


**The USA v. The World—  
Wealth Preservation Trusts  
Estate Planning Council of Greater Miami  
November 19, 2015**

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**Leslie A. Share** received his B.A. from Northwestern University, his J.D. from the University of Florida, and his Master of Laws in Taxation from New York University. He served as Chief Tax Editor and Research Editor of the Florida Law Review. Les specializes in the areas of domestic and international tax, estate, and business planning, and wealth preservation. Les has advised clients in numerous and diverse areas such as Broadway theatrical productions, domestic and foreign real estate like-kind exchanges, and Internet tax planning matters.

Les speaks at various seminars in the U.S., Europe and the Caribbean on subjects ranging from Florida and offshore trust and tax law, advanced asset protection techniques, U.S. tax treaties, representing a foreign investor in an Internal Revenue Service examination, the role of the Internet in U.S. tax planning, and preferred structures for U.S. persons investing overseas and engaging in foreign business activities.

Les has written numerous articles for publications such as the Asset Protection Journal, Entertainment Law & Finance, Estate Planning, the University of Florida Law Review, and an American Bar Association book entitled Foreign Investment in U.S. Real Estate-A Comprehensive Guide. He is “AV” (highest) rated by Martindale-Hubbell and is listed in Best Lawyers in America and as a “Super Lawyer” in the Tax area.

# Initial Planning Issues

- Most important—plan and protect now, because it may be much more expensive and difficult to do it later, it really **IS** a worthwhile practice cost
- Put your client's house in order **NOW** to plan for death, disability, retirement and buy-outs with buy/sell, employment and shareholder agreements
- Have your client consult with independent professional advisors—you, attorneys, pension plan administrators, financial brokers, etc. to establish the overall strategy **IN ADVANCE**
- Use lawyers to draft documents, and use accountants to practice accounting—**DON'T CUT CORNERS**

# Combine Wealth Preservation With Estate Planning

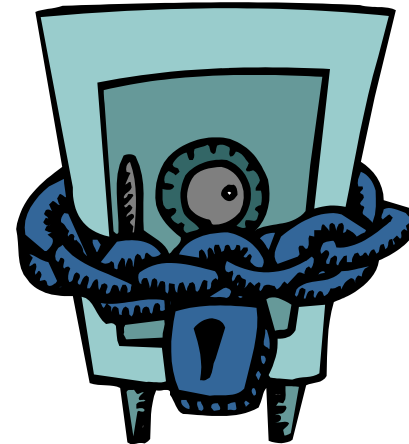
- You are seeking tax and estate planning advice—wealth preservation is a “value added” benefit—don’t let the proverbial “tail” wag the dog
- All documents must be consistent from an estate planning standpoint
- Coordinate duties among professionals—attorney, CPA, asset custodian, insurance agent, etc.

# Should You Assist a Client with Wealth Preservation?

- Ascertain the actual status of any existing or potential litigation, either as a plaintiff or a defendant
- Have the client prepare a comprehensive estate planning and financial questionnaire
- Where appropriate, meet with litigation and bankruptcy counsel before proceeding with the trust to determine related issues
- Don't assist in "protecting" against the U.S. government
- Beware of federal aiding and abetting penalties and money laundering statutes

# Revocable Trusts v. Irrevocable Trusts

- Revocable living trusts avoid probate, but generally provide no asset protection during the settlor's lifetime
- Revocable trusts can be valuable for NRAD estate and tax planning
- Settlor's "Letter of Wishes" must be precatory
- An irrevocable, completely discretionary trust can still effectively be revoked at any time by the trustee by distributing out all of the trust assets

