Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #
Date:
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **Nevada Passes New Charging Order Laws**

Steven J. Oshins is a member of the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who is listed in The Best Lawyers in America® and has been named one of the Top 100 Attorneys in Worth magazine. He was voted into the NAEPC Estate Planning Hall of Fame® and will be inducted in 2011. He is one of the most innovative attorneys in the country as demonstrated by how active he has been in writing some of Nevada's most important estate planning and creditor protection laws, including the law making the charging order the exclusive remedy of a judgment creditor of a Nevada LLC and LP, the law changing the Nevada rule against perpetuities to 365 years and the law making Nevada the first and only state to allow a Restricted LLC and a Restricted LP. He is also the author of the Annual Domestic Asset Protection Rankings at http://www.oshins.com/images/DAPT_Rankings.pdf. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com. His law firm's web site is http://www.oshins.com.

Steve is happy to report that the charging order language that he co-authored with Reno attorney Mark Smallhouse and Las Vegas attorney Rob Kim in SB405 passed through the 2011 Nevada legislative session by unanimous vote in both the Senate and the Assembly. Having also authored Nevada’s charging order laws in both the 2001 and 2003 legislative sessions, Steve notes that the third time’s a charm. Steve would like to thank Rob Kim and Mark Smallhouse for their work on the charging order portion of the legislative bill and would like to thank Mr. Kim, Mr. Smallhouse and the rest of the Executive Committee of the Business Law Section of the State Bar of Nevada for sponsoring the bill and including the charging order language.

The new charging order language affects Nevada LLCs, LPs and corporations. The changes to the statutes will be effective on October 1, 2011. This newsletter summarizes the key changes made to the statutes.

COMMENTS:

Following are the key changes:

1. Single Member LLCs and Single Shareholder Corporations

The new language specifically makes the charging order the exclusive remedy of a judgment creditor for Nevada LLCs, corporations and LPs, specifically including both single member LLCs and single shareholder corporations. A charging order is essentially an order issued by the court granting the judgment creditor a lien over the judgment debtor's interest in the business entity. By specifically making the charging order the exclusive remedy for single member LLCs (and single shareholder corporations), the new Nevada law statutorily negates the problems that have occurred with single member LLCs in cases such as *Ashley Albright* (Colorado, 2003), *A-Z Electronics, LLC* (Idaho, 2006), *In re Modanlo* (Maryland 2006) and *Olmstead* (Florida, 2010).

Through appropriate forum shopping, the asset protection plan can be designed using business entities where the charging order is the exclusive remedy so that the client's potential creditors will typically be frustrated into settling for pennies on the dollar.

2. No Equitable Remedies

The legislation also adds language to the Nevada LLC, LP and corporation statutes specifying that no other remedies (i.e., no equitable remedies) can apply. This would include equitable remedies such as reverse veil piercing, alter ego, constructive trust and resulting trust theories that may have allowed a judge to circumvent the prior language that the charging order is the exclusive remedy. Note that most states that make the charging order the exclusive remedy of a judgment creditor do not also exclude equitable remedies from applying. Further note that during the legislative session, a negotiated exception was made only with respect to corporations (i.e., no effect on LLCs or LPs) allowing the alter ego theory to be the exclusive equitable remedy to apply to corporations.

3. NRS Chapter 87A Limited Partnership Charging Order Laws Fixed

Nevada has two different limited partnership Chapters - Chapters 87A and 88. Chapter 88 has existed for many years, whereas Chapter 87A was created much more recently in 2007. Asset Protection planners have traditionally used Chapter 88 to form Nevada limited partnerships since Chapter 87A limited partnership statutes did not make the charging order the exclusive remedy, probably as a result of its passage well after Nevada's charging order statutes were modified in 2001 and 2003. The language adopted in SB405 fixes this problem by adopting similar charging order language for both limited partnership Chapters.

OPPORTUNITIES:

The Nevada charging order laws create numerous planning opportunities. These opportunities assume that Nevada law is applied for charging order purposes.

