

NEVIS TRUST LAW

By Jonathan E. Gopman, Esquire¹

Introduction:

As a jurisdiction, Nevis is highly regarded as setting the standard among offshore trust laws, blazing new trails in this area since 1994 with which other jurisdictions playing catch up. As the years have passed, other jurisdictions have enacted similar trust laws, however, Nevis continues to remain at the forefront of innovation and practicality. The legal and business world does not remain static; therefore, with external legal developments, laws need to be modernized to remain relevant. The trust laws of Nevis are no exception and that is what Nevis has done. On May 27, 2015, the Nevis Island Assembly enacted the Nevis International Exempt Trust (Amendments) Ordinance, 2015 (the “**Trust Amendments**”). The Trust Amendments are effective July 1, 2015.

The Nevis International Exempt Trust (Amendment) Ordinance, 2015 (the “**Ordinance**”), modernizes the Nevis International Exempt Trust Ordinance, 1994 (the “**Original Ordinance**”) and makes it more competitive in the trust services market. The Trust Amendments include provisions:

1. updating important terms used throughout the Ordinance since its inception in 1994 and adding a number of new definitions;
2. clarifying the validity of a trust registered under the Ordinance that was formed or established in a location other than the settlor’s domicile or residence;
3. eliminating the Rule Against Perpetuities and the Rule Against Accumulations;
4. limiting the rights of a creditor to reach a beneficiary’s interest in a trust;
5. permitting a settlor to establish a directed trust;
6. increasing the asset protection aspects of a trust and ensuring the administration of a trust will not be interrupted by litigation;
7. clarifying the indemnification provisions applicable to the trustee;
8. clarifying certain aspects of the fraudulent transfer rule;

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9. expanding the list of beneficiaries of an international trust;
10. facilitating the administration of a trust;
11. expanding protections available to a trustee with regards to accounting to beneficiaries;
12. expanding the list of powers that a settlor can retain without a trust being declared invalid;
13. increasing the bond requirement for creditors who want to challenge an international trust in Nevis;
14. allowing the Minister charged with the responsibility of finance in Nevis to establish an advisory body for matters affecting the Ordinance; and
15. permitting a statutory tenancy by the entirety trust (“**STET**”).

New Definitions:

Section 2 was amended to revise and add various definitions.

“**attorney-at-law**” means a person whose name has been entered on the Roll of attorneys at law pursuant to the Legal Professions Act, 2008, as amended;

“**ascertainable standard**” means generally accepted norms or criteria relating to a natural person’s health, education, support, or maintenance;

“**authenticated translation**” means a translation into the English language of an instrument which was drafted in a language other than English and was prepared by a professional translator who is accredited by a court of law, a government agency or an international organization;

“**bankrupt**” means a situation where a person is insolvent and is otherwise unable to pay his debts and obligations, and the term “**bankruptcy**” shall be construed accordingly;

“**beneficiary**” means any person entitled to the constructive enjoyment of trust property of which a trustee holds legal title, or in whose favour a power to distribute trust property may be exercised;

“**breach of trust**” means the violation, omission, neglect or failure of any duty imposed on a trustee by this Ordinance or by the terms of the international trust;

“**business entity**” means a corporation, business trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, instrumentality, or any other legal or commercial entity, whether foreign or domestic;

“**charitable purpose**” shall be construed in accordance with the provisions of section 7 of this Ordinance;

“**charitable remainder annuity trust**” means a trust:

- (a) from which a sum certain is to be paid, not less often than annually,
- (b) to one (1) or more persons (at least one (1) of which is not a charity and, in the case of natural persons, only to a natural person who is living at the time of the creation of the trust),
- (c) for a term of years or for the life or lives of such natural persons or natural persons (here the “**lead term**”),
- (d) from which no amount other than the payments described herein and other than qualified gratuitous transfers described herein may be paid to or for the use of any person other than a charity, following the termination of the lead term,
- (e) the remainder interest in the trust is to be transferred to, or for the use of, a charity or is to be retained by the trust for such a use, and
- (f) the value of such remainder interest (determined by applying generally accepted actuarial principles) is at least two percent (2%) of the initial net fair market value of all property placed in the trust;

“**charitable remainder unitrust**” means a trust:

- (a) from which a fixed percentage of the net fair market value of its assets, valued annually, is to be paid, not less often than annually (the “**lead payment**”),
- (b) to one (1) or more persons (at least one (1) of which is not a charity and, in the case of natural persons, only to a natural person who is living at the time of the creation of the trust),
- (c) for a term of years or for the life or lives of such natural person or natural persons (here called the “**lead term**”),
- (d) from which no amount other than the payments described herein and other than qualified gratuitous transfers described herein may be paid to or for the use of any person other than a charity, following the termination of the lead term,
- (e) the remainder interest in the trust is to be transferred to, or for the use of, a charity or is to be retained by the trust for such a use, and
- (f) the value of such remainder interest (determined by applying generally accepted actuarial principles) is at least two percent (2%) of the initial net fair market value of all property placed in the trust.

Notwithstanding the foregoing, the trust deed may provide that the trustee shall pay the income beneficiary for any year the amount of the trust income, if such amount is less than the amount required to be distributed as the lead payment and any amount of the trust income which is in excess of the amount required to be distributed as the lead payment, to the extent that (by reason of this provision) the aggregate of the amounts paid in prior years was less than the aggregate of such required amounts.

“**Court**” means the High Court of St. Christopher and Nevis;

“**creditor**” means a person to whom an obligation or debt is owed;

“**deputy registrar**” means the person or persons appointed by the Minister to assist the registrar in performing his duties under this Ordinance;

“**Dollars**” or “**\$**” means Eastern Caribbean Dollars unless expressly stated otherwise in this Ordinance;

“**endorsement**” means the seal, stamp or handwritten signature of the Registrar, or any other method, now known or hereinafter invented or adopted which may be used to indicate the approval of the Registrar;

“**foreign court**” means any court which is located outside of St. Christopher and Nevis, any court other than the Court, or any court which assumes jurisdiction over any person or property which is governed by this Ordinance without the permission of the Court;

“**formalities**” in relation to a disposition of property means documentary evidence and proof of any other actions required generally by the laws of a relevant jurisdiction for all dispositions of like form concerning property of like nature without regard to –

(a) the fact that the particular disposition is made in trust,

(b) the terms of the trust,

(c) the circumstances of the parties to the disposition, or

(d) any other particular circumstances; but includes any special formalities required by reason that the party effecting the disposition is not of full legal age, is subject to mental or bodily infirmity or is a business entity;

“**functions**” includes rights, powers, discretion, obligations, liabilities and duties;

the “**Gazette**” means the Official Gazette of St. Christopher and Nevis;

“**general power of appointment**” means a power of appointment exercisable in favor of the holder of the power, the power holder’s creditors, the power holder’s estate, or the creditors of the power holder’s estate;

“governing law” means the law controlling or directing a trust registered in Nevis or elsewhere;

“grantor retained annuity trust” means a trust:

(a) from which a sum certain is to be paid, not less often than annually,

(b) to one (1) or more persons (and, in the case of natural persons, only to a natural person who is living at the time of the creation of the trust), and

(c) for a term of years or for the life or lives of such natural person or natural persons;

“grantor retained unitrust” means a trust:

(a) from which a fixed percentage of the net fair market value of its assets, valued annually, is to be paid, not less often than annually,

(b) to one (1) or more persons (and, in the case of individuals, only to an individual who is living at the time of the creation of the trust), and

(c) for a term of years or for the life or lives of such individual or individuals;

“heirship rights” means any right claim or interest in, against or to property of a person arising or accruing in consequence of such person's death, other than any such right, claim or interest created by will or other voluntary disposition or resulting from an express limitation in the disposition of the property of such person;

“insolvency” includes the making of an administrative order, the appointment of a receiver and the bankruptcy of any person;

“intent to defraud” means an intention of a settlor willfully to defeat an obligation owed to a known creditor;

