Does the New Alaska Trusts Act Provide an Alternative to the Foreign Trust?

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The new Alaska Trust Act provides an opportunity for Americans in all states to create trusts in Alaska that may help achieve legitimate asset protection goals.

The substantial concerns held by Americans about the potential of financially devastating legal judgments have been a primary motivator for them to create trusts for their own benefit in certain offshore jurisdictions where creditors cannot, as a general rule, attach the trust assets. Such trusts could not be effective in the United States because, as a general matter, the assets in a trust created under the laws of virtually all states[1] are subject to the claims of the trust grantor's creditors to the maximum extent the grantor is eligible to receive distributions in the discretion of a trustee, even if the transfer to the trust was not in defraud of creditors.

However, effective April 2, 1997, certain self-settled trusts can be created under a new Alaska law without subjecting the trust assets to claims of the grantor's future creditors. (The new law also effectively repeals the rule against perpetuities for Alaska trusts.)[2] This article discusses the Alaska Trust Act and compares some of the effects of creating a trust under that law to creating one under the laws of certain foreign asset protection havens. It begins by way of background with a discussion about asset protection afforded by trusts in general and certain foreign asset protection trusts (FAPTs) in particular.

General Use of Trusts and Asset Protection

A trust, particularly a purely discretionary one—that is, one where a trustee who is not a beneficiary can withhold all distributions to beneficiaries—can provide exceptional asset protection.[3] Usually, neither the beneficial interest held by a beneficiary nor the trust assets are subject to claims of any beneficiary's creditors if the trust is irrevocable and so provides. In some jurisdictions, trusts are automatically so protected by statute (that is, they are "spendthrift"); in others, they are spendthrift only if the governing instrument so specifies. They are also, as a general rule, immune from claims of the grantor's creditors unless the transfer to the trust was a fraudulent conveyance.

Despite those basic rules, the beneficial interest of the grantor in a self-settled trust (that is, one of which the grantor is a beneficiary) and/or the trust assets themselves in such a trust are subject for all time to claims of the grantor's creditors.[4] Nevertheless, many countries outside of the United States (primarily, so-called "offshore" jurisdictions, such as Nevis, the Cook Islands, and Belize) have enacted statutes that specifically provide spendthrift protection for self-settled trusts.

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About Fraudulent Conveyances

"Fraudulent conveyances" are pre-bankruptcy transfers (or obligations incurred) (1) that the debtor made with actual intent to hinder, delay or defraud his or her creditors or (2) (a) for which the debtor received inadequate consideration (usually less than "equivalent value") and (b) at the time or as a result of the transfer the debtor was insolvent, undercapitalized, or unable to pay his or her debts as they matured. Fraudulent conveyances may be defined with reference to the Bankruptcy Code or under applicable state law. The Bankruptcy Code permits such transfers to be set aside only if made within one year before filing of the petition, but many states permit reference to a much longer period, especially in the case of transfers to family members. Avoided fraudulent conveyances are "brought back" into the debtor's estate, usually for distribution to the debtor's creditors.

In general, it is only persons who are creditors at the time of the transfer who can set aside a transfer made without consideration by one who is or will thereby be rendered insolvent, although the creditors' claim need not be reduced to a judgment. As to subsequent creditors, proof of actual intent to defraud is usually required. By contrast, those who become creditors after the transfer can attack transfers made where insufficient assets are retained for future business needs of the debtor.*

*For a detailed analysis of fraudulent conveyance law, see a series of articles by Neal Wolf written for the *Journal*: "Understanding the Uniform Fraudulent Transfer Act and Its Application in Creditor Attacks," Vol. 1, No. 1 (Sep/Oct 1995); "Understanding the Uniform Fraudulent Conveyance Act and Its Application in Creditor Attacks," Vol. 1, No. 4 (Mar/Apr 1996); "Converting Nonexempt Property to Exempt Property in Preparation for Bankruptcy," J. of Asset Prot., Vol. 1, No. 5 (May/Jun 1996); "Fraudulent Conveyance Law as Contained in the U.S. Bankruptcy Code," Vol. 1, No. 6 (Jul/Aug 1996); and "The Right of 'Future Creditors' Successfully to Maintain Actions Under Fraudulent Conveyance Statutes," Vol. 1, No. 6 (Jul/Aug 1996).

