Is a Tennessee Domestic Asset Protection Trust (aka a Tennessee Investment Services Trust) Right for You ?

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A domestic asset protection trust (a "DAPT") is a type of irrevocable trust, allowable under state law, that provides the assets of the trust a layer of protection from the creditors of the trust's grantor, while also allowing for the grantor to retain a personal beneficial interest in the trust's assets. Since 2007, Tennessee has authorized the creation of these self-settled domestic asset protection trusts, or Tennessee Investment Services Trusts as they are called under the Tennessee statute.[1] In this article, a Tennessee Investment Services Trust is referred to as a "Tennessee DAPT." Additionally, to narrow the scope in reviewing Tennessee DAPTs, the "transferor"[2] of any assets is assumed to be the grantor of the trust for the purposes of this article.

Although a grantor does not need to be a resident of Tennessee to take advantage of a Tennessee DAPT, there are certain requirements that must be met in order to receive such asset protection.

Tennessee DAPT Requirements

The Tennessee DAPT must:

- be governed by the laws of Tennessee.[3]
- be irrevocable.[4]
- contain a spendthrift provision.[5]
- have at least one **qualified trustee**.[6]
- have the transferor of the assets sign a **qualified affidavit**.[7]

Qualified Trustee

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At least one trustee of a Tennessee DAPT is required to be a qualified trustee. A qualified trustee is either a Tennessee resident or a Tennessee licensed corporate trustee.[8] The qualified trustee should also have some meaningful involvement with the trust assets, such as maintaining the records of the trust or preparing the tax returns for the trust. Although the qualified trustee requirement theoretically limits the scope on who can take advantage of a Tennessee DAPT, so long as the qualified trustee of the Tennessee DAPT is afforded a certain level of active involvement with the trust assets, the asset protection should be respected.

Qualified Affidavit

With the creation of the Tennessee DAPT, the grantor, as the owner of the property being transferred, is required to execute a qualified affidavit that states the following:

- The grantor has full rights and authority of the assets being transferred.
- The transfer will not cause the grantor to become insolvent.
- There is no intent on the part of the grantor to defraud a creditor of the assets by transferring the assets into the trust.
- The grantor is not involved in any administrative proceedings that have not been disclosed as an attachment to the affidavit.
- The grantor is not currently contemplating bankruptcy.
- The assets being transferred were lawfully acquired.[9]

Tennessee DAPT Benefits

Grantor as a Trust Beneficiary

A grantor of a Tennessee DAPT is an allowable beneficiary of the trust that will not cause the trust to lose asset protection.

Although the grantor is unable to be a qualified trustee, even if the grantor is a Tennessee resident, the grantor of a Tennessee DAPT is able to be an investment advisor for the trust.[10] An investment

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advisor is a special fiduciary role that, if granted in the trust document, could provide the grantor with the ability to remove or appoint a new qualified trustee, direct trust distributions, and make investment decisions for the trust.[11]

Asset Protection

Certain claims are excluded from asset protection, such as past-due child support, past-due alimony or a judgment of a court for division of marital property. [12] Tort claims are not specifically excluded; therefore, tort claims are treated like the claims of any other creditor and have the same statute of limitations and requirement that the creditor prove fraudulent intent of the transferor in order to get to the assets of the Tennessee DAPT. Tennessee currently has the shortest statute of limitations time frame for creditor claims at 18 months.[3]

Additionally, a creditor's claim is extinguished six months after the creditor discovers the transfer of the asset into the Tennessee DAPT.[14] A creditor is deemed to have discovered the transfer to the Tennessee DAPT if such transfer is documented in the public record.[15]

Future Flexibility

Although the trust must be irrevocable, meaning that the grantor has to give up the ability to make future amendments or revoke the trust, Tennessee has favorable trust decanting laws. Trust decanting allows an old irrevocable trust to be "poured into" or decanted into a new trust document. For example, if the new decanted trust removed a beneficiary from the old trust, the removed beneficiary would not be required to receive notice of the trust change.[16]

Since the enactment of the Tennessee Investment Services Act of 2007, which created Tennessee DAPTs, there has been little case law to offer guidance on how such trusts will be respected in practice. If you think a Tennessee DAPT may be right for you, please contact the author of this article or any attorney in Frost Brown Todd's Estate Planning & Administration Group. You can also visit our Tax Law Defined® Blog for insights into new developments and

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trending topics in state, local and federal tax administration.

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[1] *See* TCA §35-16-101 *et seq*.

[2] TCA §35-16-102(14)(A).

[3] TCA §35-16-102(7)(A).

[4] TCA §35-16-102(7)(B).

[5] TCA §35-16-102(7)(C).

[6] *See* TCA §35-16-108.

[7] *See* TCA §35-16-103.

[8] TCA §35-16-102(12).

[9] *See* TCA §35-16-103.

[10] TCA §§35-16-102(12), 109.

[11] TCA §§35-16-108.

[12] TCA §35-16-104(i).

[13] TCA §35-16-104(b)(1).

[14] TCA §§35-16-104(b)(1)(A).

[15] TCA §35-16-104(b)(2).

[16] TCA §35-16-816(c).

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