1. Single Member LLCs: Given the recent case law in at least four jurisdictions, most planners have been reluctant to create single member LLCs since the judge may rule that a single member LLC doesn't get the charging order as the exclusive remedy. Despite this fairly recent drafting trend, a new option is to use a single member LLC, but domicile it in Nevada.

2. Any LLCs or LPs Established in other Jurisdictions: In order to obtain the advantages of Nevada law where the charging order is the exclusive remedy and no equitable remedies can be issued, consider any of the following strategies:

a. Dissolve the existing entity and start over with a Nevada entity. This is simple if the underlying assets are easy to transfer out of one entity and then into another entity. In most cases, this is the best option since it is so simple.

b. Change the existing entity to Nevada law using a statutory conversion (a.k.a., a domestication). For assets that are difficult to move out of one entity and then into another entity, this is a very simple way of switching state law for the entity since it's essentially just a change of state laws without any material disruptions.

c. Merge the existing entity into a new Nevada entity. This is more complex than a statutory conversion and requires a new tax identification number since it's a change in entity. The merger option will be selected if the initial entity's state law doesn't allow statutory conversions. Although a merger is more disruptive than a statutory conversion, the disruption is most likely very small in comparison to the asset protection advantages of merging the entities.

d. Form a Nevada entity as a holding company. This a great solution where there are multiple existing entities formed under the laws of a state which has lesser creditor protection laws. For example, many people have multiple LLCs, each owning one piece of real estate. Just forming one additional Nevada entity to hold the interests in the other entities puts a charging order-only wall around all of the other entities. This is also a solution if a merger is too complex. Instead of a merger, the Nevada entity can own 100% of the already-existing other entity.

3. Corporations: Because of the greater creditor protection traditionally given to LLCs and LPs through the charging order, the national trend has been to use less corporations and more of the other forms of business entity. Despite this trend, there are countless corporations that have already been formed and that are still being formed. Consider obtaining the charging order benefits of a Nevada corporation. Nevada is the only state that makes the charging order the exclusive remedy and thus provides this greater protection. In order to use this protection, one must do one of the following: form a new corporation in Nevada, domesticate (or convert) an existing corporation to Nevada, merge an existing entity into a Nevada corporation or use a Nevada corporation as a holding company. All of these concepts are explained above.

SUMMARY:

With the passage of SB405, Nevada has enhanced its creditor protection laws for its LLCs, LPs and corporations. It has done so by expanding its laws to not only make the charging order the exclusive remedy, but to also remove all potential equitable remedies that might apply. The only exception is that the alter ego equitable remedy is still permitted to apply to Nevada corporations.

The new legislation also specifies that creditors of a member of a single member LLC and creditors of a shareholder of a single shareholder corporation are limited to the charging order remedy (other than the alter ego equitable remedy for corporations), thereby distancing itself from the laws of other states.

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #
Date:
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **Nevada Passes Updates to Self-Settled Spendthrift Trust Laws**

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Steven J. Oshins is a member of the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who is lis in The Best Lawyers in America® and has been named one of the Top 100 Attorneys in Worth magazine. He was voted into the NAEPC Estate Planni Hall of Fame® and will be inducted in 2011. He is one of the most innovati attorneys in the country as demonstrated by how active he has been in writi some of Nevada's most important estate planning and creditor protection lav including the law making the charging order the exclusive remedy of a judgment creditor of a Nevada LLC and LP, the law changing the Nevada ru against perpetuities to 365 years and the law making Nevada the first and or state to allow a Restricted LLC and a Restricted LP. He is also the author o the Annual Domestic Asset Protection Rankings at http://www.oshins.com/images/DAPT_Rankings.pdf. Steve can be reached 702-341-6000, x2 or at soshins@oshins.com and http://www.oshins.com.

