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Indiana Enacts Self-Settled Asset Protection Trust Legislation

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On April 9, 2019, the Indiana Legislature enacted S.B. 265 to amend the Indiana Code concerning trusts and fiduciaries. The Indiana governor signed the act May 5. One important provision of the act was the addition of a new Section 30-4-8 to the Indiana Code to permit the establishment of “Legacy Trusts,” which are a form of self-settled domestic asset protection trust (DAPT), and provide spendthrift creditor protection to the settlors of Legacy Trusts. As of the effective date of July 1, 2019, Indiana will become the 18th state to have DAPT-enabling legislation. The other 17 states are Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia and [Wyoming](#).

The Indiana Legacy Trust law is similar to the statutes of the other states that permit DAPTs. Either the owner of property or the holder of general power of appointment can transfer assets to a Legacy Trust. The transfer of assets to the Legacy Trust must be a “qualified disposition.” To be a qualified disposition, the Legacy Trust must be irrevocable; have a “qualified trustee” as one of the trustees; incorporate Indiana law to govern the validity, construction and administration of the Legacy Trust; and have a spendthrift clause.

The transferor of assets to a Legacy Trust must sign a “qualified affidavit” affirming that:

1. the transferor has full right to transfer property to the trust,
2. the transfer will not cause the transferor to be insolvent,
3. the transferor does not intend to defraud creditors with the transfer,
4. there are no pending or threatened court actions against the transferor other than those identified by the transferor in the affidavit,
5. the transferor is involved in no administrative proceedings other than those identified in the affidavit,
6. the transferor does not contemplate filing for bankruptcy, and

7. the property transferred to the trust is not derived from unlawful activities.

A married transferor must provide a copy of the qualified affidavit to his or her spouse.

The Legacy Trust must have a “qualified trustee,” who is either an individual residing in Indiana or an entity authorized by Indiana law to act as a trustee. Qualified trustees must:

1. maintain or arrange for the custody of the property in the trust,
2. maintain records of the trust on an exclusive or nonexclusive basis,
3. prepare or arrange for the preparation of all tax returns, and
4. materially participate in the administration of the trust.

The act addresses the consequences if a non-Indiana court seeks to assert jurisdiction over a Legacy Trust or apply the law of a state other than Indiana. If a court declines to apply Indiana law in determining the effect of a spendthrift provision in a Legacy Trust, the trustee must immediately resign and thereafter can transfer the trust property only to another trustee. The act also provides that an Indiana court “to the maximum extent permitted by the United States Constitution and the Indiana Constitution,” must exercise jurisdiction over the trust even if a court of another jurisdiction has or may have proper jurisdiction of a matter involving the trust.

The only claims of creditors that can be enforced against the assets in a Legacy Trust are:

1. fraudulent transfer claims under the Indiana Uniform Fraudulent Transfer Act,
2. child support obligations, and
3. marital obligations incurred in a divorce (when the transfer of assets to the trust occurs after the marriage or within 30 days of the marriage).

Claims are subject to a two-year statute-of-limitations period.

Transferors can have certain rights and powers with respect to the Legacy Trust. A transferor to a Legacy Trust may serve as investment adviser to the trust. The following provisions can be included in a Legacy Trust:

1. the transferor’s power to veto a distribution from the trust,
2. the transferor’s testamentary limited power of appointment,
3. the transferor’s power to take out principal under an ascertainable standard, and

4. the transferor's right to remove a trustee or trust director and appoint a new trustee or trust director who is not a related or subordinate party under Section 672(c) of the Internal Revenue Code.

With Indiana becoming the 18th DAPT state, other states are likely to at least consider DAPT legislation, and may likewise adopt it. Connecticut is currently considering DAPT legislation.

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