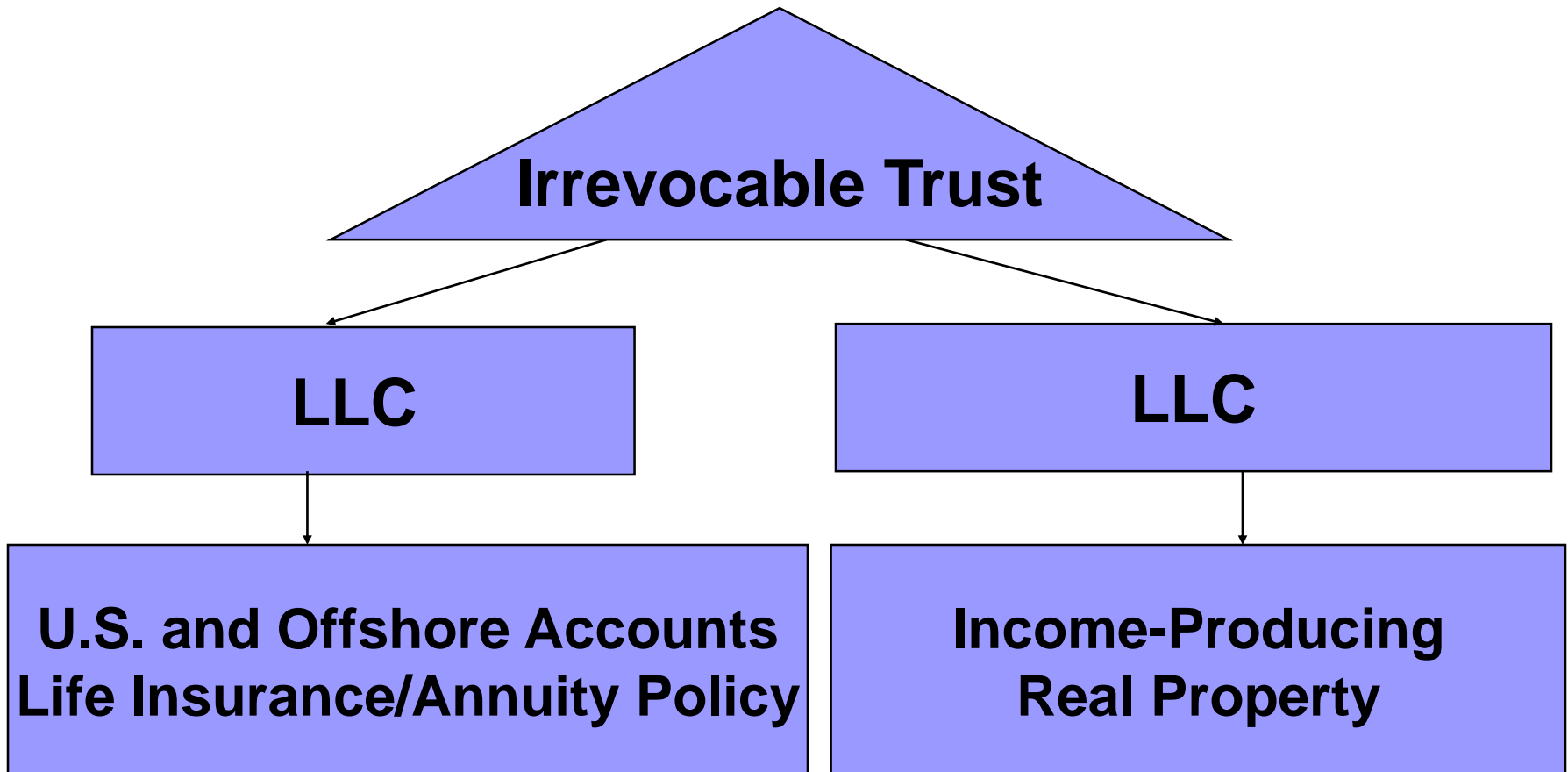


# Irrevocable Discretionary Trusts

- Delaware, Alaska and certain other states permit “self-settled spendthrift trusts” whose assets are intended to be shielded from creditors of the settlor/beneficiaries
- Although domestic wealth preservation trusts are strongly promoted, and avoid the foreign trust tax and compliance tax rules, no one knows if they will ultimately “work,” and they face numerous legal and practical issues
- Consider “going offshore”

# Trust Structure

## U.S. Settlor/Independent Trustee/Protector





# Weighing the Pros and Cons of Creating an Offshore Trust

- Foreign wealth preservation trusts can work, but only if the structure in question is properly and timely formed, funded, administered and terminated
- Carefully planned trust structures are intended to be creditor settlement devices, and no structure is forever “bulletproof”
- If an offshore trust structure is too complex for you or the client to understand or implement, don't use one, because it will probably fail if tested by a creditor

# Is the Entity a “Foreign Trust”?

- The entity must be a “trust” under IRS classification rules—Reg. § 301.7701-4, some questions remain as to certain foreign entities
- Generally—governed by a foreign law with a foreign trustee
- “Domestic” or “foreign” status has an enormous effect upon the applicable U.S. tax and compliance rules—Reg. § 301.7701-7
- Careful drafting is essential, but uncertainties remain due to lack of interpretive case law and rulings
- A trust will be deemed a “foreign trust” unless it satisfies both the “court test” and the “control test”