General FAPT Characteristics

Subject to certain exceptions and special rules, trusts formed in certain foreign jurisdictions provide asset protection in several ways:[5]

- *Some prohibit the enforcement of judgments rendered in other countries.* As a consequence, a judgment obtained from a United States court, for example, cannot be enforced by the local courts. This will require the creditor to bring suit in the foreign country and to retry the case there. Difficulty in obtaining jurisdiction over certain parties and witnesses may mean that it is impossible for the claimant to successfully prosecute the suit.
- *All, or almost all, lawyers in that jurisdiction may be "conflicted" out.* In other words, the local lawyers may render services to the institution that is the local trustee and may not be able to, or may choose not to, bring suit against that institution in its capacity as trustee of the trust that holds the assets which the debtor has transferred to the trust. (In some of these countries, lawyers may not render services for a contingent fee.)
- *Fraudulent conveyance law can be very debtor-friendly in many jurisdictions.* Some of the jurisdictions do not have fraudulent transfer rules[6] or have extremely short statutes of limitations within which one can claim a transfer was fraudulent.[7]
- *Generally, the trusts in these countries are fully spendthrift even if the grantor is a beneficiary.* These jurisdictions have repealed the rule (derived from the 1570 English law known as the Statute of Elizabeth) providing, in substance, that the assets in the trust are subject for all time during the grantor's lifetime to claims of the grantor's creditors. Under this rule, creditors of the grantor can reach the trust assets even though the transfer to the trust was not fraudulent and even though the grantor holds no entitlement to receive any property from the trust but simply is a person to whom the trustee, other than the grantor, may, in the exercise of discretion, distribute trust assets.

An Alaska trust can only provide the last of these benefits. In other words, although an Alaska trust, under that state's law, may be structured so it is free from claims of the grantor's creditors if the grantor is merely eligible, and not entitled, to receive distributions from the trust, it will not provide the additional

practical barriers that are often present with respect to FAPTs.[8] For example, under the full, faith, and credit clause of the U.S. Constitution, Alaska courts are required to enforce judgments of the sister states. However, a judgment against one person is not enforceable against another person, including a trust, unless a special rule applies.[9] Nonetheless, in the case of bankruptcy, the U.S. Bankruptcy Court's reach will extend to virtually all persons in the United States, including the Alaska trustee of an Alaska trust, whereas the Bankruptcy Court may have no jurisdiction over an FAPT.[10]

Interest Attachable Only to the Extent of the Grantor's Interest. Even the broad rule contained in Section 156.2 of the Restatement (2d) Trust is limited to the extent of the grantor's interest in the trust. For example, if the grantor has retained the right to the income but no portion of the principal, only the grantor's income interest is attachable. Although it might seem that an income interest will have little practical worth where it will terminate upon the death of a person whose life expectancy cannot be predicted with assurance, a court might direct the termination of the trust and the distribution of the trust assets to the person owning the income interest and to the remaindermen in accordance with their respective actuarial interests in the trust.[11]

In any case, at least a few courts have held that creditors of the grantor could not demand payment of any portion of the trust assets where the grantor was merely eligible and not entitled to receive distributions from an American trust. Perhaps, the leading case is *Herzog v. Commissioner*,[12] a tax case involving a New York trust, in which the court held that creditors of the grantor could not attach any part of the trust property when the grantor was only eligible but not entitled to receive trust distributions.

Herzog was decided by one of the great judicial panels, consisting of Judges Learned and Augustus Hand and Judge Chase. The court's analysis seems completely sound. However, an intermediate court of the State of New York held, in effect, to the contrary of *Herzog* in *Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A.*[13] In fact, the *Vanderbilt* court notes that *Herzog* is contrary to its holding. Recently, in *In re Larry Portnoy*, the U.S. Bankruptcy Court analyzed New York law consistently with *Vanderbilt*. Even though the *Portnoy* court cited *Herzog*, it failed to mention that its holding was contrary to *Vanderbilt* and it failed to attempt to distinguish *Herzog* or criticize its reasoning. *Portnoy*, which will be discussed in more detail subsequently, clearly presented facts that were disturbing to the court. Without much question, the court wanted to find that the grantor's creditors could, as a matter of New York law, attach the assets in the trust. Although virtually all of the *Portnoy* court's statements about New York law are dicta, they nonetheless almost certainly convey the court's belief that creditors can attach the property in a New York trust to the extent the trustee is authorized, even if not directed, to distribute the trust property to the grantor.

