



Duke Law Firm, P.C.-in the News

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Happy New Year!

Uniform Trust Code

The following information regarding the Uniform Trust Code (UTC) is, in part, from the article "U.S. Uniform Trust Code," Global Assets, Finance Publications Off-shore Ltd. (St. Helier, Jersey, Channel Islands) vol. 3, no. 4 (Autumn 2005) by Richard Duke.

<http://www.assetlaw.com/news.htm>

The UTC (last revised or amended in 2005) is 188 pages in length on PDF file.

The National Conference of Commissioners is a group of lawyers, judges, legislators and law professors from each state in the U.S., including the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The National Conference of Commissioners seeks uniformity in state laws.

Each state determines how to appoint its commissioners. The National Conference of Commissioners is funded by state appropriations (based on population), the American Bar Association, the American Law Institute and grants from the U.S. Government.

After the drafting process and investigatory phase, each act is presented and considered, section by section, by a committee. After committee approval, the states vote.

The UTC has been adopted and is in effect in some States. Other states have adopted the UTC and it will become effective at a specified date within the next several years. Other states are considering and apparently will adopt the UTC with amendments.

U.S. attorneys who specialize in asset protection planning, including those who are members of the Asset Protection Committee of the Real Property, Probate & Trust Law Section of the American Bar Association, are not in favor of various aspects of the UTC. Those aspects of the UTC will be discussed in later issues of this newsletter. Philosophically, the asset protection practitioners believe that an individual has the right to transfer his wealth as he desires (as impacted by the tax laws). Asset protection attorneys take the position that the person with wealth has the right to determine how his assets will be disposed, including whether beneficiaries have a right to know about provisions of the trust. Some of the provisions written in the UTC indicate that the National Conference of Commissioners take the position that, in certain areas, beneficiaries' rights should override the rights of a person to determine how his wealth is to be disposed (transferred).

Asset protection planning lawyers are in the minority and are losing with respect to the fight against the adoption of the UTC by states. An asset protection lawyer engages in the practice of law in the area of asset protection planning (or wealth preservation planning) that includes the sub-categories of: (1)

estate planning; (2) tax planning; (3) charitable planning; and (4) other types of planning that are related to estate planning. Estate planners exclude asset protection planning (wealth preservation planning) from their focus and are not as concerned about the rights of persons with wealth who are establishing trusts to dispose of their property as they desire.

Apparently, the members of the National Conference of Commissioners have not read U.S. history. This country was founded under the principles of John Locke, the English philosopher who wrote *Treatises I* and *Treatises II* of government. John Locke's principles, especially in *Treatise II*, focused on property rights and protection of property rights. He considered the taking of property by government to be an invasion. In certain areas, the UTC goes contrary to Lockean principles. Alexander Hamilton and Thomas Jefferson, two of our founding fathers, were always at odds. But, Alexander Hamilton and Thomas Jefferson would be in unison that certain parts of the UTC are contrary to the principles of protecting property rights.

It is the responsibility of each lawyer to advise his clients of the rights of beneficiaries and other creditors and the duties of trustees to inform, if the state has adopted the UTC. After clients are informed of these specific provisions and how it affects the operations of their trusts, those clients with any degree of wealth will request alternatives. The lawyer is then under a duty to advise clients of the options of establishing trusts

under the laws of other states that have not adopted the UTC or amended the bothersome or intrusive provisions.

Ownership of Real Estate in a Foreign Jurisdiction by U.S. Persons

Our firm is frequently asked how U.S. persons should own real estate in a foreign jurisdiction. That question depends on the facts, such as whether the real estate will be held for personal use only, whether it will be rented, or whether it will be sold sometime in the future.

For this discussion, I am assuming that the property will be personally owned and used by the owner and his family as a vacation home. Often, the lawyer in the jurisdiction where the property is located will recommend that the property be owned directly by the U.S. person. Thus, I am assuming that this advice of personal ownership is proper with respect to that jurisdiction. Because personally-owned assets are subject to claims of creditors and levy, it is recommended that this property be owned by a limited liability company (LLC) that provides limited liability protection to the owner. Limited liability protection means that the LLC statute states that each member of the LLC has no personal liability with respect to the LLC.

