GASSMAN CROTTY & DENICOLO, P.A.

ATTORNEYS AT LAW

THE THURSDAY REPORT

Issue #244 Thursday, May 24, 2018

Re: The Memorial Report

In This Issue:

Memorial Day or **Decoration Day** is a federal holiday in the United States for remembering the people who died while serving in the country's armed forces.[1] The holiday, which is currently observed every year on the last Monday of May, will be held on May 28, 2018. The holiday was held on May 30 from 1868 to 1970.[2] It marks the unofficial start of the summer vacation season,[3] while Labor Day marks its end. The holiday, from latest to earliest, is slightly more likely to fall on May 30, May 28 or May 25 (58 in 400 years each) than on May 27 or May 26 (57), and slightly less likely to occur on May 31 or May 29 (56).

Many people visit cemeteries and memorials, particularly to honor those who have died in military service. Many volunteers place an American flag on each grave in national cemeteries. (Wikipedia)

We, at the Thursday Report, salute all of those who made the ultimate sacrifice for their country and hope that no more ever have to.

Changing and Unwinding a Client's Estate Plan Because Income Tax Planning is More Beneficial for the Client Who Does Not Have Estate Tax Exposure

by Ken Crotty and Kateline Tobergte

With the new increase in estate tax exemption, many clients that practitioners had done planning for are no longer subject to the estate tax or may feel that they may not have potential estate tax exposure in the future. For these clients, practitioners should consider unwinding the planning that they had done before. The benefits of unwinding the planning typically will result in having a larger portion of the client's assets be included in his or her estate on the client's death thereby minimizing the income taxes that the beneficiaries will owe on the eventual sale of the assets.

For trusts in Florida, §736.0412 provides that an irrevocable trust may be modified non-judicially "after the settlor's death ... as provided in §736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries." Non-judicial modification is not an available option for:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.

(c) Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

Fla. Stat. Ann. § 736.0412 (West). However, a spendthrift clause or provision in the trust instrument that prohibits amendment or revocation of the trust does not prohibit non-judicial modification. Id.

One benefit of a non-judicial modification is that the client does not need to incur the expenses associated with drafting a petition to amend an irrevocable trust along with the associated documents and paying the filing fee with the applicable probate court, which currently is $__________ per trust.

If all of the qualified beneficiaries and the trustee agree, then the trust can be modified through the non-judicial modification process. As a refresher, a qualified beneficiary is:

a living beneficiary who, on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date..

Fla. Stat. Ann. § 736.0103 (West).

Assuming that the qualified beneficiaries and the trustee agree, then an irrevocable trust, which had been drafted to provide a beneficiary with a limited power of appointment can be amended so that the beneficiary has a general power of appointment. A general power of appointment is one that is exercisable in favor of the beneficiary, the beneficiary's estate, the beneficiary's creditors, or creditors of the beneficiary's estate. A limited power of appointment is any power of appointment that is not general.

Typically, trusts were drafted to provide beneficiaries with a limited power of appointment allowing them to direct how the assets would pass among the Grantor's descendants on the beneficiary's death without subjecting the assets to estate and income taxes. Because the estate tax exemption has increased to $11,180,000, the estate tax is no longer a concern for many clients. As a result, modifying the terms of the trust to provide the beneficiary with a general power of appointment will cause the assets to be included in the beneficiary's estate for income and estate tax purposes. Assuming that there is no estate tax liability, the inclusion of the assets in the beneficiary's gross estate will have a beneficial tax impact to the family. The inclusion will allow the assets to receive a step-up in basis on the beneficiary's death reducing the amount of capital gains that the family will pay in the future.

The easiest method would simply be to provide the beneficiary with a general power of appointment. However, in the event that the estate tax comes down in the future or the beneficiary is actually subject to estate tax on his or her death, this could be problematic. In addition, if you provide the beneficiary with the power to appoint assets to creditors of his or her estate, the beneficiary might actually do so, which obviously would mitigate any benefit the family would have received from a lower tax burden. To prevent this from happening, practitioners should consider providing the beneficiary with a power to appoint assets to creditors of his or her estate provided that the exercise of such power must be approved by one or more non-adverse parties, such as the family CPA, attorney, or other trusted advisors. Although this reduces the possibility that the power would actually be exercised, it does not prevent the power from qualifying as a general power of appointment causing the assets to be included in the beneficiary's estate.

One further planning idea, which would prevent the need to modify trusts again in the event that the estate tax exclusion is reduced or the beneficiary's assets significantly increase, is to limit the beneficiary's power of appointment to only be equal to the value of the assets of the trust that are not in excess of his or her remaining estate tax exemption. This could further be modified so that the assets with the biggest difference between their current fair market value as of date of death and their basis would be the assets that were first included. This is further discussed in the article that I wrote with Alan Gassman that was published in the Thursday Report dated _________________.

