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**Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #452**

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**From:** Steve Leimberg's Asset Protection Planning Newsletter

Alan S. Gassman, Martin M. Shenkman & Jonathan G. Blattmachr on

**Subject:** **In the Matter of CES 2007 Trust: Delaware Court Upholds Delaware Asset Protection Trust Owning Real Estate LLCs Managed by the Grantor/Beneficiary**

*“While a Delaware Court of Chancery Opinion has limited precedential value, the trail is being blazed here to follow the path that Jonathan Blattmachr and others started with Alaska in 1996 enacting the first state’s DAPT statute, so that the rest of us can follow in a responsible manner.”*

**Alan S. Gassman, Martin M. Shenkman, and Jonathan G. Blattmachr** provide members with commentary on *In the Matter of CES 2007 Trust*. Members who wish to learn more about this topic should consider Alan and Martin’s eBook “**Asset Protection Trust Handbook for Advisors**” and its companion webinar. To learn more, click this link: [Asset Protection Trust Planning](#)

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of Wealth Transfer Planning, a software system for lawyers, published by Interactive Legal LLC ([www.interactivelegal.com](http://www.interactivelegal.com)).

Here is their commentary:

### **EXECUTIVE SUMMARY:**

A Magistrate of the Delaware Court of Chancery, in reviewing a creditor’s motion to set aside a Delaware Asset Protection Trust and related LLCs, ruled that neither the Trust nor the LLCs (with the Trust owning 90% of each LLC), could be pierced or disregarded. This decision stands despite the Grantor being named manager of each LLC and serving as the Trust’s investment advisor. The Grantor’s brother was the Trust Protector with the power to replace the Delaware Trustee who had sole discretion as to whether to make distributions to the Grantor and other family members.

The Court did not address fraudulent conveyance concerns, which they may adjudicate in the future if the parties do not settle. The Court ruled only that the Trust met the statutory requirements to be considered an asset protection trust, and that the Petitioner failed to plead facts to overcome this showing (i.e., that trustees were unqualified, that Respondent was a *de facto* trustee, or that the spendthrift provision should be invalidated). The magistrate stated she “need not reach... the remaining merit-based arguments.”<sup>[i]</sup> The opinion also stated that, “It would be inappropriate for this Court, through this type of proceeding, to adjudge the real estate transactions at the LLC level under the guise of potential fraudulent transfer sufficient to void the Trust’s spendthrift provision.”<sup>[ii]</sup> Thereby leaving the fraudulent conveyance concerns to other proceedings.

Estate and financial planners who may have been “on the fence” should make their clients aware of the potential benefits of DAPTs. Practitioners should explain to the clients the advantages, disadvantages, risks, and other possible issues with respect to the use of this technique. While this case is a positive development to the use of DAPTs, it does not eliminate all issues or risks.

### **FACTS:**

In the May 2, 2025 Opinion issued by the Delaware Court of Chancery for *In The Matter of CES 2007 Trust*, Senior Magistrate Selena E. Molina granted a motion to dismiss filed in response to a petition brought by a creditor of the grantor of a Delaware Asset Protection Trust (DAPT).<sup>[iii]</sup>

The creditor sought to invalidate the trust’s spendthrift provision or void the trust entirely in an effort to collect on a nearly \$14,000,000 judgment stemming from a 2014 loan made to an entity affiliated to the grantor.<sup>[iv]</sup>

Following entry of the judgment, the Oakland County Circuit Court in Michigan issued an injunction prohibiting the grantor from transferring assets outside the ordinary course of business pending satisfaction of the judgment.<sup>[iv]</sup>

The grantor asserted that he had no personal assets to satisfy the judgment and that the assets held in the CES 2007 Trust were not subject to collection.<sup>[v]</sup>

The CES 2007 Trust was created in 2007, with U.S. Trust Company of Delaware, a large independent institutional trustee, serving as the initial Trustee.<sup>[vi]</sup> The grantor retained the role of “advisor” with “full power to manage the investments of the [T]rust . . . in a fiduciary capacity.”<sup>[viii]</sup> The Grantor’s brother served as the initial Trust Protector and had the power to remove the Trustee and appoint a successor Trustee.<sup>[ix]</sup>

The Trustee, U.S. Trust Company of Delaware, had the sole and absolute discretion to distribute net income and principal for the benefit of the beneficiaries.<sup>[x]</sup> The Grantor was not permitted to act as a Trustee.<sup>[xi]</sup>

The Magistrate Opinion indicates that the Trust was set up to benefit the Grantor’s wife, parents and issue thereof, if alive.<sup>[xii]</sup> To clarify, this is the parents of the Grantor and their issue, which includes the Grantor, so that the trust is a self-settled trust.

The Grantor was thus a beneficiary because he is one of the issue of his parents.

The Trust had a conventional spendthrift provision that indicated that no beneficiary could assign or pledge their interest in the Trust.<sup>[xiii]</sup>

The Grantor transferred to the Trust 90% ownership interests in three separate LLCs for which the Grantor was named manager.<sup>[xiv]</sup>

The LLCs own real estate managed by the Grantor as manager of the LLCs owned in part by the Trust.<sup>[xv]</sup>

The Magistrate noted that there was litigation pending with respect to these transfers between the parties in Pitkin County, Colorado.<sup>[xvi]</sup>

The Opinion mentions that the creditor has indicated that the Grantor has “improperly identified himself as the ‘100%’ owner of” one of the LLCs in at least three financial statements.<sup>[xvii]</sup>

At oral argument, the Trustee of the Trust confirmed that it did “not have knowledge about the underlying management of the LLCs,” and indicated, “policing management of the LLCs is beyond its fiduciary responsibilities as Trustee.”<sup>[xviii]</sup>

The Magistrate Opinion indicates that the creditor failed to plead a reasonably conceivable claim for avoidance of the protections afforded to the Trust, and its beneficiaries, as an “Asset Protection Trust,” and that the Trust “meets the statutory requirements for such protections, and the Petitioner has failed to plead facts that would overcome that showing. . . .”<sup>[xix]</sup> The requirements of Delaware law for an asset protection trust (i.e., a self-settled domestic asset protection trust or DAPT) are as follows:

[1] the transfer must be a “qualified disposition” – Delaware law defines a qualified disposition to be “a disposition by or from a transferor (or multiple transferors in the case of property in which each such transferor owns an undivided interest) to 1 or more trustees, at least 1 of which is a qualified trustee, with or without consideration, by means of a trust instrument.”<sup>[xx]</sup>

[2] the transfer must be to a “qualified trustee” – Delaware law defines a qualified trustee as a person who meets the requirements of the following paragraphs of (8)a and b of Delaware Code Title 12, § 3570(8):

a. In the case of a natural person, is a resident of this State other than the transferor or, in all other cases, is authorized by the law of this State to act as a trustee and whose activities are subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation, or the Comptroller of the Currency and

b. Maintains or arranges for custody in this State of some or all of the property that is the subject of the qualified disposition, maintains records for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of fiduciary income tax returns for the trust, or otherwise materially participates in the administration of the trust.<sup>[xxi]</sup>

[3] The trust agreement must invoke Delaware law;

[4] The trust must include a spendthrift provision;

[5] the trust must be irrevocable.<sup>[xxii]</sup>

The Magistrate held that the Grantor was not a “*de facto* Trustee,” and that the spendthrift provision would not be invalidated.<sup>[xxiii]</sup>

The Magistrate noted that it is very difficult to disregard a trust entity, and that there were “simply put, no transfers to/from the Trust which would give rise to such an inquiry, and [as to the LLCs], the Petitioner has plead no basis on which this Court should engage in a veil piercing.”<sup>[xxiv]</sup>

The creditor claimed that the Grantor’s retention and exercise of control over the real estate was sufficient to enable the Court to conclude that the Trust was a sham and could be invaded by the creditor.<sup>[xxv]</sup> The Court held otherwise.<sup>[xxvi]</sup>

The Magistrate did not rule on whether transfers to the Trust would be considered to be “fraudulent” and set aside, but noted that there are statutes of limitation that can apply with respect to the ability to do this, and that different rules apply before the funding of a qualified asset protection trust and after the funding of such a trust.<sup>[xxvii]</sup>

The Magistrate indicated that Delaware Courts would “not give effect to a spendthrift trust that has no economic reality and whose only function is to enable the Settlor to control and enjoy the [T]rust property without limitations or restraints,” but as discussed above that was not the case in this situation.<sup>[xxviii]</sup>

#### THE DELAWARE COURT SYSTEM:

This opinion is the equivalent of a trial court decision, but it can only be appealed to the Delaware Supreme Court, as there are no other appellate courts in Delaware. Many readers may be interested to know that Delaware structures its court system with specialized divisions. At the apex, the Supreme Court acts as the *sole appellate court* for the state.<sup>[xxix]</sup> The Court of Chancery occupies a unique position as Delaware's court of equity, specializing in corporate disputes, trusts, and real property cases.<sup>[xxx]</sup> As the Court of Chancery's chief judge, the Chancellor then appoints Magistrates in Chancery.<sup>[xxxi]</sup> These Magistrates in Chancery are judicial officers who preside over a full docket of cases consisting of traditional matters in equity, and have a role akin to a judge.<sup>[xxxii]</sup> Appeals from a Chancery Court decision from a magistrate may go directly to the Delaware Supreme Court or are reviewed by a Chancellor from the Court of Chancery.<sup>[xxxiii]</sup> However, magistrate decisions are typically persuasive rather than binding precedent, as Delaware's stare decisis principles prioritize opinions from the Supreme Court and Chancellors of the Court of Chancery.<sup>[xxxiv]</sup>

A search of Delaware Supreme Court cases, dealing with DAPTs specifically, did not turn up anything that would affect this decision. Apart from this Court of Chancery decision, the Delaware Supreme Court has addressed spendthrift provisions in the context of divorce but has yet to rule on DAPTs or qualified dispositions. The Court of Chancery is the leader on cases such as this one.

#### DISCUSSION AND ANALYSIS:

**Steve Oshins, Esq.**, evaluated this case in LISI Newsletter #445 describing this decision, and the implications thereof.<sup>[xxxv]</sup>

Oshins noted that “[i]t is not uncommon for a DAPT to own interests in the settlor’s LLC or LP.”<sup>[xxxvi]</sup> In fact, he states:

There is absolutely nothing wrong with the settlor serving as manager of an LLC or as general partner of an LP that is owned by a DAPT. The settlor of a DAPT can serve as investment trustee of the DAPT, so why would there be an issue with the settlor managing an LLC (or LP) that is owned partially by a DAPT?<sup>[xxxvii]</sup>

The real issue raised by a grantor’s participation, as a manager (general partner, officer, etc.), is whether the actions of the grantor in that capacity, and conduct of the entities’ business, were reasonable, at arm’s length, and handled in a business-like manner. If a grantor in that capacity takes an unreasonable salary, has perquisites paid out of the

business that an unrelated party would not receive, signs entity transactions in the grantor's name instead of the entity name and so forth, the structure in another case may not be respected and could in fact be pierced.<sup>[xxxviii]</sup> Thus, while this case presented a victory for the Grantor, similar success is not assured in other situations depending on the facts. Advisers must counsel clients to conduct all activities pertaining to the trust, and entities or other assets held by the trust, appropriately.

