Domestic Asset Protection Trusts—A Viable Estate and Wealth Preservation Alternative

by Thomas O. Wells

The use of domestic asset protection trusts has been increasing as settlors seek both to avoid federal estate tax inclusion under §§2036 and 2038 of the Internal Revenue Code of 1986, as amended (IRC or the "code"), for assets transferred to the trust, and to minimize the claims of creditors made against the trust assets. A "domestic asset protection" trust is a trust that complies with certain laws of Delaware,[1] Nevada,[2] Alaska,[3] or Rhode Island.[4] Such a trust eliminates the common law rule, applicable in most states, that allows a settlor's creditors to levy against the assets of the trust if the settlor creates the trust for his own benefit (also known as a self-settled trust). According to Richard Nenno, vice president and trust counsel for Wilmington Trust Company since 1997, several hundred Delaware asset protection trusts have been created, with a time-of-funding market value in excess of $2 billion.[5]

The purpose of this article is to review some of the basic provisions of the domestic asset protection trust legislation as enacted in Delaware and Nevada, as two representative states; analyze how Florida courts may interpret the rights of the settlor's creditors seeking to levy against the assets of a domestic asset protection trust; analyze and critique some of the common arguments suggesting that a domestic asset protection trust would not be recognized by courts in other states; and discuss some of the estate planning benefits of a domestic asset protection trust.

A domestic asset protection trust provides significant wealth preservation protection, and this protection is likely to be recognized by Florida courts applying *Brown*.

Delaware and Nevada Domestic Asset Protection Trust Legislation

Creating a Delaware asset protection trust is relatively easy. The essential elements are: 1) the trustee must be a Delaware resident, or an entity authorized by Delaware law to act as a trustee; 2) the Delaware trustee must maintain or arrange for custody in Delaware of at least some of the trust's assets; 3) the trust agreement must provide that Delaware law governs the validity, construction, and administration of the trust; 4) the trust must be irrevocable and contain a spendthrift clause; and 5) the settlor cannot retain the power to serve as trustee, or the power to direct distributions from the trust or to demand a return of assets transferred to the trust.[6]

Unlike the laws of other domestic asset protection trust jurisdictions, the settlor of a Delaware asset protection trust may retain the right to receive current income, thereby providing greater flexibility to the settlor.[7] However, such a right, if retained, could be reached by a settlor's creditors in a Florida court under the rationale applied in *In re Jane McLean Brown,* 303 F.3d 1261 (11th Cir. 2002).

Delaware law provides that certain creditors can defeat the protection offered by a Delaware asset protection trust. Those creditors are: 1) a person whose claim arose *before* a transfer of assets is made to the trust, brings an action within four years after the transfer (or, if later, within one year after the creditor discovered or should have discovered such transfer) and establishes by clear and convincing evidence that the transfer was fraudulent as to such person; 2) a person whose claim arises *after* a transfer of assets is made to the trust, brings an action within four years after the transfer and establishes by clear and convincing evidence that the transfer of assets to the trust was fraudulent; 3) a person whose claims result from an agreement or court order providing for alimony, child support, or equitable distribution; and 4) a person who suffers death, personal injury, or property damage prior to the transfer of assets to the trust for which the settlor has liability.[8] If one of these four types of creditors is successful in

asserting its claims against the trust assets, only that portion of the assets transferred by the settlor to the trust may be attached by the creditor to pay his claim and related costs, including attorneys' fees. A beneficiary (other than the settlor) who has received a distribution from the trust prior to the commencement of the action by the creditor may keep the amounts distributed unless the beneficiary acted in bad faith.[9]

Creating a Nevada asset protection trust is also relatively easy. The essential elements are: 1) the settlor must create a written, irrevocable Nevada spendthrift trust; 2) at least one trustee must be an individual Nevada resident and domiciliary, or a trust company or bank with a Nevada office; 3) the Nevada trustee must maintain records and prepare the income tax returns for the trust; 4) all or part of the administration for the trust must take place in Nevada; 5) the trust agreement cannot require that any part of the income or principal of the trust be distributed to the settlor other than as a discretionary distribution; and 6) a transfer to the trust cannot be made to hinder, delay, or defraud *known* creditors.[10] (Emphasis added.)

