

Creditors Beware...New Tennessee Trust Law Strengthens Asset Protection

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The Tennessee legislature has passed new legislation yet again trying to move Tennessee's trust law up the ladder for state trust laws that provide maximum asset protection. More favorable trust laws hopefully bring more trust business into Tennessee. In 2007, Tennessee joined a handful of states allowing for the creation of domestic asset protection trusts. Specifically, an individual can create and put assets into a trust, continue to benefit from the trust assets while protecting the trust assets from the trustmaker's creditors. In 2010, the statute allowing for these trusts (the Tennessee Investment Services Trust Act) was revised to strengthen the protection of these trusts. Effective July 1, 2013, the Tennessee legislature has again improved upon the protections offered by the Tennessee Investment Services Trust ("TIST") and improved the creditor protection throughout the Tennessee Uniform Trust Code. The 4th Annual Domestic Asset Protection Trust State Rankings Chart (published by Steve Oshins, a nationally recognized asset protection specialist) now lists Tennessee as tied for third amongst the domestic asset protection trust states. So how do these changes benefit Tennessee trustmakers, trustees and beneficiaries?

Waiting Period Shortened. A TIST cannot be used to defraud an existing creditor. TISTs are typically used to protect against potential future claimants. We have used them on numerous occasions since 2007 for clients who are potentially subject to a great deal of liability, involved in a risky profession, or otherwise generally con-

cerned about asset protection. Often, the liability may be the simple risks of driving a car and potentially being subject to a lawsuit resulting from a car accident. Under the TIST statute as originally passed, there was a 4-year "waiting period" before the assets of the trust could be fully protected. Therefore, if you established and funded a TIST on January 1, 2008, had a car wreck and got sued as a result on March 1, 2010, the assets in the TIST would still be subject to the car wreck creditor because it was within four years of the transfer to the trust. The revised statute shortens the waiting period to 2 years in this circumstance. In the example given above, the car wreck claimant would only have until January 1, 2010 (2 years from the date of the transfer to the trust), to make a claim against the trust assets. If the creditor failed to do so, he could not reach the trust assets to satisfy his claim. If the creditor or his claim existed when the assets were transferred to the trust, the creditor would have until the later of 2 years from the transfer OR six months after the person discovers or should have discovered the transfer to the trust.

Tennessee Law Governs. Most trusts drafted by a Tennessee attorney for a Tennessee resident specifically state that Tennessee law governs the trust. However, what happens if the trustee, the trustmaker or a beneficiary moves to another state? What if a beneficiary gets a judgment against him in another state? Will that judgment creditor be able to reach a Tennessee trust? The new law specifies that "the validity, construction and administration of a trust" will be determined under Tennessee law for Tennessee trusts. Since Tennessee law has become more trust-friendly and less

creditor-friendly, this change should allow a beneficiary to take advantage of stronger laws in Tennessee if the beneficiary has a creditor or judgment in another state, even if the beneficiary lives in another state. Additionally, the statute specifies that Tennessee trusts are not subject to the laws of a foreign country and a judgment of a foreign court is ignored.

Creditors Must Work Even Harder. We frequently use a lot of discretionary language in trusts established for beneficiaries at the death of a client to make sure that creditors cannot reach the assets of the trust. In other words, the trustee has discretion to make distributions to or for the benefit of a beneficiary but there are often no forced distributions. This discretionary distribution standard means we do not have to expose the trust assets to a potential creditor if the beneficiary does not need the distribution. However, we often allow the beneficiary to be his or her own trustee so that the beneficiary can still use the trust assets for his needs. Under the revised statutes, even after a distribution, a distribution for support (typically, health, education, maintenance and support) can only be reached by a creditor if the distribution exceeds what is necessary for the beneficiary's health, education, maintenance and support. In addition, the creditor has the burden to prove that the distribution exceeded what was necessary for support and what portion exceeded the beneficiary's support. Additionally, a trustee cannot be liable to a creditor for a distribution for the beneficiary's expenses. This means that expenses paid directly by

a Trustee for the benefit of a beneficiary are virtually unreachable to a creditor. Finally, if the Trustee has discretion in making distributions under the trust document, a court can only review a trustee's distribution using their discretion if the trustee: (1) acts dishonestly (2) acts with improper motive OR (3) fails to act if under a duty to do so.

Beneficiary as Sole Trustee. We talk with clients frequently about leaving a beneficiary's inheritance to them in an asset and divorce protection trust. With these trusts, we often allow responsible, adult beneficiaries to serve as their own Trustee. Thus, a beneficiary can get the protections of a trust from a creditor, lawsuit, divorce or other predator, but can also make distributions to himself for his health, education, maintenance and support. While we have drafted this language into our trusts already, the revised statute specifically states that a beneficiary serving as his own Trustee does not give a creditor any greater rights unless he has discretion to make distributions to himself for standards above and beyond health, education, maintenance and support. Thus, the revised statute specifically confirms that a beneficiary serving as sole Trustee is not any less protected from creditors than a beneficiary who has an independent Trustee as long as the beneficiary is subject to the standards of health, education, maintenance and support.



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How Does This Help Me?

We would love the opportunity to talk with you about how these changes impact your estate plan or provide additional opportunities to meet your objectives. Please contact our office to learn more about potential opportunities for you and your family with this new legislation. At Wiseman Bray, asset protection planning has always been a significant focus of our practice. The combination of high federal estate tax exemptions, a phasing out of the Tennessee inheritance tax, and continually improving asset protection law in Tennessee provide us with a variety of opportunities to maximize the wealth you can transfer and protect for the next generation.

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