

Domestic Asset Protection Trust Planning: Jurisdiction Selection

There's No Place Like Home – Domestic Self-Settled Asset Protection Trusts and Inter Vivos QTIP Trusts: Why Do Them and Where to Go

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NEVADA

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I. The Basics – Creating a Self-Settled Nevada Asset Protection Trust

Chapter 166 of the Nevada Revised Statutes (the Spendthrift Trust Act of Nevada (herein the “Nevada Act”)) was introduced into law in October 1999, placing Nevada into the Domestic Asset Protection Trust ring with only a handful of other states. In the fifteen plus years since its enactment, as other states have adopted versions of a self-settled spendthrift trust statute, the Nevada Act has been refined to keep Nevada among the elite jurisdictions in which to establish an asset protection trust.

A. Requirements for Creation

- (1) The trust must be irrevocable, must not require that any part of the income or principal of the trust be distributed to the settlor, and must not be funded with an intent to hinder, delay or defraud known creditors (NRS 166.040).
- (2) The trust must appoint at least one Nevada trustee who has the power to maintain records and prepare income tax returns for the trust. The Nevada trustee must be one of the following: (i) a natural person who resides or has his or her domicile in Nevada, (ii) a trust company that is organized under federal law, Nevada law or another state’s law and maintains an office in Nevada for the transaction of business, or (iii) a bank that is organized under federal law, Nevada law or another state’s law, that maintains an office in Nevada for the transaction of business and that possesses and exercises trust powers (NRS 166.015(2)).
- (3) The trust must contain a spendthrift clause that places a restraint on the voluntary and involuntary transfer of the interest of the beneficiary (NRS 166.020).

B. Powers of Settlor

The Nevada Act permits the settlor to retain significant powers over the trust and its assets, while still qualifying as a spendthrift trust. The primary power that the settlor may *not* retain is the power to make distributions to himself or herself without the consent of another person. The

Nevada Act specifies explicitly some of the powers that the settlor may retain without disqualifying the trust as a spendthrift trust. Specifically, the Nevada Act allows the settlor to retain the following controls or powers:

- (1) The settlor may be a co-trustee of the spendthrift trust, so long as the role as co-trustee does not enable the settlor to make distributions to himself or herself without the consent of another person (NRS 166.040(3)). Clients are often concerned with granting another individual investment control over their assets. This statute expressly permits the settlor to be an investment trustee of the trust and maintain the investment control, so long as the role of the investment trustee is restricted so that the settlor may not make distributions to himself or herself without the consent of another person.
- (2) The settlor is permitted to remove and replace the trustees, direct trust investments and exercise other management powers over the trust assets (NRS 166.040(3)).
- (3) The settlor may have the power to prevent a distribution from the trust (NRS 166.040(2)(a)). In designing a Nevada Asset Protection Trust, this is generally referred to as a “veto power,” by which the settlor may have advance notice of a proposed distribution by the distribution Trustee, and may veto the proposed distribution before it is made to the intended beneficiary. This power is used when utilizing an incomplete gift Nevada Asset Protection Trust (discussed below).
- (4) The settlor may retain a lifetime or testamentary special power of appointment (NRS 166.040(2)(b)). A special power of appointment is one that may be exercised in favor of anyone but the settlor, the settlor’s estate, the settlor’s creditors or the creditors of the settlor’s estate. The Nevada Act specifically permits the settlor to retain a testamentary and lifetime special power of appointment over the trust assets. This power of appointment is crucial in designing the trust as an incomplete gift for federal transfer tax purposes.
- (5) The settlor may use real or personal property owned by the trust (NRS 166.040(2)(h)). The Nevada Act permits the settlor, in his or her capacity as a beneficiary of the trust, to continue to use property contributed to the trust with or without payment of rent (so that trust property may be retained within the protection of the trust and not distributed to the beneficiaries).