Although it's not clear that the IRS rather would accept a non-judicial modification, it is clear that the IRS is only bound by a decision from the Supreme Court of the state. In other words, having a non-judicial modification executed appears to be as likely to be respected by the Internal Revenue Service as filing a petition in the applicable county's probate court. This assumes that your client will not be going to the Supreme Court to get a ruling with respect to the reformation of the trust.

One time that you may want to get a reformation of a trust in the probate court as opposed to relying on a non-judicial modification is with respect to a Grantor trust while the Grantor is still alive. A Grantor trust is a trust that is treated as being owned for income tax purposes by the Grantor due to certain powers that he or she retained over the trust, but is excluded from the Grantor's estate for the purposes of determining his or her estate tax liability. The law is unclear as to whether such a trust would receive a step-up in basis on the Grantor's death. Many practitioners do not feel that such a trust would receive a step-up in basis on the Grantor's death. Therefore, if you want to be certain that the trust will receive a step-up in basis on the Grantor's death, the practitioner should obtain a court order modifying the terms of the trust. A court order is required because non-judicial modification is not available as an option for a trust if the Grantor is still alive.

Another instance in which a court reformation may be more desirable than a non-judicial modification is if you have a beneficiary whose reluctant to sign off on the proposed modification. Oftentimes every party will consent to the reformation. As described above, with a non-judicial modification, all of the qualified beneficiaries and the trustee must sign the modification. If a court order is necessary, then notice will need to be given to all of the interested parties. In some situations, the "troublesome beneficiary" may not sign off on the proposed modification, but at the same time will also not get legal counsel to represent him or her and contest the judicial modification. In such an instance, after the applicable notice period has ended [KEN TO PUT IN THE PERIOD OF DAYS, WHICH I BELIEVE IS 20 DAYS AFTER SERVICE], then the court in most situations will reform the trust pursuant to the petition and order that were filed.

Practitioners should also consider modifying the terms of LLC and partnership agreements. When these agreements had been drafted, they contained restrictions on the lack of control and lack of marketability for limited partner, non-voting, or minority membership interests. These restrictions had allowed discounts to be applied to the reported value of the interest being sold or gifted. These restrictions can be removed from the Operating Agreement or partnership agreement by a simple amendment executed by all of the members and managers or all of the partners as applicable. Once these restrictions have been removed, then the value of the partnership interest or LLC interest owned by the trust should no longer be discounted and should get a full step-up in basis on the death of the Grantor. If these restrictions are not removed, then even if a step-up in basis is possible, the step-up in basis probably would be limited to the discounted value. By means of example, if the un-discounted partnership interest was worth $100, but a 32% discount had been applied to the valuation report to the sale or gift of the partnership interest, then on death the partnership interest would only get a step-up in basis to $68 instead of getting a step-up in basis to $100.

In addition to the above, practitioners should also consider repaying any notes that were owed by the trust to the applicable Grantor. This can help simplify the planning while the Grantor is still alive, and also minimize any chances of an income tax event occurring after the Grantor's death.

One of the easiest things that practitioners need to be aware of, and should take advantage of, is that most Grantor trusts have a "Swap Power," which allows the Grantor to swap assets owned by the trust with assets that are owned by him or her so long as the assets are of equal value. In the event that the practitioner knows that the client has a certain life expectancy, the practitioner should take assets that have a basis equal to or close to their fair market value, such as cash, and swap them with assets owned by a Grantor trust that have a large difference between the fair market value of the asset and the basis. Although it is possible that the assets may receive a step-up in basis when owned by the Grantor trust, assets owned by the client individually or by his or her revocable trust will receive a step-up in basis. Swapping assets with a large difference between their value and basis for assets with little to no difference eliminates the potential concern that assets of the Grantor trust may not receive a step-up in basis on the death of the Grantor. This is a relatively simple exercise that can be done with the help of the client's financial planner and can potentially drastically reduce the capital gains that the client's family would otherwise pay on the eventual sale of the assets after the client's death.

Another alternative the clients may want to consider is intentionally triggering inclusion of the assets of the trust under Section 2036. [KEN TO PROVIDE A DESCRIPTION OF SECTION 2036]. For example, if a client had placed his or her house in a qualified personal residence trust, after the end of the term, the client needs to pay fair market value rent to utilize the property to prevent the IRS from arguing that the assets should be included in his or her estate pursuant to Section 2036. It seems as though if a client intentionally used the property without paying rent that the client could assert that Section 2036 will cause the asset to be owned by the client and, therefore, the assets should receive a step-up in basis on the client's death in the event that the client was not comfortable relying on the fact that the asset was owned by a Grantor trust.

