Leimberg Information Services, Inc.

Steve Leimberg's Asset Protection Planning
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Subject: Steve Oshins on the 20th Anniversary of Domestic Asset Protection Trusts

"After 20 years of DAPTs, there still isn't even one known case where a creditor was able to get a judgment or settlement against a debtor (where there was no bankruptcy or fraudulent conveyance) and then actually reach into the DAPT and access the trust assets. Zero, zilch, nada, nope, not even once.

Therefore, as we celebrate the 20th anniversary of DAPTs, we are celebrating that they have a perfect record. There is no way to count the number of favorable settlements, including lenders who modified loans because of the fear of facing a DAPT. But they do exist. Those are all victories for the debtors."

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Steve authors three different annual state rankings charts and one state income tax chart:

- The Annual Domestic Asset Protection Trust State Rankings Chart
- The Annual Dynasty Trust State Rankings Chart
- The Annual Trust Decanting State Rankings Chart
- The Annual Non-Grantor Trust State Income Tax Chart

Yesterday marked the celebration of the 20th anniversary of Domestic Asset Protection Trusts ("DAPTs"). With this 20th anniversary, it is now time to look back at the past two decades and see where DAPTs stand and how they have performed.

Here is Steve's commentary:

EXECUTIVE SUMMARY:

The first DAPT statute was effective under Alaska law for trusts funded on or after April 2, 1997. Just months after Alaska's statute was enacted, Delaware followed with a DAPT statute. Then, in 1999, Rhode Island and Nevada became the next two states to enact DAPT statutes. With the recent Michigan DAPT statute becoming effective, there are now 17 states with DAPT statutes.

Soon after the Alaska legislation was passed, scholarly articles were published questioning whether a resident of a non-DAPT state can set up a DAPT in a DAPT state and obtain the protection of that state's DAPT statute. That theory has continued even through today, but has anybody actually stopped to assess where things actually stand after 20 years? This newsletter seeks to do that.

COMMENT:

Defining Asset Protection

Many planners misunderstand asset protection. Asset protection isn't simply about finding case law that has approved an asset protection technique. In other words, there is faulty logic when one assumes that just because a technique worked in one court that it will always work in another court, or that just because a technique failed to work in one court that it will fail to work in another court.

In fact, there is no requirement that there be any case law at all.

Asset protection is usually about structuring assets in such a way that the structure will induce a quick and cheap settlement. It's that simple. Certainly, it doesn't hurt to have actual case law approving that it works since, obviously, positive case law should move the settlement number in

the debtor's favor. Conversely, adverse case law will have the opposite effect on the settlement number.

This is not to say that asset protection is solely based on assuming that there will be a settlement rather than the matter ending up going through the court system. Therefore, a bonus is that the chosen asset protection structure actually be strong enough to hold up if actually tested in court. In fact, no good asset protection structure would lack that feature.

Very, Very, Very, Very Important Author Comment

After 20 years of DAPTs, there still isn't even one known case where a creditor was able to get a judgment or settlement against a debtor (where there was no bankruptcy or fraudulent conveyance) and then actually reach into the DAPT and access the trust assets. Zero, zilch, nada, nope, not even once.

Therefore, as we celebrate the 20th anniversary of DAPTs, we are celebrating that they have a perfect record. There is no way to count the number of favorable settlements, including lenders who modified loans because of the fear of facing a DAPT. But they do exist. Those are all victories for the debtors.

Let's take a look at the minimal DAPT case law that exists:

***In re Huber*, 2012 Bankr. LEXIS 2038 (May 17, 2013)**

This is the case that most people cite for the proposition that DAPTs don't work. However, this was a bankruptcy and fraudulent conveyance case, so there was never any test to see if a creditor could force assets out of a DAPT in a non-bankruptcy, non-fraudulent conveyance situation. The part of the decision that people often cite is the dicta where the bankruptcy judge ruled that Washington law (where the debtor resides) applies and Alaska law (where the DAPT was established) does not apply in a choice of law analysis. However, as best explained by Attorney Barry Engel at http://www.barryengel.com/asset-protection-developments/is-in-re-huber-important-to-anyone-other-than-mr-huber, the judge applied the wrong Restatement of Law. The judge applied §270 of the Restatement (Second) Conflicts of Law rather than applying the correct Section, §273, which would have made Alaska the applicable law since it very clearly says in part, "in the case of an *inter vivos* trust, by the local law of the

state, if any, in which the settlor has manifested an intention that the trust is to be administered, and otherwise by the local law of the state to which the administration of the trust is most substantially related". Thus, had the judge applied the correct Section of the Restatement, the dicta would have concluded that the law of the DAPT state applies in a choice-of-law analysis.

******Dahl v. Dahl***, 2015 UT 23, Supreme Court of the State of Utah (January 30, 2015)**

This was a divorce case where Dr. Dahl set up a Nevada DAPT, probably selecting Nevada law rather than Utah law because at the time Utah had eight exception creditors, including pre-existing tort creditors and divorcing spouses, the two most likely classes of creditors of which he was likely concerned. Dr. Dahl won in the trial court, but the judgment was reversed in the Supreme Court of the State of Utah when the judge ruled that the trust was actually a revocable trust, not a DAPT, even though the part that made it revocable was an obvious drafting error where one word was misdrafted. Therefore, after all that, this case mostly just illustrates how a person can use a DAPT to "stay in the game" in a lawsuit or divorce as opposed to doing do no asset protection planning and thus having a 100% chance of losing.

******Battley v. Mortensen***, Adv. D.Alaska, No. A09-90036-DMD (2011)**

Mortensen used a do-it-yourself trust kit to create his own DAPT. Although this case is sometimes cited for the proposition that DAPTs don't work, that's not what happened. Mortensen strategically filed for bankruptcy since the dollar value of the assets in his DAPT was substantially less than the dollar value of his liabilities and thus it was in his best interest to make that trade. Anybody in his shoes would have sacrificed the DAPT assets under those conditions. That point almost always gets left out by anti-DAPT proponents who are trying to argue that DAPTs don't work.

Author Note: This level of success does not mean that the author herein believes that DAPTs are such slam dunks that a regular DAPT should be used for a resident of a non-DAPT state. It is still much, much safer to use a Hybrid DAPT (a third-party trust that can turn into a DAPT) since the Hybrid DAPT technique should induce a much more favorable settlement

and doesn't risk getting the wrong judge should the dispute go to court and test the trust structure.

Conclusion

Yesterday marked the 20th anniversary of the first DAPT statute. There are now 17 states with DAPT statutes, so they have become more and more popular.

The objective of this newsletter is to point out that after 20 years of DAPTs, there still isn't even one known case where a creditor was able to get a judgment or settlement against a debtor (where there was no bankruptcy or fraudulent conveyance) and then actually reach into the DAPT and access the trust assets. Zero, zilch, nada, nope, not even once. [Yes, this is being repeated once last time.]

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

Steve Oshins

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