# Is It Ever Too Late To Form or Fund a Trust?—Part I

- Generally, so long as it's legal, it's better to take a shot at asset protection than just to give up
- Grupo Mexicano De Desarrollo (S.Ct. 1999) confirmed that in the absence of a judgment, you can generally pick and choose your creditors, but it did not consider fraudulent transfer issues, and some appellate courts have bent over backwards to distinguish this decision

# Is It Ever Too Late To Form or Fund a Trust?—Part II

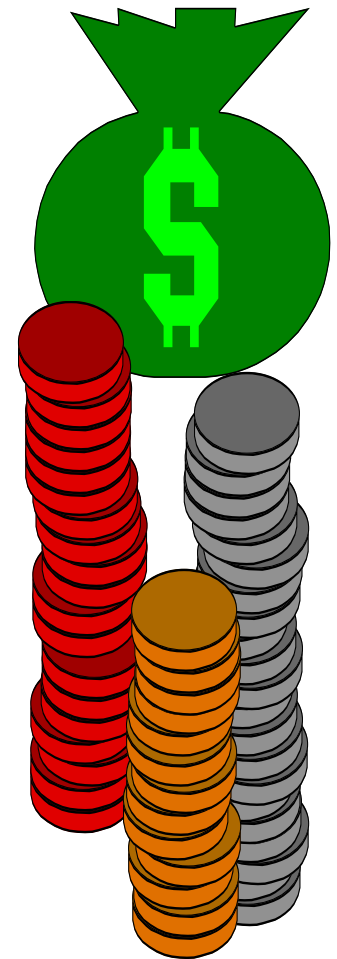
- Be very careful in certain “public policy” situations—you may have problems if transferor is about to enter or is in divorce proceedings
- Don't do last minute (or any other) planning to avoid governmental creditors
- Don't lie to or try an “11th hour” move against a bankruptcy judge—you won't be discharged, and you may go to jail

# Creating the Trust

- Generally, no need for the settlor to execute the trust deed in the trust jurisdiction
- Trust must be executed and witnessed in accordance with local law requirements
- An “Affidavit of Solvency” is generally required to show that no fraudulent transfer occurred, backed up with a litigation specialist’s opinion
- Trust is likely useless if not properly funded through written assignments, deeds, or other appropriate documents

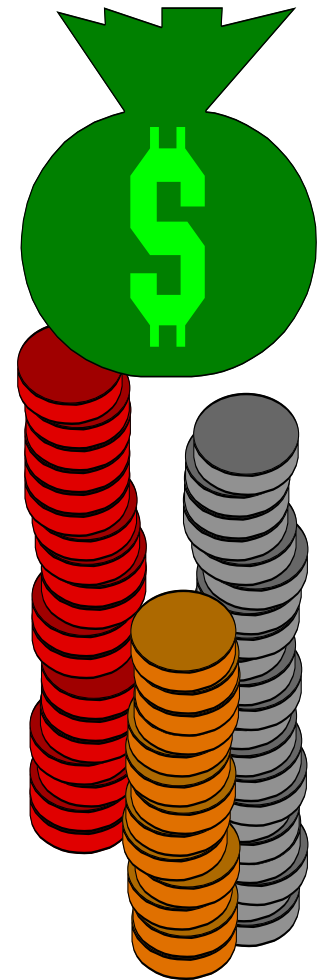
# Irrevocable Trust Planning—Part I

- Foreign trusts most likely remain the best method of shielding assets from creditors of the settlor and other trust beneficiaries, notwithstanding recent U.S. court attacks
- A “grantor trust” for U.S. income tax purposes—a total flow-through to the settlor
- Must provide for discretionary, **not** mandatory distributions, because if a beneficiary can’t touch the trust assets, it’s difficult for his or her creditor



