PASSPORT TRUST

THE NEVADA PASSPORT TRUST®

BY

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Introduction

Clients who come into our office looking for asset protection in the form of a domestic asset protection trust ("DAPT") often ask us what additional protections an offshore trust could offer them. Some of those additional protections include a shorter statute of limitations for creditors to attack assets after the assets have been transferred into the trust, a higher standard of proof that creditors must meet to undo a transfer into an offshore trust, and the fact that the creditor must go to the foreign jurisdiction to pursue their claims and bring an entirely new cause of action. After reviewing these benefits, many clients are anxious to set up an offshore trust, but that excitement wanes considerably we discuss the high set up costs and maintenance fees, the formalities and complexities that must be adhered to in order to enjoy those extra protections, and the need for an offshore trustee.

To obtain the additional protections for our clients, but reduce the upfront costs and eliminate the need for the appointment of an immediate offshore trustee and the more stringent formalities of an offshore trust, JEFFREY BURR, LTD. has created the Passport Trust®. The Passport Trust® is an asset protection vehicle that combines the flexibility and simplicity of a DAPT with the advantages of an offshore jurisdiction's additional protections against creditors, if the need arises.

A Passport Trust® includes "passport" provisions in the trust agreement that enable a DAPT to be redomiciled in a foreign non-US jurisdiction such as the Cook Islands if there is ever a distress event. Typically, there will be no new waiting period for creditor claims in the offshore jurisdiction – the original transfer date of assets into the DAPT will also be used as the transfer date for purposes of the Cook Island's rules regarding creditor claims.

Passport Trusts® lower the entry cost to obtain the additional protections an offshore jurisdiction can provide by allowing clients to begin with a DAPT and 'start the clock' on the state and offshore waiting period for protection from creditor claims and later convert to an offshore trust, if necessary, for the best of both worlds.

The Passport Trust® begins as a DAPT with all the protections that Nevada's self-settled spendthrift law provides, but includes a special passport provision that enables the Trustee to move the trust's domicile to a foreign jurisdiction. In conjunction with this passport provision, application will be made to a foreign trust company (SouthPAC) upon the creation of the DAPT to pre-approve the DAPT for redomiciliation. The foreign trust company shares in the due diligence regarding the creation of the trust. As a result of their early involvement, the foreign trust company agrees to serve as a special trustee, dormant and waiting with 'open arms' to receive the trust assets if a distress event occurs. If a distress event does not occur, clients enjoy the flexibility and simplicity of a DAPT with the comfort of knowing that their assets are protected in the event of a lawsuit or other misfortune, and will pass that protection on to their children.

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Advantages of Beginning with a DAPT

There are other advantages to starting out with a DAPT in Nevada. They are as follows:

1 Greater Flexibility. The Spendthrift Trust Act of Nevada statute (the "Act") is very flexibly constructed to allow the Settlor the following powers:

a. The Act allows the Settlor to be an Investment Trustee of the Trust. This is true even if the Settlor is a nonresident of Nevada.

b. In all cases where the Settlor is also a trustee, the Act requires that another person or entity have discretion over the right to make distributions to or for the benefit of the Settlor. This person or entity is often referred to as a "Distribution Trustee" or "Administrative Trustee." The Settlor has the first right to select who the Distribution Trustee will be. Thereafter, a Trust Advisor can remove and replace the Distribution Trustee. The Settlor, however, can make all decisions regarding the investments of the Trust and can even make distributions to other beneficiaries of the Trust.

c. If the Settlor chooses to not serve as the Investment Trustee, the Act gives the Settlor a veto power to veto any proposed distribution by the Trustee of the Trust. So, if for jurisdictional reasons or otherwise a Settlor doesn't serve as Trustee, the Settlor still has power over proposed distributions by the Trustee.

d. An alternative to the Settlor serving as Investment Trustee is to have a Nevada resident or Trust Company serve as Trustee and have the Trust form a Nevada LLC with the Settlor as the Manager of the LLC. This allows the Settlor to manage the assets of the Trust.

e. The Settlor retains a lifetime and testamentary power of appointment to direct the disposition of Trust property during the Settlor's lifetime or at the Settlor's death. Because the DAPT is irrevocable, it cannot be amended by the Settlor. However, the Settlor can, in effect, amend or change the dispositive provisions of the Trust through the exercise of his or her power of appointment. Of course, the Settlor's power to appoint excludes the power to appoint to the Settlor, the Settlor's creditors, the Settlor's estate and creditors of the estate.

f. The Trust Advisor will have the power to make administrative changes to the Trust to cause the Trust to be current and relevant in the event of new statutory changes or due to judicial decisions.

g. The Trust Advisor can also be given the power to add or remove beneficiaries from the Trust.

h. Most DAPTs are drafted to cause the Trust to be a grantor trust for income tax purposes. This causes all income and deductions to be reported on the Settlor's income tax return and alleviates the need to file a separate tax return for the DAPT.

i. In effect, except for a need to have a separate Nevada Distribution Trustee, the DAPT is substantially similar to a revocable living trust in terms of flexibility, but provides additional protection from creditors that a revocable trust does not provide.

