Date: 15-Aug-16
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: Dick Nenno & Dan Rubin on the Uniform Voidable Transactions Act: Are Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Voidable Transfers Per Se?

"In 2014, the Uniform Law Commission ("ULC"), also known as the National Conference of Commissioners on Uniform State Laws, adopted amendments to the Uniform Fraudulent Transfer Act ("UFTA") and "refreshed" the UFTA's comments. Among other things, the amendments renamed the UFTA as the Uniform Voidable Transactions Act ("UVTA") and added a new Section 10 that provides that the law of an individual's residence is to be the governing law concerning whether such individual has made a voidable transfer.

Unfortunately, the revisions to the comments erroneously state further that a transfer to a self-settled spendthrift trust is a voidable transfer per se *and, therefore, that an individual who lives in a state that does not recognize asset protection trusts ("APTs") cannot protect assets by creating an APT in a state that does recognize APTs (noting that a state that does recognize the validity of APTs has, obviously, modified its law in this regard). States considering adopting the UVTA should delete the inaccurate comments described below or replace them with language that reflects the actual state of the law.*

Edwin E. Smith, Chair of the Committee to draft amendments to the UFTA, invited Dick Nenno to be an observer for the UVTA project because of his familiarity with self-settled spendthrift trusts. As the project progressed, the Reporter made clear his disapproval of APTs and gratuitously inserted the comments with the objective of making it impossible for a resident of a state without APT legislation to establish an APT in a state that allows them. Shortly after the Reporter issued the comments, Dick sent him the relevant authorities. Subsequently, though, the Reporter denied getting the authorities until Dick directed him to the message acknowledging their receipt. When Dick attempted to press his points, the Reporter shouted him down and never allowed him to resume. Dick's efforts to pursue his points with the Chair and the then President of the ULC were also unavailing.

We understand that the Chair and the Reporter now express surprise at the substantial push-back from the trusts and estates bar on these and other issues as they lobby for enactment of the UVTA around the country. We're told that the drafting committee has refused to budge notwithstanding the request of the Joint Editorial Board for Uniform Trust and Estate Acts, which was not consulted in connection with the UVTA's approval."

We close the week with **Dick Nenno** and **Dan Rubin**'s important commentary on the Uniform Voidable Transactions Act and whether transfers to self-settled spendthrift trusts by settlors in non-asset protection trust states are voidable transfers per se.

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Here is their commentary:

EXECUTIVE SUMMARY:

In 2014, the Uniform Law Commission ("ULC"), also known as the National Conference of Commissioners on Uniform State Laws, adopted amendments to the Uniform Fraudulent Transfer Act ("UFTA") and "refreshed" the UFTA's comments. Among other things, the amendments renamed the UFTA as the Uniform Voidable Transactions Act ("UVTA") and added a new Section 10 that provides that the law of an individual's residence is to be the governing law concerning whether such individual has made a voidable transfer.

Unfortunately, the revisions to the comments erroneously state further that a transfer to a self-settled spendthrift trust is a voidable transfer per se and, therefore, that an individual who lives in a state that does not recognize asset protection trusts ("APTs") cannot protect assets by creating an APT in a state that does recognize APTs (noting that a state that does recognize the validity of APTs has, obviously, modified its law in this regard).0pt;font-family:"Times New Roman","serif"">
Therefore, the gist of Comment 8 under Section 4 of the UVTA, in light of "the historical interpretation referred to in Comment 2," is that if a resident of New York, which is an example of a state that does not yet offer creditor protection for the settlor of a self-settled spendthrift trust, creates such a trust in Delaware, which is a state that does offer such protection (and which permits a non-resident of Delaware to create such a trust, in large part through the simple expedient of naming a Delaware sitused trustee as at least one of the trustees of the trust), New York law would apply pursuant to Section 10 of the UVTA if it had been enacted in New York. As a consequence, creation of the trust would be deemed a voidable transfer per se, and every creditor, even a completely unanticipated future creditor, would be able to enforce claims against the trust's assets.

The result that follows from Comment 8 is flawed in two important respects. First, the law does not provide that a transfer to a self-settled spendthrift trust is a voidable transfer per se, but rather that the transfer must still be proven to have been made either with an intent to hinder, delay, or defraud creditors or in connection with the debtor's insolvency. Second, the applicable law in connection with the question of the creditor protection afforded through a transfer to a trust, including a self-settled spendthrift trust, has historically been determined under Chapter 10 (§§ 267–282) of the Second Restatement of Conflict of Laws,[x] and not fraudulent transfer law (including the UFTA and the UVTA).

