

Steve Leimberg's Estate Planning Email Newsletter Archive Message #2511

Date:01-Feb-17

Subject: Steve Oshins on the Completed Gift Hybrid DAPT as the Most Important Estate Planning Tool in an Estate Tax Reform Era

“The Completed Gift Hybrid DAPT takes on an even greater significance given the current likelihood of estate tax reform. There is no doubt that the worst decision a wealthy client or planner can make at this point is to simply do nothing. But it is understandable that one would be afraid to proceed at this point.

The solution to these concerns is to fund and leverage one or more Completed Gift Hybrid DAPTs in order to move the assets away from the settlor’s taxable estate, but yet, nearly with the snap of one’s fingers, be able to cause estate inclusion over those assets that are desired to be included in the estate based on the laws that exist at such time, but then, again nearly with the snap of one’s fingers, be able to reverse that decision without any adverse tax consequences.”

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 was inducted into the NAEPC Estate Planning Hall of Fame® in 2011. He is listed in The Best Lawyers in America®. He has written some of Nevada's most important estate planning and creditor protection laws. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com. His law firm's web site is <http://www.oshins.com>.

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](#)

As Steve notes in his commentary, with the potential for substantial estate tax reform on the horizon, the Completed Gift Hybrid Domestic Asset Protection Trust (“Completed Gift Hybrid DAPT”) takes on a heightened importance in the estate planner’s toolbox.

Before we get to Steve’s commentary, members should note that **Martin Shenkman, Esq.** and **John Warnick, Esq.**, will be presenting a free webinar titled “**Collaboration of the Estate and Financial Planning Team**” on Tuesday February 7, 2017 12:00 noon EST. Collaboration between the members of the estate and financial planning team will provide better results for clients, more networking for advisers, reduction in liability exposure for advisers, and more. Planning frequently involves multi-disciplinary, multi-faceted issues that a team can address better than any one expert alone. What are the impediments to effective collaboration? Why does collaboration not happen as often as it should? What do your colleagues have to say about collaboration? Comments from interviews of two dozen colleagues are integrated in to the presentation. What can wealth advisers, CPAs and attorneys each do to foster more and better collaboration? The webinar is sponsored by **The Purposeful Planning Institute** and members should [click this link](#) to learn more and to register.

Now, here is Steve Oshins’ commentary:

EXECUTIVE SUMMARY:

The Hybrid DAPT is the most important tool in the asset protection industry. Period. It has no equal. See *Steve Oshins & The Hybrid Domestic Asset Protection Trust*, **LISI** Asset Protection Planning Newsletter #200 (May 10, 2012).

But when most people hear the terms “DAPT” or “Hybrid DAPT” they think about asset protection planning. However, the completed gift version is more of an estate tax avoidance trust more so than asset protection being the predominant feature. Asset protection is more of a secondary benefit that potentially allows the settlor to be a beneficiary (in the regular DAPT) or allows a trust protector to have the power to add the settlor as a beneficiary (in the Hybrid DAPT).

First, some necessary definitions:

DAPT – A DAPT is an irrevocable trust in which the settlor is generally a discretionary beneficiary set up in one of the 17 jurisdictions that allows a settlor to be a beneficiary without creditors of the settlor being able to access the trust assets.

Hybrid DAPT – A Hybrid DAPT is a third-party irrevocable trust generally set up for the benefit of the settlor's spouse and descendants in which the settlor isn't a beneficiary, but which gives the settlor the power to appoint a trust protector who has the power to add and remove beneficiaries, including the power to add or remove the settlor. It is set up in one of the 17 DAPT jurisdictions. For asset protection purposes, this is significantly more protective than a regular DAPT because a regular DAPT has a much greater chance of having local law applied [albeit wrongly] in the settlor's jurisdiction if the settlor isn't a resident of the DAPT jurisdiction. Because the Hybrid DAPT is really just a third-party trust, despite the glitz and glamour behind its marketing name, it would be nearly impossible for a judge to rule that its assets are subject to the settlor's creditors unless the settlor made a fraudulent transfer to the trust.

-Author Note: The “plan” should not be to transfer so much of the settlor's assets to the trust that the settlor will likely need to be added in, except maybe in the situation where the settlor is a physician or other person in a high-risk profession who simply wants to take assets off the table knowing that he or she can easily be added in during retirement when creditors are less of a concern. The author has set up roughly a couple thousand Hybrid DAPTs, including both incomplete gifts and completed gifts, and had only one settlor added in as a beneficiary and the only settlor who has been added as a beneficiary to this date was one who misunderstood that she would have to access the assets indirectly through her husband. This nearly unblemished “record” is the result of careful planning up front to only put assets into the Hybrid DAPT that the settlor either will likely not need anytime soon or where the settlor is married and is comfortable running the income through his or her spouse who is a discretionary beneficiary of the trust.

Two-Grantor Hybrid DAPT – This is the same as a regular Hybrid DAPT, except that the assets transferred to the trust are community property and

therefore transferred by both spouses. Since there are two settlors, the trust is generally for the benefit of their descendants only and the settlors have the power to appoint a trust protector who can add and remove beneficiaries, including the power to add or remove either or both settlors.

