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Safeguarding Personal Wealth
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Protecting Your Home – the New Massachusetts Homestead Law

On March 16, 2011, the newly-enacted Massachusetts Homestead Act took effect, expanding coverage for homeowners and eliminating confusion caused by what many considered a deficient law ripe with ambiguities. The precursor to the modern law was the Homestead Act of 1862, passed by the U.S. Congress to encourage settlement and cultivation of unappropriated public land in the West, providing up to 160 acres of unoccupied public land to each homesteader on payment of a staggering $1.25 per acre after five years of residence.

Today, the homestead law is intended to protect a portion of a homeowner's equity from seizure by unsecured creditors. In other words, if you are sued, lose and the winning plaintiff attempts to force the sale of your home or attach its equity to satisfy the claim, the law sets aside a portion of the equity in your home so that you are not left homeless. This supports a public policy against displacing individuals from their homes, the economic cost of which would in part fall upon the shoulders of the community. Unfortunately, the benefits of this law accrued only to those who filed a *written* Declaration of Homestead at the local Registry of Deeds, after which point up to $500,000 was protected against the claims of unsecured creditors. Note that, under the new and old laws, this does not include secured creditors such as a mortgage company, MassHealth, agencies enforcing tax obligations, child or spousal support. Under the new law, all Massachusetts homeowners receive an automatic exemption of $125,000 on their principal residence without having to file. However, G.L. c. 188 provides the same increased amount, $500,000, for those who file a written declaration.

Of particular interest is that homes held in revocable trusts – but not necessarily nominee trusts - are now eligible for protection, along with 2-4 family homes and mobile homes where the home is an individual's primary residence. Individuals wishing to convey property to a revocable trust to avoid probate costs - which in Massachusetts can add up to 1-3% of probated property – should reexamine the relevancy of this in their estate plans. Also noteworthy is the enhanced protection for elders: where a home is owned by two elderly or disabled persons, the total exemption is $1,000,000. To underscore an exception, if an elderly parent enters a nursing home and MassHealth pays for his or her care, the homestead law does not preclude MassHealth from placing a lien on the property. Grown children come to our office concerned because an ailing parent drives when he should have given up his license long ago. As that parent could strike a pedestrian, the parent, spouse or his children on his behalf should seek to maximize economic protections available to that parent by filing the elder homestead.

In keeping with Massachusetts' recognition of same-sex marriage resulting from a 2003 case, Goodridge v. Dep't of Pub. Health, the law affords the same protections to spouses and children of same-sex marriages as a heterosexual marriage. Bankruptcy counsel can rest more easily knowing now that the proceeds from the sale of a home subject to homestead are entitled to protection under the new law until the sooner of the acquisition of another principal residence or one year from the date of sale.

The last notable ambiguity that was resolved, of particular relevance in light of the low interest rate environment, was to provide that a homestead declaration does not need to be re-filed after refinancing as the new law automatically subordinates estates of homestead to mortgages.

For those interested in minutiae, the maximum automatic exemption for homes owned jointly or as tenants-by-entirety, a special form of ownership reserved for those who are married, remains whole and unallocated between the owners. Where a trust or tenants in common own a home, the maximum automatic exemption is allocated relative to the individual's ownership interested. Similarly, as regards to the $500,000 exemption, said exemption is whole and unallocated where a home is held through a joint tenancy or t-by-e; where the home is held in trust or by tenants-in-common, the declared exemption amount for an individual is $500,000 multiplied by her percentage ownership interest.

Does this new law dispense with the need for homeowner's insurance or umbrella coverage? Absolutely not. Furthermore, you do not need to re-file if you have filed already, as prior declarations remain unaffected. However, the law signifies laudable progress insofar as deficiencies are eliminated and provides yet another reason that clients should contact their advisor to determine if and how to avail themselves of the new law. As always, feel welcome to call our office if you are interested in discussing this or any other asset protection strategy.

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Have Your Cake and Eat It, Too – Domestic Asset Protection Trusts

"How do I protect my wealth?" While that question means different things to different people, our office is asked that question often, usually by doctors in the context of potential malpractice claims or business owners who want to safeguard their non-business wealth against shareholder litigation. In conjunction with liability insurance, an S-corporation, single-member LLC or other corporate entity is usually adequate to segregate one's non-business wealth from claims against the business. But what tool is available to protect personal wealth outside the business?

While *revocable* living trusts provide many benefits – professional money management for children, avoidance of probate costs and time delays, state and federal tax reduction or elimination – creditor protection for the "grantor" or creator of the trust is not one of them. It is well-settled that because said trust is a grantor-trust, wholly revocable as to income and principal, meaning it can be amended at any time, it remains property of the grantor precisely because of that accessibility. Many a client, and counsel on their behalf, have attempted to argue that spendthrift provisions or other carefully-crafted language enables a grantor to have his proverbial cake and eat it too, that is, retain the flexibility to change a trust at any time, and also be afforded protections from creditors, be it a plaintiff in a lawsuit, divorcing spouse or estranged child. So far, all have failed in this respect. While properly-drafted revocable trusts do provide creditor protections for beneficiaries *after the grantor dies*, the only way to insulate one's self or his loved ones during his life was to irrevocably transfer wealth to a separate entity, such as a limited liability company or gift away wealth outright to others. If protecting *your* wealth is a priority, then giving it away would appear to contradict that goal.