“interest” means the legal or financial stake held by a beneficiary in the property of an international trust;

“international trust” means a trust registered under this Ordinance and in respect of which:

(a) at least one (1) of the trustees is either:

(i) a corporation incorporated under the Nevis Business Corporation Ordinance, Cap 7.01,

(ii) a limited liability company formed under the Nevis Limited Liability Company Ordinance, Cap 7.04,

(iii) a trust company licensed in Nevis,

(iv) an attorney-at-law or firm of attorneys-at-law duly licensed by the Nevis Island Administration to carry on the business of a registered agent, or

(v) a multiform foundation established and registered under the Multiform Foundations Ordinance, 2004,

(b) the settlor and beneficiaries are at all times non-resident, and

(c) the trust property does not include any real property situated in St. Christopher and Nevis;

“Minister” means the Minister for the time being charged with the responsibility of finance in the Nevis Island Administration;

“minor” means a person who has not attained full legal age under the law of his domicile;

“non-resident” means:

(a) a natural person not domiciled in St. Christopher and Nevis,

(b) a natural person not ordinarily resident in St. Christopher and Nevis,

(c) a natural person who obtained citizenship of St. Christopher and Nevis by way of the citizenship by investment program,

(d) a corporation incorporated under the Nevis Business Corporation Ordinance, 1984,

(e) a limited liability company formed under the Nevis Limited Liability Company Ordinance, 1995, or

(f) a business entity incorporated, formed or established under the laws of any jurisdiction other than St. Christopher and Nevis, and which does not ordinarily engage in any trade or business within St. Christopher and Nevis;

“person” means a natural person or business entity;

“personal representative” means the executor or administrator of the estate of a deceased natural person.

“power of withdrawal” means a presently exercisable general power of appointment other than a power exercisable by: (a) a trustee and limited by an ascertainable standard; or (b) another person only upon consent of the trustee or a person holding an adverse interest.

“profit” means to obtain financial gain, benefit or pecuniary advantage which equals an excess of income over expenses.

“property”:

(a) means property of any description, wherever situated, including any shares or interest therein, but excluding any real property situated in St. Christopher and Nevis,

(b) includes any rights, whether vested, contingent, defeasible or future;

“**protector**” means a person who is the holder of a power which when invoked is capable of *directing*, providing consent to or disapproving a trustee’s actual or proposed *investment decisions, distribution decisions or other decisions* of the trustee in matters relating to the trust and in respect of which matters the trustee has discretion and includes a person who is the holder of a power to appoint or dismiss trustees;

“**provisions of this ordinance**” includes the provisions of any Order hereunder;

“**purpose**” means an aim or goal, charitable or non-charitable which is sought to be achieved under a trust, and in furtherance of which, a power to distribute trust property may be exercised by the trustee;

“**qualified foreign trust**” means a trust described in section 37(3) of this Ordinance;

“**registrar**” means the person appointed by the Minister to perform the duties of registrar under this Ordinance;

“**relatives**” in relation to a natural person means his parents, his spouse, the parents of his spouse, his siblings, his spouse’s siblings, his children and remoter issue and the spouses of such children and issue;

“**revocable**” means the power of the settlor of an international trust to cancel or withdraw assets from the trust, without the consent of the trustee or a person holding an adverse interest;

“**settlor**” means a person, including a testator, who gratuitously contributes trust property to a trust or makes a testamentary disposition of trust property on trust. If more than one (1) person gratuitously contributes trust property to a trust or makes a testamentary disposition on trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution or testamentary transfer only;

“**spouses**” mean two natural persons (one of whom is male and the other female) who are lawfully wedded together in a union recognized under the laws of the jurisdiction where the marriage took place or the marriage license was issued;

“**terms**” means the provisions, words or phrases in respect of a trust having exact meaning and limited in use governing a trust, and any other provisions, words or phrases applicable to a trust under the proper law of such trust;

“**trustee**” has the meaning given by section 53 and includes an original, additional and successor trustee, and a co-trustee;

“**trust property**” means real or personal property which is held on trust.

Practice Note:

(1) The terms charitable remainder annuity trust (“**CRAT**”), charitable remainder unitrust (“**CRUT**”) (a CRAT and CRUT may collectively be referred to as a “**CRT**”), grantor retained annuity trust (“**GRAT**”) and grantor retained unitrust (“**GRUT**”) are defined to clarify that such trusts can be formed in Nevis with the settlor’s retained interest in such trusts also being protected under Nevis law.

(2) The definition of international trusts was broadened to include that at least one of the trustees could be a Nevis LLC, a Nevis law firm and a Nevis multiform foundation.

(3) The definition of non-residents was broadened to include a natural person who obtains his or her citizenship in St. Kitts and Nevis by way of the citizenship investment program, a Nevis Business Corporation, a Nevis LLC and a business entity incorporated, formed or established under the laws of any jurisdiction other than St. Kitts and Nevis, and which does not ordinarily engage in any trade or business within St. Kitts and Nevis.

(4) A U.S. citizen would want to consider creating a CRT in the U.S. as opposed to Nevis. The settlor of a CRT would generally fund such trust with property that he or she expects to appreciate, with the goal of not paying tax on the gain. Under Section 679(a)(1) of the Internal Revenue Code (“§”), a U.S. person who directly or indirectly transfers property to a foreign trust is treated as the owner for his taxable year of the portion of the trust attributable to such property if for such taxable year there is a U.S. beneficiary of any portion of such trust. Since the charitable beneficiaries of a CRT must be U.S. charities, a Nevis CRT established by a U.S. settlor, with a U.S. charitable remainder beneficiary, would be subject to the provisions of § 679 because the domestic charity is a U.S. person with an interest in the trust. This would cause unnecessary tax consequences to the U.S. citizen settlor. The exception to the application of § 679 for foreign charitable trusts only applies to trusts that are exclusively devoted to charitable purposes under § 501(c)(3), not to CRTs that gain their U.S. tax exemption under § 664(c).²

In order for a trust to be a charitable remainder trust, it must meet the definition of and function exclusively as a charitable remainder trust from the creation of the trust. Solely for the purposes of section 664 and the regulations thereunder, the trust will be deemed to be created at the earliest time that neither the grantor nor any other person is treated as the owner of the entire trust under subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code (relating to grantors and others treated as substantial owners), but in no event prior to the time property is first transferred to the trust. For purposes of the preceding sentence, neither the grantor

² See discussion in Galligan, “International Charitable Giving and Planning Under U.S. Tax Law,” 29 Est., Gft. & Tr. J. 151 (May 13, 2004).

nor his spouse shall be treated as the owner of the trust under such subpart E merely because the grantor or his spouse is named as a recipient.³

While this provision prevents the interest of the U.S. settlor or settlor's spouse from causing a foreign trust to fail to qualify as a CRT, the requirement that the charitable beneficiary be domestic would cause any otherwise eligible CRT to fail to qualify if the CRT were set up as a foreign trust because § 679 would still apply.⁴

An additional consideration for foreign CRTs is warranted under § 684. Section 684 is an income recognition provision for a taxpayer who transfers appreciated property to certain foreign trusts. Absent § 684, appreciated property could be transferred to a foreign nongrantor trust without any gain recognition, and the asset subsequently sold without any U.S. income taxation being imposed on that asset's built-in gain at the time of transfer. Section 684(a) provides that a transfer of appreciated property by a U.S. person to a foreign non-grantor trust is not subject to gain recognition. The transferor is treated as recognizing a capital gain with respect to the transferred property. The capital gain is then included on the U.S. person's income tax return for the year of the transfer and subject to U.S. income taxation at that time.

Under § 684(b), § 684(a) does not apply to the extent a U.S. person is treated as the owner of such trust under § 671, referring to the grantor trust rules of §§ 671-679. As previously discussed, § 679 specifically applies to foreign trusts, which have one or more U.S. beneficiaries. If § 679 ceases to apply due to a change in circumstances, then § 684 could apply at the change in circumstances, even if the change occurred years later.

