

Judicial Foreclosures and Constitutional Challenges: What Every Estate Planning Attorney Needs to Know

By
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Dennis M. Sandoval analyzes the asset protection features of family limited partnerships, family limited liability companies and domestic asset protection trusts.

With the increase in the number of marital separations and dissolutions,¹ the tendency of the judicial system to allow for ever-expanding theories of liability² and runaway juries awarding astronomical damages,³ it has become more common for estate planning attorneys to recommend asset protection entities, such as family limited partnerships (FLPs), family limited liability companies (FLLCs) and domestic asset protection trusts (DAPTs) in drafting estate plans for high-net-worth clients. In doing so, the estate planner leaves himself vulnerable if he does not disclose to the client the possibilities of attack against these entities.

Family Limited Partnerships

A family limited partnership is defined as a “[p]artnership comprised of one or more general

partners who manage the business and who are personally liable for partnership debts, and one or more limited partners who contribute capital and share in profits but who take no part in running the business and incur no liability with respect to the partnership.”⁴ There is no question that the FLP is a very useful estate planning tool. It allows the client to consolidate assets and provide for centralized management. It provides for a degree of family

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income and wealth sharing and a potential reduction in overall income taxes. It allows the family to have some degree of control over the transfer of FLP assets to anyone other than a family member and provides for a potential reduction in estate taxes. Finally, the FLP affords some measure of asset protection from the divorcing spouses and judgment creditors of the family partners.

Inside and Outside Creditors

The estate planning client needs to be concerned about two types

a member of the client's immediate family, then the tenant would be an outside creditor. Inside creditors can recover from the assets of the FLP, as well as the net worth of the general partner, while outside creditors are generally limited to a charging order (explained below) against a debtor-partner's FLP interest.

The General Partner

As noted above, the general partner remains liable for the debts of the partnership. In an effort to reduce the liability of the general

partner, many estate planning attorneys recommend that the general partner of the limited partnership be structured as an S corporation. This strategy can be a double-edged sword. Where the estate planning client has significant assets outside of the limited part-

nership, an entity general partner can preserve those assets from an attack by an inside creditor. The inside creditor would be limited to recovery from the assets of the partnership itself and the entity general partner. In this circumstance, however, the assets held outside the partnership remain liable to the client's outside creditors.

Where the bulk of the client's assets are owned under the umbrella of the limited partnership, the use of a corporate general partner could prove fatal. The client's assets outside the limited partnership would be subject to the creditor's judgment. This in-

cludes the shares of the corporate general partner owned by the client or the client's revocable living trust. Once the judgment creditor obtains title to the corporate stock, he or she has control of the general partner, and thereby control over the distributions from the partnership, dissolution or liquidation of the partnership and the admission of an assignee as a substitute limited partner.

Rather than using a corporate general partner, the sophisticated estate planning attorney should consider the use of multiple and/or layered limited partnerships to increase the client's protection from inside as well as outside creditors.⁵ Where an asset has significant exposure to inside creditors, such as with real estate and certain types of businesses, an FLLC offers greater overall protection than an FLP.

The Charging Order

Act Sec. 703 of the Uniform Limited Partnership Act of 2001⁶ (ULPA 2001) and Section 703 of the Revised Uniform Limited Partnership Act of 1976 (with 1985 amendments)⁷ (RULPA) provide that the sole remedy for a judgment creditor of a partner is a "charging order." (For a list of the partnership "charging order" statutes of each state, see Appendix A.) The charging order arose as the remedy of choice because it minimizes the disruption of partnership business and protects the non-debtor partners from having partnership property seized by the creditors of the debtor partner. The charging order also protects the creditors of the partnership itself.⁸

The comments to Act Sec. 703 of ULPA 2001 summarize the benefits of the charging order as follows:

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However, in advising clients, the prudent estate planning attorney should be careful not to convey the idea that these tools provide "bullet-proof" asset protection for the client.

of creditors when structuring a plan to provide asset protection. Inside creditors are those whose cause of action is derived from assets owned by, or a business conducted by, the FLP. For instance, a tenant of an apartment complex owned by the FLP would be an inside creditor if he or she was injured by a slip and fall that was caused by negligent maintenance of the apartment complex. Outside creditors are those whose cause of action is not related to the asset owned or business conducted by the FLP. For instance, if that same tenant were involved in a car accident with the estate planning client or

The remedy of a charging order “[b]alances the needs of a judgment creditor of a partner with the needs of the limited partnership and non-debtor partners ... [T]he judgment creditor of a partner [] is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the partner whose interest is subject to the order, the creditor has no say in the timing or amount of those distributions. The charging order does not entitle the creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited partnership.”⁹