In addition to explicitly outlining broad powers that the settlor of a Nevada Asset Protection Trust may retain, the Nevada Act further qualifies certain trusts, traditionally used for estate and income tax planning, as spendthrift trusts. Specifically, the Nevada Act permits Qualified Personal Residence Trusts (QPRTs), Grantor Retained Annuity Trusts (GRATs) and Charitable Remainder Trusts (CRTs) to be characterized as spendthrift trusts during the period that the settlor retains an interest (through personal use or a retained annuity/unitrust), thereby protecting the settlor’s retained interests therein.

C. Creditor Exposure and Statute of Limitations

NRS 166.170 outlines limitations on actions brought with respect to transfers of property to a spendthrift trust.

- (1) **Who is a Creditor?** Under Nevada law, a person is a creditor if the person has a claim. A claim is defined generally as a right to payment (NRS 112.150).

- (2) **Future Creditors** - A person that becomes a creditor of the transferor after the transfer is made to a spendthrift trust may not bring an action with respect to the transfer of the property to the spendthrift trust unless the action is commenced within two years after the transfer is made (NRS 166.170(b)).
- (3) **Current Creditors**
- a. If at the time a transfer is made to a spendthrift trust the transferor has a current creditor, that current creditor's action with respect to the transfer would be barred unless it is commenced within two years from the date of the transfer or six months from when the current creditor discovers or reasonably should have discovered the transfer, whichever is later (NRS 166.170(1)(a)).
 - b. The Nevada Act permits the "tolling" of the limitations period as a public policy matter, so that a creditor who has no reasonable expectation of discovering a transfer to a spendthrift trust has an extended period of time to bring an action.
 - c. The tolling period in Nevada is among the shortest in the states that permit Domestic Asset Protection Trusts. The majority of DAPT jurisdictions permit a one-year tolling of the statute of limitations period for current creditors.
- (4) **Statutory Exception Creditors? NO!** Of the Domestic Asset Protection Trust states, nearly all allow certain exception creditors to pierce through the spendthrift trust. These exception creditors include child support, divorcing spouses, alimony, and in some instances (such as Delaware) preexisting tort creditors. Nevada does not have any statutory exception creditors. It and Utah are the only Domestic Asset Protection Trust states that do not statutorily create these "super-creditors."
- (5) **Bankruptcy.** Although Nevada does not have any statutory exception creditors, every self-settled spendthrift trust is subject to a ten-year statute of limitations period in Bankruptcy. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added new language to Section 548 of the Bankruptcy Code, which governs fraudulent transfers and obligations, as follows:
- "(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 the filing of the petition if-*
- (A) Such transfer was made to a self-settled trust or similar device;*
 - (B) Such transfer was 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 transfer was made, indebted."*
- (6) **Other Considerations**
- a. **Nevada Advantage: Limiting the Exposure of Tolling.** Not only does Nevada have one of the shorter tolling periods, the Nevada Act also permits a transferor to make a public record of a transfer to put potential current creditors on notice (thereby effectively eliminating the tolling period if the public record is made at the time of the transfer). See NRS 166.170(2) below:

“A person shall be deemed to have discovered a transfer at the time a public record is made of the transfer, including, without limitation, the conveyance of real property that is recorded in the office of the county recorder of the county in which the property is located or the filing of a financing statement pursuant to [chapter 104](#) of NRS.”