Nevada law, similar to the law of Delaware, provides that certain creditors may defeat the protection offered by a Nevada asset protection trust. Such creditors are a person whose claim arose *before* a transfer of assets is made to such trust and who brings an action within two years after the transfer (or, if later, within six months after the creditor discovered or should have discovered the transfer); and a person whose claim arises *after* a transfer of assets are made to the trust and who brings an action within two years after such transfer.[11] Although the statute of limitations in Nevada is two years shorter than the statute of limitations in Delaware, a creditor attacking a transfer to a Nevada trust need not establish by clear and convincing evidence that a transfer of assets to the trust was fraudulent. Nevada law may provide a settlor with greater protection than Delaware law because Nevada law protects against creditors seeking alimony, child support, or equitable distribution, or who have suffered death, personal injury, or property damage prior to the transfer of assets to the trust.

Possible Interpretation by Florida Courts

Based upon the decision in *Brown*, if a Florida settlor only retains a discretionary right to receive distributions from a domestic asset protection trust and if the transfer to the trust does not constitute a fraudulent conveyance under applicable law, it may be difficult for a settlor's creditors to levy against the trust assets. In the *Brown* case, Ms. Brown, as grantor, had established an irrevocable charitable remainder unitrust in 1993. The grantor received a monthly seven percent unitrust interest and served as the sole trustee of the trust. Four charities were named as remainder beneficiaries. Ms. Brown's powers as trustee were limited primarily to directing investments. She lived off the income she received from the trust. After Ms. Brown died, her daughter was to receive the seven percent unitrust interest, subject, however, to Ms. Brown's ability to divest that interest pursuant to the exercise of a limited testamentary power of appointment. The trust included a spendthrift provision.

In 1999, Ms. Brown filed for voluntary Ch. 7 bankruptcy in the Southern District of Florida. The bankruptcy court held that Ms. Brown's interest in the trust could not be attached by her creditors because there was a spendthrift provision in the trust and the trust qualified as a spendthrift trust. The bankruptcy court did not address whether Ms. Brown's interest was an annuity exempt from the claims of creditors under F.S. Ch. 222.

On appeal, the U.S. District Court for the Southern District of Florida upheld the bankruptcy court's conclusion that Ms. Brown's interest in the trust could not be attached by her creditors due to the spendthrift provision. The 11th Circuit Court of Appeals upheld the lower court's decision that, under applicable Florida law, restrictions on creditors of the beneficiary of a spendthrift trust are valid provided another person establishes the trust. However, the 11th Circuit Court reversed the decision of the lower court and reasoned that this protection does not apply to a grantor's beneficiary interest based on the common law "self-settled trust" rule. Notwith-

standing the lack of creditor protection afforded to self-settled trusts, the 11th Circuit Court held Ms. Brown's creditors could not attach the trust property itself, but could only attach what the grantor retained as a beneficiary, because the creditors were bound by the terms of the trust. In summary, the 11th Circuit Court held that Ms. Brown's creditors were bound by the terms of the trust; could attach Ms. Brown's retained seven percent unitrust interest; and could not attach or liquidate the trust's assets in satisfaction of their claims.

The settlor of a Nevada asset protection trust can only retain a discretionary distribution right. Therefore, applying the reasoning of the *Brown* case, the creditors of a Florida settlor with a Nevada asset protection trust can only reach the rights retained by the settlor—a discretionary distribution right. A creditor's right to reach a settlor's retained interest in a spendthrift trust, under the reasoning of the *Brown* case, could be analogized by Florida courts to a charging order imposed against a partner's interest in a partnership.[12] A creditor's right to a debtor's discretionary distributions from a trust is similar to a charging order because, absent a fraudulent conveyance, and under the holding in *Brown*, the court cannot order the trust to make a distribution to the settlor, and the creditor cannot attach the assets owned by the trust because the creditor must respect the terms of the trust.

From a wealth preservation perspective, a domestic asset protection trust may be more advantageous than a family limited partnership because a trustee generally has greater discretion in the timing and amounts of distributions to beneficiaries than a general partner in a partnership with multiple partners. In addition, the trustee often has greater latitude in purchasing non-business, non-income-producing assets to be used by the beneficiaries (*e.g.*, a home in Aspen) than does a general partner of a partnership.

