

Asset Protection Trusts in Virginia

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Jonathan Kinney

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BKK Wills, Trusts and Estates Newsletter

August 2012

As of July 1, 2012, residents of Virginia can now avail themselves of domestic asset protection trusts or qualified self-settled spendthrift trusts ("QSSST"), as they are commonly referred to. The Virginia Assembly amended and reenacted an existing section of the Virginia Code and added new sections 55-545.03:2 and 55-545.03:3 to allow for this new means of asset protection. In doing so, Virginia joins 12 other states that already permit such trusts.

The QSSST is an irrevocable, self-settled spendthrift trust created by a settlor where the settlor may retain beneficial interests which are generally not subject to seizure by a creditor. A spendthrift trust is a trust with a clause preventing spending down of assets or unwise borrowing against the assets by the beneficiary of the trust. In essence, it protects the beneficiary from themselves and shields them from some creditors. To receive the protection from creditors, a QSSST must be an irrevocable trust. Irrevocable generally means that once a trust has been created it cannot be amended or revoked by the settlor except in very unusual circumstances. In the case of the new Virginia statute, the term irrevocable means something very specific.

A QSSST may be particularly compelling for individuals working in professions that have a high probability of lawsuits, such as building contractors, doctors or even attorneys. It offers protection against future creditors and present creditors after a five-year transitional period. During the five-year transitional period, future creditors may still bring claims against assets transferred into a QSSST. This transitional period is longer in the Virginia statute than what is provided for by most other states' statutes.

Under the new Virginia statute, once the five-year transitional period has lapsed, future creditors will not be able to receive a judgment against the assets in the QSSST, unless they can prove that the trust was created with the intent to delay, hinder or defraud the creditors, under Virginia's Fraudulent Conveyances laws. Simply setting up a QSSST is not evidence of such intent. If a creditor can prove a fraudulent transfer, the trust may be set aside and attorney fees can be awarded to the creditor who proves such fraudulent intent. The ideal time to set up a QSSST is before any legal claims are filed or when debts owed have not become unreasonable.

There are very specific requirements that must be met for a QSSST to be valid. If any of the factors are not met, the trust will not qualify as a QSSST and the creditor protection will fail. The statute is new and quite lengthy. The requirements, briefly, are as follows:

1. Trust must be irrevocable, as defined by Section 55-454.03:03 of the statute;
2. The trust must be created during the settlor's life (an inter vivos trust);

3. The trust must name at least one beneficiary other than the settlor;
4. Discretionary benefits only based upon ascertainable standards or 5 and 5 powers;
5. Must name at least one qualified independent trustee as defined by the statute;
6. Must have some Virginia property interest;
7. Must be governed by Virginia law;
8. Must include spendthrift trust provision; and
9. The settlor may not retain a veto right as to any of the distributions from the trust.

If you think an asset protection trust may be beneficial to you, you should contact an estate planning attorney to discuss the pros and cons and the statutory requirements in greater detail. While it remains to be seen how popular this new trust vehicle might become in the Commonwealth, one thing is certain, this is one more tool that Virginians now have at their disposal to protect their wealth from business litigation claims and resulting collection actions.