or other payments otherwise due to the donee spouse by the income taxes payable on accumulated capital gains. This option is especially fair where the donor spouse has no retained interest should Code Sections 677(a) and 672(e) result in grantor trust treatment subjecting the donor spouse to tax without any rights to trust remainder upon death of the donee spouse. Perhaps this reimbursement obligation would be coupled with a right in the donee spouse to require the trustee to pay him or her an amount equal to the taxes. Without such coupling, the obligation of the donee spouse to reimburse the donor spouse may be difficult to secure and it is possible that alimony payments owed by the donor spouse to the donee spouse could be less than the amount of income taxes payable by the donor spouse, such that a portion of the reimbursement to the donor spouse is unsecured.

5. Creation of Nonreciprocal Inter Vivos QTIP Trusts. If non reciprocal inter vivos QTIP trusts are created by husband and wife, then each inter vivos QTIP trust can authorize discretionary distributions of trust principal to the donee spouse of an amount in excess of trust income to reimburse the donee spouse for any income tax obligations post-divorce resulting from grantor trust status of

such trust (i.e., the inter vivos QTIP trust created by husband for wife would provide that in addition to trust income that must be distributed annually to wife, wife would be entitled to a distribution from trust principal post-divorce to reimburse wife for any income taxes payable by wife on any trusts created by wife for husband that are determined to be grantor trusts). As long as there are sufficient assets in both inter vivos QTIP trusts, this approach may provide the security against an unanticipated diminishment of the donor's estate so that the consequences of grantor trust status, post-divorce, will not be burdensome to the donor spouse. However the provisions may enhance an IRS position that the trusts are in fact reciprocal trusts.

6. Create Options to Terminate Wholly Grantor Trust Status. One possible solution is to create some alternatives for turning off grantor trust status as to principal. For example, the inter vivos QTIP trust could have a trust protector authorized to terminate grantor trust status as to principal, including the ability to terminate the backend interests of the donor spouse. Moreover, the donor spouse could release his or her backend interests to terminate that incident of grantor trust status. The gift tax QTIP rules specifically provide that a transfer of such retained interests during the donee spouse's lifetime is not a transfer for gift tax purposes.[xviii] These options could be combined with provisions that automatically terminate the trustee's authority to distribute principal and/or any special power of appointment in favor of the donee spouse upon divorce.

Conclusion

Although there are numerous asset protection and estate planning benefits of using inter vivos QTIP trusts discussed at tax conferences and in articles and treatise materials, potential income tax exposure on undistributed capital gains in the event of divorce of the donor and donee of the inter vivos QTIP trust needs to be a part of planning discussions. In light of the potential income tax consequences to the donor of an inter vivos QTIP trust, practitioners should address these issues when inter vivos QTIP trust planning is considered and during marital settlement negotiations. The asset protection and estate planning benefits of inter vivos QTIP trust planning are exceptional, especially in Inter Vivos QTIP Trust Jurisdictions.[xix] Yet, a divorce could disrupt the plan and clients must be aware of potential income tax consequences in the event of divorce.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Barry Nelson

Richard Franklin

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[i] As discussed below, the donor is not subject to the grantor trust rules as to principal if there are no grantor trust triggers as to principal, post-divorce.

[ii] *See* Barry A. Nelson, Lester Law & Richard S. Franklin, Seeking and Finding New Silver Patterns in a Changed Estate Planning Environment: Creative Inter Vivos QTIP Planning, Address at the ABA Section of Real Property, Trust and Estate Law Spring Symposia (May 2, 2014) (and accompanying materials); Jonathan G. Blattmachr, Mitchell M. Gans & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*[sm] *versus Portability*, 28 Prob. & Prop. 10 (Mar./Apr. 2014); Diana S.C. Zeydel, *Cutting Edge Estate Planning Techniques: What Have I Learned From My Colleagues?*, NAEPC J. of Est. & Tax Plan. at 29 (2012); Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*[sm]*: A Super Idea for Married Couples Especially in Light of the 2010 Tax Act*, AK Tr. Co. Newsl. (May 2011); Barry A. Nelson & Richard R. Gans, *New §736.0505(3) Assures Tax/Asset Protection of Inter Vivos QTIP Trusts*, 84 Fla. Bar J. 50 (Dec. 2010); Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*, 21 Prob. & Prop. 52 (July/Aug. 2007).

[iii] What is "income" for purposes of Code Section 682 and how does the reallocation of income (and deductions) work as compared to grantor trust status? By its terms, the definition of "income" in Code Section 643(b), which looks to the governing instrument and local law to define income, does not apply to Code Section 682. This is because Code Section 643(b) applies to Subparts A, B, C and D of Subchapter J, and Code Section 682 is in Subpart E of Subchapter J. Even so, it seems that these rules would apply to determine income.

[iv] Consider when the donee spouse is "entitled to receive" income for purposes of § 682.

[v] I.R.C. § 2523(f)(2).

[vi] Treas. Reg. §§ 25.2523(f)-1(c), 25.2523(e)-1(f).

[vii] Presumably, the portion rules of Treas. Reg. § 1.671-3(b) would also be applicable to allocating deductions between the donee spouse.

[viii] PLR 200408015. Please note, Private Letter Rulings ("PLRs") cannot be cited as precedent and apply only to the taxpayer who requested the ruling.

[ix] This ruling also explains that Code Section 682 is applicable to trusts created incident to a divorce, notwithstanding the out of date regulations, which previously made Code Section 71 apply in such circumstances. "Prior to 1984, the section 682 regulations provided that section 71 would govern trusts formed in contemplation of divorce such as the one at issue here."

[x] Presumably, if the donor spouse had not retained the power to substitute assets to create grantor trust status as to principal, the capital gains allocated to principal would have been taxed to the trust itself.

[xi] PLR 9235032.

[xii] Treas. Reg. §§ 1.643(a)-3(b)(2) and (3) also allow capital gains to be included in DNI if the gains are allocated to principal but consistently treated as part of the distribution to the beneficiary or actually distributed to the beneficiary. Will Code Section 682 apply in these situations if the inter vivos QTIP trust allows the trustee the discretion to distribute principal to the donee spouse, even after divorce? This question is unanswered.

[xiii] *See* Carlyn S. McCaffrey, *Restructuring and Dissolving Trusts in the Context of Divorce*, 12 (*forthcoming* 2014); Robert T. Danforth & Howard M. Zaritsky, Grantor Trusts: Income Taxation Under Subpart E, 819 T.M. Est. Gifts & Tr. at A-60 (2010); Donna G. Barwick, Divorce: Right up There With Death and Taxes, Estate Planning Techniques in the Context of Divorce, Address at the 29th Annual Heckerling Institute on Estate Planning (Jan. 1995), *in* 29th Annual Heckerling Institute on Estate Planning (Matthew Bender, Pub., 1995).

[xiv] The term "income" means fiduciary accounting income or "trust income," and not taxable income. *See* Treas. Reg. § 25.2523(f)-1(c)(2).

[xv] I.R.C. §§ 2523(f)(1)(B) & 2056(b)(7)(B).

[xvi] *See* discussion in materials of Nelson, Law & Franklin, *supra* note i. The "Inter Vivos QTIP Trust Jurisdictions" are Arizona, Delaware, Florida, Kentucky, Maryland, Michigan, North Carolina, Oregon, South Carolina, Texas, Virginia and Wyoming.

[xvii] Consideration could be given to requiring the donee spouse to make a payment at death to the descendants of some portion of the value of the distribution.

[xviii] I.R.C. §2523(f)(5)(A); Treas. Reg. § 25.2523(f)-1(d)(1).

[xix] *See* ARIZ. REV. STAT. § 14-10505(E); DEL. CODE ANN. TIT. 12 § 3536(C)(2); FLA. STAT. § 736.0505(3); KY. REV. STAT. ANN. § 381.180(8)(a); MD. EST. & TR. CODE ANN. § 14-116(a)(1)-(2); MICH. COMP. LAWS § 700.7506(4); N.C. GEN STAT. § 36C-5-505(c); OR. REV. STAT. § 130.315(4); S.C. CODE ANN. § 62-7-505(b)(2); TEX. PROP. CODE § 112.035(g); VA. CODE ANN. § 64.2-747(B)(2); WYO. STAT. ANN. § 4-10-506(e).

EXHIBIT 10

New §736.0505(3) Assures Tax/*Asset* Protection of Inter Vivos QTIP Trusts by Barry A. Nelson and Richard R. Gans

The Florida Bar Journal, December 2010

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LINK TO WEB ARTICLE

by Barry A. Nelson and Richard R. Gans

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New §736.0505(3) Assures Tax/Asset Protection of Inter Vivos QTIP Trusts

Effective July 1, 2010, new F.S. §736.0505(3) allows married couples to take advantage more easily of one another's estate tax exemptions and, at the same time, to enhance asset protection planning.[1] Before enactment of the new statutory provision, it was unclear whether assets contributed to an inter vivos QTIP trust by one spouse that pass in trust for the benefit of the initial donor upon the death of the donor's spouse would be subject to the claims of the donor spouse's creditors, and, therefore, includible in the donor spouse's estate under I.R.C. §2041.[2] The new statute clarifies the asset protection and estate tax benefits of inter vivos QTIP trust planning. As described below, inter vivos QTIP trust planning can be enhanced if trusts are created by both the husband and wife, but only if the two trusts are not reciprocal.[3]

Example

The following example illustrates this technique: Bob and Judy, both attorneys, have been married for 28 years and have four children. Bob and Judy have accumulated a net worth of approximately $13.5 million, of which $3.5 million is equity in their Florida homestead, and $10 million is invested in a joint brokerage account (titled "tenants by the entirety"). Assuming estate taxes are reinstated and the estate tax exemption amount stays at $3.5 million (its 2009 level), Bob and Judy are significantly underutilizing their estate tax exemption amounts. Exhibit 1 shows estate taxes due upon the death of Bob and Judy and the amount of their assets that would be protected from their creditors during their joint lifetimes (assuming they remain married to one another) and upon the death of the first spouse. All jointly held assets pass outright by operation of law to the surviving spouse.

Understanding that Bob and Judy's current estate plan fails to take advantage of the estate tax exemption amount of the first spouse to die, their CPA suggests that Judy's assets be retitled so Bob has $5 million in his revocable trust (thereby avoiding probate and taking advantage of his estate tax exemption if he dies first), and Judy has $5 million in her revocable trust. Each of their revocable trusts directs that an estate tax-exempt gift of the greatest amount that can pass free of estate tax be used to create a trust for the surviving spouse; this trust is intended to pass free of estate tax upon the death of the surviving spouse.

Bob and Judy's desire is to maintain access to all family wealth until the survivor of them passes away, but they do not mind having a portion of the funds held in trust for the surviving spouse, as long as the surviving spouse can serve as a co-trustee or as sole trustee during his or her lifetime, and as long as distributions can be made to the surviving spouse based upon an ascertainable standard (such as for his or her health, maintenance, and support).

Bob and Judy want to confirm their CPA's recommendation, so they consult with their estate planning attorney, Lauren, whose practice combines estate planning with asset protection advice. Lauren explains that converting $10 million of their assets from tenants by the entirety by dividing those assets equally between their respective revocable trusts changes the character of the assets from those that are protected from potential creditors (as long as the debt was not a joint debt of Bob and Judy, and both were living and married to one another), and subjects the entire $10 million to claims of their creditors because assets in a revocable trust are unprotected.[4]

Exhibit 2 shows estate taxes due upon the death of Bob and Judy and the amount of the assets that would be protected from their creditors during their joint lifetimes and upon the death of the first spouse, assuming they follow their CPA's suggestion. Bob and Judy ask for alternatives that would allow each of them to take advantage of their estate tax exemptions while at the same time not subjecting their assets to exposure to the claims of future creditors.

F.S. §763.0505(3) to the Rescue

The new statute provides as follows:

> (3) Subject to the provisions of s. 726.105 [This is a reference to Florida's fraudulent transfer statute], for purposes of this section, the assets in:
>
> (a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the elec-

tion described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and

(b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a), shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.[5]

As a result of the enactment of §736.0505(3), Bob and Judy can divide the $10 million tenants by the entireties brokerage account equally between them and create separate inter vivos QTIP trusts, taking care that the trusts are not reciprocal.[6] Inter vivos QTIP trusts take advantage of new F.S. §736.0505(3) to provide a solution to many of Bob and Judy's tax and asset protection objectives. Rather than maintaining the assets in unprotected revocable trusts (and thereby subjecting $10 million of assets to potential future creditors), assume that Bob created an inter vivos QTIP trust for Judy and transferred $5 million of assets to the trust. Also assume that Bob would only be willing to create the trust for Judy if he had reasonable assurances that, should Judy predecease Bob, he would have access to the $5 million (or such other amount as may be held in the trust upon Judy's death). To maintain flexibility for future planning, the inter vivos QTIP trust can give Judy a testamentary special power of appointment that could be exercised in favor of one or more of Bob, their children, or a charity.[7] However, if Bob wants to be certain that, should Judy predecease him, the QTIP trust assets will pass in trust for Bob's benefit, he could draft the inter vivos QTIP trust to require that, should Judy predecease him, the QTIP trust assets would pass into an estate tax-exempt trust for Bob (to the extent of Judy's estate tax exemption amount, as of her date of death), and if Bob survives her, with any remaining assets passing into a testamentary QTIP trust for Bob.[8] Use of this technique assures that the assets held in the inter vivos trust for the benefit of Judy are protected from her creditors during Judy's lifetime because the QTIP trust is a spendthrift trust.

Upon Judy's death, the assets remaining in the trust will be held in an asset-protected spendthrift trust for Bob's benefit (an estate tax exempt trust) under the terms of the inter vivos QTIP trust.[9] Until F.S. §736.0505(3) was enacted, assets passing from the trust back to Bob at Judy's death might have been thought to be subject to the claims of Bob's creditors because Bob created the original trust.[10] Bob would have argued that Judy, and not Bob, should be considered as the donor of the trust after Judy's death, so Bob is not properly considered a beneficiary of a trust that he created. This argument would be consistent with IRS Treas. Reg. §25.2523(f)- 1(f), Example 11, which provides that assets held in an inter vivos QTIP trust — for the benefit of the settlor after the death of his or her spouse — will not be includible in the settlor's taxable estate under Code §§2036 and 2038. Thus, following the tax ownership reasoning, the trust created for Bob upon Judy's death should not be considered settled by Bob.[11]

F.S. §736.0505(3) makes it un-

necessary to analogize to federal estate tax concepts. Under the new statute, if the inter vivos QTIP trust is properly drafted — and assuming the initial transfer to the trust was not a fraudulent conveyance — it is now clear under Florida law that the assets of the inter vivos QTIP trust described in the example above will not be subject to the creditors of the initial donor (Bob) upon the death of the initial donee spouse (Judy), and that the assets passing in trust for Bob's benefit after Judy's death will not be includible in Bob's estate.

Potential Pitfalls

There are a number of issues and traps that must be considered when creating an inter vivos QTIP trust, some of which are described briefly below.

- *Jurisdiction* — The trust must be created in a jurisdiction in which assets that benefit the initial donor spouse in a protected trust will be protected from creditors' claims (as is the case in Florida as a result of new F.S. §736.0505(3)).
- *Reciprocal Trusts* — If both spouses create an inter vivos QTIP trust, there is a possibility that the IRS could take the position that they were reciprocal.[12] Avoidance of reciprocal trust attacks can be accomplished by allowing a considerable amount of time lapse between the creation of the husband's inter vivos QTIP trust and the wife's inter vivos QTIP trust, and by having different dispositive provisions in the trusts, for example: providing for different trustees, different beneficiaries upon the death of the donee spouse, a special power in favor of certain beneficiaries in each trust, or not providing a special power upon the death of the donee spouse at all in one of the trusts. Arizona has addressed the reciprocal trust dilemma by enacting Arizona Revised Statutes §14-10505(E)(4) that, in conjunction with §14-10505(E), provides that a person who would otherwise be treated as a settlor or deemed a settlor of a trust should not be treated as settlor with respect to an irrevocable inter vivos trust created by the settlor's spouse for the benefit of the settlor, regardless of whether or when the settlor also created an irrevocable inter vivos trust with respect to which such spouse is a beneficiary.[13]
- *Divorce* — A number of important issues need to be considered before proceeding with creation of the inter vivos QTIP trust. Once created, the inter vivos QTIP trust is irrevocable for the lifetime of the donee spouse, and the trust will not qualify for the gift tax marital deduction if the spouse's interest in the trust automatically terminates in the event of divorce. As a result, even after divorce, the donee spouse will have the benefits of the trust assets. One planning technique may be to limit principal invasions in the event of dissolution of marriage so that, after divorce, only income distributions will be mandated without the consent of a "special trustee." Will the assets in the trust be considered for purposes of determining elective share rights of a surviving spouse? Would the value of assets in the inter vivos QTIP trust be considered in the event of a subsequent dissolution of marriage of the donor and donee spouse? If so, will the terms of discretionary distributions provided in the trust be considered in determining the value of the trust for purposes of computing the division of assets? Some of these issues could be dealt with if each spouse created an inter vivos trust for the benefit of the other spouse.

Conclusion

Inter vivos QTIP trusts can provide very effective tax planning and asset protection benefits, but only if there is certainty about the rights of the creditors of the initial settlor in the trust assets. Florida may be the best state in which to create such a trust, if a sufficient nexus exists to invoke Florida law. Newly enacted F.S. §736.0505(3) provides certainty that assets in an inter vivos QTIP trust that pass in trust after the death of the beneficiary spouse to the initial donor will not be subject to the creditors of the initial donor spouse; combine this with the fact that Florida has no state income or intangible taxes, and it may be an unbeatable combination. Inter vivos QTIP trusts that can continue in trust for the benefit of the initial settlor after the death of a spouse can provide the following benefits: 1) reduction or elimination (depending upon the values of assets and the applicable estate tax exemption

amounts) of estate taxes in the estates of both spouses; 2) protection of the trust assets from the claims of creditors of both the settlor and the settlor's spouse; and 3) control of the ultimate disposition of the trust assets by the settlor. If desired, the settlor can assure that the trust assets will be continued in trust for his or her benefit after the death of the beneficiary spouse in a creditor-protected trust not subject to estate taxes at the subsequent death of the settlor.

In light of the recent statutory change, inter vivos QTIP trusts can now be considered by anyone desiring both to take full advantage of his or her estate tax exemption and to maintain asset protection for their assets.❑

[1] Fla. Stat. §736.0505 (3).

[2] Barry A. Nelson, Asset Protection for Estate Planners, Address at the 43rd Annual Heckerling Institute on Estate Planning (Jan. 2009), *in* 43rd Annual Heckerling Institute on Estate Planning at 18-15-18-20 (Matthew Bender, Pub., 2009); Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*, 21 Probate & Prop. 52 (July/August 2007); Dana R. Irwin, *Removing the Scaffolding: The QTIP Provisions and the Ownership Fiction*, 84 Neb. L. Rev. 571 (2005).