The Statute of Henry VII vs. the Statute of Elizabeth I

The rules that allow creditors to set aside voidable transfers began with a statute, called the Statute of Elizabeth,[xi] enacted in England in 1571 during the reign of Queen Elizabeth I, the last Tudor monarch. But, the ability of creditors to reach the assets of self-settled spendthrift trusts comes from a statute[xii] enacted almost a century earlier during the reign of Queen Elizabeth's forebear, King Henry VII, who founded the Tudor dynasty in 1485 when he and his forces defeated the infamous King Richard III, the last Plantagenet ruler, and his supporters at the battle of Bosworth Field.

As Professor Griswold explained this distinction in 1947:[xiii]

> Many states have expressly reenacted the substance of a statute which was first passed in England in 1487. This statute provided that "All deeds of gift of goods and chattels, made or to be made in trust to the use of that person or persons that made the same deed or gift, be void and of none effect." In its original form the statute applies in terms only to gifts of goods and chattels, and it has been held that it applies only to gifts made for the sole benefit of the settlor. It was not directed against trusts made with fraudulent intent, but was a prohibition of trusts for the benefit of the settlor on the ground that such a trust was against public policy. All trusts to which a statute of this type applies are invalid against the claims of any creditor, whether the trusts are spendthrift trusts or not.

Hence, there was no need for the later enacted Statute of Elizabeth to cover the potential abuses of self-settled spendthrift trusts because that issue already had been addressed almost a century earlier!

The Restatements of Trusts incorporate this historic rule against self-settled spendthrift trusts (the historic "Self-Settled Trust Rule"). Thus, the pertinent provision of the Second Restatement of Trusts says:[xiv]

> Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.

And, the relevant section of the Third Restatement similarly provides:[xv]

> A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid.

The comparable rule in the model Uniform Trust Code ("UTC") provides, in pertinent part:[xvi]

> With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit.

Accordingly, the historic Self-Settled Trust Rule continues to be applicable, generally, under modern trust law.[xvii] However, one looks in vain for a section of the UFTA, or of the UVTA, providing that a transfer to a self-settled spendthrift trust is voidable per se—it's simply not there. To be clear, the Reporter is unable to direct us to (and neither of us is aware of) a single state statute that declares a transfer to a self-settled spendthrift trust to be a voidable transfer per se. Instead, creditors' rights vis-à-vis self-settled spendthrift trusts are governed by trust law—not voidable transfer law.

Case Law

Introduction

In an attempt to support the Reporter's position that established law provides that a transfer to a self-settled spendthrift trust is a voidable transfer per se, Comment 2 under Section 4 of the UVTA cites to the cases of Mackason's Appeal, 42 Pa. 330, 338-39 (1862), Ghormley v. Smith, 139 Pa. 584, 591-94 (1891), and Patrick v. Smith, 2 Pa. Super. 113, 199 (1896).

Notwithstanding the citation to these few cases from the Nineteenth Century, however, Pennsylvania's version of the UFTA,[xviii] enacted in 1993, simply does not provide that a transfer to a self-settled spendthrift trust is a voidable transfer per se. Moreover, Pennsylvania enacted UTC § 505(a)(2) in 2010, to the effect that "[a] judgment creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit,"[xix] thereby obviating through its trust law any need for a transfer to a self-settled spendthrift trust created under Pennsylvania law to be deemed a voidable transfer per se.

In a follow-up article on the UVTA,[xx] the Reporter similarly cited early cases from Missouri,[xxi]Tennessee,[xxii] and Virginia[xxiii] in support of the Comment's approach.[xxiv] However, as in Pennsylvania, whatever precedential effect those decisions originally might have had no longer exists. Again, this is because neither Tennessee's or Missouri's version of the UFTA,[xxv] nor Virginia's idiosyncratic voidable conveyance statute,[xxvi] actually states that a transfer to a self-settled spendthrift trust is a voidable transfer per se. Moreover, all three states now permit APTs.[xxvii]

And, as shall now be seen, recent cases in other jurisdictions also demonstrate that the creditor protection afforded by a self-settled spendthrift trust is an issue that is to be resolved using trust law principles, and that the transfers of property funding such trusts are not to be deemed voidable transfersper se.

Rush University Medical Center v. Sessions (Ill. 2012)

In this case,[xxviii] the Supreme Court of Illinois set aside transfers to an offshore trust which were frustrating a creditor's ability to enforce a large charitable pledge of the debtor. The issue was whether the debtor's trust was invalid vis-à-vis the creditor's claim under the historic Self-Settled Trust Rule or whether Illinois's adoption of the UFTA had supplanted that rule, in which event the creditor would have had to show that transfers to the trust were fraudulent transfers.

