

Simmons & Oshins on SB221: Nevada Passes Updates to Self-Settled Spendthrift Trust Laws

Nevada is one of thirteen states that enable a person to establish a spendthrift trust for himself. In order to make use of Nevada's self-settled, spendthrift trust statute, a trust must have at least one Nevada trustee (which can either be a Nevada resident or a Nevada bank or trust company) and at least part of the administration of the trust must occur in the state of Nevada.

Nevada has consistently been in the top-tier of the self-settled, spendthrift trust states because it has the shortest statute of limitations period of the domestic asset protection trust jurisdictions, and because it has no statutory exception creditors who can pierce the trust. [SB221](#), which was passed through the Nevada legislature and was [signed into law by the Governor Brian Sandoval on June 4, 2011](#), makes Nevada's already superior spendthrift trust laws even stronger. The changes to the statutes will be effective on October 1, 2011.

Now, **Kristen Simmons** and **Steve Oshins** provide members with their analysis of this important and late-breaking development.

Kristen E. Simmons is a member of the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. Kristen has been named a Rising Star in estate planning by Mountain States Super Lawyers magazine for the last four years and serves on the legislative committee of the probate and trust section of the Nevada State Bar, which drafted the 2011 updates to the Nevada self-settled spendthrift trust laws. Kristen can be reached at 702-341-6000, x7 or at ksimmons@oshins.com and <http://www.oshins.com>.

Steven J. Oshins is a member of 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 voted into the NAEPC Estate Planning Hall of Fame® and will be inducted in 2011. He is one of the most innovative attorneys in the country as demonstrated by how active he has been in writing 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, 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. He is also the author of the Annual Domestic Asset Protection Rankings at http://www.oshins.com/images/DAPT_Rankings.pdf. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com and <http://www.oshins.com>.

Before we get to their commentary, **LISI** members should take note of the fact that **Bob Keebler** has posted three new podcasts! The second podcast that we would like to bring to the attention of members is titled: “[Willis v. Menotte](#)” In this podcast, **Bob Keebler** and **Barry Picker** discuss the important bankruptcy case of Willis v. Menotte, as well as the impact of prohibited transactions.

Now, here is Kristen and Steve’s commentary:

EXECUTIVE SUMMARY:

[SB221](#) was recently [signed into law by the Governor Brian Sandoval on June 4, 2011](#), and makes Nevada’s already superior spendthrift trust laws even stronger. This commentary summarizes these changes as well as the planning opportunities that arguably make Nevada’s self-settled, spendthrift trust statute the most favorable among the states that allow such trusts.

FACTS:

The following summarizes the key changes:

1. Clarification and Expansion of Types of Trusts that May Qualify as Spendthrift Trusts

The statute has broadened the class of trusts that may qualify as spendthrift trusts. Specifically, under the new language, a charitable remainder trust, a grantor retained annuity trust and a qualified personal residence trust are all expressly permitted to be spendthrift trusts from which the settlor may benefit. The new language also explicitly provides that the settlor of a self-

settled spendthrift trust may use real or personal property owned by the trust without limiting the scope of the protection provided by the spendthrift trust.

2. “Tacking” of Statute of Limitations Period for Non-Nevada Spendthrift Trusts that Change Situs to Nevada

The legislation also adds language to the spendthrift trust statutes that enables a trust administered under the laws of another state or a foreign jurisdiction to move to Nevada without starting the statute of limitations period over. Under the new law, if the laws of the other state or jurisdiction in which an existing trust is domiciled are substantially similar to the laws of Nevada, and if the domicile of the trust is effectively changed to Nevada by complying with the other requirements imposed by Nevada law (the trust has a Nevada trustee, etc.), the date of a deemed transfer for purposes of Nevada’s statute of limitations period is the date on which the settlor made the transfer to the trust (if the laws of the applicable jurisdiction were substantially similar to Nevada at the time of transfer), or the date on which the laws of the applicable jurisdiction became substantially similar.

3. Limitation of liability of Trustees of Spendthrift Trusts

Nevada law already protects advisers to the settlors or trustees of spendthrift trusts from claims involving the establishment of a spendthrift trust. Specifically, Nevada law provides that a person cannot bring a claim against an advisor of the settlor or trustee of a spendthrift trust unless the person can provide by clear and convincing evidence that the adviser knowingly and in bad faith violated the laws of the State of Nevada and that the adviser’s actions directly caused the damages suffered by the person. In the new legislation, the trustee of a spendthrift trust is also protected from liability from a claim unless the claimant (other than a beneficiary or settlor) can show by clear and convincing evidence that the trustee knowingly and in bad faith violated the laws of the State of Nevada and that the trustee’s actions directly caused the damages suffered by the plaintiff.