Many foreign trusts permit the settlor to direct the disposition of the trust assets pursuant to a general or special power of appointment to ensure that the transfer of assets to the trust is an incomplete gift and included in the settlor's gross estate to avoid income tax under IRC §684. Under Florida law, the settlor's retention of such a power could allow a creditor to reach the principal and income of the trust.[13] With a domestic asset protection trust, the settlor is not subjected to income tax under IRC §684 and need not retain a general or special power of appointment. This line of attack is therefore effectively cut off with domestic asset protection trusts.

Common Arguments Attacking Effectiveness

There are four arguments (in addition to the self-settled trust rule) that have been made to attack the viability of domestic asset protection trusts.

1) *Conflicts of laws arguments.* It has been argued that conflicts of laws principles mandate that the laws of the settlor's state of domicile—and not the laws of the state in which the trust was created—would govern the rights of the settlor's creditors against the trust. The Restatement (Second) of Trusts, §269, allows a trust instrument to select the state whose law is to govern with regard to both inter vivos and testamentary transfers, provided that the state whose law is selected has a "substantial relation to the trust" and that the application of its laws does not violate a strong public policy of the state. Both Delaware and Nevada asset protection trust laws require that at least one trustee be a resident or qualified entity in that state, the trust records be maintained in that state, that the domiciliary trustee materially participate in the administration of the trust, and that the trust agreement expressly incorporate the laws of the state to govern the validity, construction, and administration of trust. Further, most practitioners require the trustee to execute a domestic asset protection trust agreement in either Delaware or Nevada, as may be applicable, and maintain bank accounts in that state. In *Togut v. Hecht*, 54 B.R. 379, 381, *aff'd*, 69 B.R. 290 (S.D.N.Y. 1987), the bankruptcy court held that that the settlor's choice of governing law in a trust agreement controls conflicts of law principles. Accordingly, if the trust is properly created and maintained consistent with either Delaware or Nevada's asset protection trust laws, it is unlikely that the conflicts of laws principles will cause a court not to apply the laws of either Delaware or Nevada.

2) *Full faith and credit clause of the U.S. Constitution.* The second argument is that the full faith and credit clause of the U.S. Constitution[14] will require the courts of Delaware or Nevada to enforce a judgment in favor of an out-of-state settlor's creditors rendered by a court in another state against the settlor and the trust. In a similar vein, the Restatement (Second) of Conflicts of Laws, §93, provides that, with certain exceptions, a valid judgment rendered in one state of the U.S. must be recognized in a sister state.

However, the out-of-state trust and/or trustee must have sufficient minimum contacts with the state rendering the adverse judgment before that state may exercise personal jurisdiction over the trust or trustee. In *Hanson v. Denckla*, 357 U.S. 235, *reh'g denied*, 358 U.S. 858 (1958), the U.S. Supreme Court invalidated a decision by the Florida Supreme Court against a Delaware trust company as a violation of due process under the 14th Amendment of the U.S. Constitution because the Florida court did not have personal jurisdiction over the Delaware trust company. For this reason, many practitioners recommend limiting the trustees of an out-of-state domestic asset protection trust only to those persons or entities who reside in the state in which the trust was created and who do not have a significant presence in the settlor's state of domicile.

3) *Supremacy clause of the U.S. Constitution.* The third argument is that the supremacy clause of the

U.S. Constitution[15] requires that federal law (such as federal bankruptcy law) override conflicting state law and, therefore, that the Delaware or Nevada asset protection trust legislation must give way. However, federal bankruptcy laws do not necessarily conflict with state laws because federal bankruptcy laws use state laws to determine the interest of settlors and beneficiaries of a trust.

Under §541(c)(2) of the U.S. Bankruptcy Code, a spendthrift clause is enforceable if it is "enforceable under applicable non-bankruptcy law." In other words, if the assets of a trust are not subject to the claims of the settlor's creditors under state law, those assets will not be subject to the claims of creditors under federal bankruptcy laws.

