

**Bankruptcy Trustee Tools to Recover Debtor Assets  
Held in Asset Sheltering Trusts**

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## I. Introduction

With the tough economic times, more and more of the “formerly well-to-do” are having to file Chapter 7 or individual Chapter 11’s, due to guarantor liability or disastrous investment losses. Some of these one-time swells may have put together complicated trusts for innocent estate planning purposes; others might have at least been savvy enough to utilize trusts as one method of ultimate protection against creditors. During the boom years, several states sought to capitalize on individuals’ desires to shelter assets from creditors by passing laws creating Domestic Asset Protection Trusts.

The purpose of these materials is to discuss the state of the existing law and the ability of creditors and bankruptcy trustees to reach trust income and assets under 11 U.S.C. § 541 and the newly enacted 11 U.S.C. § 548(e). Given the fact that Section 548(e) is a relatively brand-new section and domestic asset protection trusts are also relatively new, challenges to domestic asset protection trusts under this Section have been few and far between. However, for obvious reasons, that soon may change.

## II. Domestic Asset Protection Trusts

Domestic Asset Protection Trusts, also referred to as Alaska or Delaware Trusts, are substantially similar to the Offshore Asset Protection Trusts used to shelter assets outside the United States. In 1997, both Alaska and Delaware decided that they wanted part of the \$2 Trillion dollar market in offshore trusts, so each state enacted a trust act authorizing self-settled spendthrift trusts, also referred to as Domestic Asset Protection Trusts.<sup>1</sup> Since that time, similar statutes have also been enacted in Nevada, Rhode Island, Utah, Oklahoma, South Dakota, Missouri, Tennessee, Wyoming, and New Hampshire.<sup>2</sup> These states passed very similar statutes,

with many similar characteristics, all designed to allow individuals to transfer their own assets to trusts for their own benefit and away from the reach of creditors.<sup>3</sup>

Two of the key aspects of these domestic asset protection trusts is that they can be self-settled and that they must contain spendthrift provisions. In Alaska and Delaware, a settlor may create a spendthrift trust of which it is a beneficiary as long as the trust is irrevocable and the trust does not specifically *require* that any income or principal of the trust be distributed to the settlor. Each state identifies situations in which the spendthrift provisions of the trust may be avoided by creditors, such as for the payment of child support or alimony, but these situations are fairly limited. In the event a creditor can avoid the spendthrift provision, only that creditor can touch the trust res, and only up to the amount of the creditor's claim; the trust otherwise remains effective against all other creditors. However, most states provide that the domestic asset protection trust is void if the trust was formed with the intent to hinder, delay, or defraud creditors. To attack a transfer to a domestic asset protection trust, both Alaska and Delaware require that a creditor bring an action for invalid transfer of property to such a trust up to the later of (a) four years after the transfer or (b) one year after the transfer is or reasonably could have been discovered by the creditor. Under the Nevada Trust Act, the statute of limitations is cut to two years after the transfer is made or six months after the creditor "discovers or reasonably should have discovered the transfer."<sup>4</sup>

The domestic asset protection trusts also generally require that some or a majority of the assets be located in the state of trust formation and that these assets be administered by a person domiciled in the state or a trust company or bank of such state. The statutes also generally require that at least one of the trustees be domiciled in the state and that records and tax returns

be prepared within the state. In most cases, the settlor cannot be the trustee, but settlors are granted special testamentary rights and other control rights.

Bankruptcy courts have yet to fully address the powers the court may exercise over such trusts, but it is likely that courts outside Alaska, Delaware, Nevada, Rhode Island, and Utah will treat such trusts similar to Offshore Asset Protection Trusts. In effect, courts will likely use the Conflict of Laws most significant relationship test to determine whether the spendthrift provisions of such trusts will apply in the bankruptcy proceedings.<sup>5</sup> So, unless the debtor has a strong relationship with the State under which the trust was formed, a court is likely to find that the laws of the state where the debtor filed for bankruptcy will prevail. Without the protection of state law, these self-settled spendthrift trusts are likely to fail in other jurisdictions, and creditors will be able to get at the assets held by these self-settled spendthrift trusts.