The above are some potential planning considerations that clients and practitioners need to consider. With the increase in the estate tax exemption, for many clients the estate tax is no longer a concern. Instead, the taxes that can be minimized with additional planning are the income taxes that the trust and beneficiaries will pay after the client's death.

[Back to Top](#)

Why Doctors Should Be Operating Through an S Corporation

by Alan Gassman and Brandon Ketron

Many physicians ask us whether they should provide services under an S corporation or as an individual. Many doctors provide services through an LLC. Under the income tax law, an LLC can be disregarded for income tax purposes, or may make an election to be treated as an S corporation.

Generally, S corporations do not pay income tax, and the net income of the company is reported on the tax return of the shareholder or shareholders through K-1 Forms that the S corporation issues to each owner to inform them of their share of the corporate income and deductions.

In addition to income taxes, doctors working as independent contractors or having unincorporated trades or businesses must pay self-employment tax based on 15.3% of the first $128,400 of self-employment income, and a 2.9% Medicare tax on any income over that, plus an additional 0.9% Medicare tax on self-employment income exceeding $200,000 for single filers or $250,000 if filing jointly. Income from LLCs that are disregarded for income tax purposes or taxed as a partnership is also treated as self-employment income if the individual is active in the trade or business. As a result, doctors operating as independent contractors under these types of structures will owe self-employment tax on both compensation paid to the doctor and on the remaining net income of the entity.

If instead, the doctor were to operate through an S corporation, only compensation paid to the doctor by the S corporation is subject to employment taxes. The remaining income is not considered self-employment income, and can either be distributed to the owner or held in the company. This can provide significant tax savings for the doctor.

For example, Doctor A is an independent contractor and has an LLC that is disregarded for income tax that earns $775,000 each year. In addition to income taxes, Doctor A would be considered to have $775,000 of self-employment income and to owe self-employment taxes of $43,250.

If instead Doctor A operated under an LLC taxed as an S corporation, only compensation paid from the S corporation would be subject to self-employment taxes. Under the above scenario, A could pay himself a salary of $275,000, and only the $275,000 would be subject to self-employment taxes. A would only pay self-employment taxes of $24,250, thus saving $19,000 in taxes each year.

Many advisors urge doctors to have much more than half of the income classified as wages where most of the income is the result of the personal work of the doctor.

If the doctor operates under an S corporation structure, the doctor must pay himself or herself a reasonable salary. Otherwise, the IRS has the ability to re-allocate a portion of the income from the S corporation as compensation subject to self-employment taxes, and to charge the doctor with interest and penalties for not paying a reasonable compensation amount. What constitutes a reasonable salary depends on the facts and circumstances of a particular doctor and the nature of his or her business. Generally speaking, salaries should be set at comparable rates to other similar doctors in the area. Some doctors may choose to receive compensation of $275,000 (if this is considered reasonable under the doctor's particular circumstances) as only the first $275,000 of wages may be counted in determining relative pension and profit sharing plan contributions for 2018.

It is also noteworthy that the IRS has the ability to re-allocate income between a person and his or her professional corporation if there is only one primary customer who pays the S corporation.

Many doctors prefer to use S corporations because they are less likely to be audited by the IRS, and can facilitate segregation of personal and business activities, expenditures, and writeoffs.

Oftentimes, a family-owned S corporation can have children perform services to help them learn a work ethic and to facilitate the funding of Roth IRA accounts that can grow tax free for the child's entire lifetime. Sometimes spouses will also perform services and be added to the payroll to facilitate pension funding for the spouse as an additional tax benefit.

Other than legal, accounting, and filing fees to form and maintain the S corporation, or to convert an existing entity into an S corporation, there is little downside to this planning opportunity. The tax savings each year would outweigh these costs and provide significant savings for doctors that typically operate as independent contractors.

Back to Top

Toni 1 Trust v. Wacker – Reports of the Death of DAPTs for Non-DAPT Residents is Exaggerated

by Alan Gassman, Martin Shenkman, Jonathan Blattmachr & Matthew Blattmachr

The Alaska Supreme Court affirmed the dismissal of a declaratory judgment lawsuit brought by the trustee of an Alaska Domestic Asset Protection Trust (DAPT), which sought to declare that fraudulent transfer judgments entered in Montana and the U.S. Bankruptcy Court which voided transfers of Montana property to the Alaska DAPT were void and unenforceable, because Alaska courts could not restrict the forum for decisions relating to transfers to self-settled trusts formed under Alaska law exclusively to themselves. However, the Alaska decision did not hold or even indicate that Alaska self-settled trusts were void or voidable. In fact, the decision has no bearing on the viability of a self-settled trust created under the law of any state which does not allow the settlor's creditors access to the trust assets when the transfers to the trust were not fraudulent.