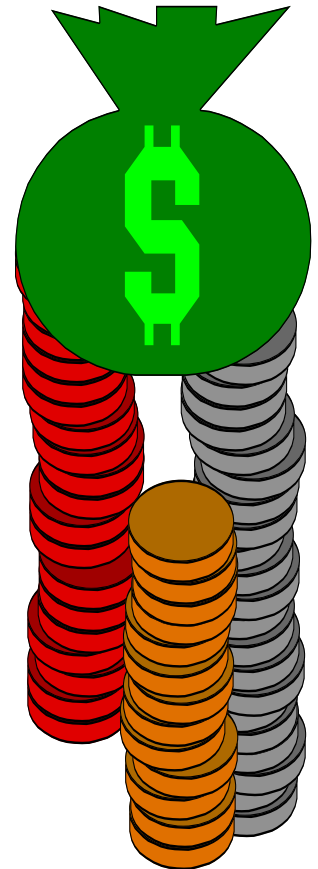
# Irrevocable Trust Planning—Part II

- Choose a jurisdiction with advantageous fraudulent transfer laws—the applicable period ranges from zero to forever
- The use of a trust protector acts as a check and balance—veto powers, co-signature authority and the right to remove and replace the trustee
- Use a foreign protector to avoid U.S. court jurisdiction issue, or at least have one as a backup successor



# Irrevocable Trust Planning—Part III

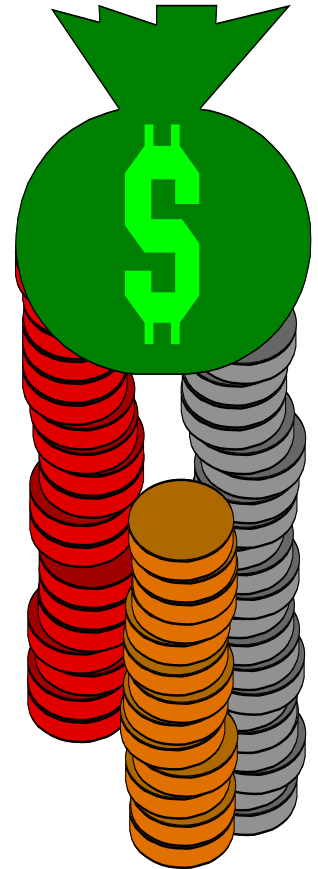
- Choose jurisdiction, asset custodian(s) and trustee carefully—how will they react to an event of duress?
- Be prepared for significant administrative costs
- Make certain the client is fully aware of how offshore trusts operate
- Only use “Play Money”—the trust must only be your nest egg, **not** your checkbook!
- Paying U.S. taxes and professional, custodial and fiduciary fees and costs is better than losing your assets
- Always require annual trust accountings prepared under applicable law standards





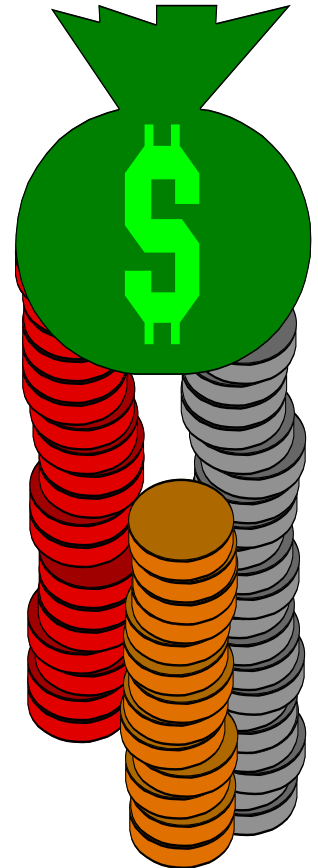
# Irrevocable Trust Planning—Part IV

- Be prepared to be taxed on trust income even where no distributions are made
- Warn the client in advance in writing of the “worst case scenario”—the possibility of jail for contempt for the failure to repatriate trust assets, even when arguably “impossible”
- In a “worst case scenario,” how long are you willing to sit in jail to keep your money? (the Lawrence story)



# Irrevocable Trust Planning—Part V

- Don't give the settlor the right to remove or replace the trust protector, even pursuant to an ascertainable standard or limited by an event of duress clause
- Use an independent, unrelated person or entity as a trustee
- Paying trust creation and maintenance fees and costs is better than losing 100% of the client's nest egg



# Irrevocable Trust Provisions— Part I

- Income and principal distributions must be entirely discretionary, to or for the benefit of a beneficiary or a trust for his or her benefit
- “Spendthrift” clauses protect a beneficiary from creditors and himself
- “Event of duress” clauses prevent non-voluntary actions by the settlor, a beneficiary, the protector, and the trustee
- “Flee” clauses allow trusts and trustees to move elsewhere if necessary

