

Asset Protection Guide

Barry S. Engel, Engel & Reiman pc, Colorado, USA and John Goldsworth, editor TRUSTS & TRUSTEES

This is a conversation between Barry S Engel, author of a new expanded edition of *Asset Protection Planning Guide*, (the “Guide”) and John Goldsworth, editor of TRUSTS & TRUSTEES, in which some of the varying opinions of trust practitioners on the subject of asset protection trusts are explored. The result of this conversation is presented below in the form of an interview which looks at many of the matters surrounding this type of trust for international jurisdictions.

Question 1 - We welcome the new edition of your book on asset protection planning trusts. This suggests that the interest in asset protection trusts continues and the demand for a specialised publication continues.

Answer - And I welcome the pleasure of speaking with you here today, John, about the *Asset Protection Planning Guide*, thank you. This second edition of the Guide was published just this past October, so fortunately my publisher, Commerce Clearing House (or, CCH as it is more commonly known), sees the interest as continuing.

I see the interest continuing as well, yes. Just like people have a continuing interest in fire insurance in case the family home burns down, they have a continuing interest in asset protection in case someone points a flamethrower at their assets.

Question 2 - Asset protection trusts were frequently spoken of and referred to say, 10 years ago. Recently, however, they have caught less of the profession’s attention. Do you agree with this, are there any particular reasons?

Answer - I continue to speak and travel and write regularly on the subject, so my perspective on this is a bit different. I also see plenty of new articles and books, and read about a fair share of asset protection-related conference topics.

Asset protection planning may not be as controversial as it was in its earlier days, and it isn’t as much of a novelty as it was in its earlier days, so in this regard I would agree, it has caught less of the profession’s attention.

Question 3 - What new areas of law in the US and internationally have you particularly dealt with in the new edition? Do you regard these changes as indicating any particular trend in legal thinking about Asset Protection Trusts?

Answer - The new edition deals in more detail with domestic, US-based trusts for the asset protection element of the overall integrated estate plan. As you know from my conference papers and articles, and from the book itself, asset protection and traditional estate planning come together to form what I characterised many years ago as **Integrated Estate Planning**.

Today there are nine states in the US with some form of protective trust legislation and case law. This represents an exponential increase over what there was a decade ago. For this reason, the new edition of the Guide has a new chapter comparing domestic, US-based asset protection trusts with offshore asset protection trusts.

Also, there has been a lot of talk about litigation involving these trusts, and about related contempt of court issues. In spite of the fact that there have been very few published cases related to these areas since the first edition of the Guide was published over five years ago, I still had no shortage of words.

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Another new chapter in the second edition covers planning for the protection of a business interest or a professional practice. Then, areas of general update include the US Patriot Act, the new bankruptcy reform provisions that took effect in October of this past year, and limited liability trusts ... to name a few. This edition is extremely comprehensive and an excellent tool for the estate planning practitioner and others as well. Because it was written for the non-lawyer as well as for the lawyer, many purchasers of the book have been trust settlors or potential trust settlors.

In terms of indicating any particular trend in legal thinking about Asset Protection Trusts, I think the bankruptcy law changes I just mentioned are really pretty benign, just like the foreign trust tax law changes made in 1996. After about 20 years, there have been only two pieces of federal law that take direct aim, as it were, at asset protection trusts, and both of these have little to no impact on what we do in my office and how we do it. That speaks volumes, I feel.

Question 4 - You have, in the last few years, published in TRUSTS & TRUSTEES two articles dealing with the attitude of the US court to defensive moves by trustees which have led to allegations of contempt of court where these measures took place after proceedings against the trustees were commenced. [“Asset Protection Planning and Contempt of Court” by Barry S Engel and Eric D Sanderson, Volume 5, Issue 9, 1999 and the second article by the same authors in conjunction with Edward D Brown, Volume 6 Issue 2, 2000.] Have there been any further cases developing this idea any further or has the matter now settled down and can trustees now be confident that the rules are clearer?

Answer - There are no recent noteworthy cases. And in actual fact, I do not view this as an area that needs much clarification. The law on contempt and on the impossibility of performance defence is really pretty clear. As you know from my previous writings, I have never considered the **Anderson** case or any of the few other cases concerning foreign trust planning and contempt of court as breaking new ground in contempt law.

To me, it seems as if some detractors continually point to the same few reported cases involving a settlor being found in contempt of court, but my educated guess is these are a handful of cases out of literally tens of thousand or more plans. Interestingly enough, there hasn't been a contempt case of major import for several years. The **Anderson** case goes back to 1999 and it is the same with the **Lawrence** case. True, the **Eulich** case is more recent, but this case involved failure to produce documents that, by the way, amazingly appeared once the settlor was faced with contempt. If contempt is such a threat to the proper plan, where are all the cases? Why do detractors of Integrated Estate Planning keep going back to the same few cases from a number of years ago?

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In my new CCH book, which is actually a much expanded second edition, one of the new chapters is specifically on contempt issues. Another new chapter is on trust litigation issues. The Guide analyses the reported cases and the planning flaws in quite some detail.

Question 5 - The offshore world in the last three years has been very concerned with transparency, in particular the OECD measures relating to exchange of information and the ability of foreign tax authorities to learn the identity of beneficial owners of assets placed in offshore structures. Has this affected the attitude of US investors or their advisors?