The Waiting Game

There is no question that the charging order provides asset protection, especially where the general partner of the FLP is controlled by a family member sympathetic to the protection of the debtor-partner. If the partnership is so drafted, the general partner may elect not to distribute partnership profits—to postpone distributions and use profits internally for partnership purposes—thereby depriving the judgment creditor of any distributions with which to satisfy his or her judgment. However, this protection can be limited where the debtor-partner cannot forego distributions from the FLP for extended periods of time. Then it becomes a waiting game—can the partners¹⁰ forego distributions (and pay the income taxes on the phantom distributions) for a sufficient time to get the judgment creditor to compromise his or her claim, or

must distributions be made to satisfy the needs of one or more partners, in which case the charging order requires that the debtor-partner’s share of the distribution be used to satisfy the judgment creditor’s claim?¹¹

Erosion of Charging Order Protection

There is a growing trend by courts to allow for judicial foreclosure of a charging order. A judicial foreclosure is a process by which a judgment creditor with a charging order can sell his or her “assignee” interest, and thereby create a means by which the judgment creditor can at least partially satisfy his or her debt.

While a judicial foreclosure does not create any rights in the purchaser of the assignee interest to participate in the management of the limited partnership,¹² it does create significant problems from an asset protection standpoint:

- The judgment creditor may now be less likely to enter into serious negotiations with the debtor-partner if the judgment creditor realizes he or she may be able to receive a greater payoff by way of a judicial foreclosure sale.
- In the event the judicial foreclosure sale does not net sufficient proceeds to satisfy the judgment creditor, the debtor-partner still has to deal with the judgment creditor with regard to settlement of the balance of the judgment creditor’s claim.
- Although only an assignee of the debtor-partner, the purchaser of the foreclosed partnership interest is entitled to a *pro rata* share of all future distributions attributable to the debtor-partner’s share from the FLP—not just an amount to

satisfy the judgment against the debtor-partner.

- Finally, the other partners must now be forced to negotiate with the purchaser at the foreclosure sale in order to repurchase the foreclosed interest, or bid themselves to purchase the assignee interest at the foreclosure sale.¹³

As of the date of drafting this article, California, Connecticut, Georgia, Maryland, Missouri, New Hampshire, New Mexico, Pennsylvania and Texas were the states known to the author to allow for foreclosure of a charging order. Alaska, Arizona, Florida, Minnesota, Oklahoma and Virginia provide, either by statute or by case law, that the sole remedy against a partner of a limited partnership is that of a charging order.

For at least the last 10 years, the popular press, together with many attorneys, accountants and financial planners, have touted the FLP as *the* asset protection strategy for consumers of moderate wealth. This promotion has led to the misperception that the FLP provides absolute asset protection for the limited partners. When counseling the client as to the advisability of using an FLP for asset protection purposes, the prudent estate planning attorney should explain the aspects of the “waiting game,” as well as the potential advisability of providing that the FLP be governed by the laws of a state that statutorily prohibits foreclosure of a charging order.¹⁴ The prudent estate planning attorney should explain to the client that the law regarding charging orders is evolving, with a definite trend toward allowing judicial foreclosures of charging orders.¹⁵ Furthermore, more and more courts are looking askance at arrangements where the debtor

attempts to derive significant wages for himself and his family while at the same time thumbing his nose at his or her creditors.¹⁶

Family Limited Liability Companies

Because it has the same passthrough tax treatment and operational flexibility as an FLP, but without the problems associated with general partner liability, more and more estate planning attorneys have recommended the use of the FLLC (as opposed to the FLP) for estate planning and asset protection purposes.¹⁷

Like ULPA 2001 and RULPA, the Uniform Limited Liability Company Act¹⁸ (ULLCA) provides that the sole remedy for a judgment creditor of an LLC member is a charging order. Unlike the Uniform Partnership Acts, however, ULLCA specifically provides that “the court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time”¹⁹ (some states have not adopted this part of the Uniform Act, see the chart at Appendix A for a list of the LLC “charging order” statutes of each state). Thus, the LLC is subject to the same potential foreclosure problems as discussed above. As of the date of the drafting of this article, Alabama, Alaska, Arizona, Kansas, Minnesota, Nevada, New Jersey, North Dakota, Oklahoma and Tennessee all provide by statute that the sole remedy to a judgment creditor of an LLC member is a charging order. In contrast, Colorado, Hawaii, Illinois, Montana, South Carolina, South Dakota, Vermont and West Virginia all provide that a court may sell an LLC member’s interest at a judicial foreclosure sale.