Uhl and *German*, both also tax cases, held that creditors of the grantor cannot attach the trust assets under Indiana and Maryland law, respectively, if the grantor's interest in the trust is purely discretionary. Notwithstanding these cases, few Americans have seemed willing to wager any significant part of their wealth in American trusts for their own benefit to effect asset protection. However, Americans appear to have been willing to place literally trillions of dollars in asset protection trusts outside the United States in those jurisdictions that have clear statutory rules for asset protection for self-settled trusts.[14] Now the adoption by Alaska of a clear statutory rule that property in an irrevocable Alaska discretionary trust is not subject to the claims of the grantor's creditors may cause some U.S. individuals to consider using Alaska rather than FAPTs for asset protection as well as estate planning.

"If the grantor has retained the right to the income but no portion of the principal, only the grantor's income interest is attachable."

Should Alaska Law or the Debtor's State's Law Govern?

Using *Portnoy* as an Illustration. The significant aspect of the *Portnoy* decision is not its failure to address the *Herzog* case. Rather, it was the fact that in determining whether the New Jersey debtor, who had failed to disclose his interest in a Jersey (Channel Islands) trust he had recently established, was entitled to a discharge in bankruptcy, the court analyzed his creditors' rights with respect to the trust under principles of New York law. Even though the facts in this case are somewhat extreme, they are instructive, perhaps, of conduct that will bring on a court's wrath and how a court will struggle to produce a result to avoid what it perceives to be a clearly abusive situation.

Portnoy's financial problems started when he guaranteed the indebtedness of his 100%-owned corporation's debt to Marine Midland Bank in 1987. In August 1989, Portnoy created a Jersey trust for which he and his children were beneficiaries. The evidence indicated that Portnoy then knew that the corporation was in trouble and by December 1989 it defaulted on its loan. Marine sued Portnoy on his guarantee in New York State Supreme Court. During settlement discussions, Portnoy misrepresented, among other things, that his assets "were all gone" due to expensive experimental cancer treatments. When the settlement discussions failed, Marine obtained a judgment against Portnoy and discovered that he had established an FAPT and that he concealed the transfer of his salary payments to his daughter, and, later, to his wife. Once Marine obtained a garnishment order against him, he filed a Chapter 7 proceeding in the hope of obtaining a discharge.

Among other issues, the court turned its analysis to whether Jersey law or New York law should apply, given the language in the trust that it is to be interpreted under Jersey law. Judge Brozman stated it was not necessary to determine whether the state or federal choice of law rules govern here because they yield the same result. Both rules provide in essence that the law of the jurisdiction having the greatest interest in the litigation shall apply.[15]

The court in *Portnoy* concluded that "the trust, the beneficiaries, and the ramifications of Portnoy's assets being transferred to the trust have their most significant impact in the United States...and that application of Jersey's substantive law would offend strong New York and federal bankruptcy policies"[16]

The court seemed especially infuriated by the debtor's contention that the court had no jurisdiction even to consider the trust in determining whether he was entitled to a discharge in bankruptcy. In substance, in determining whether the debtor should be denied a discharge in bankruptcy, the court concluded that the creditor's rights to his interest in the trust would be determined under New York law.[17] Perhaps, most significant, the court found under the circumstances (apparently, especially because (a) the trust was created shortly after the loan was obtained from the New York bank that was the creditor in the action and at a time he knew of the financial troubles, (b) he could remove and replace the trustee at will and seems as though he could appoint himself, and (c) the court's apparent finding that the debtor was not a mere beneficiary of the trust but retained dominion and control over the trust assets) that the debtor himself could have believed that New York law, not Jersey law, would govern the trust.

Pretty clearly, these represented "bad facts" to the court and, no doubt, the adage "bad facts, bad law" has to be considered.