Completed Gift Hybrid DAPT – A Completed Gift Hybrid DAPT is a Hybrid DAPT in which the settlor doesn't retain a lifetime or testamentary power of appointment or a power to veto distributions and thus is simply a third-party irrevocable trust just like any other trust to be designed to move assets out of the settlor's estate for gift and estate tax purposes. The ability to appoint a trust protector who can add (and remove) the settlor as a discretionary beneficiary creates a back-door emergency ability to get assets back. This is the version that is the subject of this newsletter.

COMMENT:

Trump and the Republicans

President Trump and the Republican-led House and Senate would like to abolish the estate tax. The filibuster rules in the Senate require 60 votes to do so which would be unlikely given that the Republicans only have a slim 52 to 48 majority in the Senate.

This would likely mean that President Trump will need to go through the budget reconciliation process which requires a simple majority of 51 votes, but will be subject to the Byrd Rule and will therefore sunset after ten years like President Bush's tax legislation enacted in the year 2001.

Regardless of whether it has a lifespan of ten years or is called permanent, estate planners know that these rules are only valid until the next Congress meets and decides to change it. And since historically the estate tax has always been reinstated after being abolished, it is foolish to stop our advanced planning, yet many of our clients will take the bait and lose valuable time playing a game of chicken with Congress.

The Likely Tax Reform

My best guess, based on all of the facts, internet articles and news reports, is that Trump and the Republicans will enact some sort of estate

tax phase-out over a ten-year period, including a capital gains tax on appreciated assets in excess of \$10 million for a married couple.

Completed Gift Hybrid DAPT Becomes the Most Important Technique

We don't know when our clients will die. We don't know whether they will die while there's no estate tax or while there is an estate tax. We don't know whether there will be a capital gains tax at death. We don't know many other variables that may affect our decision-making.

Thus, it becomes of utmost importance that we plan our clients' estates using vehicles that provide the necessary flexibility to "change or minds" over and over and over. Doing "nothing" is certainly not the answer, especially given the fact that the estate tax has always been reinstated after being abolished previously. This brings us to the Completed Gift Hybrid DAPT.

The Completed Gift Hybrid DAPT allows the settlor to appoint a trust protector who can add the settlor and/or other persons as discretionary beneficiaries. One might initially suspect that the plan will be to simply add the settlor and distribute all of the assets back to him or her if there is no estate tax. However, from a creditor protection standpoint, that is a horrible decision, and even worse, in fact much, much worse, it puts assets that have an income tax basis higher than the fair market value back in the settlor's estate where they will therefore receive a step-down in basis and it puts those assets back in the settlor's estate where there's a good chance there will be a reinstated estate tax in effect as of the only date that really matters – the date of the settlor's death.

Therefore, the likely plan would be for the trustee to split the trust into two trusts if the estate tax is either abolished or temporarily abolished, one with low basis assets and the other with high basis assets. A trust protector can be appointed to add the settlor as a discretionary beneficiary over the trust with low basis assets and either the trust protector or an independent trustee can give the settlor a testamentary general power of appointment over assets that have an income tax basis lower than fair market value in order to get a basis step-up, but not over assets that would get a step-down in value. This can be done using a formula that also takes into

consideration whether the general power of appointment would cause a federal or state income tax by causing estate inclusion.

Author Note: If the estate planner is comfortable that adding the settlor in as a discretionary beneficiary won't in and of itself cause estate inclusion, which would occur if the IRS determines that this opens the trust up to the settlor's creditors, then the trust would not need to be divided into two trusts to accomplish this. But the safer option is to divide the trust into two trusts, in order to avoid this uncertainty.

Estate Inclusion in other Beneficiaries' Estates

The trust protector or independent trustee can also have the flexibility to give a formula general power of appointment instead to a beneficiary other than the settlor. Since the Hybrid DAPT gives a trust protector the party the power to add additional beneficiaries such as "any one or more of the settlor's grandparents or the descendants of the grandparents" as discretionary beneficiaries, it thereby has a potential large pool of prospective warm bodies who can be used to obtain a new income tax basis over assets.

Author's Note: Read any of Ed Morrow's articles on this concept for everything you could ever want to know.

The general power of appointment would be given subject to the written approval of a non-adverse party such as the trust protector or independent trustee, thereby reducing the possibility of actual exercise to nearly zero and adding a degree of creditor protection.

Conclusion

The Completed Gift Hybrid DAPT takes on an even greater significance given the current likelihood of estate tax reform. There is no doubt that the worst decision a wealthy client or planner can make at this point is to simply do nothing. But it is understandable that one would be afraid to proceed at this point.

The solution to these concerns is to fund and leverage one or more Completed Gift Hybrid DAPTs in order to move the assets away from the settlor's taxable estate, but yet, nearly with the snap of one's fingers, be able to cause estate inclusion over those assets that are desired to be

included in the estate based on the laws that exist at such time, but then, again nearly with the snap of one's fingers, be able to reverse that decision without any adverse tax consequences.

The threat of estate tax abolishment often causes clients to sit on their hands and do nothing. Playing a game of chicken with the IRS has historically been a fool's game that only delayed the transfer of assets out of the taxable estate and thus increased the ultimate transfer tax...since the estate tax has always returned after abolishment.

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

Steve Oshins

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