### III. Collecting Assets from Spendthrift Trusts and Self-Settled Trusts

#### a. Spendthrift Trusts—Section 541(c)

Spendthrift trusts have long been used by financial planners to protect an individual's assets from the reach of his or her creditors. Bankruptcy Code Section 541(c) addresses spendthrift trusts and states the following:

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law –

- (A) that restricts or conditions transfer of such interest by the debtor; or
- (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

This provision allows a bankruptcy trustee to recover assets held in a spendthrift trust only if applicable law will not enforce the spendthrift provision of the trust. The bankruptcy trustee is then at the mercy of state law to determine which trust assets the trustee may reach. As to be expected, state statutes creating domestic asset protection trusts all specifically provide that the spendthrift clause in such statutes is deemed under state law to be a restriction on transfer with specific reference to 11 U.S.C. § 541(c)(2).

In their article, *Planning Techniques for Large Estates, Asset Protection: Trust Planning*, Duncan Osborne and Jack Owen identify two possible arguments creditors (and bankruptcy trustees) may use to reach assets held in domestic asset protection trusts.<sup>6</sup> First, Osborne and Owen rightfully suggest making the argument that Congress' intent in including Section 541(c)(2) was to protect traditional spendthrift trusts, i.e. trusts set up by parents to provide assets for the care of irresponsible children without the fear that the children's creditors would be able to reach the assets. Such traditional trusts foster a public policy of allowing parents to provide for the needs of their heirs. However, domestic asset protection trusts are self-settled and generally provide for the needs of the settlor, which means that the same public policy concerns do not apply. For example, the State of Texas does not permit self-settled spendthrift trusts, and the Fifth Circuit Court of Appeals has stated that:

Public policy does not countenance devices by which one frees his own property from liability for his debtors or restricts his power of alienation of it; and it is accordingly universally recognized that one cannot settle upon himself a spendthrift or other protective trust, or purchase such a trust from another, which will be effective to protect either the income or the corpus against the claims of his creditors, or to free it from his own power of alienation. The rule applies in respect of both present and future creditors and irrespective of any fraudulent intent in the settlement or purchase of a trust.<sup>7</sup>

Since the Bankruptcy Code contained Section 541(c)(2) prior to the enactment of the Domestic Asset Protection Trust statutes, Section 541(c)(2) could not have contemplated exempting self-settled spendthrift trusts.

Second, Osborne and Owen suggest “that even if § 541(c)(2) did apply, the ‘applicable nonbankruptcy law’ should be determined by a ‘governmental interest’ or ‘significant relationship’ test, asserting that the interests of the debtor’s domicile prevail over those of the Domestic Venue.”<sup>8</sup> Since only eleven states currently provide for self-settled spendthrift trusts, that means that the majority of states probably have state laws unsupportive of such trusts. So, unless a debtor lives in one of the eleven states promoting self-settled spendthrift trusts, the bankruptcy court may choose to look at the state law of the debtor’s domiciliary state to determine whether a self-settled spendthrift trust is effective. As state above, the states creating domestic asset protection trusts generally require several ties to the state, such as assets present within the state and a trustee managing the trust within the state. However, courts may choose to overlook these required contacts in favor of applying the law where the debtor actually lives.

In determining which state law to apply under Section 541(c)(2), a court may use several approaches for the choice of law, but the most common are the *Klaxon* rule and the *Spindle* rule.<sup>9</sup> In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, the U.S. Supreme Court held that federal courts must apply forum state choice of law rules when the court has jurisdiction based on diversity jurisdiction.<sup>10</sup> Technically, a bankruptcy court should not apply the *Klaxon* rule since its jurisdiction is based on 28 U.S.C. § 1334 rather than diversity jurisdiction. However, federal courts are generally accustomed to applying the *Klaxon* rule, which approach may be further supported by the Rules of Decision Act.<sup>11</sup> Thus, courts are more likely to apply the choice of

law rules of the state where the debtor filed for bankruptcy rather than the state where the trust was formed.