# Irrevocable Trust Provisions— Part II

- Trustee may be given power to amend the trust with the consent of the protector
- Protector may have powers to remove and replace trustee, and thus to effectively change the trust jurisdiction
- Protector may be given selected “veto” powers over trustee actions—distributions, investments, etc.
- Protector may be given co-signatory power over trust accounts with trustee

# Cook Islands Irrevocable Trust Law

- Section 13B(1)—A creditor will have to prove beyond a reasonable doubt that the international trust:

(a) was so settled, established or disposed by or on behalf of the settlor with the principal intent to defraud that creditor of the settlor; and

(b) at the time such settlement, establishment or disposition took place rendered the settlor insolvent or without property by which that creditor's claim (if successful) could have been satisfied

# Cook Islands Irrevocable Trust Law

- Section 13B(3)— a trust shall not be deemed settled, established or funded with intent to defraud a creditor if settled:
  1. More than 2 years after the date the creditor's cause of action arose; or,
  2. If settled, established or funded within 2 years from the date that the creditor's cause of action arose, the creditor fails to commence proceedings in a "court of competent jurisdiction" within 1 year from the date therefrom

# Cook Islands Irrevocable Trust Law

- Section 13B(4)—A trust settled before the creditor's cause of action arose cannot be deemed to be settled with intent to defraud—claims based on “future fraud” are prohibited
- Section 13B(5)—A settlor shall not have imputed to him an intent to defraud solely by reason that the settlor: (1) settled the trust within 2 years of the creditor's cause of action arising; (2) retains certain powers of control and disposition; (3) is a beneficiary, trustee or protector; or (4) the settlor settled the trust at a time when proceedings by the creditor had been commenced

# Cook Islands Irrevocable Trust Law

- The tests in Section 13B do not apply where the plaintiff has already issued proceedings in respect of that plaintiff's cause of action prior to the settlement of the Trust or the assets being transferred to such Trust.



# Cook Islands Irrevocable Trust Law

- Section 13K(2)—proceedings in a Cook Islands court to set aside the settlement of an International Trust or a contribution to any International Trust, or seeking any relief or remedy under Section 13B must be commenced within 2 years from the date of settlement or such contribution

# Cook Islands Irrevocable Trust Law

- If the creditor's claim is proved, the trust is not void or voidable—the claim must be satisfied from that portion of the trust assets equivalent to the amount claimed using a market value test.
- No other remedy is permitted.
- Therefore, the possibility that the plaintiff's remedy will be in the form of a constructive or resulting trust is eliminated.



# Cook Islands Irrevocable Trust Law

The creditor will have to prove that the consequence of setting up the trust or disposing assets to it was to render the settlor insolvent and unable to satisfy the claims of the creditor.

1. The creditor has the burden of establishing insolvency which means the creditor will need to have access to the settlor's financial information before he can proceed.
2. Solvency under Cook Islands law is measured by determining whether, immediately after a transfer to the trust, the settlor had retained sufficient assets to pay the specific creditor who is bringing the legal claim. All other creditors are irrelevant.

# Recent Nevis Trust Law Developments

- Nevis International Exempt Trust (Amendment) Ordinance, 2015—now working on a “glitch bill”—major changes include:
  - RAP abolished
  - Numerous changes and corrections that “tighten up” attempts to attack Nevis trusts, but some work remains to be done

# Nevis Trust Law Issue

- Section 32, Beneficiaries of trusts, provides that: “(5) A Nevis Company, a corporation, a limited liability company or a multiform foundation may also be a beneficiary of the trust.”
- What about another trust?
- Is Section 32(4) [“ A settlor or trustee of a trust may also be a beneficiary of the trust.”] already sufficient for this purpose?

