

Estate Planning on America's Last Frontier: Alaska Trusts, Limited Partnerships, and LLCs

by Jonathan G. Blattmachr, New York, New York*
George E. Goerig, Jr., Anchorage, Alaska; and
Richard S. Thwaites, Jr., Anchorage, Alaska

Two 1997 statutory changes to Alaska law provide new estate planning opportunities for clients throughout the country, as well as for some outside the United States. The Alaska Trust Act, Chapter No. 6, SLA 1997, which became effective in April, 1997, allows individuals to create "self-settled" trusts under Alaska law that are immunized under that state's laws from claims of the individual's creditors. Another act amended Alaska law relating to limited partnerships and limited liability companies formed in that state. Chapter No. 78, SLA 1997. This second change was designed to simplify the formation and operation of these entities as permitted under the new Treasury Department "check the box" regulations. These two statutory changes provide enhanced opportunities in the United States for asset protection. Perhaps of greater interest to Fellows, the two acts provide new opportunities in estate planning. Although using either act alone may be effective, estate planning may be more enhanced in many cases by using a combination of Alaska trusts and Alaska limited partnerships or limited liability companies.

Alaska Trusts

The principal changes made by the Alaska Trust Act are (1) effectively to repeal the rule against perpetuities for Alaska trusts, and (2) to permit an individual to create an Alaska trust of which he or she is an eligible beneficiary yet (unlike the law that prevails in virtually all other American states) which will not be subject to the claims of his or her creditors. This latter change not only provides asset protection, but also allows lifetime transfers to be complete for federal gift and estate tax purposes in ways not previously available under American law.¹

As a general matter, to the extent that a creditor can reach assets transferred by an individual to a trust, those transfers will not constitute completed gifts and will be includable in the gross estate of the transferor. However, it seems certain that if the trust is formed in "a state where the grantor's creditors cannot reach the trust assets, then the gift is complete for federal gift tax purposes...." Rev. Rul. 76-103, 1976-1 C.B. 293.

*Copyright 1997 Jonathan G. Blattmachr, George E. Goerig, Jr., and Richard S. Thwaites, Jr. All rights reserved.

See also Rev. Rul. 77-378, 1977-2 C.B. 347; *Estate of German v. U.S.*, 7 Cl. Cl. 641 (1985); *Estate of Uhl v. Commissioner*, 241 F.2d 867 (7th Cir. 1957); *Estate of Wells v. Commissioner*, T.C. Memo 1951-574. Both Rev. Rul. 76-103 and Rev. Rul. 77-378 specifically deal with completed gifts, and not with estate exclusion. These rulings make clear that if, under the law where the trust is created, creditors cannot reach the property transferred, the transfer is *entirely* complete for gift tax purposes.² If the grantor has retained an interest, as noted above, creditors can reach that interest and presumably the transfer would not be entirely complete. Although it is theoretically possible for a transfer to be entirely subject to gift tax (even though partially an incomplete gift) and still be included in the gross estate of the transferor, such circumstances are rare. However, the rulings state that the transfer is entirely complete for gift tax purposes, not just that it is entirely subject to gift tax. It is thus reasonable to conclude that the Internal Revenue Service has determined that no interest was retained by the transferor because if the grantor had retained an interest, the transfer would be partly incomplete.³

In contrast to the law of most American states, many jurisdictions outside the United States provide that the interest of a grantor in a trust he or she created is not subject to the claims of his or her creditors unless the transfer to the trust was a fraudulent transfer under that jurisdiction's rules. As a consequence, under U.S. law transfers to such a foreign trust can be complete for U.S. estate and gift tax purposes, even though the grantor is a beneficiary of the trust. Indeed, the *German*, *Uhl*, and *Wells* cases cited above so hold. In addition, the IRS has explicitly so ruled in private letter rulings. For instance, in PLR 9332006,⁴ the Service held that a transfer to an offshore trust of which the grantor and members of the grantor's family were eligible as beneficiaries in the discretion of a trustee (who was a person other than the grantor) was a completed gift and would not be in the grantor's gross estate for federal estate tax purposes because, under the law governing the trust, creditors of the grantor could not attach the trust assets. See also PLR 8037116. With the Alaska Trust Act, such a tax-advantaged trust can now be created under the law of Alaska.