4. Explicit Ordering of Transfers: Last In, First Out

The new Nevada statutes have further limited a creditor’s access to the self-settled spendthrift trust assets by creating a “Last In, First Out” mechanism. The changes to the statutes specify that if the settlor of a spendthrift trust makes more than one transfer to the trust, the later transfers to the trust must be disregarded for purposes of determining whether a creditor may bring an

action with respect to an earlier transfer to the trust. Although assumed under previous law, the new language makes clear that a more recent transfer for which the statute of limitations period has not run will not taint the whole trust. Additionally, a distribution made to a beneficiary from a spendthrift trust will be deemed to have been made from the most recent transfer made to the spendthrift trust.

5. Decanting Spendthrift Trusts

Nevada added the ability to decant trusts to its general trust law in 2009. In SB221, the legislature expanded its self-settled spendthrift trust statutes to make use of the favorable decanting laws. Under the new statutory language, the trustee of a spendthrift trust may decant the trust into a second spendthrift trust. If the trustee does exercise his or her discretion to decant an existing spendthrift trust into a second spendthrift trust, it will not effect the statute of limitations period applicable to the transfers made to the original trust. The date the property was initially transferred to the original spendthrift trust will be the deemed transfer date for the property even after it has been decanted into the second spendthrift trust.

6. Limitation of Actions against Spendthrift Trust

Nevada's statute of limitations for self-settled spendthrift trusts provides that a future creditor may not bring an action with respect to property transferred to a spendthrift trust unless the action is commenced within two years from the date of the transfer. If the person bringing the action is a creditor when the transfer is made, the person has the longer of two years from the date of transfer or six months from when the person discovers or reasonably should have discovered the transfer. It has been argued that Nevada's fraudulent transfer law, which includes a four-year statute of limitations period, negates the favorable two-year rule. However, in the new legislation the Nevada statutes have been refined to make it clear no action of any kind may be brought at law or in equity against the trustee of a spendthrift trust if at the date the action is brought an action by a creditor with respect to a transfer to the spendthrift trust would be barred.

Additionally, the statutes have been modified to provide that a creditor may not bring an action with respect to a transfer of property to a spendthrift trust unless the creditor can prove by clear and convincing evidence that the transfer (i) was a fraudulent transfer or (ii) "violates a legal obligation owed

to the creditor under a contract or a valid court order that is legally enforceable by that creditor.” If the creditor does not have clear and convincing proof that the transfer was a fraudulent transfer or violated a legal obligation, the property transferred is not subject to the claims of the creditor.

7. Negation of Implied Agreement by Trustee

Another change to Nevada’s self-settled spendthrift trust statutes clarifies that the settlor only has the rights and powers conferred to the settlor explicitly in the trust agreement and that an agreement, whether express or implied, between the settlor and the trustee of the spendthrift trust that attempts to grant or expand the rights that are outlined in the trust agreement is void.

COMMENT:

Planning Opportunities

Though there were many changes to Nevada’s self-settled spendthrift trust statutes with the passage of SB221, the key opportunity made possible by the statutory changes is the ability to change the situs of existing asset protection trusts to Nevada without starting the statute of limitations period over. Of all the domestic jurisdictions that enable a person to establish a self-settled spendthrift trust, Nevada is the only jurisdiction without any statutory exception creditors that may pierce the trust. That, along with having the shortest statute of limitations period to protect a transfer to the trust makes Nevada a very favorable situs.

With the addition of the “tacking” statute noted above, a person who has established a domestic asset protection trust in another jurisdiction that either has exception creditors or a longer statute of limitations period may change the situs of the trust to Nevada and not have to restart the clock for the previous transfers. Consider how many people have established their domestic asset protection trust in a jurisdiction that allows divorcing spouses, preexisting tort creditor or other statutory exception creditors to pierce the trust. The trustees of their trust may now move the trust to Nevada to take advantage of the more favorable laws.

SB221 also adds strength to the use of a Nevada self-settled spendthrift trust as a completed gift trust. With the issuance of PLR 200944002, many advisors have become comfortable with the establishment of a self-settled spendthrift trust as both an asset protection tool and estate tax avoidance vehicle.

In PLR 200944002, the IRS determined that an Alaska self-settled spendthrift trust that was structured as a completed gift for gift tax purposes was also outside of the grantor's estate for estate tax purposes. However, in the PLR the IRS made a point of excepting from its ruling the possibility of an understanding or pre-existing arrangement between the grantor and the trustee of the self-settled spendthrift trust that may otherwise cause inclusion of the trust assets under IRC § 2036.

Under Nevada's new self-settled spendthrift trust laws, any agreement between the grantor and the trustee of the trust, whether express or implied, would be deemed void if it expands the powers and/or rights of the grantor. The addition of this statute should bolster the use of a Nevada Asset Protection Trust as an estate tax savings tool for the right client.

Summary

Although many of the changes to Nevada's self-settled spendthrift trust laws made possible by SB221 are just clarifications of items that may have already been implied under existing law, the changes result in more comprehensive self-settled spendthrift trust statutes that are arguably the most favorable among the states that allow such trusts.

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

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Steve Oshins

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