Domestic and International Asset Protection Planning

Elena Marty-Nelson
BOOK REVIEW

DOMESTIC AND INTERNATIONAL ASSET PROTECTION PLANNING

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ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS. By Duncan E. Osborne, Clark, Boardman & Callahan 1995

Duncan Osborne and his contributing authors have produced the finest comprehensive treatise on domestic and international asset protection planning available to date. This extensively researched and cogently written four volume treatise should find a place in the libraries of a wide range of professionals, including experts and novices in asset protection planning, estate planners, debtors' rights advocates and, for reasons discussed below, even creditors' rights advisors.

The publication of Asset Protection: Domestic and International Law and Tactics comes at a time when, as the authors acknowledge, a controversy "rages about asset protection [planning] as a strategy." On one hand, many experienced practitioners in the area regard complex asset protection strategies—with their nearly impenetrable protections for the assets of wealthy clients—as the perfect antidote to the unpredictability of a tort litigation system run amok. On the other hand, critics regard the current law as, at best, a way for clients to avoid their just debts and,

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1. The treatise was written, in part, by Duncan E. Osborne and Leslie C. Giordani, who also served as the editor and assistant editor, respectively, of the entire work. Both are partners in the law firm of Osborne, Lowe, Helman & Smith. The 37 contributing authors, as practitioners in the featured local jurisdictions and experts in the specific areas, bring invaluable insight and depth to the work.
3. Id.
at worst, a means to carry out what otherwise would be considered fraudulent transfers under a banner of legitimacy.\textsuperscript{4} Moreover, as I have previously observed,\textsuperscript{5} the near monopoly of the literature in the area by practitioners touting the offshore trust as a panacea for virtually all creditor-related ills has fueled the perception of an unjust system.\textsuperscript{6}

Mr. Osborne and his co-authors have risen above the fray, aspiring to the commendably neutral goal of “enlighten[ing] the reader about the state of the law and about what can and cannot be achieved within its boundaries.”\textsuperscript{7} Although many of the contributors to this work are also practitioners, with a potentially partisan perspective, they wisely eschew bias and polemics. The resulting product, the first truly exhaustive treatment of the subject, is not only valuable as an in-depth and balanced addition to the literature,\textsuperscript{8} but is a work with the potential to influence the development of this relatively uncharted area of the law.

The magnitude of this ambitious work is enormous; fortunately for the harried practitioner, the material is organized for maximum utility and includes an extensive index. Broadly speaking, the subject matter is organized into three categories. Part I deals, appropriately enough, with ethical issues faced by the client and his advisors, with special attention to the law of fraudulent transfers. Part II is devoted to domestic asset protection planning, ranging from the simplest structures, such as exemption planning, to the more complex arrangements such as limited liability companies. Part III, on offshore asset protection planning, contains some of the most insightful and intellectually rewarding analysis in the four volumes.

A more detailed analysis of the topical content provides insight into the breadth of material contained in this treatise. In an introductory essay to

\begin{itemize}
\item \textsuperscript{4} Id.
\item \textsuperscript{5} Elena Marty-Nelson, Offshore Asset Protection Trusts: Having Your Cake and Eating it Too, 47 Rutgers L. Rev. 11, 14 (1994).
\item \textsuperscript{7} 1 Osborne, supra note 2, § 1:07.
\item \textsuperscript{8} Although asset protection planning as such is not “new,” the concept of going beyond the traditional domestic strategies and incorporating international vehicles into the client’s plan is a development that has blossomed in the 1990s.
\end{itemize}
Chapter I, Mr. Osborne reports that asset protection “has burst onto the [legal] stage” and has become “[t]he buzz word in the 1990's among lawyers representing clients at risk.” Mr. Osborne explains that, in large part, the unrestrained growth in litigation and the corresponding increase in plaintiffs' judgments in recent years have fueled this phenomenon. Thus, the traditional base of super-rich clients concerned with wealth preservation has expanded to include clients whose professions or businesses leave them vulnerable to potentially devastating tort judgments. Asset protection planning is now imperative among professionals such as doctors, lawyers, and accountants as a way to shield assets from runaway malpractice claims. Similarly, the extension of corporate liability to officers and directors has compelled those clients to focus on asset protection planning.