Self-Settled Estate Planning Trusts

The Alaska Act opens a new dimension in estate planning for Americans. They can now make lifetime transfers, which are complete for federal gift and estate tax purposes, to an Alaska trust of which the grantor is eligible, but not entitled, to receive distributions in the discretion of a trustee (other than himself or herself).³ Such self-settled Alaska trusts could be used for virtually all lifetime estate planning transfers.

For instance, an individual may make transfers under the protection of the Internal Revenue Code §2503(b) gift tax annual exclusion by transferring property to an annual exclusion or so-called "Crummey" trust, which provides that certain individuals (such as a transferor's spouse, descendants, and perhaps others, but not the grantor) can withdraw property transferred to the trust up to the amount of annual exclusions not used elsewhere. With an Alaska trust, the grantor may remain eligible to receive distributions of trust property in the discretion of a trustee other than the grantor without causing the trust assets to be includable in his or her estate. From an estate planning perspective, the grantor will want distributions to him or her to be minimized, because such distributions diminish the estate tax planning benefits of having made completed transfers to the trust that otherwise would be excludable from his or her estate.

If an agreement that the grantor would receive the income from or the use of the assets held by the trust may be inferred from the circumstances, the assets almost certainly will be includable in the grantor's estate, under Code §2036(a)(1), even when coupled with the finding that the grantor had no legal entitlement to such income or use. See, e.g., *Estate of Skinner v. U.S.*, 197 F. Supp. 726 (E.D. Pa. 1961), *aff'd*, 316 F.2d 517 (3rd Cir. 1963). On the other hand, only occasional use of trust assets or occasional receipt of trust income should avoid any such inference. See, e.g., *Estate of Wells v. Commissioner*, *supra*. Actual retention of the property or the income (that is, the failure actually to transfer the property or the income to another) may also result in estate tax inclusion. See, e.g., *Lee v. United States*, 86-1 U.S.T.C. ¶ 13,649 (CCH)(W.D. Ky. 1986).

Annual Exclusion Trusts

Not infrequently, a Crummey trust will acquire one or more life insurance contracts on the life of the grantor or on the lives of the grantor and the grantor's spouse. Ownership of the policies by the trust is an attempt to keep the proceeds paid at death from inclusion in the estate(s) of the insured(s). If the insured holds no "incident of ownership" in the policy at or within three years of death, and if the proceeds are not paid to the estate of the insured, the proceeds should

not be included in the insured's gross estate. Code §2035, 2042.

If the terms of an annual exclusion (or another type) Alaska trust that acquires a cash value life insurance contract provide merely that the trustee may, in the exercise of its discretion, distribute trust assets to the grantor, the incidents of ownership in the contract should not be attributed to the insured grantor so as to cause the proceeds to be includable in his or her estate. See, e.g., PLR 9434028 (incidents of ownership held by a trust are not automatically attributed to the beneficiary whose life is insured if the beneficiary is not a trustee).

This provides an opportunity for the grantor, through the exercise of discretion of a trustee other than himself or herself, to be eligible to receive cash value in the policy without causing the proceeds paid at death to be includable in his or her estate.

Unified Credit, GST Exemption, and Other Trusts

One of the most effective lifetime planning techniques is to transfer as early as possible in life the amount protected from gift tax by reason of the unified credit allowable under Code Sec. 2010 or by reason of the amount of GST exemption under Code Sec. 2631. Use of the unified credit (which under the Taxpayer Relief Act of 1997 will increase commencing in 1998 and continuing through 2006) early in life can result in a very large amount being excludable from the transferor's estate. The early use of the \$1 million GST exemption (which under the Taxpayer Relief Act of 1997 is indexed for inflation) can be even more effective from an estate planning perspective. In the long run, because the GST exemption can be used to avoid wealth transfer tax on property as it passes from one generation to the next without limit, the use of the GST exemption to avoid tax may be even more important than use of the unified credit. (As noted earlier, an Alaska trust can be structured so it can last perpetually. Also, Alaska has no income tax.)