In contrast to the *Klaxon* rule, the *Spindle* rule provides that the state law of the state where the trust was created must govern the trust.<sup>12</sup> However, the *Spindle* rule comes from the 1884 Supreme Court case of *Spindle v. Shreve*<sup>13</sup>, and since this case predates *Erie Railroad v. Tompkins*<sup>14</sup>, the seminal choice of law case, and may ignore the Rules Decision Act, courts may elect not to follow it.<sup>15</sup>

At this point, it does not appear that any bankruptcy courts have applied Section 541(c)(2) to domestic asset protection trusts.<sup>16</sup> In addition, it does not appear that the bankruptcy courts have wrestled over which choice of law rule to apply to determine applicable law under Section 541(c)(2). For example, in a recent case out of the Bankruptcy Court for the Southern District of Texas, the court sidestepped the question of how to determine which state law qualified as applicable nonbankruptcy law.<sup>17</sup> Although the facts of the case do not specify that the trusts at issue in *In re Kerr* were formed under the Oklahoma domestic asset protection trust provisions, it may be assumed that the trusts were **not** formed under these provisions since the debtor filed for bankruptcy in 2005 and the debtor was a grandchild of the trust settlor. In any event, the debtor filed for bankruptcy in Texas, but the court summarily found that Oklahoma law would apply for purposes of Section 541(c)(2) since the trusts were established under Oklahoma law, and the Chapter 7 trustee did not argue that a different state law would apply. Since Oklahoma law authorized and recognized spendthrift provisions, the Chapter 7 trustee could not reach debtor's interest in the trusts.<sup>18</sup>

In *In re Stroehmann*, the Bankruptcy Court for the Eastern District of North Carolina also avoided the exercise of determining the applicable state law when deciding whether the Chapter

7 trustee could recover income or assets from a trust formed in Pennsylvania.<sup>19</sup> The court elected to apply Pennsylvania law to determine the validity of the trust's spendthrift provision in protecting the debtor's right to income and principal during the life of the trust. However, the court did not apply Pennsylvania case law when it conflicted with precedent from the Bankruptcy Court in the Eastern District of North Carolina. In *Stroehmann*, the Chapter 7 trustee claimed an interest in the debtor's future remainder interest in the principal of the trust that would be distributed upon the termination of the trust, which termination would occur upon the death of the debtor's father. In an earlier case, the court had found that "no transfer restriction existed on the distribution of the corpus which was to take place at the trust's termination," and so those trust assets would become part of the bankruptcy estate upon termination of the trust.<sup>20</sup> In contrast, a Pennsylvania bankruptcy court had held "that a debtor's future interest in a spendthrift trust is not property of the estate."<sup>21</sup> In electing to follow the cases decided in the Eastern District of North Carolina, the court found that "[a]lthough the decision of a sister court interpreting the law of its forum state is entitled to respect, it is not a statement of Pennsylvania law binding on this court."<sup>22</sup>

In addressing the effectiveness of a self-settled spendthrift trust in a non-domestic asset protection trust state, the Bankruptcy Court for the District of Massachusetts recently held in *In re Tosi* that the Chapter 7 trustee could recover assets from a self-settled spendthrift trust under Massachusetts law.<sup>23</sup> In *Tosi*, the court found that even though Massachusetts law generally recognizes spendthrift provisions, "when a person creates for his own benefit a trust for support or a discretionary trust, his creditors can reach the maximum amount which the trustee, under the terms of the trust, could pay to him or apply for his benefit.... This is so even if the trust contains spendthrift provisions."<sup>24</sup> The court further found that a spendthrift trust governed by

Massachusetts law may fail either because it is self-settled or because the settlor retained too much control over the assets of the trust.<sup>25</sup> Several other Bankruptcy Courts have also invalidated spendthrift trusts based on state law on the grounds that either the trust was self-settled or that the trustee/beneficiary could control the trust assets.<sup>26</sup> One further point to note on *Tosi* is that the debtor filed after the effective date of BAPCPA and the trust at issue was a self-settled trust with a spendthrift provision, but the bankruptcy trustee chose to try to reach the trust assets under Section 541 rather than Section 548.

b. Self-Settled Trusts—Section 548(e)

In describing the impetus behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress identified several motivating factors, one of which was to close some of the loopholes used by individuals to shield their assets from creditors.<sup>27</sup> Spendthrift and self-settled trusts have often been called the “millionaire’s loophole” since they allow individuals with assets to hide those assets from creditors.<sup>28</sup> As part of BAPCPA, Congress amended Section 548 of the Bankruptcy Code to include a new provision (e) specifically designed to aid bankruptcy trustees in recovering assets from self-settled trusts. Section 548(e) provides as follows:

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if—

- (A) such transfer was made to a self-settled trust or similar device;
- (B) such transfer was by the debtor;
- (C) the debtor is a beneficiary of such trust or similar device; and
- (D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by—

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15 (d) of the Securities Exchange Act of 1934 (15 U.S.C. 781 and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

In adding this provision to the Code, Congress sought to close the millionaire's loophole, but it remains unclear whether this new provision will have any real effect. This change to the bankruptcy code should largely nullify the value of such self-settled trusts as long as the bankruptcy trustee can show that there was intent to defraud, but some have argued that this amendment to the code does not add anything to the existing law.<sup>29</sup>

Section 548(e) has several distinct features: (1) there is a 10 year look back period; (2) the provision does not look at state law to determine whether the trust is valid, only to aid in a determination of fraudulent intent; and (3) the bankruptcy trustee must show "actual intent to hinder, delay, or defraud" any existing or future creditor. In assessing the practical effect of Section 548(e) on Domestic Asset Protection Trusts, one estate planning practitioner found that "the worst-case scenario is that it merely creates a 10-year limitations period for avoidance actions based on fraudulent transfers," and that "[t]he best-case scenario is that § 548(e) requires proof that a debtor-transferor had specific creditors in mind when making an alleged fraudulent transfer."<sup>30</sup>

First, the 10 year look back period does expand the number of transactions a bankruptcy trustee may review. Section 9 of the Uniform Fraudulent Transfer Act provides that a party must bring an action for transfer of assets with actual intent to hinder, delay, or defraud under UFTA "within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the

claimant.” Most states that provide for domestic asset protection trusts follow this statute of limitations language. Thus, under Section 548(e), a bankruptcy trustee has expanded powers to reach back farther than he/she previously could. However, it is unclear whether the additional reach back period will meaningfully aid the trustee in recovering assets since it will become increasingly difficult with the passage of time to show the badges of fraud.<sup>31</sup>

As discussed above, one of the key contentions surrounding the validity of Domestic Asset Protection Trusts is which state law will apply to determine whether the trust will stand or whether the trust assets will become part of the bankruptcy estate. Under Section 548(e), the court does not have to determine whether the trust is valid under state law, thereby sidestepping the issue of choice of law provisions. Bankruptcy trustees will benefit from this provision by avoiding the debate of whether state law and public policy of the state will uphold debtor settled spendthrift trusts. Instead, bankruptcy trustees will need to reserve their resources to prove actual intent to hinder, delay, or defraud creditors, which intent may be determined based on state law.

Before a bankruptcy trustee may recover under Section 548(e), he must prove that the debtor transferred property to the trust “with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.” A bankruptcy trustee generally shows actual intent by proving different badges of fraud, as determined by state law. In addition to showing actual intent, the Honorable William Houston Brown of the Western District of Tennessee has suggested that, “the trustee would need to show the existence of actual creditors and relate the debtor’s intent to those creditors, rather than merely showing that the debtor created or transferred to an asset protection device.”<sup>32</sup> While identifying actual creditors may appear to add an additional step, given the fact that the debtor

has filed for bankruptcy protection, the trustee should not have any difficulties identifying such creditors. The problem remains proving actual intent.

Since 2005, very few courts have addressed the applicability of Section 548(e) to trust transfers. In *In re Potter*, the Bankruptcy Court for the District of New Mexico allowed the Chapter 7 Trustee to recover assets transferred to a California Trust upon finding that the transfers were fraudulent and could be avoided under Section 548(e).<sup>33</sup> In *Potter*, the debtor formed a trust in California approximately two (2) years prior to filing for bankruptcy. Looking at statements made by the debtor through various filings and applying California law, the court found enough evidence to “establish the presence of a number of the relevant badges of fraud from which actual intent to defraud may be inferred under the UFTA.”<sup>34</sup> While the language of the trust specifically stated that it was not meant to defraud creditors, the court looked at the facts that Potter formed the trust after a large judgment was entered against him, that the trust provided for the transfer of all of his assets, rendering Potter insolvent, and that Potter remained living in a personal residence transferred to the trust. The court quoted an earlier Ninth Circuit case for the principle that the “presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of actual intent to defraud, absent ‘significantly clear’ evidence of a legitimate supervening purpose.”<sup>35</sup> The debtor argued that Section 548(e) did not apply because he was not the sole beneficiary under the trust and other entities (controlled by debtor) had transferred assets to the trust. The court held that Section 548(e) did not require that the debtor be the sole beneficiary of the trust and further found that the assets transferred by other entities were effectuated by the debtor and thereby satisfied the requirements of Section 548(e).

