Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #283
Date: 12-Feb-15
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: Steve Oshins & Jeremy Spackman on Dahl v. Dahl: Utah Supreme Court Rules Trust Not a Domestic Asset Protection Trust!

"The Court specifically uses the terms 'strong public policy' and 'repugnant' in their analysis. Query how they might have ruled had this been a defendant in a negligence action, for example, rather than it being a divorce matter. Would the Court still have applied Utah law under its 'strong public policy' and 'repugnant' requirements? It appears that the answer would be 'no' given this requirement that it be a 'strong public policy' and 'repugnant,' but this is far from clear. What may appear at first glance to be a bad part of the case for DAPTs may actually be a positive for DAPTs, except with respect to certain obvious classes of creditors such as divorcing spouses, alimony and child support which may be deemed 'repugnant' situations. But this is merely speculation on our part and also will vary on a court-by-court basis."

Dahl v. Dahl received a lot of attention from practitioners since it appeared to be the only Domestic Asset Protection Trust case that had been decided on a choice-of-law basis. However, in a decision filed January 30, 2015, the Supreme Court of the State of Utah has reversed most of the lower court's decision. But it's not exactly what you may think! Hint: The Court ruled that the trust was a revocable trust, not a DAPT. Now, **Steve Oshins** and **Jeremy Spackman** update members on this significant development.

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- The Annual Domestic Asset Protection Trust State Rankings Chart
- The Annual Dynasty Trust State Rankings Chart
- The Annual Trust Decanting State Rankings Chart

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Before we get to their commentary, members should note that a new **60 Second Planner** by **Bob Keebler** was recently posted to the **LISI** homepage. In the second of his three-part series, Bob summarizes the proposals in the Administration's 2016 Budget dealing with IRAs and qualified retirement plans. You don't need any special equipment - just click on this link

Now, here is Steve and Jeremy's commentary:

EXECUTIVE SUMMARY:

We co-authored Asset Protection Newsletter #227 which described the *Dahl v. Dahl* district court's decision. In that decision, the court ruled on summary judgment that Utah resident, Dr. Charles Dahl's Nevada Domestic Asset Protection Trust's assets were protected from his divorcing spouse, Kim Dahl.

However, in a decision filed January 30, 2015, the Supreme Court of the State of Utah has reversed most of the district court's decision. This newsletter will focus solely on the issues that are of most relevance to estate and asset protection planners. The decision itself is lengthy and deals with a multitude of ancillary issues.

FACTS:

Dr. Charles Dahl and Ms. Kim Dahl were married for nearly eighteen years. Dr. Dahl is a practicing cardiologist. On October 23, 2002, Charles executed a trust instrument called The Dahl Family Irrevocable Trust (the "Trust") which named Charles as Settlor and his brother C. Robert Dahl as Investment Trustee. Although not apparent from the facts in the case, based on language

crossed out on a deed obtained by the authors of this article, Nevada State Bank was named as Qualified Person Trustee.

The trust named the Settlor, the Settlor's spouse, the Settlor's issue and certain organizations that the Settlor may later designate as beneficiaries. The trust named Nevada as the domicile in its choice of law provision. Thus, this appeared to be a Nevada self-settled asset protection trust. But wait! There will be an interesting twist to this story!

On October 23, 2002, Charles transferred 97% of Marlette Enterprises, L.C. (the "LLC"), a Utah limited liability company, to the Trust, keeping 1% for himself and 1% for each of the parties' two children. As of December 31, 2002, the LLC owned brokerage accounts with a total value of $935,996.

On June 20, 2003, Charles and Kim jointly deeded their primary residence to the Trust. It is unclear why Kim jointly signed the deed to a trust settled by Charles only. The house purportedly cost Charles and Kim over $1,000,000 to build.

Charles filed for divorce on October 24, 2006 and the Decree of Divorce was entered July 20, 2010 after plenty of courtroom drama. But let's fast-forward through years of court proceedings.