Another reason for the gaining popularity of FLLCs is the ability in many states to have a single member LLC. Although a single member LLC is a disregarded entity for federal income tax purposes,²⁰ this tax fiction should not cause the entity to be disregarded for state property law or asset protection purposes.²¹ However, because the charging order remedy was established to effect a balance between the judgment creditor’s right to recover on the creditor’s claim and the rights of the LLC members not to have their business disrupted, perhaps the equation becomes unbalanced when the debtor member is the only business owner.²² This leads to perhaps the greatest disadvantage of using an LLC for asset protection and estate planning purposes—there are significant uncertainties on many important issues.²³

When counseling a client as to the advisability of using an FLLC for asset protection purposes, the prudent estate planning attorney should counsel the client about the problems associated with judicial foreclosures of LLC charging orders and the advisability of drafting the LLC to be governed by the laws of a state that statutorily prohibits foreclosure of a charging order. The prudent estate planning attorney should also explain to the client that there is a dearth of significant litigation history involving the creditor protection aspects of LLCs and the associated risks that go along with the lack of settled case law.

Domestic Asset Protection Trusts

Generally, self-settled spendthrift trusts are not recognized for purposes of protecting the assets of the settlor. However, a number of states now grant some degree

of asset protection to transfers of the settlor’s assets to a self-settled domestic asset protection trust (DAPT).²⁴ These states are Alaska,²⁵ Colorado,²⁶ Delaware,²⁷ Missouri,²⁸ Nevada²⁹ and Rhode Island.³⁰

Alaska

Under the Alaska statute, a settlor can create a DAPT that will protect the settlor’s assets from future creditors. To qualify as an Alaska DAPT, the trust must be irrevocable, distributions must be at the discretion of the trustee and the settlor may not be in default on child support payments. Furthermore, at least one of the trustees must be an Alaska resident,³¹ some of the trust assets must be situated in Alaska³² and the Alaska trustee’s duties must include both the maintenance of trust records as well as the preparation of trust income tax returns.³³ The settlor may retain a veto power over trust distributions and a testamentary special power of appointment.³⁴

With regard to a fraudulent conveyance claim, if the creditor is a pre-existing creditor of the settlor when the trust is created, the creditor must bring a claim within the later of four years after the transfer of assets to the Alaska DAPT is made or one year after the transfer to the trust could have reasonably been discovered by the creditor.³⁵ If the creditor becomes a creditor after the transfer of assets to the Alaska DAPT, the creditor has four years in which to bring a cause of action.

Colorado

C.R.S. §38-10-111 provides that “[a]ll deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, or real property, made in trust for the use of the per-

son making the same shall be void against the creditors existing of such person.” The court in *In re Baum*,³⁶ interpreted this statute to provide asset protection to the creator of a self-settled trust from creditors that did not exist at the time the trust was created, thereby depriving Baum’s bankruptcy trustee access to his trust’s assets.

Delaware

The Delaware statute provides that a “qualified disposition” is a transfer from the settlor (made after July 1, 1997) to a trustee that is a Delaware resident who maintains or arranges for custody of at least some of the trust assets in Delaware and prepares or arranges the preparation of the trust income tax returns or otherwise materially participates in the trust’s administration.³⁷ Similar to the Alaska and Nevada statutes, the settlor may retain the power to veto a distribution from the trust and a testamentary power of appointment.³⁸ An added bonus under the Delaware statute is the ability of the settlor to appoint advisors with the power to (1) remove and replace the trustees, (2) direct, consent to or disapprove distributions from the trust, and (3) management investment decisions.³⁹ Certain creditors are exempted from the protection afforded under a DAPT, including alimony, child support, a person who suffers death, personal injury or property damage before the qualified disposition that was caused by the settlor or another person for whom the settlor is liable.

With regard to a fraudulent conveyance claim, if the creditor is a pre-existing creditor of the settlor when the trust is created, the creditor must bring a claim within the later of four years after the transfer of assets to the Delaware DAPT is made or one year

after the transfer to the trust could have reasonably been discovered by the creditor.⁴⁰ If the creditor becomes a creditor after the transfer of assets to the Delaware DAPT, the creditor has four years in which to bring a cause of action.⁴¹

Missouri

Mo. Ann. Stat. §456.080(3) provides that:

[a] provision restraining the voluntary or involuntary transfer of beneficial interests in a trust will prevent the settlor’s creditors from satisfying claims from the trust assets except ... [t]o the extent of the settlor’s beneficial interest in the trust assets, if at the time the trust was established or amended: (a) The settlor was the sole beneficiary of either the income or principal of the trust or retained the power to revoke or amend the trust; or (b) The settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely by the provisions of the trust instrument.

Thus, it appears that under Missouri law, an irrevocable trust where the settlor was not the sole beneficiary and did not retain a right to receive a specific portion of the trust should provide asset protection for the settlor.⁴² Notwithstanding the legislation, at least two courts have refused to shelter the assets of a settlor who created a self-settled trust according to Missouri law⁴³—thereby giving pause to reliance on this statute for asset protection purposes in Missouri or elsewhere.