The court first noted that Illinois's adoption of the UFTA generally supplemented and did not supplant common-law principles and found no irreconcilable difference between the historic Self-Settled Trust Rule and the UFTA.[xxix] It then contrasted the purposes of the UFTA and the historic Self-Settled Trust Rule. Regarding the UFTA, it said:[xxx]

> It has been stated that the general purpose of the Act is to protect a debtor's unsecured creditors from unfair reductions in the debtor's estate to which creditors usually look to security.

By contrast, it described the purpose of the historic Self-Settled Trust Rule as follows:[xxxi]

> The common law rule also has a general purpose of protecting creditors, but it addresses the specific situation where an interest is retained in a self-settled trust with a spendthrift provision. Traditional law is that if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the clause is void as to the then-existing and future creditors, and creditors can reach the settlor's interest under the trust. And the rule is applicable although the transfer is not a fraudulent conveyance and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.

The court reconciled the two doctrines as follows:[xxxii]

> Both laws have a general purpose of protecting creditors. But the common law [rule] focuses on the additional matter of the interest <u>retained</u> by the settlor of a specific kind of trust, and not simply the fraudulent <u>transfer</u> of an asset or the fraudulent <u>incurring</u> of a debt, as does the statute. Additionally, the Act and the common law rule each operate in some circumstances where the other does not, thus negating any inference that the common law rule would render the Act superfluous. The Act is effective, but the common law rule is not, in a much larger sphere, which includes both situations that do not involve trusts and in connection with transfers into trusts that are not for the settlor's benefit because they permit distributions only to other persons.

The court continued:[xxxiii]

> We also do not find any displacement of the common law rule by the language in section 5 of the Act, as it is not a fraudulent <u>transfer</u> of funds that renders the trust void as to creditors under the common law, but rather it is the spendthrift provision in the self-settled trust and the settlor's<u>retention</u> of the benefits that renders the trust void as to

creditors.

The Rush case shows that the historic Self-Settled Trust Rule is alive and well in Illinois and in many other states notwithstanding enactment of the UFTA (or, now, the UVTA). It means that statutes of limitations, fraudulent-transfer rules, and burdens of proof will be of no avail to a trustee defending a self-settled spendthrift trust created under the law of a state that does not yet have self-settled spendthrift trust legislation. Under the law of a state that does, a creditor will have to prove the necessary facts underlying the claim of a voidable transfer in connection with the funding of the trust – and not merely allege that all transfers to self-settled spendthrift trusts are voidable transfers per se.

Waldron v. Huber (In re Huber) (Bankr. W.D. Wash. 2013)

In this federal bankruptcy case,[xxxiv] the bankruptcy trustee was able to access the assets of an Alaska APT created by a Washington State resident.

The first issue that the court had to decide was whether to apply Alaska or Washington State law to the trust. Regarding this issue, the court began:[xxxv]

> In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules. In applying federal choice of law rules, courts in the Ninth Circuit follow the approach of the Restatement (Second) of Conflict of Laws (1971).

The court continued by quoting § 270(a) of the Restatement,[xxxvi] which provides: [xxxvii]

> An inter vivos trust of interests in movables is valid if valid under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6.

The court then applied the above principles to the case at hand:[xxxviii]

> Under the Restatement, the Debtor's choice of Alaska law designated in the Trust should be upheld if Alaska has a substantial relation to the Trust. Restatement § 270(a). Comment b provides that a state has a substantial relation to a trust if at the time the trust is created: (1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state. These contacts with the state are not exclusive. In the instant case, it is undisputed that at the time the Trust was created, the settlor was not domiciled in Alaska, the assets were not located in Alaska, and the beneficiaries were not domiciled in Alaska. The only relation to Alaska was that it was the location in which the Trust was to be administered and the location of one of the trustees, AUSA.
>
> Conversely, it is undisputed that at the time the Trust was created, the Debtor resided in Washington; all of the property placed into the Trust, except a $10,000 certificate of deposit, was transferred to the Trust from Washington; the creditors of the Debtor were located in Washington; the Trust beneficiaries were Washington residents; and the attorney who prepared the Trust documents and transferred the assets into the Trust was located in Washington. Accordingly, while Alaska had only a minimal relation to the Trust, using the test set forth in Comment b, Washington had a substantial relation to the Trust when the Trust was created.

