Asset Protection for California Residents
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Eastern Bar Association – Los Angeles

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.
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> - Declaration of Independence,
>   Text approved on July 4, 1776, and signed on August 2, 1776

The United States has been in national existence for 243 years. It has been a Constitutional republic for 230 years, since 1789. The thirteen colonies were settled as a refuge for the debtor who did not have, for the persecuted who had and did not want it taken away, and for the venturer who wanted more: Georgia was a debtor colony; Massachusetts, Rhode Island, Maryland and Pennsylvania were refuges for religious dissidents; other colonies were settled primarily for economic opportunity. Those who came were coming toward a future, a new home. In the process, they forestalled the claims of creditors or detractors in the place they left. But their primary purpose lay in the future; it was not to defraud their past. Asset protection planning in the United States today takes place in the long shadows of this heritage, and the political philosophy that was evolving at the same time these colonies were being populated.

The purpose of this article is to put asset protection planning, generally, in perspective as a legal practice area rooted in the values of the American political economy, with a view to asset protection planning in California, in particular. The objective of the article is to give a competent overview of planning issues, of the legal considerations and tools available to address those issues, and also of the "Happiness" objective which is the commitment of a nation where individual potential and merit are the coin of our political realm. Any asset protection plan that has as its primary objective to hinder, delay and defraud in order to hoard, will fail on several levels, including legally; the purpose of protected wealth is, as the Declaration states, the Pursuit of Happiness.

I. Asset Protection Planning In Perspective

A. *Asset Protection Planning in the United States in Perspective.* A meaningful discussion of asset protection planning will take into account two fundamental historical understandings that give perspective to the acquisition of, and the rights and obligations associated with, property in the American legal system.

The first of these understandings is the enduring proposition set out in that preeminent eighteenth century Enlightenment document, the Declaration of Independence, concerning "unalienable Rights" originating from the Creator, among which is the "pursuit of Happiness". The Enlightenment notion of "Happiness" has been variously identified with the concept of a Lockean "natural law" right to acquire and own property, as a means to an end, and with

"Happiness" as that end in and of itself. Professor Carli N. Conklin, of the University of Missouri School of Law, convincingly argues that the phrase "pursuit of Happiness" as used in the Declaration of Independence referred to the right of a human being to seek to live a life that would result in *happiness,* associated in the Enlightenment mind with the Greek sense of "eudaimonia" or *human flourishing*, through the use of property properly acquired.

The second of these understandings lies in the Lockean concept of property itself, as the means by which human beings pursue the end of "human flourishing." In his *Two Treatises of Government,* John Locke (1632-1704) – with whom the Founding Fathers were intimately familiar – developed the proposition that human beings, by nature being free and equal, have natural rights to "life, liberty and property" that derive from the Creator and not from a ruling human sovereign. The primary human property interest is his and her body, and the fruits of a person's labor are property derived from that primary property interest.

In evaluating the competing interests in property that must be considered by a lawyer advising in the area of asset protection planning, it is helpful to understand that, for our Founding Fathers, the purpose of government was to protect property interests as essential to human flourishing. Fundamental to maintaining perspective as to the "why" of legitimate asset protection is the idea that property is to be held and employed to sustain oneself, with the excess used to promote societal good.

B. *Validity and Effectiveness of Asset Protection Planning.* Asset protection planning as practiced by the legal profession today has its detractors,[1] and doubters,[2] especially with regard to developing "asset protection trust" law. Attorney and legal commentator Jay Adkisson has demonstrated that asset protection trusts are ineffectual to the extent they are settled for the purpose of defrauding existing or foreseeable creditors, are funded with the fruits of fraud, or are essentially the alter ego of the settlor.[3] He could have added to his list of failed

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The author dedicates this article to his brother, attorney Raymond F. Feist, Jr., in appreciation for his long service to the legal profession in California, and for insights such as "the practice of law is a contemplative profession."

This article is written for discussion purposes only, and not for the purpose of giving legal advice. Legal counsel can rely only on their own research, analyses and conclusions as these apply to the particular facts and circumstances of any particular representation.

1 See, Hirsch, Adam J., "Fear Not the Asst Protection Trust," 27 Cardozo L. Rev. 2685 (2006); Cohen, Patricia, "States Vie to Shield the Wealth of the 1 Percent," *New York Times,* August 8, 2016.
In 2018, Georgia Governor Nathan Deal vetoed House Bill 441 which allowed for the creation and use of self-settled spendthrift trusts in Georgia. Under then-current Georgia law, spendthrift protection was not available to a beneficiary who is also a settlor of or a contributor to the trust, to the extent of the contribution made to the trust. The governor vetoed this legislation out of concern for the potential that self-settled spendthrift trusts presented an opportunity to shirk creditors while preserving the assets of the trust for distribution to the settlor-beneficiary.

2 Consider the issue addressed by the Maryland Supreme Court, in *Duvall v. McGee,* 826 A.2d 416 (Md.Ct.App. 2003), where the court upheld the ability of a trust's spendthrift provision to thwart an attempt to enforce a civil judgment to recover from the trust interest of a felon-beneficiary.

3 Adkisson, "Introduction to Trusts for Asset Protection," at http://www.trustsassetprotection.com/trusts.htm, citing to *In re Stephen J. Lawrence*, 279 F.3d 1294 (11th Cir. 2002), *SEC v. Brennan*, 230 F.3d 65 (2nd Cir. 2000), *FTC v. Affordable Media, LLC,* 179

domestic asset protection trusts (DAPTs) those that lose their virility when before the courts of states in which DAPTs are contrary to public policy,[4] and those relying on ineffectual over-reaching provisions purporting to disable the jurisdiction of sister state courts.[5]

One observation may serve to address these negative concerns: Except where asset protection legal structures are found to be unenforceable when subject to the jurisdiction of a non-DAPT sister state, asset protection plans have only failed when settlor behaviors have violated applicable fraudulent transfer or voidable transfer law. If rights of third parties in property are respected, and the trust is administered beyond the jurisdictional reach of unsympathetic courts, a client can expect full judicial support and validation of an asset protection plan.

C. *Availability of Asset Protection Planning.* The political philosophy out of which United States legal protections for personal property rights has developed, has made this Country a preferred venue for foreigners seeking protection for their assets.[6] Similarly, the diverse legal asset protection regimes offered by some states within our federal union can also be made available to those who are not residents of those states, through insightful and informed protection planning taking into account considerations of jurisdiction, full faith and credit, conflicts of law and choice of law principles.

D. Attorney Obligations and Potential Liabilities regarding Asset Protection Planning.

F.3d 1228 (9th Cir. 1999); *SEC v. Bilzerian,* 131 F. Supp. 2d 10 (D.C. 2001), *Riechers v. Riechers*, 679 N.Y.S.2d 233 (1998); *Bank of America v. Weese,* 277 B.R. 241 (Bkrpt. D.Md. 2002), *In re Brooks,* 217 B.R. 98, 32 Bankr.Ct.Dec. 23 (Bkrpt. D.Conn. 1998), *In re Portnoy*, 201 B.R. 685 (Bkrpt. S.D.N.Y. 1996), *In re Colburn*, 145 B.R. 851 (Bkrpt. E.D.Va. 1992); *Breitenstine v. Breitenstine,* 2003 WY 16, 62 P.3d 587 (Wyo. 2003)

4 See, *Dahl v. Dahl,* 345 P.3d 566, 2015 UT 23 (Sup.Ct.Utah 2015), rev'd in part, aff'd in part, --- P.3d ----, 2015 WL 5098249, 794 Utah Adv. Rep. 5, 2015 UT 79 (Utah law applies to Nevada trust); *In re Huber,* 493 B.R. 798, 2013 WL 2154218 (Bkrpt. W.D. Washington 2013) (Washington law applies to property of Alaska DAPT which is located in Washington).

5 *Toni 1 Trust v. Wacker,* 413 P.3d 1199 (Alaska Sup.C. 03/02/2018) (assertion by Alaska law, and as a term of the trust agreement, that Alaska courts had exclusive subject matter jurisdiction with regard to transitory causes of action brought against an asset protection trust settled under Alaska law, is unenforceable); *Tangwall v. Wacker,* 413 P.3d 1199, 2018 WL 1125033 (2018) (Alaska statute giving Alaska courts exclusive jurisdiction over fraudulent transfer claims against Alaska self-settled spendthrift trusts (1) was ineffective to limit the scope of the Montana court's subject matter jurisdiction over fraudulent transfer action against trust, or federal bankruptcy court subject matter jurisdiction over fraudulent transfer claims against trustee, and (2) was preempted by federal statute which granted federal district courts original and exclusive jurisdiction of all cases under the U.S. bankruptcy code)

6 "The combination of modern trust laws, the greater demand for U.S. investments, a desire for political stability and the protection of property, as well as the desire to establish a trust in a non-blacklisted country, have driven this trend. The modern trust laws in the most popular U.S. trust jurisdictions, such as Alaska, Delaware, Nevada, New Hampshire, South Dakota and Wyoming, are attractive to international families as they provide flexibility and control, tax savings, asset protection, privacy (versus secrecy) among other key advantages." King, Al W., "International Families Increasingly Want U.S. Trusts," *Trusts & Estates,* June 22, 2018. See also, Kosnitzky, Michael, "U.S. Gains Favor as Trust Jurisdiction for Nonresidents," Estate Planning Journal (Sept. 2016)

1. Professional Responsibility of California Lawyers relating to Asset Protection Planning Practice, Generally. Several of the Rules of Professional Conduct, as adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court effective November 1, 2018, have particular application to the asset protection planning lawyer.

a. *Duties relating to Adequate Professional Service.* Rule 1.1 ("Competence") sets the standard for a lawyer's own learning, skill, and mental ability "reasonably necessary"[7] to perform promised legal services. This rule requires a lawyer whose client requests asset protection advice, counsel and drafting services, and who does not have competent training and ability in this practice area, to refer that client to a lawyer that is qualified to provide those serviced.

If a lawyer refers an asset protection matter to another lawyer, and the referring lawyer continues as the client's primary contact in the representation, as not infrequently occurs where a longstanding relationship with the client exists, then Rule 5.1(b)[8] could require the referring lawyer to "make reasonable efforts to ensure" that the other lawyer complies with general practice professional responsibilities such as diligence (Rule 1.3), disclosure of professional liability insurance (Rule 1.4.2), and avoiding conflicts of interest (Rules 1.7 and 1.10). Therefore, a referring lawyer is not only responsible for vetting the professional qualifications of the lawyer she recommends to the client for asset protection planning legal services, but she may also be responsible to satisfy herself concerning that lawyer's procedures and practices relating to the professional rules.

b. *Protection Planning and Professional Duties relating to Asset Transfers.* A fundamental inquiry that diligence requires of an asset protection planning lawyer is the current state of her client's obligations, both actual and contingent. By its very nature, a central consideration in an asset protection planning representation is the rights of third parties in the client's property.[9] A lawyer who transfers client assets into protected status, where this is subsequently determined to be a fraudulent transfer or voidable transaction as to creditors, violates Rule 1.2.1(a), which requires that "[a] lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent,[10] or a violation

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7 "Reasonably" is defined at Rule 1.0.1(h) to mean, "in relation to conduct by a lawyer," to mean "the conduct of a reasonably prudent and competent lawyer."