If § 679 were to apply and the appreciated property contributed to the foreign trust is subsequently sold, any built-in gain with respect to the appreciated property contributed to the foreign trust would be recognized and subject to U.S. income taxation. Consequently, the income recognition provision of § 684(a) would not be necessary. In this case, there is no reason to accelerate the taxation of the built-in gain in those cases where §679 applies.⁵ Under Regs. §1.684-3(c), if the settlor ceases to be treated as the §679 owner because of the settlor's death but the trust is includible in the settlor's taxable estate, making it eligible for a step-up in basis, § 684 is not triggered. Under Regs. §1.684-3(b), § 684 is not triggered if property is transferred to a foreign trust devoted exclusively to charitable purposes as described in § 501(c)(3), even if the trust has not applied for recognition of its exempt status or given notice of its intent to do so.

Validity and Enforceability of Trusts:

³ See Treas. Regs. § 1.664-1(a)(4).

⁴ See Rev. Rul. 77-285, 1977-2 C.B. 213.

⁵ See Levin, "Transfers to Foreign Trusts Could Trigger Gain Recognition," 37 Est. Plan J. 14 (Oct. 2010).

Section 3 was amended to provide that an international trust registered under the Ordinance is valid and enforceable even if it is invalid according to the law of settlor's domicile, residence, place of current incorporation, place of formation or establishment.

“3. Validity of international trusts

(1) An international trust registered under this Ordinance shall be valid and enforceable notwithstanding that it may be invalid according to the law of the settlor's domicile or residence or place of current incorporation, formation or establishment.

(2) An international trust shall be invalid and unenforceable to the extent that -

(a) it purports to do anything contrary to the laws of St. Christopher and Nevis;

(b) it purports to confer any right or power or impose any obligation the exercise of which or the carrying out of which is contrary to the laws of St. Christopher and Nevis; or

(c) the property of the trust, or any part thereof, are the proceeds of a crime for which the settlor has been convicted.”

This amendment is practical since most trusts are formed or established in jurisdictions other than a settlor's domicile or residence.

Elimination of Rule Against Perpetuities:

Section 5(1) eliminates the Rule Against Perpetuities and permits a trust to continue forever if the terms of the trust provide that the trustee has the unlimited power to sell all trust assets or if one or more persons, one of whom may be the trustee has the unlimited power to terminate the trust:

“5. Unlimited duration of international trusts and accumulation of income

(1) No rule of law against perpetuities or suspension of the power of alienation of the title to property, any other existing law against perpetuities, or any law restricting or limiting the duration of an international trust shall apply with respect to any interest in real or personal property held in trust if the terms of an international trust specifically state that the trustee of the trust has the unlimited power to sell all trust assets or if one or more persons, one (1) of whom may be the trustee, has the unlimited power to terminate the entire trust.

(2) The rule of law known as the rule against perpetuities shall not apply to an international trust and unless otherwise provided in its terms, an international trust shall have an unlimited duration.”

Sections 5(3) and (4) eliminates the Rule Against Accumulations.

“(3) Notwithstanding any rule of law or equity to the contrary, where a trust instrument empowers a trustee to accumulate income, or to refrain from making any distribution of capital or income until a specified date or event, or where any provision of the instrument otherwise prevents the making of any distribution of capital or income, notwithstanding that a beneficiary may, but for this section, otherwise be entitled to that accumulation or distribution, the trustee may, in his absolute discretion, subject to any other terms of the instrument, give effect to that direction as he thinks fit notwithstanding that a beneficiary shall request the trustee to immediately distribute the accumulation or distribution and will give a valid discharge to the trustee for such distribution.

(4) The income arising from any international trust may be accumulated in accordance with the terms of the trust for as long a time as is necessary to accomplish the purposes for which the trust was created, notwithstanding any law limiting the period during which trust income may be accumulated.”

Discretionary Trusts:

Section 8A was added to better define the rights of a creditor of a beneficiary (including the settlor) of a discretionary trust.

“8A. Discretionary interests in international trusts

(1) This section applies to a creditor’s claim with respect to a discretionary interest of any beneficiary (including a settlor) in an international trust unless the trust deed provides explicitly otherwise.

(2) A discretionary interest in an international trust is not a property interest or an enforceable right rather is a mere expectancy that a creditor of a beneficiary (including the settlor) may not attach, garnish or otherwise reach.

(3) A creditor of a beneficiary (including the settlor) may not compel or force a distribution with regard to a discretionary interest in an international trust, nor compel or force a trustee to exercise the trustee’s discretion to make a distribution with regard to a discretionary interest in an international trust.

(4) A creditor of a beneficiary (including the settlor) may not compel or force a protector to exercise a power to direct a trustee to make a distribution to any beneficiary of an international trust.

(5) In the case of a discretionary interest in an international trust, a trustee who has the authority to pay income or principal to a beneficiary (including the settlor) may pay it to a third party if the payment is for the benefit of the beneficiary (including the settlor), and the

trustee of an international trust shall not be liable to any creditor of a beneficiary (including the settlor) for paying income or principal on behalf of such beneficiary.

(6) A creditor of a beneficiary (including the settlor) may not maintain an action or a proceeding in Court that interferes with the trustee's discretion to apply income or principal on behalf of the beneficiary of an international trust.

(7) A creditor of a beneficiary (including the settlor) may not obtain an order of attachment, garnishment or similar relief that would prevent a trustee from making a discretionary payment to a third party on behalf of the beneficiary (including the settlor) of an international trust.

(8) In this section, a beneficiary's entitlement (or lack thereof) to a distribution is within the discretion of a trustee, whether or not the trust deed states the purposes for the distribution, is expressed in the form of a standard of distribution or uses the terms 'may,' 'shall,' 'sole and absolute,' 'uncontrolled,' 'unfettered,' or similar words and whether or not the trustee has abused the discretion.

(9) Regardless of whether a beneficiary of an international trust has any outstanding creditor, a trustee of a discretionary interest may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary (including the settlor) who holds a discretionary interest.

(10) (a) In this section, 'discretionary interest' means a beneficiary's interest in an international trust if the beneficiary's entitlement to a distribution is within the discretion of the trustee."

(b) This section shall not prevent a creditor from obtaining relief from under Section 23 of this Ordinance that is not inconsistent with this Section 8A."

Section 8A greatly limits the rights of a creditor to reach a beneficiary's interest in such a trust. In the absence of such a provision, a creditor of a beneficiary might attempt to obtain a court order to garnish future distributions made to or for the benefit of a beneficiary. Such garnishment could result in a trustee being unable to make any distributions for the benefit of a beneficiary. This section also specifically permits a trustee to make payments to third parties on behalf of the beneficiary without incurring any liability to a creditor and prevents even the remote possibility of any such attachment, garnishment or interference.

Directed Trusts:

Section 9 was amended in its entirety. Most notably, subsection (3) of Section 9 now allows a trust protector to be granted the authority to direct a trustee to make distributions;

approve distributions made by a trustee; and direct the trustee to make investments. By giving a protector authority to direct the trustee to make distributions and investments, in conjunction with giving trustees an indemnity for following the directions of the protector, a trustee has the ability to administer trusts it might not otherwise be willing to administer and it will facilitate the administration of a trust because the trustee is exonerated from liability for acting at the direction of a protector.

“9. Protector of a trust

(1) The terms of an international trust may provide for the office of protector of the trust. Where a person is given authority by the terms of an international trust to direct, consent to or disapprove a trustee’s actual or proposed investment decisions, distribution decisions or other decision of the trustee, such person shall be considered to be a protector when exercising such authority (unless the terms of the trust shall otherwise provide).

(2) The protector of an international trust shall have the power to:

(a) (unless the terms of the trust shall otherwise provide) remove a trustee and appoint a new or additional trustee; and

(b) exercise such further powers as are conferred on the protector by the terms of the international trust or by the provisions of this Ordinance.