- b. **Burden of Proof.** A creditor wishing to bring an action with respect to the transfer of property to a spendthrift trust bears the burden of proving by clear and convincing evidence that the transfer was a fraudulent transfer or that the transfer violated a legal obligation owed to the creditor bringing the action under a contract or court order that was enforceable by the creditor at the time of the transfer. Absent clear and convincing evidence, the property transferred would not be subject to the claims of the creditor, even if the transfer was made within the statutory period noted above (NRS 166.170(3)).
- c. **Permitted Transfers for Convenience.** The Nevada Act permits the trustee of the Nevada Asset Protection Trust to distribute property from the trust to a settlor or beneficiary for the purpose of obtaining a loan secured by a mortgage or deed of trust. So long as the property distributed is reconveyed to the trust, there is no “new” transfer when the property is reconveyed and the transfer from the trust is disregarded as though the property was owned by the Nevada Asset Protection Trust from its original date of contribution (NRS 166.170 (4)).
- d. **Protection of Advisors and Trustees.** In addition to protecting transfers to a spendthrift trust (subject to the limitations and burden of proof noted above), the Nevada Act also protects the advisors of a settlor or trustee of a spendthrift trust and the trustee of a spendthrift trust from liability associated with the transfer of property to a spendthrift trust unless the person who would otherwise bring the action regarding the transfer, by clear and convincing evidence, can prove that the advisor or trustee acted knowingly and in bad faith in violation of the laws of Nevada and that the action of the advisor or trustee directly caused damages to the person asserting the claim (NRS 166.170(5) and 166.170(6)).
- e. **Coordination with Decanting Laws.** Nevada law permits the Trustee of a trust to decant an existing trust into another trust (NRS 163.556). The Nevada Act provides that if a spendthrift trust is decanted into a second spendthrift trust, the statute of limitations period during which a creditor could bring an action against the original spendthrift trust is not lengthened. Rather, when the assets of the original spendthrift trust are distributed to the second spendthrift trust through the decanting action of the Trustee, the assets transferred to the second spendthrift trust are deemed to have been transferred to that trust on the same date they were initially transferred by the settlor to the original spendthrift trust (NRS 166.170(9)).
- f. **Change of Situs.** Generally, if the situs of an existing trust is transferred to Nevada from another Domestic Asset Protection Trust state or from a foreign jurisdiction that permits self-settled spendthrift trusts, then for purposes of determining the statute of limitations period applicable in Nevada, the date that the property was initially transferred to the trust in the other state or foreign jurisdiction will be the deemed date of transfer in Nevada. See NRS 166.180(2):

“2. For purposes of [NRS 166.170](#), if the domicile of an existing trust is transferred from another state or from a foreign jurisdiction to this State and the laws of the other state or jurisdiction are similar to the provisions of this chapter, the transfer shall be deemed to have occurred:

(a) On the date on which the settlor of the trust transferred assets into the trust if the applicable law of the trust has at all times been substantially similar to the provisions of this chapter; or

(b) On the earliest date on which the applicable laws of the trust were substantially similar to the provisions of this chapter.”

D. The Nevada Advantage

In outlining the basics above, it is important to note that there are many benefits to establishing a Domestic Asset Protection Trust under Nevada law. To reiterate these benefits, the following are the most commonly noted Nevada advantages:

- (1) **No Exception Creditors.** Nevada does not have any statutory exception creditors that can pierce a spendthrift trust. As an illustration, assume a physician is looking to establish a self-settled spendthrift trust and is unaware of any malpractice claims, but has treated hundreds of patients in his or her practice. That physician may choose to utilize a Nevada Asset Protection Trust over a similar Delaware trust, since preexisting tort creditors (including malpractice creditors that are unknown to the physician at the time of the transfer but who the physician treated prior to the transfer) are exception creditors in Delaware.
- (2) **No Affidavit of Solvency Required.** Many states, such as Alaska, Utah and Ohio, require that each time a transfer is made by the settlor to a self-settled spendthrift trust, the settlor must execute an Affidavit of Solvency that states that the settlor is solvent and not intending to delay, defraud or hinder a known creditor by making the transfer. Although this may be a “best practices” approach in any jurisdiction (so that the attorney is not advising the settlor to make a fraudulent transfer), having a statutory requirement that an Affidavit of Solvency be signed each time a transfer is made sets up the settlor of the trust for failure. Neglecting what some settlor’s may consider a menial and cumbersome task in a state that requires the Affidavit could void the protection afforded by that state’s spendthrift trust statute. Nevada does not require that the settlor execute an Affidavit of Solvency when making transfers to the trust.
- (3) **Short Statute of Limitations Period.** As noted above, Nevada has one of the shortest statute of limitations periods during which a creditor may bring a claim against a transfer to a Nevada Asset Protection Trust. A majority of the Domestic Asset Protection Trust states have four-year statute of limitations periods, with a one-year tolling period for current creditors. Nevada, however, has a two-year statute of limitations period and a six-month tolling period (which can be avoided by providing public notice of a transfer) for current creditors.
- (4) **No State Income Tax.** Nevada does not impose a state income tax on residents or on trusts administered in Nevada. This consideration becomes important in the discussion of Nevada Incomplete Gift Non-Grantor Trusts (NINGs) below.