8 Concerning lawyers who have "direct supervisory authority" over another lawyer

9 As discussed infra, these involve those to whom legal obligations of support are due; persons to whom the client has made executory promises, such as those having cash call rights against the client, and the obligations of others that the client has guaranteed; taxing authorities; and contingent tort claimants, which arguably include those to whom the client reasonably owes duties of care as a professional service provider, a motor vehicle operator and homeowner.

10 Rule 1.0.1(d), Terminology, states that "fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive. The Executive Summary of Rule 1.0.1 states that "Paragraph (d) defines 'fraud' or 'fraudulent' and is nearly identical to ABA Model Rule 1.0(d). The Commission believes it is appropriate that the components of fraud under paragraph (d) be determined under the law of the applicable jurisdiction.[6] In addition, Comment [3], discussed below, clarifies that neither damages nor reliance need to be proven because that would frustrate the rule's intent to prevent the fraud or avoid the lawyer providing assistance to the defrauder. Comment [3] to this Rule further states that "when the terms 'fraud' or 'fraudulent' are used in these rules, it is not

of any law, rule, or ruling of a tribunal," and Rule 8.4(c), which states that "[i]t is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation."

On the other hand, as noted, discussions between the attorney and her client concerning fraudulent or voidable asset transfers will be a routine part of an asset protection planning consultation. Rule 1.2.1(b) recognizes that lawyers discuss the legal consequences of proposed planning alternatives with clients, to assist them in understanding the consequences of proposed actions. Comment [1] to that Rule recognizes that "There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action."

Some advocates of asset protection planning put forward the idea that such planning could pose an obstacle to creditors in litigation, so that in order to cut short litigation uncertainties and to minimize ongoing litigation fees, costs and expenses, the plaintiff creditor would be amenable to settling their claim on terms favorable to the client. This advice appears to dance close to an ethical precipice defined by Rule 3.1(a)(1), which states "[a] lawyer shall not bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person," and Rule 3.2,[11] which states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Granted, leveraging protection planning in settlement negotiations with creditors may not be the *only* "substantial purpose" for which an asset protection plan is created, but if it is the only *substantial* purpose, the risk of an ethical violation still exists.

Finally, though violation of the Rules of Professional Responsibility does not create a legal cause of action against an attorney,[12] violation of the Rules by the actions described above could give rise to action by the State Bar of California against the lawyer, under Bus. & Prof. Code § 6106, which provides that

> The commission of any act [by an attorney] involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of [the attorney's] relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

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necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud or avoid a lawyer assisting in the perpetration of a fraud, or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent conduct. The term '"fraud' or 'fraudulent' when used in these rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information."

11 The comment to this Rule relates the rule to "a lawyer's representation of a defendant in a criminal proceeding." However, it is imprudent to assume that the Rule itself, as stated, does not have a wider application to civil litigation.

12 Rule 1.0(b)(3)

2. Concerning the Duty of Competence, Specifically. Asset protection planning, as discussed in this article, reaches to the very roots of legal estate planning. The operative principle is this: Where a relatively simple and straightforward legal remedy exists, and the lawyer is aware of her client's risk exposures, there potential malpractice liability lies.

The case of *Helling v Carey*[13] is instructive. In that case, the plaintiff had entirely lost her vision due to glaucoma, for which her doctor of many years had not tested her even though he was aware of her deteriorating condition, and the test for glaucoma was quick, non-invasive, cheap and effective. The *Helling* court held as follows:

> We therefore hold, as a matter of law, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.[14]

Subsequently, the California court, in *Barton v. Owen,*[15] held that the *Helling* decision "does not state the law in California,"[16] citing to the Washington appellate court decision in *Meeks v. Marx*[17] which narrowed the *Helling* on the basis of its "thorough analysis of [the *Helling*] decision" which led that court "to conclude the holding there was intended to be restricted solely to its own 'unique' facts, i.e., cases in which an ophthalmologist is alleged to have failed to test for glaucoma under the same or similar circumstances."[18] This rationale is actually consistent with the *Heller* decision, which was rendered in consideration of "the undisputed facts of this case".

One can reasonably infer from *Barton* that if the narrow "same or similar circumstances"[19] arising from "undisputed facts" as were at issue in *Helling* did, in fact, apply to an analogous situation in California, the *Helling* proposition that "the proper standard of care to be followed by [professional service providers] [is] not that which is usually done, but that which ought to be done"[20] may well apply. The *Helling* "circumstances," as summarized by the *Barton* court, were as follows:

> The plaintiff in that case had been to see the defendant numerous times over a period of several years complaining about eye problems. The record indicates that the plaintiff had been in to see the defendant with complaints about her eyes in September 1963, October 1963, February 1967, September 1967, October 1967, May 1968, July 1968, August 1968, September 1968 and finally in October 1968.

13 83 Wash.2d 514, 519 P.2d 981, 67 A.L.R.3d 175 (Wash.Sup.Ct. 1974)
14 83 Wash.2d at 519, 519 P.2d at 983
15 71 Cal.App.3d 484, 139 Cal.Rptr. 494 (Ct.App. Second Dist. Div.4 1977)
16 71 Cal.App.3d at 492, 139 Cal.Rptr. at 498
17 15 Wash.App. 571, 550 P.2d 1158 (1976)
18 15 Wash.App. 571, 577, 550 P.2d 1158, 1162
19 *Barton,* loc. cit.
20 *Id.*

> It was not until October 1968 that the glaucoma test finally was given. At trial the defendant testified that throughout this entire period the plaintiff had detectable glaucoma.[21]

The pivotal elements in an estate planning legal representation that would be analogous to the determinative circumstances in *Heller* as set out above, are (1) familiarity with the client's financial and family situation, (2) availability of legal planning tools to position the client and her estate defensively, (3) the fees, implementation and ongoing maintenance costs of the planning, and (4) the benefit to the client relative to these costs.

Potential risks of loss to which a client and her estate may be, or may become, exposed include deficiency judgments resulting from defaults on consensual obligations; tort liability arising from routine life activities; derivative liability as an employer, a parent or a partner; and, after death, contest by family members. What lawyer would relish the moment when the beneficiaries of a deceased client's estate plan, after discovering that their inheritance is now a fraction of what it could have been if relatively simple and cost-effective legal protections had been put into place when the client's planning was in the hands of the lawyer, ask the lawyer if she had discussed asset protection planning with the decedent?

Therefore, an estate planning lawyer would do well to consider that her duty of competence to her client requires her to inquire and inform herself concerning these matters, unless the scope of the representation, as set out in the attorney-client engagement agreement, explicitly states that asset protection planning lies outside the scope of the representation.

3. Money Laundering and Asset Protection Planning. In 1970, the Bank Secrecy Act[22] was signed into law, requiring U.S. financial institutions to assist U.S. government agencies in detecting and preventing money laundering. In 1989, the Financial Action Task Force on Money Laundering (FATF) was formed at the G7 Summit in Paris to combat money laundering of criminal enterprise profits through the global financial system. The several "Recommendations" promulgated by the FATF has application to international money transfers, generally, and to trust transactions in particular. In addition, the FATF published the "RBA [risk-based approach] Guidance for Legal Professionals." In 2012, the U.S. Department of the Treasury's Financial Crimes Enforcement Network issued in the Federal Register, [23] the "Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators." The Financial Industry Regulatory Authority (FINRA) has issued its Anti-Money Laundering requirements.

The American Bar Association, concerned about the implications of the FATF's RBA Guidance for attorney-client confidentiality, collaborated with the American College of Trust and Estate Counsel to publish "Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing," followed in 2013 by ABA Formal Opinion 463, "Client Due Diligence, Money Laundering, and Terrorist Financing". The opinion affirms that "[t]he Model Rules [of Professional Responsibility] neither require a lawyer to fulfill

21 *Id.*
22 31 USC 5311 *et seq.*
23 77 FR 81487

a gatekeeper role, nor do they permit a lawyer to engage in the reporting that such a role could entail. [However,] [i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity." Those due diligence elements are identified as follows:

> The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any "beneficial owner" of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives.

Formal Opinion 463 was published in the context of developing official concern and regulation relating to asset transfer transactions. The opinion, together with Rule 1.3(a) ("A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client") and Rule 1.2.1(a) ("A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law . . ."), would seem to define the scope of a lawyer's due diligence professional responsibility, as it relates to this aspect of asset protection planning. The implication is that the lawyer involved in funding an asset protection plan has a best-practices due diligence professional responsibility to have a process[24] by which assets transferred into protected status are reasonably determined to derive from legal sources and legitimate enterprise activities.

4. Aiding and Abetting Liability The 2003 case of *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.,*[25] was a landmark decision for attorney civil liability for facilitating client fraud on creditors. In that case, the Third Circuit found that a judgment creditor had a cause of action against the debtor's attorney and his law firm for

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[24] Depending on the complexity and sophistication of the asset protection plan, the attorney's process could include:

- an opinion letter from client's accountant;
- a client affidavit regarding the source of assets transferred into protected status;
- a client affidavit of personal solvency, including affirmation concerning retention of sufficient assets and adequate cash flow for current client obligations, concerning the existence or non-existence of current and anticipated litigation, and concerning known contingent liabilities;
- a client certification of retained financial and economic resources sufficient to sustain the standard of living and to maintain quality of life of herself and those whom she has a legal obligation to support, including saving for anticipated financial obligations such as children's education;
- a written agreement between the client, as asset transferor, and the transferee, that the client will disclose the identity of assets in protected status as part of all financial disclosures the client is required to give to third parties

Note: It would be imprudent for the lawyer herself to obtain and review the client's financial documents, such as income tax returns, as the basis for her due diligence reliance on the client's financial condition and the source of the client's assets. Instead, a defensible reasonable best-practice would be for the lawyer to rely on the client's sworn statements and certified representations, and the opinions of those other professionals who are familiar with the client's financial situation.

[25] 331 F3d 406 (3d Cir. 2003)

conspiracy and for aiding and abetting. Under New Jersey law which applied in that case, *conspiracy* lay against the attorney if he "agreed" with his client's fraudulent acts, even though the attorney did none of those acts himself; the three elements of *aiding and abetting* were that a wrongful act was committed, the aider-abettor knew about the wrongful act, and the aider-abettor "knowingly and substantially participated" in the wrongdoing – in this case, arguably by the attorney devising a plan to thwart the judgment creditor's ability to collect on its claim. The *Morganroth* court observed that

> [The facts alleged], if proven, would establish that the [attorneys] went beyond the bounds of permissible advocacy; they allege that [the attorneys] were active participants and planners in the scheme to obstruct the plaintiffs' efforts to execute on their judgment.[26, 27]

II. Protection Planning Essential Considerations

A. *Sources of Potential Risk of Asset Loss.* When analyzing a client's protection needs, risks posed by the following should be taken into consideration:

1. Loss arising from family situations,[28] including:
    - divorce[29]
    - family business disputes[30]
    - estate disputes[31]

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26 *Id.* at 412

27 The *Morganroth* case is cited by two unpublished California cases: *Miller Avenue Professional and Promotional Services, Inc., v. Koss,* 2005 WL 2787455 (Ct.App. First Dist. Div. 5 2005) (concerning corporate counsel potential liability to minority shareholders), and *Hsieh v. Hsieh,* 2015 WL 914025 (Ct.App. Second Dist. Div. 7 2015) (concerning the running of the limitations period under the Uniform Fraudulent Transfer Act). The *Miller Avenue* court, noting that *Morganroth* was decided under New Jersey law, nonetheless quoted it favorably in its Footnote 4.