(3) The terms of an international trust may grant the protector the power to:

(a) direct the trustee to make distributions from the trust;

(b) consent to or approve any distributions made by the trustee from the trust; and

(c) direct the trustee regarding any or all investment decisions of the trust, which includes the power to direct a trustee to retain, purchase, sell or exchange property held in the trust or to engage in any other transaction affecting the ownership or rights over such property. [*emphasis added*]

(4) If the terms of an international trust provide that a trustee shall follow the direction of the protector and the trustee acts in accordance with such a direction, then except in cases of willful misconduct on the part of the trustee so directed, the trustee shall not be liable for any loss resulting directly or indirectly from any such act.

(5) If the terms of an international trust provide that a trustee shall make decisions with the consent of the protector, then except in cases of willful misconduct or gross negligence on the part of the trustee, the trustee shall not be liable for any loss resulting directly or indirectly

from any act taken or omitted as a result of such protector's failure to provide such consent after having been requested to do so by the trustee.

(6) Whenever the terms of an international trust provide that a trustee shall follow the direction of the protector with respect to investment decisions of the trustee, then, except to the extent that the international trust provides otherwise, the trustee shall have no duty to:

(a) monitor the conduct of the protector;

(b) provide advice to the protector or consult with the protector; or

(c) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the protector.

Absent clear and convincing evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the protector's authority (such as confirming that the protector's directions have been carried out and recording and reporting actions taken at the protector's direction), shall be presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the trustee to monitor the protector or otherwise participate in actions within the scope of the protector's authority.

(7) Unless the terms of the trust shall otherwise provide the protector of an international trust may also be a settlor or a beneficiary of the trust.

(8) Subject to the terms of the international trust, in the exercise of his office a protector shall owe a fiduciary duty to the beneficiaries of the trust or to the purpose for which the trust is created.

(9) Where there is more than one (1) protector of a trust then, subject to the terms of the trust, any functions conferred on the protectors may be exercised if a majority of the protectors for the time being agree on its exercise.

(10) A protector who dissents from a decision of the majority of protectors may require his dissent to be recorded in writing.

(11) (a) A protector may delegate duties and powers with regard to investment decisions. The protector shall exercise reasonable care, skill, and caution in:

(i) selecting an agent such as an investment advisor;

(ii) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(iii) reviewing the agent's actions periodically to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the protector/trustee/beneficiary or purpose for which the trust was created to exercise reasonable care to comply with the terms of the delegation.

(c) A protector who complies with subsection (a) and, when investment functions are delegated, is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.”

Section 45(1) coincides with the amendment to Section 9 by expanding the list of authorized trust investments to include such assets approved by the protector.

“(1) A trustee shall not invest any of the trust funds other than in securities, assets, or property authorized expressly or by necessary implication for the investment of the trust funds by and under the instrument by which the trust is established or created or in such securities, assets, or property authorized and approved by the protector pursuant to Section 9 (2) and (6) of this Ordinance.”

Creditors' Rights:

Section 9A was added to the Ordinance to clarify that creditors will only have a right to a beneficiary's interest in a trust if that beneficiary has either a lifetime or testamentary general power of appointment, that is, a power to appoint the trust property to the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate, however, only to the extent that the beneficiary exercises such power of appointment.

“9A. General power of appointment granted to a beneficiary

A creditor shall have no right against the interest of a beneficiary of an international trust or against the beneficiary or trustee of the trust with respect to such interest unless.

(1) The beneficiary (other than the settlor) has a power to appoint all or part of the trust property to the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate by will or other instrument such that the appointment would take effect only upon the beneficiary's death and the beneficiary actually exercises such power in favor of the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate but then only to the extent of such exercise.

(2) The beneficiary (other than the settlor) has a power, including a power of withdrawal, to appoint all or part of the trust property to the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate during the beneficiary's lifetime and the beneficiary actually exercises such power in favor of the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate but then only to the extent of such exercise."

This provision codifies the common law rule regarding general powers of appointment and further provides that the amount subject to a creditor's reach could never exceed the amount subject to the exercise of the beneficiary's power.

Additionally, Section 9B was added to clarify that creditors only have a right to a settlor's interest in a trust if the settlor retains a power to revoke the trust and to appoint the trust property to the settlor, the settlor's estate, the settlor's creditors, or the creditors of the settlor's estate, however, only to the extent the settlor exercises such power.

“9B. Right of revocation retained by settlor

A creditor shall have no right against the interest of a beneficiary of an international trust who is the settlor or against the settlor or trustee of the trust with respect to such interest unless the settlor has a power to revoke the trust and appoint all or part of the trust property to the settlor, the settlor's creditors, the settlor's estate, or the creditors of the settlor's estate during the settlor's lifetime and the settlor actually exercises such power in favor of the settlor, the settlor's creditors, the settlor's estate, or the creditors of the settlor's estate but then only to the extent of such exercise."

Section 9B will enhance the asset protection provided by an international trust by giving creditors the right to a settlor's interest only in the limited circumstances where the settlor has unfettered control of the trust property and exercises such control, however, only to the extent of such exercise. The additions of Sections 9A and 9B were in direct response to the holding in *Tasarruf Mevduati Sigorta Fonu v. Merrill Lynch Bank and Trust Company, et al.*, Privy Council of the Cayman Islands, Appeal No. 0036 of 2010, decided June 21, 2010.⁶ In *Tasarruf*, the Privy Council held that a power to revoke retained by the settlor of two trusts established and funded in the Cayman Islands was tantamount to a property interest because it was a personal power, not a fiduciary power, *i.e.*, the settlor owed no duty of trust or confidence to any other person, and no act personal to the settlor was required to be performed. Therefore, the power could be delegated and/or assigned by the settlor to another person. Thus, the court in *Tasarruf* allowed the settlor's creditors to reach the assets in held in two revocable trusts. The holding in *Tasarruf* was in direct conflict with existing Cayman law and represented a rare instance where the Privy Council

⁶ *Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd & Ors (Cayman Islands)*, [2012] 1 WLR 1721, [2011] 4 All ER 704, 14 ITEL 102, [2011] UKPC 17, [2011] BPIR 1743, [2011] WTLR 1249.

overturned the holding of the trial court and the Eastern Caribbean Court of Appeals where underlying common law in the jurisdiction was clear. The codification of this rule should preclude a creditor of the settlor of an international trust who has retained a power of revocation from reaching the assets held in such trust and subject to the power of revocation notwithstanding the holding in *Tasarruf*. Likewise, Section 9A should preclude creditors of a beneficiary possessing a power of withdrawal from attaching the trust property. Even though the Ordinance contains these specific provisions, it is recommended that U.S. clients refrain from including such powers in an international trust, as a U.S. court would almost certainly have serious problems with a settlor's unfettered control of the trust property.

Section 13 was amended to provide a statutory duress provision applicable to all international trusts.

“13. Duress; Termination by beneficiaries

To the extent any person is granted the power under the terms of a trust to demand or request any act on the part of a settlor, beneficiary, trustee, protector, or other person, or has the authority to approve, veto, or compel any action or exercise any power which affects or will affect an international trust or any interest therein, each such person is directed, to the extent such person would not be subject to personal liability or personal exposure:

(1) to accept or recognize only demands or requests, or the effects of any approval, veto, or compelled action or the exercise of any power, which are given by or are the result of persons acting of their own free will and not under compulsion or pursuant to any legal process, directive, order, or like decree of any court, administrative body, or other tribunal or like authority; and

(2) to ignore any demands or requests, or the effects of any approval, veto, or compelled action or the exercise of any power, where the person attempting to demand, request, approve, veto, compel the act, or exercise the power is not a person either appointed or so authorized pursuant to the terms of such trust.”

The amendment provides that when any person granted the power under the terms of a trust to demand or request any act on the part of a settlor, beneficiary, trustee, protector, or other person, or who has the authority to approve, veto or compel any action or exercise any power that could affect an international trust, he, she or it may ignore demands or requests given by or the result of persons acting under duress, including pursuant to any legal process, court, administrative body, etc.

Section 22 was amended to clarify that the Court may not issue a *Mareva* injunction, *Anton Piller* order, or any similar remedy.

