



SUFFOLK ACADEMY OF LAW
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RECENT CHANGES IN DOMESTIC ASSET PROTECTION TRUSTS

Presenter

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DAVID J. DePINTO, ESQ, LLM, CPA, MST, CELA**CURRICULUM VITAE**

David J. DePinto practices in the areas of trusts, estate planning, asset protection, charitable entities, business and succession planning for closely held businesses, estate and gift taxation, income taxation, elder law, guardianship, probate and administration of trusts and estates, estate litigation and also provides representation to Guardians, Trustees and other fiduciaries. He acts a Property Guardian for wealthy individuals and in the role of Executor and Trustee on a wide range of Trusts and Estates. He has been retained by private clients as an expert witness at trial for litigation cases involving trusts and related issues and also appointed as estate planning counsel on complex and high value cases including forensic review of trust and estate planning documents before the State Supreme Court.

Before going into private practice in 1999, Mr. DePinto spent seven years with a mid-sized NYC firm where he practiced in their Trusts and Estates department, handling a broad range of matters including estate planning, Wills and Trusts, estate taxation, taxation of charitable organizations, probate and administration of estates. He also worked in the IRS District Counsel Office for the Northeast, handling tax litigation matters for the Government.

Mr. DePinto received his LLM Master of Laws degree from NYU Law School, his JD degree from Brooklyn Law School and his Master of Science degree in Taxation, with academic honors, from Long Island University CW Post and his BBA degree from Hofstra University. He is a NYS Certified Public Accountant (CPA) and a (CELA) Certified Elder Lawyer certified by the National Elder Law Foundation as accredited by the American BAR Association; He is the recipient of the Edith Blum Foundation Award for Excellence in Taxation and the professor's Award for Academic Achievement in Taxation.

He has spoken for the New York State BAR Association on complex trust and Estate Planning topics and regularly lectures before the Nassau and Suffolk BAR Association centers for continuing Legal Education, and their committees and sub committees. He is frequently asked to speak on trust topics for (NBI) the National Business Institute and other providers of legal education. Known in the community for his expertise on trusts and related matters, he acts as counsel to many large and small law firms, providing advice and guidance in his areas of concentration.

He is a former Part 36 Court fiduciary, member of the American, New York State, Nassau County and Suffolk County bar associations, and also a former member of the American Association of Attorney-CPAs, American Institute of Certified Public Accountants and the New York State Society of Certified Public Accountants. He was treasurer for the Estate Planning Committee for the Nassau County Chapter of the NYSSCPA and is also currently admitted to practice before the United States Tax Court.

Current Developments with Asset Protection Trusts

David J. DePinto, Esq., LL.M., CPA

History of Asset Protection Trusts

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- Restatement (third) of Trusts §58 - a self settled trust is permanently available to creditors
- 1997 - Alaska Statutes: §34.40.110
- If a trust is self settled it is not subject to Grantor's creditors unless:
 - The trust is revocable by the Grantor
 - The trust was created in order to defraud creditors
 - The Grantor is in default of child support by 30 days at the time or the transfer
 - Mandatory payments of income or corpus to Grantor

Estate Tax Issues

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- 2036(a)(1) - Since 1931 a decedent's estate includes all property transferred to a trust if the decedent retained the right to income even if not legally enforceable in state court
- IRS must argue implied understanding between Grantor and Trustee on this issue if discretionary payments of income and principal were distributed back to the Grantor.
- Also, tax law follows state law future creditor's rights with regard to estate taxation of a trust (i.e. if Grantor's creditors can attach to or get to the assets, it is an incomplete gift to a trust and in the estate on death by default. (25.2511-2(b))

Blattmachr IRS Letter Rulings

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- **PLR 9837707:** A transfer of property to an irrevocable trust that benefits the Donor and his or her living descendants is considered a completed gift for federal gift tax purposes as long as the Donor and his or her descendants are not a Trustee and there is no agreement between the Donor and the Trustee pertaining to how the Trustee will exercise sole discretion about distributions on income and principal. The trust must also provide that the interest of a beneficiary of the trust may not be either voluntarily or involuntarily transferred before the payment or delivery of the interest to the beneficiary by the trustee unless 1) the transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons; 2) the trust provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; 3) the trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor; or 4) at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support order.