28 Asset protection planning casts a wider net than consideration of external threats. Family conflicts arising from emotional and psychological dynamics between siblings, and between parents and children. Pursuing internecine combat destroys not only the integrity of the family itself, but also its financial future. In 2012, Consumer Reports quoted Boston attorney Alexander A. Bove, Jr., to say that a conservative estimate of legal fees in the typical will contest was between $10,000 and $50,000, with the dispute "easily" lasting two years or more. See at https://www.consumerreports.org/cro/2012/03/how-to-contest-a-will/index.htm.

29 A particular consideration relating to dissipation of client wealth through divorce concerns the possible effect of a <u>child's</u> divorce on the <u>client's</u> estate: ten (10) states include the value of a party's potential inheritance, however contingent, in property division calculations; these are Connecticut, Indiana, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, South Dakota, Oregon and Vermont.

30 Discussion of strategies to keep the family business from becoming collateral damage in warfare between estate beneficiaries is an asset protection discussion which this article is too short to accommodate. The issues, however, are straightforward: planning for succession to control of the business; providing for surviving family members' participation in business value, or its equivalent, without putting business cash flow at risk; insulating the business itself from intrafamily struggles relating to significance, position, entitlement and even, in some cases, pay-back.

31 Planning for protection of the client's estate from post-mortem dissipation resulting from family discontents is within the ambit of an asset protection client discussion. Some planning tools available for this purpose include: no-contest provisions (Prob. C. Sec. 21310 *et seq.*); requiring as a condition

- risk of loss of government entitlements due to receipt of a personal injury award, or an inheritance[32]

2. Contingent liabilities on consensual obligations to third parties, including:
   - business partners[33]
   - as guarantor on loans to third parties[34]
   - deficiency due after creditor's foreclosure on insufficient collateral[35]

3. Non-consensual obligations to third parties, including:
   - those arising from routine life activities[36]
   - as a property owner (e.g. home and recreational property owner)[37]

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precedent for vesting that beneficiaries consent to trust provisions, including those that require alternative resolution of beneficiary-trustee disputes (see, *McArthur v. McArthur,* 224 Cal.App.4th 651, 168 Cal.Rptr.3d 785, 2014 Daily Journal D.A.R. 2580, 2014 Daily Journal D.A.R. 2955 (First Dist. Div. 5, 2014); putting a professional fiduciary in control of trust and estate administration instead of family members (at much less cost than litigation between a family-member fiduciary and her siblings or parent); financial disincentives to pursuing disputes by surcharging fees and costs against the beneficial share of an unsuccessful litigating beneficiary; providing in governing plan documents for a distribution committee representing the various stakeholder interests in the family's financial future, for a trust advisors whose guidance to the trustee could set a presumption of reasonableness, and a trust protector to represent the interests of beneficiaries to the trustee; and, perhaps, even putting in place a process for constituting, on an *ad hoc* basis, a neutral panel of agreed-upon qualified professionals to interpret and apply the terms of a trust instrument, which, if beneficiaries have consented to the terms of the trust agreement as a condition to their interests vesting, could be binding on all except for bad faith and fraud.

32 A client's property right to government entitlements can be preserved by having inherited and judgment award assets held in a supplemental needs trust, pursuant to 42 U.S.C. §1396p(d)(4)(A). Individuals receiving MediCal and SSI disability benefits, and who earn more than the permitted amount, can deposit their excess earnings into a supplemental income trust, pursuant to 42 USC § 1396p(d)(4)(B), and still be eligible to continue receiving government assistance.

33 For instance, executory obligations for additional capital contributions, and equity buy-sell obligations upon the occurrence of stated events

34 These run the gamut of the routine guarantee of children's obligations to third parties, to more substantial guarantees of commercial loans and complex cross-guarantees related to venture undertakings

35 When a client is the obligor on a secured loan, the essential solvency inquiries are, What is the value of the collateral at the time the client transfers assets into protected status, beyond the reach of creditors? and, Is it reasonably foreseeable that the value of the collateral will decline?

36 *E.g.,* operating a vehicle – as a simple example: If a client's vehicle has a purchase money lien against it, and if the client (though having the insurance coverage required by Insurance Code §11580.1b) does not maintain property and casualty insurance equal to the value of the vehicle if it is totaled in an accident, then the client is obligated under fraudulent transfer principles to retain sufficient assets to pay off the loan obligation.

37 Beyond the fact that California's anti-deficiency statute (CCP § 580b) relating to residential property purchase money loans limit residential lenders to the value of their collateral, there are still potentially significant liability risks relating to events occurring on the property.

- as a personal property owner (e.g. pets, livestock, etc)[38]
- marketplace liability, for being in the chain of commerce[39]
- business owner (e.g. residential rental property owner)[40]
- derivative liability as a parent[41]
- liability as an employer[42]
- as a professional service provider[43]

4. Strict liability:
   - vicarious liability as an employer[44]

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[38] *E.g.,* personal injury caused by attacks by pets, and accidents caused by livestock escaping pasture

[39] "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. GM Corp.,* 8 Cal.4th 548, 560, 34 Cal.Rptr.2d 607, 882 P.2d 298 (Sup.Ct. 1994)

[40] "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person…" (CC § 1714), including injury caused by foreseeable criminal activity, and unsafe conditions on the property

[41] *E.g.,* CC § 1714.1, "Liability of parents and guardians for willful misconduct of minor," resulting in damage or defacement of property, or injury to persons (e.g. negligent entrustment); "willful" means having "the mental capacity to intend to commit the wrongful act" (*Fire Insurance Exchange v. Altieri,* 235 Cal.App.3d 1352, 1354, 1 Cal.Rptr.2d 360, 361 (Ct.App. Sixth Dist. 1992); CC § 1714.3, "Civil liability for any injury to the person or property of another proximately caused by the discharge of a firearm by a minor under the age of 18 years shall be imputed to a parent or guardian having custody and control of the minor for all purposes of civil damages, and such parent or guardian shall be jointly and severally liable with such minor for any damages resulting from such act, if such parent or guardian either permitted the minor to have the firearm or left the firearm in a place accessible to the minor"; Veh. Code § 17707, "Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle"

[42] See, *Moore v. State Bar of California,* 62 Cal.2d 74, 396 P.2d 577, 41 Cal.Rptr. 161 (Sup.Ct. in bank 1964) (an attorney must accept responsibility to supervise the work of his staff); *Vaughn, Jr. v State Bar of California,* 6 Cal.3d 847, 494 P.2d 1257, 100 Cal.Rptr. 713 (Sup.Ct. in bank 1972) (attorney engaged in a course of conduct involving gross negligence and carelessness, tantamount to moral turpitude, in failing his responsibility to supervise the work of his associate attorney and his clerical staff)

[43] "[T]he court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed....'", *Cabral v. Ralphs Grocery Company,* 51 Cal.4th 764, 772, 248 P.3d 1170, 1175, 122 Cal.Rptr.3d 313, 319, [11 Cal. Daily Op. Serv. 2627, 2011 Daily Journal D.A.R. 3140] (Sup.Ct. 2011) (emphasis in the original), citing to (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6, 224 Cal.Rptr. 664, 715 P.2d 624; accord, *Parsons v. Crown Disposal Co., supra,* 15 Cal.4th at p. 476, 63 Cal.Rptr.2d 291, 936 P.2d 70; *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1841, 20 Cal.Rptr.2d 913.)

[44] "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if

- vicarious joint and several liability as a partner[45]
- alter ego liability as an entity owner[46]
- alter ego liability as a trust settlor or beneficiary[47]

5. Statutory liability:
   - tax liability[48]

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somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital,* 12 Cal.4th 291, 296, 907 P.2d 358, 361, 48 Cal.Rptr.2d 510, 513, [64 USLW 2414, 95 Cal. Daily Op. Serv. 9879, 95 Daily Journal D.A.R. 17,103] (Sup.Ct. 1995)

45 "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan*, 48 Cal.App.3d 557, 569, [122 Cal.Rptr. 119] (Fifth Dist. 1975))

46 "The law is well settled that, in order to cast aside the legal fiction of a distinct corporate existence, it must appear that the corporation is the business conduit and alter ego of its stockholders, and that to recognize it as a separate entity would aid in the consummation of a wrong. In other words, not only must it appear that one man or two men own the stock and control the policies, but it must also be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person or persons has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." *Wood Estate Co. v. Chanslor et al.,* 209 Cal. 241, 245-246, 286 P. 1001, 1002 (Sup.Ct. 1930). For alter ego liability due to enterprise undercapitalization, see Gelb, Harvey, "Piercing the Corporate Veil – the Undercapitalization Factor," 59 Chicago-Kent L. Rev. 1 (1982)

47 See, *Schwerin v. Kuhns,* 2014 WL 1435898 (Ct.App. First Dist. 2014) (unpublished/noncitable):

"The alter ego doctrine typically applies to pierce " 'the corporate veil.' " (See *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) The doctrine has two general requirements: (1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) an inequitable result will follow if the acts of the corporation are treated as those of the corporation alone. (*Ibid.*)

"The alter ego doctrine can also apply in the trust context. (*Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 365.) In the case of a trust, the question is whether the trustee lacks independence and simply carries out the bidding of the equitable owner of the trust property. (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 521–522; see *In re Schwarzkopf* (9th Cir. 2010) 626 F.3d 1032, 1037–1040 [alter ego doctrine applied where equitable owner dominated and controlled all decisions of the trust]; see also *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1319 [trust beneficiaries hold equitable estate and are regarded as real owners of trust property under general principles of trust law].) The trust itself cannot be a person's alter ego because a trust is not a separate legal entity. (*Greenspan v. LADT LLC, supra,* 191 Cal.App.4th at pp. 521–522.) Instead, the alter ego doctrine provides " 'a viable legal theory for creditors vis-a-vis trustees.' " (*Id.* at p. 522.)

"It appears the alter ego scenario in the Trust context commonly involves a settlor transferring assets to a trust to shield them from creditors, while still maintaining control over the assets. (See e.g., *In re Gillespie, supra,* 269 B.R. 383, 388–389.) In such a case, the trust is a sham from the outset. Here Schwerin does not claim the Trust was a sham when it was created. It was only after the settlor's death that observance of trust formalities allegedly ceased. If Schwerin can prove the requisite unity of interest (legal and equitable ownership), the alter ego doctrine should provide a viable legal theory for Bradenberg's creditors."

48 *E.g.,* donee liability for federal gift taxes (IRC § 6324(b)); liability of estate beneficiaries for all unpaid federal taxes of the decedent or the estate, to the extent of value distributed to them (IRC §§ 6324(a)(2), 6901(a)) (note: discharge of an executor under IRC § 2204 does not release beneficiaries from transferee liability); executor personal liability for unpaid estate taxes (31 USC § 3713(e.g.

- liability under federal and state law for environmental pollution[49]
- liabilities relating to statutory obligations to support family members[50]
- liabilities relating to statutory fiduciary duties owed to partners[51]

B. *Client Protection Planning Intent*

A trust is one asset protection tool where a client has the opportunity to explicitly state what her planning intent is. At common law, there are five requirements for a trust, two of which – *settlor intent* and *beneficiaries* – are statutory in California.[52] The central importance of these two statutory requirements lie in the fact that a trustee's faithful execution of its fiduciary duties is measured by the settlor's intent, and beneficiaries, who have equitable ownership of trust property,[53] are the ones to whom those fiduciary duties are owed.

