

New Virginia Trust Legislation Offers Creditor Protection

By Michelle Chapin

On April 4, 2012, Governor Bob McDonnell signed into law new trust legislation which provides additional opportunities for Virginia and non-Virginia residents to achieve creditor protection. Effective July 1 of this year, a person may create a self-settled spendthrift trust into which the settlor (otherwise known as the person creating the trust) irrevocably transfers assets to a trust, and the assets are protected from claims of the settlor's creditors, provided the settlor is a *discretionary* beneficiary and there is at least one other beneficiary of the trust.

Virginia is only the thirteenth state to authorize these valuable asset protection trusts. The transfer to a self-settled spendthrift trust cannot be made with the intent to delay, hinder or defraud creditors. A creditor has five (5) years after the date of such transfer to bring an action to avoid the transfer or otherwise enforce a claim that existed on the date of the transfer. The trust must contain a spendthrift provision which restrains both voluntary and involuntary transfers of the settlor's qualified interest, which is defined as "the settlor's interest in receiving distributions of income, principal or both in the sole discretion of the independent qualified trustee." Only an independent qualified trustee may make such distributions to the settlor; such trustee must be a resident or entity authorized to conduct business in the Commonwealth. A settlor's spouse, siblings, parents, descendants, employees or business entity in which the settlor owns 30% of the voting power cannot act as an independent qualified trustee. A qualified trustee must maintain the trust property, prepare trust records and tax returns and generally administer the trust within the state.

Virginia has taken a more conservative approach than other states with self-settled spendthrift trusts by not granting the settlor the right to veto distributions from the trust. The settlor can, however, retain the right to remove a trustee and appoint a new trustee, and the settlor may retain a testamentary power of appointment provided the settlor does not appoint to his estate or the creditors or his estate.

The passage of this statute creates additional planning opportunities for residents of Virginia and non-residents with Virginia situs assets, such as those with real property in the state. We encourage you to contact us if you would like to learn more and explore the use of an asset protection trust.