Nevada

Under the Nevada statute, a settlor can create a DAPT that will protect the settlor’s assets from future creditors. To qualify as an Nevada DAPT, the trust must be irrevocable, at least one of the trustees must be a Nevada resident, the settlor may only be a discretionary beneficiary of the trust, at least some of the trust assets must be situated in Nevada and the Nevada trustee’s duties must include both the maintenance of trust records as well as the preparation of trust income tax returns.⁴⁴ The settlor may also retain a veto power over trust distributions and a special testamentary power of appointment without forfeiting the asset protection provided by Nevada law.⁴⁵

With regard to a fraudulent conveyance claim, if the creditor is a pre-existing creditor of the settlor when the trust is created, the creditor must bring a claim within the later of two years after the transfer of assets to the Nevada DAPT is made or six months after the transfer to the trust could have reasonably been discovered by the creditor. If the creditor becomes a creditor after the transfer assets to the Nevada DAPT, the creditor has two years in which to bring a cause of action.⁴⁶ This makes Nevada’s fraudulent conveyance statute the most favorable of any state offering a DAPT.⁴⁷

Rhode Island

Like the Delaware statute, the Rhode Island legislation applies to “qualified dispositions” (made after June 30, 1999). A qualified disposition is a transfer to a trust that is irrevocable, incorporates the law of Rhode Island to govern the validity, construction and administration of the trust, contains spendthrift provisions⁴⁸ and pro-

vides for discretionary distributions to the settlor by one or more trustees that are neither related to nor subordinate to the settlor. As with the Nevada and Alaska legislation, the settlor may retain the power to veto trust distributions and a testamentary special power of appointment.⁴⁹

With regard to a fraudulent conveyance claim, if the creditor is a pre-existing creditor of the settlor when the trust is created, the creditor must bring a claim within the later of four years after the transfer of assets to the Delaware DAPT is made or one year after the transfer to the trust could have reasonably been discovered by the creditor.⁵⁰ If the creditor becomes a creditor after the transfer assets to the Delaware DAPT, the creditor has four years in which to bring a cause of action.⁵¹

Potential Challenges to Domestic Asset Protection Trusts

Notwithstanding the passage of the statutes outlined above, the prudent estate planner should be aware of and enlighten his or her clients of potential challenges to the validity of DAPTs.

Contracts Clause. DAPTs may be held to violate the “Contracts Clause”⁵² of the U.S. Constitution, which prohibits the enactment of any state law that substantially impairs the obligations of parties to existing contracts or makes them unreasonably difficult to enforce.⁵³ Any state’s legislation that precludes the enforcement of judgments against property that is subject to a contract and from which the debtor retains a benefit is arguably unconstitutional.⁵⁴ The Contracts Clause is violated because of the retroactive effect of the state statute upon contracts that existed on the date of the enactment of the statute.⁵⁵ The DAPT

settlor will argue that the contract creditor still has adequate remedies under the state’s fraudulent conveyance statute, while the contract creditor will argue that if the transfer does not constitute a fraudulent conveyance, the DAPT settlor removed assets that had previously been within the reach of the creditor.⁵⁶ Because this argument applies only to contract creditors who existed at the date of the enactment of the DAPT statute in question, this debate will become less and less relevant as time rolls on.⁵⁷

Full Faith and Credit Clause. The “Full Faith and Credit Clause” of the Constitution⁵⁸ requires that each state recognize and enforce a validly rendered judgment of a sister state.⁵⁹ Many commentators, however, believe that courts in DAPT jurisdictions will refuse to enforce the judgment of a sister state brought only against the settlor of a DAPT.⁶⁰ The question, then, is whether the courts would enforce the sister state judgment against the trustee of the DAPT or its assets. Some commentators point to *Hanson v. Deckla*⁶¹ and *Baker v. General Motors*⁶² for the answer.⁶³ In *Hanson*, a Pennsylvania settlor established a trust and named a Delaware trustee. He subsequently moved to Florida, where he died. His widow attempted to exercise a power of appointment over the trust, and the children objected. The children obtained an order in a Florida court voiding the exercise of the power of appointment and attempted to enforce their Florida order against the Delaware trustee. The Delaware trustee refused, arguing that the Florida court lacked jurisdiction over the trustee and the trust assets, and thus the Full Faith and Credit Clause was inapplicable. The U.S.

Supreme Court upheld the trustee’s refusal to enforce the order of the Florida court.⁶⁴

In *Baker*, the U.S. Supreme Court held that a Missouri court was not bound to enforce a Michigan judgment prohibiting testimony from a particular witness when the parties to the Missouri action had no connection to the Michigan court.⁶⁵ Both these cases were decided on jurisdictional issues, and it is uncertain whether they would afford much protection to trustees in DAPT states that are advertising their services on a nationwide basis.