The remainder following the grantor's retained interest term in a grantor retained annuity trust (GRAT), grantor retained unitrust (GRUT), or grantor retained income trust (GRIT), including a qualified personal residence trust, can pass outright to others or remain in trust. In most jurisdictions in the United States, the property will continue to be includable in the grantor's estate if the grantor is eligible to receive continuing distributions in the discretion of a trustee after the grantor's entitlement to payments ceases, because the grantor's creditors will be able to attach the trust assets. See Rev. Rul. 77-378, *supra*. However, if the GRAT, GRUT, or GRIT is an Alaska trust, the property should not be includable in the grantor's estate after the annuity, unitrust, income, or use term

ends, even if the grantor remains eligible to receive distribution from the continuing trust for the balance of his or her lifetime in the discretion of the trustee other than the grantor.

If the Alaska trust holds real property outside of that state, it is possible that a court would apply the spendthrift trust rule of the state where the property is situated rather than the spendthrift trust rule of Alaska. If the real estate is located in a state where spendthrift trust provisions are not effective in protecting the grantor's interest in the trust from claims of his or her creditors, it may be appropriate to permit the trustee to distribute trust property to the grantor only if the real property outside of the state of Alaska is no longer held in the trust (e.g., the non-Alaska real estate has been sold by the trustee or distributed to other beneficiaries).

In most states, the grantor could not become a beneficiary to whom the trustee could distribute assets from any continuing trust after the charitable term of a charitable lead trust without causing the property to be includable in the grantor's estate due to the right of the grantor's creditors to attach the trust assets. See Rev. Rul. 77-378. If the charitable lead trust is created under Alaska law, however, the grantor may remain eligible to receive distributions from the continuing trust after the charitable term ends without causing the property to be includable in his or her estate. *Estate of German v. U.S.*, *supra*, *Estate of Wells v. Commissioner*, *supra*, *Estate of Uhl v. Commissioner*, *supra*.

Use of Alaska Trusts by Non-U.S. Persons

Alaska trusts may also be effective vehicles for use by non-U.S. persons. For example, many individuals who are neither U.S. citizens nor U.S. domiciliaries ("foreigners") have American relatives or friends whom they wish to benefit. Except for U.S. real estate and tangible personal property, a foreigner may make lifetime gifts to or in trust for Americans without the imposition of U.S. gift tax. Similarly, a foreigner may make transfers at death to or in trust for Americans without the imposition of U.S. estate tax, except to the extent the transfer consists of U.S. real estate or tangibles, stock in U.S. corporations, and certain indebtedness of U.S. obligors. In addition to avoiding U.S. gift and estate tax, these transfers may be made free of generation-skipping transfer tax. Treas. Reg. §26.2663-2(b). A foreigner can thus transfer to or place in trust for Americans unlimited amounts of non-U.S. assets which will never be subject to U.S. wealth transfer tax. Such an opportunity suggests consideration of the creation of a very long-term or perpetual trust by a foreigner for American relatives or friends whom the foreigner wishes to benefit.

Six American states allow trusts to last perpetually: Alaska, Delaware, Idaho, South Dakota, and Wis-

consin. Alaska may be the most preferable of all for several reasons. First, if the foreigner wishes, he or she could remain a beneficiary of an Alaska trust to whom the trustee could make distributions without causing the trust to be includable in his or her estate for federal estate tax purposes. This could be very important due to the major distinction in the taxation of foreigners for gift tax purposes on the one hand, and estate tax purposes on the other. Lifetime gifts by foreigners of U.S. securities are not subject to U.S. gift tax but those same securities, as a general rule, are subject to U.S. estate tax if includable in the foreigner's estate at death. Hence, a foreigner could transfer U.S. stock to an Alaska Trust free of U.S. tax, remain an eligible beneficiary for life and yet avoid U.S. estate tax on the trust assets at death. Also, only Alaska has a statutory rule of what makes a trust be treated as sited there: (i) there must be an Alaska trustee whose duties consist at least of maintaining a set of trust records and of preparing or arranging for the preparation of any trust tax returns, (ii) part of the trust assets must be maintained in Alaska, such as by maintenance of a bank or brokerage account there, and (iii) some part of the administration must occur in Alaska, such as holding some trustee meetings there or effecting some "trades" there.