The Bankruptcy Court for the Eastern District of New York also addressed Section 548(e) in determining whether two annuity policies purchased by the debtor could be drawn in to the estate in *In re Combes*.<sup>36</sup> The court in *Combes* did not analyze whether the annuities qualified as “similar devices” under Section 548(e), but focused on whether the debtor acted with intent to hinder, delay, or defraud. In reaching its decision, the court held that an analysis of fraudulent intent under Section 548(e) was the same as an analysis under New York law.<sup>37</sup> In reaching its decision, the Court cited earlier holdings stating that “[u]tilizing available exemptions and engaging in pre-petition planning, without more, is not indicative of actual intent to defraud creditors.”<sup>38</sup> In looking at the facts of the case, the court concluded that “[i]n light of the debtor’s background, the timing of the transfers, and the significant amount of nonexempt assets remaining after the purchase of each of the Annuities, it is clear that the debtor did not purchase the Annuities and file for bankruptcy in a scheme to shield those funds from her creditors.”<sup>39</sup> Since the court could not find intent to hinder, delay, or defraud on behalf of the debtor, the trustee could not recover the annuities under Section 548(e).

Based on the two cases discussed above that have addressed Section 548(e), the crux of any decision under Section 548(e) will be whether the debtor acted with intent to defraud. The real benefit of Section 548(e) will be the bankruptcy trustee’s ability to look back 10 years rather than 2 years.

c. Bankruptcy Trustee’s Burden of Proof in Identifying Trust Assets

Once the bankruptcy trustee proves that the estate includes trust assets, the bankruptcy trustee then has to show which trust assets are part of the estate. Courts addressing this issue have analogized the bankruptcy trustee’s burden of proof with that of trust beneficiaries trying to show that a trustee has misappropriated trust assets.<sup>40</sup> To recover trust assets for the estate, the

bankruptcy trustee must not only show that debtor transferred assets to the trust, the bankruptcy trustee must also show what happened to assets after being transferred to the trust. While a bankruptcy trustee may more easily trace real property, personal property may go through several variations, and it may be difficult for the bankruptcy trustee to show that current trust assets are the product of assets placed in the trust by debtor.

#### IV. Conclusion

The question remains as to whether it will be easier for a bankruptcy trustee to recover assets from a self-settled trust after BAPCPA than before. While Section 548(e) appears to give the bankruptcy trustee another tool, it may be difficult to prove actual intent on behalf of the debtor to defraud creditors. However, there can be no doubt that in the coming years more and more courts will be asked to address the validity of domestic asset protection trusts and self-settled trusts.

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<sup>1</sup> John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 Fla. L. Rev. 41, 42 (2000).

<sup>2</sup> See Duncan E. Osborne & Jack E. Owen, Jr., *Planning Techniques for Large Estates, Asset Protection: Trust Planning*, SP023 ALI-ABA 779 (2008) for a thorough discussion of the aforementioned states' trust provisions.

<sup>3</sup> See Susan Reedy Williams, *The Use of Alaska and Delaware Trusts for Asset Protection and Wealth Transfer Planning*, at <http://www.dcba.org/brief/aprissue/1999/art20499.htm>.

<sup>4</sup> Nevada Revised Statutes 166.170 (2003).

<sup>5</sup> See, Thomas L. Flynn and Matthew Cronin, *Self-settled Spendthrift Trusts Move Close to Home*, 19-7 ABIJ 10 (Sept. 2000); and David Kupetz, *Spendthrift Trusts: the Real (but Not Unlimited) Benefits in Bankruptcy*, 22-8 ABIJ 34 (Oct. 2003).

