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Follow up with Clients Regarding Self-Settled DAPTs

Here's a sample letter explaining proactive steps that might be taken

Martin M. Shenkman | Feb 04, 2015

This year's Heckerling Institute on Estate Planning included an excellent session on asset protection. The bottom line appears to be that in spite of some negative cases, self-settled asset protection trusts remain a viable planning technique. Further, the continued growth in the states permitting these trusts is certainly a positive. A key takeaway for practitioners is that proactive steps we can help clients take now might strengthen their self-settled trusts and other asset protection planning. This letter is intended to inform clients with domestic asset protection trusts (DAPTs) that counsel can help them take proactive steps to support DAPTs and to evaluate other planning.

*DATE

Via Regular Mail

*CLIENTNAME

*CLIENTADDRESS

Re: Self-Settled Domestic Asset Protection Trust

Dear: *CLIENTNAME:

You created a self-settled domestic asset protection trust (DAPT). Before you created your trust, we discussed many of the formalities of funding and operating such a trust and the ancillary planning that is essential if such a trust and plan is to have a likelihood of success. In addition, we discussed many of the risks associated with your trust and plan. Since the time your trust was created, there have been developments concerning self-settled trusts, and asset protection, generally, which deserve your attention.

A self-settled trust is a trust you set up and for which you are a beneficiary. These trusts can be set up for both estate tax planning as well as asset protection and other purposes. While there have been both negative and positive developments concerning these trusts, there may be proactive steps you can take now to enhance the viability of your DAPT and other asset protection steps you might wish to consider.

DAPTs are not new or unusual. Alaska , for example, has permitted DAPTs since 1997. About one third to one half of new Delaware trusts are some type of asset protection trust. So, many appear to use the technique on a regular basis.

A recent cases, however, was quite negative with respect to this planning technique. In *In re Huber*, 201 BR 685, which involved a Washington lawyer, a Washington debtor and Washington creditors, the court permitted creditors to reach DAPT assets. If creditors can reach trust assets, those trust assets will be included in the settlor's taxable estate. So even if creditors don't reach your trust, if they could, the trust assets might be included in your taxable estate.

The trust in Hubert had its most significant relationship with Washington, and Washington has a strong public policy against asset protection trusts. There was also a co-trustee in Washington. This is common, as many sophisticated trusts name an array of individuals (investment advisor, trust protector, person authorized to make loans without adequate security, distribution committee or a person who can add charitable beneficiaries). Some of these individuals might reside in your (the settlor's) home state, thus increasing the exposure to that home state endeavoring to apply its law rather than the law of the jurisdiction where the trust is. While it is advantageous to structure a trust with all parties outside of your home jurisdiction, this is at best very difficult and for many people simply too uncomfortable. You might endeavor to pursue this objective now by replacing home state fiduciaries and power holders with persons outside your home state. The more you limit connections to your home state (and the more you increase ties to the jurisdiction where your trust is located) the more secure your DAPT should be.

Another theme of many of the cases is that the more control you as settlor have given up, the more likely that the DAPT plan will succeed. If you have too much control, it will undermine the planning. Your trust instrument, its administration and the overall plan can and should be reviewed regularly to identity potential direct or indirect controls that might be limited.

While this and other cases have cast a negative pale over DAPTs, it appears that most commentators view these as "bad fact – bad law" cases. Also, offsetting these negative developments is the fact that the number of states adapting legislation permitting DAPTs has grown since the first state enacted such legislation. Fifteen states now permit the creation of DAPTs. If you have been debating the merits of a DAPT, and your home state now has law permitting them, it is certainly time to reconsider such a plan. Another 10 other states permit some form of an asset protection trust, including lifetime marital qualified terminable interest property (QTIP) trusts. The trend to permit such trusts has clearly grown. While this is certainly helpful, nothing is a guarantee.

If you have an asset protection trust, you may not be able to control the developments of case law, but you can control the administration of the trust, reevaluate trust terms periodically and consider modifying (e.g., by trust protector action) or decanting (i.e., merging) the trust into an instrument that might better address certain issues. Passivity and neglect will assuredly not shore up your asset protection or DAPT plan.

Apart from using DAPTs, there are a host of other planning techniques that can also provide valuable asset protection benefits. If your planning was limited, it may well be opportune to explore other techniques. A pedestrian life insurance trust can be a rather powerful tax as well as asset protection tool. A qualified personal residence trust (QPRT) might be a useful estate planning and asset protection tool. A recent case, *In re Yerushalmi*, 487 BR 98, upheld the use of a QPRT when challenged in this context.

If you have not had an annual meeting since your DAPT was established, you should call and make an appointment so that we can explore the above planning considerations issues, as well as other options. You should invite your accountant and other appropriate advisors to attend the meeting as well, as their input might be critical. Which other advisors to invite will depend on the assets held in your trust and ancillary considerations. It might include a wealth manager or insurance consultant. There may be a number of positive steps that can be taken to enhance your protection.

Sincerely,

*LAWFIRM NAME

By: ___________________________

*LAWYERNAME, Esq.

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