



Cayman Asset Protection Trusts

Asset protection is always a consideration when establishing trusts. Sometimes it is the main consideration and other times it is one consideration amongst many. The term means different things to different people: protecting assets on divorce, protecting assets from future creditors, or even protecting assets from mismanagement or from spendthrift family members. All of these interpretations relate to the same goal – how to legitimately preserve capital and to prevent it being claimed by others.

How can a Cayman Islands trust be used as part of an asset protection plan?

The Cayman Islands is a world-renowned private client and trust jurisdiction which has laws in place to balance the competing interests of creditors and debtors. These rules allow trusts to be used for asset protection in certain circumstances and make the Cayman Islands a strong choice for establishing an asset protection trust.

Many asset protection advisors advocate that protection structures should be both “structurally remote” and “jurisdictionally remote”. For a US based grantor a Cayman Islands irrevocable trust meets both of these requirements.

Fraudulent Dispositions Law

Cayman Islands law allows transfers into trust to be challenged on the basis that the transfer amounted to a “fraudulent disposition”. Under the Fraudulent Dispositions Law (1996 Revision) (FDL), every disposition of property (i) with an intent to defraud and (ii) at an undervalue is “voidable” at the instance of a creditor thereby prejudiced.

The FDL introduces a six year limitation period to fraudulent disposition claims. After six years passes, a disposition is protected from claims under the FDL regardless of the intention behind that disposition.

Transfers within the last 6 years are potentially vulnerable to attack but only if a person attacking the trust falls within the definition of a creditor to whom an “obligation” is owed. Obligation is defined to include an obligation or liability (including a contingent liability) which existed on or before the date of the disposition and of which the transferor had notice. A creditor who meets these requirements must then establish that the “intention” behind the disposition was to “willfully defeat an obligation owed to a creditor”. It many cases it is very difficult for someone to satisfy the Cayman Islands courts that all of these requirements are met and so have the transfer declared voidable.

Most asset protection trusts established in the Cayman Islands do not rely on the limitation period in the FDL. This is because they are established by grantors at the time when the grantor does not have any “creditors to whom an obligation is owed”. As a result any such disposition into trust can be protected immediately from attack under the FDL.

Firewall Provisions

The Trusts Law (2011 Revision) (Trusts Law) contains provisions, at Part VII (Firewall Provisions) which change, as a matter of Cayman Islands law, the conflict of law rules as they apply to Cayman Islands law governed trusts.

The Firewall Provisions apply to all lifetime trusts governed by Cayman Islands law: the Firewall Provisions make it clear that a declaration in a trust that Cayman Islands law is the proper law of the trust will be “valid, effective and conclusive”.

The Firewall Provisions go on to provide that “all questions in regard to a trust which is for the time being governed by the laws of the [Cayman] Islands or in regard to any disposition of property upon the trusts thereof...are to be determined according to the laws of the [Cayman] Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected”.

There are some exceptions to this important general rule, including that (i) the Firewall Provisions do not apply to testamentary trusts; and (ii) they do not validate any disposition of property which the grantor does not own at the time of the disposition.

The impact of the Firewall Provisions is that once assets are validly transferred into a Cayman Islands law governed trust, it is Cayman Islands law that will be used to determine most of the important questions later arising in respect of that trust. This has important implications for asset protection as it often renders unenforceable an order of a foreign court (i.e: non-Cayman) which purports to apply to the trust.

In essence the Firewall Provisions reduce the situations in which a law other than that of the Cayman Islands will be applied to determine an important consideration in respect of a Cayman Islands trust. This allows more certainty over how that trust will be treated if it is attacked.

Cayman Trusts and Berlinger v Casselberry

There is a growing body of legal opinion in Florida which believes that the District Court of Appeal, Second District, decision in *Berlinger v Casselberry* allows a creditor to attach to a beneficiary’s interest in a discretionary trust, where the creditor in question is that beneficiary’s former spouse. This appears to be the case notwithstanding provisions of the Florida Trust Code which appear to be at odds with that decision.

Whilst this uncertainty remains, a prudent grantor might look to establish a Cayman Islands Trust as the Firewall Provisions would then apply to ensure that Cayman Islands law was applied to determine all important questions in respect of the trust.

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- British Parliamentary system - elected democratic government overseen by UK-appointed governor
- Strong infrastructure with 40 of the world’s largest banks, major international law firms and the big four accounting firms are residents
- Cayman Islands Monetary Authority (CIMA) provides regulatory and legal oversight - no Cayman financial institution went bankrupt during the 2008 global financial crisis
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