FACTS:

After both Montana and the US Bankruptcy Courts entered default judgments on a lawsuit claiming that the transfers to an Alaska trust were fraudulent, the trustee commenced an action in the Alaska courts seeking a judgment that the decisions in Montana and before the US Bankruptcy Court were essentially void because Alaska Statute 34.40.110 provides that any court proceeding relating to transfers to self-settled Alaska trusts must be determined exclusively by Alaska courts. Some have contended that the decision is the death knell for self-settled trusts created in any DAPT state by a resident of a non-DAPT state.

COMMENT:

The recent Alaska Supreme Court decision of *Tony 1 Trust v. Wacker* has stoked certain commentary that seems to be misinterpreted and hence overstated.[i]

The court simply held that a provision of Alaska law that says that all legal actions involving transfers to Alaska self-settled trusts must be decided by Alaska courts was not enforceable when the courts of another state, or the US Bankruptcy Court, have jurisdiction over the matter and the parties.

Essentially, the Montana Courts had jurisdiction over the parties, including the trustee of a trust that purported to be an Alaska trust, and default judgments to the charge of fraudulent transfers were entered in both the Montana and US Bankruptcy Courts.
The trustee of the trust then brought an action in Alaska asking that the Montana and Bankruptcy court judgments be found to be void because AS 34.40.110 grants Alaska courts exclusive jurisdiction on matters involving transfers to Alaska self-settled trusts. It is interesting to note that even if the Alaska Supreme Court had held that only its courts had exclusively jurisdiction, the trustee of the trust would most likely not have prevailed because: (1) Alaska law does not protect a self-settled trust if the transfer to it was fraudulent (and the transfer in the case may have been so found), and (2) it is not clear if the proper formalities for creating a self-settled trust in Alaska (e.g., the settlor's completion of an affidavit of solvency) were followed. In fact, in footnote one of the case the Court noted: "The appellees argue that (1) the Trust is not an Alaska trust at all and (2) even if it is, the Trust is not subject to the Alaska statute because it was not created in compliance with applicable statutory requirements. The superior court did not resolve these factual questions, and we assume, without deciding, that the Trust is an Alaska trust subject to AS 34.40.110."

The Alaska Supreme Court acknowledged that the claims by the trustee on the jurisdictional questions were not frivolous but concluded that the attempt to grant exclusive jurisdiction to the Alaska courts would not be upheld. The Alaska Court based its decision on the Tennessee Coal holding.[ii] But the Court also noted "The basic principle articulated in Tennessee Coal has not changed in the last century." So, if the principle of law is old and unchanged, why is Wacker being advocated as a new revelation as to the non-viability of DAPTs?
Some now claim that self-settled trusts formed in the 17 states which do not allow creditors to reach into trust assets to satisfy the claims of a settler cannot be used except by residents of those states. That claim is overblown.

Self-Settled Trusts. Whenever someone creates a trust from which he or she may receive distributions, it is a self-settled trust—that is one created (or settled as the English say) for one's self. That is not per se sinful. Indeed, all IRAs and other retirement trusts are self-settled and are protected and encouraged by federal law and the law of most states. The key is that, in all US jurisdictions, before 1997 when the Alaska Trust Act was passed, creditors of the grantor of a trust could attach assets in a self- settled trust, even if the grantor had no intention of trying to hinder, delay, or defraud a creditor, and no matter when the claim arose. It is important to note that the intent of the Alaska Trust Act was to encourage individuals to use their lifetime wealth transfer exemptions, and not to compete with foreign jurisdictions, as many believe, to intentionally thwart creditors. We discuss this later in the article.
It is vitally important to appreciate that making a fraudulent transfer is quite different than simply creating a self-settled trust.

Fraudulent Transfers. All states basically void, or make voidable, fraudulent transfers (although actions do so may be dismissed if not timely made under state or US Bankruptcy Code statutes of limitations). And even though most fraudulent transfer claims are made under state law, the US Bankruptcy Code was amended in 2005 to add additional restrictions. US Bankruptcy Code Section 548(e) provides that a transfer to a self- settled trust (or similar device) may be set aside if it occurred within ten years of the filing of the petition for bankruptcy and was made "with an actual intent to hinder, delay or defraud" a creditor.

And, of course, a fraudulent transfer can be set aside regardless of the entity or person to whom the property is transferred. In other words, a transfer to a spouse or other relative, or even a friend,

which is fraudulent will be set aside if the action is commenced before the running of the statute of limitations. There is no reason for the transfer to be to a self- settled trust to be set aside.
The Uniform Voidable Transfers Act ("UVTA") at Section 4, Comment 8, makes mention that a transfer to a self-settled DAPT is voidable if the transferor's home state does not have DAPT legislation. The Comment provides: "By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y." Some commentators have criticized this comment as not being supported by applicable law or precedent and point out that it is merely a comment, and not an actual proposed law.[iii] Many expect that some states that adopt this Act in the future will do so without adopting or endorsing this controversial comment.