Intent, then, is the critical component of a competent protection plan. "Asset protection," as a planning objective, is, conceptually, not objectionable;[54] but it is well-settled that a trust created for the purpose of defrauding creditors or other persons having a legitimate interest in the

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transferee liability for transfer taxes; "responsible person" fiduciary liability for tax withholding (IRC § 6672); spousal liability for income taxes reported on a joint return (IRC § 6013(d)(3))

49 See, Hingerty, Michael B., "Property Owner Liability for Environmental Contamination in California," 22 U.S.F.L. Rev. 31 (1987-1988)

50 In 2014, an 18-year-old child living in New Jersey sued her parents to force them to continue paying tuition for her to attend a private high school. New Jersey is one of 13 states that allow courts to award children of divorced or unmarried parents financial support for higher education expenses. In California, Fam. Code §3900 obligates parents to support their <u>minor</u> children "in a manner suitable to the child's circumstances," calculated on each parent's respective income and timeshare. In addition, Fam C §4062 gives the court discretion to order supplemental child support related to a child's educational needs, other special needs, and travel for visitation. However, though parental support obligations terminate under California law when a child becomes an adult, nothing prevents a parent from contractually binding himself or herself to pay for a child's educational or other expenses after statutory support obligations have ceased. For an interesting discussion of the New Jersey case and its issues, see Chinsky, Lawrence, "Opening the Floodgates: Adult Children Suing Their Parents For College Support: Has the Law In New Jersey Gone Too Far Or Not Far Enough?" 68 Rutgers U. L. Rev. 827 (2016).

51 Corp. Code § 16404

52 Those requirements are: a competent grantor; grantor intent in settling the trust (Prob. C. § 15201); property transferred into trust; a trustee; one or more beneficiaries (Prob. C. § 15205(a)).

53 *Schwarzkopf v. Broines,* 626 F.3d 1032, 1039, 53 Bankr.Ct.Dec. 266, 10 Cal. Daily Op. Serv. 14,590, 2010 Daily Journal D.A.R. 17,668 (9th Cir. 2010); *Steinhart v. County of Los Angeles,* 47 Cal.4th 1298, 1319, 223 P.3d 57, 72, 104 Cal.Rptr.3d 195, 213 [10 Cal. Daily Op. Serv. 1586, 2010 Daily Journal D.A.R. 1913] (Sup.Ct. 2010) (trust beneficiaries hold the equitable estate and, as such, are regarded as real owners of trust property under general principles of trust law)

54 See, *In re Ellison,* 2017 WL 3976304 (9th Cir. BAP 2017) (unpublished): In 2012, the debtor had significant judgments against him, and no job. In 2014, he consulted with a Nevada asset protection planning attorney. The court found that, considered by themselves, many of the debtor's transfers appeared to be "benign"; but considered in the context of the totality of his circumstances, the transfers taken together displayed a pattern of intent to hinder or delay creditors.

client's property is illegal and may be disregarded.[55] In this regard, timing is critical: consider the case of *In re: Medina,*[56] where, with husband's financial obligations becoming unmanageable, he and his wife entered into a transmutation agreement pursuant to Fam. Code Sec. 852(a). The husband's defense to the bankruptcy court was that he was only transmuting his wife's community property interest in their combined assets into her separate property, and that after the transmutation agreement he and his wife were in no different position as before. Further, he argued, he and his wife could have filed for divorce and gotten the same result, namely, recognition of their separate interests in marital property. The court disagreed, pointing out that at the time he entered into the transmutation agreement, an aspect of community property ownership was that the husband had a right to apply all of the assets of the community to pay his debts; after the transmutation, he only had his own half.[57]

The clearer a client expressly sets forth the non-creditor purposes for her asset protection plan, the more likely it is that her plan will be vindicated when it comes under judicial scrutiny. Non-creditor planning purposes include estate planning,[58] tax planning,[59] business planning[60] and personal financial planning.[61] If the operative word in asset protection planning is "preservation"

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55 *Schwarzkopf v. Broines,* 626 F.3d 1032, 1037, 53 Bankr.Ct.Dec. 266, 10 Cal. Daily Op. Serv. 14,590, 2010 Daily Journal D.A.R. 17,668 (9th Cir. 2010), citing to *In re Marriage of Dick,* 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743, 752 (1993); *see also* Prob.C. § 15203 ("A trust may be created for any purpose that is not illegal or against public policy")

56 2018 WL 6721764 (Bankr. S.D.Cal. 2018)

57 It is worth noting that, if husband and wife had gotten a divorce as an artifice for obtaining their separate rights in the community property, this would have been for the sole purpose of hindering and delaying the rights of the husband's creditors . . . and, arguably, the divorce would have been a voidable transaction.

58 For instance, transferring excess family wealth in a manner to protect it from creditors of children and grandchildren, to transfer unearned wealth to future generations in a way to avoid the enervating effects of unearned entitlement, and to maintain family harmony. In this last regard, consider the case of *In re Agnew*, 355 B.R. 276 (Bankr. D.Kan. 2006), where a farmer who owned an undivided one-fifth interest in his farmland on which he lived and in the farming equipment he used. Shortly before the farmer filed bankruptcy, the farmer transferred his interest in land and equipment to his mother in exchange for a lease for life on both. Years before this transfer, the farmer and his mother had discussed this transaction as a way to keep his siblings from evicting him from the land after mother died. The bankruptcy court held that the transfer was not fraudulent, and that the farmer could rightfully exempt the farm as his homestead.

Consider, too, the fact that the law has made available statutory protection tools such as 529 Plans and ERISA savings plans, for the purpose of giving workers and families a "head start" (as opposed to the "fresh start" objective of bankruptcy) toward personal economic security.

59 *E.g.,* to remove value out of the transferor's taxable estate; or, upstream transfers to take advantage of a poorer parent's or grandparent's estate tax exemption at death, and to get a step-up in basis as well; or, to put property into protected status by funding an irrevocable inter vivos qualified terminal interest trust (QTIP), to provide for a spouse during his lifetime and, if the QTIP is properly structured, on the death of the beneficiary spouse with the settlor spouse surviving, to have the beneficiary spouse's estate tax exemption applied to the trust value, to get a basis step-up for the trust property, and to make the trust property available to the surviving spouse for his/her lifetime.

60 *E.g.* to make sure assets are available for paying the transferor's contingent executory obligations to business partners, including future cash calls and buy-sell purchases of shares or units, and obligations pursuant to a third party guarantee.

61 *E.g.* to put assets into protected status to make sure funds are available to pay life insurance premiums

instead of "protection", the focus of planning is less with a view the transferor's creditors and more with a view to defensible family purposes.

Finally, clients in every socio-economic level have an interest in asset protection planning, for different reasons. Statutory exemption planning is the starting point of all protection planning, but it has particular relevance to clients at a lower end of the socio-economic scale. Clients at the upper reaches of the scale may have planning concerns that focus more on using protection planning tools to put family wealth beyond the reach of generational greed, and to incentivize personal development and financial self-sufficiency instead of entitlement and dependence. Clients rising in the middle class have an interest in protecting assets to support a quality of lifestyle, and to provide opportunities for their children. Finally, there are planning issues that arise from circumstances that can visit any client, regardless of socio-economic status – such as those relating to blended marriages, special needs children, family dysfunctions such as divorce and sibling rivalries and alienation of child from parent, and threats from financial predators, to name a few. However, for each client, clarity concerning the "why" of asset protection planning is the critical reference point for proceeding with the "how" and "what" of the planning process.

C. *Trust Beneficiary Access Options*

1. The Irrevocable Trust. By contributing property to an irrevocable trust, a settlor is presumed to have parted with all rights of dominion, control, enjoyment and disposition over that property. Irrevocable trust options include any and every kind of irrevocable trust, including "domestic" asset protection trusts.

2. Domestic Asset Protection Trusts.[62] With two exceptions, domestic asset protection trusts ("DAPTs")[63] (as distinct from "foreign" trusts that purport to provide similar benefits),[64] are irrevocable trusts that provide settlors with statutory protection

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[62] Appendix II attached to this article sets out a comparative summary of the elements of domestic asset protection trusts settled under the law of Alaska, Oklahoma, South Dakota and Nevada. A concise discussion of the DAPT statutes of all seventeen states, with forms, can be found at in *Bogert's The Law of Trusts and Trustees,* Ch. 51, "Domestic Asset Protection Trusts"

[63] Seventeen (17) states have enacted DAPT statutes: Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. All, except Oklahoma, require that a DAPT be irrevocable.

[64] This article will not address foreign trusts as an asset protection option. These trusts typically offer asset protection bolstered by several features expressly intended to obstruct, hinder and delay creditors in pursuit, by insulating the foreign trustee from the jurisdictional reach of U.S. courts, by flight provisions allowing the trustee to transfer the trust to other jurisdictions as a "catch me if you can" strategy, and by trust provisions that, *de jure* if not *de facto*, purport to disable the power of the settlor-beneficiary under creditor assault to demand and receive distributions from the trust. An instructive case is *Nastro v. D'Onofrio,* 263 F.Supp.2d 446, 45650 UCC Rep.Serv.2d 888 (Conn. 2003) , which addressed the issue of whether the foreign trustee of defendant's foreign asset protection trust was an *indispensable* necessary party to the litigation, such that without personal jurisdiction over that trustee the creditor's recovery action could not legally proceed. The *Nastro* court stated (at 456) as follows:

> Finally, "equity and good conscience" demand that his action go forward. D'Onofrio has transferred these certificates to an off-shore trust in Jersey, which is known as a haven for "asset protection" trusts, in an apparent effort to specifically thwart Nastro's efforts to collect a

from creditors by one of two mechanisms: (1) a settlor, as a beneficiary of her own irrevocable trust, is granted spendthrift protections while retaining a right to receive distributions for stated purposes (*e.g.* health, education, maintenance and support), or (2) a settlor is permitted to receive trust distributions in the discretion of the trustee.

The one exception to the statutory requirement that a DAPT be irrevocable, is the Oklahoma Family Wealth Preservation Trust Act.[65] Under this act, a resident or nonresident settlor may settle a Preservation Trust as either revocable or irrevocable. The act differs from the other states' DAPT statutes in that a settlor cannot be a beneficiary of her Preservation Trust.

The other distinction set out in the Oklahoma act is that trust property is <u>exempt</u> from creditors. The South Dakota Qualified Disposition in Trusts Act also uses this same protection mechanism. There still remains the distinction that an Oklahoma Preservation Trust can be revocable and the settlor cannot be a beneficiary, while a South Dakota Qualified Disposition Trust must be irrevocable and the settlor is a beneficiary.

