



## *Asset Protection Trusts – How to Plan Correctly” “*

Asset protection has been more and more critical in the Estate Planning process. With the plethora of lawsuits, the volatility of business opportunities and other “creditors” in these tough economic times, asset protection is becoming more and more crucial.

Asset protection comes in a variety of forms. The ideal way of providing asset protection is within a Last Will and Testament or within a trust vehicle for the benefit of a third party (i.e. parents preparing for the benefit of children).

An alternative form of asset protection comes in the form of self settled asset protection trust which has become more and more popular since the advent of the ability to prepare asset protection vehicles in certain jurisdictions such as Nevada, Delaware and Alaska without the need to go offshore. (i.e. to a foreign jurisdiction such as the Cook Islands). This became extremely popular starting in the late 1990’s. There has been a recent decision, Battley v. Mortensen, Adv. D. Alaska, No. A09-90036-DMD, May 26, 2011 where a Bankruptcy Judge ruled that Bankruptcy Code Section 548(e) authorized and allowed a court to void a transfer of property to an Alaska Asset Protection Trust because the trust was created with the intent to hinder, delay and potentially defraud future creditors.

Alaska has a four (4) year statute of limitations for transfers made with fraudulent intent. In the case, Mr. Mortensen funded a trust and waited the four year period and thereafter filed bankruptcy. In Mortensen, the bankruptcy judge looked to 11 U.S.C. § 548(e) which provides that a transfer can be voided during a ten (10) year period if there was a transfer to a self settled trust during that period of time. The court found that Mr. Mortensen made the transfer with the actual intent to hinder, delay and defraud creditors.

What is quite interesting from the case is that Mr. Mortensen was not in a financial position to have created an Asset Protection Trust and I personally would not have represented Mr. Mortensen in such a transaction due to the fact that he had limited assets at the time that he wished to create the asset protection vehicle. Mr. Mortensen testified that “saddled with debt and increasing competition in my shrinking business market, I have not recovered from the financial carnage of the divorce.” Mr. Mortensen, at the time of the creation of the Asset Protection Trust had limited income and significant debt. This would not be the ideal candidate for an asset protection vehicle.

Furthermore, Mr. Mortensen did not even hire an attorney to draft the Asset Protection Trust; however he did hire an attorney to review the trust and make some changes. Additionally, what is interesting to note is that at the time that Mr. Mortensen filed for bankruptcy he was also past Alaska’s four (4) year statute of limitations related to Asset Protection Trusts so there was a chance that the trust would have even been protected if he had not filed for bankruptcy protection.

Asset Protection Trusts and planning for protecting one’s assets are becoming more and more important as one of the foundation blocks in estate planning. It is imperative that if one is attempting to create an Asset Protection Trust, they seek independent legal counsel who has a specialty in preparing Asset Protection Trust vehicles.

We at the law firm of Fein, Such, Kahn & Shepard, P.C. are well-equipped in this area of practice.

Fein, Such, Kahn & Shepard, PC is general practice law firm of more than 45+ attorneys serving clients in New Jersey and New York. For over 25 years the firm has offered innovative solutions to business and individuals in the areas of asset protection business planning, civil litigation, creditor representation in the areas of foreclosure, bankruptcy and collections, elder law, family law, personal injury, tax, and trusts and estates. For more information, go to [www.feinsuch.com](http://www.feinsuch.com).

If you have additional questions of how this might apply to your individual situation, please contact:

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