The Supreme Court of Utah Reverses

Kim sought a share of the Trust assets, which she claimed were marital property. Specifically, she sought declaratory judgment as to the parties' rights and obligations under the Trust, arguing that the Trust was null and void, that the Trust was revocable as a matter of law, that she was a settlor of the Trust, and that she was entitled to an accounting from the Trust. The parties filed cross-motions for summary judgment, and the district court granted the Trust Defendants' motion, dismissing Kim's claims. She appealed to the Supreme Court of Utah asserting that the district court erred when it declared that she had no enforceable interest in Trust assets.

The Supreme Court of the State of Utah (the "Court") has now reversed the district court and has agreed with Kim. But not exactly for the reasons that you may think!

Analysis: Utah Law Applies

The Court determined that Utah has a strong public policy interest in the equitable division of marital assets and that Utah state law should apply to the trust even though the stated choice of law in the trust was Nevada.

According to the Court:

> Because Utah is the forum state, Utah choice-of-law rules apply. *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 14, 54 P.3d 1054. Under Utah choice-of-law rules, we will generally enforce a choice-of-law provision contained in a trust document, unless doing so would undermine a strong public policy of the State of Utah. *See* UTAH CODE § 75-7-107 & cmt. ("This section does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law."); *see also Jacobsen Constr. Co. v. Teton Builders*, 2005 UT 4, ¶ 19, 106 P.3d 719 (refusing to allow parties to "employ choice of law provisions to force forum states to enforce contractual terms wholly repugnant to local public policy"). Thus, we will refuse to enforce a settlor's choice-of-law provision if doing so would undermine strong public policy goals of this state.

COMMENT:

The Court specifically uses the terms "strong public policy" and "repugnant" in their analysis. Query how they might have ruled had this been a defendant in a negligence action, for example, rather than it being a divorce matter. Would the Court still have applied Utah law under its "strong public policy" and "repugnant" requirements? It appears that the answer would be "no" given this requirement that it be a "strong public policy" and "repugnant", but this is far from clear. What may appear at first glance to be a bad part of the case for DAPTs may actually be a positive for DAPTs, except with respect to certain obvious classes of creditors such as divorcing spouses, alimony and child support which may be deemed "repugnant" situations. But this is merely speculation on our part and also will vary on a court-by-court basis.

The Trust is Revocable, not a DAPT!!!

The trust is called "The Dahl Family Irrevocable Trust." Section 5.5 of the trust agreement states, "*Trust Irrevocable*. The Trust hereby established is

irrevocable. Settlor reserves *any power whatsoever* to alter or amend *any* of the terms or provisions hereof." (Emphasis added).

Despite the fact that the trust appears to be intended to be a DAPT given that it was established under Nevada law, with a Nevada co-trustee, it has the word "Irrevocable" in its name, it has the word "Irrevocable" in Section 5.5, and every other aspect of the trust appears to be what would generally be done with a DAPT, the Court ruled that it's not a DAPT. Instead, they determined that it is a revocable trust.

According to the Court, "We employ familiar principles of contract interpretation when construing trust instruments. *Makoff v. Makoff*, 528 P.2d 797, 798 (Utah 1974). We begin our analysis with the language of the trust agreement to ascertain the intent of the settlor. *Id.* Because we presume that the settlor knew and intended the legal effect of the language used, we give the words used in the trust agreement their ordinary and usual meaning. *See* 76 AM. JUR. 2D *Trusts* § 33 (2005) ('[T]he words used in a trust instrument are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be ascertained.')."

We believe that the trust was clearly intended to be a DAPT and that the sentence in question was simply not drafted as intended. Looking at the four corners of the trust agreement, that is obvious to us as estate and asset protection planners. And we are nearly certain that the drafting attorney would agree that it was intended as an irrevocable DAPT had the drafting attorney been asked to clarify this issue. However, the Court has spoken and has determined the trust to be a revocable trust.