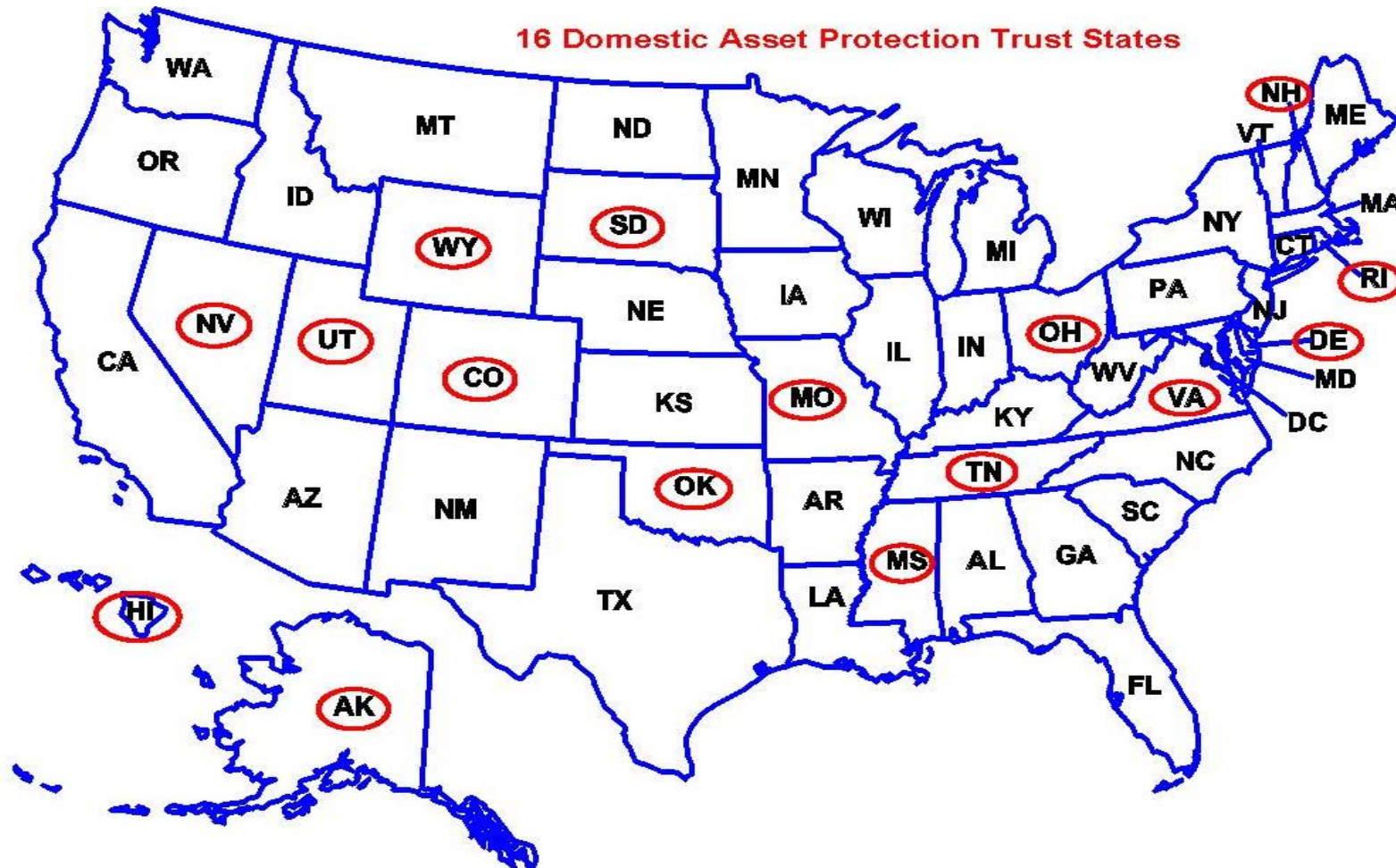
Blattmachr IRS Letter Rulings

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PLR 200944002: Grantor's transfer to a trust will be considered a completed gift when the grantor does not retain any power to change beneficial title, name new beneficiaries or change interests of beneficiaries. It also states that if a trust contains a provision that restricts the transfer of the interest of a beneficiary, either voluntarily or involuntarily, before payment or delivery of the interest to the beneficiary by the trustee, it will prevent a creditor existing upon creation and a person subsequently becoming a creditor from satisfying a claim out of the beneficiary's interest unless 1) the transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons; 2) the trust provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; 3) the trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor; or 4) at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support order.

Asset Protection Trust States

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States with limited asset protection include: Arizona, Maryland and Florida

* Map and chart by Steve Oshins, Esq.; Oshins Associates Las Vegas, Nevada

6th Annual Domestic Asset Protection Trust State Rankings Chart

Rank	State	State Income Tax (60% weight)	Statute of Limitations (Future Creditor) (5% weight)	Statute of Limitations (Preexisting Creditor) (5% weight)	Spouse/ Child Support Exception Creditors (Spouse 3% weight/ Alimony 1% weight/ Child Support 1% weight)	Preexisting Torts Exception Creditors/Other Exception Creditors (5% weight)	Ease of Use – Is a new Affidavit of Solvency required for every new transfer? (7.5% weight)	Fraudulent Transfer Standard (5% weight)	Decanting State Ranking (7.5% weight)	Total Score
1	Nevada	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	No	No	No Affidavit Required	Clear and convincing	Ranked #2	99
2	South Dakota	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support (only if indebted at time of transfer)	No	No Affidavit Required	Clear and convincing	Ranked #1	98
3	Tennessee	No (except dividends/ interest on residents)	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required	Clear and convincing	Ranked #3	86.5