[3] *See* Gans, Blattmachr, and Zeydel, *Supercharged Credit* at 58-59.

[4] Fla. Stat. §736.0505(1)(a) ("The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor").

[5] Fla. Stat. §736.0505 (3).

[6] This should only be done if Bob and Judy do not have existing debt because once assets held as tenants by the entirety are divided and retitled in their respective names, assets that previously were protected from creditors as tenants by the entirety (assuming no joint debt) would be subject to creditor's claims of Bob and Judy since they will have outright ownership of $5 million each prior to contributing such assets to the new QTIP trusts. Reciprocal trusts must be avoided. *See* endnote 2 for articles addressing the reciprocal trust issue in great detail.

[7] A special power of appointment provides the power holder with the right to distribute property, subject to the power, to a limited class of beneficiaries or alternatively to a broad class that excludes the power holder, the power holder's estate, the power holder's creditors, or the creditors of the power holder's estate. *See* I.R.C. §2041.

[8] The mandatory reversion in favor of Bob would be even more critical if he had his four children from a prior marriage and he wanted to be certain that upon his death the assets would a) pass for his benefit if he survives Judy or b) to his children if he predeceases Judy or disclaims the interest otherwise passing to him upon Judy's death.

[9] This article assumes assets in a spendthrift trust are protected from general creditors. Exception creditors, such as the IRS or child support, may circumvent spendthrift protection. *See* Fla. Stat. §736.0503(2): "To the extent provided in subsection (3), a spendthrift provision is unenforceable against: (a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance. (b) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust. (c) A claim of this state or the United States to the extent a law of this state or a federal law so provides."

[10] *See* Fla. Stat. §736.0505(1)(b) ("With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit"). If the original settlor of an inter vivos QTIP trust is also treated as the settlor of the trust for his or her benefit after the death of the initial beneficiary spouse, under Florida law prior to §736.0505(3), the settlor's creditors could reach the trust assets in satisfaction of their claims.

[11] 26 C.F.R. §25.2523 (f)(1)(f), Ex. 11.

[12] *See* Gans, Blattmachr, and Zeydel, *Supercharged Credit*, for a thorough analysis of reciprocal trusts.

[13] A.R.S. §14-10505(E).

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This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Brian J. Felcoski, chair, and William P. Sklar and Kristen Lynch, editors.

Exhibit 1
Bob and Judy – Tenancy by the Entireties Plan

	Bob	Judy	T by E
House – Protected Homestead			$3.5 M
Brokerage			$10 M
TOTAL			$13.5 M
Bob's Gross Estate Assuming He Dies First			$6.75 M
MARITAL DEDUCTION			$6.75 M
Bob's Taxable Estate			$0
Bob's Tax			$0

	Bob	Judy	T by E
UPON JUDY'S DEATH			
Judy's Gross Estate			$13.5 M
Less Unified Credit Equivalent Amount			($3.5 M)
Judy's Taxable Estate			$10 M
Judy's Tax			$4.5 M
Assets subject to creditors while both married and living			$0
Assets subject to creditors upon death of 1st spouse or divorce			$10 M

EXHIBIT 11
Proposed Amendment to Florida Statute §736.0504 to Revise *Bacardi* and *Berlinger* for Claims of Spouse, July 14, 2016

Never submitted to the Executive Committee.

To amend Section 736.0504 to read as follows:

(1) As used in this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.

(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach, garnish or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

(3)If the trust contains a spendthrift provision, a creditor of the beneficiary, other than a beneficiary's child as provided in s. 736.0503(2)(a) or a creditor described in s. 736.0503(2)(b) or (c), may not attach, garnish or otherwise reach in any manner the interest to which a beneficiary becomes entitled as a result of the trustee exercising its discretion to make discretionary distributions to or for the benefit of the beneficiary.

(4) Whether or not a trust contains a spendthrift provision, if there is an unsatisfied judgment or court order against a beneficiary, the trustee may, without liability to any of such beneficiary's creditors, make discretionary distributions to or for the benefit of the other beneficiaries of the trust to the maximum extent permitted by the trust instrument.

(5) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach, garnish or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(64) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

EXHIBIT 12
Proposed White Paper for Exhibit 11

DRAFT

RPPTL WHITE PAPER

PROVIDING CLARIFICATION TO TRUSTEES OF THIRD PARTY TRUSTS IN MAKING DISTRIBUTIONS TO BENEFICIARIES

I. SUMMARY

The proposed legislation seeks to provide guidance for trustees serving under Florida sitused trusts who have authority to make distributions of income and principal to beneficiaries at the trustees' discretion, whether or not the discretion is expressed in the form of a standard of distribution. More specifically, this proposal addresses duties and liabilities of the trustee when there is a spouse, a former spouse or a child who has a court order for maintenance and support against one of the beneficiaries of the trust. For example, as the law currently stands, if a beneficiary of a Florida trust is subject to an order of maintenance or support in favor of a spouse, former spouse or child, it is unclear whether the trustee can exercise its discretionary authority to make a distribution to or for the benefit of the other members of the class of permitted beneficiaries without the approval of the court. The need for continuing court authority in this exercise of a trustee's basic fiduciary duty imposes additional trust administration and cost, further burdens the Florida judicial system and negatively impacts beneficiaries who are not the subject of the support order and who may otherwise become impoverished. In most cases, it will also run afoul of the settlor's intent.

The proposed legislation does three things:

1. The proposal includes "garnishment" as a right available to a creditor, consistent with a creditor's right to "attach" or "otherwise reach" an interest, which cannot be exercised against a beneficiary's interest in a discretionary trust when the trustee has not exercised its discretion to make a distribution to that beneficiary. This is a logical construction since Black's Law Dictionary considers "garnishment" as a synonym for "attachment". This proposal clarifies the law, that a beneficiary's interest until the trustee exercises its discretion is nothing more than an expectancy with no alienable interest or right vested in the beneficiary that is subject to a creditor's claim.

2. Recognizing that, in most circumstances, the trustee's exercise of discretion does not occur instantaneously with its delivery of the distribution, the proposal provides that no creditor of a beneficiary of a discretionary trust, including a spouse, former spouse or child in whose benefit there is an order of support or maintenance, and regardless of whether the trust contains a spendthrift provision, may attach, garnish or otherwise reach the interest that a beneficiary might have in the future as a result of the trustee exercising its discretion to make distributions to or for the benefit of that beneficiary. However, if the trust contains a spendthrift provision, then recognizing the public policy of this State to protect children, a beneficiary's child in whose favor there is a support order in default, may attach, garnish or otherwise reach the interest to which the beneficiary becomes entitled and which will vest in the beneficiary as a result of the trustee exercising its discretion to make a discretionary distribution to or for the benefit of the beneficiary. For similar public policy purposes, a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, and the State of Florida or the United

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States may enforce their claims by attaching, garnishing or otherwise reaching the interest to which the beneficiary becomes entitled as a result of the trustee's exercise of discretion.

3. Whether or not the trust contains a spendthrift provision, if there is an unsatisfied judgment against a beneficiary, the proposal provides that the trustee may, without seeking court authority, exercise its discretionary authority to make distributions of income or principal to or for the use and benefit of members of the class of beneficiaries other than the beneficiary/debtor.

II. CURRENT SITUATION

A. Spendthrift Trusts in Florida

The beneficiary of a trust is the real party in interest as to trust property and is the *de jure* owner of the property to the extent of his or her interest. Although the trust property is legally titled in the name of the trustee, the trustee is merely an instrument for administering the trust and its property for the benefit of the beneficiary. Thus, the beneficiary of a trust is considered to be the owner of an equitable interest that can be assigned or transferred in the same way as any other property interest.

If, however, the settlor of a trust wants to make sure that the beneficiary's interest will be preserved and protected from the beneficiary's debts and obligations, the settlor can impose restrictions on the interest to preclude voluntary assignment of the trust assets and thus prevent the beneficiary's creditors from reaching the trust and its property. The authority for acceptance of "spendthrift" trusts is found in the common-law concept that maximum effort should be given to the objectives and intentions of the settlor. In Florida, the general rule is that the interest of a beneficiary under a trust, including the right to income from the corpus of the trust, is alienable by the beneficiary. *Goldman v. Mandell*, 403 So.2d 511 (Fla. 5th DCA 1981). Additionally, the interest of a beneficiary is liable to be taken in satisfaction of his or her debts and obligations. *Bradshaw v. American Advent Christian Home & Orphanage*, 145 Fla. 270, 199 So. 329 (1940) (when trust provides income is to be applied for use of beneficiary, equity may direct application of that income to payment of beneficiary's debt); *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460, 57 So. 243 (1911) (when one has interest in property that one may alienate or assign, that interest, whether legal or equitable, is liable for payment of one's debts); *Preston v. City National Bank of Miami*, 294 So.2d 11 (Fla. 3d DCA 1974).

However, trust assets may be protected against dissipation by a beneficiary or levy by creditors through creation of a spendthrift or similar protective trust. See, e.g. *Waterbury v. Munn*, 159 Fla. 754, 32 So.2d 603, 174 A.L.R. 620 (1947). Even before the enactment of Part V of *F.S.* Chapter 736, effective July 1, 2007, spendthrift trusts were enforced and upheld as valid in Florida. See, e.g. *Waterbury*. Provisions vesting discretion in the trustee to determine the time, amount, or manner of payments to the beneficiary are likewise recognized as valid. *Philp v. Trainor*, 100 So.2d 181 (Fla. 2d DCA 1958). A spendthrift provision restricts a beneficiary from voluntarily or involuntarily alienating his or her interest in a trust, which includes access to or attachment through the claims of his or her creditors. 55A FLA.JUR.2d *Trusts* §36. A spendthrift trust is created to provide a fund for the maintenance of another while securing such fund against the beneficiary's own improvidence or incapacity, *i.e.*, a beneficiary's inability to protect himself or herself. "A spendthrift trust operates through the mechanism of a direct restraint against voluntary or involuntary alienation of the beneficial interest in the trust." 55A FLA.JUR.2d *Trusts* §36.

Effective July 1, 2007, under *F.S.* 736.0501, a court may authorize a creditor to reach a beneficiary's interest in a trust by attachment of present or future distributions to the extent the beneficiary's interest is not subject to a spendthrift provision. Section 736.0502 provides:

> (1) A spendthrift provision is valid only if the provision restrains both voluntary and involuntary transfer of a beneficiary's interest. This subsection does not apply to any trust the terms of which are included in an instrument executed before the effective date of this code.
>
> (2) *A term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.*
>
> (3) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this part, *a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary.*
>
> (4) A valid spendthrift provision does not prevent the appointment of interests through the exercise of a power of appointment. (emphasis added).

Thus, when the terms of a trust express that the interest of the beneficiary is held subject to a spendthrift provision, or *words of similar import*, and are sufficient to restrain both a voluntary or involuntary transfer of a beneficiary's interest, a creditor or assignee of the beneficiary may not reach the interest or a distribution *before receipt by the beneficiary.*

B. Discretionary Trusts in Florida

Because a creditor of the beneficiary of a spendthrift trust may not reach the beneficiary's interest until it is received by the beneficiary, an issue of major controversy arises under sections of the Uniform Trust Code not adopted in Florida, and involves the right of a creditor to force a distribution from a trust when the trustee has discretionary authority to distribute under the ascertainable standard of "health, education, support, or maintenance" under §2041(b)(1)(A) or §2514(c)(1) of the Internal Revenue Code of 1986, as amended ("*I.R.C.*"), or under some other "support" standard.

To ameliorate this controversy, for purposes of Florida law, *F.S.* 736.0504(2), as passed in 2006 and amended in 2007, very clearly establishes that, even in the absence of a spendthrift provision, a creditor of the beneficiary may not:

> (a) Compel a distribution that is subject to the trustee's discretion; or
>
> (b) Attach or otherwise reach the interest, if any, which the beneficiary *might have* as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary. (emphasis added).

In cases in which the beneficiary is the sole trustee, if the trustee's discretion is limited to an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the

interest would be subject to the creditor's claims were the beneficiary not acting as trustee. *F.S.* 736.0504(3).

These provisions only apply to discretionary distributions from a trust; they do not apply against "mandatory distributions," as described in *F.S.* 736.0506(1), such as distributions of income and principal the trustee is required to make under the terms of the trust, including distributions upon termination of the trust.

C. Limitations on Spendthrift Trusts

1. Rights of Spouse and Minor Children

In the absence of and prior to enactment of Part V of *F.S.* Chapter 736 in 2007, Florida case law did protect and still protects most spendthrift trust assets from the claims of general creditors. However, spouses, ex-spouses, and minor children have been excepted from the spendthrift provisions in certain limited circumstances. In 1985, the Florida Supreme Court ruled that one of the limited exceptions to the spendthrift protection was the payment of trust assets to fulfill the beneficiary's obligations to pay alimony and child support. *Bacardi v. White*, 463 So.2d 218 (Fla. 1985). In the absence of any statutory law limiting or qualifying spendthrift provisions for alimony or any other payments, the dilemma facing the Supreme Court involved two competing public policies:

> On the one hand, there is the long held policy of this state that recognizes the validity of spendthrift trusts. On the other hand, there is the even longer held policy of this state that requires a former spouse or a parent to pay alimony or child support in accordance with court orders. When these competing policies collide, *in the absence of an expression of legislative intent*, this Court must decide which policy will be accorded the greater weight. (emphasis added).

Bacardi (supra) at 221. The court ruled that Florida's interest in the enforcement of alimony orders under certain limited circumstances is paramount to the declared intention of the settlor and the restraint of a spendthrift trust.

In 2007, the Florida Supreme Court's decision in *Bacardi* was codified in *F.S.* 736.0503, "Exceptions to spendthrift provision." Thus, by statute, a spendthrift provision is unenforceable against:

> (a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.
>
> (b) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust.
>
> (c) A claim of this state or the United States to the extent a law of this state or a federal law so provides.

F.S. 736.0503(2). The above listed creditors are referred to as "exception creditors". As set forth in *F.S.* 736.0503(3), an exception creditor "may obtain from a court, or pursuant to the Uniform Interstate Family

Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary." However, the exception to the spendthrift provision for claims made by an exception creditor is available "*only as a last resort* upon an initial showing that traditional methods of enforcing the claim are insufficient." (emphasis added). *Id.* Until the "last resort" standard has been satisfied, the exception creditors have no right to attach or otherwise reach a beneficial interest in a spendthrift trust.

2. *Berlinger v. Casselberry*

After thirty years of marriage, Berlinger and Casselberry divorced in 2007. Pursuant to the marital settlement, Berlinger agreed to pay Casselberry $16,000 a month in permanent alimony. Although he continued to live on trust distributions, Berlinger discontinued paying alimony.

In April, 2012, Casselberry filed a motion for a writ of garnishment against the trusts seeking to attach present and future distributions on the grounds that (i) she is a former spouse who has a court order against the beneficiary for support pursuant to *F.S.* 736.0503(2)(a), and (ii) garnishment was the last resort since traditional methods of enforcing the alimony obligation were insufficient pursuant to *F.S.* 736.0503(3).

Florida's spendthrift trust law is found in *F.S.* 736.0502. Subsection (3) provides, in part, "a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee *before the receipt of the interest or distribution by the beneficiary*." (emphasis added).

As a result of a change in Florida's discretionary trust law in 2007, *F.S.* 736.0504 was modified to provide:

> (1) In this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.
>
> (2) *Whether or not a trust contains a spendthrift provision*, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, in*cluding a creditor described in s. 736.0503(2), may not*:
>
> (a) Compel a distribution that is subject to the trustee's discretion; or
>
> (b) *Attach or otherwise reach the interest, if any, the beneficiary might have as a result of the trustee's authority to make discretionary distributions* to or for the benefit of the beneficiary. (emphasis added).

The purpose for the modification was to distinguish discretionary trusts, in which a beneficiary has no "attachable trust interest" from spendthrift trusts that, pursuant to the Florida Supreme Court decision in *Bacardi*, excepted a former spouse from spendthrift protection against creditors' claims. Footnote 201 of the Scrivener's Summary to the Florida Trust Code *(Florida Trust Code Scrivener's Summary, Ad Hoc Trust Law Revision Committee, Real Property Probate, Property and Trust Law Section, The Florida Bar, 2005)*, the law enacting the spendthrift provisions in *F.S.* 736.0502 and the discretionary trust provisions of *F.S.* 736.0504, citing *Bacardi*, asserts "Existing Florida case law does not permit the garnishment of interests in wholly discretionary trust interests".

Notwithstanding the very distinguishable provisions of the two sections of the Florida Trust Code, one which directs that a creditor cannot reach a distribution before receipt of the distribution by the beneficiary unless the creditor is an exception creditor and the "last resort" standard has been met, and the

other that specifically directs no creditor can even reach an interest a beneficiary might have as a result of a trustee's authority to make a discretionary distribution, the Second District Court of Appeal held:

> Sections 736.0503 and 736.0504 codify the Florida Supreme Court's holding in *Bacardi*. Neither section protects a discretionary trust from garnishment by a former spouse with a valid order of support. The order in this case complied with the *Bacardi* decision and sections 736.0503 and 736.0504 of the Florida Trust Code. Florida has a public policy favoring spendthrift provisions in trusts and protecting a Beneficiary's trust income; however it gives way to Florida's strong public policy favoring enforcement of alimony and support orders.

Berlinger v. Casselberry, 133 So.3d 961, 972-973 (Fla. 2d DCA, 2013), *review denied*, 2014 Fla. LEXIS 3427 (Fla. 2014).

Effectively, the Court disregarded the distinction between spendthrift provisions and discretionary trusts, and rendered its opinion that *F.S.* 736.0503 *AND F.S.* 736.0504 codify the *Bacardi* decision.

D. Settlor's Intent Over Beneficiary's Interest.

In *Bacardi*, the Florida Supreme Court was required to address two competing public policies:

> *On the one hand, there is the long held policy of this state that recognizes the validity of spendthrift trusts. On the other hand, there is an even longer held policy of this state that requires a former spouse or a parent to pay alimony or child support in accordance with court orders. When these competing policies collide, in the absence of an expression of legislative intent, this Court must decide which policy will be accorded greater weight.*

So in the absence of legislative intent, the court ruled that Florida's interest in the enforcement of alimony orders under certain limited circumstances is paramount to the declared intention of the settlor and the restraint of a spendthrift trust.

In 2016, the Trust Law Committee's Settlor Over Beneficiary Subcommittee published a White Paper suggesting proposed revisions to FS 736.0103, 736.0105 and 736.0404.

As stated therein *"The purpose of the proposed amendments...is to clarify and illuminate Florida's* ***well established jurisprudence in favor of donative freedom, so that it is crystal clear that the settlor's intent is paramount when interpreting and applying Florida trust law.*** *"* (emphasis added).

The Report specifically addresses the "tension between the dual goals of effectuating a settlor's intent and protecting the interests of beneficiaries", and concludes that "effectuating the settlor's intent would remain the paramount, guiding principle of Florida trust law".