Chapter 2, authored by Clifton B. Kruse, Jr., examines the law of fraudulent transfers. While modestly billed as encompassing only “the rights of creditors where debtors have gratuitously transferred assets into irrevocable trusts settled in foreign jurisdictions,” Chapter 2 goes much further. Both the analysis and the extensive references to statutory and caselaw make the chapter valuable for analyzing a myriad of gratuitous transfers, and are by no means limited to transfers into trusts, foreign or otherwise. By the same token, while the statutory focus is nominally the Uniform Fraudulent Transfer Act, the practical tips and case analyses provided will aptly serve practitioners in dealing with the fraudulent transfer laws of states that have adopted statutory or common law variations of the Statute of Elizabeth or the Uniform Fraudulent Conveyance Act. Finally, the busy practitioner should find very helpful Appendix 2B of the chapter which contains a clear reference chart highlighting the fraudulent transfer laws of each state.

9. 1 Osborne, supra note 2, § 1:01.
10. Id. §§ 1:01-02.
13. See Gideon Rothschild, Asset Preservation: Legal and Ethical Strategies, N.Y. L.J., Mar. 11, 1994, at 1 (noting that foreign situs trusts may provide “insurance” against unexpected lawsuits that threaten a lawyer's net worth, such as allegations of a partner's wrongdoing).
15. 1 Osborne, supra note 2, § 1:02.
16. Id. § 2:06.
17. Id.
A discussion of bankruptcy law in Chapter 3 follows the discussion of state fraudulent transfer laws in Chapter 2, because a gratuitous transfer also can be deemed fraudulent under bankruptcy law. Chapter 3 starts with an introduction to certain general bankruptcy law concepts and procedures. The author then turns to a more specific analysis of certain bankruptcy law concepts deemed of particular relevance to professionals whose clients are concerned with asset protection planning: what constitutes a preferential transfer or a fraudulent conveyance under Sections 547 and 548, respectively, of the Federal Bankruptcy Code.18

A relatively minor criticism of the bankruptcy coverage is that the experienced asset protection planner probably would have preferred omission of some of the more general discussion in favor of additional sections delving deeper into subjects particularly germane to asset preservation. For example, the chapter mentions that “[t]he Bankruptcy Code [under § 544(b)] also allows . . . trustee[s] in bankruptcy to assert certain rights under applicable nonbankruptcy law which are otherwise available (outside of a bankruptcy context) to an actual unsecured creditor” and includes that one such right would be a “state law fraudulent conveyance claim.”19 Readers might have expected a sharper focus on the interplay between state fraudulent transfer laws and the Federal Bankruptcy Code. Similarly, asset protection planners might have hoped for a more in-depth discussion on when gratuitous transfers into trusts or otherwise might prevent a bankrupt from obtaining a discharge.20 The otherwise elucidating discussion of pre-bankruptcy planning could benefit greatly from concrete examples of the critical distinction between legitimate bankruptcy planning and fraudulent activity.21 The author’s invocation of “various factors such as the amount of property converted, the timing of such conversion, the legitimacy of the conversion transactions, and the judge ruling upon the issue”22 leaves the reader yearning for models or caselaw that describe how those concepts might be resolved in practice.

Chapter 4 turns to an examination of the attorney’s role in asset protection planning, primarily focusing on “whether a lawyer’s conduct in creating an offshore protection trust or planning or implementing any wealth preservation technique . . . violates a rule of professional conduct under either federal or state law.”23 The author provides a useful check-

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18. Id. §§ 3:19-20.
19. Id. § 3:18.
20. Section 25:02 of Chapter 25 on creditors’ remedies, however, does contain a helpful discussion of objections to discharge.
21. 1 Osborne, supra note 2, § 3:24.
22. Id.
23. Id. § 4:03.
list of points to consider “prior to and during any engagement which involves counselling a client about the creation or management of any wealth preservation techniques.”24 A particularly helpful section discusses the need for proper due diligence. Here the author admonishes that “[i]t is imperative that an attorney accurately characterize and evaluate the client’s circumstances and motivation . . . [to conduct] an objective investigation of the client’s finances, business, family, and other relevant data.”25