In fact, even if a foreigner does not wish to benefit Americans but simply wants to create a trust for his or her own benefit that is protected from claims of his or her creditors, an Alaska trust may be preferable to one created in an "offshore" jurisdiction even if that jurisdiction provides for the trust assets to be protected from claims of the grantor's creditors. For several reasons, many foreigners acquire or maintain assets in the United States. Holding those assets through an Alaska trust may well provide an additional level of protection for them.

Alaska Limited Partnerships and Limited Liability Companies

Limited partnerships and limited liability companies have become a mainstay in business and personal planning. The adoption by the Treasury Department of the so-called "check the box" regulations effective January 1, 1997, vastly simplified the formation and administration of such entities. See Treas. Reg. §301.7701-1, 2, 3. Prior to the adoption of those regulations, four complex factors (known as "corporate characteristics factors") had to be analyzed to determine whether an entity other than a corporation would be taxed as a corporation or as a partnership. It is generally preferable for an entity to be taxed as a partnership rather than a corporation because profits are taxed once, losses are passed through to the owners of the entity, and adjustments to basis are usually more favorable. See, e.g.,

IRC § 754. Moreover, entities treated as partnerships for income tax purposes can be much more flexible in formation, operation and ownership than so-called S corporations. Subject to certain exceptions (such as for domestic (U.S.) corporations), an entity may elect on its first tax return filed after 1997 to be treated as a partnership (or, alternatively, as a corporation) for federal income tax purposes.

Entities treated as partnerships, in certain circumstances, can be used to enhance the protection of assets from claims of creditors. First, "buy-out" provisions contained in a partnership agreement (or other document) sometimes provide other owners or the entity itself the right to buy partnership interests (or comparable interests in a LLC) from a partner who becomes bankrupt. Although these "triggered by bankruptcy" provisions sometimes are not enforceable, they may be enforceable in certain other cases. In any event, their mere existence may chill a creditor from attempting to attach a partnership interest. Second, as a general matter, any creditor who does succeed to the economic interest of the bankrupt partner but does not become a partner (because, for example, state law or the partnership agreement so provides) nonetheless may be taxed apparently on a pro rata portion of the income, even if no distributions are made. See Rev. Rul. 77-137, 1977-1 C.B. 178. This may make the attached interest in the partnership a liability in the hands of the creditor (because it may generate an income tax liability without a concomitant distribution of cash or other assets,) which may cause the creditor to agree to disgorge the asset at a lower price or possibly to abandon it. Under the law of virtually all jurisdictions, however, a court having jurisdiction over the partnership may order its liquidation for any "equitable" reason. See, e.g., 8A N.Y. Cons. Law §121-802. In addition, under those state laws that otherwise permit a partner to demand to be bought out upon six month's notice (which is the default rule contained in the Revised Uniform Limited Partnership Act), a creditor might convince a court that a creditor should be able to exercise that power to be liquidated out.

Under the new Alaska law, a court will be able to order the dissolution of a partnership or limited liability company only if it determines that it is impossible for the enterprise to continue to operate. Therefore, the court will be unable to order a liquidation merely for an "equitable" reason. In addition, unlike the default rules under most state laws, an Alaska limited partnership or limited liability company does not go out of existence upon the death of a general partner of a limited partnership or of a member of an LLC.

Limited partnerships and LLCs are widely used for estate planning. They can accomplish many goals, including providing a family unit with an opportunity

to shift income more efficiently, share in lower brokerage and investment advisory fees, and centralize and harmonize the management of assets and investment decisions. Use of these entities changes the nature of what is owned. In other words, family members no longer own an interest in the assets owned by the partnership or LLC, but rather own interests in the partnership or LLC. Because the nature of the family's interest changes, so does it value. Often, the value is reduced. Lower value may mean lower gift, estate, or generation-skipping transfer tax when an interest is transferred. It can also mean a smaller "step-up" in income tax basis at death. See IRC §1014.