Despite §541(c)(2) of the U.S. Bankruptcy Code and the lack of conflict between federal and state laws, some bankruptcy courts have disregarded the terms of a trust and the laws under which the trust was created and have applied local laws to allow creditors to levy against trust assets. For example, in the foreign trust area, the bankruptcy court in *In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996), applied the laws of New York, instead of the laws of Jersey in the Channel Islands. Applying the "dominant interest" theory under conflicts of laws, the bankruptcy court permitted the creditor to proceed against the assets of an offshore irrevocable trust due to the debtor's "fraudulent conduct" because the debtor failed to disclose the trust to the bankruptcy court and made false statements to the bankruptcy court. The bankruptcy court in *In re Brown*, No. 95-3072 (Bankr. D. AK., 1996), applied the laws of Alaska, rather than laws of Belize, and treated the trust as a "sham" because there was no executed trust document, the debtor retained direct control over the trust, and there was no credible purpose for the trust other that to defraud creditors. The bankruptcy court in *Lawrence v. Chapter 7 Trustee*, 251 B.R. 630 (Bankr. S.D. Fla. 2000), invalidated a spendthrift provision based upon Florida law, and not the laws of the Mauritius which was the governing law under the trust agreement, because the trustee/settlor exercised substantial control over the trust assets. This case is better thought of as a "substantial control" case. If a settlor can avoid fraudulent statements, and if he or she can create and maintain the trust in accordance with the laws of either Delaware or Nevada, the settlor should not fall within the "fraudulent conduct" case, the "sham trust" case or the "substantial control" case. Absent these sorts of egregious conduct on the part of the settlor, the bankruptcy court should construe the rights of a settlor's creditors pursuant to the laws under which the trust was created.

4) *Fraudulent conveyance laws.* Notwithstanding the asset protection afforded by a domestic asset protection trust, if the transfer of the assets to a trust constitutes a fraudulent conveyance under applicable law, creditors may void the transfer of property to the trust, attach the trust assets, obtain the appointment of a receiver to take charge of the property transferred to the trust, or obtain a levy of execution on the property transferred to the trust or its proceeds.[16]

Under Florida law, a fraudulent conveyance occurs as to present creditors if the settlor of such trust transfers property to the trust: a) with actual intent to hinder, delay, or defraud any creditor of the settlor; or b) without receiving a reasonably equivalent value in exchange for the transfer, and either the settlor was engaged or was about to engage in a business or transaction for which the remaining assets of the settlor were unreasonably small in relation to the business or transaction or the settlor intended to incur, or believed or reasonably should have believed he would incur, debts beyond his ability to pay as they become due; or c) without receiving reasonably equivalent value in exchange for the transfer, and the settlor was insolvent at that time or became insolvent as a result of the transfer; or d) which trust was an insider (*i.e.*, the settlor or his relative is a trustee of the trust) to whom the settlor owed a debt, the settlor was insolvent at that time, and the trustee had reasonable cause to believe that the settlor was insolvent.[17] Creditors with claims against the settlor that exist prior to the transfer may seek to recover under a fraudulent conveyance for transfers described in a), b), c), or d) above,

and creditors with claims against the settlor that arose after the transfer may seek to recover under a fraudulent conveyance for transfers described in a) or b) above.

In re Crawford, 172 B.R. 365 (M.D. Fla. 1994), is a good example of a fraudulent transfer involving a settlor and a trust. In that case, the settlor had created a revocable trust in 1986 as to which she was the sole trustee. On January 9, 1992, an adversary bankruptcy proceeding was filed against the settlor. On January 22, 1992, the settlor amended the trust to become irrevocable, and resigned as trustee. The bankruptcy court determined that the modification of the terms of the trust, and the relinquishment of the settlor's trust powers and dominion and control over the trust, constituted a fraudulent conveyance because the bankruptcy court could have seized the assets of the trust prior to the settlor's amendment to the trust agreement and the relinquishment of her power as trustee. It is important to note that a Delaware or Nevada domestic asset protection trust must be irrevocable, and, further, that the settlor cannot serve as trustee. Therefore, it is unlikely that the facts of *In re Crawford* would apply with respect to such asset protection trust.

Estate Planning Benefits

There are significant gift, estate and generation-skipping tax benefits provided by domestic asset protection trusts.

Assets transfers to a domestic asset protection trust can either be included in the settlor's gross estate or excluded from the settlor's gross estate, depending upon how the settlor chooses to structure the trust. For example, the settlor may choose to fund a domestic asset protection trust so as to avoid any gift taxes upon the transfer of property to the trust by retaining a special testamentary power of appointment. The retention of the special power of appointment makes a transfer of assets to the trust both an incomplete gift (until distributions are actually made from the trust to persons other than settlor) and includable in the settlor's gross estate under either or both of IRC §§2036 and 2038. Conversely, if the settlor desires to make a completed gift to the trust (or to sell assets to the trust at their fair market value in a sale to a so-called "defective" grantor trust) so that the appreciation of the trust assets are excluded from the settlor's estate, and if the settlor wants to retain a discretionary right to receive distributions from the trust, the practitioner should consider using a domestic asset protection trust. Nondomestic asset protection trusts (such as a Florida trust) allow a settlor's creditors to reach the assets transferred to the trust which cause the transfer of such assets to be an incompleted gift and included in the settlor's gross estate under IRC §§2038(a)(1) and 2036(a)(2).[18] In contrast, domestic asset protection trusts deny the settlor's creditors the right to reach the assets transferred to the trust and allow for the transfer of assets to such trusts to be a completed gift and excluded from the settlor's gross estate.

