

**Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #227**

**Date:** 03-Jul-13

**From:** Steve Leimberg's Asset Protection Planning Newsletter

**Subject:** **Steve Oshins & Jeremy Spackman on Dahl v. Dahl: Status of Favorable Nevada Self-Settled Asset Protection Trust Case**

*“Although it is encouraging to see the Utah Court apply Nevada law to protect the assets in the Dahl Trust from the settlor’s divorcing spouse, until we see a pattern of a number of cases going one way or the other, it is difficult to predict the outcome of other cases that go through the court system. DAPTs for non-residents should continue to work for just about all settlors, either because they are in the fortunate 99%+ where the creditors choose to avoid the battle altogether, or because they litigate the matter and win like Charles F. Dahl.”*

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Attorneys **Steve Oshins** and **Jeremy Spackman** update members on an interesting case involving a Utah resident who set up a Nevada self-settled asset protection trust and successfully protected the trust assets from his wife in a contentious divorce.

**Steven J. Oshins, Esq., AEP (Distinguished)** is an attorney at the Law Offices of **Oshins & Associates, LLC** 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. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011. He has written some of Nevada's most important 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 (in 2001, 2003 and 2011), the law changing the Nevada rule against perpetuities to 365 years (in 2005) and the law making Nevada the first and only state to allow a Restricted LLC and a Restricted LP, creating larger valuation discounts than any other state allows (in 2009). He is also the author of the Annual Domestic Asset Protection Trust State Rankings Chart at [http://www.oshins.com/images/DAPT\\_Rankings.pdf](http://www.oshins.com/images/DAPT_Rankings.pdf) and the Annual Dynasty Trust State Rankings Chart at [http://www.oshins.com/images/Dynasty\\_Trust\\_Rankings.pdf](http://www.oshins.com/images/Dynasty_Trust_Rankings.pdf). Steve can be reached at 702-341-6000, x2 or at [soshins@oshins.com](mailto:soshins@oshins.com). His law firm's web

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**Jeremy B. Spackman** is an attorney at the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. He practices in the areas of estate, business and asset protection planning. He has been practicing law since 2008. He has given lectures on various topics, including advanced estate and asset protection planning. He can be reached at (702) 341-6000, x240 or via e-mail at [jspackman@oshins.com](mailto:jspackman@oshins.com).

Now, here is Steve Oshins and Jeremy Spackman's commentary:

## **EXECUTIVE SUMMARY:**

Asset protection is generally considered successful not only where there is an actual favorable court case, but also where the creditor believes that the probability of success in a collection suit is sufficiently low that the creditor either goes away altogether or settles the dispute for less than the amount that the debtor would have had to pay if the creditor were to successfully win a judgment and be able to collect.

Although there have likely been thousands of prospective creditors who have either walked away altogether or settled matters to avoid having to face the battle against a self-settled asset protection trust, it is always good to see an actual court case finding that the trust assets are protected.

One such litigation matter which the authors of this commentary have been following since 2011 is the *Dahl v. Dahl* case, Civil No. 090402989, in the Fourth Judicial District Court, Appellate Court, Utah County, State of Utah.

### **The Basic Facts**

Charles F. Dahl ("Charles") and Kim Dahl ("Kim") lived in Utah as husband and wife.

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 commentary, 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 was a Nevada self-settled asset protection trust.

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.

### **The Divorce**

Charles and Kim had a contentious divorce with the divorce decree being signed on July 20, 2010.

### **Order Granting Defendants’ Motion for Summary Judgment**

Kim petitioned the Court for a judgment regarding whether the Trust’s assets should be considered in the division of assets in the divorce. The Defendants were Charles, the Trust and the LLC.

Kim made a number of arguments, and the Court granted summary judgment against Kim on each attempted argument.

1. Kim argued that the Trust should be determined to be null and void. However, the Court ruled that “null and void” is not a formal cause of action.
2. Kim argued for a determination that she has an immediate interest in the Trust. However, the Court ruled that Kim was not entitled to any fixed sum and that any distributions to Kim would have been in the discretion of the Trustee and then would have had to survive the thirty-day veto right that Charles retained over distributions made from the Trust. The retained veto right is traditionally used in a trust designed as an incomplete gift.
3. Kim argued that the trust was revocable, not irrevocable. She cited a

paragraph entitled, “Trust Irrevocable” which says, “The Trust hereby established is irrevocable. Settlor reserves **any** power whatsoever to alter or amend any of the terms or provisions hereof. [Emphasis added.] The Court ruled that the cited language did not create any general right to amend or alter the terms of the Trust, but rather it simply reserved the rights of the settlor granted by statute to amend, alter or terminate the Trust.