Oshins then outlines how both Delaware and Michigan (the assumed state of residency for the Respondent) have DAPT laws today. However, Michigan did not have enabling legislation when the trust in the instant case was created. The case, unfortunately for practitioners, did not address the Full Faith and Credit issue, so there is still no answer about whether a resident of a non-DAPT jurisdiction can successfully protect assets by creating a DAPT in a DAPT state.<sup>[xxxix]</sup> Only a few other DAPT cases have addressed instances where one state has DAPT laws and the other does not. In the present case, at the time of the Trust's enactment, Michigan had not enacted DAPT legislation as Delaware had.<sup>[xl]</sup>

Oshins indicated that the only other DAPT case that seems to have addressed the Full Faith and Credit issue is *Huber*, which applied the law of the state of residency of the settlor of the DAPT.<sup>[xli]</sup> Oshins and others all believe that *Huber* was decided incorrectly, as it should have been decided based on a fraudulent conveyance by the settlor.<sup>[xlii]</sup> He argued that the court incorrectly applied the Restatement (Second) Conflicts of Law §270 but should have applied §273, as “§270 is used to determine whether the trust is valid whereas §273 is used to determine whether the trust is protected from the beneficiary's creditors.”<sup>[xliii]</sup> Because that case involved bankruptcy and creditor access to DAPT protected assets, he argues that §273 should have been applied, with the end result being that the law chosen in the trust agreement, rather than the settlor's residency, would control.<sup>[xliv]</sup>

The facts in *Huber* were viewed as bad facts by most commentators. The Grantor was in default on loans on several properties and in a lawsuit with his business partner when he made the transfers.<sup>[xlv]</sup> Those transfers were clearly fraudulent conveyances, and the case should have been decided on that basis.

There are other cases that should be considered by planners who are involved with asset protection trusts, including *Portnoy*,<sup>[xlvi]</sup> where a bankruptcy judge found that an offshore asset protection trust should be ignored based upon extreme facts; *Campbell*,<sup>[xlvii]</sup> where a Tax Court Judge found that assets in an old and cold offshore trust would not be considered in an Offer in Compromise filed by the debtor; and the *FTC*<sup>[xlviii]</sup> and *Lawrence*<sup>[xlix]</sup> cases, where debtors who made asset protection moves when it was too late and were not honest with the courts ended up in jail on contempt charges.

It is noteworthy that the Petitioner's brief in opposition to respondent's motion to dismiss the amended complaint that was filed on June 21, 2024, provided whatever support that the creditor apparently had for the proposition that the Trust assets should be accessible to the creditors, due to the activities of the debtor.

Those who represent or administer irrevocable trusts should be mindful of the facts and positions taken by the plaintiff, which other courts could possibly find to be compelling. Some of the facts alleged in the Petitioner's brief would be very disconcerting to anyone defending this structure but also show that some deviation from good business practices may exist without assuredly causing a structure to be disregarded. Fortunately, for the settlor, this did not occur here, and the Magistrate got it right. On these issues, the analysis for practitioners is perhaps similar to that given after the *Schlapfer v. Commissioner* case. In *Schlapfer*, the Court found that the taxpayer had adequately disclosed gifts on a gift tax return so that the statute of limitations on the ability to challenge the gift expired.<sup>14</sup> The facts in the case were not optimal. So, while it was a helpful taxpayer victory, the advice many give is not to rely on *Schlapfer* at the planning stage and only use its analysis if there is an issue discovered after the fact. Similar advice could apply in structuring asset protection trust plans after the instant case. Practitioners should advise and guide clients to adhere to all formalities and avoid, in particular, each of the infractions the Grantor in the instant case committed. However, in the face of a challenge, the holding of this recent Delaware case certainly could be raised.

Here are some excerpts from the Petitioner's Brief:

B. The Trustee's Resignation and Lack of Oversight

From the outset, Schubiner [the Grantor] treated the Trust as a sham. For example, there is no evidence Schubiner ever involved the Trustee, USTD, in any decision-making. In fact, from 2012 through the beginning of 2017, Schubiner failed to respond to USTD's communications and requests for the appointment of a successor Trustee. See Petition, ¶ 23. In other words, **for at least 5 years**, Schubiner did not even communicate with the Trustee and also refused to pay the Trustee, resulting in USTD filing a Petition for Resignation before this Court in 2017, seeking an order allowing its resignation as Trustee. Pet., at Ex. D.

Analysis: These facts are unfavorable and should be avoided. Although the Respondent succeeded in this particular case, that outcome should not serve as justification for allowing the settlor, rather than the trustee, to effectively administer the trust.

Schubiner's behavior toward the Trustee of the Trust is consistent with his treatment of the trustee of his other trust, the CES S.D. Trust and his brother's Trust, the JDS S.D. Trust – i.e., they refused to communicate or pay the trustees, leading to petitions to resign and the appointment of new trustees.

Analysis: Practitioners should advise all clients with complex trust arrangements—including all domestic asset protection trusts (DAPTs), which should be treated as complex—to cooperate and permit the independent trustees of the trust to act as such, to hold annual meetings to review trust administration, and take other appropriate steps. This practice helps minimize the risk of problematic facts arising.

Specifically, around the same time that USTD was attempting to resign as Trustee of the Trust, the Trustee of JDS S.D. Trust was similarly attempting to resign as Trustee. That is, Bankers Trust Company of South Dakota (“BTSD”) wanted to resign “due to a delinquency in fees and unresponsiveness to communications regarding taxes.”

[. . .]

The circumstances leading up to the petition to resign reveal how Schubiner treated the trustees of his two trusts – the Trust and the CES S.D. He did not want or expect any involvement of the trustees. For example, on November 7, 2014, after three years of failing to pay the annual fees Schubiner told SDTC that “it is best that SD Trust withdraws and we appoint a low or no cost trustee.” Unless SDTC agreed to reduce its annual fee to a nominal amount, Schubiner requested SDTC’s “immediate withdrawal,” further explaining that, “[t]here is not expected to be any change in the assets **or any requests until my death and I’m 48, so this is just far too expensive to pay a big fee for likely many decades with no service required.**”

[. . .]

Analysis: This is precisely the wrong attitude for a settlor to take. Appointing an independent institutional trustee can strengthen any trust plan and reduce the risk that a claimant or the IRS will argue that an implied agreement exists between the settlor and the trustee. However, if the settlor disregards trust formalities and fails to respect the trustee’s role, they may not achieve the favorable outcome seen in this case.

### C. Petitioner’s Judgment and Schubiner’s Unfettered Use and Enjoyment of the Properties

On December 16, 2019, the Oakland County Circuit Court in Michigan entered a judgment in favor of Can IV Packard Square, LLC (“Petitioner”) against Schubiner for nearly \$14 million in connection with a loan Petitioner made to one of Schubiner’s companies in 2014 to finance the construction of a luxury retail and residential development project in Ann Arbor, Michigan (the “Judgment”). Pet., ¶45.

