



Benefits of US asset protection statutes not to be overlooked

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Prior to 1997 if one sought asset protection using a self settled trust he would have to have settled it under the laws of a non US jurisdiction. Since then, 14 states have enacted legislation recognising such trusts as effective to protect from future creditors. Although many of the features of these domestic statutes are similar, there has been, what some commentators have referred to, a "race to the bottom". They suggest that these states have gone too far in competing with each other by including provisions that make it more difficult for creditors to pierce through.

This article will compare some of these features, identify some of the applications for such trusts and explain why they might also be appropriate for non-US persons to consider.

Distinguishing features among the states

The most significant differences exist in the context of fraudulent transfer considerations and the rights and powers that settlors may retain. Some states provide for as long a period as five years from the date property is transferred to a trust for creditors to challenge such transfers as fraudulent transfers, while other states have reduced such periods to as short as 18 months (in Ohio) or six months after the transfer is or reasonably could have been discovered if the creditor files suit or makes a written demand that asserts a claim based on an act or omission that occurred before the settlement and that suit is then filed within three years after the settlement. Some states have limited the class of creditors who have the additional period from date of discovery to those creditors who are "existing" creditors - that is, requiring them to have commenced an action within four years, in the case of Alaska.

The other feature which varies considerably among the states is the settlor retained powers. In Delaware, for example, the settlor may retain an annuity interest, an interest as a discretionary beneficiary, a testamentary power of appointment and veto power over distributions and may be designated as a trust protector or investment advisor. In Virginia, on the other hand, he cannot retain a veto power on distributions. And in Oklahoma, the settlor can even retain the power to revoke the trust (although query how effective that might be if compelled to do so by a court).

Applications for self settled trusts - US settlors

Since 2012, US domiciliaries can make gifts of up to USD5 million (indexed to USD5,340,000 in 2014) or USD10 million if married. Since relatively few clients have the resources to make such large gifts in an outright manner, there is a preference among those who may have more modest wealth to give it away but retain the possibility of benefiting from the trust if there is a reversal of fortune. A basic principle under the estate tax rules is that if one transfers assets but retains any rights thereto or powers to direct beneficial enjoyment the trust will be includible in his estate. Furthermore if, under the governing law of the trust, his creditors can reach it, inclusion will follow. In those states that have not enacted self settled trust legislation a settlor's creditors can reach the maximum amount which the settlor retains or which the trustee has discretion to distribute to him. As a result, if one transfers assets to a trust governed under the laws of one of these 14 states in which his creditors cannot reach it the transfer will be

deemed a completed gift and may thus be excluded from estate tax (provided there is no implied or express agreement to provide distributions to the settlor).

Thus by utilising such a trust one can avoid estate tax on any future appreciation of trust assets while also achieving significant asset protection - all while having the ability, through a friendly trustee, to receive distributions if the need arises. Although asset protection is perfectly legal (when not engaged in to avoid existing or foreseeable creditors) a settlor can achieve better optics if he can demonstrate significant tax or other benefits (such as avoiding forced heirship) afforded thereby.

Another recent application for such self settled trusts has been to structure them as non-grantor trusts. After five years of silence on this issue from the Internal Revenue Service, they recently issued a private letter ruling¹ concluding that, when properly structured, a settlor can make a non-taxable transfer (incomplete gift) to a non-grantor trust in a state which protects the trust from the settlor's creditors and allows the settlor to retain an inter-vivos and testamentary power of appointment while remaining a discretionary beneficiary. To date, only four of the foregoing 14 states allow for such settlor retained powers (Alaska, Nevada, South Dakota and Wyoming). The objective of these trusts, in addition to their obvious asset protection benefits, is to avoid state income tax where a settlor resides in a high income tax state.

Applications for self-settled trusts by non-US persons

Other benefits available with US based asset protection trusts which non-US clients may desire include avoidance of forced heirship rules as well as the stability and financial resources available in the United States. It may not be apparent to many that a non-US person can settle a trust under the laws of one of these 14 states and not be subject to US taxation (provided it does not directly own US securities or real estate). The key is to draft the trust so that it is classified as a foreign trust under the Internal Revenue Code. A simple solution is to designate a non-US person as either a co-trustee or trust protector (with significant powers such as removal of trustees or distribution consent). Doing so will cause the trust to be taxed as a non-resident alien while getting all the benefits of established trust law, an excellent judicial system and access to world class money managers.

Such trusts can also be utilised by foreign persons who wish to make gifts or provide inheritances for US family

members. Gifts or inheritances thereto will remain protected from creditors, divorcing spouses and wealth transfer taxes (in many states in perpetuity).

When this author first became involved in the asset protection area there were few options to consider and all of them were offshore. Now with the


addition of these 14 states the opportunities exist to permit for a better matching of jurisdiction with the desired client objectives.

Domestic Asset Protection Trust State Rankings Chart (updated)

Rank	State	State Income Tax (65% weight)	Statute of Limitations (Future Creditor) (5% weight)	Statute of Limitations (Pre-existing 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? (5% weight)	Fraudulent Transfer Standard (5% weight)	Decanting State Ranking (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	97
3 (tie)	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 #7	89
3 (tie)	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 #5	89
5	Alaska	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No	Affidavit Required	Clear and convincing	Ranked #8 (tie)	81
6	Wyoming	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Property listed on app. to obtain credit – but only as to that lender	Affidavit Required	Clear and convincing	Ranked #8 (tie)	80.5
7	Delaware	No (except residents)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Pre-existing Torts	No Affidavit Required	Clear and convincing	Ranked #4	80
8	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 #13	79
9	New Hampshire	No (except dividends/ interest on residents)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Pre-existing Torts	No Affidavit Required	Limited clear and convincing evidence standard	Ranked #3	77
10	Hawaii	No (except residents)	2 Yrs.	2 Yrs. Pers. Injury; 6 Yrs. Contract	Divorcing Spouse; Alimony; Child Support	Pre-existing Torts, Certain Lenders, Hawaii Tax	No Affidavit Required	Limited clear and convincing evidence standard	None	76
11	Rhode Island	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Pre-existing Torts	No Affidavit Required	Clear and convincing	None	75
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 #11	23
14	Mississippi (assuming Governor signs bill)	Yes	None (immediate protection)	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Pre-existing Torts, State/ Criminal Restitution/Up to \$1.5MM if no \$1MM Umbrella Policy	Affidavit Required	Clear and convincing	None	15
15	Oklahoma	Yes	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Must be majority Oklahoma assets	No Affidavit Required	Clear and convincing	None	14

5th Annual Domestic Asset Protection Trust State Rankings Chart created in April 2014. Reprinted with permission. Copyright (c) 2010-2014 by Steve Oshins (All rights reserved). *The Decanting State Ranking column is based on the 1st Annual Trust Decanting State Rankings Chart created in January 2013 at http://www.oshins.com/images/Decanting_Rankings.pdf. *Utah's law is great for Utah residents, but is ranked low because of its state income tax uncertainty for non-residents.

END NOTE:
 1. See *Private Letter Ruling 201310002*, (March 8, 2013)



A Beverly Hills lunch with Mr Hollywood: An asset protection planner's dream May 2011, Issue 216
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