“(4) No action or proceeding (whether substantive or interlocutory in nature) shall be heard, and no injunction, order of any kind, or any other relief or remedy, whether legal or equitable, shall be made, issued, granted or ordered, by the Court concerning an international trust where the purpose of such action or proceeding would be to detain, inspect, garnish, attach or otherwise interfere in any manner whatsoever or possible with:

(a) any trust property wherever situated whether in St. Christopher and Nevis or elsewhere, or

(b) any right, duty, discretion, obligation or power which a trustee may have in respect of any trust property.”

The purpose of the amendment was to prevent a claimant from circumventing the limitations on remedies contained elsewhere in the Ordinance, such as under Section 24 concerning creditor claims. The main purpose of an asset protection trust is to protect its settlor in a time of great need. In *Federal Trade Commission v. Affordable Media, LLC*,⁷ the court in the Cook Islands issued a *Mareva* injunction freezing the assets of the trust (i.e., cash in a bank account at a bank in the Cook Islands). Then, while frozen, such funds were not available for use by the settlors to pay their basic living expenses. Such action frustrated the purpose of the trust until the creditors settled.

Section 35A automatically removes a trustee or protector of an international trust that is subject to any other court’s jurisdiction, except the High Court of St. Christopher and Nevis.

“35A. Removal of trustee and protectors

(1) If, in any action is brought against a trustee of an international trust in a foreign court, such foreign court fails to dismiss such action, or orders such trustee to take any action in regards to such trust, such trustee shall immediately upon such court’s action and without the further order of any court, cease in all respects to be trustee of such trust and a successor trustee shall thereupon succeed as trustee in accordance with the terms of the trust instrument or, if the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the Court, upon the application of any beneficiary of such trust, shall appoint a successor trustee upon such terms and conditions as it determines to be consistent with the purposes of such trust and this statute.

Upon such trustee ceasing to be trustee, such trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust instrument or appointed by the Court in accordance with this section. The trustee shall, within fourteen (14) days of its removal, give notice in writing to the Registrar of such removal.

⁷ 179 F.3d 1228 (9th Cir. 1999).

(2) If, in any action is brought against a protector of an international trust in a foreign court, such foreign court fails to dismiss such action, or orders such protector to take any action in regards to such trust, such protector shall immediately upon such court's action and without the further order of any court, cease in all respects to be a protector of such trust. Upon such protector ceasing to be a protector, such protector shall have no power or authority in regards to the trust. The protector shall, immediately following its removal hereunder, give notice in writing to the trustee of the international trust of such removal."

This statutory duress provision is unique among jurisdictions. It has its origins in the Delaware Trust Code (§3327), however, it is a vastly improved provision. Together, Sections 13, 22 and 35A make Nevis the strongest jurisdiction in the world to establish an asset protection trust.

Indemnification Provisions Applicable to Trustee:

Section 17(1) was amended to allow the terms of an international trust to indemnify the trustee against liability.

"(1) A beneficiary may relieve a trustee of liability for a breach of trust or indemnify a trustee against liability for a breach of trust and the terms of the trust may relieve a trustee of liability for a breach of trust or indemnify a trustee against liability for a breach of trust."

This is an expansion of the previously drafted Section 17 which only permitted a beneficiary to indemnify the trustee.

Fraudulent Transfers:

Section 24 was amended to clarify the fraudulent transfer rule.

(a) deleting the phrase "a settled or established or property disposed to a trust" and replacing it with the phrase "a trust settled or established, or property disposed or transferred to a trust,";

(b) deleting the phrase "in the event that" in subsection (2) and replacing it with the word "if";

(c) deleting subsection (3) in its entirety and replacing it with the following subsection (3) to read as follows:

"(3) A trust settled or established, or a disposition or transfer of property to such trust, shall not be fraudulent as against a creditor of a settlor if such settlement, establishment, disposition or transfer occurs after the expiration of one year from the date that such creditor's cause of action accrued or originated."

(d) deleting subsection (4) in its entirety and replacing it with the following subsection (4) to read as follows:

“(4) A trust settled or established, or a disposition of property to such trust, shall not be fraudulent as against a creditor of a settlor if such settlement, establishment or disposition took place before the creditor’s cause of action against the settlor had accrued or had arisen.”

(e) deleting subsection (5) (b) in its entirety and replacing it with the following subsection (5) (b) that shall read as follows:

“(b) has retained, possesses or acquires any of the powers or benefits referred to in Subsections (a) to (i) of Section 47;”

(f) deleting subsection (7) in its entirety and replacing it with the following subsection (7) that shall read as follows:

“(7) The burden of proof regarding the settlor’s intent to defraud the creditor shall be borne by the creditor.”

(g) adding the phrase “action or” subsection (8) (c) after the word “any” and before the word “proceeding”; and

(h) deleting subsection (9) in its entirety and replacing it with the following subsection (9) that shall read as follows:

(9) The provisions of this section shall apply to all actions and proceedings brought into the Court, however described, against the person (whether a party to the action or proceedings or not) with regard to the settlement of an international trust or the disposition of property to such a trust, or receipt of property by or for such a trust and the remedy conferred by subsection (1) shall be the sole remedy available in such an action or proceedings to the exclusion of any other relief or remedy against any party to the action or proceeding.”

The original text was modeled after Section 13B(3) and (4) of the Cook Islands International Trusts Act (“**ITA**”). The ITA deems a transfer in trust to be not fraudulent as against a creditor if the transfer takes place two years from when the creditor’s cause of action accrues. If the transfer takes place within two years of the cause of action accruing, the ITA deems the transfer to be not fraudulent if the creditor fails to commence a court action within one year. Similarly, the ITA deems a transfer in trust to be not fraudulent as against a creditor if the transfer takes place before the creditor’s cause of action accrues.

As described above, subsection (3) was revised to eliminate what arguably may have given a creditor a three-year window to file a fraudulent transfer claim against an international

trust. This “sliding window” was introduced in § 13B(3) of the Cook Islands ITA, after which subsection (3) of Section 24 was modeled. While paragraph 13B(3)(a) of the ITA is intended to protect a transfer in trust made more than two years after a creditor’s cause of action accrues, paragraph (b) gives the creditor one more year to bring a claim if the creditor’s claim happens to arise right before the expiration of the two year period referenced in paragraph (a). The revision to subsection (3) of Section 24 implements a fixed one year window beginning with the date on which the creditor’s cause of action accrues. Further, subsection (5)(b) of Section 24 was revised to expand the list of powers that a settlor can retain without having an intent to defraud a creditor imputed to the settlor.

In its entirety following amendment, Section 24 reads as follows:

“24. Avoidance of fraud.

(1) Where it is proven beyond reasonable doubt by a creditor that a trust settled or established, or property disposed or transferred to a trust-

(a) was so settled established or disposed by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and

(b) did at the time such settlement establishment or disposition took place render the settlor insolvent or without property by which that creditors claim (if successful) could have been satisfied, then such settlement establishment or disposition shall not be void or voidable and the international trust shall be liable to satisfy the creditor's claim and such liability shall only be to the extent of the interest that the settlor had in the property prior to settlement establishment or disposition and any accumulation to the property (if any) subsequent thereto.

(2) In determining whether a trust, settled or established or a disposition, has rendered the settlor insolvent or without property by which a creditor's claim (if successful) may be satisfied, regard shall be had to the fair market value of the settlor's property, (not being property of or relating to the trust) at the time immediately after the settlement establishment or the disposition referred to in subsection (1) (b) and if the fair market value of such property exceeded the value of the creditor's claim, at that time, after the settlement establishment or disposition, then the trust so settled or established or the disposition shall for the purposes of this Ordinance be deemed not to have been so settled or established or the property disposed of with intent to defraud the creditor.

(3) A trust settled or established, or a disposition or transfer of property to such trust, shall not be fraudulent as against a creditor of a settlor if such settlement, establishment, disposition or transfer occurs after the expiration of one year from the date that such creditor’s cause of action accrued or originated.