The *Bacardi* court felt compelled to decide "in the absence of an expression of legislative intent". The Section is poised to embark upon adoption of legislation that would establish as public policy in the State

of Florida a settlor's donative freedom is the jurisdictional foundation of Florida trusts and estates law. Consequently, one must presume that, if adopted, a Florida settlor may impose any restrictions and limitations on how property is administered and disposed of. And, if such is the case, if a Florida settlor directs that assets cannot be attached, reached or garnished by any beneficiary or creditor of a beneficiary, then his donative intent must be accepted.

Consequently, the current state of the law in Florida is unclear as there exists (i) a statute that provides a creditor may not attach a beneficiary's interest in a discretionary trust and (ii) an appellate court decision that holds the exception available to former spouses that is statutorily limited to spendthrift trusts nonetheless extends to discretionary trusts.

III. ANALYSIS AND EFFECT OF PROPOSED CHANGES

FS 736.0502 was enacted as part of the Florida Trust Code and provides that if a trust contains a spendthrift provision that restrains both voluntary and involuntary transfers of a beneficiary's interest, then a beneficiary may not transfer an interest in the trust, and, subject to certain statutory exceptions, a creditor or assignee may not reach the interest or a distribution by the trustees *before receipt of the interest or distribution by the beneficiary*. FS 736.0502(3).

Consistent with the decision of the Florida Supreme Court in *Bacardi*, FS 736.0503, entitled "Exceptions to **spendthrift provisions**" (emphasis added), was enacted to codify the Court's decision that a spendthrift provision is unenforceable against "a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance". (FS 736.0503(2)(a)).

In contrast, with respect to a trust that is subject to a trustee's discretion, whether or not a trust contains a spendthrift provision, a creditor of a beneficiary, including a beneficiary's child, spouse or former spouse who has a judgment or court order, may not *attach or otherwise reach* the interest, if any, which the beneficiary *might have* as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary. (FS 736.0504).

In *Berlinger v. Casselberry* (supra), the lower court, found the language of FS 736.0504(2)(b), that directs that any creditor of a beneficiary, including a spouse or former spouse who has a judgment or court order for support, may not attach or otherwise reach the beneficiary's interest in a third party trust, did not prevent a spouse from obtaining a continuing writ of garnishment over distributions that might be made to the beneficiary, since the term "garnishment" was not expressly excluded by the statute. Consequently the lower court (at paragraph 17) concluded "The *Bacardi* decision has been codified by statute in Florida Statute Section 736.0503 **and Section 736.0504...**"; and (at paragraph 24) "Consistent with *Bacardi*, if the trustee wishes to make distribution to the former husband beyond the amount of the outstanding alimony ... the trustee shall seek court approval and the court may authorize such payment if sufficient assets remain in the trust or other provisions are made to secure the contractual payment of alimony." In other words, the lower court found that FS 736.0504(2)(b) does NOT preclude attachment of distributions that might be made from a discretionary trust.

Moreover, in affirming the lower court, the 2nd District Court of Appeal alludes to the fact that FS 736.0504 provides that a former spouse may not compel a distribution that is subject to the trustee's discretion or *attach or otherwise reach* the beneficiary's interest. "The section does not expressly prohibit a former spouse from obtaining a *writ of garnishment* against discretionary disbursements made by a trustee exercising its discretion ... Casselberry is not seeking an order compelling a distribution that

is subject to the trustee's discretion or attaching the beneficiary's interest. Instead, she obtained an order granting a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion." (emphasis added). Accordingly, neither Section 736.0503 and Section 736.0504 "...protects a discretionary trust from *garnishment* by a former spouse with a valid order of support".

It is instructive that in adopting Chapter 222, which sets forth the statutory method for setting apart the homestead and other property exempt from the claims of creditors, the Florida Legislature specifically referred to "Earnings ... exempt from attachment or *garnishment* (FS 222.11, Exemption of wages from *garnishment)*; certain other assets as not being liable to "attachment, *garnishment* or legal process in favor of a creditor" (FS 222.14, Exemption of cash surrender value of life insurance policies and annuity contracts from legal process); or "...shall not in any case be liable to attachment, *garnishment*, or legal process in this state" (FS 222.18, Exempting disability income benefits from legal process). No literal construction of Florida law can support the thesis that the Legislature intended to protect a person's statutorily exempt assets from "attachment and *garnishment*", but a beneficiary's discretionary interest in a third party trust is only exempt from "attachment".

Furthermore, notwithstanding that according to Black's Law Dictionary, the term "garnish" is synonymous to "attach", the 2nd District reached a judicial determination based on the fact that FS 736.0504(2)(b) uses the terms "attach or otherwise reach", but does not expressly use the term "garnish".

Similarly, notwithstanding the clear and unambiguous language of FS 736.0504, that ANY creditor of a beneficiary, INCLUDING A CREDITOR AS DESCRIBED IN FS 736.0503(2), may not attach or otherwise reach a beneficiary's interest in a third party trust, the court determined that the spouse, a creditor described in FS 736.0503(2), nonetheless had a right to garnish distributions that might be made to the beneficiary at any time in the future.

Simply put, the proposed legislation is intended to make sure the law "says what it means, and means what is says"; and, specifically, to accept the notion that the word "garnish" is interchangeable with "attach" and "reach", and when the statute refers to any creditor of a beneficiary, including a creditor as described in FS 736.0503(2) (including a spouse or former spouse who has a judgment or court order), there is no ambiguity in the statute's intent.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposed legislation may have a positive fiscal impact on the state government. In view of the uncertainty many Florida residents have over the status of the law applicable to trusts they wish to create for their descendants, many are settling the trusts in other states and foreign jurisdictions, thereby reducing the number of trusts being administered in the State of Florida and, coincidentally, reducing the amount of taxable fees and commissions that would be charged by the institutional trustees conducting business in the state.

V. DIRECT IMPACT ON PRIVATE SECTOR

If Florida citizens do not feel that their objectives and wishes as to how they wish to dispose of their property will be protected by the Florida courts, those citizens will seek to establish their trusts and implement their estate plans in jurisdictions that do provide such assurance and protection. The impact will be that Florida attorneys will have fewer clients to represent for estate and tax planning; Florida

accountants will have fewer tax returns to prepare; Florida wealth managers will see an outflow of assets into states where trusts are being created; and Florida professional trustees will be appointed in fewer trusts resulting in lower fees, commissions and expenses.

VI. CONSTITUTIONAL ISSUES

There appears to be no constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

Family Law Section
Trial Law Section
Business Law Section
Attorney General, U.S. Department of Justice
Attorney General, State of Florida

To amend Section 736.0504 to read as follows:

(1) As used in this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.

(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach, garnish or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

(3)If the trust contains a spendthrift provision, a creditor of the beneficiary, other than a beneficiary's child as provided in s. 736.0503(2)(a) or a creditor described in s. 736.0503(2)(b) or (c), may not attach, garnish or otherwise reach in any manner the interest to which a beneficiary becomes entitled as a result of the trustee exercising its discretion to make discretionary distributions to or for the benefit of the beneficiary.

(4) Whether or not a trust contains a spendthrift provision, if there is an unsatisfied judgment or court order against a beneficiary, the trustee may, without liability to any of such beneficiary's creditors, make discretionary distributions to or for the benefit of the other beneficiaries of the trust to the maximum extent permitted by the trust instrument.

(5) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach, garnish or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(64) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

EXHIBIT 13
Comprehensive Revision to §736.0504 Based Upon Nevada and South Dakota Statutes That Died in Committee

Proposed statute by Barry A. Nelson and Michael Sneeringer. November 25, 2016

736.0504 Discretionary trusts.—

(1) As used in this section, the term: ~~"discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.~~

(a) "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not: (i) the discretion is expressed in the form of a standard of distribution; (ii) the trust instrument states the purposes for the distribution or the trustee's authority is evidenced by permissive language such as "may," "shall," "sole and absolute," "uncontrolled" or similar words; and (iii) the trustee has abused the discretion.

(b) "reach" means, with respect to a beneficiary's interest in a discretionary trust, to subject the trustee of such trust or the distribution from such trust to a judgment decree, garnishment, attachment, execution, levy, creditor's bill or other legal, equitable or administrative process, relief or control of any court, tribunal, agency or other entity as provided by law.

(2) Even if a beneficiary has an outstanding creditor, whether~~Whether~~ or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, ~~a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not~~ unless the trust instrument provides otherwise and subject to s. 736.0504(3), below, the trustee:

(a) is not liable to any creditor of the beneficiary, including but not limited to, a creditor of the beneficiary described in s. 736.0503(2), for paying any income or principal on behalf of the beneficiary; and

(b) may not:

~~(a)~~1. Compel a distribution that is subject to the trustee's discretion; or

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~~(b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.~~

2. Reach any interest which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary; or

3. Obtain an order of attachment or similar relief that would prevent the trustee from making a payment to a third party on behalf of the beneficiary.

(3) ~~If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.~~ Notwithstanding s. 736.0504 (2), a claimant described in s. 736.0503(2)(a) can obtain a writ of garnishment against the interest of the beneficiary in a trust described in this s. 736.0504, but only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient. Even if a claimant described in s. 736.0503(2)(a) can obtain a writ of garnishment against the interest of a beneficiary under authority of this paragraph, the trustee can:

(a) Make distributions from the trust to or for the benefit of the beneficiary whenever the beneficiary is not in default of his or her obligations described in s. 736.0503(2)(a); and

(NOTE –default and notice of default require definition)

(b) Make distributions from the trust to or for the benefit of beneficiaries, other than the beneficiary against whom the judgment or claim described in s. 736.0503(2)(a) exists, to the maximum extent of the discretion granted to the trustee under the trust instrument.

(4) ~~This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.~~ If

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the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(5) Subject to s. 736.0504(3), a trustee having authority to make discretionary distributions for the benefit of a beneficiary may make direct payment of the trust assets in payment of any expense on behalf of a beneficiary to the extent permitted by the trust instrument or otherwise by applicable law without liability to any creditor of the beneficiary.

(6) No trustee may be ordered by a court to change a decision to exercise or not to exercise a discretionary power conferred by this s. 736.0504 unless it determines that the decision was an abuse of the trustee's discretion. A trustee's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power. This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(7) The beneficiary or beneficiaries of a discretionary trust shall be named or clearly referred to in the trust instrument. No spouse or former spouse shall be a beneficiary unless named or clearly referred to as a beneficiary in the trust instrument.

(8) A creditor of a beneficiary of a discretionary trust may not exercise, and a court may not order the exercise of:

(a) A power of appointment or any other power concerning a discretionary trust that is held by a beneficiary;

(b) Any power to direct as described in s. 736.0808;

(c) A trustee's discretion to:

1. Distribute any discretionary interest;

2. Distribute any mandatory interest which is past due directly to a creditor; or

3. Take any other authorized action in a specific way; or

(d) A power to distribute a beneficial interest of a trustee solely because the beneficiary is a trustee.

(9) A settlor may provide in the terms of the trust instrument that a beneficiary's beneficial interest may not be transferred, voluntarily or involuntarily, before the trustee has delivered the interest to the beneficiary.

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SUPPLEMENT TO:
Asset Protection Planning with Trusts: Part I - By Barry A. Nelson, Esq.

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2017 Heckerling Estate Planning Institute

Divorce Considerations in Trust Drafting

Most clients with children are very concerned about possible exposure of their children's inheritance to the reach of a child's former spouse. "It's my money and I don't want it going to my children's former spouses if they get divorced!" What are the rights of a beneficiary's former spouse and dependent children to have alimony and child support obligations satisfied from a trust created by the beneficiary's parents? What can the drafting attorney do to help protect trust assets from a beneficiary's legally binding alimony and child support obligations? What ethical issues does the drafting attorney face if the attorney also represents the trust beneficiary or the trustee? What if the drafting attorney also serves as a trustee? The following is an example of a clause to be used in a trust instrument to deal with protection of trust assets from marital property and alimony claims.

Restrictions Applicable to a Married Beneficiary

1. The following rules apply with respect to all distributions to or for the benefit of each beneficiary of a separate trust under clause XX (whether the primary beneficiary or a descendant of the primary beneficiary) who is married. [Note: XX refers to the number of the article or clause in the will or trust instrument governing distributions.]

1.1 No Trustee other than an Independent Trustee may make any distributions or decisions with respect to distributions to or for the benefit of that beneficiary.

1.2 The Independent Trustee is prohibited from making any outright distributions to that beneficiary for any purpose other than amounts required for that beneficiary's immediate and direct needs for his or her own personal health and basic support needs for food, clothing, and shelter, after taking into account all other available income and resources known by the Independent Trustee to be reasonably available to that beneficiary for those purposes. It is my intention by this provision to prohibit distributions that would allow a beneficiary to accumulate funds to preserve or increase his or her personal net worth or enhance his or her marital lifestyle, whether directly or indirectly by allowing the beneficiary to rely on trust distributions instead and thus preserve his or her own assets and resources.

1.3 The provisions of clauses 1.1 and 1.2 will apply at all times while that person is married, whether he or she was married upon the creation of the trust or becomes married after creation of the trust, except as follows.

1.3(a) Distributions to or for the benefit of a beneficiary who is married will be governed as otherwise provided in clause XX and without regard to the restrictions set forth in clauses 1.1 and 1.2 if the spouse of that beneficiary has executed a written instrument satisfactory to the Independent Trustee in content and form which irrevocably and permanently waives all rights of any nature which the spouse of that beneficiary might have or assert claiming each of the following:

1.3(a)(1) a direct or indirect beneficial interest in the trust, including an interest awarded by judgment, court order, or other involuntary assignment, other than beneficial interests specifically conferred upon that spouse by me under the terms of this [Will] [trust instrument] (such as by naming the spouse as a beneficiary by specific reference to his or her name, or by specific reference as the spouse of a descendant of mine, or by including the spouse as a permissible appointee under a power of appointment),

1.3(a)(2) marital property rights, community property rights, or other direct or indirect ownership interests in the beneficiary's beneficial interest in the trust, and

1.3(a)(3) the right to bring proceedings against the trustee, the trust estate, or any person or financial institution holding trust assets seeking to garnish, attach, or otherwise satisfy obligations of the beneficiary to his or her former spouse arising out of the dissolution of marriage.

1.3(b) The waiver must expressly state that it runs in favor of the Trustee, the beneficiary to whom that spouse is married, and all other persons having a beneficial interest in the trust estate, and it must be delivered to the Independent Trustee. The waiver may be executed before or after the marriage to that beneficiary.

1.3(c) If a beneficiary's spouse executes a waiver in accordance with the provisions of clause 1.3, and either the beneficiary or the beneficiary's spouse thereafter changes his or her residence to another jurisdiction while they are still married to each other, the restrictions set forth in clauses 1.1 and 1.2 will once again govern distributions to that beneficiary unless the spouse of that beneficiary executes another waiver in accordance with the provisions of clause 1.3 which is satisfactory to the Independent Trustee in content and form under the laws of jurisdiction in which the new residence is located.

1.3(d) The Independent Trustee will not be liable to anyone for decisions to make distributions based on a waiver that is later determined to be invalid, or for refusing to make distributions if the Independent Trustee believes the waiver to be invalid, if the Independent Trustee obtains legal advice about the effectiveness of the waiver and otherwise acts in good faith.

1.4 The provisions of clauses 1.1 and 1.2 will not apply to a beneficiary during any time when he or she is not married (whether never married, or whether married previously if the marriage has terminated because of the death of his or her spouse or by dissolution in legal proceedings during lifetime), except as follows. The provisions of clauses 1.1 and 1.2 will continue to apply at all times even after dissolution of a beneficiary's marriage if it was finally determined that the beneficiary's former spouse has rights or interests described in clauses 1.3(a)(1) or 1.3(a)(2), or while proceedings described in clause 1.3(a)(3) are pending, until the beneficiary's former spouse (or the legal representative or successor in interest of the beneficiary's former spouse) is legally barred from efforts to seek to enforce those rights or obligations, or to bring those proceedings, whether because of reversal of the award, death, passage of time, satisfaction, or other reason.

1.5 It is my specific intention not to allow distributions for purposes beyond the immediate and direct personal needs for support and health of a beneficiary who is married as permitted in clause 1.2 which might be used to support or enhance his or her marital lifestyle, and which might lead to claims of reliance by the beneficiary's spouse in the event of divorce, and the assertion of claims for beneficial rights or interests with respect to income or principal of the trust estate, whether directly in the nature of a beneficial interest in the trust, or indirectly through the assertion of marital property rights or other interests in the beneficial interest of that beneficiary, unless the beneficiary's spouse has irrevocably and permanently waived the right to assert all claims and rights as provided in this clause 1. Unless I have made provisions for other persons by explicit terms in this [Will] [trust instrument], I intend for the assets which I have acquired during my lifetime to be used only for the benefit of my spouse and my descendants as provided in this [Will] [trust instrument]. I disavow any intention to make provisions for anyone else, including the spouses of my children and descendants, as it is their responsibility, not mine, to provide for their own spouses from assets and resources they acquire on their own efforts. I direct the Trustees to enforce these provisions rigorously, and to take a narrow and conservative view of the distributions which are permitted to be made to a married beneficiary in the absence of an irrevocable and permanent waiver by that beneficiary's spouse.

(optional provisions requiring annual notice and waivers)

1.6 The Trustee must send a written notice to the adult beneficiaries of each trust who are then eligible to receive current distributions of income or principal once each calendar year to remind them of the requirements of clause 1. The notice may be given together with accounting statements or other reports, or it may be given separately. The failure of a beneficiary to receive a reminder will not prevent the application of the provisions of clause 1, including the following provisions requiring the beneficiary to submit an annual statement verifying the beneficiary's marital status, and if applicable an annual written instrument signed by the beneficiary's spouse that satisfies the requirements of clause 1.3.

1.6(a) The notice from the Independent Trustee must inform the beneficiary that in order to be eligible for further distributions (other than amounts required for the beneficiary's immediate and direct personal needs for support and health), the beneficiary must submit a statement to the Independent Trustee verifying the beneficiary's marital status, and if the beneficiary is married on the date of the notice (even if divorce proceedings are pending on that date), that the beneficiary is required to give the Trustee a written instrument satisfactory to the Independent Trustee in content and form that satisfies the requirements of clause 1.3 which is signed by the beneficiary's spouse. The notice may consist solely of a copy of the provisions of clause 1.

1.6(b) The statement signed by the beneficiary and the written instrument (if any) signed by the beneficiary's spouse must be signed under penalties of perjury within 30 days before or after the date of the notice given by the Trustee. They must personally sign those documents in the presence of an officer authorized to administer oaths under the laws of the United States or any state or territory of the United States, which officer is located in any federal, state, or local governmental office within the United States or a territory thereof, or in any United States embassy or consular office, or in the United States in the office of any bank or trust company authorized to engage in the trust business.

1.6(c) The statement signed by the beneficiary and the written instrument (if any) signed by the beneficiary's spouse must be executed and given to the Trustee annually. The Trustee's authority to make distributions to a beneficiary (other than amounts required for the beneficiary's immediate and direct personal needs for support and health) shall expire one year after the last to occur of (i) the date of the Trustee's notice, and (ii) the later of the date of execution of the last such statement signed by the beneficiary and the date of execution of the last such written instrument (if any) signed by the beneficiary's spouse.