If the comment becomes law this will be bad for the debtor who makes the fraudulent transfer and may be worse for his or her advisors. In a 2014 case, an Iowa lawyer who merely prepared documents of transfer and had advised his clients not to make fraudulent transfers was charged with unethical behavior for providing the transfer instruments. Although the Iowa Supreme Court found that he had not violated attorney ethical rules, it shows that a lawyer may face serious discipline, possibly disbarment, for knowingly assisting in a fraudulent transfer. No lawyer and no other person should ever help another in doing so if state or Federal law makes this illegal, although in some states the opposite may apply, as a lawyer has a fiduciary duty to do what is best for a client within the bounds of the law. In those states it is common to refer the client to an advisor who is willing to give proper advice and assist as appropriate within the confines of the law.

Contrast to Self-Settled Trusts. Self-settled trusts are clearly different than fraudulent transfers. Nearly everyone in America takes some action to avoid future claims that might otherwise arise. Informed individuals enter prenuptial agreements when they marry to protect their assets if they get divorced. In fact, a common use of DAPTs is not nefarious or inappropriate avoidance of creditors, but as a backstop to legitimate premarital planning. See Sandra D. Glazier, Martin M. Shenkman & Alan Gassman on "DAPTs & Klabacka – At the Intersection of Estate Planning and Family Law," Steve Leimberg's Asset Protection Planning Email Newsletter Archive Message #357, Date: 01-Feb-18. No rational person can claim that is morally wrong, and that the law should not respect such actions. Similarly, few would contend that a resident of Florida, Michigan or Texas is doing something untoward by buying a home and arranging its ownership under the state's homestead law to protect it from claims of creditors. Millions of Americans make contributions to IRAs which are self-settled trusts, but which are protected under State law from claims of creditors. Many clients convert traditional IRAs to Roth IRAs, paying the tax cost on conversion out of non- IRA assts. The result of this is to convert pre-tax to post-tax protected dollars in a state that provides protection to Roth IRAs. While income tax benefits of Roth IRAs are certainly a motive, many of these conversions are undertaken for asset protection benefits. Additionally, almost all competent advisors recommend that individuals create limited liability entities, such as an LLC or corporation, to operate their businesses and thereby protect their personal assets from creditors of the business enterprise. Setting up irrevocable life insurance trusts ("ILITs") has been part of estate planning for many decades. While increasing estate tax savings by using a trust to own insurance has certainly been a motive, protecting insurance proceeds from creditors and divorce has also been a motive. Now that the estate tax is irrelevant to most Americans, the protective benefits of ILITs are perhaps now the only motive for many. The point is that while some commentators suggest that there is something inappropriate in using self-settled trusts or even taking normal asset protection steps generally, most people and practitioners commonly do and should pursue asset protection strategies, and in the opinion of some might be committing malpractice if they don't.

Yet until 1997, all but possibly one state seemed to have a rule that allowed creditors of a grantor access to assets in a self-settled trust even if the creditor was not trying to defraud anyone, and even if the creditor's claim arose decades after the trust was created.[iv] It was just a rule. Alaska in 1997 changed the rule and adopted a statute that protected the trust assets in a self-settled trust if, among other things, the transfer was not a fraudulent one. If it is fraudulent, the Alaska trust provides no protection at all (again, as long as the claim is brought before the running of the statute of limitations).

Legitimate Reasons for a Self-Settled Trust. There are many reasons people create self-settled trusts other than to make fraudulent transfers. One is to engage good estate tax planning. Today, the estate tax exemption is enormous–$11.18 million per taxpayer, which is much larger than what most individuals will ever need to protect their wealth from estate tax. However, the exemption is scheduled to decline to about $5.5 million after 2025, which is where it was before 2018. Although, again, since the vast majority of people will not come close to needing to use even this smaller exemption, there is the risk of it being further rolled back by later legislation. Also, an individual's wealth likely will not remain stagnant.

Most well invested wealth grows. In fact, if it grows at a rate of 7.2% a year, it will double every ten years. Hence, a 50-year-old who lives to 90 could see her current wealth of $2 million grow to $32+ million if she earns 7.2% a year. If she only earned 5.2% her estate would grow to more than $15 million. At 9.2% compounded it would grow to close to $68 million.
So, there is good reason to use the temporary enhanced exemption but few can afford to walk away from large amounts of wealth. By making such a gift to a self-settled trust, the grantor may be able to benefit from the property in the future if a need arises, and it is not a fraudulent transfer if the grantor is not trying to avoid a known or expected creditor.