A final notable distinction is that a revocable Oklahoma Preservation Trust is the only domestic asset protection trust that will be immune from the 10-year clawback provision in

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judgment. Courts have a responsibility to remedy wrongful conduct, and have, recently, cast a discerning eye at the substantiality of off-shore spendthrift trusts in order to find the proverbial "chink in the armor." *See, e.g., Lawrence v. Goldberg (In re Lawrence),* 279 F.3d 1294 (11th Cir.2002) (affirming bankruptcy court's contempt citation against settlor of an off-shore spendthrift trust, which was created two months prior to the issuance of an arbitration judgment of $20.4 million against him, who refused to repatriate the trust assets to the bankruptcy estate despite retaining control over the trust); *Federal Trade Commission v. Affordable Media, LLC,* 179 F.3d 1228, 1238–44 (9th Cir.1999) (affirming district court's contempt citation against perpetrators of a fraud scheme who refused to repatriate assets held in an off-shore spendthrift trust on the grounds that the perpetrators retained enough control over the trust so that they could be ordered to repatriate the assets). Here, the presence of the Connecticut corporations before this court is a sufficient connection to allow the court to provide relief. *See generally* 12 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 3021, at 167 (2d ed. 1997) ("However, a court may compel action outside of its jurisdiction by its order with regard to persons and property within its jurisdiction. 'Equity courts have known for a long time how to impose onerous alternatives at home to the performance of affirmative acts abroad as a means of getting those affirmative acts accomplished.' " (quoting *Kroese v. General Steel Castings Corp.,* 179 F.2d 760, 765 (3d Cir.1950))). The only impediment to providing Nastro a remedy is the abstract and dubious interest of the trustee, which can be adequately protected by other parties to this lawsuit with concurrent interests. *See Jaser v. New York Property Ins. Underwriting Ass'n,* 815 F.2d 240, 242 (2d Cir.1987) ("As an alternative to dismissal, a court should take a flexible approach when deciding what parties need to be present for a just resolution of the suit."). Therefore, the absence of the trustee does not necessitate dismissal of this action.

[65] The Oklahoma act embodies the essence of legitimate asset protection planning intent: asset preservation, to which protection is ancillary, for family purposes, not for anti-creditor purposes. While this intent may be otherwise inferred from the subtleties set out in planning documents based on the asset "protection" trusts of other jurisdictions, Oklahoma legislatively removes all doubt: an Oklahoma trust is to be used to underwrite family wellbeing and potential, not to defraud creditors (see 31 O.S. § 17).

federal bankruptcy, at 11 U.S.C § 548(e)(1)[66], which applies to *irrevocable* self-settled trusts which have the *debtor-settlor as a beneficiary*.

3. Purpose Distribution Trusts. "Ascertainable standards" for trust distributions is a developed concept in tax law[67] referring to definite and discrete distribution purposes reasonably susceptible of certain definition, such as "health, education, maintenance and support." In the family estate planning (including asset protection planning) venue, these standards most usually related to issues of family wellbeing, behavior and culture.[68] These standards can include character and personal development incentives.[69]

4. Discretionary Trusts. Trust property that can only be distributed to beneficiaries in the "sole and absolute" discretion of the trustee is, arguably, in the most defensible protected status possible. However, exercise of trustee discretion must always be reasonable, as measured by the settlor's intent.[70]

5. Use and Enjoyment Trusts. A class of purpose trust is one in which the settlor gives beneficiaries rights to use and enjoy trust property. For instance, a trustee may be authorized to use a beneficiary's interest to acquire a residence, held in a limited liability entity owned by the trust, for the beneficiary's use. It is not unusual for the trust to require some personal responsibility obligations from the beneficiary, such as reimbursing the trust for the cost of utilities, insurance and taxes, understanding that all such reimbursements by the beneficiary are accruing to the future trust value that will be available to his children, as successors to his beneficial interest. Such rights of use and enjoyment are personal in nature, and as such they cannot be transferred for the benefit of creditors.[71]

D. *Analysis of Client Obligations: Fraudulent and Voidable Transfers.* Transfers of property, without consideration, by a person who is unable to pay his current

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[66] §548(e)(1): In addition to any transfer that the [bankruptcy] trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if— (A) such transfer was made to a self-settled trust or similar device; (B) such transfer was by the debtor; (C) the debtor is a beneficiary of such trust or similar device; and (D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

[67] Internal Revenue Code (IRC), Sec. 2041, and the regulations promulgated thereunder

[68] See, for example, *Estate of Feinberg,* 235 Ill.2d 256, 919 N.E.2d 888, 335 Ill.Dec. 863 (Ill.Sup.Ct. 2009) (beneficiary restriction clause in trust providing that grandchild would be considered deceased for trust purposes if he married outside Jewish)

[69] See, Marjorie J. Stephens, "Incentive Trusts: Considerations, Uses and Alternatives," presented at the American College of Trust and Estate Counsel 2003 Annual Meeting,, March 4 - March 10, 2003, at http://www.actec.org/assets/1/6/A03_Stephens_Incentive_Trusts.pdf

[70] Prob. C. 16080; *In re Greenleaf's Estate, Greenleaf v. First National Bank in Santa Ana,* 101 Cal.App.2d 658, 225 P.2d 945, 948 (Fourth Dist. 1951) ("[T]he governing principle must be the intention of the settlor, which intention must be gathered from the general purpose and scope of the agreement . . . . the basic inquiry, whenever the exercise of a trustee's discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor.")

[71] Restatement Second, Trusts § 160

obligations as they become due, or whose net assets are not equal to the principal amount of his indebtedness, is voidable under the terms of the California Voidable Transactions Act.[72]

California adopted its Voidable Transactions Act (UTA)[73] in 2016, to replace the fraudulent transfers act it had adopted in 1986. Though California is listed as one of twenty states[74] to have enacted the Uniform Voidable Transactions Act promulgated by the Uniform Laws Commission, the California act differs significantly from the uniform act. For instance,

(1) Comment 2 under Sec. 4 of the uniform act, which states: “Section 4, unlike § 5, protects creditors of a debtor whose claims arise after as well as before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no requirement in § 4(a)(1) that the intent referred to be directed at a creditor existing or identified at the time of transfer or occurrence,” is not included in Sec. 3439.04 of the California act; and,

(2) The third paragraph under Comment 8 to Sec. 4 of the uniform act, which states: “A transaction that does not place an asset entirely beyond the reach of creditors may nevertheless ‘hinder, delay or defraud’ creditors if it makes the asset more difficult for creditors to reach. Simple exchange by a debtor of an asset for a less liquid asset, or disposition of liquid assets while retaining illiquid assets, may be voidable for that reason,” is not included in Sec. 3439.04 of the California act.

A material consideration in asset protection planning is *how much* to put into protected status. Comment 7(e) under UTA Sec. 3439.04 sets out as a badge of fraud, “Whether the transfer was of substantially all the debtor's assets.” The implication underlying this badge is that even a client with no debt and no creditors, actual or contingent, cannot impoverish herself without risking voidable transfer liability. Consistent with this principle is the 30-month[75] lookback period for MediCal eligibility, when a person impoverishes himself to qualify for government assistance.

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72 Civ. Code Secs 3439 – 3439.14

73 The word “uniform” is conspicuously omitted from the California Voidable Transactions Act. Reference to a “Uniform Voidable Transactions Act” occurs only the 2016 addition of Sec. 18640 to the Corp. Code (“§ 18640. Application of Uniform Voidable Transactions Act”), and in the case of *Potter v. Alliance United Insurance Co.,* --- Cal.Rptr.3d ----, 2019 WL 3296949, 19 Cal. Daily Op. Serv. 7113, 2019 Daily Journal D.A.R. 6951 (Second Dist. Div.5 07/23/2019), where the court only refers to the California act as the “Uniform Voidable Transactions Act” (see, fn. 2, “The UVTA was formerly known as the Uniform Fraudulent Transfers Act (UFTA) until it was amended and renamed effective January 1, 2016.”)

74 As of 2019, the other 19 states are: Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia; the act has been introduced in Massachusetts, New Jersey, New York, South Carolina

75 See, https://www.dhcs.ca.gov/services/ltc/Documents/Medi_CalQandA.pdf. Query: Does the Full Faith and Credit Clause of the U.S. Constitution require that a person who, while residing in California, satisfied the 30-month lookback period and is receiving MediCal, but who then moves to another state that has a 60-month lookback period, continue to receive Medicaid assistance from that other state even though that person has made disqualifying asset transfers within that other state’s 60-month lookback period? See, Rochelle Bobroff, “Enforcing Federal Rights Against States and State Officials,” at https://www.povertylaw.org/clearinghouse/fpmd/chapter8/section1, and, Gebhardt, Shawn, “Full Faith and Credit for Status Records: A Reconsideration of Gardiner,” 97 Calif. L. Rev. 5 (October 2009)

A final material consideration with regard to voidable or fraudulent transfers is: Does the limitations period for fraudulent transfer purposes begin to run when the transfer is known or knowable, or when judgment is entered against the defendant? The Second District appellate court, in a pre-UTA unpublished opinion,[76] concluded as follows: "While a plaintiff under the UFTA is not required to wait until he or she has a judgment in order to file an action to set aside a fraudulent transfer, we find that if the plaintiff opts first to obtain the judgment, the subsequent action for fraudulent transfer is not barred if brought in a timely manner thereafter."

E. *Analysis of Client Obligations: Reasonably Foreseeable Liabilities*. The issue of reasonably foreseeable liabilities is first a matter of duty for tort liability purposes, not for fraudulent or voidable transfer purposes. The California Supreme Court, in *Cabral*,[77] defined the duty inquiry as follows: "[T]he court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed....'"

Duty, so broadly defined, implicates Comment 2 under Sec. 4 of the Uniform Voidable Transaction Act, which, as noted above, does not appear under Civil Code Sec. 3439.04 of the California Voidable Transactions Act. That comment states, in part, "there is no requirement in § 4(a)(1) that the intent referred to be directed at a creditor existing or identified at the time of transfer or occurrence." It may be a reasonable inference that,

- if a client is engaged in any activity to which attaches an actuarial possibility of causing "sufficiently likely to result in the kind of harm experienced" from the client's actions, and,
- if the client does not insure against the possible occurrence of that harm, and
- if Comment 2, though omitted from the California UTA, is determined to be applicable, then
- transfers of assets into protected status made by the client could be deemed to be voidable transfers.

F. *Spousal Rights in Client's Property*. Only the separate property of a client should be transferred into protected status. Transmutation of the character of property from community "is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."[78]

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[76] *Hsieh v. Hsieh,* 2015 WL 914025 (Second Dist. Div. 7 2015)

[77] See fn. 43 supra. *Cabral v. Ralphs Grocery Company,* 51 Cal.4th 764, 772, 248 P.3d 1170, 1175, 122 Cal.Rptr.3d 313, 319, [11 Cal. Daily Op. Serv. 2627, 2011 Daily Journal D.A.R. 3140] (Sup.Ct. 2011)

[78] Fam. C. § 852(a). See, *Tran v. Nguyen,* 2019 WL 2207125 (App.Ct. Fourth Dist. Div. 3 05/22/2019) (unpublished/noncitable), where a husband executed an Interspousal Transfer Grant Deed conveying property into the name of his wife; the wife subsequently claimed the property as her separate property, but the court held that since there was no recitation in the deed of the grantor's intent to convey the property to her as her separate property, the "express declaration" requirement of Fam. C. § 852(a) had not been satisfied.

The *Dahl*[79] case is instructive. In that case, husband had settled an irrevocable Nevada asset protection trust without his wife's knowledge, making her a beneficiary as long as she was married to him. Divorce proceedings were subsequently filed in Utah, where the couple lived. The Utah court found that, since property in which the wife had a marital interest had been used to fund the trust, the wife was a co-settlor of the trust, with the right to disregard the irrevocable nature of the trust and reach her share of its property.

G. *Tax Planning.* There are income and transfer tax implications to every asset protection plan. These include grantor trust planning, basis step-up planning, and charitable planning.

1. Grantor Trust Rules. The grantor trust rules[80] have particular application to asset protection trusts, due to the compressed marginal federal income tax rate brackets applied to trusts[81] as opposed to the same rate brackets applied to individuals.[82] However, before 1954, when the grantor trust rules were enacted, the situation was reversed, and income-producing assets were put into trusts. So, the tax effect where the grantor trust rules apply is that trust income is reported by the grantor on her own Form 1040.