II. Considerations for Non-Residents of Nevada

Only fifteen states currently permit a self-settled spendthrift trust. Clients in other states want to know – will the Nevada Asset Protection Trust work to protect the non-resident settlor’s assets. There are several considerations for non-Nevada residents.

(1) Conflict of Laws Issues

- a. Generally, the Full Faith and Credit Clause of the U.S. Constitution will require states to recognize the laws of another state, unless those laws are against a strong public policy of the home state.
- b. Some proponents argue that the increasing number of states recognizing some form of self-settled trusts weakens the public policy arguments of other states.

c. Limited Case Law

- i. There have been only two primary cases addressing whether a Domestic Asset Protection Trust will be upheld if established by a non-resident of the Domestic Asset Protection Trust state. Neither case gives clear authority of the rule of law.
- ii. *In re Huber*, a Bankruptcy Court case, included assets of an Alaska self-settled spendthrift trust established by a Washington state resident in the bankrupt settlor’s bankruptcy estate. In the dicta, the court stated that it believed it was against Washington state’s public policy for a Washington resident to establish a self-settled trust. Because of this harmful dicta, this case is often cited by nay-sayers that Domestic Asset Protection Trusts do not work. However, the transfers made in the Huber case were within the ten-year claw-back period outlined in Section 548(e) of the Bankruptcy Code. Further, the transfers made in the Huber case were found to be clear fraudulent transfers, with the intent to defraud a known creditor.
- iii. The lower court in *Dahl v. Dahl* upheld what appeared to be a Nevada Asset Protection Trust in a Utah divorce case, finding that the divorcing wife was not entitled to assets transferred by husband to the Nevada trust. However, the Utah Supreme Court recently reversed the decision, finding that the trust in question, although called “The Dahl Family Irrevocable Trust” was in fact a revocable trust. This is because the settlor reserved a power to alter or amend any of the terms of the trust. Therefore, this case is no longer relevant to determining the choice of law issues that would apply for a non-resident establishing a Domestic Asset Protection Trust.

(2) Funding Considerations for Non-Residents

- a. The first step a non-resident can take in bolstering the argument that Nevada law should apply to a Nevada Asset Protection Trust is to carefully choose the assets to be contributed to the trust.
- b. Nevada assets would be ideal for contribution. Forming a Nevada limited liability company or Nevada limited partnership to hold the underlying assets, and then contributing the LLC or LP interest to the trust results in a Nevada trust holding Nevada personal property (as LLC and LP interests are deemed personal property).

- c. The least favorable asset to contribute to a Nevada Asset Protection Trust, or any Domestic Asset Protection Trust, for that matter, is real property located in a jurisdiction that is not a Domestic Asset Protection Trust state.

(3) Hybrid Nevada Asset Protection Trust

- a. The conservative approach is for a non-resident to use a Hybrid Nevada Asset Protection Trust.
- b. A Hybrid Nevada Asset Protection Trust is one that does not include the non-resident settlor as a beneficiary. Instead, it includes the non-resident settlor's family and gives a Trust Protector the ability to add the non-resident settlor at some point in the future (when the choice of law issue is clearer or when there is no longer as strong a concern about asset protection).
- c. Because the settlor is not a beneficiary of the Hybrid Nevada Asset Protection Trust, it is important that it is treated as a rainy day fund and that the settlor retains sufficient assets to maintain the settlor's lifestyle.
- d. A more thorough discussion of the Hybrid Nevada Asset Protection Trust is outlined in the design portion of the outline below.