Another case cited by proponents of the DAPT is *National Shawmut Bank v. Cumming*.⁶⁶ In *National Shawmut*, a husband created a trust in Massachusetts. Upon his death, the trust was to pay income to his wife, mother and siblings. Husband died while living in Vermont. Wife brought a suit against the trust in Massachusetts for enforcement of her statutory share under Vermont law. The Massachusetts Supreme Court held that the trust was valid and Massachusetts law should apply. In making its holding, the court considered the following factors: (1) the presence of the trust property in Massachusetts, (2) the execution of the trust in Massachusetts, (3) a Massachusetts trustee, and (4) the fact that the trust document expressly stated that Massachusetts law should govern its administration.⁶⁷ It is questionable how much comfort *National Shawmut* gives to a settlor of a DAPT. The case is really one of choice of law, and not the Full Faith and Credit Clause of the U.S. Constitution.

The application of the Full Faith and Credit Clause remains an issue that will likely have to be

settled by a future U.S. Supreme Court case.⁶⁸

Supremacy Clause. The “Supremacy Clause” of the Constitution⁶⁹ provides that federal law, such as the Bankruptcy Code, may override state law where the two are in conflict.⁷⁰ Should a creditor petition for the involuntary bankruptcy of a DAPT settlor, the question arises as to which state law will the bankruptcy court use in determining whether a spendthrift clause is enforceable.⁷¹ Many proponents of the DAPT argue that the bankruptcy court should follow the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS and hold that the applicable law of the trust would control.⁷² Unfortunately, in ruling on this issue as it applies to Foreign Asset Pro-

tection Trusts, several courts have held otherwise.⁷³

The pro-active debtor may wish, if confronted with a creditor petitioning for involuntary bankruptcy, to voluntarily file for bankruptcy in the state under which the DAPT is governed. By doing so, the bankruptcy court would be bound to use the spendthrift statute of that state and the conflicts of law dilemma is eliminated.⁷⁴

Conclusion

Family limited partnerships, family limited liability companies and domestic asset protection trusts are viable estate planning tools that every estate planning attorney should have in his or her arsenal. However, in advising clients, the prudent estate planning attorney should be

careful not to convey the idea that these tools provide “bullet-proof” asset protection for the client. The trend is for legislators and courts to allow for the foreclosures of charging orders against partnerships and limited liability companies, and the ability of domestic asset protection trusts to withstand a variety of constitutional challenges is uncertain. Notwithstanding these shortcomings, it is clear that some level of protection is available from the use of FLPs, LLCs and DAPTs, and that the mere presence of these asset protection vehicles and the uncertainties of litigation may lead many creditors to accept settlements they would not be otherwise disposed to accept. For those clients seeking the stronger asset protection, consideration should be given to the use of a foreign asset protection trust.

ENDNOTES

¹ The Census Bureau estimates that half of all marriages since 1970 will end in divorce. See Charlene Wear Simmons, Ph.D., *Readings on No-Fault Divorce* (Mar. 1998), at www.library.ca.gov/crb/98/04/.

² BARRY ENGEL, DAVID LOCKWOOD & MARC MERRIC, *ASSET PROTECTION PLANNING GUIDE: A STATE-OF-THE-ART APPROACH TO INTEGRATED ESTATE PLANNING*, at ¶135.01 (2000).

³ *State Judges Often Toss Out Large Monetary Jury Awards*, LUBBOCK AVALANCHE-J. (Nov. 27, 1997); Newt Gingrich, *Excessive Jury Awards Endanger Medical System*, USA TODAY, Aug. 13, 2002, at 15A; Catherine Ivy, *Jury Awards Soar—Tort Winnings Called “Unparalleled”* (Jan. 11, 2000), at <http://more.abcnews.go.com/sections/us/dailynews/verdicts000111.html>.

⁴ BLACK’S LAW DICTIONARY, at 928 (6th ed. 1990).

⁵ For greater discussion on the multiple partnership strategy, see *supra* note 2, at ¶885.

⁶ Act Sec. 703 of the Uniform Limited Partnership Act (2001).

⁷ Act Sec. 703 of the Revised Uniform Limited Partnership Act (amended 1985) (1976).

⁸ PETER SPERO, *ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS*, at ¶9.02 (2002); Gideon Rothschild, *Protecting the Estate from In-Laws and Other Predators*, 35 U. Miami Heckerling Inst. on Est. Plan., at ¶1700 (2001); *supra* note 2, at ¶1708.1. See also J. Gose, *The Charging Order Under the Uniform Partnership Act*, 28 WASH. L. REV. AND ST. B. J. 1 (1953).

⁹ *Supra* note 6, at comment to §703; see also, *supra* note 2, at ¶815; SPERO, *supra* note 8, at ¶9.02; Rothschild, *supra* note 8, at ¶1708.1–1708.2.