The *Portnoy* case appears to be the exception, based quite apparently on its exceptional facts, to the general rule that the grantor or settlor of a trust can specify and thereby control what law governs spendthrift protection of a trust.

Analyzing Bankruptcy Law. Unfortunately, it is not certain whether a court will apply

Alaska law or the law where a debtor or creditor resides to determine the validity of a spendthrift self-settled trust. On the one hand, the validity of such a trust may be governed by the jurisdiction designated by the settlor in the trust agreement.[18]

Section 541(c)(2) of the Bankruptcy Code excludes from the debtor's estate a debtor's beneficial "interest in a trust that is subject to restrictions on its transfer which restrictions are enforceable under applicable nonbankruptcy law." The legislative history of the Bankruptcy Reform Act makes it clear that this section is intended to protect spendthrift trusts.[19] Because the grantor may specify[20] what state law controls, it seems that that state's law should be the applicable nonbankruptcy law.

On the other hand, some commentators believe that the choice of law to determine a creditor's rights should be subject to the "governmental interest" or "significant relationship" test. The factors used to make such determination are:

- the needs of the interstate and international system;
- the relevant policies of the forum;
- the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue;
- the protection of justified expectations;
- the basic policies underlying the particular field of law;
- the certainty, predictability and uniformity of result; and
- ease in the determination and application of the laws to be applied.[21]

Provisions of the Alaska Trust Act. As analyzed subsequently, the Alaska Trust Act requires a significant connection to the state for its law to apply. Assuming, therefore, that the settlor of an Alaska trust has not engaged in a fraudulent conveyance (even under the law of her state of domicile) the Alaska trust law should be given full faith and credit. The greatest degree of certainty may be achieved by an Alaska domiciliary transferring her assets located in Alaska to an Alaska trust and having an Alaska trustee alone hold the power to make or withhold distributions. The nondomiciliary of Alaska may be well advised to consider having an Alaska trustee alone hold the power to make or withhold distributions and using interests in an Alaska limited liability company or limited partnership as the funding assets of an Alaska trust in order to establish further the adequate contacts with Alaska to sustain a "significant relationship test" in the event a court determines to use that test rather than the rule that the grantor can direct conclusively in the instrument what law will govern.

In any case, as one leading commentator states, "Whether the bankrupt's interest as a *cestui que trust* [(i.e., beneficiary)] was, at the time of bankruptcy, assignable or transferable, or subject to attachment,

The Rule for Making the Trust Alaskan

The Alaska statute provides an explicit rule as to what nexus is adequate to make a trust an Alaska trust for both the purpose of avoiding the rule against perpetuities* and the purpose of creating a trust that will not be subject to claims of the settlor's creditors. First, some of the trust assets must be deposited in Alaska and be administered by a "qualified person." "Deposited in Alaska" means holding some assets in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account located in Alaska. A "qualified person" is an Alaskan domiciliary or an Alaska trust company or bank. Second, the Alaskan trustee's duties must at least include an obligation to maintain records for the trust (on an exclusive or non-exclusive basis with other trustees) and the obligation to prepare or arrange for the preparation of income tax returns that must be filed by the trust (again on an exclusive or non-exclusive basis with other trustees). Third, part of the administration must occur in the state.

*Although four other jurisdictions (Delaware, South Dakota, Idaho, and Wisconsin) allow trusts to last perpetually in their jurisdictions, no statutory guidance is provided by their laws as to what connection or nexus is sufficient to cause their state's law to apply to the trust.

seizure or judicial sale, is a matter generally to be determined by the law of the state where the trust has its situs. [Footnote omitted.]"[22] Another leading commentator similarly remarks, "As a general rule, the validity of a spendthrift clause or other protective trust provisions concerning a living trust is governed by the jurisdiction that administers the trust, as designated by the settlor."[23] However, this situs rule will not protect the property in an Alaska trust from claims of the grantor's creditors even under Alaska law if the transfer to it was made with intent to defraud creditors of the grantor or in certain other cases.[24]

"An Alaska trust, unlike a foreign trust, will be subject to the jurisdiction of the United States Bankruptcy Court."