III. Designing and Integrating a Nevada Asset Protection Trust into a Client's Overall Plan

A Nevada Asset Protection Trust can take many forms. Depending on the intended use of the trust, it may be structured as a grantor trust for income tax purposes or a complex trust for income tax purposes; it may be used solely as an asset protection tool or may also be used for estate tax savings; it may include the settlor as a beneficiary or it may leave open the ability for the settlor to become a beneficiary in the future. This section will outline the different design considerations when incorporating a Nevada Asset Protection Trust into a client's overall plan.

A. Incomplete Gift Nevada Asset Protection Trust

- (1) When a Nevada Asset Protection Trust is intended for asset protection only, and not for estate tax savings, the self-settled spendthrift trust is structured so that transfers are incomplete gifts for transfer tax purposes. An Incomplete Gift Nevada Asset Protection Trust will be included in the settlor's estate, and therefore, should be drafted to coordinate with the settlor's overall estate plan.
- (2) **Drafting Considerations.** In order to ensure that transfers to the trust are not completed gifts, the settlor of the trust often retains the following powers over the trust property:
 - a. The settlor may retain the power to veto distributions proposed by the distribution trustee. A power to veto a distribution is a power to affect the beneficial enjoyment of the property. The veto power causes not only estate inclusion of the trust assets in the settlor's federal estate tax proceeding, but it also prevents a completed gift by the settlor to the Nevada Asset Protection Trust. Further, the veto power also protects the settlor from an unintended completed gift in the event the distribution trustee decides to make a distribution to a beneficiary other than the settlor (since the settlor can override the distribution trustee's decision).

- b. The settlor may retain a lifetime and a testamentary limited (special) power of appointment. As noted above, the special power of appointment must be limited so that the settlor may not appoint trust property to the settlor, the settlor's estate, the settlor's creditors or the creditors of the settlor's estate. The lifetime and testamentary powers of appointment give the settlor the power to change the interests of the beneficiaries of the Nevada Asset Protection Trust, thereby making transfers to the trust incomplete gifts (See Treasury Regulation 25.2511-2)).
- c. In order to mitigate estate taxes at the settlor's death, it may be desirable to include marital deduction provisions within the Incomplete Gift Nevada Asset Protection Trust, since it will be included in the settlor's estate. Adding a marital deduction formula will protect against an unintended estate tax of the assets in the Nevada Asset Protection Trust at the settlor's death.

(3) Benefits

- a. There are no gift tax ramifications in funding the Incomplete Gift Nevada Asset Protection Trust, so there is no need for an appraisal of hard-to-value assets contributed to the trust and there is no ceiling on the amount that can fund the trust.
- b. There is more flexibility with an Incomplete Gift Nevada Asset Protection Trust, because of the settlor's retained veto power and powers of appointment. Both of these powers give the settlor flexibility to modify the ultimate beneficiaries of the trust and make modifications to the Nevada Asset Protection Trust without amending it.

B. Completed Gift Nevada Asset Protection Trust

Can an Asset Protection Trust be used for estate tax planning purposes? With guidance from Private Letter Ruling 200944002, it appears the answer may be yes, depending on the jurisdiction selected.

(1) Completing a Gift to a Nevada Asset Protection Trust

- a. A settlor may make a transfer to a Nevada Asset Protection Trust that is structured as a completed gift. The Nevada Asset Protection Trust must be drafted carefully to ensure that the gift is complete.
- b. The settlor must not retain dominion and control over the property (Treas. Reg. Section 25.2511-2).
 - i. In a completed gift Nevada Asset Protection Trust, the settlor would not be permitted to retain a power to veto distributions made by the Trustee of the trust. The retained veto power would be a power to affect the beneficial enjoyment of the property.
 - ii. Further, the settlor may not retain a lifetime or testamentary special (limited) power of appointment over the trust property. Treas. Reg. 25.2511-2 addresses that a retained power of appointment, even if it is a limited power, can cause a transfer to be characterized as an incomplete gift.

