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The Nevada Asset Protection Trust: Why Nevada is the Leading Jurisdiction…Period!

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There are now 17 states with statutes allowing Domestic Asset Protection Trusts ("DAPTs"). Nevada is the best of those states. Period.

That's not just the conclusion of this author. Rather, it appears to be the conclusion reached by the high majority of the estate planning industry, including unbiased planners. This article will not only explain why Nevada is such an asset protection trust powerhouse, but it will also explain how the Nevada Asset Protection Trust works so those planners who are not currently making use of this opportunity can now do so.

What is a Domestic Asset Protection Trust?

A DAPT is an irrevocable trust in which the grantor of the trust is a discretionary beneficiary. For, example, the trust might be set up for the benefit of the grantor, the grantor's spouse and the grantor's descendants. Under the laws of the 17 states that have DAPT statutes, transfers of assets to the DAPT are protected to the extent hose statutes allow. But this is where the states will often differ as follows:

Statute of Limitations: Each of the DAPT states has a statute of limitations that determines how long it will take for the trust assets to be protected. The statutes range from 1.5 years to five years. Nevada has a two-year statute. However, most people haven't realized that the Nevada statute actually protects the trust assets starting on day one when the transfer is made, not two years after the transfer. If you read NRS §170.170.1 carefully, the two-year rule says that a person may not <u>bring an action</u> after two years. It doesn't say <u>it isn't protected</u> for two years. Conversely, NRS §170.170.3 says in part that "*A creditor may not bring an action with respect to transfer of property to a spendthrift trust unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor. In the absence of such clear and convincing proof, the property transferred is not subject to the claims of the creditor.*" In other words, the transfer is protected from day one unless the creditor can prove by clear and convincing evidence that the transfer to the trust was a fraudulent transfer. Period.

Statute of Limitations, Preexisting Creditor: Each DAPT state tolls the statute of limitations for a preexisting creditor, meaning a creditor whose claim arose prior to the grantor's transfer to the trust. Most states have either a six-month tolling or a twelve-month tolling. Nevada has a six-month tolling. This means that with respect to a preexisting creditor, no person can sue the Nevada DAPT after the longer of two years from the date of transfer to the trust or six months after the person discovered the transfer to the trust or reasonably should have discovered the transfer to the trust. But wait, there's even one more Nevada advantage! Nevada is one of only five states that allows its tolling period to start running upon making a public notice of the transfer to the trust (i.e., such as recording an assignment at the Recorder's Office). Those five states are Nevada, South Dakota, Ohio, Utah and Mississippi. This is a huge advantage since there may be preexisting creditors and their six-month tolling period runs out six months into Nevada's two-year statute of limitations if the public notice is made on day one thereby effectively making the statute of limitations a flat two years even with respect to a preexisting creditor.

Exception Creditors: Nevada and Utah are the only DAPT states that have no statutory exception creditors. Exception creditors are classes of creditors that are able to access the trust assets despite the existence of the DAPT statute because that state's public policy protects that class of creditor. For example, Delaware DAPT statutes allow divorcing spouses, alimony, child support and preexisting tort creditors to access a Delaware DAPT. This is another superior feature of Nevada law. Imagine a physician client setting up a Delaware DAPT rather than a Nevada DAPT and then getting sued for a previous botched surgery! That's just one example.

Ease of Use, Affidavit of Solvency: Nevada is one of nine DAPT states that do not require a new Affidavit of Solvency to be executed before each and every transfer. An Affidavit of Solvency is a notarized affidavit that essential says that the transferor isn't making a fraudulent transfer and is leaving him/herself solvent after the transfer to the DAPT. The states that require a new Affidavit for each transfer are Tennessee, Ohio (with some forgiveness), Missouri, Alaska, Wyoming Utah, Michigan (with some forgiveness), Mississippi and West Virginia. For a person making a one-time transfer of assets to the DAPT, this isn't a big deal, but for the person making monthly transfers to the DAPT, this is a lot of extra work for that person, not to mention the fact that some of our clients don't follow our directions after the fact. If this direction isn't followed, it's disastrous since those assets aren't protected if using one of the DAPT states that requires a new Affidavit of Solvency for each transfer. This is yet another reason that Nevada is superior.

Using Nevada Law

Nevada law allows the grantor to be the investment trustee, so the transferor can retain all powers to make investment decisions. However, the grantor cannot have any powers to make distributions. Therefore either the transferor's close friend or a Nevada trust company or bank will be the distribution trustee. There must be at least one Nevada trustee, so if the grantor is the investment trustee and the transferor's close friend is the distribution trustee, then if neither of them is a Nevada resident either a Nevada resident, a Nevada trust company or a Nevada bank will serve as a jurisdictional trustee. The transferor can retain the power to fire and hire trustees, so regardless of the trustee decisions made, the grantor can retain the power to change the trustees at any time. Thus, there is substantial protection from creditors, but without much sacrifice in control and access.

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