4	Ohio	No (except residents)	1.5 Yrs.	1.5 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required	Clear and convincing	Ranked #6	85
5 (tie)	Delaware	No (except residents)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #5	79
5 (tie)	Missouri	No (except Missouri source income)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Alimony; Child Support	State/U.S. to extent state/federal law provides	No Affidavit Required	Clear and convincing	Ranked #11 (tie)	79
7	Alaska	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No	Affidavit Required	Clear and convincing	Ranked #7	77
8	Wyoming	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Property listed on app. to obtain credit – but only as to that lender	Affidavit Required	Clear and convincing	Ranked #11 (tie)	75.5
9	Rhode Island	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #19 (tie)	75
10	New Hampshire	No (except dividends/ interest on residents)	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Limited clear and convincing evidence standard	Ranked #4	74.5
11	Hawaii	No (except residents)	2 Yrs.	2 Yrs. Pers. Injury; 6 Yrs. Contract	Divorcing Spouse; Alimony; Child Support	Preexisting Torts/ Certain Lenders/ Hawaii Tax	No Affidavit Required	Limited clear and convincing evidence standard	None	72
12	Utah	Very uncertain ability to avoid	None (immediate protection)	2 Yrs. or 1 Yr. Discovery (also 120-day mailing/ publication option)	No	No	Affidavit Required	Missing clear and convincing evidence standard	None	70*
13	Virginia	Yes	None (immediate protection)	5 Yrs.	Child Support	Creditor who has provided services to protect trust/ U.S./city, etc.	No Affidavit Required	Clear and convincing	Ranked #8 (tie)	29.5
14	Oklahoma	Yes	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Must be majority Oklahoma assets	No Affidavit Required	Clear and convincing	None	16.5
15	Mississippi	Yes	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts, State/ Criminal Restitution/ Up to \$1.5MM if no \$1MM Umbrella Policy	Affidavit Required	Clear and convincing	None	14.5

*6th Annual Domestic Asset Protection Trust State Rankings Chart created in April 2015. Original State Rankings Chart created in April 2010.