Immediately following the entry of the Judgment, Petitioner filed an Emergency Motion to Enjoin the Transfer of Property Pending Satisfaction of Judgment with the Michigan court. On January 16, 2020 the Michigan court granted the motion and “enjoin[ed] [Schubiner] from transferring assets outside of the normal course of business pending satisfaction of the final judgment [and further ordered that] any person or entity having knowledge of the Order shall be enjoined from accepting any interest in property from Defendant, individually or jointly . . .” (the “Property Transfer Injunction”). Pet., ¶46. After entry of the Property Transfer Injunction, Schubiner transferred assets from his individual name to 305 Associates LLC – in which, as stated above the Trust holds a 90% membership interest

(with the remaining 10% collectively held between the JDS S.D. Trust (2.5%) and the CES S.D. Trust (7.5%)). *Id.*

[. . .]

Analysis: When planning trusts for asset protection or estate tax reduction, practitioners and clients must rigorously observe all formalities. Avoid any transfers that an independent third party would not approve. If the trust plan involves related-party financing, ensure every aspect of the transaction is conducted at arm's length. For example, if a party provides a guarantee, determine whether the trust should pay a guarantee fee. If the trust makes a loan, carefully select an interest rate that reflects an arm's-length transaction, not merely the minimum rate required to avoid gift tax treatment. In short, always structure transactions as independent parties would since compliance with formalities and objective standards strengthens the integrity and enforceability of the trust plan.

## **II. THE PETITION SUFFICIENTLY STATES A CLAIM FOR AN ORDER VOIDING THE SPENDTHRIFT PROVISION IN THE CES 2007 TRUST, OR, ALTERNATIVELY, INVALIDATING THE CES 2007 TRUST ALTOGETHER.**

Faced with exposure to Mr. Schubiner's valid personal debts, Respondents improperly attempted to recast the allegations in the Petition – and then ask the Court to dismiss the Petition as they characterize it, rather than the one Petitioner actually filed. Respondents' lead argument relies exclusively on the protections that "qualified dispositions" enjoy under Delaware's Qualified Dispositions in Trust Act (the "Act"). Respondents' argument completely ignores Petitioner's clear, detailed allegations establishing that the Act is inapplicable due to the impermissible control that Mr. Schubiner has continually exerted over the Trust since its inception, specifically, by acting as *de facto* trustee. See Amended Pet. ¶¶80-103.

Analysis: Even though Schubiner prevailed in this case, it remains essential to observe all formalities. Practitioners should encourage clients to hold annual meetings to review trust and entity administration, as these steps help ensure compliance—provided clients are willing to participate. Because the formalities of complex estate or asset protection plans are rarely intuitive for non-specialists, clients who lack regular professional guidance are likely to make mistakes. Ultimately, as this case demonstrates, the critical issue is whether the number and severity of those missteps reach a point where the courts may disregard the planning structure altogether.

Relying upon this same flawed premise, Respondents then argue: (1) that Petitioner's claim is barred by a 4-year statute of limitations set forth in 12 Del. C. §3572(b)(2), see Opening Br. At 10, (2) that Petitioner is required to plead actual intent to defraud a creditor under Delaware's Fraudulent Transfer Act ("DUFTA"), see Opening Br. At 11, and (3) that Section 3570(11)(b) of the Act expressly permits Mr. Schubiner to maintain certain powers, including the power to use and receive trust asset or income while still maintaining the

trust's status as an asset protection trust. See Opening Br. At 14 – 16. Yet, given Mr. Schubiner's actions here, those protections under the Act offer him no safe haven.

As set forth below, and detailed further in the Petition, Petitioner has alleged the particulars of Mr. Schubiner's dominion and control over the Trust, his disregard for formalities, and, ultimately, his utter failure to recognize the existence of the Trust separate and apart from himself. These allegations are more than adequate at the pleading stage of this litigation to support Petitioner's claims that the CES 2007 Trust fails to qualify as a domestic asset protection trust under the Act and that, under common-law principles, the Court should invalidate the Trust's spendthrift provision, or, alternatively, invalidate the Trust altogether. Respondents' Motion to Dismiss must be denied.

A. Petitioner Has Adequately Pled that Mr. Schubiner Retained Impermissible Control Over the Assets in the CES 2007 Trust, Such that the Restrictions in the Qualified Dispositions in Trust Act (the "Act") are Inapplicable and Common Law Instead Applies.

Section 3571 of the Act states that a "qualified disposition" is subject to the limitations set forth in Section 3572, with certain exceptions. Section 3572 details when qualified dispositions are subject to avoidance, including a claim arising under DUFTA. However, for the Act to apply, the Trust has to fit within the definition of a "Trust instrument" contained in Section 3570(11) of the Act, and the fiduciary appointed must be a "Qualified trustee" as defined in Section 3570(8). Yet, among other things, given the fact that the purported "trustee" never did and never was intended to "materially participate in the administration of the Trust," the CES 2007 Trust does not qualify for protection under the Act.

[. . .]

Analysis: Regular meetings between the trustee and the officers or managers of entities owned by the trust, accompanied by the creation of appropriate documentation, can help demonstrate that the trust and entity formalities are being observed. Even if these documents are prepared intentionally to evidence compliance, they serve as valuable proof that the structure is respected. For instance, if the manager of an LLC and the trustee or owner (as member) both sign an amended and restated operating agreement for the LLC, this action affirms the independence and proper governance of both the trust and the entity.

Indeed, although Respondents note that Section 3570(11)(b) identifies multiple ways in which a transferor can maintain certain rights over a trust and use or receive its assets while still maintaining the trust's status as an asset protection trust, see Opening Br. at 16, *none* of those powers include the right to manage, control, and operate a business owned by the trust. A review of the permissible powers illustrates this point.

