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**Asset Protection Trusts in Texas?
Really?**

Presented by:

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Amy P. Jetel is a partner in the Austin, Texas, law firm of Beckett Tackett & Jetel, PLLC, where she focuses her practice on the design, implementation, and administration of outbound and inbound foreign trust and entity structures. In this practice, she has gained a depth of experience in the U.S. tax and compliance aspects of non-U.S. trusts and entities, and she frequently addresses complex international tax and treaty issues faced by individuals with ties to multiple jurisdictions.

Ms. Jetel has developed a niche practice in planning around the throwback-tax regime that applies to foreign non-grantor trusts, and in representing clients before the Internal Revenue Service to bring previously unreported foreign structures into full compliance. Ms. Jetel also practices in the areas of traditional estate and disability planning, probate and estate administration, and entity formation and governance.

She is a frequent author and speaker in the areas of estate planning, asset protection, and international taxation and compliance. Ms. Jetel is a veteran of the U.S. Navy.

Education

The University of Texas School of Law (J.D., 2002)
The University of Texas at Austin (B.A., English, with honors, 1998)
The University of Texas at Austin McCombs School of Business
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Professional Affiliations

Society of Trust and Estate Practitioners (STEP)
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American Bar Association
- Real Property, Probate and Trust Law Section
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OTHER QUALIFICATIONS:

- Fellow, The American College of Trust and Estate Counsel (ACTEC) (Member, Estate & Gift Tax Committee)
- Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
- Best Lawyers in America, Trusts and Estates
- Admitted to Practice: State Bar of Texas; Federal District Court for the Southern District of Texas; United States Tax Court

PROFESSIONAL ACTIVITIES:

- Real Estate, Probate and Trust Law Section, State Bar of Texas (Council Member, 2014-2018; Member, Decedents' Estates Committee, 2011-present)
- Tax Section, State Bar of Texas (Council Member, 2013-2016; Vice Chair, Estate and Gift Tax Committee, 2011-2014)
- Fellow, Texas Bar Foundation
- Member, State Bar of Texas (Sections of Real Estate, Probate and Trust Law; Tax); Houston Bar Association (Section of Probate, Trusts and Estates); The College of the State Bar of Texas; Houston Estate and Financial Forum

RECENT SPEECHES AND PUBLICATIONS:

- Co-Author/Panelist: *Tax Issues in Fiduciary Litigation*, Federal Tax Institute of New England, 2015
- Author/Speaker: *Income Tax Basics for Estate Planners*, American Bar Association Section of Real Property, Trust & Estate Law, Skills Training for Estate Planners – Fundamentals Course, 2015
- Co-Author/Panelist: *Treating Capitals Gains as Trust Accounting Income: Essential Updates for Estate Planners*, ACTEC-ALI CLE Telephone Seminar/Audio Webcast, 2015
- Author/Speaker: *Decanting Trusts: Irrevocable, Not Unchangeable*, Corpus Christi Estate Planning Council, 2015
- Author/Speaker: *Between Death and Probate: Selected End-of-Life Issues*, Disability and Elder Lawyers Association, 2015; East Texas Estate Planning Council, 2015; The University of Texas School of Law 16th Annual Estate Planning, Guardianship and Elder Law Conference, 2014
- Panelist: *Planning with SCINs and Private Annuities – Seizing Opportunities While Navigating Complications*, 49th Annual Heckerling Institute on Estate Planning, 2015
- Co-Author/Panelist: *Evaluating Portability, Potential Problems and the Post-ATRA Planning Paradigm*, 40th Annual Notre Dame Tax and Estate Planning Institute, 2014
- Co-Author/Panelist: *Directed Trusts and the Slicing and Dicing of the Trustee's Duties*, ACTEC 2014 Fall Meeting
- Panelist: *The Changing Role of the Fiduciary and Who Represents Them*, State Bar of Texas 38th Annual Advanced Estate Planning and Probate Course, 2014
- Co-Author/Panelist: *It Slices, It Dices, It Makes Julianne Fries: Cutting-Edge Trust Tools*, State Bar of Texas 20th Annual Advanced Estate Planning Strategies Course, 2014
- Author/Speaker: *End-of-Life Issues*, State Bar of Texas Advanced Elder Law Course, 2014
- Co-Author/Speaker: *The Brave New World of Estate Planning*, San Antonio Estate Planners Council's Docket Call in Probate Court, 2014
- Comment letter to Department of Treasury on behalf of the Tax Section of the State Bar of Texas on proposed regulations regarding reporting of net investment income tax by trustees of charitable remainder trusts, February 20, 2014
- Author: *Decanting Trusts: Irrevocable, Not Unchangeable*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 35, 2013
- Author: *What Happens After Death?*, The Houston Lawyer, Nov./Dec. 2013 issue
- Co-Author/Panelist: *Trust and Estate Planning in a High-Exemption World and the 3.8% "Medicare" Tax: What Estate and Trust Professionals Need to Know*, The University of Texas School of Law 61st Annual Tax Conference – Estate Planning Workshop, 2013; Amarillo Estate Planning Council 23rd Annual Institute on Estate Planning, 2014
- Author/Speaker: *The Net Investment Income Tax: A Trust and Estate Perspective*, Wednesday Tax Forum, 2013
- Author/Panelist: *Affordable Care Act: A Trust and Estate Perspective*, State Bar of Texas 31st Annual Advanced Tax Law Course, 2013
- Author/Speaker: *Between Death and Probate: Practical Items of Esoterica*, State Bar of Texas 37th Annual Advanced Estate Planning and Probate Course, 2013

Asset Protection Trusts in Texas? Really?