(4) A trust settled or established, or a disposition of property to such trust, shall not be fraudulent as against a creditor of a settlor if such settlement, establishment or disposition took place before the creditor's cause of action against the settlor had accrued or had arisen.

(5) A settlor shall not have imputed to him an intent to defraud a creditor, solely by reason that the settlor-

(a) has settled or established a trust or has disposed of property to such trust within two years from the date of that creditors cause of action accruing;

(b) has retained, possesses or acquires any of the powers or benefits referred to in Subsections (a) to (i) of Section 47;

(c) is a beneficiary.

(6) Where a trust is liable to satisfy a creditor's claim in the manner provided for in subsection (1), that creditors right to recovery shall be limited to the property referred to in subsection (1) , or to the proceeds of that property, to the exclusion of any claim right or action against any trustee or any other property of the trust.

(7) The burden of proof regarding the settlor's intent to defraud the creditor shall be borne by the creditor.

(8) For the purpose of this section-

(a) the date of the cause of action accruing shall be, the date of that act or omission which shall be relied upon to either partly or wholly establish the cause of action, and if there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, shall be the date that the cause of action shall have accrued;

(b) the term "cause of action" means the earliest cause of action capable of assertion by a creditor against the settlor of a trust or, as the case may be against the settlor of property upon a trust by which that creditor has established (or may establish) an enforceable claim against that settlor;

(c) the entry of judgment in any action or proceeding shall not constitute a separate cause of action.

(9) The provisions of this section shall apply to all actions and proceedings brought into the Court, however described, against the person (whether a party to the action or proceedings or not) with regard to the settlement of an international trust or the disposition of property to such a trust, or receipt of property by or for such a trust and the remedy conferred by

subsection (1) shall be the sole remedy available in such an action or proceedings to the exclusion of any other relief or remedy against any party to the action or proceeding.

(10) Failure by a creditor to present all claims arising out of any controversy and join all parties with a material interest shall prevent that creditor from presenting such claims and bringing an action against such parties in a subsequent proceeding.

(11) For the purposes of this section the term "creditor" means a creditor of the settlor, including a judgment creditor and an assignee from such creditor of any claim and includes any person who alleges a cause of action against a settlor.”

Section 46 was amended to clarify that an international trust may be void or voidable in the event of a settlor’s bankruptcy, insolvency or liquidation, including if a corporation or limited liability company is in liquidation.

“46. Bankruptcy

Notwithstanding any provision of the law of the settlor’s domicile or place of ordinary residence or the settlor’s current place of incorporation, formation or establishment and notwithstanding further that an international trust is voluntary and without valuable consideration being given for the same or is made for the benefit of the settlor’s spouse or children, an international trust shall not be void or voidable in the event of the settlor’s bankruptcy, insolvency, or liquidation or in any action or proceeding at the suit of creditors of the settlor, but shall remain valid and subsisting and take effect according to its tenor subject to sections 23 and 24 of this Ordinance.”

Beneficiaries:

Section 32(5) was amended by expanding the list of beneficiaries of an international trust.

“(5) A Nevis Company, a corporation, a limited liability company or a multiform foundation may also be a beneficiary of the trust.”

Facilitating Administration:

Section 35B allows the trustee of an international trust to combine two or more separate trusts into a single trust or divide a single trust into two or more separate trusts provided that such action does not impair the rights of any beneficiary or adversely affect the purpose of the trust or trusts. This provision permits the trustee to segregate the assets of a trust for greater protection and liability purposes, and to combine the assets of separate trusts where administratively more convenient or efficient.

“35B. Combination and division of trusts

(1) Unless otherwise provided in the trust instrument, after notice to the beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively.

(2) Subject to the terms of the trust instrument, the trustee may take into consideration the difference in tax attributes and other pertinent factors in administering the trust property of any separate trust, in making applicable tax elections, and in making applications or distributions.

(3) A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective, including, but not limited to any and all issues related to the liability of a trustee or the trust assets pursuant to a contract, in tort or otherwise.

(4) The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power and any such action under this provision shall be made only pursuant to a written instrument filed with the records of the trust.

(5) In dividing a trust into two (2) or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (a) with a pro rata portion of each asset held by the undivided trust; or (b) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(6) An international trust may be established to simultaneously benefit beneficiaries and to fulfill a purpose.”

It also provides rules governing any such combination or severance.

Section 36 was amended to allow a trustee to act pursuant to a resolution and to appoint an agent to act on its behalf.

“36. Trustee resolutions.

A trustee which is either a Nevis trust company, a corporation, a limited liability company or a multiform foundation, may—

(a) act in connection with a trust pursuant to its board of directors, board of managers, management board or other governing body; and

(b) appoint an officer, employee or agent to act on its behalf in connection with the trust.”

Section 42(1) was amended to add limited liability companies and multiform foundations to a list of entities where an international trustee may have its registered office.

“(1) The registered office of an international trust shall be the office of the Nevis Company, attorney-at-law, corporation, limited liability company or multiform foundation which is the trustee.”

Waiver of Notice/Accountings:

Section 35C was added as follows:

“35C. Effect of provisions of instrument

(1) Notwithstanding any other provision of this Ordinance or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary’s interest for any period, the grounds for removal of a trustee, the circumstances, if any, in which the trustee must diversify investments, and a trustee’s powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument.”

Section 35C(1) provides that the terms of a trust deed may expand, restrict, eliminate, or otherwise vary the rights and interests of beneficiaries, including the right of beneficiaries to be informed of their interests in the trust for any period, the grounds for removal of a trustee, the circumstances, if any, in which the trustee must diversify investments, and a trustee’s powers, duties, standard of care, rights of indemnification and liability to persons who are granted interests under the trust instrument. The change to Section 35C(1) provides that a trustee has no duty to account and changes a longstanding rule under English law.⁸ Section 35C(2)-(4) provides:

⁸ See *e.g.*, *Armitage v. Nurse* [1997] EWCA Civ 1279, [1998] Ch 241, [1997] 3 WLR 1046, [1997] 2 All ER 705. In *Armitage v Nurse* [1998] Ch. 241 at 261, the court provided in *dicta*:

The respondents submit that the policy to which section 21(3) of the Act of 1980 gives effect is that it would be unfair to bar a plaintiff from bringing a claim unless and until he is of full age and entitled to see the trust documents and so has the means of discovering the injury to his beneficial interest. The difficulty with this argument, in my judgment, is that it proves too much. Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not. The rationale of section 21(3) appears to me to be different. It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy. Similar reasoning would apply to exclude a person who is merely the object of a discretionary trust or power which may never be exercised in his favor.

“(2) Nothing contained in this section shall be construed to permit the exculpation or indemnification of a trustee for the trustee’s own willful misconduct or preclude the Court from removing a trustee on account of the trustee’s willful misconduct.

(3) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this provision.

(4) This section shall give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.”

Expanded List of Interests and Powers that Settlor can Retain without Declaring Trust Invalid:

Section 47 was amended to expand the list of interests and powers that a settlor could retain over an international trust without a trust being declared invalid. The list was expanded to incorporate many of the types of trusts used in the United States for estate planning purposes, such as GRATs and GRUTs which are permitted under the statutes of most of the states that allow self-settled asset protection trusts.

