Welcome to the Estate Planning Council of the Fun Coast

The Domestic Asset Protection Trust: Incomplete Gift and Completed Gift Opportunities

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Asset Protection Planning

- Asset protection planning is a form of insurance
  - You insure your car
  - You insure your house
  - You insure your health
  - You insure your life
  - So you should also “insure” your assets
- Our goal is to structure your assets to either:
  - Avoid a lawsuit altogether; or
  - Settle a dispute for less than what is owed

Domestic Asset Protection Trust

- A DAPT is a U.S. asset protection trust in which the trust grantor is a permissible beneficiary
- Thirteen states allow DAPTs
  - 2-yr. statute of limitations – Nevada, Hawaii
  - 3-yr. statute of limitations – South Dakota, Utah
  - 4-yr. statute of limitations – All other states
- Preexisting creditors versus non-preexisting creditors
- Fraudulent conveyance laws – transfer with the intent to hinder, defraud or delay

Statutory Exception Creditors

- Twelve of thirteen states have statutory exception creditors
  - Such as divorcing spouses
  - Such as preexisting tort creditors
- Nevada = only state with no statutory exception creditors

Ranking the States' DAPT Laws

- Forbes Magazine published an article on DAPTs in 2010 assigning letter grades as follows:

Domestic Asset Protection Trusts

As Seen In **Forbes**

Forbes.com - July 21, 2010

A+	**Nevada**
A	Alaska
A-	South Dakota
A-	Delaware
B	Tennessee
B	Rhode Island
B-	New Hampshire
C	Wyoming
C	Utah
C-	Missouri
C-	Oklahoma
D	Colorado

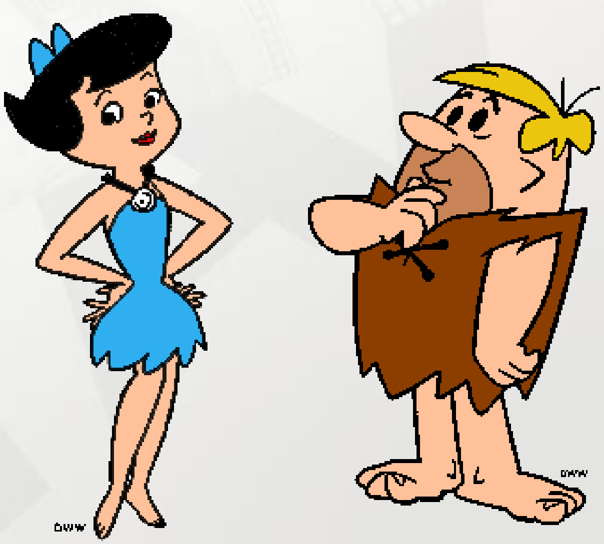
*Chart prepared by Oshins & Associates, LLC

The Big Four Asset Protection Trust States: Nevada Ranked #1

Ranking/ Forbes Grade	State	Statute of Limitations?	Available to Spouse Creditor?	Available to Pre-existing Tort Creditor?	State Income Tax?
1/A+	Nevada	2 Years	No	No	No
2/A	Alaska	4 Years	Yes	No	No
3/A-	South Dakota	3 Years	Yes	No	No
4/A-	Delaware	4 Years	Yes	Yes	No (Just on Residents)

Delaware Asset Protection Trust

- Prehistoric Laws (Bedrock, Delaware??)
  - 4-Year Statute of Limitations
  - Divorcing Spouses can Pierce Trust
  - Preexisting Tort Creditors can Pierce Trust