The Court issued an **ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT** on November 1, 2011, thereby ruling that the Trust’s assets were not part of the divorce.

The Court issued a **FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT** on February 27, 2012. This Order essentially restated the November 1, 2011 Order.

### **Choice of Law Analysis**

Of particular interest to many people, the Court held as follows when discussing the irrevocability of the Trust:

“The most compelling argument however is based upon statute. Section 5.4.6 of the Trust provides as follows: Governing Law. The validity, construction and effect of the provisions of this Agreement in all respects shall be governed and regulated according to and by the laws of the State of Nevada.....”

The Court continued:

“As noted by the Court in *Innerlight v. Matrix Group, LLC*, 2009 UT 31, **choice of law and choice of forum provisions contained in contracts and legal documents are enforceable.**” [Emphasis added.]

### **Interesting Observation**

Utah is a self-settled asset protection trust jurisdiction. As of the time of the *Dahl* case, divorcing spouses were exception creditors under Utah law. Therefore, had Utah law been applied, the Trust assets would have been exposed to the division in the divorce. Utah recently enacted legislation

removing all exception creditors and thus Utah and Nevada are currently the only DAPT jurisdictions with no exception creditors who can break through a DAPT.

### **Kim's Appeal**

Kim submitted an Appeal on August 7, 2012. In her appeal, she has made the following arguments:

1. The Trust is revocable under Utah law.
2. Judge Davis erred when he resorted to Nevada law as an alternative basis to construe the Trust as irrevocable because the application of Nevada law leads to a result that violates Utah's public policy.
3. Judge Davis abused his discretion when he entered summary judgment on Kim's alter ego theory without allowing her to conduct discovery.
4. Judge Davis erred when he issued a hypothetical ruling that causes of action not before him would have been barred by the statute of limitations.

It is unclear where the Appeal now stands.

### **What Does this Mean for DAPTs?**

Regardless of whether Kim ultimately loses her Appeal or wins her Appeal, DAPTs will continue to be used for non-residents of the DAPT states. If Kim loses her Appeal, this doesn't necessarily mean that DAPTs are always going to be successful, but it certainly helps the comfort level.

For a case with a negative result, see *In re Huber* as reported by **Jonathan D. Blattmachr** and **Jonathan G. Blattmachr** in [Asset Protection Planning Newsletter #225](#), and by **Chris Riser** and **Jay Adkisson** in [Asset Protection Planning Newsletter #226](#), as well as **LISI's** recent "[60-Second Planner](#)" on the case by **Bob Keebler**.

However, the *Huber* case doesn't give us any solid guidance. Although nobody wants to claim "bad facts make bad law," *Huber* (a) involved a blatant fraudulent conveyance, (b) was a bankruptcy case in which probably nobody

would disagree unwinds the transfers under the ten-year bankruptcy claw-back, and (c) involved a Washington resident as the settlor, and Washington law has a strong anti-self-settled trust statute and is the home of the *Mastro* offshore trust case. This is not to say that we should take the decision lightly, but could the facts have been any worse?

Although it is encouraging to see the Utah Court apply Nevada law to protect the assets in the Dahl Trust from the settlor's divorcing spouse, until we see a pattern of a number of cases going one way or the other, it is difficult to predict the outcome of other cases that go through the court system. DAPTs for non-residents should continue to work for just about all settlors, either because they are in the fortunate 99%+ where the creditors choose to avoid the battle altogether, or because they litigate the matter and win like Charles F. Dahl.

The bottom line is that we still have not seen a court case where there is no bankruptcy and no fraudulent conveyance, where the local court rules against the defendant, and where the plaintiff is able to successfully access assets in the DAPT jurisdiction, despite the DAPT state's court's likely refusal to allow the trust to be pierced.

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

*Steve Oshins*

*Jeremy Spackman*

**TECHNICAL EDITOR: DUNCAN OSBORNE**

**CITE AS:**

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## **CITES:**

Dahl v. Marlette Enterprises, LC, C. Robert Dahl, Dahl Family Irrevocable Trust, and Charles F. Dahl, Fourth Judicial District Court, Utah County, State of Utah, Civil No. 090402989; Dahl v. Marlette Enterprises, LC, C. Robert Dahl, Dahl Family Irrevocable Trust, and Charles F. Dahl, Utah Court of Appeals, Appellate Case No. 20111077; Waldron v. Huber (In re Huber), BK.W.D.Wa Adversary No. 12-04171, Bankruptcy No. 11-41013, Order Granting Trustee Partial Summary Judgment, Doc. 142, May 17, 2013.

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