For moderate wealth clients, using the exemption will require more access to assets to achieve a sufficient level of comfort to make gifts. Several options exist to meet this goal post-TCJA.
So, what can a person who wishes to use the temporary increase in the exemption do? He or she could create a self-settled trust, from which he or she could benefit later in life, under the laws of his or her own state. But if that state allows his or her creditors to attach the assets in the trust, even though there was no fraudulent transfer, the plan will fail. The IRS has long held that assets transferred to an irrevocable trust will be included in the grantor's gross estate for Federal estate tax purposes if his or her creditors can attach the trust assets under the state law applicable to the trust. See Rev. Rul. 76-103, 1976-1 293. But it also seems clear that the trust will not be included in the grantor's gross estate if the trust is governed by the law of a state that does not permit his or her creditors to attach the assets in the trust.

So, if a taxpayer resides in a state that permits perpetual access by the grantor's creditors to the assets of a self-settled trust governed by laws of his or her state, as more than half of American states do, then he or she cannot use his or her exemption and remain an eligible beneficiary of the trust. But, as indicated, he or she could create a trust in one of the several jurisdictions that do not subject assets in a self-settled trust permanently to the claims of the grantor's creditors.
A planning structure that has become relatively common will serve as a foundation for many moderate wealth clients post-TCJA. That plan is the use of non-reciprocal, dynastic, GST exempt, spousal lifetime access trusts ("SLATs"). SLATs have and continue to serve many clients as a means to use exemption, but nonetheless preserve access to the assets transferred to the trusts. A planning issue for SLATs has always been to avoid the reciprocal trust doctrine which might be

used by the IRS to uncross the trusts causing estate inclusion, or allowing creditors to pierce the plan.

For single clients wishing to use the exemption, the planning challenges are greater. Single clients might implement non-reciprocal trusts with another family member. Indeed, the first significant estate tax reciprocal trust doctrine involved two brothers. Lehman v. Commissioner, 109 F.2d 99 (2nd Cir. 1940). Alternatively, a non-married person (or a married one but who does not wish to implement a non-reciprocal trust with his or her spouse) is most likely to have to look to a DAPT, or variations of a self- settled trust, to use his or her exemption. In fact, the use of DAPTs might be more common to facilitate single clients. Because of the concern some commentators have over the use of DAPT, variations thereof, which might be referred to as "almost-DAPTs", may be more popular. For almost- DAPTs, the settlor is not named as an immediate beneficiary, but rather a person in a non-fiduciary capacity is given the power to add the settlor as a beneficiary. Another approach might be to provide for distributions to the settlor (or to descendants of the Settlor's grandparents) only at the discretion of a non-fiduciary in the same way that beneficiaries of trusts are often given the power to appoint assets to anyone they may choose other than creditors, their estate, or creditors of their estate. This power to add the Grantor may enhance asset protection of the trust, since a trust which does not permit distributions to the settlor by the trust is, by definition, not a self-settled trust (The Restatement (Second) of Trusts, Section 156(2) (1959) provides in relevant part "[w]here a person creates for his own benefit, a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."

The harsh interpretation of the Wacker case, which the authors believe inaccurate, would inhibit the use of DAPTs by single clients, thus significantly disadvantaging non-married clients as compared to married clients who can use non-reciprocal SLATs. Why should asset protection planning be permitted for married clients (has anyone challenged the use of non-reciprocal SLATs with the same tenor as DAPTs?) but not for single clients seeking the same reasonable objectives?

Back to Top

A Letter Concerning United States Based Asset Protection Trusts Following the *Toni 1 Trust v Wacker* Case

By Alan Gassman

Our letter concerning United States based Asset Protection Trusts following the Toni 1 Trust v. Wacker case.

We have covered the recent Alaska Supreme Court decision of *Toni 1 Trust v. Wacker* where the Alaska Court struck down an Alaska Statute which indicated that the determination of whether a fraudulent transfer to an Alaska Creditor Protection Trust has occurred must be made by an Alaska Court.

While some have decried the decision as being the death now for Domestic Creditor Protection

Trusts, we do not believe that this is the case, especially where the donor to the Trust would not be a Beneficiary unless certain conditions exist that are beyond the control of the donor.

A sample letter to clients that Marty Shenkman and I wrote for publication by Commerce Clearing House is as follows:

Via Regular Mail

[Date]

Re: Self-Settled Trusts and the Recent Tony 1 Trust v. Wacker Case

Dear Client/Former Client/Inactive Client:

Do you want to keep up with the Latest industry news, trends and analysis?

YES, TELL ME HOW.