Although §2036(a)(2) or 2038(a)(1) may not require estate tax inclusion for property transferred to an asset protection trusts, the assets of the trust could still be included in the settlor's estate if a pattern of distributions to the settlor can be established as a retained income interest under §2036(a)(1).[19] Therefore, the settlor must avoid such pattern of distributions to eliminate the application of §2036(a)(1) that would otherwise cause such assets to be included in the settlor's gross estate. Avoiding this pattern of distributions is also helpful in preventing a creditor from arguing that the settlor (and not the trustee) has ultimate control over the trust assets. Such an agreement, if successful, could allow the creditor to levy against the assets of the trust in a "substantial control" or "sham trust" case.

Another tax benefit with a domestic asset protection trust comes in the area of generation-skipping tax (GST) planning. The allocation of the settlor's GST exemption will not be effective as long as the assets of the trust are includable in the settlor's gross estate.[20] As discussed above, estate tax inclusion results where the settlor's creditors can reach the assets of the trust. Therefore, the allocation of the settlor's GST exemption to a non-domestic asset protection trust (such as a Florida trust) that is considered a self-settled trust is ineffective, whereas the allocation of a GST exemption to a domestic asset protection trust would likely be respected.

From a wealth preservation perspective, offshore asset protection trusts can provide advantages over domestic asset protection trusts. These advantages can include the cost to creditors of prosecuting the case in the jurisdiction in which the

trust was created, no recognition of foreign judgments, and shortened fraudulent conveyance limitation periods. However, domestic asset protection trusts also have advantages over offshore trusts. First, domestic asset protection trusts may more be likely recognized than a trust created in a remote, offshore jurisdiction. In *In re Lawrence*, 238 B.R. 498, 500 (Bankr. S.D. 1999), the bankruptcy court, challenging the purpose of creating an offshore asset protection trust, stated the following:

> [I]t defies reason—it tortures reason—to accept and believe that this Debtor transferred over $7 million in 1991, an amount then constituting over 90% of his liquid net worth, *to a trust in a far away place administered by a stranger* – pursuant to an Alleged Trust which purports to allow the trustee of the Alleged Trust total discrepancy over the administration and distribution of the trust res.

(Emphasis added.)

Second, certain clients may want the security and financial strength of a trust created under the laws of, for example, Delaware or Nevada and maintained by a trust company located within the U.S. Third, a domestic asset protection trust avoids the special tax reporting rules of a foreign trust. Finally, a domestic asset protection trust avoids the potential adverse federal income tax consequences associated with the ownership of assets by a foreign trust. Under IRC §684, ownership of assets by a foreign trust can result in a deemed sale, with gain taxable in an amount equal to the difference between the fair market value of the assets owned by the foreign trust over the adjusted basis of such assets in the hands of the transferor, determined as of the date the foreign trust (that formerly qualified as a grantor trust during the life of the settlor) no longer qualifies as a grantor trust, for example, upon the death of the settlor.

The principal risks in using domestic asset protection trusts are that the legislation is relatively new and the laws applicable to such trusts have not yet been tested in court. However, based upon an analysis of creditor rights under the *Brown* case, this risk may be acceptable to clients. Despite facing similar risks in the early to mid-1990s, limited liability companies (LLCs) have become the predominant entity of choice for closely-held businesses. Newer does not necessarily mean riskier in the long run.

A domestic asset protection trust provides significant wealth preservation protection, and this protection is likely to be recognized by Florida courts applying the *Brown* case. Such trusts also provide significant estate, gift and generation skipping tax advantages over other types of domestic trusts. Therefore, based on the foregoing, domestic asset protection trusts have become a viable estate and wealth preservation alternative and like LLCs, may become the predominant trust form in the future. ❑

[1] Del. tit. 12, §3570 *et seq.*, known as the Delaware Qualified Dispositions in Trust Act effective July 9, 1997.