New York Law

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- Case Law:
 - **Vanderbilt Credit Corp vs. Chase Manhattan Bank, N.A., 100 A.D. 2d 544, 1984**
 - Enforcement by a judgment creditor. Debtor argued that he was not the only beneficiary of the trust. The Appellate Division held in this case that creditors could reach a self settled trust when a Trustee has discretion to pay income and principal to the Grantor and not until his death the remaining principal was to be paid to the Grantor's children. The Court so held that even though there was a beneficiary or beneficiaries other than the Grantor named in the indenture, that disposition was only effective upon the Grantor's death.
- Statutes:
 - EPTL 7-3.1(a) - A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.
 - CPLR § 5205(c) Exceptions for the Enforcement of a Money Judgment

Trust exemption (1) Except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment

Federal Law

2005 Bankruptcy Act

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- A Trustee in Bankruptcy may avoid any transfer of an interest of the debtor made on or within 10 years before the date of filing a bankruptcy petition if the debtor voluntarily or involuntarily made a:
 1. Transfer to a self settled trust of similar device; and
 2. Transfer with actual intent to hinder, delay or defraud any entity to which the debtor was or became on or after the transfer was made, indebted. (i.e. Fraudulent Transfers)

Note: Prior to 2005 and Enron debacle as portrayed by NY Times Editorial the law was 1 year before filing. The time frame for other transfers not to a self settled trust is now 2 years before filing.

Fraudulent Transfers

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- Remedy for Creditor to Set Aside the Transfer to Trust and force property back to Grantor
- NYS - Later of 6 year transfer look back period or 1 year from date transfer discovered or should have been discovered (so could be very long time) N.Y.C.P.L.R. §§ 213, 203(f)

2 Types of Fraud

1. Actual Fraud - Where you admit it... Or more realistically it is inferred if you gave away your assets without consideration while being name as a defendant a court will likely find actual fraud. Under DC Law § 273-a, a conveyance unsupported by fair consideration is fraudulent if the conveyor (1) was, at the time of the transfer, "a defendant in an action for money damages" or "a judgment in such an action has been docketed against him," and (2) has "fail[ed] to satisfy the judgment."
2. Constructive Fraud - here an intent to hinder or delay creditors is not definitive its presumed at law and is determined by grantor's actions. The standard in NY is clear and convincing evidence and burden of proof is on the person challenging the transfer. They must show that the debtor transferred the property with "actual intent to hinder, delay or defraud his creditors," DC Law § 276; and (2) the recipient had "knowledge of the fraud at the time of the purchase," DC Law § 278(1); Since it is hard to prove intent the Court looks to the following Badges of Fraud:

Badges of Fraud

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- Lack of Consideration - one element but always considered
- Family Relationship between recipient and transferee
- Pending claims or litigation
- Concealed and no notice given of transfer
- Grantor retained control and/or the benefits of the transferred assets
- Grantor is insolvent as a result of transfer
- Timing of transfer

Recent Cases Affecting APTs

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- **Dahl v. Dahl**, 2015 UT 23, 2015 WL 404521 (Jan. 30, 2015)
 - Choice of Law case - Utah Cardiologist did an Nevada APT. in 2006 his wife filed for divorce and a nasty and bitter fight ensued. Utah District Court ruled in favor of the doctor but Supreme Court found in favor of the wife and applied the laws of Utah and not Nevada when it came to the APT
- ***Shaun Olmstead, et. Al., vs. The Federal Trade Commission***, Supreme Court of Florida. Case No. SC08-1009. (June 24, 2010).
 - Florida Supreme Court held that a single member LLC does not get the same protection as a multi member LLC and that the debtors interest can be foreclosed to access the assets owned by the LLC.

Recent Cases Continued

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Wells Fargo Bank v. Barber, 2015 WL 470589 (M.D. Fla., Feb. 4, 2015).