The Internal Revenue Service has shown a strong and growing inclination to disregard the existence of the partnership (or LLC) when disregarding its existence would result in a larger value for estate, gift, or generation-skipping transfer tax purposes, and thus, higher taxes. The Service's attack, to date, has revolved around four primary arguments. See, generally, Aucutt, "More on Deathbed FLPs," 9 *Probate Practice Report* 1 (August 1997), for a discussion of some of these arguments.

First, the IRS has contended that the taxpayer may be making a gift upon formation of the entity to other equity owners (e.g., partners) if the taxpayer receives back an interest worth less than what he or she contributed. The argument may not be sound. For example, upon termination any such "gift" to the other partners may be offset by a "gift" back from the others. If so, any transfer upon formation must be for full consideration and cannot be a gift. At least in some cases, the courts have not completely dismissed the argument that a gift can be made upon formation, thus this argument should not be disregarded in forming a limited partnership or LLC. Cf. *Estate of Trenchard v. Commissioner*, T.C. Memo 1995-232. See, also, Horn, "Limited Partnerships: Some Thoughts and Theories about Key Issues," 23 *ACTEC Notes* 37 (Summer 1997).

Second, the IRS has contended that the existence of the partnership should not be respected in those cases where the partnership was formed only for tax reduction reasons, at least if its existence has no other substantial economic impact. It appears more likely that there will have been a smaller non-tax impact if a transfer of partnership units occurs immediately after the formation of the entity. See, e.g., National Office Technical Advice Memorandum (NOTAM) 9719006 (formation of partnership by individual who was terminally ill and died two days after partnership was formed). See, also, NOTAM 9723009 (formation 54 days before death), and NOTAM 9725002 (formation two months before death).

Third, the Internal Revenue Service also has recently contended that the existence of the partner-

ship should be ignored because it constitutes a restriction on the use of the assets of the partnership. See, e.g., NOTAM 9719006. IRC §2703 provides that, in certain circumstances, an option, agreement, or other right to acquire or use property at a price less than fair market value or any restriction on the right to sell or use the property is ignored for estate, gift, and generation-skipping transfer tax valuation purposes unless it is established by the taxpayer that the option, etc., is comparable to similar ones found in arms' length transactions.

Fourth, the IRS has attempted to attack partnership discounts under IRC §2704(b), on the basis that the partnership agreement (or LLC operating agreement) imposes one or more applicable restrictions. See, e.g., NOTAM 9724703 (provision of partnership agreement that eliminates the right under Massachusetts law of a limited partner to withdraw on six months' notice is disregarded). A restriction is disregarded for valuation purposes under Code Sec. 2704(b) only if the restriction will expire or if the family acting together without non-family members can remove it. It is understood that the Internal Revenue Service may contend that any applicable restriction in a partnership that contains a fixed term (such as terminating in the year 2039) means that the applicable restriction will expire by the terms of the partnership when the term of the partnership ends, and, therefore, any such restriction should be disregarded for valuation purposes. The Internal Revenue Service may also contend that the family can remove any applicable restriction (which under Treas. Reg. §25.2704-2(b) is to be determined under default state law, and not as limited by the terms of the partnership agreement) even in a circumstance where a non-family member (such as a niece or nephew) is also a partner. Under the partnership laws of many states, certain actions may not require unanimous consent of all the partners (unless the partnership agreement expressly so provides).

Alaska law was amended not only to permit simpler formation of limited partnerships and LLCs pursuant to the check-the-box regulations and to use them more effectively for asset protection and other non-tax reasons, but also to assist a taxpayer in resisting such IRS attacks on valuation of interests in partnerships and LLCs. First, Alaska law is now clear that a single member (one owner) LLC may be formed. Forming a limited partnership with only one real owner of equity (e.g., the same person owns all limited partnership interests and all of the stock of a corporation which owns a relatively small general partnership interest) or a single member LLC should avoid any argument by the Internal Revenue Service that a gift is made upon formation from one owner to another. (If a husband and wife, both of whom are United States residents, are

the only partners or members, there also is no taxable gift because any gift from one to the other should qualify for the gift tax marital deduction under IRC §2523, barring some provision that would make it a so-called "terminable interest.") The Internal Revenue Service has essentially conceded that a subsequent gift of an interest even in a wholly owned enterprise is to be valued by looking at the interest transferred in isolation. Rev. Rul. 93-12, 1993-1 C.B. 202. Hence, the "depletion of the value of the estate" argument, which is essentially what the gift upon formation contention is, should not arise if the entity is formed by a single owner who thereafter makes gifts to others of interests in the entity.