[2] NEV. REV. STAT. ch. 166, known as the Spendthrift Trust Act of Nevada, effective October 1, 1999.

[3] ALASKA STAT. §§13.36.105 to 13.36.220, known as the Alaska Trusts Act, effective April 2, 1997.

[4] R. I. GEN. LAWS §§18-9.2-1 to 18-9.2-7, effective July 1, 1999.

[5] Based upon telephone interview with Richard Nenno on February 11, 2003.

[6] Del. tit. 12, §3570(9) and (10).

[7] Del. tit. 12, §3570(9).

[8] Del. tit. 12, §§3572(a), 3570(2) and 3573(1).

[9] Del. tit. 12, §3574(b)(2).

[10] NEV. REV. STAT. §§166.040 and 166.015.

[11] NEV. REV. STAT. §166.170(1) and (2).

[12] Florida courts have long recognized the limitations upon creditors of a partner in a partnership to levy against the assets of the partnership based upon a charging order to satisfy the debts of the debtor-partner. As to a general partnership, *see Krauth v. First Continental Dev-Con, Inc.*, 351 So. 2d 1106, 1108 (Fla. 4th D.C.A. 1977) ("At common law [a partner's interest in a partnership] was subject to levy and sale under execution, but that was changed by the Uniform Partnership Act, which has made the statutory charging order the only means by which a judgment creditor can legally command payment from a debtor's partnership interest."); *Anderson v. Potential Enterprises, Ltd.*, 596 So. 2d 488, 491 (Fla. 5th D.C.A. 1992); *In re Canto*, 84 B.R. 773, 776 (Bankr. N.D. Fla. 1988); *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So. 2d 1002, 1003 (Fla. 4th D.C.A. 1986); and *In re Jam Fine Furniture, Inc.*, 19 B.R. 578, 582 (Bankr. S.D. Fla. 1982). As to a limited partnership, *see In re Dutch Inn of Orlando, Ltd.*, 2 B.R. 268, 272-273 (Bankr. M.D. Fla. 1980) (rights of a judgment creditor against a general partner's interest in a limited partnership); and *In re Stocks*, 110 B.R. 65, 66-67 (Bankr. N.D. Fla. 1989) (rights of a judgment creditor against a limited partner's interest in a limited partnership). For a more complete discussion of charging orders, *see* Thomas O. Wells, *Asset Protection in the Partnership Context: What's All the Hoopla?*, 68 FLA. B.J. 43 (Feb. 1994).

[13] *See Brown*, 303 F.3d 1261, citing *Waterbury v. Munn*, 32 So. 2d 603, 605 (Fla. 1947). Footnote 9 of *Brown* provides that both self-settlement and exercise of dominion over the trust assets serve as independent grounds for invalidating a spendthrift provision. *See* RESTATEMENT (SECOND) OF TRUSTS, §156, comment c.

[14] U.S. CONST. art. IV, §1; 28 U.S.C. §1738.

[15] U.S. CONST. art. VI, §2.

[16] FLA. STAT. §726.108.

[17] FLA. STAT. §§726.105 and 726.106.

[18] Compare P.L.R. 9837007 (applying Rev. Rul. 77-378, 1977-2 C.B. 348) in which assets transferred to an Alaskan asset protection trust were a completed gift with T.A.M. 199917001 (applying Rev. Rul. 76-103, 1976-1 C.B. 293) in which assets transferred to an irrevocable California self-settled trust were not a completed gift and the trust assets were included in the estate of the settlor because California did not recognize self-settled trusts. *See also Estate of Paxton v. Comm'r*, 86 T.C. 785, 818 (1986) (applying Washington law that allowed creditors to reach the corpus of a self-settled discretionary trust causing estate tax inclusion); and *Outwin v. Comm'r*, 76 T.C. 153 (1981), acq. 1981-2 CB 2 (applying Massachusetts law in determining an incomplete gift for a transfer of assets to a self-settled discretionary trust).

[19] *See Estate of Skinner v. United States*, 197 F. Supp. 726 (E.D. Pa. 1961), *aff'd*, 316 F.2d 517 (3d Cir. 1963).

[20] Treas. Reg. §26.2632-1(c).

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