- Florida Court found that a state resident who owed \$62mm to Wells Fargo et al was subject to a charging order lien against the LLC interest. The debtors assets about \$1mm were moved to an account titled to a Nevis LLC in a last minute attempt to save it. The Court held that the LLC asset is intangible and has a situs where the debtor resides and Nevis LLC law is not applicable. Florida allows foreclosure on a SMLLC based on Olmstead.

Battley V. Mortensen, Adv. D. Alaska No. 0A09-90036-DMD, May 26, 2011

- First case looking at the 10 year transfer of real estate by an Alaska resident to an Alaska self settled trust rule under §548(e)(1) of the Bankruptcy Code. He downloaded the trust and drafted it himself and filed for bankruptcy 4 and ½ years later. The Court held due to the badges of fraud that the debtor's transfer to the trust was made with an actual intent to delay, hinder and defraud creditors and said the Trustee could void the transfer.

Kilker v. Stillman, 2012 WL 5902348 (Cal.App. 4 Dist., Unpublished, Nov. 26, 2012).

- Asset protection vs. Estate Planning Case.

Attorney Liability In APT

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1. Ethical and Disciplinary Actions - Most common form of sanctions for attorneys in this area
2. Civil Aiding and Abetting - “Knowingly” giving “substantial assistance” to a client to defraud a creditor
3. Civil Conspiracy - If another is harmed by the attorney’s actions in conjunction with debtors
4. Criminal Liability - Limited application but NY Penal code §185.00 makes a fraudulent transfer criminal when it is known that a court administrator of the debtor’s property is about to be appointed (i.e. Receiver) and also a Federal crime to defraud a Trustee under §152 of the Bankruptcy Code
5. IRS - anyone who impedes the collection of Federal taxes can be charged with a criminal act under IRC §7212
6. Malpractice - if the planning didn’t work and the debtor believed that based on the advice given they would be protected from creditors.

Attorney Liability

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***Morganroth & Morganroth v. Norris, McLaughlin & Marcus P.C.*, 331 F.3d 406 (3d Cir. 2003).** Morganroth was a law firm that sought to collect a judgment it had against its former client and car maker, John DeLorean. The Defendant was a New Jersey law firm representing Mr. DeLorean in his asset protection by transferring deeds to the children. The complaint alleged that the New Jersey firm actively, knowingly and intentionally participated in Mr. DeLorean's unlawful efforts to shield his assets from collection. The Morganroths allege that the lawyers took this action "with the intent of defrauding them and aiding DeLorean in his efforts to hinder and delay the enforcement of the judgment. The Court found Morganroth was able to collect the attorneys fees of \$6mm judgment from the Defendant law firm. Ouch!

***Iowa Supreme Court Attorney Disciplinary Board v Ouderkirk*, 845 N.W. 2d 32 (Supreme Court of Iowa March 28, 2014)** - Iowa Court ruled that a lawyer did not breach ethical duties when he assisted a client in transfers that were later found to be fraudulent. Facts were bad - the client (via his agent of POA) did asset protection planning trusts two months after he shot and killed his neighbor. Attorney was unaware of the crime at the time. Widow got a \$5.7mm judgment and sued both the attorney and the client alleging a "complex shell game" was effectuated by both. The Court of course found fraud and set aside the transfers. The widow then went on and filed an ethical complaint with the disciplinary committee. The committee found the attorney acted unethical but the Supreme Court dismissed all the complaints saying the attorney was not aware of the fraud until later. Phew!

Minimize any liabilities by pre screening, solvency affidavits, common sense and due diligence.