Over the past few years, legislators of various states – perhaps to attract new residents, businesses and sources of revenue for depleted state coffers – have adopted new statutes allowing for Domestic Asset Protection Trusts ("DAPTs"). Alaska passed the first domestic asset protection statute; Delaware and Nevada, among others, followed suit shortly thereafter. Massachusetts has yet to enact a similar statute, but a Massachusetts resident may execute an asset protection trust which has a situs, or tax home, in Delaware, invoking Delaware laws and favorable Delaware treatment. Not meant to be exhaustive, benefits include:

1. **Protection from grantor's creditors**: After to a "tail period", typically four years, has elapsed, trust wealth becomes unavailable to satisfy a claim[1]. Each transfer to the trust creates its own tail period.

[1] Two classes of creditors are exempt: a spouse or child with a claim for unpaid alimony, child support or share of marital property; a person with a claim for death, personal injury or property damage that predates the transfer to the DAPT [and] if claim arose out of grantor's act or omission or act or omission of someone for whom grantor is vicariously liable.

2. **Avoid trust fund babies**: Many wealth parents are concerned their children's knowledge of a significant inheritance will erode the child's work ethic, morphing him into a "trust fund baby." Though a trustee has a common law duty to disclose a beneficiary's interest, statute can and does override this law, permitting grantor to direct trustee not to disclose the existence of the trust "for a period of time", such as child's age 30.

3. **Trust may "live" forever, amassing considerable wealth**: Delaware has repealed the Rule Against Perpetuities. Unlike Massachusetts, wealth inside a Delaware-based Dynasty asset protection trust may accumulate indefinitely, free from the imposition of transfer taxes at each successive generation. $1,000,000 would grow to over $32,000,000 in 75 years in a DAPT, compared with $6,000,000 were the strategy not employed.[2]

4. **Flexibility**: Though the DAPT is irrevocable, a "limited power of appointment" allows Grantor to change the ultimate beneficiaries of the trust. Pursuant to trustee's discretion, Grantor may receive up to 5% of trust's principal annually. Grantor may remove and replace a trustee and pay the trust's income taxes.

5. **Substitute for Prenuptial Agreements**: While transfers to a DAPT *after* marriage are not protected, transfers to a DAPT that predate the marriage are not considered marital property or property of the grantor.

6. **State Income Tax Savings**: Massachusetts imposes income taxes of 5.3% on capital gains and accumulated income in addition to federal taxes. Delaware does not impose state income tax on federally taxable income of irrevocable trusts accumulated in future years to non-resident beneficiaries.

For those unfortunate enough to be treading presently in the deep waters of litigation or threatened with litigation, know that you may not transfer wealth to DAPT to defraud an existing creditor(s). A creditor may establish a "fraudulent transfer", but only if it can be show that the grantor made the transfer with the actual intend to defraud that particular creditor, arguably a high burden of proof to overcome. The touchstone of "actual fraud" is whether the grantor could have reasonably anticipated the *particular* future creditor's claim when the transfer to trust was made.

When faced with the prospect of a Delaware trust, a client might logically ask, "Can I retain my existing advisors?" The answer is "yes". You may bifurcate responsibilities, dividing duties between your existing financial advisor, attorney and CPA. You would then choose an adjunct administrative trustee, be it a Delaware individual or corporation with whom our office works regularly.

While the DAPT presents significant opportunities, establishing a DAPT comes with numerous implications, including additional costs. The simple addition of a new clause is insufficient to invoke the benefits discussed. What's more, it is usually advisable to deposit only some, not all, of your wealth into a DAPT, as your family's well-being demands sufficient liquidity outside of the trust. Please contact us if you would like us to help determine if and to what extent a Domestic Asset Protection Trust fits into your family's personal and corporate estate plan.

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Get Out Your Shovel – Liability for Snow Accumulation

Many would argue there is nothing more serene and calming than the first snowfall. But anxiety may replace serenity and introspection now that the Massachusetts Supreme Judicial Court decided in *Papadopoulos v. Target Corp.* to expand the duty and liability of property owners. We have all seen hard working small business owners shoveling – or sometimes sweeping if a shovel is unavailable – the snow from the sidewalk in front of his business.

[2] Assumes 45% federal estate tax rate, no state income taxes, new generation every 25 years and 5% annual investment rate of return

However, for more than a century, the rule had been that property owners could not be held liability for injuries due to the natural accumulation of snow and ice. From this was borne the legal fiction of “unnatural accumulation.” If property owner did not clear the snow from the sidewalk, he could defend himself by asserting the injury was the result of an “unnatural accumulation”, including but not limited to footprints in the snow and ice melting from gutters. An easier way to understand the law is that if the injury arose from untouched snow or ice, property owner could no be held liable. This is no longer a valid defense, as the property is owner is under a duty to clear both natural and unnatural accumulations.

Insofar as the decision affects virtually all Massachusetts landowners, family and corporate clients should heed their newfound responsibility (and liability). In the words of the SJC, “We now will apply to hazards arising from snow and ice the same obligation that a property owner owes to lawful visitors as to all other hazards: a duty to 'act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.”

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