One of the most effective ways to avoid the IRS contention that the partnership was formed only for tax reduction reasons and without any other substantial economic or other impact is to operate the partnership or LLC for substantial period of time prior to making gifts or sales of the units (and forming it as long before death as practicable if the interests in it will be held until then). As mentioned above, limited partnerships and limited liability companies often provide significant non-tax benefits, such as providing for asset protection and lower brokerage or investment advisory fees through the aggregation of wealth. By making gifts of relatively small interests in the enterprise, the others who receive these transfers can participate in such non-tax benefits attributable to the structure of the enterprise.

The IRS argument that the existence of the partnership should be ignored under IRC §2703 appears flawed. It is based on the Code section, regulations promulgated thereunder, and its legislative history, which indicate that the section applies only with respect to the property which is the subject of the gift or transfer at death. In the case of gifts or transfers at death of partnership interests, it is those interests (not the underlying partnerships assets) that must be restricted for the section to apply. As mentioned, the section does not apply where the taxpayer establishes that unrelated third parties have entered into similar arrangements. Presumably hundreds of such entities will be created under Alaska law, a majority of which probably will be created by unrelated third parties. In many cases, these agreements will contain no provisions other than those provided under default state law. This may help establish that any family partnership agreement or limited liability company, at least to the extent that the governing agreement does not provide additional restrictions, is the same as that entered into by unrelated third parties.

The new Alaska law should go far in combatting the IRS arguments under §2704(b). First, as a matter of default state law, Alaska limited partnerships and

limited liability companies last indefinitely (just as corporations do). In addition, as a matter of default Alaska law, the terms of a partnership agreement (or governing documents of a limited liability company) can only be changed with the unanimous of all partners (or members of an LLC). Hence, if there is any partner who is not a family member (such as a niece or nephew), the family will not be able to remove the restriction and, accordingly, it should not constitute an applicable restriction the existence of which may be disregarded under IRC §2704(b).

Alaska has also eliminated any right of a limited partner or LLC member to demand to be bought out on six months' notice. In fact, under default state law, a partner or member is entitled to distributions only as provided in the governing documents. Moreover, unlike the default rules under the law of virtually all the other states, neither a limited partnership nor a limited liability company is dissolved under Alaska law upon the death of any general partner or member. Rather, a limited liability company continues for as long as there is one member. A limited partnership continues in existence as long as there is another general partner, or if there is none, it dissolves only if a majority-in-interest of the remaining partners fail to elect a new general partner within 90 days.

New Delaware Asset Protection Trust Legislation

Effective July 1, 1997, Delaware enacted a new law similar to and intended to produce the same estate planning and asset protection benefits that the Alaska Trust Act provides. The official synopsis of the new Delaware law states that the purpose of the Act is to facilitate the establishment of trusts in Delaware and is intended to be like the Alaska Trust Act. In fact, much of the language in the Delaware law is identical to the Alaska law.⁶

Unfortunately, it appears that the Delaware law will provide less asset protection than the Alaska law will. Perhaps of much greater significance, it may not be possible for a gift to a self-settled trust formed under Delaware law, as enacted, to be complete for

federal tax purposes. See Dela. Stat. Ann. §3573. Subsection §3573(a) appears to provide that the trust is permanently available to discharge the grantor's obligation to pay alimony, child support, and property settlement awards even if the obligation arises after the transfer to the trust occurs. As indicated above, a transfer is incomplete for Federal estate and gift tax purposes to the extent the grantor can relegate the grantor's creditors to the trust. Here, because the potential use of trust assets is limited and probably ascertainable, it seems the transfer might be only partly incomplete (i.e., to the extent potential use of trust assets for child support, etc. is ascertainable). See Treas. Reg. §20.2036-1(a)(ii).