“47. Retention of control by settlor

(1) An international trust shall not be declared invalid or otherwise be affected in any manner if the settlor, and if more than one (1), any of them either retains, possesses or acquires -

(a) the power to revoke the trust;

(b) the power to veto a distribution of income or principal by the trustee;

(c) the power to amend the trust;

(d) any benefit, interest or property from the trust, including, but not limited to the following:

(i) the settlor’s potential or actual receipt of income or principal from the trust, including rights to such income or principal retained in the trust deed;

(ii) the settlor’s potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust and the settlor’s right, at any time and from time to time by written instrument delivered to the trustee, to release such settlor’s retained interest in such a trust, in whole or in part, in favor of a charity that has or charities that have a succeeding beneficial interest in such trust;

(iii) the settlor's potential or actual receipt of income or principal from a grantor retained annuity trust or grantor retained unitrust;

(iv) the settlor's receipt each year of a percentage (as specified in the trust deed) of the initial value of the trust assets (which may be described either as a percentage or a fixed amount) or the value determined from time to time pursuant to the trust deed;

(v) the settlor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a trustee acting:

A. in such trustee's discretion;

B. pursuant to a standard that governs the distribution of principal and does not confer upon the settlor a substantially unfettered right to the receipt or use of the principal; or

C. at the direction of a protector who is acting:

1. in such protector's discretion; or

2. pursuant to a standard that governs the distribution of principal and does not confer upon the settlor a substantially unfettered right to the receipt of or use of principal;

(vi) a settlor's potential or actual use of real property, chattels or tangible assets held either directly or indirectly in the trust;

(vii) the settlor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes or other levies due on income or principal of the trust to any taxing authority located in any jurisdiction if such potential or actual receipt of income or principal is pursuant to a provision in the trust deed that expressly provides for the payment of such taxes and if such potential or actual receipt of income or principal would be the result of a trustee acting in such trustee's discretion or pursuant to a mandatory direction in the trust deed; or at the direction of a protector who is acting in such protector's discretion. Distributions to pay income taxes made under a discretionary or mandatory provision included in a settlement establishing an international trust may be made by direct payment to a taxing authority;

(e) the power to remove or appoint a trustee or protector;

(f) the power to direct a trustee or protector on any matter;

(g) except as provided in subsection (1)(h), an inter vivos or testamentary power of appointment (other than a power to appoint to the settlor, the settlor's creditors, the settlor's estate or the creditors of the settlor's estate) exercisable by will or other written instrument of the settlor;

(h) the ability, whether pursuant to discretion granted to the trustee, a direction in the trust deed or the settlor's exercise of a testamentary power of appointment, of a trustee to pay, after the death of the settlor, all or any part of the debts of the settlor outstanding at the settlor's death, the expenses of administering the settlor's estate, or any estate or inheritance tax or other levies imposed on or with respect to the settlor's estate; and

(i) the ability to serve as investment adviser to the trust.

(2) An international trust is not invalid even though the settlor may be the only beneficiary of the trust or the settlor is one of multiple beneficiaries. Except as provided in this Section, a settlor shall have no other rights or authority with respect to property held in an international trust or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void and of no effect.”

The revisions broaden the circumstances where the validity of an international trust will be upheld. Thus, the settlor can retain various rights and/or benefits over the trust and from the income and/or principal of the trust and the terms of a trust deed can provide for an expanded array of powers to be granted to a protector.

Option to Establish Advisory Body:

Section 54 was amended to clarify that the Minister (as defined above) may establish an advisory body for matters affecting the Ordinance.

“54. Power to establish the Nevis International Exempt Trust Ordinance Advisory Committee.

(1) The Minister may establish an advisory body for matters affecting this Ordinance; and such body so established, shall consist of such members as the Minister may from time to time appoint.

(2) In establishing the body under sub-section (1) above, the Minister shall have regard to the desirability of having members who have the expertise and knowledge of the Ordinance and the law of trusts.

(3) It shall be the duty of the Nevis International Exempt Trust Ordinance Advisory Committee established under this section to:

(a) advise the Minister on any matter that the Nevis International Exempt Trust Ordinance Advisory Committee believes that the Minister should be aware of, on an annual basis by September 30th or on such more frequent occasions as may be necessary;

(b) provide recommendation regarding possible amendments to this Ordinance; and

(c) advise the Minister on any matter which is referred to it by the Minister.

(4) The Minister may defray or contribute towards the expenses of an advisory body established under this section.”

Bond:

Section 55 was amended to increase the amount of the bond required by a creditor before the creditor is permitted to bring an action governed by the Ordinance. The bond requirement was increased to Two Hundred Seventy Thousand Eastern Caribbean Dollars. The previous bond requirement was only One Hundred Thousand Eastern Caribbean Dollars. This increase was made to eliminate frivolous or nuisance claims against the trustees of international trusts. The bond requires that a creditor will pay the trustee's legal fees expended to defend and protect the assets held in a trust.

Statutory Tenancy by the Entireties Trust:

Section 56 was amended in its entirety. A slight technical glitch was corrected in the language in Section 56(1).

“56. Community property and tenancy by the entireties property

(1) Where spouses transfer property to one or more trusts established under an international trust or a trust that subsequently becomes an international trust and, immediately before being transferred, such property or any part thereof or any accumulation thereto is, pursuant to the law of its location or the law of either of the transferring spouses' domicile or residence, determined to be community property, then notwithstanding such transfer and except where the provisions of the trust deed may provide to the contrary, that property and any accumulation thereto shall, for the purpose of giving effect to that law, be deemed to be community property and be dealt with in a manner consistent with that law but in every other respect shall be dealt with in accordance with the trust deed and the governing law of that deed.”

A new Section 56(2) was added permitting married settlors of an international trust to establish a STET. Following funding the settlors' interest in such trust with tenancy by the entireties property, the underlying property of the international trust will remain tenancy by the entireties property.

“(2) Where spouses transfer property to one or more trusts established under an international trust or a trust that subsequently becomes an international trust and, immediately before such transfer, such property or any part thereof or any accumulation thereto was, pursuant

to applicable law, owned by them as tenants by the entirety, then notwithstanding such transfer and except where the provisions of the trust deed may expressly provide to the contrary, that property and any accumulation thereto shall be tenancy by the entirety property while held in trust during the lifetime of both spouses and shall be dealt with in a manner consistent with that applicable law however in every other respect shall be dealt with in accordance with the terms of the trust deed. Furthermore, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the transfer, if at all, the sole remedy available to the creditor with respect to trust property that is tenancy by the entirety property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entirety.”

A Nevis STET provides substantial flexibility in dealing with tenancy by the entirety property (“T by E”) in the context of asset protection planning. Florida law and the law of several other U.S. states recognize tenancy by the entirety.⁹ T by E is a form of ownership that can only exist between two individuals who are married to each other. Although the rules relating to T by E property can vary greatly between the states that recognize it as a form of ownership, generally property owned in T by E cannot be reached to satisfy the claims of a creditor of only one spouse.¹⁰ Every U.S. state that recognizes T by E as a form of ownership permits real estate (or certain types of real estate, e.g., a homestead) to be owned by married individuals in T by E. A few of the states that recognize T by E as a form of ownership, however, such as Delaware, Florida, Michigan and Pennsylvania, also permit ownership of personal property in T by E.¹¹

In many instances I have met and advise a number of married couples who were resident or owned property in states that recognize T by E as a form of ownership. The conversation in many of these meetings included an extensive discussion of the fundamental principles of ownership of property in T by E. The discussion also included the potential pitfalls of continuing to own property in T by E and relying on this form of ownership as an asset protection strategy. Although the unexpected loss of the protection provided by ownership of

⁹ See e.g., *Estate of Berlin v. Pecora*, 968 So.2d 47 (Fla. 4th D.C.A. 2007); *In re McRae*, 282 B.R. 704 (2002); *In re Koesling*, 210 B.R. 487 (1997); and *Amsouth Bank of Florida v. Hepner*, 647 So.2d 907 (Fla. 1st D.C.A. 1994).

¹⁰ See e.g., *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45 (Fla. 2001); *Neu v. Andrews*, 528 So. 2d 1278 (Fla. 4th D.C.A. 1988); and *Winters v. Parks*, 91 So.2d 649 (Fla. 1956).