Having determined that Washington rather than Alaska had the most substantial relation, the court continued:[xxxix]

> Additionally, Washington State has a strong public policy against self-settled asset protection trusts. Specifically, pursuant to RCW 19.36.020, transfers made to self-settled trusts are void as against existing or future creditors. This statute has been in existence for well over a century, as it was first enacted in 1854.

The court concluded:[xl]

> [I]n accordance with § 270 of the Restatement, this Court will disregard the settlor's choice of Alaska law, which is obviously more favorable to him, and will apply Washington law in determining the Trustee's claim

> regarding validity of the Trust.

As an aside, albeit an important one, it is clear that the court misapplied the Restatement, under which issues are divided into matters of validity, governed by § 270, and construction, administration, and creditor rights, governed by other sections of the Restatement. Under this framework, matters of "validity" are confined to issues such as whether the trust violates the rule against perpetuities or the rule against accumulations.[xli] In contrast, § 273 of the Restatement[xlii] deals specifically with the question of a creditor's ability to reach trust assets, and provides that the law designated by the settlor governs—without stated exception.

Having found that Washington law governed, the court turned to RCW 19.36.020,[xliii] which clearly is based on the historic Self-Settled Trust Rule and provides:[xliv]

> That all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.

The court concluded:[xlv]

> The Trust is admittedly a self-settled trust. In accordance with RCW 19.36.020, the Debtor's transfers of assets into the Trust were void as transfers made into a self-settled trust.

The bankruptcy trustee had also alternatively sought summary judgment arguing that transfers to the trust were voidable under § 548(e)(1) of the Bankruptcy Code,[xlvi] which provides:[xlvii]

> In addition to any transfer that the 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.

The parties agreed that the first three elements were satisfied and that the controversy involved the fourth element.[xlviii] After analyzing various badges of fraud,[xlix] the court determined:[l]

> [T]he evidence presented by the Trustee supports an inference of actual fraudulent intent by the Debtor to hinder, delay, or defraud his current or future creditors, in violation of § 548(e)(1)(D). The Trustee is entitled to summary judgment on this claim as a matter of law.

Clearly, however, the above analysis regarding the actual fraudulent intent of the Debtor to hinder, delay, or defraud his current or future creditors, would have been unnecessary if a transfer to a self-settled spendthrift trust constituted a voidable transfer per se under § 548(e)(1).

The court next turned to the bankruptcy trustee's contention that summary judgment was warranted because transfers to the trust constituted fraudulent transfers under § 544(b)(1) of the Bankruptcy Code and RCW § 19.40.041(a).[li] Section 544(b)(1) provides in pertinent part: [lii]

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law.

Under § 544(b)(1) and applicable Washington law, the bankruptcy trustee could set transfers to the trust aside under RCW § 19.40.041(a)(1),[liii] which provides:[liv]

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation…[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor; ...

After analyzing badges of fraud,[lv] the court concluded:[lvi]

> [V]iewing the evidence in the light most favorable to the Debtor, the Trustee has established that there is no genuine dispute as to any material fact, and the Trustee is entitled to summary judgment as a matter of law on its UFTA claim based on actual fraudulent intent.

Again, the court would not have had to go through this analysis if a transfer to a self-settled spendthrift trust were a fraudulent transfer per se under Washington's UFTA.

In re Mortensen (Bankr. D. Alaska 2011)

In this case,[lvii] a federal bankruptcy judge in Alaska considered, inter alia, the debtor's motion to reconsider a holding that the transfer of a parcel of Alaska real property to an Alaska APT should be set aside under § 548(e)(1) of the Bankruptcy Code, quoted above. Initially, the judge rejected the debtor's contention that the judge's prior ruling meant that the transfer was a voidable transfer per se:[lviii]

> The defendants contend the essence of the court's ruling is that any transfer to a self-settled trust made within 10 years of the filing of a bankruptcy petition is a fraudulent conveyance. They base this contention on my finding that a settlor's expressed intention to protect assets placed into a self-settled trust from a beneficiary's potential future creditors can be evidence of an intent to defraud. I made this finding notwithstanding AS 34.30.110(b)(1)[sic], which specifies that a settlor's expressed intention to protect trust assets from a beneficiary's potential future creditors is not evidence of an intent to defraud.
>
> The defendants say the court should not use the creation of the trust itself as evidence of fraudulent intent, but should instead deal solely with the transfer of the property. However, when property is transferred to a self-settled trust with the intention of protecting it from creditors, and the trust's express purpose is to protect that asset from creditors, both the trust and the transfer manifest the same intent. In this case, I found that the trust's express purpose could provide evidence of fraudulent intent. However, it was not the only evidence

> upon which I based my decision.