1.6(d) If distributions are suspended because of a failure to meet the requirements of this clause 1.6, those distributions will not resume until the statement signed by the beneficiary and the written instrument (if any) signed by the beneficiary's spouse have been delivered to the Trustee. Mandatory distributions that were otherwise due to the beneficiary but which were withheld during the period of the suspension shall be paid to the beneficiary in arrears upon satisfaction of these requirements. Discretionary distributions that otherwise would have been made by the Trustees but which were withheld during the period of the suspension may be paid to the beneficiary in arrears upon satisfaction of these requirements, in the discretion of the Trustees.

1.6(e) Other than giving the annual notice required by this clause 1.6, the Trustee has no duty to inquire independently whether a beneficiary is married and can rely on the annual statement signed by the beneficiary and the annual written instrument (if any) signed by the beneficiary's spouse in making distributions as otherwise provided in this [Will] [trust instrument]. The Trustee is to be indemnified from the trust estate and held harmless from any liability of any nature in exercising its judgment and authority under this clause, including any failure to conduct a separate investigation whether a beneficiary is married, or for making distributions while a beneficiary is married, unless the Trustee is acting in bad faith.

ASSET PROTECTION PLANNING WITH TRUSTS: PART II

CURRENT DEVELOPMENTS UNDER FLORIDA LAW
DOMESTIC ASSET PROTECTION TRUSTS

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ASSET PROTECTION PLANNING WITH TRUSTS: PART II
CURRENT DEVELOPMENTS UNDER FLORIDA LAW
DOMESTIC ASSET PROTECTION TRUSTS

1-1 DOMESTIC TRUSTS

1-1.1 Introduction

Much has been written about the use of Foreign and Domestic Asset Protection Trusts. This outline focuses on the status of Domestic Asset Protection Trusts based upon recent case law, and suggests that in light of uncertainty as to whether such trusts will be recognized to protect assets of a nonresident debtor and the ten year reach back under Bankruptcy Code Section 548(e), that use of Domestic Asset Protection Trusts be limited to situations where other more certain asset protection techniques available to Florida residents would not be effective, or if used, that the Domestic Asset Protection Trust be combined with other more protective techniques such as funding the trust with limited partnership interests.

This outline focuses on four topics related to domestic self-settled trusts: (1) why conventional Florida domestic self-settled trusts, whether revocable or irrevocable, even with spendthrift protection, are subject to creditors' claims; (2) the potential effectiveness of self-settled asset protection trusts that are created by Florida residents in states that have enacted self-settled asset protection legislation; (3) the effectiveness of both third party created irrevocable trusts to protect gifts to beneficiaries who may be subject to creditors' claims, and how state laws provide significantly different levels of creditor protection for certain beneficiaries; and (4) concludes that a diversified asset protection approach is likely to provide the greatest asset protection, and why attorneys should determine if the client who is initiating planning prefers the certainty of protection using a variety of Florida statutory protections (such as annuities, cash surrender value life insurance, homestead or inter vivos QTIP trust planning) as compared to the creation of a domestic self-settled asset protection trust.

1-1.1.1 What are the biggest traps?

In light of the discussion, below, there are significant risks for a Florida resident who relies heavily on the protection of a domestic self-settled asset protection trust created in a state that provides such protection. First, the client will need to establish that the transfer of assets to the self-settled asset protection trust was not made with actual intent to hinder, delay or defraud the client's creditors, even if the client is solvent at the time of transfer. Second, the client must be concerned that a court could determine that the public policy of the law of Florida (assuming a

Florida resident), rather than the state designated in the trust instrument, should control. This Article describes recent cases that void transfers to Alaska self-settled asset protection trusts based upon specific facts and concludes that clients need to be aware of substantial risks when using domestic self-settled asset protection trust planning.

1-1.2 Why Revocable Trusts and Self-Settled Irrevocable Trusts Created in Florida do Not Protect Assets Transferred to the Trust From the Settlor's Creditors

1-1.2.1 Revocable Trusts

Generally, Florida law provides that revocable trusts do not protect the settlor's assets from creditors during the settlor's lifetime. Florida Statutes Section 736.0505 provides that whether or not a trust contains a spendthrift provision, the property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor. In Florida, a revocable trust does not provide creditor protection upon the death of the settlor/beneficiary. Florida Statute Section 733.707(3) provides that revocable trust assets are available to creditors to the extent the probate assets are insufficient to satisfy the settlor's creditors and expenses of administration.

1-1.2.2 Irrevocable Trusts—Created by the Settlor

1-1.2.2.1 General

Just like outright gifts of property, transfers to irrevocable trusts, conceptually, place assets outside the reach of the settlor. Nevertheless, a creditor can pursue the settled assets where (i) the trust is funded as a result of a fraudulent conveyance, (ii) the settlor retained too much control over the trust, (iii) the settlor retained too much of an interest in the trust and/or (iv) the trust is illusory. Florida Statutes Section 736.0505(b) provides that with respect to irrevocable trusts, a creditor of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. Three exceptions to the general rule are provided under Florida Law.

1-1.2.2.2 Exceptions to General Rule in Florida

Florida Statutes Section 736.0505(1)(c) provides that the general rule (allowing a beneficiary's creditors to reach the maximum amount of assets that can be distributed to or for the beneficiary/settlor's benefit) does not apply solely with respect to a trustee's discretion to reimburse or pay directly to the tax authorities any tax on trust income or principal that otherwise would be payable by the settlor under the law imposing the tax.

Florida Statutes Section 736.0505(2) provides that upon the lapse, release or waiver of a power of withdrawal, the holder is treated as the settlor of a trust only to the extent the value of the property subject to the power, release or waiver exceeds the greater of the amounts specified in Code Sections 2041(b)(2), or 2514(e) (i.e., "five and five powers") or Code Section 2503(b), and if the Settlor was married at the time of the transfer, twice the amount specified in Code Section 2503(b) (currently $14,000 if unmarried or $28,000 if married).

Florida Statutes Section 736.0505(3) provides that assets in an intervivos QTIP trust, or another trust, to the extent that the assets in the other trust are attributable to a intervivos QTIP Trust, are treated as being settled by the settlor's spouse after the death of the settlor's spouse and not by the settlor. See detailed discussion of Intervivos QTIP Trusts in outline titled "Asset Protection Planning with Trusts: Current Developments Under Florida Law Planning with Inter Vivos QTIP Trusts".

1-1.2.2.3 Cases Addressing Creditor's Rights over Self-Settled Trusts Created in States that have not Enacted Self-Settled Asset Protection Statutes

Numerous cases have recognized that a creditor can reach a debtor's interest in a self-settled spendthrift trust. See In re Lichstrahl, 750 F. 2d 1488 (11th Cir. 1985) (applying Florida law); In re Robbins, 826 F. 2d 293 (4th Cir. 1987) (applying Maryland law); Levey v. First Virginia Bank, 845 F. 2d 80 (4th Cir. 1988) (applying Virginia law); In re Witlin, 640 F. 2d 661 (5th Cir. 1981) (applying Florida law); Plymouth Rock Fuel Corp. v. Bank of New York, 91 Misc. 2d 837, 398 N.Y.S. 2d 814, 815 (1977), aff'd, 102 Misc. 2d 235, 425 N.Y.S. 2d 908 (1979) (applying New York law). These cases hold that when a person creates a trust for his or her own support, or a discretionary trust for their benefit, such person's creditors can reach the maximum amount which the trustee, under the terms of the trust, could pay to, or apply for the benefit of the settlor of the trust.

It is important to note that no matter the type of trust, a spendthrift clause in a self-settled trust in a state that has not adopted self-settled asset protection trust legislation is ineffective. For example, In re Brown, 303 F. 3d 1261 (11th Cir. 2002), the debtor, an alcoholic, funded a charitable remainder unitrust with a $250,000 inheritance received. The Appellate Court noted that under Florida law, self-settled spendthrift provisions are not recognized. A self-settled spendthrift provision is one in which the settlor and beneficiary are the same person. Although when the debtor/settlor created the trust she was solvent and there was no intent to defraud creditors, the spendthrift provision was void as against public policy. Because the debtor's sole

right was to a fixed percentage of the trust assets for life, that was what the creditor was able to attach.

An individual may be able to create a trust that is asset protected, in whole or in part, of which such individual is a permissible beneficiary, by restricting the discretionary authority of the trustee with respect to such individual. These restrictions include: (i) limiting distributions to the settlor to an ascertainable standard (e.g. health, maintenance and support), (ii) requiring that distributions to the individual not hamper the ability of the trustee to provide for the support of other beneficiaries such as the spouse or children of the individual and (iii) requiring that the trustee first obtain the consent of adverse beneficiaries prior to distributing funds to the settlor/beneficiary. The greater the foregoing restrictions, the less likely it is that the trust estate will be reachable by the creditors of the settlor/ beneficiary. However, these provisions truly limit the settlor's ability to benefit from such trust assets.

1-2 DOMESTIC SELF-SETTLED ASSET PROTECTION TRUST LEGISLATION ADOPTED IN 15 STATES

1-2.1 Self-Settled Asset Protection Jurisdictions

Sixteen states have adopted a version of self-settled asset protection trust legislation. *See* ALASKA STAT. §§ 13.36.310, 34.40.110; DEL. CODE ANN. TIT. 12, §§ 3570-3576; HAW. REV. STAT. § 554G; MISS. CODE ANN. §§ 91-9-701 – 91-9-723; MO. REV. STAT. §§ 456.5-505; NEV. REV. STAT. §§ 116.010-166.170; N.H. REV. STAT. ANN. § 564-D:1-18; OHIO LEGACY TRUST ACT, CHAPTER 5816 OF THE OHIO REVISED CODE; OKLA. STAT. ANN. TIT. 31, § 10-18; R.I. GEN. LAWS § 18-9.2-1 – 18.9.2-7; S.D. CODIFIED LAWS §§ 55.16-1–55-16-17; TENN. CODE ANN. § 35-16-104, 107; UTAH CODE ANN. § 25-6-14 (repealed an re-enacted in 2013); VA. CODE ANN. §§ 64.2-745.1 and 64.2-745.2; W. VA. CODE Sections 44D-5-503a, 44D-5-503b, 44D-5-503c and 44D-5-505; WYO. STAT. §§ 4-10-505 & 4-10-510–523. For a comprehensive summary of the domestic asset protection trust statutes, see David G. Shaftel, Comparison of the Domestic Asset Protection Statutes, Updated Through September 2016, September 2016, available at http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf. Other states, including Florida, have designated limited situations where assets in a self-settled trust would be protected from creditor's claims. See discussion in paragraph 1.3.1 below and in Exhibit 10 in the Florida Bar RPPTL Seminar outline entitled "Asset Protection Planning with Trusts: Current Developments Under Florida Law Planning with Inter Vivos QTIP Trusts" by Barry A. Nelson.

1-2.2 How Protected are Domestic Self-Settled Asset Protection Trusts Created in Self-Settled Asset Protection Jurisdictions by Florida Residents?

Since self-settled asset protection legislation was enacted first in Alaska, followed by Delaware (both in 1997) there has been considerable controversy as to whether the law designated in the self-settled asset protection trust or rather the law of the settlor's residence should apply if a judgment is rendered against the settlor even if there was no fraudulent conveyance when the trust was created. See Todd A. Flubacher & Randolph K. Herndon, Jr., Delaware Asset Protection Trusts and Creditors' Rights, 37 EST. PLAN. J. 19 (Sept. 2010); Richard W. Nenno, Choosing and Rechoosing the Jurisdiction for a Trust, Address at the 40th Annual Heckerling Institute on Estate Planning (Jan. 2006), in 40th Annual Heckerling Institute on Estate Planning (Matthew Bender, Pub., 2006). Furthermore, Bankruptcy Code Section 548(e), which was enacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L.No. 109-8, 119 Stat. 23 (2005), was intended to close "the self-settled trust loophole and was directed at the states that then permitted self-settled asset protection trusts. Its main function was to provide the bankruptcy estate representative with an extended reach back period for certain types of transfers. In re Mortensen, A09-00565-DMD, 14 (Bankr. D. Alaska May 26, 2011) (citing 5 Collier on Bankruptcy ¶ 548.10[1], [3][a] n.6 (N. Alan Resnick & Henry J. Sommer eds., 16th ed.)). As a result, those using domestic or foreign self-settled asset protection trusts will be subject to a ten year reach back to determine whether assets conveyed to self-settled asset protection trusts were transferred to the trust with actual intent to hinder, delay or defraud the settlor's creditors. In such event even if the debtor resided in the self-settled asset protection trust jurisdiction the conveyance could be avoided. In 2011 and then in 2013 two unrelated cases held that the conveyance to an Alaska self-settled asset protection trust could be avoided, one case where an Alaska resident made the transfer that was determined to be fraudulent under Bankruptcy Code Section 548(e), and in the other because the transfer by a Washington state resident debtor was deemed to be fraudulent under Bankruptcy Code Section 548(e), but also because Washington state law should apply. These cases are insightful as to the dangers of relying on the laws of domestic asset protection trust jurisdictions and are detailed below.

1-2.2.1 In re Mortenson

The unpublished decision of In re Mortensen held that the Alaskan debtor, who created an Alaska self-settled asset protection trust in 2005, made a fraudulent conveyance to the trust that could be set aside under Bankruptcy Code Section 548(e) that provides a ten year reach back period. The Bankruptcy court decision was entered more than six years after the date the Trust

was registered and the debtor transferred unimproved real property located near Seldovia, Alaska (the "Seldovia" property) to the trust on February 1, 2005. The transfer was made after the debtor's divorce when his income fluctuated substantially. The express purpose of creating the trust was "to maximize the protection of the trust estate or estates from creditors' claims of the Settlor or any beneficiary and to minimize all wealth transfer taxes." The debtor and his descendants were the trust beneficiaries. After Mortensen conveyed the Seldovia property to the trust his mother provided him with two $50,000 checks one dated February 22, 2005 (21 days after he conveyed the property to the trust along with a note that is quoted in the opinion as follows):

> "Enclosed is my check #1013 in the amount of fifty thousand dollars, as we have discussed, to pay you for the Seldovia property that you have put into the trust for my three special "Grands"! In the next few weeks there will be a second check mailed to you in the amount of fifty thousand dollars, making a total of $100,000." In re Mortensen, at 7. Mortensen's mother provided him with a second check April 8, 2005 referencing the Seldovia Trust. Mortensen contributed $80,000 of the $100,000 into the trust.

Four years after the trust was registered, when the debtor filed his petition for bankruptcy he had over $250,000 in credit card debt and over $8,000 in medical debt. The debtor disclosed the creation of the Alaska trust on his statement of financial affairs.

The debtor submitted an affidavit at the time of the trust's creation alleging among other things that he was solvent and had no intent to defraud creditors by creating the trust. The bankruptcy trustee alleged that the debtor failed to establish a valid asset protection trust under Alaska law, claiming the debtor was insolvent when the trust was created. The Court disagreed with the Trustee and held that under Alaska law, the debtor was solvent at the time the trust was created.

However, even though the Court determined the debtor was solvent when the trust was created, the trustee also argued that the transfer of the Seldovia property to the asset protection trust should be set aside as fraudulent under Bankruptcy Code Section 548(e) which provides:

> (e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of filing of the petition, if—
>
> > (A) such transfer was made to a self-settled trust or similar device;
> >
> > (B) such transfer was made by the debtor;
> >
> > (C) the debtor is a beneficiary of such trust or similar device; and

> (D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such was made, indebted.

The Court in Mortensen, in agreeing with the trustee, characterized the debtor's trust as a self-settled trust within the purview of Bankruptcy Code Section 548(e). The Court reasoned that Bankruptcy Code Section 548(e) was enacted to close the self-settled trust loophole by avoiding any transfer of an interest of the debtor in property to a self-settled trust that was made on or within ten years before the date of the filing of a bankruptcy petition, and the debtor made such transfer with actual intent to hinder, delay, or defraud.

The Mortensen Opinion states:

> I conclude that a settlor's expressed intention to protect assets placed into a self-settled trust from a beneficiary's potential future creditors can be evidence of an intent to defraud…Here, the trust's express purpose was to hinder, delay and defraud present and future creditors. However, there is additional evidence which demonstrates Mortensen's transfer of the Seldovia property to the trust was made with the intent to hinder, delay and defraud present and future creditors. <u>In re Mortensen</u>, at 16-17.

The most significant factors cited in the opinion were that Mortensen was:

> [C]oming off some very lean years at the time he created the trust in 2005…He had burned through a $100,000 annuity which he cashed out in 2000. He had also accumulated credit card debt of between $49,711 to $85,000 at the time the trust was created. He was experiencing 'financial carnage' from his divorce. Comparing his low income to his estimated overhead...Mortensen was well 'under water' when he sought to put the Seldovia property out of reach of his creditors by placing it in the trust. <u>In re Mortensen</u>, at 17.

Mortensen is concerning because the decision appears to place significant weight on Mortensen's express purpose in creating the trust to protect such assets from creditors. Even though he was solvent when the trust was created the decision states that the combination of his stated intent and that he was "underwater" when the transfers were made was evidence of his intent to hinder delay and defraud creditors. Although one can argue that the decision would not have been the same if Mortensen had a strong financial position at the time the trust was created and when he contributed the funds to the trust he received from his mother, some argue that simply because the trust stated its purpose was to protect assets was sufficient to create a fraudulent conveyance if he incurred debt within ten years of the transfer under Bankruptcy Code Section 548(e). Such a position would put a chilling effect on the use of any self-settled asset protection trusts. For

additional discussion of Mortensen, see David G. Shaftel, Court Finds Fraudulent Transfer to Alaska Asset Protection Trust, 39 EST. PLAN. J. 15 (Apr. 2012); Daniel S. Rubin, The Future of the Domestic 'Asset Protection' Trust After Mortensen, 28 AICPA Planner 5 (Jan./Feb. 2012); John E. Sullivan, et al., Fraudulent Transfer Claims: Does the bankruptcy court's decision in In re Mortensen spell the end of the asset protection trust?, 150 TR. & EST. 43 (Dec. 2011).

1-2.2.2 In re Huber

The case of Waldron v. Huber (In re Huber), BK.W.D.Wa Adversary No. 12-04171, Bankruptcy No. 11-41013, Order Granting Trustee Partial Summary Judgment, Doc. 142, May 17, 2013 (the "Order"), addressed whether an Alaska self-settled asset protection trust was valid with respect to the creditors of a Washington state real estate developer/manager ("Debtor") who guaranteed loans through his real estate development company. In 2007, the Debtor began experiencing turmoil in many of his real estate projects. The Order sets out four cases against the Debtor that were filed in 2009 or 2010. In all four, the plaintiffs were granted judgment against the Debtor, and as such, the Debtor had four judgments against him by 2010.