By
Amy P. Jetel

The last hundred years of our history has fostered an increasing number of risks to individual wealth. For instance, the United States judicial system has developed in a way that causes many individuals to feel exposed to legal judgments that are wholly disproportionate to any actual liability. This fear, along with a general distrust of governmental regulatory agencies and the potential liability arising from future legislation, has led many individuals to look for ways to protect themselves from these risks.

The “spendthrift trust” (which protects a trust’s assets from the claims of a non-settlor beneficiary’s creditors) was created at the end of the 19th century in response to the general social fear and unease arising out of the unstable economic and business environment during those times.¹ Though creditors and many scholars disliked spendthrift trusts,² individuals demanded them, courts approved of them,³ and by the first part of the 20th century, nearly every state had adopted the spendthrift trust concept by either statute or common law.⁴ State legislation allowing spendthrift trusts was passed in response to a concern that property conveyed in trust for beneficiaries would be used as collateral for the beneficiary’s debts or otherwise imprudently assigned by a financially irresponsible, or “spendthrift,” beneficiary.

Given the merit of a settlor’s desire to protect a beneficiary from himself, some states’ legislatures agreed to codify this concept, and other states’ courts approved it under common law. But they balanced this arguably pro-debtor result with the corresponding concept that an individual should not be able to use a trust to protect assets for his or her own benefit. Thus, in the United States, spendthrift trust statutes and case law historically prohibited a person from setting a spendthrift trust for his or her own benefit (called a “self-settled spendthrift trust”). Many non-U.S. jurisdictions, however, allow a settlor to be a beneficiary of a trust that contains anti-alienation provisions similar to a spendthrift trust, thereby protecting the settlor’s beneficial interest in the trust from the claims of his creditors—this is otherwise known as an “asset protection trust.” This feature of non-U.S. law, along with other asset-protective aspects of offshore jurisdictions, has led many U.S. persons to settle trusts in foreign jurisdictions.

¹ The worldwide economic downturn of 1873–1896 is referred to as the “Long Depression.”

² See, e.g., Jesse Dukeminier and Stanley M. Johanson, *Wills, Trusts, and Estates* (Aspen Law & Business, 6th ed., 2000), at 632, citing J. Gray, *Restraints on the Alienation of Property* (1883).

³ See *Nichols v. Eaton*, 91 U.S. 716 (1875); *Broadway National Bank v. Adams*, 133 Mass. 170 (1882).

⁴ Dukeminier and Johanson at 632, citing J. Gray, *Restraints on the Alienation of Property* (2d ed., 1885) (“State after State has given in its adhesion to [the spendthrift trust] doctrine . . . and yet I cannot recant”).

However, over the last couple of decades, the attitude in the United States toward asset protection trusts has been shifting, and now 15 states have passed legislation that, to one extent or another, allows for the creation of domestic asset protection trusts.⁵

Although many estate planners think that “asset protection” planning is distinct from “traditional” trust and estate planning, limited liability has always been a fundamental part of our legal system and a core estate-planning concept. The fundamental nature of asset protection in our legal system can be seen most clearly in each state’s statutory and common-law vehicles for sheltering assets from creditors’ claims while allowing the debtor to have the continued use and benefit of the sheltered assets. For example, corporations, limited liability companies, limited partnerships, retirement plans, life insurance, annuities, homestead, and of course, spendthrift trusts, are all time-honored estate-planning and wealth-protective vehicles. In short, estate planning by its very nature has always been an exercise in asset protection planning, as its goal is to preserve wealth for current and future generations.

Texas, like most states, protects assets held in a spendthrift trust from the claims of the beneficiaries’ creditors,⁶ and Texas is one of the most protective states in this regard, as the only exception to spendthrift protection in Texas is a claim for child support.⁷ However, also like most states, it was impossible to create an “asset protection” trust under Texas law⁸—until recently.

In 2013, the Texas legislature revised section 112.035 of the Texas Trust Code (the spendthrift trust statute) to add significant exceptions to the prohibition against spendthrift protection for self-settled trusts.⁹ As discussed in greater detail below, the revised statute provides expansive opportunities for spouses to use *inter vivos* trusts to shield their assets from creditors, and it also opens the door to using powers of appointment as a mechanism for establishing an asset protection trust (of sorts) in Texas.¹⁰

A new subsection (g) to the Texas spendthrift trust statute opens with:

“For the purpose of this section, property contributed to the following trusts is not considered to have been contributed by the settlor, and a person who would otherwise be

⁵ Alaska, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming.

⁶ Tex. Prop. Code Ann. § 112.035(a), (b). (Note that Subtitle B of Title 9 of the Texas Property code is referred to as the “Texas Trust Code”).

⁷ Tex. Fam. Code Ann. § 154.005.

⁸ Tex. Prop. Code Ann. § 112.035(d); *Daniels v. Pecan Valley Ranch, Inc.* 831 S.W.2d 372 (App. 4 Dist. 1992, writ denied) (holding that a “[s]ettlor cannot create [a] spendthrift trust for his own benefit and have [the] trust insulated from [the] rights of creditors.”); see also *First Bank and Trust v. Goss*, 533 S.W.2d (Civ. App. 1976).

⁹ See Exhibit A for a copy of Section 112.035 reflecting the 2013 amendments.

¹⁰ All asset protection planning is subject to fraudulent transfer restrictions—that is, a person cannot make a transfer with the intent to hinder, delay, or defraud existing or reasonably foreseeable creditors; future creditors are not protected by fraudulent transfer law, and rightfully so. See Tex. Bus. & C. Code, Title 3, Ch. 24, for the Texas Uniform Fraudulent Transfer Act. An in-depth discussion of fraudulent transfer considerations is outside the scope of this paper.

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