- iii. The settlor may retain the power to remove and replace the Trustees of the trust and still make a completed gift transfer to the Nevada Asset Protection Trust.
- iv. If a creditor may pierce the trust to satisfy a judgment against the settlor, the settlor will be treated as retaining dominion and control over the trust assets and the gift may not be complete (see Revenue Ruling 76-103).
- v. **Nevada Advantage: No exception creditors.** By utilizing a Nevada Asset Protection Trust rather than a trust in a Domestic Asset Protection Trust jurisdiction that permits exception creditors, the client is in a better position to argue that a transfer is a completed gift. The IRS may find that a transfer to a spendthrift trust in another Domestic Asset Protection jurisdiction that has exception creditors is not a completed gift, since under the law of the state in which the trust is established, certain creditors may access the trust assets to satisfy a debt against the settlor.

(2) Private Letter Ruling (PLR) 200944002

- a. The IRS issued Private Letter Ruling (PLR) 200944002 in 2009, which analyzed a self-settled Alaskan Asset Protection Trust to determine whether the assets would be included in the Alaskan settlor's estate for estate tax purposes.
- b. The transfers made by the settlor to the trust reviewed by the PLR were completed gifts, and the settlor did not retain any powers of appointment or veto powers over the assets.
- c. The settlor of the Alaskan Asset Protection Trust was included as a beneficiary of the trust.
- d. The IRS ruled in the PLR that the spendthrift trust would not be included in the settlor's estate for estate tax purposes.
- e. The ruling included a caveat excepting from its ruling the possibility of an understanding or pre-existing arrangement between the settlor and the trustee of the spendthrift trust that may otherwise cause inclusion of the trust assets under IRC § 2036.
- f. It should be noted that PLRs are binding only as to the requesting taxpayer and do not establish precedent upon which other taxpayers may rely.

(3) Application of PLR 200944002 to Nevada Asset Protection Trust

- a. Although the PLR addressed an Alaskan resident establishing an Alaskan trust, since Alaska and Nevada have similar laws (notably, Nevada law may be superior to Alaska law because of the shorter statute of limitations period, lack of exception creditors and no requirement of an Affidavit of Solvency for each transfer made), it can be inferred from the PLR that the result would be the same for a Nevada resident establishing a Nevada trust.

- b. In 2011, the Nevada legislature updated the Nevada Act to negate any implied agreements between the settlor of a spendthrift trust and a trustee of the trust. Specifically, NRS 166.045 provides as follows:

“NRS 166.045 Powers of settlor. The settlor of a spendthrift trust has only those powers and rights that are conferred to the settlor by the trust instrument. An agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant or permit the retention of greater rights or authority than is stated in the trust instrument is void.”

- c. The addition of this language should bolster the use of a Nevada Asset Protection Trust as an estate tax savings tool for the right client.

(4) IRC 2036 and 2038 – Specific Considerations for Non-Residents

- a. Even if the Domestic Asset Protection Trust is structured as a completed gift and follows the guidelines set out in PLR 200944002, there are some additional issues to consider whether the trust will be outside of a settlor’s estate for estate tax purposes.
- b. Revenue Ruling 76-103 stands for the proposition that if a creditor can pierce a trust to satisfy claims against the settlor’s estate, the trust is includible in the settlor’s estate for estate tax purposes.
 - i. Based on this ruling, Nevada is likely the most favorable state in which to establish a Completed Gift Asset Protection Trust, if the goal is exclusion for estate tax purposes. This is because Nevada has no exception creditors.
 - ii. Nevada law would seem to clearly apply to a Nevada resident establishing a Completed Gift Nevada Asset Protection Trust, thereby ensuring that after the statute of limitations period, the trust assets would not be included in the settlor’s estate for estate tax purposes.
 - iii. As discussed above, the law is unclear as it applies to non-Nevada residents establishing a Nevada Asset Protection Trust. However, use of a Hybrid Nevada Asset Protection Trust (discussed in more detail below) may place the non-resident settlor in the best position possible if the non-resident wishes to use the Completed Gift Asset Protection Trust strategy.
- c. Further, 2036(a) provides that if a decedent made a transfer and retained a right to the income or enjoyment of the property, the decedent made a transfer with a retained interest, causing inclusion of the property in the decedent’s estate.
 - i. PLR 200944002 indicates that since the settlor of the self-settled spendthrift trust did not have an implied understanding with the Trustee that the settlor would receive property contributed to the trust back, the fact that the settlor was a beneficiary of the trust did not constitute a retained right to the income or enjoyment of the property.
 - ii. Conservative Approach: Instead of including the settlor as a beneficiary at the time of creation of the Completed Gift Nevada Asset Protection Trust, it