One of Debtor's business partners advised Debtor in 2007 that he was considering the creation of an asset protection trust and Debtor advised his partner that Debtor would consider such creation to be a fraudulent transfer. However, in 2008, the Debtor's son sought an estate planning attorney's help to plan with some of the Debtor's assets. In creating the Donald Huber Family Trust ("Family Trust"), the Debtor acknowledged that one of his principal goals was to "protect a portion of [the Debtor's] assets from [his] creditors. The Debtor was the settlor and one of the beneficiaries of the trust. The trustees were the Debtor's son, Alaska USA Trust Company ("Alaska Trust") and one of his stepchildren. By July 2010, while the Debtor personally owned only a 5% interest in a plaza, worthless notes and accounts receivable, and a 50% interest in an LLC. The Family Trust owned much of the Debtor's prior holdings and real estate operating companies and the residence occupied by his disabled daughter. When the Debtor needed money from the Family Trust, the Debtor would request disbursement from his trustee son, who would then in turn request approval of the disbursements from Alaska Trust. The Order indicates that Alaska Trust acted merely as a straw man and did nothing to become involved with the preservation and/or protection of the trust corpus. Further, although the Debtor's son alleged that at times he refused the Debtor's request for disbursements, the record reflected the Debtor received trust income of $14,500 per month and that $571,332.81 was paid out of the trust between October 1, 2010 and July 30, 2012.

The Debtor filed for Chapter 11 bankruptcy protection on February 10, 2011. A total of $406,837.27 was paid out of the trust after the filing of the Chapter 11 petition on February 10, 2011 through July 30, 2012. The bankruptcy trustee brought an adversary action against the Debtor, his son, the Family Trust, Alaska Trust and the Debtor's companies, under the following theories: fraudulent transfer under Bankruptcy Code Section 548(e) prohibiting transfers to defeat creditors to a "self-settled trust or similar device"; fraudulent transfer under Washington state law; transferring or concealing property with intent to defraud creditors warranting denial of discharge under Bankruptcy Code Section 727 of the; civil conspiracy to defraud creditors; and request for declaratory judgment that the Bankruptcy Trustee has full membership rights in DGH, LLC, including the power to vote DGH, LLC's 85% membership interests in two LLCs that owned shopping centers.

The court found that the Debtor's transfers of assets into the Family Trust were void. The Debtor's choice of Alaska law as designated in the Family Trust was not determinative of the issue because: at the time the Family Trust was created, the Debtor (the settlor of the trust) was not domiciled in Alaska (he was domiciled in Washington); the assets were not located in Alaska (except for $10,000 in an account at Alaska Trust, all of the underlying property owned mostly through business entities that was placed into the trust was located in Washington); and the beneficiaries were not domiciled in Alaska. As Washington law does not recognize self-settled trusts, the Debtor's transfers of assets into the Alaska trust were deemed void.

Although the court rejected the bankruptcy Trustee's Bankruptcy Code Section 727(a)(2) argument (precluding a bankruptcy discharge when the debtor, with intent to hinder, delay or defraud has transferred, removed, destroyed, mutilated, or concealed property of the debtor within one year before the petition date, or property of the estate after the petition date a creditor), the court avoided the transfer of interests in property under Bankruptcy Code Section 548(e)(1). The bankruptcy Trustee submitted over one hundred exhibits containing declarations, emails, documents and pleadings to establish the Debtor's intent to hinder, delay, or defraud his creditors. In considering the badges of the fraud, the court noted the following: at the time the Debtor transferred his assets into the Family Trust, there was threatened litigation against the Debtor; the Debtor transferred all or substantially all of his property into the Family Trust; the Debtor was significantly indebted at the time he transferred his assets into the Family Trust; the Debtor was both the settlor and beneficiary of the trust; and that the Debtor effectively retained the property transferred into the trust as substantially all of his requests for distributions were granted. "[T]he timing of the Trust's creation, the facts surrounding its creation, and timing of

the asset transfers support a finding of a motive other than estate planning, that of asset protection at the expense of his creditors." In re Huber, at 20.

The court then considered the bankruptcy Trustee's cause of action under Bankruptcy Code Section 544(b)(1) to bring an action to avoid fraudulent transfers under state law. In order to allege a fraudulent transfer, the bankruptcy Trustee had to demonstrate actual intent to defraud by "clear and satisfactory proof" under Washington fraudulent transfer law. Under the Revised Code of Washington Statutes, specifically RCW § 19.40.041(b), the court considered eleven badges of fraud in determining whether actual intent existed. Several of the badges of fraud overlapped with the avoidance of the transfer argument under Bankruptcy Code Section 548, above, such as that the Debtor was threatened with litigation when the transfers occurred; the transfers were of substantially all the Debtor's assets; the Debtor retained control of the transferred property; that as a self-settled trust, the transfer from the Debtor to the Trust was to an insider; and that by transferring the property into the Trust, the Debtor was attempting to remove the assets from his creditors' reach. In addition to the factors set forth in the Court's Bankruptcy Code Section 548(e) analysis, the Trustee showed that in the face of the declining real estate market, the Debtor's inability to secure funding and mounting debt, the Debtor was concerned that he would lose all of his assets to his creditors. As such, the court granted summary judgment to the bankruptcy Trustee on his fraudulent transfer claim.

1-2.2.3 TrustCo Bank v. Mathews

In ***TrustCo Bank v. Mathews***, C.A. No. 8374-VCP (Delaware 2015) decided January 22, 2015 where the question was whether Florida, Delaware or New York law should apply for purposes of statute of limitations for challenging that transfers by a debtor to three Delaware trusts were fraudulent conveyances. The Delaware court held that Florida or Delaware's statutes of limitations would apply whereby the action to avoid a fraudulent transfer must be brought within four years after the transfer, or if later, within one year after the transfer was or could reasonably be discovered, rather than New York law which provided six years to file such action. The debtor filed net worth statements to TrustCo more than four years prior to TrustCo's filing of fraudulent transfer action. Debtor's initial financial statement submitted to TrustCo in March 2008 showed assets of approximately $11.7 million. Yet in April 2008, debtor submitted a "revised net worth statement" to TrustCo reflecting assets of approximately $5.5 million including the following annotation: "I am the discretionary beneficiary of each of the three Delaware trusts that have been established as part of my estate planning." TrustCo evidenced receipt of such information by asking the Debtor to either "guarantee the loan with all three Delaware Trusts or put up

another $1 million in collateral." In fact, borrower provided $1 million of additional collateral when the loan modification closed in 2008.

Based upon the notice of the transfers to the Delaware Trusts and the expiration of four years from the date the Delaware Trusts were created, the fraudulent conveyance claim was barred under Florida and Delaware law.

1-3 ALTERNATIVE PROTECTIONS IN FLORIDA IN ADDITION TO USING SELF-SETTLED TRUSTS

1-3.1 Intervivos QTIP Trusts

While asset protection techniques are frequently discussed at educational seminars, in articles and treatises some techniques are less well known. For example, currently fourteen states in addition to Indiana, which is proposed (Arizona, Arkansas, Delaware, Florida, Kentucky, Maryland, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia and Wyoming) have enacted legislation to make it clear that intervivos QTIP trust assets remain protected in a spendthrift trust as to the initial settlor, even if the settlor's spouse predeceases the initial QTIP trust settlor and the intervivos QTIP trust assets revert to a credit shelter trust for the initial settlor spouse. See ARIZ. REV. STAT. § 14-10505(E); ARK. CODE ANN. § 28-73-505(C); DEL. CODE ANN. TIT. 12 § 3536(C); FLA. STAT. § 736.0505(3); INDIANA STAT. (PROPOSED) § I.C. 30-4.2.1-18; KY. REV. STAT. ANN. § 386B.5-020(8)(A); MD. CODE ANN., EST & TRUSTS § 14.5-1003(A)(1)-(2); MICH. COMP. LAWS § 700.7506(4); N.C. GEN STAT. § 36C-5-505(c); OR. REV. STAT. § 130.315(4); S.C. CODE ANN. § 62-7-505(B)(2); TENN. CODE ANN. § 35-15-505(D); TEX. PROP. CODE ANN. § 112.035(G); VA. CODE ANN. §64.2-747.B.3; WYO. STAT. ANN. § 4-10-506(f). Each intervivos QTIP trust jurisdiction has modified their spendthrift trust statutes to provide that where an intervivos QTIP election was made, then, after the death of the settlor's spouse, any assets passing back into a trust for the initial settlor spouse are deemed to have been contributed by the settlor's deceased spouse and not by the settlor. The creation of inter vivo QTIP trusts thereby allows married couples to take advantage of one another's federal estate tax exemptions and, at the same time, to enhance asset protection planning.

1-3.1.1 Florida Statutes Section 736.0505(3)

Florida Statutes Section 736.0505(3) allows for the creation of intervivos QTIP trusts. Florida's intervivos QTIP trust statute allows for the assets in a trust described in Code §§ 2523(e) or (f) and another trust, to the extent that the assets in the other trust are attributable to a trust described in Code §§ 2523(e) or (f), to be deemed, after the death of the settlor's spouse, as having been

contributed by the settlor's spouse and not by the settlor. See Barry A. Nelson & Richard R. Gans, New §736.0505(3) Assures Tax/Asset Protection of Intervivos QTIP Trust, 84 FLA. BAR. J. 50 (Dec. 2010) (See Exhibit 10 in the Florida Bar RPPTL Seminar outline entitled "Asset Protection Planning with Trusts: Current Developments Under Florida Law Planning with Inter Vivos QTIP Trusts" by Barry A. Nelson).

1-3.1.2 Ariz. Stat. § 14-10505(E)

Ariz. Stat. § 14-10505(E). Unlike Florida, Michigan, Virginia, North Carolina, Delaware and Wyoming, the Arizona statute provides that the initial settlor of *any* irrevocable intervivos trust created for the settlor's spouse will not be deemed to have been contributed by the settlor if the settlor is the beneficiary of the trust after the death of the settlor's spouse, even if there is no QTIP election. See Arizona Statutes Section 14-10505(E). As a result, under Arizona law, one spouse can create an intervivos credit shelter trust for the other and even if the trust assets reverted to the settlor in a credit shelter trust, upon the death of the non-settlor spouse, those assets would not be deemed to have been contributed by the settlor. As such, the assets should retain protection from the settlor's creditors during his or her lifetime despite the fact that he or she created the initial trust and was the beneficiary of the trust upon the death of the non-settlor spouse.

While at first glance the Arizona statute appears to create great asset protection and the possibility of enhanced estate tax benefits that are afforded to credit shelter trusts as compared to an intervivos QTIP Trusts (i.e., all appreciation of assets in the credit shelter trust would avoid future estate taxes and regardless of whether the applicable exclusion amount is reduced the assets in a credit shelter trust should not be subject to estate tax inclusion), there are two potential pitfalls to the Arizona statute: (1) the trust needs to have its situs in Arizona and be subject to income tax there; and (2) there is no provision similar to IRS Treas. Reg. § 25.2523(f)- 1(f), Example 11 that assures that the initial settlor will not be subject to tax under §§ 2036 or 2038 of the Internal Revenue Code. As a result, the IRS could take the position that despite state law, the initial settlor has an interest under §§ 2036 and 2038 of the Internal Revenue Code, resulting in estate tax inclusion.

Providing the initial donee of a credit shelter trust a special power of appointment to direct the credit shelter assets back to the initial settlor, as compared to retaining a reversion in the credit shelter trust in favor of the settlor, may not change the estate tax consequences to the settlor due to the Relation Back Doctrine. See In re Estate of Wylie, 342 So.2d 996, 998 (Fla. 4th DCA 1977). As a result, assets passing from an intervivos credit shelter trust back to a credit shelter

trust for the initial settlor may be considered to be held in a self-settled trust and therefore subject to estate tax inclusion.

1-3.1.2.1 Cash Surrender Value of Life Insurance and Annuities

Under Florida Statutes Section 222.14, the cash surrender values of life insurance policies issued upon the lives of citizens or residents of Florida and the proceeds of annuity contracts issued to citizens or residents of Florida, may not be subject to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor.

1-3.1.2.2 IRAs and Inherited IRAs

Florida Statutes Section 222.21(2)(a) provides that both traditional IRAs and Roth IRAs are exempt from the creditor claims of an owner of such an IRA. However, amounts distributed as required minimum distributions from a traditional IRA are not necessarily considered to be exempt property under Florida Statutes Section 222.21(2)(a) and, thus, may not be protected from claims of the distributee's creditors.

Inherited IRAs and other qualified retirement accounts would continue to be protected to the beneficiary upon death of the participant by under Florida Statutes Section 222.21(2)(c) which states:

> Any money or other assets or any interest in any fund or account that is exempt from claims of creditors of the owner, beneficiary, or participant under paragraph (a) does not cease to be exempt after the owner's death by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986, including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in s. 408(d)(3) of the Internal Revenue Code of 1986, as amended. This paragraph is intended to clarify existing law, is remedial in nature, and shall have retroactive application to all inherited individual retirement accounts without regard to the date an account was created.

1-3.2 Irrevocable Trusts – Created by a Person other than the Settlor

1-3.2.1 General

This outline is focused on self-settled "Domestic Asset Protection Trusts." However, as counselors to our clients, we should also advise clients of the risks that assets in Florida spendthrift trusts and discretionary trusts could be subject to claims of exception creditors. See

Barry A. Nelson, *Bacardi on the Rocks*, 88-FLA. BAR. J. 21 (Mar. 2012); Barry A. Nelson, *Berlinger v. Casselberry: Discretionary Trust Held to be Available to an Alimony Creditor*, Steve Leimberg's Asset Protection Planning Newsletter (Dec. 10, 2013); Barry A. Nelson, *Bacardi: The Hangover*, 88-FLA. BAR J. 40 (Mar. 2014); Barry A. Nelson, *Protecting Trusts From Claims of Alimony or Child Support*, Trusts & Estates Magazine (Mar. 2014).

1-4 PLANNING: SUNDAY MORNING QUARTER BACK APPROACHES THAT COULD HAVE SAVED THE GAME IN *MORTENSON* AND *HUBER*

1-4.1 In re Mortenson

Mortensen could have protected half of his assets if he simply advised his mother to create a third party discretionary trust for his benefit, rather than giving him the $100,000 referred to in her note described in Section 1-2.2.1., above. Instead of losing both the residence and the money gifted to Mortensen, the home could have been purchased for fair market value by the irrevocable trust created by Mortensen's mother, and the Bankruptcy Trustee most likely would have settled for the fair market value of the residence he conveyed to the Alaska self-settled asset protection trust. Mortensen should never have received a gift from his mother outright under his financial circumstances. For the same reason, one of our inquiries when we are discussing asset protection with our clients is the possibility of a future inheritance. For those who have significant concerns about existing or likely creditors, any future inheritance should be in the form of a third party discretionary trust.

1-4.2 In re Huber

Huber should have initiated his planning earlier, probably at the same time in 2007 when his partner suggested that he intended to create a "spendthrift trust" that Huber classified as a fraudulent transfer. Many clients were first experiencing the beginning of the end of the real estate bubble as early as 2006. At that time real estate values were still high, and bank appraisals were still high. In a perfect world, Huber's attorney would have Huber and his CPA create a solvency affidavit or letter. The solvency affidavit should include a balance sheet reflecting values of each of Huber's assets at that time, as well as his exposure on loan guarantees. When values were still toward the top of the market, it is likely that the solvency affidavit would have properly reflected that Huber was solvent. The next question however is whether any transfers at that time would have been considered to be with actual intent to hinder delay or defraud his creditors? This is where the rubber meets the road. Any transfers by Huber will be scrutinized after the fact. The badges of fraud are typically reviewed to determine whether transfers were made with fraudulent intent. Whether the asset protection planning technique is the acquisition of

annuities or the creation of a domestic self-settled asset protection trust, the inquiry as to whether the transfers were fraudulent are the same. The problem with a self-settled asset protection trust is that the window for review as to whether the transfers are fraudulent is ten years as compared to four years for most other transfers. In addition, for Florida residents, use of Florida statutory asset protection exemptions or protections such as annuities, cash surrender life insurance and inter-vivos QTIP trusts avoids an argument as was made in Huber that the law designated in the self-settled asset protection trust should be disregarded as against public policy since it is of the state of residence.

EXAMPLE: Solvency Affidavit

[Client Name]
[Client Mailing Address]

________________, 20___

PERSONAL & CONFIDENTIAL

[INSERT ADDRESS]

RE: Solvency Letter
for [INSERT TRUST NAME]
Our Client File [File ID] (FolderID)

Dear ______:

This letter is written to you in connection with my creation of the above-captioned trust (the "Trust"), which I will create after delivery of this letter.

I am aware that under certain circumstances my personal creditors may not reach assets held in the Trust. You have advised me that a personal creditor of mine could reach assets held in the Trust if the creditor could prove that my transfer of assets to the Trust was a fraudulent transfer.* I also understand that no assurance can be given that the law of __________ would apply to the determination as to whether a transfer of assets to the Trust is a fraudulent transfer. Accordingly, I have, to the extent I deem advisable, consulted with counsel in __________ and in other states regarding the laws pertaining to fraudulent transfers in those states.

I have no intent to hinder, delay or defraud any creditor of mine in connection with the transfer of assets to the Trust or otherwise.

I am not now engaged in, nor do I have any intent or plan to engage in, any business or transaction for which my assets remaining after the completion of my intended transfer of assets to the Trust would be unreasonably small in relation to the business or transaction.

I do not intend to incur, nor do I have any belief or reason to believe that I will incur, debts beyond my ability to pay when due.

I am not presently involved in, nor am I aware of, any pending or threatened litigation in which any person is directly or indirectly seeking damages against me], except for those matters or court actions identified in Exhibit "A"]. I am not involved in any administrative proceeding under the jurisdiction of a federal, state or municipal government as of this date], except as set forth in Exhibit "A"].

Upon the completion of my intended transfer of assets to the Trust, I will not have made a transfer to the Trust of substantially all of my assets.

Upon completion of my intended transfer of assets, I will not be insolvent under Florida law; my assets will remain greater than my current liabilities. I understand that in determining whether I am solvent under Florida law any exempt assets such as homestead, tenants by the entireties and annuities will be disregarded.

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* Under Florida law, a transfer is fraudulent if (i) made by the debtor with actual intent to hinder, delay or defraud a creditor, (ii) the debtor engages in a business or transaction for which his assets remaining thereafter are unreasonably small in relation to the business or transaction, or (iii) the debtor intended or should have known that he would incur debts beyond his ability to pay when due. The fraudulent transfer laws of other states may be more or less restrictive. See 6 Del. C § 1304(a).

[Except as described in Exhibit "B" attached hereto, to] OR [To] the best of my knowledge, I am not liable for, or indebted to, any person who suffered death, personal injury or property damage on or before the date upon which I create and fund the Trust, whose death, personal injury or property damage may be determined at any time to have been caused in whole or in part either by my act or omission or by the act or omission of another person for whom I am vicariously liable.