¹¹ See e.g., *Cohen v. Mathews*, 307 Fed. Appx. 266, (11th Cir. 2009); *Estate of Berlin v. Pecora*, 968 So.2d 47 (Fla. 4th D.C.A. 2007); *In re McAnany*, 294 B.R. 406 (Bankr. M.D. Fla. 2003); *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45 (Fla. 2001); *Cacciatore v. Fisherman's Wharf Realty Ltd. Partnership ex rel. Emalfarb Investment Corp.*, 821 So.2d 1251 (Fla. D.C.A. 2002); *In re Bundy*, 235 B.R. 110 (Bankr. M.D. Fla. 1999); *In re Campbell*, 214 B.R. 411 (Bankr. M.D. Fla. 1997); *Lapp v. U.S.*, 316 F. Supp. 386 (S.D. Fla. 1970); *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925); *Winters v. Parks*, 91 So.2d 649 (Fla. 1956); *Lauderdale v. Lauderdale*, 96 So.2d 663 (Fla. 3rd D.C.A. 1957); *Anderson v. Carter*, 100 So.2d 831 (Fla. 2nd D.C.A. 1958); *Lacker v. Zuern*, 109 So.2d 180 (Fla. 2nd D.C.A. 1959); *Tingle v. Hornsby*, 111 So.2d 274 (Fla. 1st D.C.A. 1959); *Lacker v. Zuern*, 109 So.2d 180 (Fla. 2nd D.C.A. 1959); *Lerner v. Lerner*, 113 So.2d 212 (Fla. 2nd D.C.A. 1959); *Crawford v. U.S. Fidelity & Guaranty Co.*, 139 So.2d 500 (Fla. 1st D.C.A. 1962); *Colclazier v. Colclazier*, 89 So.2d 261 (Fla. 1956); and *Doing v. Riley*, 176 F.2d 449 (5th Cir. 1949).

property in T by E could be disastrous, for example, as the result of an untimely death, many of these couples desired to continue to use T by E as their primary asset protection strategy. Often, only one spouse would resist the changes we would recommend in structuring the ownership of assets held in T by E, however, the reasons these couples provided for not doing the planning varied in many cases.

As an asset protection strategy T by E has its limitations and it is important for planners to understand these limitations. The limitations include the following:

1. **Divorce severs the T by E estate.**
2. **Death severs the T by E estate.**

No one can predict when another individual might die. An unexpected death could lead to disastrous results for an asset protection plan that relies on property continuing to be owned in T by E property.¹²

3. **Exception Creditors.**

In *U.S. v. Craft*,¹³ the Service successfully argued that T by E does not protect an interest in T by E property of a debtor-spouse from a Federal tax lien under § 6321 of the Code.¹⁴ Thus, case law in both Federal and state court can have a profound and unexpected effect on the ability of T by E to protect wealth.

While estate planners could offer advice to clients regarding the use of strategies to “hedge” against all of the foregoing risks, in many instances the use of such strategies will prove impractical, costly or unworkable for clients. For example, one such strategy might include the spouse which has little risk of incurring significant liability (that is, the low risk spouse or “LRS”), if any, establishing an irrevocable life insurance trust (“ILIT”) that could hold life insurance with a face value that approximated the value of the T by E property that could be lost to creditors if the LRS died unexpectedly. In such a case, the spouse with a greater likelihood of incurring significant liability (that is, the high risk spouse or the “HRS”) would be a discretionary beneficiary of the ILIT. If the ILIT is drafted properly, there would be little or no

¹² See e.g., *Estate of Berlin v. Pecora*, 968 So.2d 47 (Fla. 4th D.C.A. 2007); *Cacciatore v. Fisherman’s Wharf Realty Ltd. P’ship*, 821 So.2d 1251 (Fla. 4th D.C.A. 2002); *Colclazier v. Colclazier*, 89 So.2d 261 (Fla. 1956); *Baumgardner v. Kennedy*, 343 So.2d 1323 (Fla. 3rd D.C.A. 1977); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932); *Knapp v. Fredricksen*, 148 Fla. 311, 4 So. 2d 251 (1941); *Bamber v. Bamber*, 216 So.2d 806 (Fla. 3rd D.C.A. 1968); *Bendl v. Bendl*, 246 So.2d 574 (Fla. 3rd D.C.A. 1971); *Anderson v. Trueman*, 100 Fla. 727, 130 So. 12 (1930); *Logan Moore Lumber Co. v. Legato*, 100 Fla. 1451, 131 So. 381 (1930); and *Winters v. Parks*, 91 So.2d 649 (Fla. 1956).

¹³ 122 S.Ct. 1414 (2002).

¹⁴ See also, *Howard D. Popky et ux. v. United States* (No. 04-2798) (U.S. Court of Appeals for the 3d. Cir.); and *U.S. v. Hatchett*, 330 F.3d 875 (6th Cir. 2003).

risk of a creditor of the HRS ever reaching the trust assets in satisfaction of a judgment against the HRS.

Another example of a strategy to deal with the potential problems of T by E ownership as an asset protection strategy would be to advise the HRS to transfer such spouse's interest in such property to the LRS. In this case the LRS could revise such spouse's estate plan to ensure that should the HRS survive all of this property would pass for the benefit of the HRS through trust arrangements designed to maximize the protection of such wealth. Alternatively, the LRS could take such spouse's interest in this property and contribute it to a properly structured wealth protection trust arrangement. To ensure full use of the Federal estate tax exemption (when the estate tax is effective) the LRS might consider establishing a QTIP trust for the benefit of the HRS. Of course, this might subject all or a portion of the mandatory income stream to seizure by the creditors of the HRS.

In many instances the foregoing solutions to the potential creditor protection problems of owning property T by E are not acceptable to one or both spouses. For example, the cost of insurance might be expensive, one spouse might be concerned that transferring ownership of such spouse's interest to the other spouse could be the impetus for a surprise divorce or the other spouse might not be cooperative with further planning with the property after such spouse is given full ownership.

Through an idea I propounded and the efforts of Thomas R. Pulsifer, an attorney with Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Delaware, Delaware law enacted the first STET legislation. The statutes authorizing a STET are set forth in the Delaware Qualified Dispositions in Trust Act, 12 Del. C. § 3574(f) for T by E property contributed to an asset protection trust and in § 3334 of Delaware's general trust laws, 12 Del. C. § 3334, for T by E property contributed to a revocable trust. Both statutes became effective on August 1, 2010. Section 3574(f) provides:

Where a husband and wife make a qualified disposition of property to 1 or more trusts and, immediately before such qualified disposition, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, then notwithstanding such qualified disposition and except where the provisions of the trust instrument may expressly provide to the contrary, that property and any accumulation thereto shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entireties property to the extent that, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the qualified disposition, the sole remedy available to the creditor with respect to trust property that is treated as though it were tenancy by

the entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

Section 3334 of the Delaware Code provides substantially similar rules regarding creditor rights with respect to T by E property contributed to a revocable trust.

The STET provides an additional weapon in an estate planner's arsenal to deal with the pitfalls of T by E ownership as an asset protection strategy. For spouses who reside in a jurisdiction that does not recognize such broad protection for assets held in tenancy by the entireties, it may be possible for spouses to use a financial institution located in a state that recognizes such ownership as to personal property (such as Delaware). Such spouses can use Delaware as an intermediary jurisdiction to create an entireties estate prior to transferring such property to a Nevis STET. Furthermore, in the jurisdictions that recognize this extended form of T by E ownership such as Florida, it should be possible to use a STET even though there is an existing creditor with a claim or a judgment against one spouse. This is because the Uniform Fraudulent Transfer Act ("**UFTA**") specifically exempts the transfer of property held in T by E that cannot be reached by a creditor of only one spouse from the application of the fraudulent transfer rules. UFTA provides that "[a]n interest in property that is owned in tenancy by the entireties to the extent such property is not subject to process by a creditor who possesses a claim against only one tenant" is not subject to the application of the statute.¹⁵

¹⁵ For additional analysis of the STET see Ruben & Gopman, "The Delaware Statutory Tenancy by the Entireties Trust: Potentially Powerful Asset Protection for Couples Across the Country," LISI Asset Protection Planning Newsletter #233 (December 19, 2013); Gopman, "STET: Delaware Introduces New Asset Protection Trust for Tenancy by the Entireties Property," LISI Asset Protection Planning Newsletter #161 (September 8, 2010).