The LLC can be formed in a jurisdiction such as Nevis under the Nevis Limited Liability Company Ordinance, or it can be formed under an LLC statute in the U.S. If formed under a foreign law, such as under the Nevis Limited Liability Company Ordinance, the member will file a Form 8832 with the Internal Revenue Service electing to treat the LLC as a disregarded entity for U.S. tax purposes. If more than one family member forms the foreign LLC, the members file a Form 8832 electing to treat the foreign LLC as a foreign partnership. If the LLC is formed under state law, no Form

8832 is required to be filed because it is treated as a disregarded entity or a partnership for tax purposes under the Treasury Regulations.

In addition, a Nevis LLC may provide "charging order" protection that is not available for a corporation. The charging order has a dual concept: (1) avoid disruption to the remaining members when one member has a levy against his membership interests; and (2) provide a remedy to that creditor of that member, which is the right of the creditor to receive the income distributed to that member. The question is whether the charging order is applicable for a one-member LLC because, in a levy against that member, no other member is disrupted. So, the creditor of a sole member of a LLC may be able to levy against the assets of the LLC. See *In Re Ashley Albright*, No. 01-11367 (Bkrptc. D.Col. 04/2003).

Lawyers Seek Dismissal of KPMG Tax Shelter Case

REUTERS, January 14, 2006
NEW YORK—Lawyers representing former employees of accounting firm KPMG LLP who face criminal charges over the creation of certain tax shelters to help wealthy clients avoid paying taxes have asked a federal judge to dismiss the case on grounds that it was never proved that the tax shelters in question were illegal.

That same filing argues that the government, threatening KPMG with 'corporate death' forced the accounting firm to 'express a government-approved version of facts'.

The government's indictment, which was unsealed in October, charges the group with conspiracy to defraud the government, tax evasion and obstruction of internal revenue laws.

Regulators said the KPMG practices generated at least US \$11 billion in fraudulent tax losses and resulted in at least US \$2.5 billion

in tax evaded by wealthy individuals. The questionable shelters are no longer sold by KPMG.

15,000 Offshore Account Holders Targeted In HMRC Tax Probe

by Jason Gorrige, *Tax-News.com*, London 25 January 2006

Around 15,000 people can expect to be on the receiving end of an investigation by HM Revenue and Customs into unpaid taxes relating to bank and credit card accounts held offshore, as a result of a decision by an Inland Revenue Tribunal earlier this month.

The ruling made against a leading financial institution, which came after an appeal by the HM Revenue and Customs Special Civil Investigations Offshore Fraud Projects Group, means that the department will be able to serve formal notices on the institution in question requesting information about its customers' offshore accounts, under section 20 of the 1970 Taxes Management Act.

The unnamed institution, thought to be a well-known high street bank, had tried to argue that the Revenue's request for information was incompatible with the Human Rights Act, a claim which commissioner John Avery Jones rejected.

A sample analysis of the bank's account holders suggests that only 19% of those with UK addresses and holding offshore debit/credit cards declared their income on tax returns, while only 18% declared foreign income.

The sample showed that the largest number of offshore debit and credit cards were linked to accounts in the Channel Islands and the Isle of Man.

Credit cards associated with offshore accounts can be used either to draw money in the UK from ATMs, or sums charged to the card in the UK can be paid from

the offshore account. HMRC considers that this presents a significant risk to the proper collection of UK tax.

Blackberry® Woes

Reported by the Associated Press on January 24, 2006

On Monday, January 23, 2006, the U.S. Supreme Court refused to hear an appeal from the company that makes Blackberry. This suit involves issues over patent with respect to Blackberry's PDA (personal digital assistant). This appears to mean that the Richmond, Virginia trial judge can issue an injunction against the company that makes Blackberry to prohibit it from using the device among the many owners in the U.S.

In the January 30, 2006 issue of CLE Alert, West LegalEdcenter, the following was reported:

*Can You Live Without Your BlackBerry®?
Critical Patent Lessons Learned*

With the possibility of a shut-down looming, and Monday's Supreme Court decision refusing to hear the BlackBerry patent case, an estimated 3 million BlackBerry users in the United States may be forced to answer that question. In the wake of these startling events in the courts, Congress and the Patent Office have recently changed the landscape of software and business method patent law, with even more radical changes on the horizon.

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10.35(b)(4)(ii) AND SECTION 10.35(b)(5)(ii).

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