In another recent case involvin a foreign trust and "bad facts," the result was similar to *Portnoy.* In *In re Brown*,[25] two Belize trusts created by another individual in late 1989 and 1990 for an Alaska accountant and his spouse who filed bankruptcy on March 31, 1995 after a creditor obtained a $1.4 million judgment against them. The court described the trusts as common law business trusts, also known as Massachusetts trusts. Both incorporated features found in corporations and trusts. Even though it is unclear from the decision, it appears that neither the creator of the trust nor the trustee, who were both individuals, was domiciled in Belize. After formation, the trust issued certificates to the accountant and his spouse, and they became the "president" and "secretary" of the trust. One of the trusts contained significant assets. The court found that (1) neither trust conducted any business activity in Belize, (2) none of the trust assets were placed in the hands of the trustee,[26] and (3) the trustee never controlled any of the trust assets. Apparently, the creator and trustee of the trust had not signed a single trust document since the trust was formed in 1989 and, in fact, the debtors had the ability to withdraw assets from the trust without any interference from the trustee. The court concluded that the trust with significant assets was "simply a sham" and that the assets of both trusts were included in the debtors' bankruptcy estate.

Even though both trusts stated that they were governed by Belize law, the court did not apply such law. After citing conflict of laws principles, the court reasoned that the policies of Alaska would not be served by applying the laws of Belize. The court cited old AS 34.40.110[27] and concluded that the debtors transferred assets to the trusts to hinder, delay or defraud future creditors. The court applied a six-year statute of limitation to the conveyances to the trusts in 1989 and 1990 and ruled that the limitations period did not begin to run until after the $1.4 million judgment was entered on February 10, 1995.[28]

As mentioned, an Alaska trust, unlike a foreign trust, will be subject to the jurisdiction of the United States Bankruptcy Court; it will not be necessary for the court to determine whether non-U.S. law should apply. Alaska has a "full fledged" fraudulent transfer rule that applies to transfers to Alaska trusts and has a four-year statute of limitations within which any person who was a creditor at the time the transfer to the trust occurred may bring suit. The result that the courts in *Portnoy* and *Brown* clearly wanted to reach (that is, that the debtor should not be granted a discharge in bankruptcy) would not have been necessary had the trust been created in Alaska because the Courts would have had direct jurisdiction over the assets which could be added to the bankrupt's estate and distributed to creditors if the courts found that the trusts were shams or the transfers to them were fraudulent conveyances.[29]

Overview of the Alaska Trust Act

The new Alaska Trust Act[30] provides that a person who, in writing, transfers property in trust may provide that the interest of a beneficiary may not be voluntarily or involuntarily transferred before it is paid or delivered to the beneficiary.[31] The Act

further provides that if the trust contains such a transfer restriction, no creditor existing when the trust is created, no person who subsequently becomes a creditor, and no other person may satisfy a claim out of the beneficiary's interest in the trust unless one or more exceptions apply. AS 34.40.110(b) provides four exceptions whereby the spendthrift rule will not protect the assets from creditors:

1. *To the extent that the settlor retains the power to revoke or terminate all or part of the trust without the consent of a person who has an adverse interest.* However, a power to revoke or terminate does not include the mere right to receive a distribution of income, corpus, or both in the discretion of another person, including a trustee, other than the settlor of the trust; a power to veto distributions from the trust to another beneficiary; or the retention of a testamentary special power of appointment. The latter two powers may be retained by the grantor to prevent the gift from the trust being complete for Federal gift tax purposes.[32] However, retention of such powers will cause the assets to be includable in the gross estate of the grantor at death.[33]
2. *To the extent that the trust income and/or principal must be distributed to the settlor.*
3. *To the extent that at the time of the transfer to the trust the settlor was in default by 30 or more days in making a payment due under a child support judgment or order.*
4. *To the extent the transfer was intended, in whole or in part, to hinder, delay, or defraud creditors under the Alaska fraudulent transfer law.*[34] However, an action to claim that the transfer was fraudulent may not be commenced unless the claimant was a creditor when the trust was created and the action is brought within the later of four years after the transfer to the trust was made or one year after the transfer is or could have been reasonably discovered; otherwise, if the claimant becomes a creditor after the transfer, the creditor may maintain an action contending the transfer was fraudulent only if it is commenced within four years after the transfer to the trust.