We are writing to you to inform you of an important recent case that may have impact on U.S.-based domestic asset protection trusts known as DAPTs that we may have completed for you in the past. The hallmark feature of these trusts is that the person establishing the trust (referred to as the "grantor," "settlor," or "trustor") is also a named or possible addable beneficiary of the trust. This letter is written to notify former and current clients of the Wacker case and other developments, and has not been customized to your situation. We welcome the opportunity to speak to you specifically about your situation if you contact us.

- If you are represented by new counsel, please give this letter, and the attached article, to your current attorney to review the impact of the recent case as well as other developments affecting DAPTs, the administration of DAPTs, and the status and options of a DAPT with legal counsel. [Practitioners might choose to attach one or more articles from various journals to the letter to provide a more in-depth discussion or to write a short memorandum summarizing the Wacker case and status of DAPTs. The reference in this sample letter should be modified accordingly.]

- If you are a current client, please call our office and make an appointment to meet in person, by web conference or by phone to review the above matters.

- If you aren't a current client and don't have other counsel, please call our office and make an appointment to meet in person, by web conference or by phone to review this situation, but please understand that your file has been closed since our last meeting, and your entire plan and all documents may need to be evaluated to properly advise you in this situation.

In Wacker, the Alaska Supreme Court held that the law of the residence of a man who set up an Alaska trust and conveyed assets to it for the alleged purpose of avoiding creditors would apply, instead of Alaska law, for the purpose of determining whether the transfer to the trust would be set aside because it was for the express purpose of avoiding payment to a specific and imminent creditor. We believe that the case simply confirmed that the statute that purported to grant the Alaska courts exclusive jurisdiction to decide matters relating to the transfer of assets to a self-settled trust could not block other state or federal courts from deciding matters relating to such a transfer. The Court did not hold that Alaska law would allow the creditors of the grantor access to the trust's assets. Other commentators have stated that the case confirms that DAPTs do not work for those residing in non-DAPT jurisdictions (e.g., a New York resident creating a DAPT in Alaska).

The Wacker case is not the only recent development that might be viewed as negatively affecting DAPTs. The Uniform Voidable Transfers Act is an academic and widely accepted new model law being adopted by many states that states in a commentary (Section 4, Comment 8) that a transfer to a self-settled DAPT is voidable if the transferor's home state doesn't have legislation that allows trusts that are formed by a grantor who is a beneficiary of the trust to be immune from penetration by creditors of the grantor.

"By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under §10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y."

Some commentators have criticized this comment as not being supported by the law and point out that this is merely a comment and is not an actual proposed law. Many commentators have recommended that states that adopt the UVTA in the future should do so without adopting or endorsing this controversial comment, but there is no certainty.

As a result of this situation, every DAPT arrangement should be evaluated for possible changes. This applies not only for asset protection purposes, but also because the Internal Revenue Service may claim that a trust that is accessible to a grantor's creditors will be subject to estate tax on the grantor's death unless the creditor access is removed more than three years before the grantor's death.

There are a number of issues that may be considered:

- Existing or modified DAPTs may be helpful by using the now temporarily enlarged estate, gift and generation-skipping transfer tax exemptions. The $5.6 million per donor increase in these exemptions to $11.18 million will only be available through the end of 2025 under present law, and a future administration may reduce the exemption sooner. Thus, you should evaluate whether to use all or part of this increased exemption sooner rather than later so that growth in what is gifted can also escape estate tax while being held under a DAPT might be available for you if the estate tax were eliminated or you had the need for support in the unlikely event that other assets were no longer available for you.

- If based on Wacker and other developments, you now view the risks of a DAPT as too great, then you should evaluate options for modifying an existing DAPT by removing yourself as a present possible beneficiary, taking the DAPT to an offshore jurisdiction, or taking other actions that might enhance the probability of success under the intended structure.

- Many DAPTs in process will be transformed to hybrid DAPTs (as described below) or otherwise adapted using other techniques available to enhance safety and results involved in this type of planning. For any DAPT that is in process and not yet funded (or to which additional funding will be considered), "belts and suspenders" designs might be advisable.

- A "hybrid DAPT" is not a self-settled trust, a DAPT, at inception, but rather for the benefit of individuals other than the grantor (called a "third party trust"). A named person or a person some might refer to as a "trust protector" or otherwise situated who are not trustees and who are not acting in a "fiduciary role" can be given the power to appoint or otherwise add additional beneficiaries who may be descendants of the settlor's grandparents, and the grantor may not be added unless economic events occur that make this necessary from a support standpoint. Thus, unless and until distributions are needed to the settlor, the settlor need not be a beneficiary, thereby circumventing the DAPT issue. There's a myriad of different approaches to these mechanisms.

