



ASSET PROTECTION TRUSTS THAT REALLY WORK!

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Many commentators have come out and advised various parties

that foreign asset protection trusts really do not work. The reality is they do! A properly drafted foreign asset protection trust gives one protection against creditors. How do they work? How can you set them up? What do you do? This article will explore what a foreign asset protection trust is and how it works.

WHAT IS A FOREIGN TRUST?

In its simplest terms, a foreign asset protection trust, hereinafter referred to as an "APT", is a trust that is drafted in accordance with, and governed by, the laws of a foreign country designed to protect assets from all creditors. This gives the creator, settlor of the trust, the choice of which country's laws to use, which trustee, and what provisions to draft into the trust. This is the point where experienced professionals familiar with drafting APTs are essential.

WHAT AND WHY SHOULD A ONE LOOK TO A FOREIGN JURISDICTION?

Generally, one would look for a foreign jurisdiction that does not automatically recognize United States judgments. This would require the party that had obtained a judgment against you in the United States, to relitigate their claims in a foreign jurisdiction. Foreign jurisdictions, on a whole, do not allow for contingent fee cases. Therefore, your potential claimant would have to hire a new attorney, somewhere else in the world, to relitigate the

same case. This would greatly increase their costs, as well as their risk of losing the case, as the standards of proof are generally greater to win a civil suit, in selected foreign jurisdictions. Additionally, time and expense will be incurred for your opponent to pursue you, including, in some jurisdictions, the requirement of posting a cash bond to commence a suit. An additional risk that creditors encounter is that laws in a properly selected jurisdiction are more favorable to the party protecting assets, since many foreign jurisdictions encourage United States citizens and others to create asset protection trusts within their country. This could be derived either in the imposition of a higher standard of proof in civil litigation, or the establishment of a very short statute of limitations, barring a creditor's lawsuit. If you consider that the court backlog in Cook County generally takes three to five years to obtain a judgment, if your assets were in an offshore trust during this time period, then even if you lost your case, your assets in the offshore jurisdiction could not be attached by a creditor since the two-year limitations to file a lawsuit in the offshore jurisdiction would have lapsed.

TRUST COMPLEXITIES

There are many complexities to the establishment of an offshore trust, but they are really no more complex than many of the concepts and ideas utilized in United States estate planning. First, you must understand that an APT is generally set up as an irrevocable trust rather than a revocable trust. The reason for this, is that if the creator of the trust could revoke the trust, then theoretically a judgment creditor could force the trust's creator to revoke it and pay

the creditor your funds!

INCOME TAX-WISE THERE IS NO BENEFIT TO AN APT.

An APT trust, if property drafted is considered a grantor trust for federal income tax purposes. A grantor trust means that the trust income is taxed to the grantor, the person that created it. Therefore, there is no income tax advantage to an APT. The foreign jurisdiction will not generally tax the trust or its income.

MY ASSETS OVERSEAS?

Another problem that confronts many people is a lack of comfort when placing assets overseas. This can be overcome by using various techniques. A commonly utilized technique is to create a limited partnership, (hereafter known as "LP") or a limited liability company, (hereafter known as "LLC") within the United States, where the trust's creator is the general partner of a LP, or the managing member, of a LLC. (This is the party that controls the LP or LLC.) The assets that an individual owns are transferred to the LLC or LP. An interest in the LLC or LP is then used to fund the foreign APT. Since the trust's creator is the general partner, or managing member, this allows full control of the trust's assets, and the ability to keep the assets in the U.S. The trust's creator would not have ownership of the assets aside from a retained one or two percent interest, but would have complete control. This allows the assets to be retained in the United States in control of the creator, but still benefiting from foreign APT laws. Should litigation commence against the trust's creator, the assets, if liquid, could be wire-transferred to a

trust account anywhere in the world.

PROVISIONS

Aside from standard U.S. trust provisions, a properly drafted APT generally contains additional provisions. Additional provisions include:

- A) Flight provisions
- B) Duress provisions
- C) Investment provisions

Flight provisions allow for the grantor or protector to change the situs, or country, where the trust is located. This could be based upon many events, and could include the changing of the favorable laws that lead to the trust's establishment, or it could be the inclusion of broad language relative to military invasions, lack of comfort with the jurisdiction, or merely to change trustees. Again, war, civil disturbance, political actions, change or enactment in any part of the world of measures that could directly or indirectly affect the trust could be included. This allows transferring of funds from jurisdiction to jurisdiction which makes it very difficult to determine where one should file a lawsuit to pursue trust assets. The selection of a foreign trustee is also extremely essential. A foreign trustee should provide the stability, experience, and track record to properly serve their function. In addition to these issues, a foreign trustee should not have any contact or business presence within the United States. If a foreign trustee is available to service of process within the United States, then how secure are you relative to the foreign trust? Duress provisions are extremely important. The easiest way one would consider to attach an APT, would be to obtain a U. S. court order directing the trust's creator, a U.S. trustee or general partner, to turn over all funds to whom ever the court directs. If the trust has a properly drafted duress provision, the trustee would be unable to follow any direction, control or guidance from the

creator, or beneficiaries, once duress has occurred. The definition of duress would include directions from courts, third parties, or others, that would compel or require action by the settlor, beneficiary, trust protector, or trustee.

ESTABLISHING A FOREIGN SITUS

Once the foreign situs is selected, many commentators have indicated the following steps should be pursued:

- A) Utilizing a foreign trustee who is domiciled in the selected offshore jurisdiction.
- B) Administering the trust in the offshore jurisdiction.
- C) A direction within the trust that selects the offshore jurisdiction as the situs of the trust.
- D) Language within the trust requiring the trust to be administered in the selected jurisdiction.
- E) Physical recording or transfer of the trust, or evidence thereof, in the selected jurisdiction.

CONCLUSION

To simplify the usage of an offshore trust, use a U.S. based limited partnership of which you are the general partner. You could use monies that you actually have sitting in your bank account today, transfer them to your LP or LLC. Use an interest in the LP or LLC to fund the foreign trust so that you maintain control. This allows your money, in theory, to go all the way around the world, but in reality it stays where it started. The benefit is that you can achieve protection against creditors with your assets staying in the same bank!

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