To remove any other uncertainty, the Act sets out a limitation that further restricts other challenges to Alaska trusts. Except as provided in AS 34.40.110, an Alaska trust cannot be challenged or set aside on the grounds "that the trust or transfer avoids or defeats a right, claim, or interest conferred by law on any person of a personal or business relationship with the settlor or by way of a marital or similar right."[35]

The foregoing means that if the settlor is not in default by 30 or more days of making a child support payment, the transfer was not intended to defraud creditors and the grantor retains no power to revoke or terminate the trust or the mandatory right to receive a distribution, creditors of the grantor should not be able to reach the assets in the Alaska trust. If the grantor retains the power to veto a distribution to other beneficiaries and a special testamentary power of appointment or similar right, the transfer to the trust will not be complete for gift and estate tax purposes even though it is not subject to the claims of the grantor's creditors. On the other hand, if the grantor retains no such power to veto or power of appointment or similar right, the transfer to the trust will be complete for estate and gift tax purposes.[36]

Alaska Trusts vs. FAPTs

Although an individual is now able to create an Alaska trust of which he or she is a discretionary beneficiary that will be protected from his or her creditors, an Alaska trust in the end may not offer the same degree of protection from creditors that may be afforded to a trust created in one of the offshore jurisdictions, such as the

"If the grantor retains no power to veto or similar right, the transfer to the trust will be complete for estate and gift tax purposes."

Cook Islands, Nevis, or Barbados for the various reasons outlined previously.

However, in at least three ways, an FAPT may be less desirable than an Alaska trust. First, clients may be concerned about political risk and their unfamiliarity with the legal system in these offshore jurisdictions. Second, the new extensive "anti-FAPT" reporting provisions added to the Internal Revenue Code[37] will not apply to an Alaska trust. Third, the hostility expressed by the U.S. Bankruptcy Court in *Portnoy* and *Brown* probably would not arise with respect to an Alaska trust because of the strong Alaska fraudulent transfer rule (and its rather long statute of limitations), and the fact that the assets in the trust will be subject to the jurisdiction of the U.S. courts.[38]

Planning Opportunities

The Alaska financial community hopes to generate far more interest through this legislation than from those merely seeking to protect their assets from creditors. In fact, Alaska may become the new frontier in cutting edge dynasty trusts, which, until now, were being promoted almost exclusively by South Dakota and Delaware.[39]

By featuring no state income tax, a repeal of the rule against perpetuities, and the self-settled trust rule, Alaska can now offer estate tax benefits which, previously, could only be accomplished by going offshore.

As noted, if the grantor's creditors cannot reach the trust corpus or income, the transfer to the trust will be deemed a completed gift.[40] Furthermore, by creating a nongrantor trust and allowing for accumulation of income, the trust's income should not be subject to state income tax in the settlor's domicile (nor in Alaska) and the trust will grow for the benefit of future generations. Accordingly, clients who have been reluctant to part with their assets during their lifetimes to utilize their unified credits and generation skipping transfer exemptions can now make such transfers to their Alaska trusts. By doing so, all future appreciation will be removed from their estates notwithstanding that they remain discretionary beneficiaries of the trust. Knowing that if their financial circumstances change the trustee may exercise discretion in their favor, the settlors can, perhaps, be more at ease in making such dispositions.

Conclusion

Even though not providing all of the practical protection that may be available through similar trusts created in offshore jurisdictions, many Americans will prefer for their assets to remain in the United States by creating asset protection trusts in Alaska. For those individuals, Alaska trusts may be a preferred solution. In fact, when considered in conjunction with the estate planning and income tax benefits available, Alaska becomes an attractive trust situs for more than its asset protection (or its great fishing). ■

[1]Missouri Revised Statutes § 456.080 appears to allow the creation of a "creditor proof" trust for the benefit of a class on a discretionary basis that includes the settlor of the trust in certain circumstances. It is unclear, however, what connection or nexus is necessary to come within the statute. Also, as discussed later, three tax cases suggest that it may be possible to create self-settled trusts for one's own benefit but be beyond the reach of creditors in Indiana, Maryland, and New York, in some cases. Estate of Uhl v. United States, 241 F.2d 867 (7th Cir. 1957); Estate of German v. United States, 85-1 USTC ¶ 13,610 (Ct. Cl. 1985); and Herzog v. Comm'r, 116 F.2d 591 (2d Cir. 1941). However, the conclusion reached by the Federal courts in these cases may be different from those reached by state courts. *Cf. Vanderbilt Credit Corp v.* The Chase Manhattan Bank, 100 AD 544, 473 NYS 2d 242 (2d Dep't. 1984) with Herzog v. Comm'r, supra.