[Except as described in Exhibit "C" attached hereto,] I am not presently in arrears on account of any agreement or court order for the payment of support or alimony in favor of my spouse, my former spouse or my children, nor have I failed to comply with any agreement or court order providing for the division of property in favor of my spouse or former spouse.

I have no intent to abscond.

No part of my intent in creating the Trust is to conceal assets.

I am not currently insolvent, nor have I incurred debts I am unable to pay when due. I do not currently contemplate filing for relief under the provisions of the U.S. Bankruptcy Code, nor am I involved in any situation that I reasonably anticipate would cause me to file for relief thereunder in the future.

Following the completion of my intended transfer of assets to the Trust, I will remain solvent and the value of my assets will substantially exceed my debts. To the best of my knowledge, I will remain able to pay my debts as they come due.

When I state that my assets will exceed my debts, I am referring to all of my property that is not encumbered by a valid lien except to the extent it is generally exempt under nonbankruptcy law, and except for property held in tenancies by the entirety when it is not subject to process by a creditor holding a claim against only one tenant.

I am not about to incur substantial debt, nor have I already incurred a substantial debt in relation to the value of my assets.

I have full right, title and authority to make the intended transfer of assets to the Trust. None of the assets that I intend to transfer to the Trust have been pledged or otherwise promised in satisfaction of any debt nor are any of those assets subject to any lien, encumbrance, or security interest of any type.

The assets intended to be transferred to the Trust were not derived from unlawful activities.

Whenever in this letter I refer to my "creditors" or my "debts", I mean to include both my direct creditors and direct debts and those creditors to whom, and those debts for which, I am, or may be, jointly and severally liable or indirectly liable such as, for example, those creditors to whom, and debts for which I am, or may be, liable on account of my status as a general partner in a partnership or guarantor of the debt of another.

I intend that each person now or hereafter serving as Trustee or Advisor for the Trust rely on this letter in agreeing to act as a fiduciary of the Trust. You, along with any other Trustee of the Trust, may rely upon it for any purpose including assisting in any defense in any legal proceeding that may be brought against ____________________________ in its corporate or fiduciary capacity.

Should you have any questions, please feel free to contact me.

Very truly yours,

[CLIENT NAME]

JO

cc: ______
Enclosures

1-5 SELF-SETTLED ASSET PROTECTION TRUST PLANNING IN LIGHT OF *HUBER*

A recent article by Jonathan G. Blattmachr, Jonathan D. Blattmachr and Matthew Blattmachr titled Avoiding the Adverse Effects of Huber provides suggestions on how a self-settled domestic asset protection trust can be drafted to be distinguished from the Huber facts. See Jonathan G. Blattmachr et al, Avoiding the Adverse Effects of Huber, 152 TR. & EST. (July 2013). While an excellent article, there will always be risks when a Florida resident uses domestic asset protection trust planning. The following is not intended to be a comprehensive summary of the Blattmachr article, but some of the suggestions included in the article are described below:

> Create a third party trust that allows the trust beneficiary, with the consent of a non-adverse party, to exercise a power of appointment in favor of anyone other than the initial trust beneficiary, his or her estate or creditor, or the creditors of his or her estate and then the beneficiary exercises the power to create a new trust for the initial settlor, whether created by the initial trust beneficiary or by someone else other than the initial settlor (query: is the resulting trust self-settled?).

The Blattmachr approach is creative, but whether a court will pierce through it in the event there is a series of events that result in the settlor becoming the primary beneficiary of an irrevocable trust created by someone other than the settlor, but funded primarily with assets gifted by the settlor to the initial trust. From my experience, the primary objective of clients looking for asset protection is to have some degree of certainty. This is easier to accomplish with the use of statutory Florida exemptions and other laws clearly protecting assets that were not fraudulently conveyed.

Another approach that should be considered for every self-settled asset protection trust is funding the trust with assets that are in and of themselves protective, such as funding the trust with limited partnership interests rather than marketable securities or outright ownership of real estate.

1-6 CONCLUSION

As indicated above, domestic self-settled asset protection trusts are under attack. Whether the trust is created by a resident of a self-settled asset protection trust jurisdiction, as was the case with Mortensen, an Alaskan resident creating an Alaska self-settled trust that was void as a fraudulent transfer, or creation by a nonresident such as Huber which was void as against Washington public policy and as a fraudulent conveyance, there is likely to be scrutiny. Furthermore, Bankruptcy Code Section 548(e) provides a ten year reach back to review whether the initial trust transfer was fraudulent. For these reasons, use of self-settled asset protection

trusts by Florida residents needs to be with significant notice to clients of potential attacks and only after review of other options. If after review of the potential attacks the client decides to proceed, consideration should be given to contribution of assets that, in and of themselves, provide protection such as limited partnership interests. For third party asset protection trusts created to protect the inheritance of a beneficiary, the jurisdictional issues described in the April 2013 article of Trusts & Estates Magazine titled "Are Trust Funds Safe From Claims For Alimony or Child Support?" should be considered. See article below.

By **Barry A. Nelson**

Are Trust Funds Safe From Claims For Alimony or Child Support?

State laws vary widely

Parents who want a child's inheritance to pass to a trust, rather than outright, often seek to prevent the child's former spouse from reaching such assets in the event of divorce. Unfortunately, under the laws of some states, regardless of whether a trust has a spendthrift provision or is a discretionary trust (or both), a beneficiary's children and/or a former spouse may have rights to reach trust assets that are otherwise protected from creditors. When clients are concerned about these issues, attorneys should consider creating the trust in a state where the law is clear that no creditor, including children, spouses and former spouses, will have access to trust assets.

Let's explore discretionary and spendthrift trusts under Article 5 of the Uniform Trust Code (UTC)[1] and compare the exposure of both to claims of creditors holding a judgment against a beneficiary with respect to payments required under a divorce decree. State laws differ significantly, even among the states adopting the UTC, with respect to the power of a former spouse or child to enforce his rights against a spendthrift and/or discretionary trust created by a third party.[2]

Each of the 24 states (and the District of Columbia) that adopted the UTC had an opportunity to modify or delete portions of the law. (See "Treatment of Exception Creditors by UTC States," *http://wealthmanagement.com/estate-planning/treatment-exception-creditors-UTC-states.)* Many states, including Florida, modified Article 5, titled "Creditor's Claims; Spendthrift and Discretionary Trusts."[3] Florida's experience in adopting Article 5 of the UTC serves as an example of the type of issue that may arise should a former spouse or child with a judgment for support try to enforce the judgment against an irrevocable spendthrift trust and/or a discretionary trust.

As described below, many states make it easy for a former spouse or child having a judgment for support to reach assets in a spendthrift trust when mandatory distributions are provided, as compared to discretionary trusts. States providing for exception creditors typically have a public policy of protecting former spouses and children holding a judgment and, in furtherance of that policy, give them additional rights to attach or reach certain trust assets. Some states give these rights to children, but not to a spouse or former spouse. The law is less clear as to whether: (1) a former spouse or child with a judgment for support can reach, attach or garnish assets in a discretionary trust, regardless of spendthrift provisions, before the trustee actually distributes trust funds to the intended beneficiaries; and (2) the trustee of a third-party-created trust can make distributions for the benefit of a beneficiary known to be subject to a judgment for support.

Example: Trust for Divorced Son

Mark, a domiciliary of State X, has suffered serious financial difficulties and has no assets or income to satisfy his obligation to his former spouse. Mark's wealthy father, Jack, consults his advisor and asks whether the testamentary trust Jack intends to create for Mark at Jack's death could be reached by Mark's former wife, who has received a judgment for support payments. Jack says that when Mark was financially secure, Mark was making timely payments to his former wife. However, like many others, Mark's ability to satisfy his debts was significantly curtailed when the value of his real estate vanished, as did his capacity to earn a living as a developer. Jack is helping to support Mark (hopefully temporarily) and wants to know that

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when Jack dies, Mark, and not Mark's former wife, will benefit from assets left in a testamentary trust that will be established for Mark after Jack's death.

Jack inquired about the benefits of using a spendthrift trust and/or a discretionary trust. He was advised that Mark's former wife would be considered an "exception creditor" and could reach Mark's trust if it was a spendthrift trust. Jack was advised that Mark needed a discretionary trust with a spendthrift provision. Jack asked his advisor to explain the difference between a spendthrift trust and a discretionary trust and whether either of them would protect Mark against his former wife's judgment. If State X's laws didn't provide protection, should another jurisdiction be considered?[4]

> If a trustee hasn't complied with the standard or abused his discretion, a court can order a distribution to satisfy a judgment or court order against the beneficiary for support or maintenance.

Spendthrift v. Discretionary

The UTC addresses spendthrift and discretionary trusts.

Spendthrift trusts. Sections 501 and 502 of the UTC[5] address spendthrift trusts. If a beneficiary's interest in a trust isn't subject to a spendthrift provision, a court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest in the trust by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The comment to Section 501 of the UTC states:

> This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest ... leaving those issues to the enacting state's laws on creditor's rights. The section does clarify, however, that an order obtained against the trustee, ... may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditors periodically to return to court will be reduced.

A spendthrift trust is a trust:

> '[C]reated with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection...' [quoting *Croom v. Ocala Plumbing & Elec. Co.*, 57 So. 243, 244 (Fla. 1911)]. When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust, and a creditor or assignee of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the interest...[6]

Comments to UTC Section 502 state:

> [A] settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment was made.

UTC Section 503(b) provides: "a spendthrift provision is unenforceable against: (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance..."

UTC Section 503(c) provides that "a claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distribution to or for the benefit of the beneficiary..."

Comments to UTC Section 503 state:

> The exception . . . for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts . . . and numerous state statutes. It is also consistent with federal bankruptcy law, which

exempts such support orders from discharge.

Discretionary trusts. UTC Section 504(b) provides that, other than as provided in UTC Section 504(c), regardless of whether a trust has a spendthrift provision, a creditor of a beneficiary may not compel a distribution that's subject to the trustee's discretion, even if: (1) discretion is expressed in the form of a standard of distribution, or (2) the trustee has abused the discretion. UTC Section 504(c) states if a trustee hasn't complied with the standard or abused his discretion, a court can order a distribution to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse or former spouse, and the court shall direct the trustee to pay the child, spouse or former spouse such amount as is equitable, but not more than the amount the trustee would have been required to distribute to the beneficiary if the trustee had complied with the standard or had not abused discretion.

The comments to UTC Section 504 state that the power to force a distribution due to an abuse of discretion or failure to comply with the standard belongs solely to the beneficiary, unless it's on behalf of a spouse, former spouse or child having a judgment or order against a beneficiary for support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable, but not to exceed what the trustee is required to pay the beneficiary. Similar to the law for spendthrift trusts, the UTC doesn't provide a procedure to enforce a judgment against the trustee of a discretionary trust.

Florida's Experience

Florida adopted the UTC with modifications. Attorneys with clients similar to Mark in "Trust for Divorced Son" must determine whether applicable local law follows the UTC or creates greater protection to beneficiaries of irrevocable trusts. The laws of Nevada and South Dakota appear to more clearly state that a spouse, former spouse or child can't reach assets in a properly drafted irrevocable discretionary and/or spendthrift trust, and the trustee can make payments to or for the benefit of the intended beneficiary of the trust.[7]

Common law. Before enactment of Florida's Trust Code (FTC) in 2006, the Florida Supreme Court's decision in *Bacardi v. White*[8] provided Florida common law on the rights of a former spouse to assets in a spendthrift and/or discretionary trust when a former spouse had a judgment for support.[9] The court distinguished the consequences of assets held in a spendthrift trust from assets held in a discretionary trust. In *Bacardi*, the former spouse of a donor's son was granted alimony.[10] After the son ceased paying the requisite amount of alimony, his ex-wife obtained a judgment for the unpaid balance.[11] In aid of execution on her judgments, the ex-wife served a writ of garnishment on the trustee of the spendthrift trust created by the father for his son's benefit.[12] The son and trustee asserted that, under the trust's spendthrift provision, the trust couldn't be garnished for the collection of alimony and attorney's fees.[13] The issue on appeal to the Florida Supreme Court was whether disbursements from spendthrift trusts could be garnished to satisfy court-ordered alimony and attorney's fees before such disbursements reached the debtor-beneficiary.[14] The court held that disbursements from spendthrift trusts, in certain limited circumstances, may be garnished to enforce court orders or judgments for alimony.[15]

Much of the *Bacardi* opinion centered on Florida's public policy in creating an exception to spendthrift trust provisions, specifically:

> This state has always had a strong public policy favoring the enforcement of both alimony and child support orders ... We have weighed the competing public policies and, although we reaffirm the validity of spendthrift trusts, we conclude that in these types of cases the restraint of spendthrift trusts should not be an absolute bar to the enforcement of alimony orders or judgments. Florida's interest in the enforcement of these awards under certain limited circumstances is paramount to the declared intention of the donor and the restraint of a spendthrift trust.[16]

The court added:

> In not every case where someone is attempting to enforce alimony orders or judgment, however, will garnishment of a spendthrift trust be appropriate. This enforcement alternative *should be allowed only as a last resort.* If the debtor himself or his property is within the jurisdiction of this state's courts, the traditional methods of enforcing alimony arrearages may be sufficient. In this event, there would be no overriding reason to defeat the intent

of the settlor. Florida courts have a variety of methods available to enforce alimony and child support. When these traditional remedies are not effective, it would be unjust and inequitable to allow the debtor to enjoy the benefits of wealth without being subject to the responsibility to support those whom he has a legal obligation to support.[17]

Neither South Dakota nor Nevada adopted the UTC.

It appears that the FTC codified a portion of the *Bacardi* opinion.[18] Florida Statutes Section 736.0503(3) provides an exception to spendthrift provisions:

> Except as otherwise provided in this subsection and in s. 736.0504, a claimant against which a spendthrift provision may not be enforced may obtain from a court, or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. Notwithstanding this subsection, the remedies provided in this subsection apply to a claim by a beneficiary's child, spouse, former spouse, or a judgment creditor described in paragraph (2)(a) or paragraph (2)(b) only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient.[19]

Did the FTC overrule *Bacardi* for discretionary trusts? When Florida enacted the FTC, it included separate statutes for spendthrift trusts (Sections 736.0502 and 736.0503) and discretionary trusts (Section 736.0504). Although Florida's adoption was consistent with UTC Sections 501, 502 and 503, Florida's law takes a different approach with respect to discretionary trusts. Florida law is clear that a spendthrift provision is unenforceable against exception creditors, including a trust beneficiary's child, spouse or former spouse, who has a judgment for support or maintenance.[20] However, Florida doesn't give a child, spouse or former spouse the power that UTC Section 504(c) gives them to enforce judgments against a discretionary trust when the trustee hasn't complied with a standard or has abused his discretion.

A quick and literal reading of Florida Statutes Section 736.0504 (entitled "Discretionary trusts; effect of standard" (the same title as in the UTC)) could lead to the conclusion that trust assets left to a client's child in a discretionary trust in Florida are protected from a spouse, former spouse or child holding a support judgment. Although the creditor may be an exception creditor and therefore, able to reach assets in a spendthrift trust, Section 736.0504(2) (Florida's modification of UTC Section 504) states:

> Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2) [i.e., an exception creditor], may not: (a) Compel a distribution that is subject to the trustee's discretion; or (b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.[21]

The critical issue is whether Section 736.0504(2) means a spouse, former spouse or child holding a judgment in the form of support can garnish distributions from the discretionary trust before they're in the hands of the beneficiary. Further, can a Florida trustee intentionally make distributions for the benefit of a beneficiary known to have a judgment against him for support without risking personal liability?

Although Florida law allows certain creditors to attach present or future distributions from Florida spendthrift trusts to or for the benefit of a beneficiary under limited circumstances[22] and, specifically, states that other creditors can't reach an interest or a distribution by the trustee "before receipt of the interest or distribution by the beneficiary," it appears uncertain whether exception creditors may garnish a beneficiary's interest in a Florida discretionary trust so that before the distribution is made, the child, spouse or former spouse will insert his rights, as was the case in *Bacardi*.

Florida Statutes Sections 736.0503(2)(b) and 736.0504

may provide support to the position that a discretionary trust created for a beneficiary, such as Mark in "Trust for Divorced Son," would be protected (that is, a creditor can't attach or otherwise reach the interest of a beneficiary as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary).[23] Based on such position, an exception creditor couldn't attach or otherwise reach Mark's interest in a discretionary trust, at least until Mark received his distribution from the trust, as would be the case for creditors of spendthrift beneficiaries other than exception creditors. However, the FTC doesn't define the terms "attach" or "reach," and those terms lend themselves to a number of interpretations as to whether a creditor may be able to garnish the interest of a discretionary trust once the trustee, in the trustee's discretion, is ready to make a trust distribution to the beneficiary. Attorneys involved in drafting the FTC have differing views on whether Section 736.0504 was intended to overrule *Bacardi* with respect to garnishment of discretionary trusts.[24] If *Bacardi* wasn't intended to be overruled by Florida's adoption of the UTC, a trustee should seek court approval before making a distribution to a beneficiary subject to a judgment in the form of support in favor of a child or former spouse.

Bacardi **says a discretionary trust may be subject to a writ of garnishment.** The court in *Bacardi* didn't need to address how its ruling should apply to discretionary trusts. However, it did. In dicta, the court states:

> We further limit this right of garnishment to disbursements that are due to be made or which are actually made from the trust. If, under the terms of the trust, a disbursement of corpus or income is due to the debtor-beneficiary, such disbursement may be subject to garnishment. *If disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment* . . . We also note that where a continuing garnishment is appropriate, the trustee, if it wishes to make payments to the debtor-beneficiary in excess of alimony then due, should seek court approval before it makes such payments. The court may then authorize such payments if sufficient assets remain in the trust or if other provisions are made to secure the payment of alimony to the person who should receive it.[25]

When reading the FTC in conjunction with *Bacardi*, a court could determine that once a trustee, in the trustee's discretion, decides to make a distribution, an exception creditor of the beneficiary should be able to garnish such distribution before it reaches the beneficiary, or the trustee must first obtain court approval before making a distribution to the beneficiary. The preceding analysis highlights the types of consequences that occur when states adopt or modify Article 5 of the UTC, especially when existing common law may conflict. Nevada and South Dakota, neither of which has adopted the UTC, have provided additional clarity in their statutes that specifically prohibit exception creditors from reaching discretionary trust assets and authorize the trustee to make distributions on behalf of the intended trust beneficiary, even one subject to a judgment in the form of support in favor of children or a former spouse.

If State Addresses Exception Creditors

Based on *Bacardi*, it appears that although an exception creditor may garnish a present or future distribution to or for the benefit of the beneficiary of a trust, regardless of whether the trust contains a spendthrift provision, the exception creditor can't compel distributions from discretionary trusts. If the exception creditor could garnish distributions intended to be made by the trustee of a discretionary trust, then, effectively, the donor's objective—to provide funds to the beneficiary and not to the beneficiary's former spouse—is thwarted. In Florida, the question as to whether an exception creditor can obtain a continuing garnishment over assets in a discretionary trust is likely to be determined by future case law or statutory clarification. Marc A. Chorney, in his Colorado continuing legal education publication, "Trusts in Divorce Property Revisions" (2011), cites *Bacardi* for the proposition that if a trustee of a discretionary trust exercises discretion and makes a disbursement, the disbursement may be subject to a writ of garnishment.[26] Yet, it's easy, based upon a literal reading of Florida Statutes Section 736.0504(2), to believe that Florida discretionary trusts can't be reached or attached by exception creditors.

