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Interview with Attorney Steve Oshins:
New Private Letter Ruling Opens Great Planning Opportunities

Steve Oshins is an estate planning and asset protection attorney based in Las Vegas, Nevada. He is a nationally known attorney with clients all over the United States. He often works jointly with other estate planning attorneys all over the country on domestic asset protection trusts and other estate planning and asset protection techniques.

I recently interviewed him about a new Private Letter Ruling that affects domestic asset protection trusts and opens a great new opportunity. Steve has drafted hundreds of domestic asset protection trusts, so I was very excited to conduct this interview.

Phil Kavesh: Thank you for taking the time for this interview. In order to put this topic in the right context, would you please start by explaining how the domestic self-settled asset protection trust works?

Steve Oshins: Sure, Phil. Under the laws of most states, a person cannot set up a trust for himself that is protected from that person's creditors. However, starting with Alaska in 1997, certain states began enacting laws similar to offshore asset protection trust laws which allow a person to set up a trust for himself that is protected from that person's creditors. The states that have enacted "self-settled" asset protection trust laws are Nevada, Colorado, Delaware, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah and Wyoming.

A self-settled domestic asset protection trust is an irrevocable trust, set up under the laws of one of these favorable United States trust jurisdictions into which the grantor transfers assets in order to protect those assets from the grantor's creditors. After a period of time designated by applicable state law, those assets are protected from the grantor's creditors. Thus, this is a very popular vehicle for any person with even moderate wealth.

Phil Kavesh: Steve, you noted something that I think is very important for anybody looking to set up one of these trusts. That is, after the grantor has to wait for a certain period of time before the assets are actually protected from creditors. Would you please elaborate on this?

Steve Oshins: Sure. After drafting hundreds of these trusts, I can tell you that this is

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definitely the most critical issue. This is also the reason that Nevada has developed the most favorable self-settled asset protection trust laws. Under Nevada law, with respect to non-preexisting creditors, the asset protection trust is protected from the grantor's creditors only two years after the date the assets are transferred to the trust. All of the other jurisdictions require four years to pass, except for Utah and South Dakota which both require three years.

Phil Kavesh: Let's move on to the new Private Letter Ruling that was released by the IRS on October 30, 2009. Please tell our readers about this new development.

Steve Oshins: Private Letter Ruling 200944002 answers a question that the IRS had previously avoided when it first ruled in Private Letter Ruling 9837007 that a completed gift can be made to a domestic asset protection trust. In Private Letter Ruling 9837007, the IRS expressly noted that it would not rule on the issue of whether the completed gift was also outside the grantor's taxable estate. Private Letter Ruling 200944002 rules on that issue by holding that a grantor can set up a domestic asset protection trust in which the grantor is a beneficiary and which is outside of the grantor's taxable estate.

This is one of the most important Private Letter Rulings that the IRS has issued over the past decade because it confirms the "have your cake and eat it too" type of plan where a person can move assets out of his estate yet be a beneficiary of the trust that owns those assets. This allows a person to more aggressively move assets out of his estate because of the comfort of knowing that he can still access them.

Note that a Private Letter Ruling is only applicable to the taxpayer who specifically requested the Ruling from the IRS. However, it provides guidance as to the current position of the IRS. Essentially, the rule is that if the trust is not available to the grantor's creditors, then it is not included in the grantor's estate, so long as the grantor is only entitled to discretionary distributions made by an independent trustee.

Note that it is not yet clear whether the new Private Letter Ruling works for domestic self-settled asset protection trusts set up under the laws of states other than Nevada or Alaska. A recently published article co-written by four noteworthy authors suggested that the trust should only be set up under Nevada or Alaska law because all of the other jurisdictions have "exception creditors" (such as divorcing spouses) that can pierce through the trust and thus may violate the general rule that the trust is outside of the estate only if the grantor's creditors cannot reach it.

Phil Kavesh: Does the grantor of the trust have to be a resident of Nevada or Alaska in order for the trust assets to be outside of the grantor's estate for estate tax purposes? I would love to make this technique available to my clients who live outside of those two states, if it can be done.

Steve Oshins: This is a very important question. It is a no-brainer for a Nevada or Alaska resident to set up an irrevocable gift trust and be a beneficiary of the trust since we know that the IRS position is that the trust assets are outside of that person's estate if the trust is properly drafted. Thus, every Nevada and Alaska resident with substantial or even moderate assets should consider taking advantage of this new opportunity. However, the analysis is a little different for a resident of one of the other states.

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Private Letter Ruling 200944002 specifically involves a resident of the state with the favorable laws. Thus, it does not directly deal with a non-resident. However, after more than twelve years of domestic asset protection trust laws, there is still not even one court case approving or disapproving of these trusts. Most likely, this is because potential plaintiffs do not want to litigate where they believe they have such an uphill battle. There are very few people who question that the domestic self-settled asset protection trusts protect the assets even for a non-resident. However, given my conservative nature, I believe that the client needs to be aware that there still is no binding authority and thus it is the client's decision to do it or not do it.

I do have a solution for non-residents. One of the powers I give the independent trustee (often the client's best friend) is the power to remove a person as a beneficiary. If we set up one of these trusts and the law evolves such that the IRS concludes that it doesn't work for a non-resident, then the client can ask the independent trustee to remove the client as a beneficiary of the trust. Assuming this is done, then the client must live another three years from such removal date for the trust assets to be outside of his estate. I came up with this solution as a means of dealing with the uncertainty given the lack of case law. There are so many people wanting to use this technique that this solution has proven to be very popular and has opened the door for a lot of planning opportunities for our clients.

Phil Kavesh: One of the reasons I wanted to conduct this interview was because of the amazing life insurance opportunities this presents. You and I spoke about this recently and I was hoping you could share this information with our readers.

Steve Oshins: I was hoping you would ask this question because I'm sure this newsletter reaches quite a large number of life insurance agents who will love this technique. This creates an incredible opportunity for life insurance agents to plan for their clients who need to buy significant life insurance policies, but who also want to be able to access the cash value. The general rule is to create an irrevocable life insurance trust ("ILIT") for the benefit of the insured's family (but not for the benefit of the insured) to be the owner and beneficiary of a life insurance policy in order to keep the life insurance death benefit from being subjected to an estate tax at the insured's death. Based on the holding of 200944002, the grantor can be a beneficiary of his own ILIT and have access to insurance cash value without subjecting the death benefit to estate taxes.

I expect that the new Ruling will lead to more cash value life insurance sales because of this unique opportunity.

We wanted to send our sincerest gratitude and appreciation to Steve Oshins for taking the time to provide our readers such important information! We encourage all of you to contact him for additional information and resources. You will want to discuss with him how he may be able to help you and your clients as he has helped those of Phil's law firm! Thanks again, Steve!

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