This ethics chapter, however, toes a cautious line. For example, in a discussion of the difference between known and unknown creditors,26 the author describes the case of Hurlbert v. Shackleton.27 In that case, Dr. Shackleton, who had no present or known creditors, received notice that his medical malpractice insurance was about to be cancelled.28 He promptly began transferring assets that had been in his name alone to himself and his wife as tenants by the entireties or joint tenants with right of survivorship.29 The author notes that the court in that case found no fraud on the part of the doctor but adds that “[i]t is [this] author’s opinion that attorneys are held to higher standards and any appearance of impropriety must be avoided under California statutes.”30 The reader is left wondering if any courts or regulatory bodies have held attorneys to standards that would have found them liable for advising a client under facts similar to those in Hurlbert v. Shackleton.

Chapter 5 introduces Part II of the treatise, which covers domestic asset protection. The author explains that “[o]pportunities for domestic asset protection planning exist in every state, but the asset that is shielded

24. Id.
25. Id. § 4:10. This portion of the ethics chapter dovetails nicely with the discussion of how to investigate a client before implementing an offshore trust found in §§ 23:02-05 of Chapter 23.
26. 1 Osborne, supra note 2, § 4:09 n.8.
28. Id. at 1277.
29. Id. Several months after the transfers of assets, a patient sued Dr. Shackleton for malpractice and obtained a final judgment. Id. at 1278. In deciding whether that creditor could reach the debtor-doctor’s jointly owned property to satisfy the tort judgment, the trial court distinguished between “probable” and “possible” future creditors. Id. at 1279. Reasoning that the suspect conveyances took place before the debt arose, the trial court found the creditor was merely a “possible” future creditor. Id. This finding rendered the transfers valid, and the creditor lost the protection of the fraudulent transfer laws. Id. The appellate court, while not overruling the trial court outright, stressed that the validity of the transfers turned on Dr. Shackleton’s intent at the time of the transfers. Id. at 1279-80. Since the trial court had not addressed this issue, the appellate court remanded the case to determine whether “Dr. Shackleton harbored actual fraudulent intent at the time any of the asset transfers were made.” Id. at 1280.
30. 1 Osborne, supra note 2, § 4:09 n.8.
in one may be exposed in another.” The chapters constituting Part II gratifyingly address this most vital planning consideration by providing a complete state-by-state analysis of applicable laws.

The first segment of the domestic asset protection portion of the treatise is devoted to exemption planning. Chapters 6 through 9 address to what extent personal property, homestead, life insurance and annuities, and income, respectively, are exempt from the claims of creditors under the laws of the fifty states and the District of Columbia. With input from practitioners in more than twenty-three states, these four chapters contain a wealth of information. The analyses in these chapters facilitate comparative judgments, and the extensive statutory and case law references serve the practitioner focusing on a particular jurisdiction. Moreover, each chapter includes a discussion of the planning considerations related to each topic. As might be expected, homestead and insurance allow for the greatest planning potentials and the sections discussing strategies in those chapters are particularly helpful. In Chapter 9 the author candidly acknowledges that with regard to wages “[t]here is very little a person can do by way of asset protection planning in this area... [as] [p]eople generally have little control over the amount of their wages, and even less control over the loss of those wages.”

Notwithstanding these constraints, the author provides practical tips of possible applicability to particular clients, such as those contemplating self-employment. The chapter also provides helpful cross references to the disability insurance discussion contained in Chapter 8.

A comprehensive treatise of this nature would not have been complete without an analysis of the benefits of differing types of retirement plans, the asset that “[f]or an increasing number of people... represent[s] a significant portion, if not the greatest part... of their wealth.” This truism is well addressed in Chapter 10, which catalogs the protection afforded such plans from the claims of creditors in every state and the District of Columbia. As in previous chapters, practitioners throughout the country have researched their respective state’s treatment of retirement plans and encapsulated this information into brief synopses. While the quality of analysis varies by state, a practitioner in any jurisdiction would find this chapter to be a useful tool for initial research.