The Court analyzed the additional evidence as follows:[lix]

> The defendants contend there is scant evidence of Mortensen's actual intent to defraud his creditors. Mortensen's intent goes to the heart of this matter. Because this element is often difficult to prove with direct evidence, courts will look to circumstantial "badges of fraud" to determine fraudulent intent.
>
> Among the more common circumstantial indicia of fraudulent intent at the time of the transfer are: (1) actual or threatened litigation against the debtor; (2) a purported transfer of all or substantially all of the debtor's property; (3) insolvency or other unmanageable indebtedness on the part of the debtor; (4) a special relationship between the debtor and the transferee; and, after the transfer, (5) retention by the debtor of the property involved in the putative transfer.
>
> The defendants argue that when Mortensen placed the Seldovia property in trust he actually increased his vulnerability to creditors because he replaced an exempt homestead with non-exempt cash. I disagree. He placed most of the cash he received from his mother into the trust as well, insulating it from creditors' claims. In other words, substantially all of his property was transferred to the trust…
>
> Further, evidence at trial refutes Mortensen's claim that he was making all required payments on his debts when the Seldovia property was transferred. He had burned through a $100,000.00 annuity, and his credit card debt was between $49,711.00 and $85,000.00 when the trust was created. It was difficult to determine the true nature of Mortensen's finances; he was not a credible witness. Even accepting the defendants' contention that Mortensen's monthly expenses at that time were $3,000.00, rather than $5,000.00, he was still under water when he put the realty (and then the cash) into the trust. His existing creditors were never paid off, and his debts were already unmanageable when the property was transferred. The timeline provided by the plaintiff in his opposition highlights this point. Mortensen used the Seldovia property after he transferred it to the trust, but did not regularly pay rent to the trust. He also invested the funds he had

> transferred to the trust and lent funds to a friend for a vehicle purchase. Based on this evidence, I found sufficient badges of fraud to determine that Mortensen intended to hinder, delay and defraud his creditors when he transferred the Seldovia property to the trust.

Like the Washington bankruptcy judge in Huber, the Alaska bankruptcy judge in Mortensen thus did not hold a transfer to the self-settled spendthrift trust to be voidable per se—instead it is clear that proof of the debtor's intent to hinder, delay, or defraud creditors was essential to such finding.

COMMENT:

Why This Matters

The misclassification, as a voidable transfer per se, of the transfer of property by an individual located in a state that does not yet recognize the creditor protection afforded by self-settled spendthrift trusts, to a self-settled spendthrift trust created under the law of a state that does recognize the creditor protection afforded by such trusts, through the back-door device of a comment to the UVTA, has important implications.

As Dan has explained at various lectures, including his 2014 presentation at the Heckerling Institute on Estate Planning:[lx]

> [N]otwithstanding the language of the Uniform Fraudulent Transfer Act, the common law has drawn an important distinction between those future creditors whose claims were, or at least could have been, reasonably anticipated at the time of the transfer, and those future creditors who were not, and perhaps could not have been, contemplated by the debtor at the time of the transfer (which latter class of future creditors was referred to at the beginning of this article as "potential future creditors"). This is a logical distinction because it speaks to the question of whether, in effecting the transfer, the debtor could have possessed the required actual intent to hinder, delay or defraud creditors; specifically, the more remote the future creditor, the less likely that the debtor might be found to have had such intent.

It is, in fact, well-settled that individuals have a right to protect against future adversity, as shown by the United States Supreme Court's decision in Schreyer v. Scott:[lxi]

> Reverses came unexpectedly, while in the pursuit of his ordinary business, without any intention on his part to defraud his creditors, and it may be said that, without any fault on his part, except a want of human foresight, he became embarrassed and insolvent. It is not apparent that [the transferor] had in view, at the time of the execution of the deed to his wife, any such result, or that he in any way contributed to produce the result which followed, for the purpose of defrauding his creditors and enjoying the advantages to be derived from the provisions made for his wife. Under such circumstances, the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more than any business man has a right to do, to provide against future misfortune when he is abundantly able to do so.

More recently, in connection with the question of whether to deny a Bankruptcy debtor his discharge in bankruptcy due to the debtor having undertaken a fraudulent transfer, the federal bankruptcy judge in the matter of In re Oberst wrote that:[lxii]

> If the debtor has a particular creditor or series of creditors in mind and is trying to remove his assets from their reach, this would be grounds to deny the discharge. If the debtor is merely looking to his future well-being, the discharge will be granted.