Specifically, Section 3570 provides that the **only** powers a transferor (i.e., Mr. Schubiner) may maintain with respect to property that is the subject of a qualified disposition are as follows:

1. The right to serve as an investment adviser of the trust, but *not* as a “qualified trustee” or other adviser specified under Section 3570(8)(c);  
The power to veto distributions from the trust;
2. The potential to receive income from (or a specified percentage not to exceed 5%, of) the trust, depending on the type of trust;
3. The potential to receive principal from the trust in the discretion of the trustee, or an adviser, or pursuant to an ascertainable standard which does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal;
4. The right to remove and replace trustees and an adviser (subject to the limitations of Section 672(c) of the Code);
5. The right to use real property held as part of a qualified personal residence trust;
6. The right to distribute the balance of the trust at the grantor’s death pursuant to a testamentary limited power of appointment;
7. The right to be reimbursed in the trustee’s discretion or at the direction of an adviser for the income tax liability of the grantor (if the trust is treated as a grantor trust under the Code); and,
8. The ability to designate a representative within the meaning of 12 Del. C. § 3339 (relating to designated representatives of trusts);  
See Del. C. § 3570.

Moreover, Section 3571 specifically prohibits a transferor from having any rights to property that is the subject of a qualified disposition in excess of those permitted by Section 3570. See 12 Del. C. § 3571. Section 3571 further states that any agreement or understanding to grant or permit the retention of any rights of authority greater than that which is permitted under Section 3570 “**shall be void.**” 12 Del. C. § 3571 (emphasis added).

Contrary to Respondent’s position, Petitioner has alleged facts with dates and other particulars, which, if proven, would show that Mr. Schubiner has retained impermissible control over the Trust and its assets in violation of Section 3571, above his purported role as “investment advisor.” Those allegations, and the reasonable inferences flowing from them, easily exceed the threshold established by Rule 12(b)(6) and demonstrate that:

[. . .]

3. Following the transfer of the LLCs into the CES 2007 Trust, Mr. Schubiner retained, and continues to exercise, full dominion and control over the operations and affairs of each of the LLCs, and, by extension, the assets that each LLC holds, in his capacity as manager. Amended Pet. ¶ 19.

Analysis: There appears to be no restriction on a settlor serving as manager of an LLC owned by a trust. Problems arise, however, if the settlor acts in a self-serving manner or

fails to maintain arm’s-length standards—for example, by taking an excessive salary or having the entity pay personal expenses. In light of the concerns raised in this case, practitioners should advise clients to have professional advisers review all related-party transactions within these structures to ensure compliance and reduce risk.

4. After the entry of the December 17, 2019 Judgment in favor of Petitioner, Mr. Schubiner used his authority as manager of 305 Associates LLC to transfer individually-owned real estate, including Birmingham and Linden properties, in and out of the entity and into his individual name, for virtually no consideration, and for the purpose of allowing him to use the equity in the properties to secure personal debt and to pay down his personal debts. Amended Pet. ¶¶ 47-48.

Analysis: Although the respondent prevailed in this case, that outcome does not excuse the presence of problematic facts, such as those above, which should be avoided. For instance, the trust could have pledged its entity interests to support Mr. Schubiner’s personal bank loan. If Mr. Schubiner had provided a written guarantee and paid a guarantee fee to the trust for his personal use of trust assets, those steps would have supported the legitimacy of the transaction. Instead, the settlor structured these transactions for personal benefit without observing the formalities that might have rendered them acceptable.

5. Over the years, Mr. Schubiner has established a pattern and practice of making similar realty transfers in and out of 305 Associates LLC, 306 Associates LLC, and other entities and into his individual name in an effort to hide assets from creditors, while still personally benefitting from use of them. Amended Pet. ¶¶ 55-68, 88.

[. . .]

In sum, although Mr. Schubiner is not the trustee under the *terms* of the CES 2007 Trust, and cannot be the “Qualified Trustee” under the clear terms of the Act for the Trust to constitute a qualified disposition trust, Petitioner’s well-pled, detailed facts illustrate that Mr. Schubiner’s relations to the trust res (i.e., the three LLCs), through his unfettered control as the manager of those assets, is such that he acts as the *de facto* trustee. Furthermore, Mr. Schubiner’s rights and authority as a manager relate directly to “the property that is the subject of a qualified distribution” – i.e., the LLC interests – and the Trust contains that property.

[. . .]

One of the central aspects of a trustee’s duty at common law is to keep the beneficiaries of the trust informed. *Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC*, 302 A.3d 430 (Del. Ch. 2023). “[E]ven in the absence of a request for information, a trustee must communicate essential facts” to beneficiaries. *Id.* (quoting *McNeil v. Bennett*, 798 A.2d 503, 510 (Del. 2002)). See also 12 Del C. § 3317. The trustee must ensure that beneficiaries

are “reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests. *NHB Advisors, Inc. V. Monroe Cap. LLC*, 2013 WL 6906234, at \*4 (Del. Ch. Dec. 27, 2013).

Here, USTD was not able to keep the beneficiaries informed because Mr. Schubiner and his brother James Schubiner (the Trust Protector and beneficiary of the Trust) **refused to communicate with USTD for a period of approximately five years, from 2012 to 2017.**

Analysis: Trustees must follow all requirements for proper trust administration, including providing beneficiaries with appropriate information. Under no circumstances should anyone intentionally prevent a trustee from accessing information necessary to fulfill essential trustee duties.

[. . .]

In [*Kulp v. Timmons*, 944 A.2d 1023, 1030 (Del. Ch. 2002)], the Court of Chancery granted a judgment creditor’s request to set aside a spendthrift trust to enable the creditor to execute against the trust property. Specifically, following the respondent and his wife’s creation of an irrevocable trust, and conveyance of all their significant assets to the trust, a judgment was entered against the respondent resulting from a workers’ compensation claim made by an injured employee, the petitioner. Respondent failed to pay the judgment, continued to use the trust-owned assets as his own, and conveyed his personal property to his granddaughter. Respondent asserted that as a result of the transfers of his property, he had no assets from which to satisfy the judgment. The Court held that the trust was void and its assets were accordingly subject to the claims of respondent’s creditors.

[. . .]

