

LEGAL VIEWS

The greatest compliment to us is your referrals. Your trust, loyalty, support and future referrals are most appreciated.

Divorce ▪ Civil Litigation ▪ Commercial Litigation ▪ Construction Litigation ▪ Malpractice ▪ Personal Injury ▪ Real Estate Litigation

The Integrated Estate Planning Trust: An All-Perils Insurance Policy

By Barry S. Engel, Esq., Engel & Reiman PC

Introduction

The idea of planning today in case financial calamity strikes tomorrow is nothing new. Consider, for example, a homeowner's insurance policy. The policy is acquired when there is no expectation of, say, a fire in the home; premiums are paid hoping the policy will never be needed; and in the vast majority of cases the policy will not be needed. Such policies go hand in glove with home ownership, even though by their very terms they are typically filled with exemptions and exclusions such that they do not cover "all perils."

Consider also the integrated estate planning trust ("IEPT") – a trust (usually offshore) established to protect assets at a time when there is no expectation that assets will need protecting. The trust is administered each year hoping the "policy" will never be needed, and in the vast majority of cases it will not have been "needed"... except as next described.

The IEPT can be described as an "all-perils" insurance policy for, if properly conceived, designed and implemented, it will protect subject assets in the event a threat later materializes, regardless of the particular peril involved.

The IEPT has other purposes that include those traditionally associated with estate planning trusts, e.g., estate or transfer tax mitigation; probate avoidance; privacy; and ensuring a smooth transition of wealth to the next generation.

Offshore Trusts In Context

Offshore trusts are not a new concept. What is relatively new is the use of offshore trusts for the protection of assets from future potential creditors as part of an overall integrated estate plan ("IEP"), wherein lifetime protection of the estate is built into the overall estate plan. This is an extension of older protective planning techniques found in other countries and it can include creating a foreign trust to safeguard against threats like monetary exchange controls, forced repatriation of assets, confiscatory tax rates, and the like.

The question arises as to why a creator of a trust (its "settlor") would establish an

*Ideas * News * Resolutions*

Craig Fleishman and **Philip Kay** obtained a favorable verdict following a four-week jury trial involving multiple parties in which they defended a client sued for breaching various commercial loan documents. The jury returned a \$5,000,000.00 verdict which was apportioned against all other parties in the case (including the plaintiff); Fleishman & Shapiro's client was the only party whom the jury determined was not at fault and 0% liable.

Steve Shapiro acquired a \$750,000 settlement on behalf of a very deserving woman this September. The client was involved in a motor vehicle accident and suffered myriad side effects including a traumatic brain injury as a result.

Melissa Winthers obtained a settlement in excess of \$330,000 for a woman who suffered neck and back injuries and post-concussive disorder following a collision. The liability insurer initially denied liability and extended an offer less than ten times the amount of the settlement.

Craig Fleishman successfully represented a well-to-do client who entered into Prenuptial and Post-Nuptial Agreements with his spouse. Wife sought to set them aside on grounds of: (1) ineffective attorney representation at the time the same were signed, (2) lack of understanding of the terms of the Agreements,

and (3) unfairness. Wife also sought an award of attorney fees and alimony, claiming she had various physical and mental problems which kept her from being able to be employed, and also claimed she had insufficient assets to meet her reasonable financial needs and responsibilities. The court found the Prenuptial Agreement and Post-Nuptial Agreement to be enforceable, awarded Fleishman & Shapiro's client's spouse no attorney fees and no alimony and, in fact, awarded Fleishman & Shapiro's client a portion of his attorney fees.

Marlo Greer recently settled a case involving a client who was rear ended by a cement truck. The impact shattered the back glass and broke the client's seat leaving him staring at the ceiling. The settlement was particularly difficult as the insurance company refused to make a pre-litigation offer and had the client evaluated by a well-known defense doctor. Ultimately, the case was settled for more than the insurance company's "final offer." This settlement shows that time, effort, and good clients lead to good results.

Katherine Karamalegos Kust successfully resolved a dispute between a workers' compensation carrier and her client whereby the workers' compensation carrier agreed to pay over several hundred thousand dollars toward attorney fees to the client after the client prevailed in multi million dollar litigation.

offshore trust as opposed to a domestic trust as part of an overall IEP. In an effort to attract U.S. trust business, Alaska enacted statutory asset protection trust provisions in 1997. Delaware, Nevada and Rhode Island followed suit, as have about eight other states. Why wouldn't a U.S. set-

tlor with IEP goals simply settle an Alaska trust? This is indeed an option, yes; however, there are a number of reasons as to why an offshore trust is more protective and more flexible than a domestic trust:

(continued on back)

F&S Focus: Amanda R. Pfeil

Amanda Pfeil focuses her practice on personal injury and general civil litigation. Prior to joining Fleishman & Shapiro, P.C., Ms. Pfeil clerked for the Honorable Jerry N. Jones at the Colorado Court of Appeals, where she gained valuable research and writing experience as well as exposure to diverse areas of civil and criminal law.