After ruling that the trust is revocable, the Court ruled that Kim has the right to revoke the trust as to the portion to which she was the settlor and therefore has the power to take back that portion of the trust assets that were hers, as does Charles. Although we disagree with the methodology used by the Court, we believe that this was the only equitable result given that Kim appeared not to understand the ramifications of her transfers and likely just signed documents put in front of her by Charles. We don't agree that the trust is revocable and suspect that the Court used the obvious drafting error to get to the equitable result.

Attorney Fees and Costs of $2,186,568 through January 31, 2010

Kim's attorneys submitted a claim for $2,186,568 in attorney fees, litigation costs and interest charges through January 31, 2010. This does not include fees and costs incurred after January 31, 2010, so the final amount claimed would be much higher.

The Court ruled that the attorney fees were excessive. However, regardless of the ultimate reduced figure, the point to be made here is that litigation is expensive. The Dahls appear to be worth just a few million dollars. So whatever her bills and his bills are, they both lost a very large amount of their assets by going through years of litigation.

This is why most disputes settle and don't get to this stage. They settle much earlier. And it logically follows that the more walls the asset protection planner puts around the assets, the better the likelihood of a favorable settlement. In almost every dispute, just the existence of an asset protection trust often stops the dispute and causes an early resolution, hence the value in doing asset protection planning.

Lesson: Use a Hybrid DAPT Instead of a Regular DAPT

Asset protection is a game of probabilities. It is our very strong recommendation that planners use Hybrid DAPTs rather than regular DAPTs whenever possible.

As described in Asset Protection Newsletter #200 (Steve Oshins & the Hybrid Domestic Asset Protection Trust," May 10, 2012), a Hybrid DAPT is a third-party irrevocable trust in which the settlor is not a beneficiary, but can be added in by a trust protector at a later date. The goal is to never add the settlor as a beneficiary, but to have that ability as an emergency measure, especially in the likelihood that there is no creditor issue at that time.

Especially if either the settlor does not need assets from the trust anytime soon or if the settlor is married and distributions can be distributed to a financially-trustworthy spouse, there are strong reasons to avoid the scrutiny that exists with a regular DAPT that does not exist with a Hybrid DAPT, since a Hybrid DAPT is simply a third-party trust unless it is turned into a regular DAPT.

Combining a DAPT with Charging Order Protected Entities

Although this would not be relevant to the Dahl matter, in the interests of providing the best asset protection structure to move the settlement number as

far in the debtor's favor as possible, especially when using a regular DAPT rather than a Hybrid DAPT, it is important to combine the DAPT with a charging order protected entity such as a limited liability company or a limited partnership.

This second layer of protection should further frustrate a prospective creditor both in the settlement process and in the potential litigation matter if there is no settlement. A charging order is simply a lien. Therefore, even if the DAPT would not be effective, the fallback is that the creditor generally only obtains a lien over the membership or partnership interests. This is generally not a desired outcome for most creditors.

Conclusion

The Supreme Court of the State of Utah has reversed much of the *Dahl v. Dahl* decision. To the surprise of many, they did so in part by ruling that the trust was a revocable trust rather than a DAPT.

Although the trust was ruled by the Court to merely be a revocable trust, regardless, we should be very aware of the choice-of-law analysis used by the Court. At first glance, this appears to be very negative to DAPTs in general. However, the Court's suggestion that it apply its own law to the trust when the alternative of applying the trust agreement's choice-of-law would have otherwise violated a "strong public policy and would be "repugnant" to local public policy probably means that the class of creditor would dictate which law applies, at least in Utah.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Steve Oshins

Jeremy Spackman

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CITE AS:

LISI Asset Protection Planning Newsletter #283, February 12, 2015, at http://www.leimbergservices.com

CITES:

Dahl v. Dahl, 2015 UT 23, Supreme Court of the State of Utah (January 30, 2015); Asset Protection Newsletter #200 ("Steve Oshins & the Hybrid Domestic Asset Protection Trust," May 10, 2012); Asset Protection Newsletter #227 ("Steve Oshins & Jeremy Spackman on Dahl v. Dahl: Status of Favorable Nevada Self-Settled Asset Protection Trust Case," July 3, 2013).