The principle against a settlor being able to effectively shield his or her assets from creditors while simultaneously enjoying use of the assets is a long-standing and well-settled one recognized nationwide. See *Ullman v. Cameron*, 196 N.Y. 339 (1906) (“[It is] contrary to public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and be able at the same time keep it from his creditors.”); See also *United States v. McBirney*, 261 F. App’x 741, 745 (5<sup>th</sup> Cir. 2008) (internal citations omitted):

Generally, a valid spendthrift trust, operating for the benefit of the beneficiary, could not be part of a scheme or artifice to defraud, because the beneficiary has no control over the assets, or his control is limited by an ascertainable standard. But when a beneficiary creates or controls a “spendthrift” trust for his own benefit, that trust is a sham, or invalid. A person may not retain control of his own assets, for his own benefit, under the guise of a spendthrift trust in order to keep creditors from reaching them.

Importantly, “If an entity, such as a partnership or corporation, controls a trust, the control over the trust is attributed to the debtor who owns or controls the entity, such as the majority shareholder of a corporation.” WGL ASSET ¶ 6.11 LOSS OF PROTECTION BECAUSE OF BENEFICIARY’S CONTROL, 2001 WL 1585160, 3.

Analysis: Even if the settlor wants to serve as manager of an LLC owned by a self-settled trust, it is often prudent to consider naming an alternative manager if possible. However, sometimes third-party lenders require the settlor to serve in that role as a condition of approving the transaction. In such cases, it may be worth obtaining a letter from the lender or other third party to document this requirement, which may help justify the arrangement and provide valuable support for the trust’s administration.

[. . .]

*d. The Aspen Property*

Mr. Schubiner, as manager of 306 Associates, LLC, disbursed income generated from the rental of the Aspen property to himself or to other entities which directly benefited him financially. Amended Pet. ¶ 76. The CES 2007 Trust owns 90% of the membership interest of 306 Associates, LLC. The remaining 10% of the membership interest in 306 LLC is owned by CES S.D. Trust and JDS S.D. Trust. Amended Pet. ¶¶ 17, 20.

[. . .]

Since Mr. Schubiner is not a member of 306 Associates LLC, he should not have received a distribution from 306 Associates LLC, as is alleged. If Mr. Schubiner received a distribution as a result of being a beneficiary of the JDS S.D. Trust, which owns 2.5% membership interest in 306 Associates LLC, then the CES 2007 Trust should have received 90% of the total distribution, the CES S.D. Trust should have received 7.5% of the total distribution and the JDS S.D. Trust should have received 2.5% of the total distribution. 6 Del. C. § 18-504.

Analysis: The above is correct and part of the formalities that clients of complex trust structures too often ignore. If funds are needed, clients should consider options such as a properly documented and administered loan, a formal guarantee, or a legitimate pro-rata distribution from entities to its owners (e.g., a trust member) and from the trust to permissible beneficiaries in accordance with the terms of the trust. Following these procedures helps ensure compliance and preserves the integrity of the trust structure.

class=WordSection6>

*Brief for Petitioner in Opp’n to Resp’t’s Mot. to Dismiss Am. Pet. at 6-10, 16-28, 30-31, In The Matter of The CES 2007 Trust, No. 2023-0925-SEM (Del. Ch. June 21, 2024).*

THE MICHIGAN IMPACT:

In this case, the debtor appears to have resided in Michigan, or at least that is our best guess.

One question is whether the creditor considered filing an action in Michigan to obtain a ruling that the Trust should have been set aside under the Michigan law of self-settled trusts, because the underlying activities of the LLCs are in Michigan, the debtor, and the creditor were all in Michigan.<sup>[li]</sup>

If a Michigan court had entered an order to that effect, then the plaintiff could have claimed that the Delaware court would have had to follow the order of the Michigan court under the Full Faith and Credit Clause of the United States Constitution.<sup>[lii]</sup> For instance, the Delaware Court of Chancery, in *Branson v. Branson*, upheld the Full Faith and Credit Clause principle that a state court must give a *final judgment* rendered by another state the same effect as it would be given in the state of origin.<sup>[liii]</sup> While final judgments by one state with proper jurisdiction must be given effect in other states, the enforcement practices of the state in which the collection is sought govern the collection.<sup>[liiv]</sup> In *Baker v. GMC*, the Supreme Court noted that the Full Faith and Credit Clause “does not mean that States must adopt the practices of other States regarding the ... mechanisms for enforcing judgments.”<sup>[liv]</sup> Therefore, if a Michigan court had entered a final judgment against the Trust, the Delaware courts would be obligated to enforce that judgment according to Delaware collections procedures.

However, when it comes to *conflicts of laws* between asset protection provisions for trusts in Delaware, the application of the Full Faith and Credit Clause can be complex and context dependent. The Full Faith and Credit Clause does not necessarily compel one state to enforce another state's laws if doing so would violate its own public policy.<sup>[lvi]</sup> In the U.S. Supreme Court case *Nevada v. Hall*, the Court allowed California to sustain a \$1.15 million dollar judgment against the State of Nevada when a Nevada-owned vehicle collided with a California residents' vehicle on a California roadway, despite Nevada's statutory \$25,000 limit on awards for tort liability.<sup>[lvii]</sup> Nevada argued that the Full Faith and Credit Clause required California to abide by the limitations on Nevada's statutory waiver of immunity from suit and \$25,000 award restrictions.<sup>[lviii]</sup> The Court disagreed, reasoning that California's public policy and compensation scheme – which provided for the bodily safety and economic protection of employees injured within the state – conflicted with Nevada's statute, and the Full Faith and Credit Clause did not require California to apply Nevada's law in violation of its own legitimate public policy.<sup>[lix]</sup> As to the instant case, because Delaware law provides robust asset protection for trusts, Delaware courts might resist enforcing out of state laws that undermine Delaware's strong trust statutes.