¹⁰ While it is possible to draft an FLP to provide for guaranteed payments, two-tiered distribution schemes, and non-*pro rata* distributions of profits among the partners, care should be used in doing so. In the recent Tax Court case of *T.R. Thompson Est.*, 84 TCM 374, Dec. 54,890(M), TC Memo. 2002-246, as well as *C.E. Reichardt Est.*, 114 TC 144, Dec. 53,774 (2000), and *D.M. Schauerhamer Est.*, 73 TCM 2855, Dec. 52,061(M), TC Memo. 1997-242, the IRS was successful in convincing the court to disregard limited partnerships under Code Sec. 2036 (and thereby increase the size of the decedent’s estate due to the loss of the discounting sought for estate planning purposes) where there were non-*pro rata* distributions from the partnership, and the decedent and/or other family members, by way of an “implied agreement,” exercised too much lifetime control over distributions from the partnership.

¹¹ *Supra* note 2, at ¶815.04.

¹² *Supra* note 6, at comment to §703.

¹³ *Supra* note 2, at ¶835.01; SPERO, *supra* note 8, at ¶9.02[1][b].

¹⁴ Of course, where the FLP is being established primarily for estate planning purposes, the provisions of Code Secs. 2703 and 2704 and the default dissolution statutes of the state under whose law the partnership is to be governed must also be taken into account.

¹⁵ *Supra* note 2, at ¶835.01–835.02

¹⁶ Alan Gassman, *Common Mistakes Estate Planners Make Regarding Asset Protection*, 29 EST. PLAN. J. 518 (Oct. 2002); *supra* note 2, at ¶835.06

¹⁷ Scott Friedman and James Sciarino, *Estate Planning Vehicle of Choice for the 1990’s: LLC or FLP?* 4 J. LIMITED LIABILITY COMPANIES 91 (Winter 1997); Charles Fox IV and Michael Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TRUST J. 296 (Summer 2002).

¹⁸ Act Sec. 504(a) of the Uniform Limited Liability Company Act (1996).

¹⁹ *Id.*, at §504(b).

²⁰ Reg. §§301.7701-3(a) and 33.7701-3(b)(1).

²¹ Rothschild, *supra* note 8, at ¶1709.2(A).

²² *Id.*

²³ *Id.*, at ¶1709.2(D).

²⁴ Provided the transfer to the trust is not a fraudulent conveyance.

²⁵ Alaska Stat. §34.40.110 (Michie 2001).

²⁶ Colo. Rev. Stat. §38-10-111 (2001).

²⁷ Del. Code Ann. tit. 12, §§3571–3576 (2001).

²⁸ Mo. Ann. Stat. §456.080 (West 2001).

²⁹ Nev. Rev. Stat. §166.040 (Michie 2002).

³⁰ R.I. Gen. Laws §18-9.2 (2001).

³¹ Alaska Stat. §13.36.390(1) (Michie 2001).

³² Alaska Stat. §13.36.035 (Michie 2001).

³³ Alaska Stat. §§13.36.035(c) and 13.36.390 (Michie 2001).

³⁴ Alaska Stat. §34.40.110(b)(2) (Michie 2001). Additional specifics about the provisions of Alaskan DAPTs can be found at ENGEL, *su-*