A warning that the preemptive effect of ERISA may render many state provisions ineffective qualifies the state law analysis of retirement benefits. Thus, the “protection of retirement plan benefits from the claims of

31. Id. § 5:05.
32. Id. § 9:02.
33. Id. § 10:01.
creditors involves an analysis of ERISA, federal bankruptcy law, and state law. Considering the significant potential consequences, a chapter including not only the substance of state law, but the effects of ERISA and federal bankruptcy law on protection that the laws of each state provide, while admittedly a prodigious undertaking, would be most beneficial. Instead, Chapter 10 examines state law and Chapter 11 discusses the protection afforded from ERISA and other federal statutes. Although each chapter provides a lucid analysis of its respective body of law, the treatise’s division of state and federal law into separate chapters diminishes the practicality of the information provided.

Chapters 12 and 13 jointly address the asset protection features of four different types of concurrent ownership of property: tenancy in common, joint tenancy, tenancy by the entirety, and community property. Chapter 12 provides an overview of tenancy in common and joint tenancy and chronicles the asset protection features of these forms of ownership in the state-by-state framework established in previous chapters. In this chapter, each state section sets forth the presumed method of co-ownership of property and the means by which other forms of co-ownership are created. Chapter 12 merits attention most, however, for its analysis of asset protection subtleties in the joint tenancy laws of the various states.

The logical counterpart to a chapter on jointly owned property discussing tenancy in common and joint tenancy is a chapter on joint ownership in the marital context. Thus, Chapter 13 entitled “Marital Property Considerations” discusses the remaining forms of concurrent ownership of property: tenancy by the entirety and community property. A chapter dedicated solely to these forms is welcome in a treatise on asset protection because, as the authors note, the “status as husband and wife provides opportunities not available to the unwed individual.” A chapter-opening hypothetical, showing what could happen to a married couple’s property without asset protection planning, illustrates the potentially devastating effects of poor asset protection planning. The problems raised by the hypothetical provide a convenient entry into the two systems of marital property and planning vehicles available to married persons. The remaining section in this chapter consists of a detailed state-by-state analysis of the law regarding tenancies by the entirety, community property, and marital agreements. This section also includes a plethora of statutes and cases that will serve practitioners well as a springboard for further research in the area.

34. Id.
35. Id. § 13:01.
Chapter 14 nominally covers "gifts, trusts, and disclaimers" but perhaps would have been better titled "traditional estate planning vehicles." The scope of the chapter is quite broad, encompassing an analysis of virtually all the basic strategies utilized in traditional estate planning such as marital deduction trusts, generation-skipping trusts, crummey trusts, life insurance trusts, charitable trusts, and grantor retained income trusts (GRITs), grantor retained annuity trusts (GRATs), and grantor retained unitrusts (GRUTs). These sections are exceptionally well written, provide a sophisticated tax analysis, and include substantial footnotes for further research. Moreover, this chapter analyzes the asset protection opportunities and pitfalls inherent in traditional estate planning methods. The interplay of creditor access analysis with traditional estate tax planning vehicles makes this chapter invaluable to the practitioner. This chapter also includes a state-by-state analysis of domestic trust law and the law of disclaimers.

The final segment on domestic asset protection strategies is found in Chapters 15 through 18, which analyze different types of business entities and the extent to which each provides asset protection. As the authors of Chapter 15 explain, "[e]ach form of business entity has unique characteristics which set it apart from the others and which result in distinct tax, operational, and liability consequences for its owner or owners." Thus, with a focus upon choice of entity for asset protection purposes, the first chapter of this group compares the characteristics of the general partnership, the limited partnership, the limited liability company, the S corporation, and the C corporation. After a brief general discussion of each type of entity, Chapter 15 also includes Appendix 15A, a wonderful chart that provides a clear comparison of factors that distinguish these five types of business entities, including such things as voting power of owners, liability of owners for obligations of the organization, effect of dissociation of owners, taxation of owners, and taxation of organization on receipt of property—to name but a few of the issues covered. Chapters 16, 17, and 18 provide in-depth discussion of limited partnership, corporations, and limited liability companies, respectively.