Thus, the concept of a fraudulent transfer per se, even if it should only apply to transfers to self-settled spendthrift trusts by individuals that reside in states that do not yet recognize the creditor protection afforded by such trusts under local law, turns existing voidable transfer law on its head. And, the fact that such result is to be reached through the back door device of a comment, rather than the statute itself, is particularly inappropriate.

A second important implication involves the upending of the established conflict-of-law rules that have long been used in determining whether creditors may reach trust assets. As noted, the ability of creditors to reach trust assets, including self-settled spendthrift trust assets, has historically been based on trust law principles under the rules set forth in the Second Restatement of Conflict of Laws. To reiterate, under those rules, the law of the trust jurisdiction designated by the settlor would apply to validate the protections afforded by a properly designed and implemented APT arrangement, even where the settlor is a resident of some other state. The introduction of Comment 8 under Section 4 of the UVTA introduces a conflict whereby practitioners can no longer be certain as to whether the law of the jurisdiction set forth by the settlor in the trust instrument is to apply. We had thought that the purpose of statutory law was to negate uncertainty, rather than introduce new uncertainties to established law.

Significance of UVTA Comments

LISI commentators differ on the significance of comments. One commentator asserts that, "[t]he Comments in short, are no more than a law journal article on steroids."[lxiii] But, other commentators point out (convincingly in our view) that courts are likely to refer to the Comments in interpreting Section 10 of the UVTA.[lxiv]

Irrespective of which commentator is more correct, the fact remains that the Comments do not accurately interpret existing law, and on this basis alone they should not have been included in the UVTA and should not be adopted by states enacting the UVTA.

ULC Process

As mentioned above, Chair Smith invited Dick to be an observer for the UVTA project because of his familiarity with self-settled spendthrift trusts. As the project progressed, the Reporter made clear his disapproval of APTs and gratuitously inserted the Comments with the objective of making it impossible for a resident of a state without APT legislation to establish an APT in a state that allows them. Shortly after the Reporter issued the Comments, Dick sent him the above authorities. Subsequently, though, the Reporter denied getting the authorities until Dick directed him to the message acknowledging their receipt. When Dick attempted to press his points, the Reporter shouted him down and never allowed him to resume. Dick's efforts to pursue his points with the Chair and the then President of the ULC also were unavailing.

We understand that the Chair and the Reporter now express surprise at the substantial push-back from the trusts and estates bar on these and other issues as they lobby for enactment of the UVTA around the country. We're told that the drafting committee has refused to budge notwithstanding the request of the Joint Editorial Board for Uniform Trust and Estate Acts, which was not consulted in connection with the UVTA's approval.

What the Comments Should Say

At a minimum, we believe that a state considering enactment of the UVTA should drop all of Comment 2 under Section 4 (except the first sentence) as well as the last paragraph of Comment 8 under Section 4.

Alternatively, Comment 2 might be revised to read as follows:

> 2. 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. Nevertheless, debtors are free to take steps to protect assets from claims that were neither in existence nor reasonably anticipated at the time of a transfer. Schreyer v. Scott, 134 U.S. 405, 414–15 (1890); In re Oberst, 91 B.R. 97, 101 (Bankr. C.D. Cal. 1988).

Likewise, the final paragraph of Comment 8 might read as follows:

> ~~Because t~~The laws of different jurisdictions differ in their tolerance of particular creditor-thwarting devices. ~~, choice of law considerations may be important in interpreting § 4(a)(1) as in force in a given jurisdiction~~. For example, ~~as noted in Comment 2, the language of § 4(a)(1) historically has been interpreted to render voidable a transfer to a self-settled spendthrift trust~~creditors historically have been able to reach the settlor's retained interest in a self-settled spendthrift trust pursuant to the common-law doctrine prohibiting such trusts. Suppose that jurisdiction X, in which this Act is in force, also has in force a statute permitting an individual to establish a self-settled spendthrift trust and transfer assets thereto, subject to stated conditions. If an individual Debtor whose principal residence is in X establishes such a trust and transfers assets thereto, then~~,~~ under § 10 of this Act~~,~~ the voidable transfer law of X applies to that transferand may serve to undo such transfer under § 4 or § 5 of this Act based on the facts at hand. ~~That transfer cannot be considered voidable in itself under § 4(a)(1) as in force in X, for the legislature of X, having authorized the establishment of such trusts, must have expected them to be used.~~