[2]Although beyond the scope of this article, perpetual Alaska trusts may offer additional financial, tax, and estate planning benefits. A perpetual trust now can be created under the law of Alaska which imposes no income tax. Among other things, this means that if the trust is not a grantor trust (causing the income to be attributed directly to the grantor), state (and local) income tax can be forever avoided to the extent that trust income is not currently distributed to beneficiaries who are tax residents of states (or localities) that impose income tax.

[3]See Restatement (2d) Trusts, § 155.

[4]Restatement (2d) Trusts, § 156.2.
[5]For a more detailed discussion of the use of FAPTs, see G. Rothschild, "Establishing and Drafting Offshore Asset Protection Trusts," 23 Estate Planning 264 (Feb. 1996).
[6]See, e.g., Belize Trusts Act, 1992 § 7(6).
[7]See, e.g., International Trusts Act (1984) of the Cook Islands, as amended, § 13K(1) (prohibits any action brought to set aside a transfer to a trust unless such action is commenced within two years of the transfer to the trust). Bruce, "Shutting the Door on Deceit," Shore to Shore (April 1997); and, see, e.g., International Trusts Act of the Cook Islands as modified by the International Trusts Amendment Act 1995-1996, § 13B (An international trust and a disposition to such a trust shall not be fraudulent against a creditor if settled or the disposition takes place after *two* years from the date the creditor's cause of action accrued, or if settled or the disposition takes place before the expiration of two years from the date the creditor's cause of action accrued, the creditor fails to commence an action before *one* year from the date of the settlement or disposition took place). See also C. Bruce and W. Wojewodzkik, "Will the *Orange Grove* Case Have a Long-Term Impact on the Cook Islands' Asset Protection Trust Law?" J. of Asset Prot., Vol. 2, No. 3 (Jan./Feb. 1997), and 515 South Orange Grove Owners (et al) v. Orange Grove Partners (CA 1/95 and CA 31/96).
[8]However, an Alaska trust may include a change-of-situs clause to remove the trust and its assets to a more favorable foreign jurisdiction.
[9]See, e.g., National Shawmut Bank v. Cumming, 325 Mass. 457 (1950), holding that a New York judgment against the estate of the grantor for an elective share interest (i.e., to a minimum share) of the grantor's estate was not enforceable against a revocable trust that the grantor had created in Massachusetts and of which a Massachusetts bank was the trustee.
[10]Cf. In re Larry Portnoy, 201 BR 685 (SDNY 1996), In re Brown, 4 Ak. Br. Rpt. 279 (Bkrptcy. D. Alaska, 1995).
[11]Cf. In re Constance Morgan, NYLJ (Surr. Ct. Nassau Co., May 4, 1989) 28.
[12]Herzog v. Commissioner, 116 F. 2d 591 (2d Cir. 1941).
[13]Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA, 100 AD 2d 544, 473 NYS 2d 242 (1984).
[14]See statement of U.S. Representative Sam Gibbons contained in Probate & Property (March-April 1997) at 48 ($644 billion transferred to trusts in Luxembourg, the Bahamas and the Cayman Islands through 1993).
[15]This analysis is consistent with § 403 of the Restatement (3d) of Foreign Relations Law of the United States (1987).
[16]Portnoy, 201 BR 685, 697.
[17]This was so even though the debtor was a resident of New Jersey. The creditor was a corporation domiciled in New York and that is where the contractual arrangement leading to the indebtedness apparently arose.
[18]See, e.g., In re Remington 14 BR 496 (Bkptcy. D. NJ 1981) (court applies law of Pennsylvania (which trust was created under) to determine extent to which a New Jersey beneficiary's right to income and principal was available to creditors). See also Restatement (2d) Conflict of Laws, § 273 comment b. (1971). If the trust holds real estate, however, the law of the situs of the property will govern. Restatement (2d) Conflict of Laws, § 280 (1971).