Probably most troublesome is §3573(b), under which the grantor can certify in writing to any creditor (including apparently someone who becomes a creditor after the trust has been created) that the trust assets are available to satisfy the creditor's claim. That certification seems to make the trust assets available to that creditor. This virtually assures that the gift to the trust is incomplete, because the grantor can relegate his or her future creditors to the trust assets. This power of relegation is sufficient to render the gift incomplete. Rev. Rul. 77-378, *supra*.

Third, under §3573(c) the trust assets are permanently available to claimants who have suffered personal injury, death, or property damage that occurs prior to the transfer to the trust. It appears quite certain that these claimants continue for all time to have access to the property in the Delaware trust to satisfy their claims, even if the transfer to the trust was not a fraudulent conveyance. It seems that transfers to the Delaware trust are incomplete to the extent of any such pre-transfer claims, under Dela. Stat. Ann. §3573(c).

Nonetheless, supporters of the new Delaware trust act are likely to seek to have these potential problems with the legislation cured early in that state's 1998 legislative session. With certain changes, Delaware law will provide the same estate planning benefits currently available under Alaska law.

Notes

¹ The extent of asset protection is discussed in more detail in Hompesch, Rothschild and Blattmachr. "Does the New Alaska Trusts Act Provide an Alternative to the Foreign Trust?" *The Journal of Asset Protection*, 9 (July-August, 1997).

² For example, Rev. Rul. 77-378 states, in part:

There would be no doubt of his nonliability for gift tax upon the value of the income if he had reserved to himself the absolute right to the income for his life. But he made no such reservation. He transferred the entire property. Whether he would enjoy any of its income depended entirely on the trustee, who, in his uncontrolled discretion, could deprive him of it completely. It

was only by virtue of the trustee's direction, which on this record must be regarded as entirely voluntary, that the donor received any of the income; and this direction might be terminated whenever the trustee deemed it proper that the wife should receive the income. *Such a hope of passive expectancy is not a right. It is not enough to lessen the value of the property transferred.... Whether the grantor enjoy any of the trust's assets is dependent entirely on the uncontrolled discretion of the trustee. Such a hope or passive expectancy does not lessen the value of the property transferred....* Rev. Rul. 62-13 is hereby clarified to remove any implication

that an entirely voluntary power held by a trustee to distribute all of the trust's assets to the grantor is sufficient to render a gift incomplete either in whole or in part (emphasis added).

¹ Section 2036(a)(1) requires that the decedent retain either possession or enjoyment or the right to the income. If he has legal right to income, the 'income' phrase would not support inclusion under Section 2036. Perhaps it may be said he has retained 'enjoyment.' However, if some meaning is to be accorded the word 'retained,' some showing of an arrangement, more than the fact that income was paid to the decedent, should be required.... Since such transfers are treated as complete when made for gift tax purposes there is even less reason for the imposition of estate tax liability under Section 2036."

Stephens et al., *Federal Estate and Gift Taxation*, § 20.08(4)(c) (footnote numbers and footnotes, other than a portion of the text from n. 42, omitted).

² Neither a private letter ruling nor a national office techni-

cal advice memorandum may be cited or used as precedent. IRC § 6110(j)(3). However, they often are indicative of the Internal Revenue Service's position.

³ There are four exceptions (or limitations) to the new Alaska spendthrift rule: (i) to the extent the transfer is a fraudulent conveyance, (ii) to the extent that the grantor is in default by 30 or more days in child support, (iii) to the extent that the grantor retains the right to distributions, or (iv) to the extent that the grantor retains a power to revoke. A power to revoke does not include a power to veto distributions to others or to exercise a testamentary special power of appointment. These two powers (i.e., to veto or exercise a testamentary special power) can be used to prevent the transfer to the trust from being a completed gift, but the retention of either power will cause inclusion in the grantor's estate for federal estate tax purposes.

⁴ See, generally, Hompesch, "Alaska v. Delaware: Comparison of Recent Trust Legislation," to be published in *Probate & Property* (Jan/Feb. 1998). Mr. Hompesch was the principal drafter of the Alaska LLC/Limited Partnership Amendment Act.