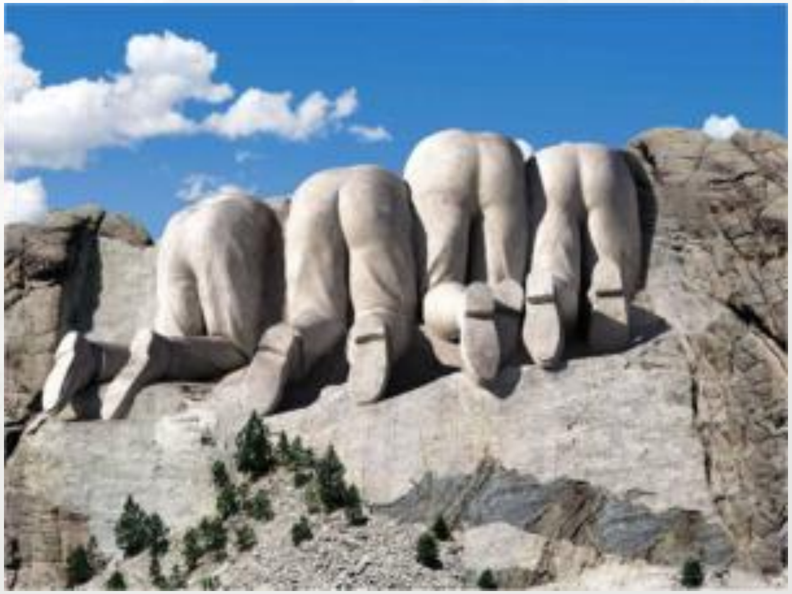


South Dakota Asset Protection Trust

- Better than Delaware, but…
  - 3-Year Statute of Limitations
  - Divorcing Spouses can pierce trust

South Dakota Asset Protection Trust

- Better than Delaware, but…
  - 3-Year Statute of Limitations
  - Divorcing Spouses can pierce trust
  - Sorry, but trying to hide from your spouse won't work!



Alaska Asset Protection Trust

- Better than Delaware, but…
  - 4-Year Statute of Limitations
  - Divorcing Spouses can pierce trust (lose your igloo to your spouse?)

Nevada Asset Protection Trust

- The best laws
  - 2-Year Statute of Limitations
  - No statutory exception creditors

Nevada Asset Protection Trust - Powers

- Grantor can be an investment trustee per NRS 166.040.3
- Grantor cannot be distribution trustee per NRS 166.040.2(b)
- At least one trustee must be Nevada natural person, trust company or bank per NRS 166.015.2
- Grantor can retain power to fire and hire trustees per NRS 166.040.3
- Grantor can retain veto power and testamentary poa per NRS 166.040.2(a)

NAPT – Incomplete Gift Version

- The most common form of the Nevada Asset Protection Trust
  - Pure asset protection planning
  - No estate tax planning

Nevada Asset Protection Trust with No LLCs: Example - $2 million

Protected in two years → Nevada Asset Protection Trust

$1 million

Not protected at all → Assets in Client's Name

$1 million

Here Comes the Creditor!!!

Nevada Asset Protection Trust with No LLCs: Example - $2 million

Nevada Asset Protection Trust

$1 million

Protected in two years

First two years: $2 million lost

After two years: $1 million lost

Nevada Limited Liability Company

- Nevada law makes the “charging order” the exclusive remedy of a judgment creditor
- A “charging order” is a lien
- So a creditor can only get a lien on the LLC membership interest and can’t force a distribution
- Let’s combine this with the NAPT

Nevada Asset Protection Trust with One LLC: Example - $2 million

Nevada Asset Protection Trust

Immediate charging order protection

Not protected at all

Nevada LLC

Client = 1% voting
NAPT = 99% non-voting

$1 million

Assets in Client's Name

$1 million

Here Comes the Creditor!!!

Nevada Asset Protection Trust with One LLC: Example - $2 million

Nevada Asset Protection Trust

Immediate charging order protection

Nevada LLC

Client = 1% voting
NAPT = 99% non-voting

$1 million

$1 million lost

Nevada Asset Protection Trust with Two LLCs: Example - $2 million

Nevada Asset Protection Trust

"Rainy Day" LLC

Nevada LLC #1

Client = 1% voting
NAPT = 99% non-voting

$1 million

"Live Out Of" LLC

Nevada LLC #2

Client = 1% voting / 98% non-voting
LLC #1 = 1% non-voting

$1 million

Here Comes the Creditor!!!