ENDNOTES

- pra* note 2, ¶ 1125.01; Rothschild, *supra* note 8, at ¶ 1704.1.A; and Fox, *supra* note 17, at 323–24.
- ³⁵ Alaska Stat. §34.40.110 (Michie 2001).
- ³⁶ *Connolly v. Baum*, CA-10, 22 F3d 1014, 1016–18 (1994).
- ³⁷ Del. Code Ann. tit. 12, §§3570, *et. seq.* (2001).
- ³⁸ Del. Code Ann. tit. 12, §3570(10)(b) (2001).
- ³⁹ Del. Code Ann. tit. 12, §3570(9)(c) (2001).
- ⁴⁰ Del. Code Ann. tit. 12, §3572(b) (2001).
- ⁴¹ Additional specifics about the provisions of Delaware DAPTs can be found at ENGEL, *supra* note 2, at ¶ 1125.02; Rothschild, *supra* note 8, at ¶ 1704.1.C; and Fox, *supra* note 17, at 324–25.
- ⁴² *Supra* note 2, at ¶ 1125.06; Rothschild, *supra* note 8, at ¶ 1704.1(D).
- ⁴³ *In re Markmueller*, CA-8, 51 F3d 775, 776 (1995); *In re R.L. Enfield*, 133 BR 515, 519 (Bankr WD Mo 1991).
- ⁴⁴ Nev. Rev. Stat. §166.015 (2002).
- ⁴⁵ Nev. Rev. Stat. §166.040(2)(a) (2002).
- ⁴⁶ Nev. Rev. Stat. §166.170 (2002).
- ⁴⁷ Additional specifics about the provisions of Nevada DAPTs can be found at ENGEL, *supra* note 2, at ¶ 1125.03; Rothschild, *supra* note 8, at ¶ 1704.1.E; and Fox, *supra* note 17, at 326–27.
- ⁴⁸ R.I. Gen. Laws §18-9.2-2(9) (2001).
- ⁴⁹ R.I. Gen. Laws §18-9.2-2(9)(b) (2001).
- ⁵⁰ R.I. Gen. Laws §18-9.2-4 (2001).
- ⁵¹ Additional specifics about the provisions of Rhode Island DAPTs can be found at ENGEL, *supra* note 2, at ¶ 1125.04; Rothschild, *supra* note 8, at ¶ 1704.1.F; and Fox, *supra* note 17, at 327–28.
- ⁵² U.S. Constitution, Art. I, §10.
- ⁵³ See also Leslie C. Giordani and Duncan E. Osborne, *Will the Alaska Trusts Work?* J. ASSET PROTECTION, Sept.–Oct. 1997, at 13; Duncan E. Osborne, Leslie C. Giordani and Arthur T. Catterall, *Asset Protection and Jurisdiction Selection*, 33 U. Miami Heckerling Inst. on Est. Plan., at ¶ 1404.5 (1999); Rothschild, *supra* note 8, at ¶ 1704.2.
- ⁵⁴ Rothschild, *supra* note 8, at ¶ 1704.2.
- ⁵⁵ Osborne, *Asset Protection and Jurisdiction Selection*, *supra* note 53, at ¶ 1404.5
- ⁵⁶ *Id.*; see also Karen Boxx, *Gray’s Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1240 (2000).
- ⁵⁷ *Id.*, at 1240, note 295.
- ⁵⁸ U.S. Constitution, Art. IV, §1.
- ⁵⁹ *Supra* note 2, at ¶ 1135.01; Rothschild, *supra* note 8, at ¶ 1704.2.
- ⁶⁰ Fox, *supra* note 17, at 326–27; David Shaftel, *Alaska’s Experience With Self-Settled Discretionary Spendthrift Trusts*, 29 EST. PLAN. 506 (Oct. 2002).
- ⁶¹ *Hanson v. Deckla*, SCt, 357 US 235, 78 SCt 1228 (1958).
- ⁶² *Baker v. General Motors*, SCt, 522 US 222, 118 SCt 657 (1998).
- ⁶³ Fox, *supra* note 17, at 349–50; *supra* note 2, at ¶ 1135.02–1135.04; Shaftel, *supra* note 61.
- ⁶⁴ *Supra* note 62, at 254–55.
- ⁶⁵ *Supra* note 62, at 241. See also Kaleen Hasegawa, *Re-evaluating the Limits of the Full Faith and Credit Clause after Baker v. General Motors Corporation*, 21 U. HAW. L. REV. 747 (1999).
- ⁶⁶ *National Shawmut Bank v. Cumming*, 91 NE2d 337 (Mass 1950).
- ⁶⁷ *Id.*
- ⁶⁸ Fox, *supra* note 17, at 349–50; *supra* note 2, at ¶ 1135.01–1135.04; Shaftel, *supra* note 61.
- ⁶⁹ U.S. Constitution, Art. VI, §2.
- ⁷⁰ *Supra* note 2, at ¶ 1135.05; Rothschild, *supra* note 8, at ¶ 1704.2.
- ⁷¹ 11 USCA §541(c)(2) (West 1993) provides that under federal bankruptcy law, a spendthrift clause is enforceable if it is “enforceable under applicable nonbankruptcy [i.e. state] law.”
- ⁷² AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF CONFLICTS OF LAW §273(b) (1971).
- ⁷³ *Boston Safe Deposit and Trust Co. v. Paris*, 447 NE2d 1268 (Mass App 1983); *In re Portnoy*, 201 BR 685 (Bankr SDNY 1996); and *In re Brown*, 4 Alaska BR 279 (1996).
- ⁷⁴ Shaftel, *supra* note 60. Further discussion of the Supremacy clause and conflicts of laws issues, see Boxx, *supra* note 56, at 1227–30; Fox, *supra* note 17, at 343–47; *supra* note 2, at ¶ 1135.05.