would be more conservative to use the Hybrid Nevada Asset Protection Trust (see discussion below). If the settlor is never added as a beneficiary of the Hybrid Completed Gift Nevada Asset Protection Trust, then upon the settlor's death, there is a greater argument that the decedent settlor did not retain a right to the income or enjoyment of the property.

C. Hybrid Nevada Asset Protection Trust

- (1) A Hybrid Nevada Asset Protection Trust is one that does not include the settlor as a beneficiary initially.
- (2) The Hybrid Nevada Asset Protection Trust may include the settlor's spouse, descendants and potentially more remote family members (such as parents or siblings) as initial beneficiaries of the trust.
- (3) In funding the Hybrid Nevada Asset Protection Trust, it is important that it is treated as a true "rainy day" fund since the settlor is not included as a beneficiary. So long as the settlor is not sued and has maintained sufficient assets outside the Hybrid Nevada Asset Protection Trust, the trust will be maintained for the benefit of the settlor's other beneficiaries.
- (4) The Hybrid Nevada Asset Protection Trust appoints a Trust Protector, acting in a non-fiduciary capacity. The primary role of the Trust Protector is to add or remove beneficiaries from the trust.
- (5) If the settlor's circumstances change in the future, the Trust Protector may add the settlor as a beneficiary of all or of a portion of the Hybrid Nevada Asset Protection Trust.

(6) When is the Hybrid Nevada Asset Protection Trust used?

- a. Incomplete Gift Nevada Asset Protection Trusts are most commonly drafted as Hybrid Nevada Asset Protection Trusts if the settlor is a non-resident of Nevada or another Domestic Asset Protection Trust state. The Hybrid version in this context places the settlor in a better position if a creditor raises a choice of law issue, presuming that the settlor never needs to be added as a beneficiary of the trust.
- b. For residents and non-residents, if a Nevada Asset Protection Trust is to be a completed gift, the most conservative approach is to use a Hybrid Nevada Asset Protection Trust. If the settlor never has to be added as a beneficiary, the result is a third-party established trust for the settlor's family, over which the settlor does not retain any right to the income or enjoyment from the property.
- c. Nevada Incomplete Gift Non-Grantor Trusts (NINGs), discussed in more detail below, should be drafted as Hybrid Nevada Asset Protection Trusts, where possible. Utilizing a Hybrid version of the trust bolsters the creditor protection. This has an added benefit in the NING because if a creditor can attach the assets of the trust, it will be deemed a grantor trust for income tax purposes (negating the state income tax savings). Further, if the settlor later moves to a state that has more favorable creditor and state income tax rules, a Trust Protector may be permitted to add the settlor as a beneficiary of the trust.

D. Nevada Incomplete Gift Non-Grantor Trusts (NINGS)

- (1) A Nevada Incomplete Gift Non-Grantor Trust (NING) is a trust that is structured to be its own independent taxpayer for state and federal tax purposes, but that does not characterize transfers made by the settlor to the trust as completed gifts for transfer tax purposes.
- (2) The ideal client for a NING Trust is a resident of a state with a high income tax rate.
- (3) Each taxing state has different rules regarding trusts that would be subject to state income taxation.
- (4) For example, in order to be protected from California state income tax, the income earned by the NING cannot be California source income and the fiduciaries of the NING would have to be non-residents of California.
- (5) Because Nevada has arguably the most favorable self-settled spendthrift trust laws, Nevada is one of the leading jurisdictions for these types of trusts.
- (6) The design considerations in drafting a NING are complex, and often will vary depending on the state in which the settlor resides. As such, an analysis of the provisions to be included (or omitted) is beyond the scope of this outline.