An article written in 2008 by Timothy J. Vitollo surveying 50 states' (and the District of Columbia's) treatment of spendthrift trusts and exception

creditors concludes that, with respect to spendthrift trusts, 20 states include child support and alimony exception creditors, either by adopting the UTC, by statute independent of the UTC or by case law.[27] According to Vitollo, 10 jurisdictions (including the District of Columbia) include child support (but not alimony) exception creditors, and 20 states fail to fully protect spendthrift trusts from claims for child support or alimony. Vitollo's article doesn't address exception creditors for discretionary trusts.

In light of the fact that as many as 30 states provide some type of exception creditor access to spendthrift trusts, it appears that for those beneficiaries known to have exposure, forum shopping for more protective jurisdictions may be advisable. Furthermore, based on "Trust for Divorced Son," even for states that may have limited or eliminated rights of exception creditors, greater certainty should be provided. Jack's primary concern is what happens when a distribution is made to his son Mark. Even if Mark's former spouse couldn't force the trustee of Mark's trust to make a distribution, could the former spouse have a continuing garnishment as described in *Bacardi*? Even if the trust assets must first reach Mark, doesn't that create a game of cat and mouse, with the judgment creditor spouse forced to monitor Mark's accounts? Why not find a state that specifically prohibits a continuing garnishment and, by statute, permits a trustee to make distributions for the benefit of a beneficiary, even a beneficiary subject to a judgment for support from a spouse or child?[28]

> Nevada specifically disallows claims of spouses, former spouses, children and dependents.

Bacardi serves as an example of how a court could rule when asked to determine if a continuing garnishment could be obtained by a former spouse or child with a judgment for support. If a court could rule that a continuing garnishment would be effective, it would also appear that a trustee who circumvents the continuing garnishment by making distributions for the benefit of a beneficiary could be liable to the creditor to the extent the trustee continues to make payments to or for the benefit of the beneficiary.[29]

In the Matter of Goodlander & Tamposi[30] is an example under New Hampshire's UTC law, in which the court decided that a former spouse may reach limited funds in a discretionary trust with a judgment for support. The Supreme Court of New Hampshire held that a trial court's award of alimony to the spouse of a beneficiary of a discretionary trust governed by New Hampshire law with the payment of the alimony amount contingent on the beneficiary spouse's receipt of trust distributions was in error.[31] The trial court had determined that the spouse of the trust beneficiary "... is awarded $50,000 per year in alimony to meet his 'most basic needs'..."[32] The trial court directed the trust beneficiary to "...pay him fifty percent of any distribution she receives from the EMT Trusts up to $50,000 per calendar year, which the EMT Trust trustee shall pay to him directly."[33] On appeal, the court stated that under the provisions of the UTC, a former spouse is entitled to seek a trust distribution to meet his most basic needs, regardless of whether a trustee makes a distribution to the beneficiary.[34]

For those clients desiring greater certainty that their beneficiaries (and not the beneficiary's former spouses) will benefit from trust assets under existing law, advisors should suggest jurisdictions that provide greater protection of trust beneficiaries who may be subject to judgments resulting from divorce. Two of the jurisdictions that appear to be most protective of such beneficiaries are South Dakota and Nevada.

Comparison to UTC

Neither South Dakota nor Nevada adopted the UTC. Their protection of trust beneficiaries from claims of a spouse, former spouse or child as a result of a judgment in the form of support is clear and provides great latitude to trustees.

South Dakota. South Dakota's statute leaves little room for misunderstanding. For example, unlike the UTC, which doesn't define the word "reach," South Dakota Codified Laws (SDCL) Section 55-1-24(6) states that a creditor can't reach assets in a discretionary trust and defines "reach" as: "to subject the distribution to a judgment, decree, *garnishment, attachment*, execution, levy, creditor's bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity as provided by law."[35]

SDCL Section 55-1-35 states that a declaration in a trust that the interest of the beneficiary "shall be held

subject to a spendthrift trust" is sufficient to restrain voluntary or involuntary alienation.[36] SDCL Section 55-1-35 additionally states:

> Regardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a spendthrift trust.[37]

South Dakota law states that a beneficiary's support interest doesn't rise to the level of a property interest:[38]

> If the trust contains a spendthrift provision, notwithstanding the beneficiary's right to force a distribution with regard to a mandatory or support interest, no creditor may force a distribution [nor reach a present or future support distribution] with regard to a mandatory or support interest.[39]

Even if a beneficiary has an outstanding creditor, the trustee of a mandatory or support interest:

> . . . may directly pay any expense on behalf of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a mandatory or support interest.[40]

Further, a discretionary interest is explicitly defined as a "mere expectancy" in South Dakota:

> [n]o creditor may force a distribution with regard to a discretionary interest. No creditor may require the trustee to exercise the trustee's discretion to make a distribution with regard to a discretionary interest.[41]

A South Dakota court can't:

> [o]rder a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.[42]

Nevada. Nevada's spendthrift trust statute dates back to 1939 and was significantly enhanced in 1999 by enlarging the class of permitted beneficiaries of spendthrift trusts and the types of spendthrift trusts to which the law of Nevada applied.[43] There's no statutory allowance for exception creditors, and Nevada specifically disallows claims of spouses, former spouses, children and dependents. Nevada Revised Statutes (NRS) Section 166.090 provides that a:

> [p]rovision for the beneficiary will be for the support, education, maintenance and benefit of the beneficiary alone, and without reference to or limitation by the beneficiary's needs, station in life, or mode of life, or the needs of any other person, whether dependent upon the beneficiary or not.[44]

NRS Section 166.080 adds that:

> [t]he beneficiary or beneficiaries of such trust shall be named or clearly referred to in the writing. No spouse, former spouse, child or dependent shall be a beneficiary unless named or clearly referred to as a beneficiary in the writing.[45]

The trustee's exercise of his discretion in a Nevada discretionary trust can only be reviewed if the trustee acts "dishonestly, with improper motive or fails to act."[46]

> Regardless of whether a beneficiary has an outstanding creditor, a trustee of a discretionary interest may directly pay any expense on the beneficiary's behalf and may exhaust the income and principal of the trust for the benefit of such beneficiary.[47]

Furthermore, creditors face an almost impossible task in trying to get a Nevada court to force a trustee to make a distribution out of a discretionary trust. NRS Section 163.417 provides:

> 1. A creditor may not exercise, and a court may not order the exercise of:
>   (a) A power of appointment or any other power concerning a trust that is held by a beneficiary;
>   (b) Any power listed in NRS 163.5553 that is held by a trust protector as defined in

NRS 163.5547 or any other person;
(c) A trustee's discretion to:
(1) Distribute any discretionary interest;
(2) Distribute any mandatory interest which is past due directly to a creditor; or
(3) Take any other authorized action in a specific way; or
(d) A power to distribute a beneficial interest of a trustee solely because the beneficiary is a trustee...

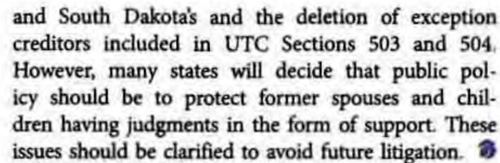
3. A settlor may provide in the terms of the trust instrument that a beneficiary's beneficial interest may not be transferred, voluntarily or involuntarily, before the trustee has delivered the interest to the beneficiary."

Picking the Best Jurisdiction

Planners who are aware of situations similar to those in "Trust for Divorced Son" should be aware of the significant differences in the law and consider the best jurisdiction if such facts arise. The law is clear for those states adopting UTC Sections 503 and 504 without modification: Trust assets are subject to limited claims of a spouse, former spouse or child. Greater analysis is required for states that modified or omitted these sections.

Remedies provided to exception creditors of spendthrift trusts and discretionary trusts vary from state to state. Based on uncertainty described above, issues such as the rights of an exception creditor to a continuing garnishment of a discretionary trust may come into dispute. Attorneys should review state laws to determine whether the beneficiary of a discretionary trust can be subject to a continuing garnishment that would cut the beneficiary off from any distributions the trustee decides to make or whether a trustee can make payments for the benefit of a beneficiary known to be subject to a judgment for support of a former spouse or child. South Dakota and Nevada statutes appear clear and most protective of beneficiaries and trustees. Attorneys should advise their clients that there are significant differences in treatment of exception creditors based on state laws, especially when clients consult their lawyers as to how to protect their children or other beneficiaries from potential judgments in the form of support.

Based on the UTC and the examples of clarity provided in Nevada and South Dakota, states that have a public policy to protect beneficiaries of an irrevocable spendthrift and/or discretionary trust should consider the inclusion of provisions such as Nevada's



and South Dakota's and the deletion of exception creditors included in UTC Sections 503 and 504. However, many states will decide that public policy should be to protect former spouses and children having judgments in the form of support. These issues should be clarified to avoid future litigation.

—Thanks to Thomas O. Wells, shareholder of the firm of Thomas O. Wells, P.A. in Coral Gables, Fla., for his review and thoughtful comments. We also acknowledge and appreciate the assistance of Michael Sneeringer, associate at the Law Offices of Nelson & Nelson, P.A. in North Miami Beach, Fla., in preparation of this article and Mona Bentz, shareholder of the Bentz Law Firm P.A. in Sunrise, Fla., in preparation of "Treatment of Exception Creditors by UTC States," available at http://wealthmanagement.com/estate-planning/treatment-exception-creditors-UTC-states.

Endnotes

1. *See* Uniform Trust Code (UTC) Sections 502, 503 and 504.
2. This article doesn't address self-settled asset protection trusts created in those states that have adopted such legislation. All references herein to a spendthrift and/or discretionary trust assume such trust was created by a third party for the beneficiary and not a trust created by the beneficiary for the beneficiary in a self-settled asset protection jurisdiction. However, for the reasons described below, it's my opinion that, as of this date, Nevada and South Dakota provide greater protection to a beneficiary against claims of a child, spouse or former spouse to enforce a judgment for support. When faced with the question of how to best protect a client's child or designated beneficiary, attorneys should consider whether the client should establish a trust in a jurisdiction outside of the client's domicile state to enhance protection. The benefits of creating trusts in states that have enacted self-settled asset protection legislation is already frequently discussed. This article suggests that for those clients with specific concerns of protecting a child or other beneficiary from judgments in the form of support for the benefit of a former spouse or child, the protection provided in certain states as compared to others may warrant creation of an irrevocable trust outside of the domicile state. As reflected in the articles cited in endnote 37, *infra*, attorneys have advocated for their home states' (such as Nevada and Delaware), stressing the virtues of their state law, while at the same time warning about potential attacks under the law of other (competing) states.
3. *See* "Treatment of Exception Creditors by UTC States," on our website, *http://wealthmanagement.com/estate-planning/treatment-exception-creditors-UTC-states*, which summarizes the modifications, if any, to Article 5 of the UTC by the jurisdictions that adopted it. *See also* ACTEC's Public website, *www.actec.org/public/StateSurveys.asp*.
4. This article addresses domestic planning techniques. Jack's father indicated a preference of using a domestic rather than a foreign asset protection trust.
5. All references to the UTC refer to the UTC as amended in 2010.

6. *Miller v. Kresser*, 34 So.3d 172, 175 (Fla. 4th DCA 2010). *See* UTC Section 502(c); Florida Statute Sections 736.0502, 736.0503 and 736.0506.
7. *See* "Treatment of Exception Creditors by UTC States" *supra* note 3, which summarizes the 24 states (and the District of Columbia) that have adopted the UTC and how the states that adopted the UTC incorporated, modified or deleted UTC Sections 503 and 504. *See also* Timothy J. Vitollo, "Uniform Trust Code Section 503: Applying Hamilton Orders to Spendthrift Interests," 43 *Real Prop. Tr. & Est. L.J.* 169 (2008-2009), for a 2008 article summarizing spendthrift laws in all 50 states as of 2007.
8. *Bacardi v. White*, 463 So.2d 218, 219-220 (Fla. 1985).
9. *Ibid.* at 219-220.
10. *Ibid.* at 220.
11. *Ibid.*
12. *Ibid.*
13. *Ibid.* at 220-21.
14. *Ibid.* at 220.
15. *Ibid.* at 222. *See also Landmark First Nat'l Bank v. Haves*, 467 So.2d 839, 840 (Fla. 4th DCA 1985). In review of a spendthrift trust, in accord with *Bacardi*, the court held that the creditor may be entitled to a continuing garnishment against the trust, but that it won't be effective unless and until the trustee exercises discretion and elects to make payments to the beneficiary. The court may not order the trustee to make such disbursements.
16. *Bacardi, supra* note 8 at p. 222.
17. *Ibid.* (emphasis added.)
18. *See generally* Fla. Stat. Section 736 (chapter effective July 31, 2007).
19. Fla. Stat. Section 736.0503(3).
20. Fla. Stat. Section 736.0503(2).
21. Fla. Stat. Section 736.0504(2).
22. Fla. Stat. Section 736.0503(3).
23. Fla. Stat. Section 736.0504(2)(b).
24. *See* Barry A. Nelson, "*Bacardi* on the Rocks," 86 *Fla. Bar J.* 21, 24, 26 (March 2012).
25. *Bacardi, supra* note 8 at pp. 222-23 (emphasis added) (Florida Trust Code preserves the ability for an exception creditor to reach a beneficiary's spendthrift interest "only as a last resort").
26. Marc A. Chorney, "Trusts in Divorce Property Divisions" (Continuing Legal Education, in Colorado Inc. 2011).
27. *See Vitollo, supra* note 7.
28. Professor Martin D. Begleiter, the co-author of the Iowa Trust Code, which isn't an enactment of the UTC, wrote "Son of the Trust Code—The Iowa Trust Code after Ten Years," 59 *Drake L. Rev.* 265 (Winter 2011). Iowa's Trust Code "was partially based on an early draft of the UTC, but has significant differences from the UTC." Iowa doesn't include exception creditors. When asked whether a former spouse or child may be able to obtain a garnishment over discretionary trust payments or whether a trustee could make payments for the benefit of a beneficiary when a former spouse or child has a judgment for support, Prof. Begleiter indicated that he thought the continuing garnishment was unlikely to be an effective remedy and had a less certain response to a trustees' payments on behalf of such beneficiaries. Prof. Begleiter thought that the trustee could lawfully decide to withhold all payments to beneficiaries while such a judgment existed. Prof. William H. Lyons, who co-wrote an extensive article with John M. Gradwohl, "Discretionary Trusts, Support Trusts, Discretionary Support Trusts, Spendthrift Trusts, and Special Needs Trusts under the Nebraska Uniform Trust Code," 86 *Neb. L. Rev.* 231 (2007), had a comment similar to that made by Prof. Begleiter.
29. *See Wilcox v. Gentry*, 254 Kan. 411 (Kan. 1994). Note that in *Wilcox*, there was no spendthrift clause in the trust.

    The balancing of public policy to protect children and former spouses against the policy to allow settlor's intent to be satisfied is well described in Calvin J. Karlin and Anna Smith's 2012 article describing spendthrift trust clauses under Kansas law. *See* Calvin J. Karlin and Anna Smith, "Spendthrift Trust Clauses and Kansas Divorces: Does a Settlor's Intent Still Matter?" *J. Kan. B. Ass'n* (May 2012):

    > Though statutory and case law continue to evolve in Kansas and elsewhere, the paramount public policy in a divorce setting seems to dictate that one party should not starve while another lives in comfort... In addition, shouldn't the interests of other trust beneficiaries be considered? Why should the current beneficiary's family benefit to the detriment of subsequent vested or contingent trust beneficiaries? . . . Creation of exceptions to spendthrift clauses undermines the ability of a settlor to have his or her intent fulfilled.

30. *In the Matter of Goodlander & Tamposi*, 161 N.H. 490 (N.H. 2011).
31. *Ibid.*
32. *Ibid.* at 503-504.
33. *Ibid.* at 504.
34. *Ibid.*
35. S.D. Codified Laws Section 55-1-24(6) (emphasis added).
36. S.D. Codified Laws Section 55-1-35.
37. *Ibid.* Although Delaware has a similar statute, there appears to be concern that the case of *Garretson v. Garretson*, 306 A.2d 737 (Del. 1973) may still be good law in Delaware; if so, trust assets may be sequestered. For two conflicting articles on Delaware law, *see* Steve Oshins and Bob Keebler, "Steve Oshins & Bob Keebler on the 40th Anniversary of *Garretson v. Garretson*: Spendthrift Trusts and Divorce Protection," *Steve Leimberg's Asset Protection Planning Email Newsletter*—Archive Message #217, Jan. 10, 2013. *See also* Jocelyn Borowsky and Jennifer Wallace, "Jocelyn Borowsky & Jennifer Wallace on *In re Garretson*," *Steve Leimberg's Asset Protection Planning Email Newsletter*—Archive Message #221, Feb. 28, 2013.
38. S.D. Codified Laws Section 55-1-42.
39. *Ibid.*
40. *Ibid.*
41. S.D. Codified Laws Section 55-1-43(1)-(2).
42. S.D. Codified Laws Section 55-13A-105(a).
43. *See* Assembly Bill 469, as introduced, March 10, 1999, *http://search.leg.state.nv.us/70th1999/Bills/70th1999_Bills.html* (enter 469 in search query).
44. Nev. Rev. Stat. Section 166.090(1).
45. Nev. Rev. Stat. Section 166.080.
46. Nev. Rev. Stat. Section 163.419(1).
47. Nev. Rev. Stat. Section 163.419(4).
48. Nev. Rev. Stat. Section 163.417(1), (3).

"TRUSTS AS IRA BENEFICIARIES: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME"

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The Top 10 List of Hot Issues

1. New planning opportunities, pre and post mortem, are available.

2. Layering beneficiaries on the designation form provides maximum flexibility in post-mortem planning

3. Trusts are a valuable tool in planning with IRAs but be sure to designate them properly on the beneficiary designation form.

4. Although inherited IRAs are protected from creditors under Florida law, there may still be good reasons to leave IRAs to children/grandchildren through GST trusts.

5. Beware of malpractice/breach of fiduciary duty claims.

6. Giving incorrect advice regarding distribution periods available after death of IRA owner or QRP participant;

7. Possibility of surcharge for incorrect handling of IRA or qualified retirement plan assets payable to an estate or trust (accelerating or missing RMDs);

8. Conflict of or loss of beneficiary designations (making IRA or QRP payable to estate or surviving spouse when not the intent of the decedent; conflict if there are annuities held; conflict if beneficiaries different than estate planning documents);

9. Incorrect treatment of IRA/QRP distributions to trusts (UPIA) or a lack of sufficient language in trust documents to qualify trusts for QTIP treatment. Florida's Principal & Income Act §738.602 will govern distributions from IRAs to trusts, and ultimately from the trust to beneficiaries, if the trust document is silent.