- For existing DAPTs, consideration of having a trust protector modify the trust, or transferring (decanting) the trust into a different or new trust that is either a hybrid DAPT, or which has other mechanisms to address the possible risks, may be worthwhile. In some instances, DAPTs completed in the rush to plan before the end of 2012, when it was anticipated that the exemption might decline from $5 million to $1 million may no longer be necessary. The growth in the stock market (or other assets) since 2012 and now being six years older may have obviated the need for the settlor to have access to the trust. In such cases it might be advisable for the settlor to renounce any rights as a beneficiary. Consideration might be given to filing a gift tax return to report that renunciation as it may be considered a gift transfer to other beneficiaries, although in a discretionary trust it's not certain how that possible gift could be valued.

- We welcome coordination with and input from your CPA and any investment advisors and insurance consultants, but please keep in mind that what is shared and discussed with them may be admissible in court, so we should be careful in our approach to collaborative communications.

- Besides the trust itself, the underlying structure as to what is owned by the trust may be updated to make it much more creditor resistant, such as by having limited liability companies owned by the trust become owned mostly by the trust and in small part by another trust or family member to have the benefit of what is known as "charging order protection" if the law of a state that recognizes such protection is applicable.

For legal ethics purposes, we should point out that some might characterize this letter as constituting attorney advertising.

With careful planning, individuals in all states may be able to still maintain, or even create, a trust that can possibly benefit the grantor in a state that has a law that does not permit creditors of the grantor to pierce the trust to collect amounts owed. If the transfer to fund the trust is not "avoidable" as being for a primary purpose of avoiding the creditor, then we expect that a well-drafted trust and related plan may have a reasonable likelihood of withstanding creditor and IRS scrutiny, but there is some degree of uncertainty with respect to this. In all instances, greater care in the planning and administration of such trusts may be warranted. Obviously, modifications to existing DAPTs and the structures associated with them might make them safer.

Please consider calling to make an appointment if you are not represented by other counsel.

Sincerely,

[Name]

By: ________________________
[Name, Title]

Back to Top

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue, we feature some of Richard's recommendations with links to the articles.

The attached article from The National Law Review says:

If your family includes a person with special needs, here are 10 tips to get you started on the right track to developing an estate plan that works for your family.

To read the article in full, please click [HERE.]()

[Back to Top]()

Humor

Back to Top

Upcoming Seminars and Webinars

Calendar of Events

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
Maui Mastermind Business Law Webinar	Thursday, June 7, 1:00PM-2:00PM	Gotowebinar.com	TOPIC: Employee Practices, Hiring, Firing and Everything in Between *Guest speaker with Mr. Gassman will be Colleen M. Flynn, Esq.	Contact: Agassman@gassmanpa.com	
Maui Mastermind Conference	June 15-17, 2018-Our Clients attend for free!	1001 N Westshore Blvd, Tampa, FL 33607	Wealth 101 for Business Owners	Contact: Agassman@gassmanpa.com	
Leimberg Services Webinar	Thursday, June 21, 3:00 PM – 4:30 PM	Gotowebinar.com	Asset Protection Opportunities You May Not Know About	Click Here	Click Here
Leimberg Services Webinar	Thursday, June 28, 3:00 PM – 4:30 PM	Gotowebinar.com	Asset Protection for Businesses and Their Owners	Click Here	Click Here
MER Primary Care Conference	Thursday, July 5-7, 2018	Yellowstone, Wyoming	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Agassman@gassmanpa.com	Click Here
Maui Mastermind Business Law Webinar	Wednesday, July 11, 1:00PM-2:00PM	Gotowebinar.com	Corporate and LLC Structuring - Business, Creditor, Tax and Family Planning Considerations	Contact: Agassman@gassmanpa.com	
Professional Acceleration Workshop	Friday, September 7, 2018. 11AM-5PM	Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707	Reach Your Personal Goals, Increase Productivity and Accelerate Your Career.	Contact: Agassman@gassmanpa.com	Click Here
Florida Osteopathic Medical Association Conference	September 14-16, 2018, 7:30 am – 8:30 am	2900 Bayport Drive Tampa, Florida 33607	Mid-Year Seminar	Contact: Agassman@gassmanpa.com	
FBA Trust & Wealth Management Conference	Thursday, September 27, 2018	Sarasota		Contact: Agassman@gassmanpa.com	
Notre Dame Tax Institute	October 11-12,	South Bend	Planning Under Section 199A and	Contact:	

	2018	Indiana	Associated Tax and Practical Considerations	Agassman@gassmanpa.com	
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	
Mote Vascular Foundation Symposium	November 30 – December 2, 2018	The Westin-Sarasota, 1175 N. Gulfstream Ave, Sarasota, FL 34236		Contact: Agassman@gassmanpa.com	

Back to Top