~~(Other facts might still render the transfer voidable under X's enactment of § 4(a)(1).) By contrast~~ If, instead, Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of jurisdiction X and transfers assets to it, then ~~the result would be different. Under § 10 of this Act,~~ the voidable transfer law of jurisdiction Y would apply to ~~the~~ that transfer and may serve to undo such transfer under § 4 or § 5 of this Act based on the facts at hand; however, absent the finding of a voidable transfer under the law of jurisdiction Y, the ability of creditors to reach the assets of the trust is determinable not under the Act but rather as a question of trust law under the law of jurisdiction X pursuant to the principles set forth under Chapter 10 (§§ 267–282) of the Second Restatement of Conflict of Laws. ~~Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y.~~

Conclusion

We acknowledge that some settlors will create self-settled spendthrift trusts with improper motives, but we disapprove of the ULC's attempt to invalidate all self-settled spendthrift trusts created by out-of-state settlors by taking the unprecedented step of classifying them as voidable transfers per se through the use of comments under the UVTA. If a settlor, who resides in a state that has enacted the UVTA but does not yet have self-settled spendthrift trust legislation, creates such a trust in a state that does have such legislation, the courts should apply the principles of Section 273 of the Second Restatement of Conflict of Laws in deciding which state's law governs. Absent a finding of intent to hinder, delay, or defraud creditors or, alternatively, a finding of insolvency, the creditor protection of such trusts should be upheld. In our opinion, courts in states that have enacted the UVTA with the Comments should ignore them; states adopting the UVTA should drop them; and the Drafting Committee should promptly revisit them.

HOPE THIS HELPS YOU HELP OTHERS MAKE

A *POSITIVE* DIFFERENCE!

Dick Nenno

Dan Rubin

TECHNICAL EDITOR: DUNCAN OSBORNE

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[ii] The text of the UFTA may be viewed at www.uniformlaws.org/shared/docs/Fraudulent%20 Transfer/UFTA_Final_1984.pdf (last visited Aug. 10, 2016). The jurisdictions that have enacted the UFTA are listed at www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent Transfer Act - now known as Voidable Transactions Act (last visited Aug. 10, 2016).

[iii] See Richard W. Nenno & John E. Sullivan, III, 868 T.M., Domestic Asset Protection Trusts.

[iv] The text of the UVTA may be viewed atwww.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014_AUVTA_Final%20Act_2016mar8.pdf(last visited Aug. 10, 2016). The jurisdictions that have enacted the UVTA are listed atwww.uniformlaws.org/LegislativeFactSheet.aspx?title=VoidableTransactions Act Amendments (2014) -Formerly Fraudulent Transfer Act (last visited Aug. 10, 2016).

[v] UVTA § 10 (2014).

[vi] UVTA § 10(b) (2014).

[vii] UVTA § 10(a) (2014).

[viii] UVTA § 4 cmt. 8 (2014).

[ix] UVTA § 4 cmt. 2 (2014).

[x] Restatement (Second) of Conflict of Laws §§ 267–282 (1971).

[xi] Statute of 13 Eliz. I, c.5 (1571).

[xii] Statute 3 Hen. VII, c.4 (1487).

[xiii] Erwin N. Griswold, Spendthrift Trusts § 473 at 539–40 (2nd ed. 1947) (footnotes omitted).

[xiv] Restatement (Second) of Trusts § 156 (1959).

[xv] Restatement (Third) of Trusts § 58(2) (2003). See Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, 3 Scott and Ascher on Trusts §§ 15.4–15.4.4 at 951–89 (5th ed. 2007); Helene S. Shapo, George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 223 at 423–91 (3d ed. 2007).

[xvi] UTC § 505(a)(2) (2000). The text of the UTC may be viewed atwww.uniformlaws.org/shared/docs/trust_code/UTC_Final_2016may24.pdf (last visited Aug. 10, 2016). The jurisdictions that have enacted the UTC are listed atwww.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust Code (last visited Aug. 10, 2016).

[xvii] Notably, today there are sixteen states — Alaska, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming — that allow some form of domestic APT. Each of the District of Columbia and every other state (except Connecticut, where the question is governed by case law), follow the historic Self-Settled Trust Rule and have a trust statute that permits creditors to reach the settlor's retained interest or the assets of a self-settled spendthrift trust irrespective of whether the transfer funding the trust was a voidable transfer.

[xviii] 12 Pa. C.S. §§ 5101–5110.