Ms. Pfeil earned her J.D. from the University of Tulsa College of Law, where she graduated with honors and earned certificates in Comparative and International



Law and in Public Policy. She also interned at the Colorado Attorney General's Office and for a barrister in Dublin, Ireland. In addition to school and work, Amanda was involved in many organizations, such as moot court, Women's Law Caucus, and Phi Delta Phi International Honors Fraternity.

Ms. Pfeil is licensed to practice in Colorado and is a member of the Colorado and Denver Bar Associations. In her spare time, Amanda enjoys spending time with her family, painting, and traveling.

Integrated Estate Planning Trust *(continued from front)*

1. The settlor has an increased ability to retain benefit and control under an offshore trust.
2. Offshore trusts are not as much of an automatic targets in litigation like domestic trusts.
3. Offshore trusts erect higher practical barriers with which adversary counsel will have to contend.
4. There is no recognition of U.S. judgments or court orders in a number of offshore jurisdictions.
5. The burden of proof an adversary will have to meet is more difficult, and the standard of proof is higher.
6. The period of time within which an adversary must bring its action is much shorter and more better defined.
7. It is far more expensive to pursue a claim abroad.
8. There are psychological barriers of dealing with foreign parties, foreign legal systems, and the like.
9. Under U.S. law, federal law pre-empts state law. This principle does not apply to offshore trusts.
10. Offshore trusts are ultimately more protective because they are supported by thorough legislation designed for the protection of assets held in trust.

facts peculiar to a client's situation; (ii) the client's goals; (iii) the manner and extent the goals can be incorporated into the IEPT's design; (iv) the skill with which the IEPT was crafted; (v) the nature of the asset(s) transferred to the IEPT; (vi) the skill with which the IEPT is attacked; (vii) the skill with which the IEPT is defended; (viii) the thoroughness and protectiveness of the IEPT's applicable law; (ix) whether the opposing party is a governmental instrumentality; (x) whether criminal sanctions would result from the trustees or others involved exercising certain options they would otherwise be free to exercise if the litigants were all private parties; (xi) the law of the forum court; and (xii) any biases of the presiding judge.

The ultimate goal of the asset protection component of an IEP can be considered to have been realized if the client weathers a storm at least moderately better than he otherwise would have weathered the storm had he not engaged in the planning. Happily, in the author's experience, this modest standard has been surpassed in every challenge with which the author has been involved when proper protocol has been followed.

The author Barry S. Engel is the founding principal of the Denver, Colorado-based law firm of Engel & Reiman PC (www.engelreiman.com) and can be reached at 303-741-1111 or b.engel@engelreiman.com

Will The All-Perils Policy "Work"?

There are many variables preventing one from making blanket statements like IEPTs "work" or "don't work." These include: (i)

FLEISHMAN & SHAPIRO ON THE MOVE

• On October 7, 2010, **Layne and Craig Fleishman** chaired the Colorado Neurological Institute's Annual Gala. More than 250 people gathered at the Seawell Grand Ballroom for the black-tie masquerade ball, and over \$250,000.00 was raised to support CNI's patient care, research, education and outreach programs.

• **Steve Shapiro** was recently appointed to the Latin American Educational Foundation's Board of Directors ("LAEF"). The local Foundation was established in 1949. LAEF's mission is to enrich the Latin American community by providing students with resources imperative to their education.

• **Steve Shapiro** is also affiliated with the Sarah Jane Brain Foundation ("SJBF") as a Legal Committee Member of the Advisory Board. SJBF is a network of professionals and brain injury survivors committed to the health and well being of individuals afflicted with a brain injury. SJBF is an inclusive resource for brain injury survivors, caregivers and family members who require assistance.

• On October 21, 2010, **Steve Shapiro** conducted a symposium at The Brain Injury Association of Colorado's 28th Annual Conference. Mr. Shapiro's presentation exemplified the many complexities associated with proving a brain injury in litigation. He provided examples in which technology facilitates the process of proving a traumatic brain injury by use of high quality animations, PowerPoint presentations, and graphics. Members of the medical community, brain injury survivors and their family members were given the opportunity to inquire further about the topic with Mr. Shapiro by asking questions related to the topic.

• **Philip Kay's** article "Class Action Certification Under C.R.C.P. 23: Procedural and Evidentiary Considerations" appeared in the June 2010 edition of *The Colorado Lawyer*, published by the Colorado Bar Association. Mr. Kay's article analyzed Colorado's class action rules and explained the mechanism by which Coloradans may bring or defend class action lawsuits.

Check out our new website at colorado-law.net