## 6th Annual Domestic Asset Protection Trust State Rankings Chart

Rank	State	State Income Tax (50% weight)	Statute of Limitations (Future Creditor) (5% weight)	Statute of Limitations (Preexisting Creditor) (5% weight)	Spouse/ Child Support Exception Creditors (Spouse 3% weight/ Alimony 1% weight/ Child Support 1% weight)	Preexisting Torts Exception Creditors/Other Exception Creditors (5% weight)	Ease of Use – Is a new Affidavit of Solvency required for every new transfer? (7.5% weight)	Fraudulent Transfer Standard (5% weight)	Decanting State Ranking (7.5% weight)	Total Score
1	Nevada	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	No	No	No Affidavit Required	Clear and convincing	Ranked #2	99
2	South Dakota	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support (only if indebted at time of transfer)	No	No Affidavit Required	Clear and convincing	Ranked #1	98
3	Tennessee	No (except dividends/ interest on residents)	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required	Clear and convincing	Ranked #3	86.5
4	Ohio	No (except residents)	1.5 Yrs.	1.5 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required	Clear and convincing	Ranked #6	85
5 (tie)	Delaware	No (except residents)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #5	79
5 (tie)	Missouri	No (except Missouri source income)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Alimony; Child Support	State/U.S. to extent state/federal law provides	No Affidavit Required	Clear and convincing	Ranked #11 (tie)	79
7	Alaska	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No	Affidavit Required	Clear and convincing	Ranked #7	77
8	Wyoming	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Properly listed on app. to obtain credit – but only as to that lender	Affidavit Required	Clear and convincing	Ranked #11 (tie)	75.5
9	Rhode Island	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #19 (tie)	75
10	New Hampshire	No (except dividends/ interest on residents)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Limited clear and convincing evidence standard	Ranked #4	74.5
11	Hawaii	No (except residents)	2 Yrs.	2 Yrs. Pers. Injury; 6 Yrs. Contract	Divorcing Spouse; Alimony; Child Support	Preexisting Torts/ Certain Lenders/ Hawaii Tax	No Affidavit Required	Limited clear and convincing evidence standard	None	72
12	Utah	Very uncertain ability to avoid	None (Immediate protection)	2 Yrs. or 1 Yr. Discovery (also 120-day mailing/ publication option)	No	No	Affidavit Required	Missing clear and convincing evidence standard	None	70*
13	Virginia	Yes	None (Immediate protection)	5 Yrs.	Child Support	Creditor who has provided services to protect trust/ U.S./city, etc.	No Affidavit Required	Clear and convincing	Ranked #8 (tie)	29.5
14	Oklahoma	Yes	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Must be majority Oklahoma assets	No Affidavit Required	Clear and convincing	None	16.5
15	Mississippi	Yes	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts, State/ Criminal Restitution/ Up to \$1.5MM if no \$1MM Umbrella Policy	Affidavit Required	Clear and convincing	None	14.5

\*6th Annual Domestic Asset Protection Trust State Rankings Chart created in April 2015. Original State Rankings Chart created in April 2010. Copyright © 2010-2015 by Steve Oshins (soshins@oshins.com / www.oshins.com / (702) 341-6000, ext. 2). All rights reserved.  
 \*The Decanting State Ranking column is based on the 2nd Annual Trust Decanting State Rankings Chart created in January 2015 and updated in February 2015 at [http://www.oshins.com/maes/Decanting\\_Rankings.pdf](http://www.oshins.com/maes/Decanting_Rankings.pdf).  
 \*Utah's law is great for Utah residents, but is ranked low primarily because of its state income tax uncertainty for non-residents.

Steve Oshins is a member of the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada. He is rated AV by the *Martindale-Hubbell Law Directory* and is listed in *The Best Lawyers in America*®. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011 and has been named one of the 24 "Elite Estate Planning Attorneys" by *The Trust Advisor* and one of the Top 100 Attorneys in *Worth*. He can be reached at 702-341-6000, ext. 2 or [soshins@oshins.com](mailto:soshins@oshins.com). His law firm's website is [www.oshins.com](http://www.oshins.com).



# Fraudulent Transfer Statute of Limitations for Pre-Existing Creditors

- Ohio—1½ years or 6 months after discovery
- Nevada—2 years or 6 months after discovery
- S. Dakota—2 years or 6 months after discovery
- Tennessee—2 years or 6 months after discovery
- Delaware—4 years or 1 year after discovery
- Alaska—4 years or 1 year after discovery
- Wyoming—4 years or 1 year after discovery

# Fraudulent Transfer Statute of Limitations for Future Creditors

- Ohio—1½ years
- Nevada—2 years or 6 months after discovery
- S. Dakota—2 years or 6 months after discovery
- Tennessee—2 years or 6 months after discovery
- Delaware—4 years
- Alaska—4 years
- Wyoming—4 years