How I Use Trusts for Asset Protection

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- APTS
 - Elder Law - Spouse refusing before Medicaid application
 - Matrimonial - 1 year before marriage as only one element of a plan
 - Bankruptcy - 2 year rule as long as there is no sparks or intent then 10 year rule applies
 - General unknown/unforeseen circumstances - creditors - all the time
- Non-Self Settled Trust Options in NY
 - Spousal transfers to low risk spouse then draft trust under Will F/B/O high risk spouse
 - Inheritance planning at parents level
 - Out of State LLC
 - QPRT for NY primary residence

NYS Resident Trust

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- New York Tax §605(b)(3): Resident estate or trust. A resident estate or trust means:
 - the estate of a decedent who at his death was domiciled in this state,
 - a trust, or portion of a trust, consisting of property transferred by will of a decedent who at his death was domiciled in this state, or
 - a trust, or portion of a trust, consisting of property of:
 - a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or
 - a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable

Resident “Exempt” Trust

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- New York Tax §605(b)(3)(D): Provided, however, a resident trust is not subject to tax under this article if all of the following conditions are satisfied:
 - all the Trustees are domiciled in a state other than New York;
 - the entire corpus of the trusts, including real and tangible property, is located outside the state of New York;
 - all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust; and
 - intangible property shall be located in this state if one or more of the Trustees are domiciled in the state of New York.

NY Trustee

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- Effective 1/1/15: Provided further, a Trustee which is a banking corporation and which is domiciled outside the state of New York at the time it becomes a Trustee of the trust shall be deemed to continue to be a Trustee domiciled outside the state of New York notwithstanding that it thereafter otherwise becomes a Trustee domiciled in the state of New York by virtue of being acquired by, or becoming an office or branch of, a corporate Trustee domiciled within the state of New York.
- Watch for out of state trust companies with New York nerve centers or back office operations.

Filing Requirements for Resident Exempt Trusts

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- According to TSB-M-10(5)I, a New York State resident must file a NYS fiduciary income tax return if the trust:
 - Is required to file a federal income tax return for the tax year;
 - Had any NY taxable income for the year; or
 - Had tax preference items for minimum income tax purposes in excess of the specific deduction.

No exception for filing for resident trusts that are not subject to tax because they meet the conditions of section 605(b)(3)(D) and must also file IT-205C.

Non-Resident Trusts

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- New York Tax §605(b)(4)(B): A nonresident trust means a trust which is not a resident or part-year resident.
- Part-year resident individual. A part-year resident individual is an individual who is not a resident or nonresident for the entire taxable year.
- Part-year resident trust. A part-year resident trust is a trust which is not a resident or nonresident for the entire taxable year.

History of INGs

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- Intentionally Non-Grantor Trusts (“INGS”) - what are they:
 - Have no powers that would cause it to be a Grantor Trust under IRC 671 to 679 (see list); are deemed incomplete gifts for IRS purposes; Grantor is a beneficiary and cannot be part of a Trustee Committee (for NY)
 - Recent IRS Rulings on INGS: PLR 201310002, PLR201310003, PLR201310004; PLR201310005, PLR201310006, CCA201208026, IR-2007-127:Non-Grantor Trust. IRS approved use of non-grantor trusts that were also incomplete gifts and included the Grantor as a beneficiary. NYS was appalled and concerned. See Bloomberg Article.

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New York 2014 Budget

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- ING: New law now treats ING's that are incomplete gifts by a NY Resident as wholly "Grantor Trusts" for NYS income tax purposes, therefore, income is taxed to Grantor by NYS. Remains a Non Grantor Trust for Federal tax.
- As of 1/1/2014, a NY resident beneficiary will be taxed on accumulated income upon distribution from a Resident Exempt trust (includes inter vivos and testamentary) if NY State resident trust at that time. Derived from old IRS "throwback rules." Many open issues and questions exist.

Using Inter Vivos ING Trust for Sale of Business after 2014 NYS Law

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- First Trust must qualify as Resident Exempt Trust under Section 605:
 - Name non-NY trustees
 - No NYS tangible or Real Property in trust
 - No NYS Source Income (tricky one)
 - NYS Income Sourcing Rules apply for Section 605 “income/gain” to Trust
 - C-Corp: No issue even if dividends are paid unless it owns real estate
 - S-Corp: More complicated if NY corporation due to NY source income (K-1) flowing to trust. Try closing books approach.
 - Partnership/Limited Liability Company: If non-NY LLC/PS then no issues. If NY source income do special allocations if they have S.E.E. under sec 704 (b)