Perhaps the creditor would have been more likely to pursue a ruling in Michigan if Michigan had not adopted an asset protection Trust statute that went into effect in 2017, which was approximately 1 year before the initial action was filed, but 10 years after the Trust was formed.<sup>[lx]</sup> Meaning while Michigan had DAPT legislation when the action was brought, it did

not have DAPT legislation when the Trust was created. According to Michigan’s DAPT statute that went into effect in 2017, the protections afforded by the statute apply to qualified dispositions made before the effective date if they “would otherwise meet the requirements of a qualified disposition,” which might have extended statutory protections to the Trust in this case if the Act’s requirements were met.<sup>[ixi]</sup> However, this case does not tell us what might happen if this type of challenge is brought or whether the Full Faith and Credit Clause might apply.

Debtors residing in states that do not have asset protection trust legislation should not rely upon this case without understanding the risk that the Full Faith and Credit Clause may apply. In particular, those residing in states that have adopted the Uniform Voidable Transactions Act (UVTA) – along with the footnote suggested under the Uniform Act which indicates that it is the public policy of the state to not recognize asset protection Trusts from other jurisdictions – should be aware that asset transfers into DAPTs may be voided subject to the laws of their state of residence. Specifically, Uniform Voidable Transactions Act section 4 (Unif. Law Comm’n 2014) provides that transfers of assets into self-settled DAPTs are voidable if the settlor’s home state has public policy against DAPTs or does not have a DAPT statute. Comment 8 states that: “if Debtor’s principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then . . . [u]nder § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y”).

One author has noted that the Full Faith and Credit Clause would not have been an issue if the Trust had moved to an offshore jurisdiction that does not recognize US judgments well before liability was incurred.<sup>[ixii]</sup> But caution must be exercised when offshore planning is used, given the possibility that the Settlor of an offshore trust may be jailed for contempt under some circumstances.

#### **COMMENT:**

This case is a winner for the asset protection trust industry. This case is certainly an indication that Delaware may respect asset protection trusts. Since Delaware is often a leader in trust law, and other state Courts often look to Delaware for guidance, other courts may respect the legislative decision to allow individuals to fund trusts for their personal benefit without exposure to creditors. However, the opinion makes clear that each element of the statute must be met to succeed.

This case also provides some support for the proposition that Trust Companies and individual Trustees under a directed trust or other conventional arrangements do not need to be involved with actively monitoring trust held entities, such as where the grantors of trusts or others control and operate these entities, subject to fiduciary standards and in a business-like and arm’s length manner.

All the above being said, caution and prudence remain important.

A few other take-home lessons from the case:

1. Use a professional or institutional trustee to assure administration of the Trust in accordance with the applicable state DAPT statute.
2. Although a Delaware self-settled trust asset protection may be successful, other case law suggests that caution should be exercised in both the structure and administration of such a trust. For example, giving the settlor too much control over the benefits to be provided by the trust, or the settlor's actual overreach in the trust's administration, even if not set forth in the trust instrument, may expose trust assets to the claims of creditors of the settlor.<sup>[lxiii]</sup> This suggests it is not appropriate to push the structure and administration of such a trust to permit the settlor great control over benefits or, even if not set forth in the instrument, actual exercise may make the trust subject to the claims of creditors of the settlor. This might occur for trusts created in other well-known jurisdictions such as Alaska, South Dakota and Nevada.
3. Consider the cautions reminiscent of the *SEC v. Wylly* case; this was not a tax case, but it supports the notion that courts may find someone to be a *de facto* trustee if their control over the trust is excessive, causing loss of asset protection and possible characterization as a grantor trust.<sup>[lxiv]</sup>
4. Monitor how the Settlor or a person subordinate to the Settlor fulfills any duties under the Trust agreement or underlying entities. The issue of control was raised in the case, but insufficient proof was provided to sway the case in favor of the claimant.<sup>[lxv]</sup> That will not be the situation in other cases.
5. The case discussed unusual transactions between the Settlor and the entities owned by the Trust, but these occurred long before the case was filed.<sup>[lxvi]</sup> Avoid such transactions if possible at any time.
6. Important to the Settlor's success in the case was that the Trust was created long before not only the claim, but long before the transaction that gave rise to the claim.<sup>[lxvii]</sup> This is an ongoing challenge practitioners face routinely. Clients that do not feel any particular need or urgency to undertake asset protection planning defer pursuing such planning. This case makes clear the benefits of having the planning done long before it is needed. Clients should take heed and plan now, not later.

It is important to note that while unfavorable to DAPTs, the *Huber* case, which was decided in a U.S. Bankruptcy Court,<sup>[lxviii]</sup> has more precedential value than this Delaware Chancery Court's decision. The federal bankruptcy court is operating within its core jurisdiction and interpreting a federal statute, while the Chancery Court is a trial court of equity operating under state law.<sup>[lxix]</sup> While Chancery Courts can decide issues of state law, their rulings do

not carry precedential weight in the federal system.<sup>[ix]</sup> While the Delaware Court of Chancery Opinion has limited precedential value, this case does provide an important, even if unquantifiable, victory for the industry.

## HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan S. Gassman  
Martin Shenkman  
Jonathan Blattmachr

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### CITATIONS:

<sup>[i]</sup> *In the Matter of the CES 2007 Trust*, C.A. No. 2023-0925-SEM (Del. Ch. 2025).

<sup>[ii]</sup> *Id.* at 18.

<sup>[iii]</sup> See generally *Id.*; For background information on the grantor and history of this case: See also Jeanette Smith, *40 under 40: 2000 – Craig Schubiner*, CRAIN’S DETROIT BUS., <https://www.crainsdetroit.com/awards/craig-schubiner> (last visited June 24, 2025) (profile of Craig Schubiner, founder of The Harbor Cos., describing his \$220 million property portfolio and above-average returns to investors).

See also Order Granting Mot. to Extend Time, *Schubiner v. Can IV Packard Square LLC*, No. 371134, LC No. 2023-200199-CB (Mich. Ct. App. 2024), <https://law.justia.com/cases/michigan/court-of-appeals-order/2024/371134.html> (last visited June 24, 2025) (granting appellant Craig Schubiner’s motion to extend time to file appellant’s brief).

<sup>[iv]</sup> *CES 2007 Trust*, supra note 1, at 3.

<sup>[v]</sup> *Id.*

<sup>[vi]</sup> *Id.* at 3-4.