Many of the grantor trust rules will cause the value of the trust to be included in the grantor's taxable estate, thus defeating the purpose of settling and funding an irrevocable trust. However, the following grantor trust powers will not cause estate inclusion:

- Where the trust instrument gives the grantor or another person, in a nonfiduciary capacity, the power to acquire trust property by substituting other property of an equivalent value.[83]

  Important planning notes:

  (i) This power is very useful for basis step-up planning. For instance, if depreciated assets are held by the trust, with the prospect of ordinary gain recapture upon sale, the grantor could acquire to include them in her

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79 *Dahl v. Dahl,* --- P.3d ----, 2015 WL 5098249, 794 Utah Adv. Rep. 5, 2015 UT 79 (Sup.Ct. 08/27/2015), amending and superseding *Dahl v. Dahl,* 345 P.3d 566, 779 Utah Adv. Rep. 13, 2015 UT 23 (Sup.Ct. 01/30/2015)

80 The grantor trust rules are set out at Secs. 671-679 of the Internal Revenue Code

81 2019 income tax rate brackets for trusts and estate are:
$0 to $2,600 in income: 10% of taxable income
$2,601 to $9,300 in income: $260 plus 24% of the amount over $2,600
$9,301 to $12,750 in income: $1,868 plus 35% of the amount over $9,300
Over $12,751 in income: $3,075.50 plus 37% of the amount over $12,750

82 2019 income tax rate brackets for a married couple filing jointly:
$0 to $19,050 in income: 0% of taxable income
$19,051 to $77,400 in income: 12% of the amount over $19,050
$77,401 to $165,000 in income: $9,288 plus 22% of the amount over $77,400
$165,001 to $315,000 in income: $36,300 plus 24% of the amount over $165,000
$315,001 to $400,000 in income: $75,600 plus 32% of the amount over $315,000
$400,001 to $600,000 in income: $128,000 plus 35% of the amount over $400,000
Over $600,001 in income: $222,000 plus 37% of the amount over $600,000

83 IRC § 675(4)(C); the IRS ruled in PLR 200603040 that retention of this power did not cause estate inclusion

taxable estate, with the result that the assets get a tax-free step up in their basis at the grantor's death[84]

(ii) It is inadvisable to give the client-grantor this power, because this power will become property of a debtor's bankruptcy estate; if family business equity is held in the trust, then the trustee can acquire the equity at its discounted value, and sell the family business

- Where the trust instrument gives a "non-adverse" third party, that is, someone other than the grantor, the grantor's spouse or a trust beneficiary, a power to add beneficiaries to the trust (other than after-born or after-adopted children)[85]
- Where the trust instrument authorizes the trustee to use trust income to pay premiums on insurance on the life of the grantor or the grantor's spouse[86]

Finally, the tax efficiency of grantor trusts includes the fact that a sale transaction between the grantor and her grantor trust results in no recognition of gain – it is a seamless income tax-free transaction.[87] This opens the door to an array of downstream planning opportunities for the grantor and her irrevocable grantor trust.

2. Basis Step-Up Planning. One species of asset protection planning is to protect unrecognized gain from appreciated assets, to the extent possible. Under current law, one of the most readily available ways of doing this is to include assets in a decedent's taxable estate, to get a step-up in asset basis to their fair market value as of the date of the decedent's death.[88] This would apply to ordinary gain recapture with regard to depreciated assets, as already noted. And given the increased federal estate tax exemption,[89] a client's upstream family members with non-taxable estates can contribute to the overall family wealth by becoming part of a family asset protection plan which gives them powers that will cause plan asset value to be included in their taxable estates.

3. Charitable Planning. The charitable lead trust, properly structured, can lessen, and possibly eliminate, estate taxes on a taxable estate. For instance, the value of a revocable Oklahoma Family Wealth Preservation Trust is includable in its grantor's taxable estate. But a charitable trust can be a "qualified beneficiary" of a Preservation Trust. Trust value contributed to a charitable lead trust can have terms which result in a net zero taxable estate. And the remainder beneficiaries of the charitable trust, after the intervening charitable interest terminates, can be asset protection trusts for the grantor's descendants.

H. *Alter Ego.* The elemental maxim in asset protection planning is that the client's creditor will step into her place, to exercise whatever powers she has with regard to her assets. For this reason, it is important – even imperative – for the client to adjust to the fact that her assets in protected status have been transferred beyond her control. A client who exercises

84 IRC § 1014
85 IRC § 674; adding a charitable beneficiary is one option that opens up significant tax-efficient planning options
86 IRC § 677
87 Rev. Rul. 85-13
88 IRC § 1014
89 $11,480,000 in 2019, to increase annually through 2025

subtle but actual control over those ostensibly having ownership of assets, will compromise the protections shielding those assets. See the discussion of "alter ego" on page 12, at footnote 47.

I. *Asset Protection Tools.* The tools available for asset protection planning are both statutory and contractual.

First, the right of a client to contractually create legally enforceable relationships with fiduciaries and partners, such as trustees and entity partners and insurer, to put a protective shield around her assets is actually rooted in the deep history of our legal system – a right which government is bound to protect. That right is set out in the Contracts Clause of the U.S. Constitution, at its Article I, Section 10, Clause 1: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

The Contracts Clause was framed by a proposal made by Rufus King of Massachusetts at the Constitutional Convention, that there be a prohibition against the states interfering with private contracts, explicitly referring to the Northwest Ordinance which had been adopted in 1787 by the Confederation Congress. A central provision of the Ordinance stated:

> [I]n the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.[90]

The issue of debtor oppression was a central concern of the Anti-Federalists in this discussion. The Anti-Federalists feared that the phrase "previously formed" would limit the states from assisting the debtor classes. James Madison, for the Federalists, argued that debtor relief would undermine the long-term stability of commercial transactions. The counterpoint to this discussion was the power delegated to Congress in Article I, Section 8, Clause 4, "to establish uniform Laws on the subject of Bankruptcies throughout the United States," as a legal refuge for debtors from creditor oppression.

It is in the context of this historical legal framework that we can set out a list of contractual options available to clients in preparing a Kevlar web of asset protection arrangements, for excess assets over and above what the client needs to maintain and support herself and those for whom she has a legal obligation to provide for, and what the client needs to fulfill her contractual obligations to third parties.

1. Statutory Exemptions. Statutory exemptions are the first resort for asset protection planning. California has two statutory exemption schemes between which residents can choose (subject to U.S. Bankruptcy residence requirements, see 11 USC § 522(b)(3)), found at CCP §§ 703 and 704. Asset protection planning begins with applying

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90 Sec. 14, Art. 2 (the text of the Northwest Ordinance may be found at https://avalon.law.yale.edu/18th_century/nworder.asp)

statutory exemptions, and then using limited liability entities owned, in large part, by an asset protection trust.

2. Limited Liability Entities. A corporation, limited partnership or limited liability company organized under California law, sufficiently capitalized and properly administered, will provide protection for the equity holder (corporate shares, limited liability company units, or partnership interests) from entity liabilities. While there is no statutory protection for corporate shares in the hands of a debtor shareholder, the intervening interests of third parties to a shareholder agreement can interdict the claims of a shareholder's creditors, if that agreement obligates a debtor shareholder to sell her shares to the other shareholders or to the company.

So, a shareholder's creditors will get something, that is, whatever the sales price is for the debtor shareholder's shares under the terms of a shareholder agreement. However, the situation is different with regard to creditors of a member of a limited liability company and partners of a limited partnership: these creditors will only be able to get a statutory "charging order". The reason for this difference lies in a fundamental distinction between the duties which corporate shareholders owe to each other, and the *fiduciary* duties (and, also, often the executory contractual obligations for additional capital contributions set out in the entity's governing operating agreement) that members and partners of a limited liability company and a limited partnership owe to each other.

Corporate shareholders owe each other duties of good faith and fair dealing; but the fiduciary duty that members and partners owe each other is the highest level of mutual duty imposed by law.[91] Fiduciary duty is not assignable, and it is for this reason that limited liability companies and limited partners are protected from the creditors of their members[92] and partners[93] by a statutory charging order.[94,95]

Many states, by statute, provide that the charging order is a creditor's only remedy against a member of a limited liability company, even if the limited liability company has only one member. In the case of a one-member limited liability company, it is not the existence of fiduciary duty between members but the legislative statutory mandate that gives the charging order its protective effect.

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91 "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." (J. Cardozo, *Meinhard v. Salmon,* 249 N.Y. 458, 463-464, 164 N.E. 545, 62 A.L.R. 1 (Ct.App. 08/09/2012))

92 Corp. C. §§ 17302, 17705.03

93 Corp. C. § 15907.03

94 See, *In re Albright,* 291 B.R. 538, 541 (Bankr. D.Co. 2003)

95 A charging order is similar in its legal effect to a wage garnishment, inasmuch as a charging order requires the company to deliver to the order holder any distributions that would be distributed to the debtor member or partner. However, as long as a limited liability company and a limited partnership continues to operate consistent with its statutory existence, it and its assets are safe from intrusion or attachment by the creditor.

For these two reasons – one, the personal nature of fiduciary duty, and, second, the statutory limit of creditor recovery to the charging order – prudent asset protection planning will give some quantum of interest in a limited liability company to at least one other person in addition to the asset protection client.

In addition to using a limited liability company to protect assets from the client's future creditors, a management limited liability company can be used to protect the client from liabilities arising from others' use of limited liability assets. For instance, a vehicle operated by a third party – including an adult child – can be transferred into a limited liability company owned partly with the child (who pays the costs of using, insuring, maintaining and registering the vehicle) and mostly with the parent (who may have contributed the vehicle to the company), should protect the parent from liabilities arising from the child's use of the vehicle As another example, it is not unusual for multiple owners of an airplane to have a limited liability company owned the airplane, with the owners having membership interests (and rights to use the aircraft) proportionate to their relative contributions to the purchase price of the airplane.

3. <u>Trusts</u>. Trusts, both revocable and irrevocable, are available as asset protection tools.

a. *Revocable trusts* which provide asset protection include:

i. the Oklahoma Family Wealth Preservation Trust;
ii. individual retirement accounts (IRAs) and Employee Retirement Income Security Act (ERISA)[96,97] plans; and,
iii. 529 Plan[98] accounts.

A revocable Oklahoma Preservation Trust is a statutory protection tool that is unique among domestic asset protection trust statutes offered by the states. A Preservation Trust can be settled by a resident or nonresident[99] as either a revocable or irrevocable[100] trust, and the trust must also have at least one corporate trustee that has a physical office in Oklahoma. To avoid compromising the robust statutory protections that shield Preservation Trust assets, it is imperative that the trustee avoid jurisdictional "minimum contracts" with any other state, and that rights of non-Oklahoma beneficiaries of a Preservation Trust likewise do not give foreign taxing authorities jurisdiction to tax that beneficiary's interest in the trust.[101] Insulation of the

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96 IRC §§ 401(a), 403(b), 410(b) and 457. Federal labor law on ERISA is codified at 29 U.S.C. § 1001 *et seq.* Reporting and disclosure requirements and responsibilities are set forth in 29 C.F.R. Parts 2509, 2510, 2520, 2530 and 2550. Interpretive bulletins explaining the Act are contained at 29 C.F.R. § 2509.75-2 *et seq.*

97 ERISA plans include 401(k)s, pensions, deferred compensation plans, profit-sharing plans, health maintenance organization (HMO) plans, health reimbursement plans (HRA), health flexible spending accounts (FSA) dental and vision plans, prescription drug plans, employer provided disability and life insurance, and 419(f)(6) and 419(e) welfare benefit plans.