Nevada is one of the thirteen states that enable a person to establish a spendthrift trust for himself. In order to make use of Nevada's self-settled spendthrift trust statute, a trust must have at least one Nevada trustee (which can either be a Nevada resident or a Nevada bank or trust company) and at least part of the administration of the trust must occur in the state of Nevada

Nevada has consistently been in the top-tier of the self-settled spendthrift trust states because it has the shortest statute of limitations period of the domestic asset protection trust jurisdictions and because it has no statutory exception creditors who can pierce the trust. SB221, which was passed through the Nevada legislature and was signed into law by the Governor on June 4, 2011, makes Nevada's already superior spendthrift trust laws even stronger. The changes to the statutes will be effective on October 1, 2011.
This newsletter summarizes the key changes made to the statutes.

COMMENTS:

Following are the key changes:

1. **Clarification and Expansion of types of trusts that may qualify as Spendthrift Trusts**

The statute has broadened the class of trusts that may qualify as spendthrift trusts. Specifically, under the new language, a charitable remainder trust, a grantor retained annuity trust and a qualified personal residence trust are all expressly permitted to be spendthrift trusts from which the settlor may benefit. The new language also explicitly provides that the settlor of a self-settled spendthrift trust may use real or personal property owned by the trust without limiting the scope of the protection provided by the spendthrift trust.

2. **"Tacking" of Statute of Limitations period for non-Nevada spendthrift trusts that change situs to Nevada**

The legislation also adds language to the spendthrift trust statutes that enables a trust administered under the laws of another state or a foreign jurisdiction to move to Nevada without starting the statute of limitations period over. Under the new law, if the laws of the other state or jurisdiction in which an existing trust is domiciled are substantially similar to the laws of Nevada, and if the domicile of the trust is effectively changed to Nevada by complying with the other requirements imposed by Nevada law (the trust has a Nevada trustee, etc.), the date of a deemed transfer for purposes of Nevada's statute of limitations period is the date on which the settlor made the transfer to the trust (if the laws of the applicable jurisdiction were substantially similar to Nevada at the time of transfer), or the date on which the laws of the applicable jurisdiction became substantially similar.

3. **Limitation of Liability of Trustees of Spendthrift Trusts**

Nevada law already protects advisers to the settlors or trustees of spendthrift trusts from claims involving the establishment of a spendthrift trust. Specifically, Nevada law provides that a person cannot bring a claim against an advisor of the settlor or trustee of a spendthrift trust unless the person can provide by clear and convincing evidence that the adviser knowingly and in bad faith violated the laws of the State of Nevada and that the adviser's actions directly caused the damages suffered by the person. In the new legislation, the trustee of a spendthrift trust is also protected from liability from a claim unless the claimant (other than a beneficiary or settlor) can show by clear and convincing evidence that the trustee knowingly and in bad faith violated the laws of the State of Nevada and that the trustee's actions directly caused the damages suffered by the plaintiff.

4. **Explicit Ordering of Transfers – Last In, First Out**

The new Nevada statutes have further limited a creditor's access to the self-settled spendthrift trust assets by creating a "Last In, First Out" mechanism. The changes to the statutes specify that if the settlor of a spendthrift trust makes more than one transfer to the trust, the later transfers to the trust must be disregarded for purposes of determining whether a creditor may bring an action with respect to an earlier transfer to the trust. Although assumed under previous law, the new language makes clear that a more recent transfer for which the statute of limitations period has not run will not taint the whole trust. Additionally, a distribution made to a beneficiary from a spendthrift trust will be deemed to have been made from the most recent transfer made to the spendthrift trust.

5. **Decanting Spendthrift Trusts**

Nevada added the ability to decant trusts to its general trust law in 2009. In SB221, the legislature expanded its self-settled spendthrift trust statutes to make use of the favorable decanting laws. Under the new statutory language, the trustee of a spendthrift trust may decant the trust into a second spendthrift trust. If the trustee does exercise his or her discretion to decant an existing spendthrift trust into a second spendthrift trust, it will not effect the statute of limitations period applicable to the transfers made to the original trust. The date the property was initially transferred to the original spendthrift trust will be the deemed transfer date for the property even after it has been decanted into the second spendthrift trust.