[19]HR Rep. No. 595, 95th Cong., 1st Sess. 369 (1977).
[20]Restatement (2d) Conflict of Laws, § 273 comment b.
[21]Restatement (2d) Conflicts of Laws § 6(2). See, e.g., In re Consolidated Equities Corp., 143 BR 80 (Bkrptcy. ND 1992); In re Kaiser Steel Corp., 87 BR 154 (Bkrptcy. Colo. 1988); In re OPM Leasing Services Inc., 40 BR 380 (Bkrptcy SDNY 1984).
[22]4A Collier on Bankruptcy, ¶ 70.26 at 364-365 (14th Ed.). See also, In re Remington, 14 BR 496 (Bkrptcy. D. NJ 1981).
[23]P. Spero, Asset Protection (Warren, Gorham & Lamont 1994 and 1997 Cum. Supps.), ¶ 7.01[2].
[24]Other conditions may also apply. For example, spendthrift protection is not available in Alaska to the extent at the time of the transfer of assets to an Alaska trust the grantor may be in default by 30 or more days of making a payment due under a child support order. AS 34.40.110(b)(4).
[25]4 Ak. Br. Rpt. 279 (Bkrptcy. D. Alaska 1995).
[26]Perhaps, somewhat similarly, the court in *Portnoy* stated that it did not know whether the trust assets were in the United States or Jersey. 201 Bkrptcy. 685, 698, n. 11.
[27]The Alaska Trust Act (SCS CSHB 101(JUD)) modified Alaska Statutes (AS) 34.40.110, which prior to April 2, 1997 provided: "A deed or gift, a conveyance, or a transfer or assignment, oral or written, of goods and chattels or things in action made in trust for the person making the deed, conveyance, transfer, or assignment is void as against the creditors, existing or subsequent, of the person."
[28]New AS 34.40.110(d) now provides a four year statute of limitations from the date of transfer of assets to a trust for filing a claim to set aside the transfer.
[29]There may be a more global "political" reason why U.S. courts will fully respect Alaska law on self-settled trusts created there. If the U.S. courts refuse to apply Alaska law, any American seeking asset protection through a self-settled trust will be driven offshore raising all of the practical barriers to any U.S. court seeking access to the trust assets when it would be appropriate to do so (e.g., when the transfer to the trust was a fraudulent conveyance) and resulting in the underreporting of trust income which is rampant as to FAPTs and which was the primary reason for many of the 1996 changes to the Internal Revenue Code relating to FAPTs. See statement of U.S. Representative Sam Gibbons contained in *Probate & Property* 48 (March-April 1997) that only $1.5 billion had been reported to the IRS through 1993 on $644 billion transferred to trusts in Luxembourg, the Bahamas and Cayman Islands.
[30]Alaska Trust Act, Chapter No. 6, SLA 1997.
[31]AS 34.40.110.
[32]Reg. § 25.2511-1(c).
[33]IRC §§ 2036(a)(2), 2038(a).
[34]It is possible that a court would determine that the statute of limitations of the grantor's domicile state (or another state) should be applied rather than the one provided under the new Alaska law. Cf., e.g., Ferrari v. Barclays Business Credit, Inc., 108 BR 384 (D. Mass. 1989). This could mean a shorter, longer, or "different" statute of limitations.
[35]AS 13.36.310.
[36]See, e.g., PLR 9332006 (not precedent) and Rev. Rul 76-103, 1976-1 CB 394.
[37]See, e.g., IRC § 6048.
[38]Although it is not necessary to make the trust valid, the existence of an Alaska trust may be registered with any Alaska probate court and thereby make its existence a matter of public record. Doing so may further demonstrate that the grantor was acting with the cleanest of hands. See, generally, AS 13.36.005-020.
[39]See, generally, Zaritsky, Blattmachr & Thwaites, "Alaska Trusts Offer New Estate Planning Opportunities," Estate Planning Alert (June 1997) at 3.
[40]See, e.g. PLR 9332006 (not precedent); Paolozzi v. Commissioners, 23 TC 182 (1954) acq. 1962-1 CB 4.