[vii] *Id.* at 4-5.

[viii] *Id.* at 5; oftentimes this position is referred to as an “investment advisor” and in some instances this relationship may be structured as an “investment trustee.”

[ix] *Id.*

[x] *Id.*

[xi] *Id.*

[xii] *Id.*

[xiii] *Id.* at 6.

[xiv] *Id.* at 6-7.

[xv] *Id.* at 7.

[xvi] *Id.* at 11-12.

[xvii] *Id.* at n. 20.

[xviii] *Id.* at n. 69.

[xix] *Id.* at 15.

[xx] 12 Del. C. § 3570(7) (2024).

[xxi] *Id.* at § 3570(8)(a)-(b).

[xxii] *Id.* at § 3570(11)(a)-(c).

[xxiii] *CES 2007 Trust*, supra note 1, at 15.

[xxiv] *Id.* at 18, n. 66.

[xxv] *Id.* at 17.

[xxvi] *Id.* at 15.

[xxvii] *Id.* at 15, 17-18.

[xxviii] *Id.* at 25.

[xxix] Delaware Courts, Overview of the Delaware Court System, <https://courts.delaware.gov/overview.aspx> (last visited June 10, 2025).

[xxx] *Id.*

[xxxi] Delaware Court of Chancery, Magistrates in Chancery, <https://courts.delaware.gov/chancery/magistrates.aspx> (last visited June 10, 2025).

[xxxii] *Id.*

[xxxiii] Overview of the Delaware Court System, supra note 29; Del. Ch. Ct. R. 144. While magistrates issue opinions, parties may request review by a Chancellor or VC through an exceptions process under Court of Chancery Rule 144. If a review is requested, the decision becomes binding when adopted by a Chancellor or VC. If parties waive Rule 144, Magistrates' final decisions carry the same precedential weight as trial court rulings. Parties to the litigation waive the ability to seek further review at the trial level but reserve the right to appeal the decision directly to the Supreme Court.

[xxxiv] *DiGiacobbe*, 743 A.2d 180 at 181. The Delaware Supreme Court cited a magistrate's analysis as persuasive but non-binding authority, noting that the “master [the previous title for magistrate] is not a judge [referring to Chancellors], however, so the master's rulings and report are not final until they have been reviewed and adopted by a judge.”

[xxxv] Steve Oshins, *In the matter of the CES 2007 Trust: Delaware Court Says Domestic Asset Protection Trust Is Protected*, LISI Asset Prot. Plan. News. No. 445 (May 14, 2025), <http://www.leimbergservices.com>.

[xxxvi] *Id.*

[xxxvii] *Id.*

[xxxviii] See generally, *Kulp v. Timmons*, 944 A.2d 1023 (Del. Ch. 2002).

[xxxix] Steve Oshins, *In the matter of the CES 2007 Trust*, supra note 34.

[xl] Qualified Dispositions in Trust Act, 2016 Mich. Pub. Acts 330 (codified at Mich. Comp. Laws §§ 700.1041–50 (2024)).

[xli] *Waldron v. Huber (In re Huber)*, Case No. 11-41013 (Bankr. W.D. Wash. Nov. 25, 2013); Steve Oshins, *In the matter of the CES 2007 Trust*, supra note 34.

[xlii] Steve Oshins, *In the matter of the CES 2007 Trust*, supra note 34.

[xliii] *Id.*

[xliv] *Id.*

[xlv] *Waldron v. Huber*, Case No. 11-41013, supra note 40, at 4.

[xlvi] *In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996).

[xlvii] *Campbell v. Commissioner*, T.C. Memo. 2019-4 (Feb. 4, 2019), Docket No. 5644-12L.

[xlviii] *FTC v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999).

[xlix] *Lawrence v. Goldberg (In re Lawrence)*, 279 F.3d 1294 (11th Cir. 2002).

[l] *Schlapfer v. Commissioner*, No. 419-20, 2023 Tax Ct. Memo (T.C. May 22, 2023).

[li] *CES 2007 Trust*, supra note 1, at 2.

[lii] U.S. Const. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”)

[liii] See *Branson v. Branson*, 201 A.3d 1197 (Del. 2019).

[liiv] *Baker v. GMC*, 522 U.S. 222, 118 S. Ct. 657 (1998).

[lii] *Id.* at 235; See also Restatement (Second) of Conflict of Laws § 99 (Am. Law Inst. 1971) (“The local law of the forum determines the methods by which a judgment of another state is enforced”).

[livi] *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979); See also *Kent Cty. v. Shepherd*, 713 A.2d 290 (Del. 1998).

[lii] *Nevada v. Hall*, 440 U.S. 410 at 411-13.

[liiii] *Id.* at 421.

[liix] *Id.* at 421-24.

[lx] *CES 2007 Trust*, supra note 1, at 2-3; Qualified Dispositions in Trust Act, supra note 39.

[lxii] Qualified Dispositions in Trust Act, supra note 39, at § 700.1045(5), 700.1050.

[lxiii] U.S. Const. art. IV, § 1.

[lxiiii] See generally, *Kulp v. Timmons*, supra note 37.

[lxiv] *SEC v. Wyly*, 56 F. Supp. 3d 394 (S.D.N.Y. 2014); see also Akers, Steve R., *Bessemer Trust*, Resurrection of “De Facto Trustee” Concept (Nov. 2014), [https://www.bessemertrust.com/sites/default/files/2018-06/SEC%20vs.%20Wyly%20Case%20Summary\\_11.2014.pdf](https://www.bessemertrust.com/sites/default/files/2018-06/SEC%20vs.%20Wyly%20Case%20Summary_11.2014.pdf).

[lxv] *CES 2007 Trust*, supra note 1, at 17.

[lxvi] *Id.* at 9-12.

[lxvii] *Id.* at 2-4.

[lxviii] *Waldron v. Huber*, supra note 40.

[lxix] U.S. Cont. art. I, § 8; Harvard Business Services, supra note 31.

[xx] Robyn Painter & Kate Mayer, Which Court is Binding? (rev. by Kate Mathews, 2017), Georgetown Law Writing Center, <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf>.