

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #150

Date: 26-Apr-10

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: [Domestic Asset Protection Trusts – Key Factors Examined](#)

Steven J. Oshins is a member of the Law Offices of **Oshins & Associates, LLC** (<http://www.oshins.com> 702-341-6000, x2 or soshins@oshins.com) in Las Vegas, Nevada. Steve is a nationally known attorney who is listed in The Best Lawyers in America® and has been named one of the Top 100 Attorneys in Worth magazine. Steve has written some of Nevada's most important and innovative estate planning and creditor protection laws, including the law making the charging order the exclusive remedy of a judgment creditor of a Nevada LLC and LP, the law changing the Nevada rule against perpetuities to 365 years and the law making Nevada the first and only state to allow a Restricted LLC and a Restricted LP.

In his commentary, Steve asks – and answers these important questions:

- Which states have the most effective Domestic Asset Protection Trust ("DAPT") laws?
- What factors must be considered in choosing a state to use in a specific client's asset protection planning?

Obviously, the answers to those questions pose not only factual but subjective issues and we certainly expect that others may want to express different opinions. And, of course, Steve recognizes that he has a built-in conflict since he lives in Nevada, one of the states that gets a large share of the DAPT business and he has been intimately involved in the authorship of Nevada's laws.

At Steve's request, attorney **Robert G. Alexander** of **Alexander & Klemmer, SC** (<http://www.alexander-klemmer.com>) in Milwaukee, Wisconsin was kind enough to review the chart and methodology used. Bob is a nationally known author and speaker on advanced wealth and asset protection planning and is the Secretary of the National Association of Estate Planners & Councils – and does not reside in one of the twelve DAPT states mentioned in this article.

Now onto Steve Oshins' commentary...

A REQUEST MADE BY THE AUTHOR:

The factors and methodology I've used are subject to substantial disagreement and

interpretation. If a reader believes that I have either made a technical error or put too much weight or too little weight on different variables used in the methodology, please feel free to email your thoughts to me at soshins@oshins.com. I will be happy to consider your thoughts when I write a future article. (Of course, positive feedback is also welcome!)

METHODOLOGY:

After I reported on The Best States for Trusts chart prepared by The Trust Advisor (<http://thetrustadvisor.com/news/states>) in [LISI Estate Planning Newsletter #1596](#) and [LISI Estate Planning Newsletter #1600](#), I was inspired by the feedback from those rankings and decided to create a chart illustrating the strengths of the twelve Domestic Asset Protection Trust ("DAPT") jurisdictions. Although one person might place more weight on one aspect of a law than another person may place on that same aspect, I decided that there are certain desirable features that are so material that if laid out in a chart, one can easily see the differences and modify his or her personal preferences accordingly.

Rather than prepare a grid that has so many items that the most important ones may get hidden among items of lesser importance, I put myself in the shoes of *my* personal clients and asked myself what characteristics I would want if I were selecting a jurisdiction for my own DAPT. [Note that I set up a DAPT for myself under Nevada law in 2005.]

If I were the client, I would make my decision based on the following decision points:

1. Does the state have a state income tax?
2. What is the state's statute of limitations period before the assets are protected from creditors?
3. Does the state recognize any special classes of creditors as a protected class that can pierce through the trust? More weight is put on divorcing spouse creditors and preexisting tort creditors since those are creditors that make up a large percentage of the creditors of which the settlor is most concerned.

Readers may, of course, have other key decision points or rank them in a different order of priorities.

SOME KEY FACTORS TO CONSIDER IN SELECTING SITUS

State	Statute Of Limitations (Future Creditor)	Statute Of Limitations (Preexisting Creditor)	Spouse/ Child Support Exception Creditors	Preexisting Torts/Other Exception Creditors
Nevada	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	No	No
Alaska	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No
South Dakota	3 Yrs.	3 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts
Delaware	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts
Tennessee	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No
Rhode Island	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts
New Hampshire	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts
Wyoming	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Property listed on app. to obtain credit; Property received by fraudulent transfer
Utah	3 Yrs.	3 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Numerous
Missouri	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Alimony; Child Support	State/U.S. to extent state/ federal law provides
Oklahoma	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Protection limited to \$1,000,000
Colorado	4 Yrs.	4 Yrs. or 1 Yr. Discovery	No	No

STATE BY STATE DETAILS:

- 1. NEVADA:** Nevada has no state income tax. It also has the shortest statute of limitations and thus provides creditor protection to a person faster than any other state, and it has no exception creditors. Most notably, Nevada does not have a statute giving a divorcing spouse or preexisting tort creditor the right to pierce a DAPT. Since divorcing spouses are often the most feared class of creditor, and since many people have preexisting tort creditors that don't rise to the level of a fraudulent conveyance, this advantage is, in my opinion, a very important consideration.
- 2. ALASKA:** Alaska, along with Nevada and Delaware, are the three states that seem to get a very significant amount of out of state DAPT business. Like other key states, Alaska doesn't have a state income tax. Alaska law is excellent except that under Alaska Stat. §34.40.110(1), unless otherwise agreed to in writing by the parties to a marriage, assets transferred to a DAPT are subject to division in a divorce to the extent those assets were transferred to the DAPT (1) after the settlor's marriage, or (2) within 30 days before the settlor's marriage unless the settlor gives written notice to the other party to the marriage of the transfer.
- 3. SOUTH DAKOTA:** Although South Dakota statutes are very similar to the Delaware statutes, South Dakota only has a three-year statute of limitations as compared to Delaware's four-year statute. Under S.D. Codified Laws §55-16-15(1), a South Dakota DAPT is not protected from division in a divorce or from alimony and child support claims.. Also, under S.D. Codified Laws §55-16-15(2), a South Dakota DAPT is not protected from preexisting torts that cause death, personal injury or property damage.
- 4. DELAWARE:** Of the DAPT states, Delaware is the most heavily marketed and gets a very large share of the DAPT business. There are a number of banks and trust companies that have planted their star trust officer in their Delaware office. Delaware has a long tradition of favorable trust laws. However, Delaware has a four-year statute of limitations period and certain exception creditors. Most notably, under Del. Code Ann. tit. §3573(1), a Delaware DAPT is not protected from division in a divorce or from alimony and child support claims. In addition, under Del. Code Ann. tit. §3573(2), a Delaware DAPT is not protected from preexisting torts that cause death, personal injury or property damage.
- 5. TENNESSEE:** Tennessee, although not traditionally considered a trust haven, doesn't have preexisting tort creditors as exception creditors which is a significant advantage.

6. RHODE ISLAND: Preexisting tort creditors are exception creditors under Rhode Island law (compare this with Tennessee).

7. NEW HAMPSHIRE: New Hampshire has a 5% state income tax on dividends and interest. Under N. H. Rev. Stat. Ann. §77:11, "[i]ncome accumulated in trust for the benefit of unborn or unascertained persons shall be taxed as if accumulated for the benefit of inhabitants of this state". This will apply unless the trust is drafted very tightly to not allow any unborn or unascertained persons and thus New Hampshire should be avoided.

8. WYOMING: Wyoming is traditionally one of the more proactive states in trying to make its laws favorable to bring in out of state business. However, under Wyo. Stat. §4-10-520(a)(2), the DAPT protections do not apply to "property that is listed upon an application or financial statement used to obtain or maintain credit other than for the benefit of the qualified spendthrift trust."

9. UTAH: Under Utah Code Ann. §25-6-14(2), the DAPT protections do not apply to numerous classes of creditors.

10. MISSOURI: The Missouri DAPT statutes are very limited in detail.

11. OKLAHOMA: Oklahoma's DAPT statutes are the only DAPT statutes that allow a revocable trust, but the protection is limited to \$1 million.

12. COLORADO: There is a significant question about whether Colorado's DAPT statute works.

SUMMARY:

Many estate and asset protection planners are using DAPTs to make some of their clients' assets look unreachable to potential creditors. The choice of jurisdiction can have a significant effect on the timing and degree of protection. Although the chart covering key factors in the twelve DAPT jurisdictions does not consider an exhaustive list of variables, it is a good start for anyone practicing in this area of law.

How *you* rank these will depend on a multiplicity of factors that will vary according to your own client's situation.

TECHNICAL EDITOR'S COMMENT:

Here are some of my thoughts about the factors that must be considered:

- Our job as planners is to understand our clients' situations and then educate them about the various options. There are very important variables that exist and will vary from client to client.
- One of the most important of these variables is the client's domicile, i.e., where does the client live?
- Another is where does he/she have real property?
- Yet another factor is the legal culture of the state in question. The state whose environment favors trusts – particularly protective trusts - is probably the best place to litigate.
- Keep in mind that assets in an asset protection trust do not "belong" to the borrower and therefore should never be listed on an individual's personal financial statement.
- A state's statute of limitations may be important but under conflicts of laws the situs of the trust may not be the governing law for Statute of Limitations purposes.
- Although many clients are concerned about divorce and about tort creditors, planners must also give considerable thought to the business risks that drive many clients.

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

Steve Oshins

Technical Editor – Duncan Osborne

CITE AS:

LISI Asset Protection Planning Newsletter #150 (April 26, 2010) at

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