Answer - If the planning is tax neutral to begin with, and if the planning is not based on secrecy or subterfuge, then the only material impact this has on proper planning is the increased due diligence with which one has to contend. The resulting “hassle factor” can be annoying, certainly, but this is something we all have to adjust to in other areas of life and business as well. Maybe we're getting used to it?

Question 6 - In the minds of misinformed politicians and prejudiced journalists, international trusts are considered to be purely tax avoidance devices. Do you see any similar attitude being taken in respect of international trusts where asset planning, or protection, are likely to be the motives rather than tax avoidance?

Answer - The emphasis here is on “misinformation” I would say, John. When the critic takes just a short amount of time to understand the basic concepts and underpinnings of asset protection planning, pre-conceived notions tend to dissipate. I am reminded of something somewhat comical from the earlier days of my work in this area. On more than one occasion a potential client would want to get a blessing from his local counsel, and I would then spend some time educating a guarded and critical attorney about the ins and outs of foreign trusts for asset protection. Many-a-time, when it was all over the attorney would want to know if I would give him a discount for his own planning if he would send me clients.

Question 7 - The offshore world is changing under competition between each other and due to the influence of super-national bodies (such as the OECD referred to above). Do you find that you now favour different jurisdictions than you preferred, say 10 years ago, and which ones do you now prefer and which ones are now left behind?

Answer - As you know, there no such thing as the “perfect” offshore jurisdiction. There is no one, single jurisdiction that will have or offer every possible planning tool. Because some jurisdictions are best for this and others are best for that, I believe in using a component approach in asset protection planning, taking the best of what each jurisdiction may have to offer.

For statutory foreign situs asset protection law, we highly favour the Cook Islands, not only for its statutory specific asset protection trust law, but also for the quality of the asset protection trustee services available.

When we are dealing with a US or domestic-based asset protection trust, I think Nevada has the best to offer, both in terms of statutory provisions and in terms of asset protection trustee services.

For offshore LLCs, we prefer the Isle of Man. For banking our choice is Switzerland and London is the place for funds management.

Essentially, our choices here were our also choices 10+ years ago. In fact, very few of our planning counterparts like offshore trustees or offshore funds managers have changed over about a 20-year period. Clients tend to find a great deal of comfort in this stability.

Question 8 - In the last year, several jurisdictions have introduced laws setting up private foundations in their jurisdictions and thus extending the range beyond Liechtenstein and Panama. Have you any opinion, as far as private foundations are concerned, for asset planning purposes?

Answer - I know it's only rhetorical when you ask if I have any opinion ... and here it is: as a planner it's nice to have yet another choice for planning, not only in terms of available planning vehicles but also in terms of jurisdictions contending for a place in the overall component approach. Who wins when jurisdictions compete? The planner and his clients win.

In terms of day-to-day usage in my practice, however, I really do not use the private foundation although this of course may change. The reason is that with what the trust itself offers and with what statutory-specific asset protection trust law offers, unless there is a compelling reason why go elsewhere?

Question 9 - You have always been considered as one of the world's leading experts in Asset Protection Trusts. Do you still consider that this is a specialised area of trust law, requiring the dedication of a specialist or has this type of trust been absorbed into general practice?

Answer - Thank you John ... coming from a man of your stature that is quite the compliment. Trust law is itself a specialised area of law, and asset protection planning through trusts is very much indeed a sub-specialty. While this type of planning has become widely accepted if not mainstream, that does not mean it can be done properly by the dabbler or the part-timer. And beyond one just learning trust provisions and applicable provisions of law in various onshore and offshore jurisdictions, this planning is more of an art than it is a science. It's one that requires a certain visceral ability that comes from the passage of time, dedication and experience. Remember, it's one thing to put a pile of papers together for a client to sign, and another to know what to do should the structure be challenged at a later date.

Question 10 - Your new edition, I am sure, will be well received. Perhaps you could summarise, for the readers, the particular areas which this new edition covers which we have not referred to so far.

Answer - Thus far, John, it has been very well received, I'm happy to say. The Guide was written in

such a way as to be understood easily (with an emphasis on understandability), recognising that many buyers will be lay people, and recognising that many lawyers are essentially lay people when it comes to this area of practice.

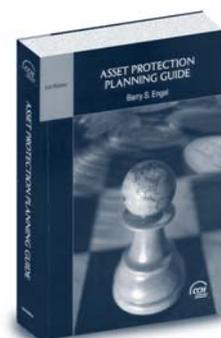
“It's one that requires a certain visceral ability that comes from the passage of time, dedication and experience.”

The second edition of the Guide, of course, contains updated information on topics covered by the first edition. Several full new chapters have been added as well. One is dedicated to trust litigation issues. Another covers planning for the protection of a business interest or a professional practice. There is also now a separate chapter on contempt of court issues, and a separate chapter that compares domestic trusts to foreign trusts for asset protection purposes. Areas of update include recently enacted domestic asset protection trust statutes, the Patriot Act, the new bankruptcy reform provisions, and limited liability trusts ... to name but a few.

John Goldsworth:

Thank you Barry.

TRUSTS & TRUSTEES,
Volume 12, Issue 4,
March 2006, reviewed
Asset Protection Planning
Guide, which Barry S
Engel and John
Goldsworth have
discussed in this
interview.



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