98 IRC § 529

99 31 O.S. § 11(1)

100 31 O.S. § 13

101 See, *Hanson v. Denckla,* 357 U.S. 235, 251 (1958) ("We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the

trust is an administrative imperative on which the virility of the trust depends, and it would be prudent to draft this into the trust agreement as an affirmative duty of the trustee.

The one common law principle of debtor-creditor law that the Oklahoma Family Wealth Preservation Trust Act alters by statute, is that, with regard to a revocable Preservation Trust, the grantor's creditors cannot step into the grantor's place to exercise the grantor's revocation power.[102,103]

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record discloses no solicitation of business in that State either in person or by mail."); *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust,* 139 S.Ct. 2213 (June 21, 2019) ("This case is about the limits of a State's power to tax a trust." [2217] Where a beneficiary residing in a state receives no income from the trust, has no right to demand that trust income be distributed to her, and could not count on ever receiving income from the trust, in-state residence of the trust beneficiaries does not supply the due process minimum connection with that state to support the state imposing tax on trust income. There must be some definite link, some minimum connection, between the taxing state and the trustee, trust property, or trust transaction.)

102 This common law principle is set out in 60 O.S. § 299.15; the Oklahoma Family Wealth Preservation Trust Act, at 31 O.S. § 12, provides that "[n]otwithstanding Section 3 of this title and Section 299.15 of Title 60 of the Oklahoma Statutes, . . . "

103 The Oklahoma Family Wealth Preservation Trust Act provides a statutory framework within which can be filled in with prudent creditor protection provisions set out in the trust agreement, such as:

- including in the trust agreement's recitals that the grantor has executed due diligence affidavits and certifications
- setting out a grantor covenant that all of the representations made in the grantor's due diligence affidavits and certifications will apply to and be trust of any assets contributed to the trust
- requiring that only separate property of the grantor be contributed to the trust
- the trust hold contributed property in one of three classifications: as "*Contingent Assets*" to be available to satisfy any grantor liability for existing unresolved creditor claim issues; as "*Collateral Assets*" for contributed property that is security for a grantor's existing contractual obligations (see in this regard, 31 O.S. § 12, "Transfer of an asset to a preservation trust does not affect any mortgage, security interest or lien to which that asset is subject"; holding collateral property in a Preservation Trust will have the effect of protecting asset equity, as loans are paid off and asset equity increases); and as "*Clean Assets*" which have no third party interests attaching to them
- requiring that trust property be held in one or more limited liability companies which has each trust beneficiary as a member owning a minimal percentage and the trust owning the rest (if the grantor, exercising her revocation power, deletes a beneficiary, the buy-sell provisions set out in the limited liability company would have the right to redeem that beneficiary's interest under the terms of the governing operating agreement)
- The grantor's exercise of her revocation power is limited to removing and replacing beneficiaries, matters relating to removing trust officers and replacing them with independent persons (as defined in IRC § 672(c)), and increasing the vested interest of beneficiaries in trust property
- The trust is authorized, for consideration from the grantor, to give the grantor a line of credit, annually renewable and adequately secured with the grantor's property
- The trust is authorized, for consideration paid by the grantor, to guarantee the grantor's contractual obligations to commercial lenders

With regard to traditional IRAs [104] and "Roth" IRAs,[105] these have limited exemption under federal law[106] and California law[107] from creditors of a participant. An inherited IRA is entirely available to creditors of non-spousal beneficiaries.[108]

529 Plan accounts cannot be voluntarily alienated[109] and they can only have "designated beneficiaries".[110,111]

b. *Irrevocable trusts* include:

i. domestic asset protection trusts (see, page 15 supra, and Appendix II)
ii. spousal limited access trusts ("SLAT");[112]
iii. inter vivos qualified terminal interest trusts ("inter vivos QTIP")[113]

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104 IRC § 408
105 IRC § 408A
106 For IRAs, exemption limited "to the extent" that it is "reasonably necessary [to] support" the accountholder or his dependents. [11 U.S.C.] § 522(d)(10)(E)", *Rousey v. Jacoway,* 544 U.S. 320, 326, 2006-13 I.R.B. 656, 125 S.Ct. 1561, 1566, 161 L.Ed.2d 563, 95 A.F.T.R.2d 2005-1716, 73 USLW 4277, 2005-1 USTC P 50,258, 53 Collier Bankr.Cas.2d 181, 44 Bankr.Ct.Dec. 144, Bankr. L. Rep. P 80,263, 2006-1 C.B. 656, 34 Employee Benefits Cas. 1929, 05 Cal. Daily Op. Serv. 2846, 2005 Daily Journal D.A.R. 3851, Pens. Plan Guide (CCH) P 23991C, 18 Fla. L. Weekly Fed. S 223
107 Civ. Proc. C. § 704.115(a)(3); § 704.115(e), "exempt only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor, taking into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires."
108 *Clark v. Rameker,* 573 U.S. 122, 134 S.Ct. 2242, 189 L.Ed.2d 157, 113 A.F.T.R.2d 2014-2308, 82 USLW 4481, 2014-1 USTC P 50,317, 71 Collier Bankr.Cas.2d 865, 59 Bankr.Ct.Dec. 159, Bankr. L. Rep. P 82,641, 14 Cal. Daily Op. Serv. 6428, 2014 Daily Journal D.A.R. 7431, 24 Fla. L. Weekly Fed. S 843 (2014).
109 IRC § 529(b)(5)
110 IRC § 529(e)(1)
111 Inherited 529 Plans have been held to be exempt from creditors, *In re Hennessy,* 526 B.R. 806, 72 Collier Bankr.Cas.2d 1832 (Bankr. D.Minn. 2015)
112 This trust has the grantor's spouse as beneficiary, but which has provisions that disqualify it for the federal gift tax deduction for inter-spousal gifts; so, the grantor applies his lifetime unified gift and estate tax credit to the transfer, to avoid paying gift taxes. The trust can give the spouse-beneficiary a limited testamentary power of appointment, with the grantor being a permitted appointee at the beneficiary's death; in this way, (a) the grantor's gift in trust for his spouse removes that value from his taxable estate, (b) the trust value is not included in the estate of the beneficiary spouse, and (c) the grantor can enjoy what remains in this trust upon the beneficiary's death without the remainder being included in the grantor-survivors's taxable estate.
113 IRC § 2523(b) permits a marital deduction for property transferred to a trust having the grantor's spouse as the sole beneficiary during that spouse's lifetime, and requiring that all trust income be distributed to the beneficiary spouse at least annually; at the beneficiary spouse's death, the trust value is included in the beneficiary's taxable estate. See, Reg. 25.2523(f)-1(b)(3)(i). If the trust gives the beneficiary spouse a limited testamentary power to appoint, with the grantor being a permitted appointee at the beneficiary's death. As with the SLAT, the estate tax exemption of the deceased beneficiary spouse is applied to the remainder of trust value, and the surviving grantor spouse can be appointed as beneficiary of the remainder with no remainder value included in the survivors taxable estate. The difference between this inter vivos QTIP trust and the SLAT is the tax avoidance mechanism: the SLAT draws down on the *grantor's federal lifetime gift and estate tax exclusion*; the

iv. generation-skipping dynasty trusts[114,115]
v. discretionary, spendthrift and purpose trusts for third parties[116]
vi. third party settled special needs trust[117]
vii. MediCal qualified income[118] or supplemental needs[119] trusts
viii. qualified charitable trust[120]
ix. qualified personal residence trusts[121]
x. grantor retained annuity trusts[122]
xi. intentionally defective grantor trusts[123]

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inter vivos QTIP uses the marital deduction for gifts between spouses, and then applies the *beneficiary's estate tax exclusion* at the beneficiary's death.

114 This irrevocable trust is settled during the grantor's lifetime for the benefit of his or her descendants, from children onward. Property contributed to the trust is a taxable gift, to which the grantor applies his/her lifetime federal unified gift and estate tax credit; the contribution is also subject to the federal generation-skipping transfer tax (GSTT), to which the grantor applies his/her GSTT exemption (IRC § 2631)

Funding the trust removes the future appreciated value of contributed property from the grantor's taxable estate, and if it is a "grantor trust" (as discussed supra in this article) the grantor will pay the trust's income tax liabilities and, in this way, will be making a tax-free constructive gift to the beneficiaries (see Rev. Rul. 2004-64, which held that payment of trust income tax liabilities by a grantor was not a taxable gift from the grantor to the beneficiaries).

A "dynasty" trust is settled in a jurisdiction that has effectively abolished the statutory and common law "rule against perpetuities" so that the trust will not be under any legal obligation to terminate sometime in the future. California adopted the Uniform Statutory Rule Against Perpetuities in 1991, codified at Prob. C. 21205-21209, and requiring that an interest in trust is certain to vest no later than (a) 21 years after the death of an individual alive when the trust was settled, or (b) 90 years after the date the trust was settled. Before adoption of the Uniform Rule, apparently California's former perpetuities statute permitted perpetual trusts (see, Dukeminier, Jesse Jr., "Perpetuities Revision in California: Perpetual Trusts Permitted," 55 Cal. L. Rev. 3 (Aug 1967).

115 But s`ee, Horowitz, Steven J. and Sitkoff, Robert H., "Unconstitutional Perpetual Trusts," Discussion Paper No. 790, Harvard John M. Olin Center for Law, Economics, and Business (08/2014); available at: http://www.law.harvard.edu/programs/olin_center/

116 See, Para. 3, "Purpose Distribution Trusts", pg. 17 supra

117 In order not to cause a person who is receiving government means-tested assistance from being disqualified, a trust for that person must prohibit distributions to the person or to others on that person's account, except to pay for items, activities and amenities that would contribute to that person's quality of life. One challenge in administering a third-party special needs trust is selecting a trustee: if a family member is the trustee, it is not usual that this family is also the remainder beneficiary of whatever is left in this special needs trust when the beneficiary dies; this presents an unavoidable financial conflict of interest that may be best resolved by engaging a professional fiduciary for the trust.

118 42 USC Sec. 1396p(d)(4)(B)

119 42 U.S.C. §1396p(d)(4)(A)

120 These would be: (a) charitable remainder trusts, drafted pursuant to IRC § 664,or (b) a charitable lead trust, drafted pursuant to IRC § 642(c). The IRS has published model forms for these trusts: for charitable remainder trusts, at Rev. Proc. 2005-52 through Rev. Proc. 2005-59; for charitable lead trusts, at Rev. Proc. 2007-45 and Rev. Proc. 2007-46.

121 See, Treas. Reg. § 25.2702-5

122 See, Treas. Reg. § 25.2702-3

123 This is an irrevocable trust that incorporates a "grantor trust" provision which causes trust income to be taxed to the grantor instead of to the trust itself.

xii. "Health and Education Exclusion Trust"[124]
xiii. "Beneficiary Defective Inheritor's Trust"[125]
xiv. Incomplete-Gift Non-Grantor ("ING") Trust[126]
xv. tax-qualified account beneficiary trust.[127]

4. Insurance. In light of the potential for actuarially foreseeable tort claimant, to protect the asset protection plan the client should maintain minimal property and casualty insurance covering her business, professional and personal life activity liability exposures. There appears to be no case law on point concerning in this regard. However, a client operating in a marketplace or acting in some other venue where insurance actuaries calculate the likelihood that a kind of damage will occur as a result of the kind of actions the client performs, implies that those kinds of actions have a foreseeable probability of causing that kind of damage. This logic could be grounds for a court to analogize the situation of an under-insured person to an undercapitalized corporation, and to conclude that the client who put her assets beyond the reach of such creditors, before any loss to that creditor occurred, is constructive fraud on such creditor to the extent the damage was actuarially likely to occur.