<sup>6</sup> *Supra*, n. 2.

<sup>7</sup> *In re Shurley*, 115 F.3d 333, 338 (5th Cir. 1997) (footnote omitted).

<sup>8</sup> *Id.*

<sup>9</sup> Richard W. Nenno & John E. Sullivan, III, *Planning and Defending Domestic Asset-Protection Trusts*, SN048 ALI-ABA 795, 885 (2008).

<sup>10</sup> 313 U.S. 487, 496-97 (1941).

<sup>11</sup> *Supra*, n. 8, 885.

<sup>12</sup> *Id.* at 886.

<sup>13</sup> 111 U.S. 542, 547 (1884).

<sup>14</sup> 304 U.S. 64 (1938).

<sup>15</sup> *Supra*, n. 8, 885.

<sup>16</sup> *Id.* at 888.

<sup>17</sup> *In re Kerr*, 2008 WL 1827606 (2008).

<sup>18</sup> *Id.* at \*2.

<sup>19</sup> 2008 WL 3539488 (2008).

<sup>20</sup> *Id.* at \*3 (citing *Janvier v. Sledge*, 03-02654-8-JRL (Bankr.E.D.N.C. June 23, 2004)).

- <sup>21</sup> *Id.* at \*4 (citing *In re Blanchard*, 201 B.R. 108 (Bankr.E.D.Pa. 1996)).
- <sup>22</sup> *Id.*
- <sup>23</sup> 383 B.R. 1, 3 (2008).
- <sup>24</sup> *Id.* at 10.
- <sup>25</sup> *Id.* at 11.
- <sup>26</sup> See, *In re Zeitler*, 2008 WL 619333 (Bkrcty. S.D.Iowa) (Chapter 7 trustee could liquidate debtor’s interest in trust since Iowa state law would not enforce a spendthrift provision where trust did not restrict debtor’s ability to transfer trust property).
- <sup>27</sup> H.R. REP. 109-31(I), at 5 (2005).
- <sup>28</sup> Gretchen Morgenson, Proposed Law on Bankruptcy Has Loophole, NY Times (March 2, 2005).
- <sup>29</sup> See Lawrence R. Ahern, III, *Homestead and other Exemptions under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observations on “Asset Protection” after 2005*, 13 Am. Bankr. Inst. L. Rev. 585, 609 (2005) (“the new provision in section 548(e) is largely duplicative of existing law. It does not dramatically change the ground rules for asset protection planning, although it does enlarge the window through which a trustee may reach to set aside transfers without being required to find an actual unsecured creditor as to whom a particular transfer was voidable under UFTA and section 544(b) of the Bankruptcy Code.”)
- <sup>30</sup> *Supra*, n. 8, 892.
- <sup>31</sup> *Id.* at 891, “it is sometimes hard to defend old transfers due to the loss of critical evidence—memories fade, witnesses may die or move to points unknown, and relevant records can be lost or destroyed in the normal course of business. However, the same factors might also make a stale case hard to prosecute.”
- <sup>32</sup> *Id.* at 892 (quoting William H. Brown & Lawrence R. Ahern, III, 2005 Bankruptcy Reform Legislation with Analysis at 77 (2005 Thomson/West)).
- <sup>33</sup> *In re Potter*, 2008 WL 5157877, \*8 (Bkrcty.D.N.M.).
- <sup>34</sup> *Id.* at \*6.
- <sup>35</sup> *Id.* at \*7, quoting *Acequia, Inc. v. Clinton (In re Acequia, Inc)*, 34 F.3d 800, 806 (9th Cir. 1994) (quoting *Max Sugarman Funeral Home, Inc., v. A.D.B. Investors*, 926 F.2d 1248, 1254-55 (1st Cir. 1991).
- <sup>36</sup> *In re Combes*, 382 B.R. 186 (2008).
- <sup>37</sup> *Id.* at 193.
- <sup>38</sup> *Id.* at 190 (quoting *In re Keating*, 2006 WL 2690239, \*5 (E.D.N.Y. September 18, 2006).
- <sup>39</sup> *Id.* at 192.
- <sup>40</sup> See, *In re Bradley*, 501 F.3d 421, 429 (5th Cir. 2007);