6**. Limitation of Actions against Spendthrift Trust**

Nevada's statute of limitations for self-settled spendthrift trusts provides that a future creditor may not bring an action with respect to property transferred to a spendthrift trust unless the action is commenced within two years from the date of the transfer. If the person bringing the action is a creditor when the transfer is made, the person has the longer of two years from the date of transfer or six months from when the person discovers or reasonably should have discovered the transfer. It has been argued that Nevada's fraudulent transfer law, which includes a four-year statute of limitations period, negates the favorable two-year rule. However, in the new legislation the Nevada statutes have been refined to make it clear no action of any kind may be brought at law or in equity against the trustee of a spendthrift trust if at the date the action is brought an action by a creditor with respect to a transfer to the spendthrift trust would be barred.

Additionally, the statutes have been modified to provide that a creditor may not bring an action with respect to a transfer of property to a spendthrift trust unless the creditor can prove by clear and convincing evidence that the transfer (i) was a fraudulent transfer or (ii) "violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor." If the creditor does not have clear and convincing proof that the transfer was a fraudulent transfer or violated a legal obligation, the property transferred is not subject to the claims of the creditor.

7. **Negation of Implied Agreement by Trustee**

Another change to Nevada's self-settled spendthrift trust statutes clarifies that the settlor only has the rights and powers conferred to the settlor explicitly in the trust agreement and that an agreement, whether express or implied, between the settlor and the trustee of the spendthrift trust that attempts to grant or expand the rights that are outlined in the trust agreement is void.

OPPORTUNITIES:

Though there were many changes to Nevada's self-settled spendthrift trust statutes with the passage of SB221, the key opportunity made possible by the statutory changes is the ability to change the situs of existing asset protection trusts to Nevada without starting the statute of limitations period over. Of all the domestic jurisdictions that enable a person to establish a self-settled spendthrift trust, Nevada is the only jurisdiction without any statutory exception creditors that may pierce the trust. That, along with having the shortest statute of limitations period to protect a transfer to the trust makes Nevada a very favorable situs. With the addition of the "tacking" statute noted above, a person who has established a domestic asset protection trust in another jurisdiction that either has exception creditors or a longer statute of limitations period may change the situs of the trust to Nevada and not have to restart the clock for the previous transfers. Consider how many people have established their domestic asset protection trust in a jurisdiction that allows divorcing spouses, preexisting tort creditor or other statutory exception creditors to pierce the trust. The trustees of their trust may now move the trust to Nevada to take advantage of the more favorable laws.

SB221 also adds strength to the use of a Nevada self-settled spendthrift trust as a completed gift trust. With the issuance of PLR 200944002, many advisors have become comfortable with the establishment of a self-settled spendthrift trust as both an asset protection tool and estate tax avoidance vehicle. In PLR 200944002, the IRS determined that an Alaska self-settled spendthrift trust that was structured as a completed gift for gift tax purposes was also outside of the grantor's estate for estate tax purposes. However, in the PLR the IRS made a point of excepting from its ruling the possibility of an understanding or pre-existing arrangement between the grantor and the trustee of the self-settled spendthrift trust that may otherwise cause inclusion of the trust assets under IRC § 2036. Under Nevada's new self-settled spendthrift trust laws, any agreement between the grantor and the trustee of the trust, whether express or implied, would be deemed void if it expands the powers and/or rights of the grantor. The addition of this statute should bolster the use of a Nevada Asset Protection Trust as an estate tax savings tool for the right client.

SUMMARY:

Although many of the changes to Nevada's self-settled spendthrift trust laws made possible by SB221 are just clarifications of items that may have already been implied under existing law, the changes result in more comprehensive self-settled spendthrift trust statutes that are arguably the most favorable among the states that allow such trusts.