Appendix A

State	LP Charging Order Statute	LLC Charging Order Statute
Alabama	Ala. Code § 10-9B-703	Ala. Code § 10-12-35
Alaska	Alaska Stat. § 32.11.340	Alaska Stat. § 10.50.380
Arizona	A.R.S § 29-341	A.R.S § 29-655
Arkansas	Ark. Code Ann. § 4-43-703	Ark. Code Ann. § 4-32-705
California	Cal. Corp. Code § 15673	Cal. Corp. Code § 17302
Colorado	C.R.S. § 7-62-703 (1999)	C.R.S. § 7-80-703
Connecticut	Conn. Gen Stat. § 34-30	Conn. Gen Stat. § 34-171
Delaware	Del. Code Ann. Tit. 6, § 17-703	Del. Code Ann. Tit. 6, § 18-703
District of Columbia	D.C. Code Ann. § 41-475	D.C. Code Ann. § 29-1338
Florida	Fla. Stat. ch. 620.153	Fla. Stat. ch. 608.433
Georgia	Ga. Code Ann. § 14-9-703	Ga. Code Ann. § 14-11-504
Hawaii	Haw. Rev. Stat. § 425D-703	Haw. Rev. Stat. § 428-504
Idaho	Idaho Code § 53-241	Idaho Code § 53-637
Illinois	805 Ill. Comp. Stat. 210/703	805 Ill. Comp. Stat. 180/30-20
Indiana	Ind. Code § 23-16-8-3	Ind. Code § 23-18-6-7
Iowa	Iowa Code § 487.703	Iowa Code § 490A.904

State	LP Charging Order Statute	LLC Charging Order Statute
Kansas	Kan. Stat. Ann. § 56-1a403	Kan. Stat. Ann. § 17-76,113
Louisiana	None	La. Rev. Stat. Ann. § 12:1331
Maine	Me. Rev. Stat. Ann. Tit 31, § 473	Me. Rev. Stat. Ann. Tit 31, § 686
Maryland	Md. Code Ann., Corps & Ass'ns § 10-705	Md. Code Ann., Corps & Ass'ns § 4A-607
Massachusetts	Mass. Gen. Laws Ann. Ch. 109 § 41	Mass. Gen. Laws Ann. Ch. 156C § 40
Michigan	Mich. Stat. Ann. § 20.1703	Mich. Stat. Ann. § 21.198 (4507)
Mississippi	Miss. Code Ann. § 79-14-703	Miss. Code Ann. § 79-29-703
Missouri	R.S. Mo. § 359.421	R.S. Mo. § 347.119
Montana	Mont. Code Ann. § 35-12-1103	Mont. Code Ann. § 35-8-705
Nebraska	None	Neb. Rev. Stat. § 67-273
Nevada	N.R.S. § 88.535	N.R.S. § 86.401
New Hampshire	N.H. Rev. Stat. Ann. § 304-B:41	N.H. Rev. Stat. Ann. § 304-C:47
New Jersey	N.J. Stat. Ann. § 42:2A-48	N.J. Stat. Ann. § 42:2B-45
New Mexico	N.M. Stat. Ann. § 54-2-42	N.M. Stat. Ann. § 53-19-35
New York	N.Y. Partnership Law § 111	N.Y. L.L.C. Law § 607
North Carolina	N.C. Gen. Stat. § 59-703	N.C. Gen. Stat. § 57C-5-03
North Dakota	N.D. Cent. Code § 45-10.1-44	N.D. Cent. Code § 10-32-34
Ohio	Ohio Rev. Code Ann. § 782.41	Ohio Rev. Code Ann. § 1705.19
Oklahoma	Okla. Stat. tit. 54 § 342	Okla. Stat. tit. 18 § 2034
Oregon	Or. Rev. Stat. § 70.295	Or. Rev. Stat. § 63.259
Pennsylvania	None	Pa. Stat. Ann Tit. 15 § 8563
Rhode Island	R.I. Gen. Laws § 7-13-41	R.I. Gen. Laws § 7-16-37
South Carolina	S.C. Code Ann. § 33-42-1230	S.C. Code Ann. § 33-44-504
South Dakota	S.D. Codified Laws § 48-7-703	S.D. Codified Laws § 47-34A-504
Tennessee	Tenn. Code Ann. § 61-2-703	Tenn. Code Ann. § 48-218-105
Texas	Tex. Rev. Civ. Stat. Ann. Art. 6132a-1	Tex. Rev. Civ. Stat. Ann. Art. 1528n
Utah	Utah Code Ann. § 48-2a-703	Utah Code Ann. § 48-2b-131
Vermont	Vt. Stat. Ann. Tit. 11, § 3463	Vt. Stat. Ann. Tit. 11, § 3074
Virginia	Va. Code Ann. § 50-73.46	Va. Code Ann. § 13.1-1041
Washington	Wash. Rev. Code § 25.10.410	Wash. Rev. Code § 25.15.255
West Virginia	W.Va. Code § 47-9-41	W.Va. Code § 31B-5-504
Wisconsin	Wis. Stat. § 179.63	Wis. Stat. § 183.0705
Wyoming	Wyo. Stat. Ann. § 17-14-803	None

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