10. Planning with portability.

The RMD Rules (abbreviated) –

Original Owners- Death before RBD:

If original owner dies **BEFORE** his / her RBD, there are four (4) possible distribution rules that can apply:

- Rule #1 – 5 Year Distribution Rule
- Rule #2 – Beneficiary Life Expectancy Rule
- Rule #3 – Pre-RBD Spousal Life Expectancy Rule
- Rule #4 – Spousal Rollover Rule

Original Owners- Death after RBD:

If original owner dies **AFTER** his / her RBD, there are four (4) possible distribution rules that can apply:

- Rule #5 – Original Owner Life Expectancy Rule
- Rule #6 – Beneficiary Life Expectancy Rule
- Rule #7 – Post-RBD Spousal Life Expectancy Rule
- Rule #8 – Spousal Rollover Rule

NOTE: If the Original Owner did not take his/her entire RMD in the year of death, **the beneficiary** (**not** the estate of the Original Owner, unless the estate is the beneficiary under the beneficiary designation) **must** take the balance of **the Original Owner's accrued by undistributed RMD by** December 31 of the year of death.

Who can be treated as a "Designated" Beneficiary?

- Any legal entity can be a valid beneficiary of an IRA for the purpose of receiving the proceeds upon the IRA owner's death, but to be a "***designated***" beneficiary that meets the IRS requirements for taking death distributions based on individual life expectancy, the beneficiary must be one of the following:

  - any individual
  - any trust that meets the requirements specified by the Internal Revenue Service.

- An IRA owner may name a charity, their estate, or a trust not meeting the Internal Revenue Service requirements but it will not be treated as a "***designated***" beneficiary for life expectancy purposes.

Trust as Beneficiary

- IRA owner must provide a list of the trust beneficiaries to the IRA custodian prior to death or Trustee has until October 31st of year after IRA owner's death to provide trust document or list of beneficiaries, although to be practical the trustee or custodian should have the documentation prior to the September 30th determination date.

- Trust must be valid under State law.

- Trust must become irrevocable by its own terms upon the death of the IRA owner.

  Caution: Beware of joint revocable trusts, as the entire trust does not usually become irrevocable upon the death of the first grantor.

- Beneficiaries must be easily identifiable through the trust document.

Why Designate a Trust as an IRA Beneficiary?

- The reasons are the same with IRAs and qualified plans as they are with other estate assets:

    - Minor beneficiaries (avoids guardianship);
    - Special need beneficiaries (avoids guardianship and can preserve Medicaid benefits);
    - Spendthrift beneficiaries;
    - Second or multiple marriages;
    - “Significant other” beneficiaries;
    - Beneficiaries with substance abuse problems;
    - Estate tax purposes (to preserve credit shelter or marital deduction).

IRS Treatment of Trusts as Beneficiaries

- For IRS purposes, all trusts fall into one of two categories:

    - "Conduit" or "look-through" trusts; or
    - "Accumulation" trusts.

- To be considered a ***conduit*** trust, the RMD must be distributed to the trust each year from the IRA, and the trustee must distribute the RMD to the trust beneficiary on an annual basis. There is no accumulation of RMDs in the trust. If the trust is treated as a conduit trust, then the

beneficiary of the trust will be granted "look-through" treatment and will be able to take distributions based upon their individual life expectancy.

- To be considered an accumulation trust, the trust document must require that the RMD be accumulated, or distributed on a discretionary basis. An example of a trust that would, by necessity, be treated as an accumulation trust would be a special needs trust, where distribution of the RMD to the special needs beneficiary might cause the special needs beneficiary to lose benefits or become disqualified for federal or state assistance. In an accumulation trust, it depends entirely on who the remainder beneficiaries are in determining the life expectancy to be used.

QTIP Trust as Beneficiary

- Desirable for second marriage situation, although less desirable now in light of portability;

- Spouse may not rollover;

- Remainder beneficiaries do not get "second bite of apple" for income tax deferral purposes;

- Rev. Rul. 89-89 required that for this to qualify for the marital deduction the language had to require that the greater of required minimum distribution or income must be payable to the trust, and that the spouse receive all the income earned annually. Rev. Rul. 2000-2 changes this by approving the marital deduction when the spouse has the right to all the income as opposed to receiving actual distribution of the income. Distributions of RMD must still be made from the IRA to the QTIP if RMD is greater than the income earned. See Uniform Principal and Income Act for trust accounting;

- To the extent funds are paid to the trust from the IRA they will be taxed at the trust's income tax rate regardless of income or principal, although the trust accounting income will probably be passed out to the spouse;

- At the IRA owner's death, distributions will have to begin the year after death and can, at best, be based on the spouse's life expectancy, which is typically shorter than the children's life expectancy; and

- The shorter deferral period and the higher income tax rate will mean less money for the spouse during their lifetime than if the IRA were left directly to the spouse, and it will mean less deferral available for the children.

Family Trust as IRA Beneficiary

- It is generally better to use assets other than IRAs (or any type of income in respect of decedent) to fund a Family Trust;

- Spouse may not rollover;

- Remainder beneficiaries do not get "second bite of apple" for income tax deferral purposes;

- The best way to use IRA assets for unified credit is to leave directly to children because of income tax deferral;

- If the spouse or significant other will need some access to the IRA funds, then a family trust will be the best alternative but:
    - to the extent funds are paid to the trust from the IRA they will

be taxed at the trust's income tax rate regardless of income or principal, although the trust accounting income will probably be passed out to the spouse or significant other;

- upon the IRA owner's death, distributions will have to begin the year after death and can, at best, be based on the spouse's or significant other's life expectancy, which is typically shorter than the children's life expectancy; and

- the shorter deferral period and the higher income tax rate will mean less money for the spouse or significant other during their lifetime than if the IRA were left directly to them, and it will mean less deferral available for the children after their death, but it might be the only way to keep the trust funds "in the family".

Two suggested ways to fund a Family Trust:

First (better for first marriages):

- Name the IRA owner's revocable trust as the IRA beneficiary;

- In the trust document, direct that all retirement assets be distributed directly to the spouse and name the spouse as sole trustee (for rollover ability);

- Provide in the trust that if the spouse should disclaim the option to take them outright, the retirement assets will be divided by a fractional formula;

- Benefits will then go to the Family Trust to the extent necessary to use up the estate tax credit (taking into account, of course, current estate tax issues and available portability);

- The balance will go to the Marital Trust, which could then be distributed outright to the spouse for rollover or held in further trust.

Second (better for second marriages):

- Designate the Marital Trust as the primary beneficiary on the retirement assets;
- Name Family Trust as the contingent beneficiary;
- Put language in the trust document that allows the trustee of the marital trust to disclaim any amount of the IRA necessary to satisfy the available estate tax credit (or up to a specified dollar amount);
- Have the trustee disclaim and then the remaining IRA assets would be payable to the Family Trust.

*** It is always better, if possible, to name the trusts themselves rather than naming the revocable trust so as not to run afoul of the "separate share" rules, for example, "The John Smith Marital Trust created under the John Smith Revocable Trust dated 1/1/03."

Other Considerations in Naming a Trust as Beneficiary

For treatment as separate shares, two requirements must be met:

1. The interests of the beneficiaries must be expressed as fractional or percentage interests as of the date of death of the IRA owner; and
2. Separate accounts must be established by December 31st of the year after the IRA owner's death.

This is important because without separate share treatment, the trust will be limited to using the life expectancy of the oldest beneficiary. If the goal was to pay the IRA to separate sub-trusts, this may be a trap for the unwary.

The IRS has issued conflicting Private Letter Rulings (PLRs) on the subject. Although PLRs cannot be used as precedent unless your client has the exact same facts and circumstances as the taxpayer in the PLR, it is the closest thing we have to case law in regard to IRS interpretation issues.

PLR 200234074 was issued prior to but in the same month as the final regulations. In this PLR, the IRA was payable to a trust. Trust One was then divided into two sub-trusts. Sub-trust A was payable to the surviving spouse outright. Sub-trust B provided for lifetime income to the surviving spouse, with the remainder paid outright and equally to three children beneficiaries. The trustee of Trust One then split the IRA into four separate inherited IRAs (one for Sub-trust A and three for the children. At the time, the IRS ruled that each child could use his or her own life expectancy, as Sub-trust B was viewed as a "look-through" trust.

Then came the final regulations.

The next series of PLRs on this issue had a completely different result. **PLRs 200317041, 200317043,** and **200317044** are eerily similar to **PLR 200234074.** In all three cases, the IRA was payable to a trust upon the death of the IRA owner. In each case, that trust was payable equally to the owner's children, with no discretion in regard to the amount of the share each child would receive. In all three cases the IRS denied separate share treatment. The IRS position seems to hinge on a new sentence in the final regulations in Reg. § 1.401(a)(9)-4, A-5(c). The sentence reads, in part "the separate account rules under A-2 of

§ 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit." In effect, the new position of the IRS is to "look no further than the beneficiary form," much like the policy has been on estates. If an estate is the beneficiary of an IRA, it is made clear in the final regulations that even if the estate is then distributed out to the ultimate beneficiaries, there is no additional life expectancy gained by doing so. Because the estate is not considered a designated beneficiary, it does not matter who ultimately receives the IRA assets (other than for income tax purposes) because they will be limited to deferral based on the remaining single non-recalculated life expectancy of the IRA owner at the time of their death.

It is equally clear from the regulations that a trust is considered to be a designated beneficiary if it meets the requirements we have already discussed earlier in this outline. It appears that the IRS' new position is that, as a designated beneficiary, the trust has a life expectancy of its own and that life expectancy is based on the life expectancy of the oldest beneficiary of the trust.

Although this is a troubling interpretation and certainly not what the professional community was lead to believe would be the IRS position in the final regulations, it is not a complete disaster. What this does require is some creative drafting.

- Be sure to designate sub-trusts specifically on the beneficiary form. Do not make the IRA payable to the master trust but rather list specific sub-trusts and the percentage or fraction that each sub-trust will inherit.
- Plan for contingencies. Leave an exit strategy. If the plan is to leave it to a trust with income for life to the surviving spouse and then to children, specify on the beneficiary form "If my spouse survives me, I designate the John Smith Trust

as beneficiary of my IRA. If my spouse does not survive me, then I designate my children as beneficiaries of my IRA in equal shares."

- Allow for disclaimers. It is a gift that the IRS has specifically endorsed the use of qualified disclaimers in order to determine designated beneficiaries. Name as many contingencies as possible. That way, it may be possible to fix an outdated beneficiary form post-mortem and still achieve the desired result.

- Beware of the contingent beneficiaries of any trust that you name on the beneficiary designation. **PLR 200252097** had a troubling result in that it was possible pursuant to the terms of the trust that someone older than the primary beneficiary of the trust might inherit the IRA proceeds. This being the case, the IRS ruled that the older contingent beneficiary's life expectancy had to be taken into account. To avoid this potential pitfall until the IRS clarifies its position, be sure that the benefits of any sub-trust named directly as an IRA beneficiary will not revert to someone older than the beneficiary whose life expectancy you want to be able to use.

Common Mistakes to Avoid with Trusts

- Older or unidentifiable contingent beneficiaries.

- Failure to name the trust correctly on the custodian's beneficiary form.

- Using the estate as the contingent beneficiary.

- Unintentional creation of powers of appointment.

- Failure of the beneficiary language or distribution language within the trust.
- Failure to provide the trust document to the IRA custodian when required.
- Making lump sum distributions from the IRA to the trust.
- Unanticipated or unintended tax consequences.
- Asset protection issues.

Charity as Beneficiary

- It is beneficial to name a charity as beneficiary, as the charity does not pay income tax and the estate will get a deduction for the full amount of the charitable gift;
- To avoid recognition of income by the estate, benefits should not be used to fund a pecuniary charitable bequest;
- Be careful if leaving an IRA to a trust that has charitable bequests because the trustee must be specifically given direction or authority to distribute IRD to charitable beneficiaries or the trust might have to recognize income;
- If only a portion of an IRA passes to charity, establish a separate share so other beneficiaries may still be "designated" beneficiaries;
- Or, distribute the charity's portion prior to the September 30 deadline for beneficiary determination.

Be aware:

- **PLR 200013041** concluded that when the trust that was the beneficiary of the IRA terminated, the trust could distribute share of the IRA to the subsequent beneficiaries and there would be no change in the tax status of these accounts. The new accounts were funded as a result of the trustee assigning the interests in the IRA to the subsequent beneficiaries and trustee to trustee transfers being executed. The IRAs were set up in the name of the decedent for benefit of ("FBO") the beneficiary. There was no additional deferral or acceleration of tax liability.

- Likewise, **PLR 200234019** reflects the same result with regard to estates.

- Be aware that although the IRS will most likely allow these transfers without any tax implications, it is sometimes difficult to find an IRA trustee or custodian who is willing to divide the IRA and allow continued deferral.

Practical Problems

Who is going to be responsible for making sure all this happens according to schedule?

The post mortem planning opportunities occur with the ability to disclaim, distribute or divide the assets.

To disclaim, it must be done in compliance with section 2518 and must generally be done within nine months of the decedent's date of death —

this is not extended to the September 30th beneficiary determination deadline.

To distribute to a beneficiary that is not a “designated” beneficiary and not have it throw off everyone else in the mix, this must be done prior to September 30th.

If the accounts are going to be set up in separate accounts, the accounts must be set up by December 31st of the year after death but must be determined by the September 30th deadline.

Other things to keep in mind:

- There is a good bit of confusion in the professional community.
- No matter what, the IRA document is a contract and the contract rules.

A Word about Private Letter Rulings:

- Not precedent – not binding, but may be used for persuasive purposes if situation is identical.
- Good indication of IRS thought process and view of a particular issue.

Some Important Recent PLR’s

- **2006-16039, 2006-16040, 2006-16041 –** Series of PLRs for the same taxpayer, where the IRS recognized a court-ordered reformation of a beneficiary designation form. The IRS is

currently rethinking this position.

- **2006-10026 –** The IRS approved of individuals named on a beneficiary form as designated beneficiaries even though the beneficiary designation form contained survivorship requirements, much as in a trust or a will**.**

- **2010-21038 –** The IRS ruled that the retroactive reformation of a trust would not be respected for purposes of §401(a)(9) and the related regulations. The trustee reformed the trust pursuant to state court order to remove charities under a limited power of appointment granted to first tier beneficiaries. The adverse ruling means that the trust was no treated as a "designated beneficiary trust" ("DBT") and that the trust beneficiaries' life expectancy could not be used for determining required minimum distributions.

- **2013-30011 -** The IRS allowed the assignment of an IRA to the remainder charities in a situation where the IRA was left to the estate, the estate poured into a trust, and the trust remainders were two charities, although there were some smaller non-charitable bequests. The IRS allowed the assignment because there were more than sufficient non-IRA assets with which to satisfy the non-charitable bequests.

RELEVANT STATE LAW

Regardless of the beneficiary named on the designation form, there are certain state statutes that must be kept in mind, whether in the estate planning stage or in the post-mortem planning stage:

- Uniform Principal and Income Act – F.S. §738.602 governs treatment of IRA/QRP distributions to trust as trust accounting income of principal if trust document is silent;

- Intestacy – If no beneficiary designation exists and there is no will, F.S. §732.101-732.111 will determine the IRA beneficiaries (but look to IRA agreement defaults first);

- Elective share – Under F.S. §732.201-732.228, IRAs and QRPs are subject to the elective share, where a surviving spouse may elect against the elective estate if they are not left at least 30% of the decedent's estate (as defined in the statute) and have not otherwise disclaimed or waived their rights.

- Asset protection – F.S. §222.21 protects IRAs and QRPs from the creditors of owners, participants and beneficiaries, in addition to the federal law, BAPCPA; however, if beneficiaries of inherited IRAs are residents of other states, the law in their state of residence may apply.

- Power of Attorney Statute – The newest version of F.S. §709.2101-709.2402 enumerates powers that may be exercised by holders over IRAs, including but not limited to changing beneficiary designations.

- New "IRA Divorce" statute – F.S. §732.703 provides that under Florida law, if a former spouse is still designated as the beneficiary of an IRA at the time of the owner's death, absent certain qualifying exceptions, the spouse will be treated as having predeceased the IRA owner.

- Guardianship F.S. §744:

    - Minors – Accounts in excess of $15,000 left to a minor outright instead of in trust are required to be supervised through a guardianship of the property;

    - Incapacity – IRAs held by adult individuals that have been

determined to be incapacitated will be governed by a guardianship unless there is a specific Durable Power of Attorney in place recognized by the court as "less restrictive means".

What Does the IRA Agreement Control?

- Beneficiary default language (if no beneficiaries are named, or if all have pre-deceased);

- Per stirpes versus per capita;

- Payout options during lifetime and post-mortem;

- Which state law governs issues under the agreement or with the custodian;

- Arbitration clauses.

What Options Are Available if there is a Problem?

- Declaratory action through the probate court (if possible) to correct missing or incomplete beneficiary designation forms.

- Court-ordered reformation of the beneficiary designation form.

- Modification or reformation of irrevocable trust for any of the following reasons:

    - Change in family circumstances:
        - Births
        - Deaths

        - Marriages
        - Divorces
        - Special Needs Beneficiaries
        - Spendthrift Issues
        - Substance or alcohol abuse
        - Capacity issues

    - Competing interests of beneficiaries that could not be foreseen;

    - Falling out with or death of successor or current trustees;

    - Trustee powers are too restrictive;

    - Unfavorable state law governing trust;

    - Inconvenient trust situs;

    - Drafting errors in document that create ambiguities or would not allow maximum tax deferral;

    - Change in tax law or unanticipated tax issues.

- To determine what options are available, look to the trust document:

    - Does the Trustee or Trust Protector have powers to correct the problem granted in the document?

    - Does anyone have a limited power of appointment over trust property that could effectively resolve the problem?

    - Does the trust document provide any express provisions for modification?

- If the trust document does not provide any solutions, consider:
  - Decanting;
  - Judicial Trust Reformation;
  - Non-Judicial Trust Reformation.

- Examples of Judicial Trust Reformation include:
  - F.S. §736.04113 – Modification not inconsistent with settlor's purpose

  - F.S. §736.04115 – Modification in the best interests of the beneficiaries

  - F.S. §736.0413 – Cy Pres

  - F.S. §736.0415 - Reformation to correct mistakes

  - F.S. §736.0416 - Modification to achieve settlor's tax objectives

  - F.S. §736.0414(2) - Modification/Termination of uneconomic trust

- Examples of Non-Judicial Trust Reformation include:
  - F.S. §736.0412 – Modification/termination pursuant to unanimous agreement of trustee and all qualified beneficiaries

  - F.S. §736.0414(1) – Modification/termination of uneconomic trust

  - F.S. §736.0417 – Combination/division of trust

- Non-Judicial Settlement Agreement is authorized in F.S. §736.0111.

  - Decanting is authorized in F.S. §736.04117.