Under the California VTA, a "creditor" is someone who *has* a "claim", without reference to whether the claim existed at the time an asset is transferred. The California supreme court, in *Mejia v. Reed*, held that "[u]nder the UFTA, a transfer is fraudulent, both as to present *and future* creditors, if it is made '[w]ith actual intent to hinder, delay, or defraud *any* creditor of the debtor.' (Civ.Code, § 3439.04, subd. (a).) Even without actual fraudulent intent, a transfer may be fraudulent as to present creditors if the debtor did not receive 'a reasonably equivalent value in exchange for the transfer' and 'the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.' (Civ.Code, § 3439.05.)" [128] [emphasis added] In *Mejia,* the issue as to future creditors was the transferor's intent at the time of transfer, and as to present (unknown?) creditors constructive fraud attached as well. An asset protection lawyer should consider the advisability of discussing possible challenges which being under-insured could pose to her asset protection plan.

J. *Jurisdiction*

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[124] This trust was presented by attorney David A. Handler at the American Bar Association 2006 Joint Fall CLE Meeting ("Structuring Transfers and Trusts to Qualify for Gift and GST Tax Exclusions for Educational and Medical Expenses Under §§ 2503(e); 2611(b); and 2642©"). It purports to be a trust that is immune from the federal generation-skipping transfer tax (GSTT), which can be used to pay for the education and medical care of the grantor's grandchildren and more remote descendants without being subject to the GSTT.

[125] See, Easton, Reed W., "Using Third-Party Settled Trusts to Avoid Taxes and Creditors in Large Estates," Practical Tax Strategies (Nov 2014)

[126] This is a trust to which income-producing assets are transferred to a trust settled in a no-trust jurisdiction ("NING" – Nevada Incomplete-Gift Non-Grantor Trust; "DING" = Delaware Incomplete-Gift Non-Grantor Trust), in order to escape taxation in the grantor's state of residence.

[127] See, Treas. Reg. § 1.401(a)(9); highly recommended: Choate, Natalie B., *Life and Death Planning for Retirement Benefits,* 8th Ed.

[128] 31 Cal.4th 657, 664, 74 P.3d 166, 170, 3 Cal.Rptr.3d 390, 395, [03 Cal. Daily Op. Serv. 7306, 2003 Daily Journal D.A.R. 9119] (Sup.Ct. 2003)

The fundamental jurisdiction of a court reaches to the person (in personum jurisdiction), to the property (in rem jurisdiction) and/or limited by statute to a particular subject matter (*e.g*. probate, workman's compensation court, U.S. Tax Court). In personum jurisdiction is either general (authority over the person for all matters) or specific (authority over the person for matters arising out of or related to the activity of the person in the jurisdiction).[129] A court has in rem jurisdiction over tangible personal property and real property located within its boundaries.

There is one overarching reason why the persons administering a client's asset protection plan will take extraordinary precautions to stay beyond the reach of a foreign court's personal jurisdiction: Without personal jurisdiction over the plan control persons, that court's judgments are not binding on those control persons, and the U.S. Constitution's Full Faith and Credit Clause will not require that this court's judgments be recognized and enforced in the state where the plan's control persons reside.[130]

Personal jurisdiction by a foreign court over a nonresident person – say, the trustee of a DAPT – can only be obtained if the nonresident has certain intentional "minimum contacts"[131] with the foreign state, to purposefully avail itself of the privileges and protections provided by that foreign state.[132]

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[129] Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are substantial, continuous and systematic. If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the specific jurisdiction of the forum. A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of' the defendant's contacts with the forum; and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice. (*Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd.,* 31 Cal.App.5th 543, 553, 242 Cal.Rptr.3d 705, 19 Cal. Daily Op. Serv. 795, 2018 Daily Journal D.A.R. 596 (Second Dist. Div.7 01/22/2019))

[130] "Even before passage of the Fourteenth Amendment this Court sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over nonresident defendants." (*Hanson v. Denckla,* 357 U.S. 235, 255, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958)). See also: O'Connor, Erin, "Full Faith and Credit Clause" *The Heritage Guide to the Constitution,* pp. 345-348, Regnery Publishing (2014); Redpath, Elizabeth, "Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records," 62 Emory L. J. 639 (2013); Mortland, Jean A., "Interstate Federalism: Effect of Full Faith and Credit to Judgments," 16 U. Dayton L. Rev. 47 (1990)

[131] *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945) (due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.,* 952 F.Supp. 1119, 1124 (W.D.Pa.1997) (there must be evidence that the defendant "purposefully availed" itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts)

[132] *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.,* 952 F.Supp. 1119, 1124 (W.D.Pa.1997) (there must be evidence that the defendant "purposefully availed" itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts)

Finally, if a foreign court gets personal jurisdiction over the trustee of a asset protection trust, in addition to being able to require the trustee's home state to enforce its judgments on the basis of the Full Faith and Credit Clause, the foreign court can also negate the law of the trust and impose the foreign state's own law on the deliberation under conflict-of-laws principles.[133]

III. Conclusion

The asset protection planning attorney undertakes duties to her profession, to her clients and to a political system committed to "human flourishing" facilitated by legally protected rights in property calibrated to personal rights of enterprise and opportunity in a world fraught with risks. This article devotes a significant amount of its focus to these preliminary, but foundational, considerations which orient an asset protection planning practice to its historical, philosophical and ethical contexts. Understanding these contexts emphasizes the importance of professionalism, of acquiring knowledge and understanding of arcane legal principles, of patiently parsing statutes for precision and case law for instructive guidance, and of committing to practice our contemplative profession with growing skill and insight.

The technical aspects of asset protection planning orbit around three baseline considerations:

(1) first, assess the client's risks of liability
(2) second, divine the broad outlines of the client's planning intent
(3) third, fill up the protection "buckets," with statutory exemptions being first, then limited liability entities held in a asset protected trust, and, finally, maintain a minimal insurance wrapper for risks that are actuarially likely to occur.

Transfer of property as part of an asset protection plan begins with due regard for third party rights in that property, whether statutory (obligations of support), contractual (obligations to lenders and partners) or as a duty to those who share life's road with us (potential obligations for damages). As set out in the law, these are those having "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" under voidable transactions law (Civ. C. 3439.01(b)), and those who have a right to not be harmed by negligent actions "likely to result" in that kind of harm (*Cabral v. Ralphs Grocery Company*, fn. 43 supra). If the interests of those two classes of potential claim-holders are adequately addressed, then the rest of the client's

133 See, *Dahl v. Dahl,* --- P.3d ----, 2015 WL 5098249, 794 Utah Adv. Rep. 5, 2015 UT 79 (Sup.Ct. 08/27/2015), amending and superseding *Dahl v. Dahl,* 345 P.3d 566, 779 Utah Adv. Rep. 13, 2015 UT 23 (Sup.Ct. 01/30/2015) – Under choice-of-law principles, a court will enforce the laws of another state in a matter under its jurisdiction unless to do so would undermine a strong public policy of the forum state. Husband had settled an irrevocable Nevada asset protection trust, naming his wife as a beneficiary so long they remained married. Divorce proceedings were subsequently filed in Utah. Even though styled as an "irrevocable" trust, the Utah Supreme Court, applying that state's choice-of-law principles, found the trust to be revocable under Utah law. The court explained that a choice-of-law provision contained in a trust document will be enforced, unless doing so would undermine a strong public policy of the forum state. Utah had a long-established policy in favor of the equitable distribution of marital assets in divorce cases, and since the trust would be irrevocable under Nevada law, enforcement of its choice-of-law provision would deny the Utah court's the power to achieve an equitable division of the marital estate.

property, less amounts sufficient to sustain the lifestyle of the client and her dependents, may be confidently transferred into protected status.

There is, however, an ever-lurking ubiquitous third party with super-rights in our client's property: the taxing authorities of the jurisdictions that provide support and protection services to our client where she lives.[134] Structuring asset transfers to the client's tax advantage, in legally permitted ways to minimize tax obligations and to maximize tax savings, has been explicitly sanctioned by the U.S. Supreme Court.[135] The asset protection planning lawyer who is not competent in matters of tax law will need, as a matter of professional responsibility, to associate a tax practitioner with the representation.

Asset protection planning involves substantive and legally consequential transfers of property, out of the client's name and under the control of others. A client who does not accept and work with this reality may attempt to indirectly manipulate those who now hold her assets in protected status, to control those persons in order to enjoy those assets as she did when they were hers to use, enjoy and dispose of. A significant challenge for the protection planning lawyer is to make sure the client understands the catastrophic consequences of alter ego behaviors. It may serve the interests of both attorney and client for the lawyer to set out, in writing, this and other legal dangers that will undermine an effective asset protection plan, as part of what the client has to review and sign as a condition of the lawyer accepting the representation.

Finally, our political system is a federal union of fifty different states, each of which has its own public policies concerning issues that relate to asset protection matters. After structuring and implementing an asset protection plan, the client needs to understand that the continued potency of the arrangement depends now on the *administration* of the plan. A fundamental and critical plan administration function is to make sure that plan assets and trustees do not fall under the in rem and personal jurisdiction of states that will not validate the plan's legal structures and will refuse to enforce its protections.

About the Author

Philip Feist received his undergraduate degree from the University of California, at Davis, a Master of Theology degree from the Dallas Theological Seminary, and his J.D. from the University of San Diego School of Law. He has practiced law since 1992, and has a Martindale Hubbell AV Preeminent® Rating. He was the 2017 editor for Chapters 49-53 of *Bogert's The Law of Trusts & Trustees*, authored the 2018 update on the Oklahoma Family Wealth Preservation Trust Act, for *Asset Protection: Domestic and International Law and Tactics*, Duncan E. Osborne, ed., was the 2018 update editor for *Koren: Estate, Tax & Personal Financial Planning,* is currently the 2019

[134] "Taxation is the price which civilized communities pay for the opportunity of remaining civilized." Albert Bushnell Hart

[135] "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering,* 293 U.S. 465, 469 (1935)

updating editor for *Koren.* has presented over 35 continuing legal education courses for county and state bar associations, and has taught estate planning, trust and probate procedure courses at two state colleges. He is admitted to practice law in California, Oklahoma, Kansas, Texas, Florida and the U.S. Virgin Islands, is certified as a specialist in Estate Planning, Trust and Probate Law by the State Bar of California, and is a member of the Texas Bar College, of the Real Estate, Probate and Trust Section of the Texas State Bar, the Estate Planning, Probate and Trust Section of the Oklahoma Bar Association, the Trusts and Estates Section of the State Bar of California, and the Real Property, Probate and Trust Law Section of the Florida Bar Association. He is also a member of the Dallas County (Texas) Bar Association, the Tulsa County (Oklahoma) Bar Association and the Los Angeles County Bar Association. He has been married for 45 years, and he has 3 children and 7 grandchildren. He is currently of-counsel with the law firm of Doerner Saunders Daniel & Anderson, LLP, in Tulsa, Oklahoma.