Chapter 19 introduces Part III of the treatise, which focuses on foreign asset protection strategies. The first segment of the foreign portion of the treatise, chapters 19 through 23, operates as a unit to address planning concepts before implementation of an offshore trust. These chapters provide a very sophisticated, yet vitally important, analysis of some of the most complex issues regarding utilization of foreign asset protection strategies. For example, Chapter 23 starts with a detailed methodology of the

36. 2 id. § 15:01.
necessary steps comprising a "due diligence" investigation of the client before implementation of any asset protection plan. The chapter then moves to a discussion of the differing structures available to serve the needs of particular clients. This segment includes an analysis of a myriad of structural variations, such as the single trust, multiple trusts, private trust company, and utilization of ancillary entities such as "drop down" or "sister" corporations. The inclusion of flow charts helps make even the most complex structures comprehensible.

One of the first questions a client interested in foreign asset protection planning asks his advisor is whether implementation of a foreign trust structure would adversely impact his overall tax liability. Chapter 24 provides a complete discussion of U.S. taxation of foreign trusts, grantors, and beneficiaries. This chapter includes the typical tax discussion explaining that offshore trusts are generally tax neutral (i.e., the trust is disregarded and the income is taxed to the grantor) because they fall under the "grantor trust" rules of Internal Revenue Code sections 671 through 679. Most notably, however, Chapter 24 also contains detailed tax analysis of the U.S. anti-abuse rules including the rules for controlled foreign corporations, foreign personal holding companies, foreign investment companies, and passive foreign investment companies. In addition, the discussion in Chapter 24 of the interaction of U.S. and foreign tax systems is of special note. Chapter 24A continues the discussion of the link between U.S. and foreign governments and addresses inter-governmental cooperation in information exchange and tax collection. Of course, the planned supplements to the treatise will be most beneficial in keeping the practitioner apprised of legislation that might vary the current tax rules.

Chapters 25 and 26 on creditors' remedies and criminal law, respectively, are included arguably for the advisor to creditors but should be mandatory reading for any asset protection practitioner. Paul Hausser and Deborah Chapnick, the authors of Chapter 25, set the tone of this segment by asserting that "APTs may not be as invulnerable . . . as some of their more enthusiastic proponents would suggest," and they enforce this assertion by laying out the various grounds for attacking asset protection trusts. The authors also include a sophisticated analysis of how a creditor may set out to prove fraud. The logical corollary to the creditors' remedies—a treatment of criminal law and contempt—begins with a client hypothetical that sets the stage for the issues analyzed in the chapter. The chapter contains a discussion of how and under what circumstances a

38. 2 Osborne, supra note 2, § 25:01.
debtor might be held under civil or criminal contempt. A sophisticated discussion of bankruptcy fraud completes the section.

Finally, the treatise turns at length to the issue of self-evident central importance to any foreign asset protection strategy: the selection of the most appropriate foreign jurisdiction. Chapter 27 sets out the factors that generally influence the selection of a jurisdiction, such as political stability, possibility of future taxation in the host jurisdiction, and qualified local professionals. Chapters 28 through 41 contain detailed sections on both nonlegal and legal issues of a staggering fourteen foreign jurisdictions. Local practitioners have written these chapters, each of which is devoted to a single jurisdiction, and thus contains local nuances and subtleties of great value.

Each chapter begins with a brief and often captivating discussion of the country’s history and political and economic stability. In general, because economic and political stability are subjective terms, the chapters that provide some form of statistical quantification of these terms are the most helpful to the advisor. Additional nonlegal sections on business environment, currency exchange, language, location and transportation assist the advisor in making conclusions about the appropriateness of a particular jurisdiction for his client.

As noted above, tax implications require careful evaluation, and indeed an earlier chapter (Chapter 24) contains a detailed discussion of U.S. tax effects on a U.S. settlor of a foreign trust. Of equal importance, of course, is the tax imposed by the country that is the site of the trust. Chapters 28 through 41 thoroughly address this critical tax issue with a detailed discussion of the local taxing system of each foreign jurisdiction. As might be expected, the jurisdictions vie with each other in offering either no or only nominal taxes on asset protection trusts.