Nevada Asset Protection Trust with Two LLCs: Example - $2 million

“Rainy Day” LLC

Nevada LLC #1

Client = 1% voting
NAPT = 99% non-voting

$1 million

Creditor
1% charging order (lien)

NAPT
99%

TURN SPIGOT ON
“RAINY DAY” LLC

“Live Out Of” LLC

Nevada LLC #2

Client = 1% voting / 98% non-voting
LLC #1 = 1% non-voting

$1 million

Creditor
99% charging order (lien)

LLC #1
1%

TURN SPIGOT OFF
“LIVE OUT OF” LLC

Where do we put High Cash Value Life Insurance?

“Rainy Day” LLC

Nevada LLC #1

Client = 1% voting
NAPT = 99% non-voting

Cash / Securities / Real Estate / Cash Value Life Insurance / Etc.

Creditor
1% charging order (lien)

NAPT
99%

“Live Out Of” LLC

Nevada LLC #2

Client = 1% voting / 98% non-voting
LLC #1 = 1% non-voting

Cash / Securities / Real Estate / Cash Value Life Insurance / Etc.

Creditor
99% charging order (lien)

LLC #1
1%

Where do we put High Death Benefit Life Insurance?

"Rainy Day" LLC

Nevada LLC #1

Client = 1% voting
NAPT = 99% non-voting

Cash / Securities / Real Estate /
Cash Value Life Insurance / Etc.

- Creditor
  1% charging order (lien)
- NAPT
  99%

"Live Out Of" LLC

Nevada LLC #2

Client = 1% voting / 98% non-voting
LLC #1 = 1% non-voting

Cash / Securities / Real Estate /
Cash Value Life Insurance / Etc.

- Creditor
  99% charging order (lien)
- LLC #1
  1%

Client → **Irrevocable Life Insurance Trust**
(provides liquidity to pay estate taxes)

NAPT – Completed Gift Version

- Not as common as the incomplete gift version of the Nevada Asset Protection Trust
- Let’s focus on how the CG NAPT can work with life insurance
- Can we have our cake and eat it too?

High Cash Value Insurance?

- High death benefit life insurance is generally owned by an ILIT
- High cash value life insurance is often left in insured's estate
- The wrong move?
  - Advisor scrutiny
  - Wrong move for estate tax purposes
  - Creditor protection

High Cash Value Insurance - Solution

- Can we have our cake and eat it too?
  - Completed gift
  - Ability to access cash value
  - Protected from creditors
  - Not subject to estate taxes
- PLR 200944002 (9/30/09)
  - Alaska resident / Alaska DAPT (4-yr. SOL)
  - Nevada resident / Nevada DAPT (2-yr. SOL)
  - Non-resident / Nevada DAPT?

High Cash Value Insurance - Solution

- What if the trust assets are includible in the grantor's estate under IRC Sec. 2036 (transfer with a retained interest)?
- Solution: Give trust protector the power to remove grantor as a beneficiary
- IRC Sec. 2035: Remove grantor as a beneficiary more than three years before death, so no estate inclusion

Third-Party Irrevocable Trusts

- Third-party trusts are irrevocable trusts in which the grantor is not a beneficiary
- The $5.12M (as of 2012) gift tax exemption opens up huge opportunities
  - Use a transfer tax strategy as an asset protection tool
  - Trust for spouse and descendants
  - Trust for descendants

Trust for Spouse and Descendants

- Grantor retains the power to fire and hire trustees
- Use a “floating spouse” provision
- If grantor loses his assets, his spouse can take care of him

Trust for Descendants

- Do you ever hear of anyone doing this as an asset protection tool for the grantor?
  - I never do!
- Grantor retains the power to fire and hire trustees
- If grantor loses his assets, his children can take care of him

Which would you rather?

- Option 1: $10M net worth
  - If you're sued and the judgment is for more than $10M, you're broke
- Option 2: $10M net worth
  - Gift $2M to discretionary trust for spouse and descendants, so net worth is now $8M
  - If you're sued and the judgment is for more than $8M, you're broke, but you can indirectly live off of the $2M discretionary trust

2010 Tax Act: $5M Exemption

- Two-year window of opportunity
  - 2011: $5M estate/gift/GST tax exemption
  - 2012: $5.12M estate/gift/GST tax exemption
  - 2013: $1M estate/gift tax exemption / $1M (plus inflation) GST tax exemption
- Consider large transfers to Dynasty ILIT before we lose this gifting ability

Questions?