[xix] 20 Pa. C.S. § 7745(2).

[xx] Kenneth C. Kettering, The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act, 70 Bus. Law. 777 (Summer 2015).

[xxi] Jamison v. Miss. Valley Trust Co., 207 S.W. 788, 789 (Mo. 1918).

[xxii] J.S. Menken Co. v. Brinkley, 31 S.W. 92, 94–95 (Tenn. 1895).

[xxiii] Petty v. Moores Brook Sanitarium, 67 S.E. 355, 356–57 (Va. 1910).

[xxiv] Kettering, supra note 20, at 802 n.110.

[xxv] RSMo §§ 428.005–428.059; Tenn. Code Ann. §§ 66-3-301–66-3-313.

[xxvi] Va. Code Ann. §§ 55-80–55-105.

[xxvii] RSMo § 456.5-505(3); Tenn. Code Ann. §§ 35-16-101–35-16-112; Va. Code Ann. §§ 64.2-747, 64.2-745.1–64.2-745.2.

[xxviii] Rush Univ. Med. Ctr. v. Sessions, 980 N.E.2d 45 (Ill. 2012).

[xxix] Rush Univ. Med. Ctr., 980 N.E.2d at 51–52.

[xxx] Rush Univ. Med. Ctr., 980 N.E.2d at 52 (citation and internal quotation marks omitted).

[xxxi] Rush Univ. Med. Ctr., 980 N.E.2d at 52 (footnote, citation, and internal quotation marks omitted).

[xxxii] Rush Univ. Med. Ctr., 980 N.E.2d at 52 (emphasis in original).

[xxxiii] Rush Univ. Med. Ctr., 980 N.E.2d at 53 (emphasis in original).

[xxxiv] Waldron v. Huber (In re Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013).

[xxxv] Huber, 493 B.R. at 807.

[xxxvi] Huber, 493 B.R. at 807.

[xxxvii] Restatement (Second) of Conflict of Laws § 270 (1970).

[xxxviii] Huber, 493 B.R. at 808–09.

[xxxix] Huber, 493 B.R. at 809.

[xl] Huber, 493 B.R. at 809.

[xli] Restatement (Second) of Conflict of Laws § 269 cmt. d (1971).

[xlii] Restatement (Second) of Conflict of Laws § 273 (1971)

[xliii] Huber, 493 B.R. at 809.

[xliv] RCW § 19.36.020.

[xlv] Huber, 493 B.R. at 809.

[xlvi] Huber, 493 B.R. at 811.

[xlvii] 11 U.S.C. § 548(e)(1).

[xlviii] Huber, 493 B.R. at 811.

[xlix] Huber, 493 B.R. at 812–14.

[l] Huber, 493 B.R. at 814.

[li] Huber, 493 B.R. at 814.

[lii] 11 U.S.C. § 544(b)(1).

[liii] Huber, 493 B.R. at 814.

[liv] RCW § 19.40.041(a)(1).

[lv] Huber, 493 B.R. at 814–16.

[lvi] Huber, 493 B.R. at 816 (footnote omitted).

[lvii] In re Mortensen, 2011 WL 5025252 (Bankr. D. Alaska July 8, 2011). The prior opinions were In re Mortensen, 2011 WL 5025288 (Bankr. D. Alaska Jan. 14, 2011); In re Mortensen, 2011 WL 5025249 (Bankr. D. Alaska May 26, 2011).

[lviii] Mortensen, 2011 WL 5025252, at *1 (footnotes and internal quotation marks omitted).

[lix] Mortensen, 2011 WL 5025252, at *2 (footnotes and internal quotation marks omitted).

[lx] Daniel S. Rubin, Asset Protection Planning—Ethical? Legal? Obligatory?, 48 U. Miami Inst. on Est. Plan ¶ 1802 at 18-4 (2014) (footnote omitted).

[lxi] Schreyer v. Scott, 134 U.S. 405, 414–15 (1890) (internal quotation marks omitted; emphasis added).

[lxii] In re Oberst, 91 B.R. 97, 101 (Bankr. C.D. Cal. 1988).

[lxiii] Jay D. Adkisson, Jay Adkisson & the Reporter's Comments to the Uniform Voidable Transactions Act, Asset Protection Newsletter #319 (Apr. 11, 2016).

[lxiv] George D. Karibjanian, Gerard "J.J." Wehle, Jr. & Robert L. Lancaster, History Has Its Eyes on UVTA—A Response to Asset Protection Newsletter #319, Asset Protection Newsletter #320 (Apr. 18, 2016).