2 Full Faith and Credit Should be Given to a DAPT by Sister States. Upon occurrence of a distress event, the DAPT Trust Advisor will have the option of defending the DAPT in state court or can move the jurisdiction to the Cook Islands. By having an option, the Trust Advisor can consider all relevant facts and circumstances. If the Trust one is trying to protect is not drafted pursuant to a self-settled spendthrift trust statute, the only option is to seek to move the jurisdiction offshore.

Moving the Trust to an offshore jurisdiction may be an easy decision when the Trust has mainly cash, bonds and marketable securities, but what if the Trust owns real estate? It is commonly agreed that ownership of real estate in an asset protection trust, even if the real estate is in an LLC, is problematic. If an action is brought in a non-DAPT state where real estate is located, then the court may seek to exercise *in rem* jurisdiction over the real estate. Plus, the Trust owning real estate or business assets in a non-DAPT state may cause the Trust, and all its other assets, to be subjected to the jurisdiction of that state.

The solution is to form two separate Trusts. One Trust will hold moveables such as cash, stocks and marketable securities, and the other Trust will own real estate and vulnerable business assets.

The moveables Trust can be easily redomiciled to the Cook Islands and receive additional protection, if necessary.

All is not lost, however, for the real estate/business Trust; if the facts are right and relevant formalities are met, there is still a fighting chance that the Trust will be held valid under the Full Faith and Credit Clause. If these assets are held in a non-DAPT Trust, then no such argument can be made. Even if the real estate/business DAPT is vulnerable, the creditor still has to jump through a lot of extra hoops to reach the Trust assets. This could result in a favorable settlement with the Trust and/or Settlor.

3 The Passport Trust® Offers These Benefits: The Passport Trust® appears to have a great degree of flexibility and an easy and quick path to redomiciliation to an offshore jurisdiction, if necessary. A Passport Trust® begins as a DAPT and does not require approval as a foreign trust in order to have the special offshore trust to pre-qualify the Trust and allow the holding period of the Trust to also meet the holding period of the offshore jurisdiction.

In addition, it is our opinion that because the Passport Trust® is statutorily authorized as an asset protection vehicle, a court is less likely to find a Settlor of a DAPT in contempt as a result of the removal of the asset to an offshore jurisdiction than it would a Settlor of a foreign trust. The Nevada statute, for example, specifically allows for the Trustee of a DAPT to transfer the assets of the DAPT into another irrevocable trust and allows the Transferee Trust to use the holding period of the Transferor Trust for purposes of creditor claims.

The Passport Trust® is the preeminent asset protection vehicle as it combines the simplicity and flexibility of a DAPT with the ultimate strength and protections afforded by an offshore jurisdiction, providing clients with ease of mind that their assets will be preserved and protected under both domestic and foreign asset protection laws.

In Summary, the Passport Trust® Offers These Benefits:

- The client has the advantage of starting "on-shore," where they have more flexibility and can essentially manage Trust assets until and unless a distress event occurs and the assets are moved offshore.
- The "Passport" provision enables clients, if they need it, to transfer assets seamlessly to one of the oldest and most tested asset protection jurisdictions – the Cook Islands, with one of the most trusted foreign trust companies – SouthPAC.
- The client receives the protections afforded by Nevada as soon as the statutory time period has elapsed from the date of transfer into the Trust, and the Cook Islands will accept that original transfer date for purposes of their protective laws as well.
- The initial set-up cost and annual maintenance fees are very reasonable because clients start with a Nevada trust, thus minimizing set-up costs in a foreign jurisdiction and foreign trustee fees.
- A client does not have to be a resident of Nevada to enjoy the benefits of a Passport Trust®, as long as they have a Nevada resident person or business entity serve as one of the Trustees.
- For the majority of clients, the Trust assets in a Passport Trust® will never be moved offshore, so they will enjoy the benefit of their assets throughout their lifetimes with flexibility and the comfort of knowing that their assets are protected in the event of a lawsuit or other misfortune, and will pass that protection on to their children.