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DOMESTIC ASSET PROTECTION TRUSTS CONTRASTED WITH FOREIGN TRUSTS

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Domestic Asset Protection Trusts Contrasted With Foreign Trusts

A number of states have enacted legislation allowing self-settled asset protection trusts. This article analyzes the role of these trusts in an integrated estate plan, and compares them to offshore asset protection trusts.

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Integrated Estate Planning (“IEP”) may be defined as the marriage of traditional estate planning with lifetime asset protection planning. IEP necessarily extends far beyond planning to minimize estate tax and to avoid probate. In fact, the asset protection planning component of IEP has for some clients become more important than the customary tax and probate aspects.

Background

Integrated Estate Planning Trusts (“IEPTs”) can be either domestic or foreign trusts. While developments surrounding the use of domestic trusts for asset protection purposes are significant and should not be ignored but rather should be encouraged and taken advan-

tage of, the use of foreign IEPTs ultimately is more protective for the following reasons:

1. Issues surrounding conflicts of laws and choice of laws often are definitively settled in the foreign context but for decades have been obscured by policy considerations retroactively applied with judicial hindsight in the U.S.
2. There are no Full Faith and Credit Clause issues in the foreign context.
3. There are no Supremacy Clause issues in the foreign setting that otherwise might alter the outcome if federal bankruptcy law, federal tax law, or federal securities laws are at issue.
4. A myriad of asset protection related issues, beyond the threshold question of the enforceability of self-settled spendthrift provisions, often are definitively and favorably determined in the foreign context but are left unaffected when using domestic IEPTs.

In 1997, Alaska’s legislature enacted landmark trust legislation that allows the enforceability of spendthrift provisions in certain self-settled trusts. The term “self-settled” in this context means that the settlor is also a beneficiary of the trust. Because most settlors of trusts established with asset protection goals want to protect the assets but do not want to relinquish benefiting from the assets (at least to a limited degree), self-settled trusts play a major role in IEP. The IEPT can be described as an “all perils” insurance policy. If properly conceived, designed and implemented, a self-settled IEPT will protect the trust assets in the event of any threat that materializes, regardless of the peril involved.

Most significantly, this Alaska legislation permits the settlor to be a discretionary beneficiary of the trust he or she settles without necessarily subjecting the trustees to the claims of the settlor’s creditors. In support of this concept, this Alaska legislation provides that Alaska law will govern the valid-

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