Each foreign jurisdiction chapter also covers corollary legal issues of particular relevance to asset protection planning. The authors give proper recognition, for example, to the importance of local fraudulent transfer laws, the potential effect of local trust laws, and an analysis of whether and to what extent the local laws provide asset protection to trusts that are self-settled.

Finally, the practitioner will find very useful the appendices contained in Volume 4, which include several offshore trust clauses and forms, all relevant U.S. tax reporting and disclosure forms, and the complete text of various tax treatises and other international agreements.

39. The treatise actually addresses more than 14 jurisdictions because it also includes a discussion of various emerging jurisdictions. 2 id. §§ 27:12-21.
Three general reservations dampen this reviewer's enthusiasm only slightly. First, as with any undertaking of this magnitude, questions arise regarding inclusion and exclusion of material. The absence of a chapter on conflict of laws—especially in the context of U.S. settlors of offshore trusts—is notable in this regard. Although such issues are analyzed throughout the work, a separate chapter that brought the various considerations together in one place would serve the experienced practitioner as well as the novice in international asset protection planning. A section setting out possible challenges to the client's choice of law determination also would be helpful. For example, would a choice of law clause in a trust instrument stating that the trust is governed by the laws of the Cook Islands survive a challenge from a U.S. judgment creditor attempting to reach a trust settled by a U.S. debtor with no other ties to the Cook Islands? Alternatively (or better yet, in addition), the index should reference those portions of the treatise that analyze conflict of laws issues. Hopefully, future supplements will provide the opportunity to expand the index in this area.

Second, the diversity and sheer number of contributing authors provide for a certain unevenness in the quality and depth of analysis. Some chapters analyze their subject matter with particular sophistication and are appropriate for the most experienced asset protection practitioner. Others, although extensively footnoted and thus of redeeming value to the expert, analyze at a more elemental level that seems geared to the less experienced practitioner. Chapters 19 through 23, for example, work brilliantly to address initial planning concepts before implementation of an offshore trust. Those chapters, authored by Mr. Osborne and his principal assistant in this endeavor, Ms. Giordani, are among the most insightful chapters in the treatise, and make the book invaluable even to the experienced international asset protection professional. By contrast, the chapter on U.S. bankruptcy law has the look and feel of an overview and is geared towards the less experienced attorney. To be sure, this variety may be an intended effort to increase the treatise's appeal to a wide range of practitioners.

Third, as with any collaborative venture, the chapters do not mesh seamlessly. For example, Chapter 2 on fraudulent transfers, superbly written by Clifton B. Kruse, Jr., distinguishes among three types of creditors: present creditors, foreseeable probable creditors, and future creditors. Present creditors are those who have already extended or are in the process of extending credit. Future creditors are those who are expected to extend credit in the future. Foreseeable probable creditors are those who are likely to extend credit but are not yet known to the debtor. The chapter provides a helpful analysis of the applicability of foreign laws to fraudulent transfers. The appendix includes a very helpful form provision for governing law. In addition, Chapter 25 regarding creditors' remedies includes an excellent discussion of international comity for purposes of obtaining discovery of pertinent trust documents. 2 id. § 25:16.
The reader is informed that this categorization is critical for determining which planning strategies are available for a particular client. As the author explains, fraudulent conveyance laws do not protect future possible creditors, "whereas present creditors and subsequent probable creditors . . . are within the classes of creditors the statutes do protect." Unfortunately, Chapter 4, covering attorney liability and ethics, written skillfully by another author, introduces the terms "existing creditors" and "unknown contingent creditors." Although a careful reading of the chapters reveals that the same classification scheme is intended for both, the different terminology is confusing.

Notwithstanding these reservations, which given the scope of this work properly could be classified as quibbles, I highly recommend this treatise. The four volumes pull together a wealth of highly useable information in this emerging area of the law. *Asset Protection: Domestic and International Law and Tactics* is a significant achievement, a singular reference work, and a treatise that will warrant frequent consultation by professionals in the asset planning field.

41. *Id.* §§ 2:14, 2:15, 2:17.
42. *Id.* § 2:23.
43. *Id.* § 4:09.