# Delaware Irrevocable Trust Law

- Delaware Qualified Dispositions in Trust Act, 12 Del. C. § 3570, et. seq., (the “Act”):
- Transfer of assets through a trust instrument
- “Qualified trustee”—Del. individual resident or trust company
- Custody in Delaware of at least some of the trust assets, maintain records for the trust on an exclusive or non-exclusive basis, prepare or arrange for the preparation of fiduciary income tax returns for the trust or otherwise materially participate in the administration of the trust

# Delaware Irrevocable Trust Law

- Delaware law governs the validity, construction and administration of the trust
- The trust must be irrevocable
- The trust must contain a spendthrift clause
- The grantor may not serve as trustee
- The grantor may not hold an advisory position (including as protector or distribution adviser) but may serve as investment adviser with the right to consent to/direct investment decisions
- The grantor may not retain the power to direct trust distributions

# Delaware Irrevocable Trust Law

- The grantor may not demand a return of assets transferred to the trust
- The grantor may retain the power to veto distributions of income or principal from the trust (helpful to make the trust transfer an incomplete gift for US gift tax purposes if so desired)
- The grantor may retain a lifetime and/or testamentary limited power of appointment (both may be needed for the same purpose)
- The grantor may retain the power to remove and replace trustees or trust advisers

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- The grantor may retain the power to remove and replace trustees or trust advisers

# Delaware Irrevocable Trust Law

- The grantor may be a discretionary income and/or principal beneficiary
- The grantor may retain certain interests in a QPRT, GRAT, GRUT and other types of trusts
- The trust may pay income taxes due from the grantor on trust income if allowed by the trust instrument and the potential or actual receipt of income or principal would be at the trustee's discretion, or pursuant to a mandatory direction in the trust instrument, or the discretion of an adviser

# Delaware Irrevocable Trust Law

- Four classes of creditors may defeat a Del. trust and reach the trust assets to satisfy a judgment through a Del. Court of Chancery action

1. A creditor whose claim arose before the creation of the trust provided the claim is brought within four years after the creation of the trust or, if later, within one year after the creditor discovered (or should have discovered) the trust and the claim is proven, by clear and convincing evidence, that the creation of the trust was a fraudulent transfer.

# Delaware Irrevocable Trust Law

2. A creditor whose claim arose after the creation of the trust, provided the claim is brought within four years thereafter and the creditor proves, by clear and convincing evidence, that the creation of the trust was a fraudulent transfer.

3. The claim results through an agreement or court order for the payment of support or alimony for the grantor's spouse, former spouse or children, or for a division or distribution of property in favor of the grantor's spouse or former spouse, only for a spouse married to the grantor before the funding of the trust.

# Delaware Irrevocable Trust Law

4. A person who suffers death, personal injury or property damage for which the grantor is liable on or before the trust's creation date.



# Recent US Case Law Developments

- Goldberg v. Rosen, 2012 WL 4933299 (11th Cir., Unpublished, Oct. 17, 2012)
- Gilmore Bank v. AsiaTrust New Zealand Ltd., 2014 WL 684377 (Cal.App.Distr. 4, Feb. 21, 2014)
- Branch Banking & Trust Co. v. Hamilton Greens, LLC, 2014 U.S. Dist. LEXIS 52470 (S.D. Fla. Feb. 26, 2014)

# “Emergency Funds Trusts”—The Most “Bang For Your Buck”

- Private Letter Ruling 200944002 (October 30, 2009)
- Grantor creates an irrevocable trust for the benefit of Grantor, his spouse and descendants
- (Independent) Trust Company will serve as trustee.
- The trustee will pay over the income and principal of Trust in such amounts as trustee in its **sole and absolute discretion** may determine for the benefit of one or more members of the class consisting of Grantor, Grantor's spouse and Grantor's descendants
- Any income not paid will be accumulated and added to principal
- Upon the termination of the trust, no part of the income or principal of Trust may be transferred or paid to Grantor, Grantor's estate, Grantor's creditors or the creditors of Grantor's estate
- Upon the death of Grantor and Grantor's spouse, the entire principal together with any accrued income shall be distributed to any descendant of Grantor then living to be held in separate trusts; or if there is no descendant then living, to one or more qualified charitable organizations

# **“Emergency Funds Trusts”— The Most “Bang For Your Buck”**

- Grantor is a resident of State and the situs of Trust is State (apparently Alaska)
- State Statute provides that a person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust, may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee

# “Emergency Funds Trusts”— The Most “Bang For Your Buck”

- The following persons may **not** be a trustee of Trust or any other trust created under trust: (1) Grantor; (2) the spouse or former spouse of Grantor; (3) any individual beneficiary of Trust or a trust created under Trust; (4) the spouse or a former spouse of a trust beneficiary; (5) anyone who is “related or subordinate” to Grantor under § 672(c)
- Grantor has the power, exercisable in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to acquire property held in the trust by substituting other property of an equivalent value
- Before completing the property substitution, the trustee must be satisfied that the acquired and substituted properties are of equivalent value
- The power can not be exercised in a manner that can shift benefits among the trust beneficiaries

# “Emergency Funds Trusts”— The Most “Bang For Your Buck”

- The IRS held that:

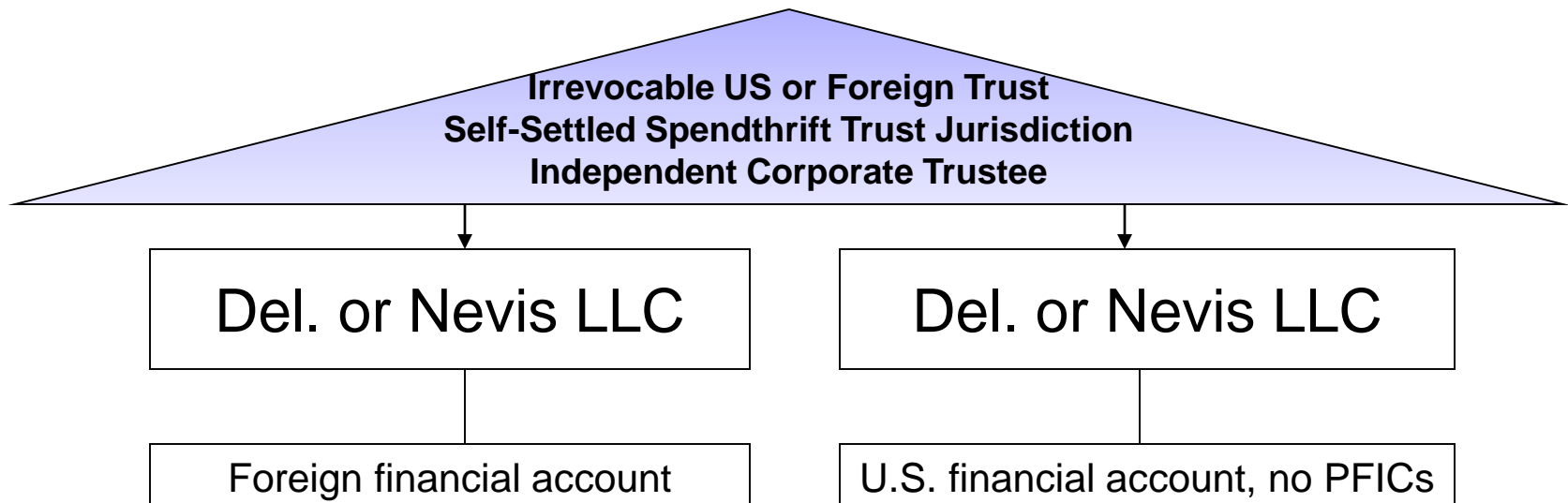
1. The transfer to the trust was a completed gift for federal gift tax purposes.

2. The trustee’s discretionary authority to distribute income and/or principal to the grantor does not by itself cause the trust to be includable in the grantor’s estate for federal estate tax purposes under § 2036(a)(1).

# **“Emergency Funds Trusts”— The Most “Bang For Your Buck”**

- This type of planning only appears to be possible if the trust is created in a jurisdiction allowing for self-settled spendthrift trusts
- There can be no “pre-arranged plan” between the settlor and the trustee regarding the trustee’s exercise of its discretion over trust distributions
- See also *PLR 9837007* (similar completed gift holding) and *Rev. Rul. 2004-64* (grantor not treated as making an additional taxable gift to the trust by virtue of paying the trust’s income tax liability)

# “Emergency Funds Trust” Structure



Note—the timing of potential U.S. tax “check-the-box elections” for each holding company will need to be determined, along with the trust jurisdiction, trustee and the protector or advisory committee.

# Planning For The Future

- You are seeking tax and estate planning advice—asset protection is a “value added” benefit—don’t let the proverbial “tail” wag the dog
- You’ve wasted your time and money if you set up the structure without proper ongoing operations and maintenance

