

The TIST Test: Tennessee Competes for Trust Dollars

Legend has it that two brothers, an Alaska banker and a New York estate planning lawyer, were camping in the Alaska wilderness in the mid-1990s and asked themselves a simple question: how can we profit handsomely by combining our professions? Their answer was brilliant in its simplicity, if complex in detail: change Alaska's trust law to encourage everyone in the country to move their trust business there, require an Alaska trustee for the law to apply, and open an Alaska trust company.

"Effective July 1, Tennessee became the 10th state, and the first in the Southeast, to authorize Domestic Asset Protection Trusts (DAPTs)."

Want to create a self-settled spendthrift trust naming yourself as beneficiary but protecting against your future creditors? Let Alaska bring the benefits of offshore trusts onshore. Want to defeat your spouse's elective share at your death, or block your children from getting child support if you divorce? Let Alaska protect against those "predators" too. Want to keep property in trust forever? Let Alaska repeal its Rule Against Perpetuities. The brothers were able to sell their plan, and Alaska enacted an expansive statute in 1997 allowing "Domestic Asset Protection Trusts," or DAPTs. Trust assets flowed from the "lower 48" to Alaska banks, and so was born a whole new competition among state legislatures. Delaware enacted a similar statute the same year, and Nevada followed in 1999, creating the primary triumvirate of DAPT states.

Effective July 1, Tennessee became the 10th state, and the first in the Southeast, to authorize DAPTs. Because "asset protection" may hint at something shady, with visions of widows and orphans eating dog food, or bankrupt businessmen leaving creditors holding the bag while they retire for life at their villa in the Caymans, Tennessee's law refers to our version of DAPTs euphemistically as "Tennessee Investment Services Trusts," or TISTs.

The new statute, based on Delaware's, sets forth a number of specific requirements to qualify as a TIST, and thus to obtain the benefits of creditor protection. Among these are: (1) the trustee must be a Qualified Trustee, meaning a Tennessee resident individual or bank who maintains at least some of the assets in state and who "materially participates" in the trust administration; (2) the trustor must sign a Qualified Affidavit prior to funding, certifying that he is not intending to defraud any creditors, that he has no pending actions against him, that the transfer will not render him insolvent, and that the assets being transferred were not derived from unlawful activities; and (3) the trust must be irrevocable and include a certain type of spendthrift clause.

Assuming these requirements are satisfied, creditors generally cannot reach a beneficiary's interest in a TIST after four years from the date of transfer into trust. There are two statutory exceptions. First, a creditor may be able to prove that the transfer was a "fraudulent conveyance" as provided in the Tennessee Uniform Fraudulent Transfer Act. Second, not all interests in trust are protected from creditors. Although almost any form of income interest will be protected, interests in trust corpus are not protected if the beneficiary's interest is either mandatory or else the beneficiary has an enforceable right to receive principal for support and the right is not limited by an ascertainable standard.

continued on page 22

Where There's A Will *continued from page 21*

A third exception may exist outside of the statute, but its scope is as yet unknown. Comparable statutes in most states list certain exception creditors, such as taxing authorities or holders of alimony or support obligations. Tennessee's statute does not list any exceptions. Courts may supply some if the legislature does not act first.

Trustees, advisors, or any person involved in "counseling, drafting, preparation, execution or funding" of a TIST are immune from creditor action. Although it makes sense that creditors barred from collecting against a valid TIST should also be prevented from suing those who merely helped the debtor create the TIST, the statute seemingly protects non-attorneys involved in unauthorized practice of law as well. One might worry whether "trust mills" whose activities the Bar has tried to limit will perceive this as statutory cover for increased swindling of our elderly citizens.

What about Tennessee's Rule Against Perpetuities? For trusts created or made irrevocable after July 1, 2007, a Tennessee trust can be made to last up to 360 years, provided that after the first 90 years, at least one person in every generation of descendants must have a testamentary power of appointment, and the permissible appointees of the power must include at least all of the powerholder's descendants. Unlike many other state statutes that have lengthened or repealed the Rule , there is no exception or shorter limitation in Tennessee for real property. Since the Tennessee constitution absolutely forbids perpetuities, one might wonder whether a constitutional challenge will be forthcoming. Would the framers of the Tennessee constitution have considered 360 years a "perpetuity" in fact, even if not technically perpetual? Would it have been a good thing if some of our ancestors in the year 1647 had tied up real property until now?

It appears the snowball is rolling down the hill, and if Tennessee is to join in, it does serve its bankers' financial interests to adopt such legislation earlier rather than later, with Johnny-come-lately states likely getting decreasing marginal benefits. Nevertheless, one wonders whether the genie emerging from the bottle is really in the best interests of society. Will the overthrow of centuries of established trust policy in favor of increased trustee fees result in reduced creditor protection, increased bankruptcies without debtors' loss of access to wealth, increased costs to consumers, and idle real property? Is this a triumph of commerce over reason? Future generations will decide.

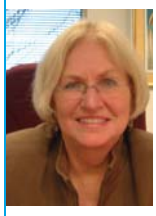
DAN W. HOLBROOK practices estate law with Holbrook & Peterson PLLC in Knoxville. He is certified as an Estate Planning Specialist by the Tennessee Commission on Continuing Legal Education and Specialization, is a Fellow of the American College of Trust and Estate Counsel, and serves on the TBA Probate Study Group reviewing and recommending legislation involving trusts and estates in Tennessee. He can be reached at dholbrook@hpestatelaw.com.



SEEKING CONSENSUS
FINDING SOLUTIONS
GETTING RESULTS

Mediation and Arbitration Services

THE MEDIATION GROUP OF TENNESSEE, LLC



Marietta M. Shipley, a retired judge, is the founder of The Mediation Group of Tennessee, LLC.

Ann Barker
Hon. Ben Cantrell (Ret.)
Hon. Lew Conner (Ret.)
Steve Heckle
Tracey Kinslow
Randal Mashburn
Paula Flowers
Dan L. McDougal
James L. McElroy
Dr. David W. McMillan
Barbara Moss
Hon. Lyle Reid (Ret.)
Tracy Shaw
Charles A. Trost
Hon. Marietta Shipley (Ret.)
Hon. Donn Southern (Ret.)
Hon. Paul Summers (Ret.)
Rachael Waterhouse
Hon. Jane Wheatcraft (Ret.)
Hon. Dewey Whitenton (Ret.)
T. Franklin Gilley, III

call us at **615-292-6069** or toll free **877-298-TMGT (8648)**
www.**themediationgrouptenn**.com