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New Law Vastly Improves Asset Protection Planning Opportunities in Tennessee

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Historically under Tennessee law, there has been no effective way for an individual to protect his or her nest egg from liabilities, such as a medical malpractice claim, and retain economic benefit from and substantial control over the nest egg in the process.

If an individual made a contribution to a Tennessee trust and retained a beneficial interest in the trust, that individual's existing and future creditors could reach into the trust and obtain trust assets.

A handful of other states and several foreign jurisdictions have offered asset protection through trusts for years, but creating a trust in those jurisdictions is less than ideal. Those trusts are expensive to create and maintain, and there has never been assurance that such trusts would effectively bar creditor claims.

In a major shift in Tennessee law, under the Tennessee Investment Services Act, it is now possible for an individual to achieve meaningful asset protection through a Tennessee trust, referred to in the new law as an "Investment Services Trust," which opens a new era in asset protection planning in Tennessee.

An Investment Services Trust is simply an irrevocable trust created under Tennessee law into which an individual contributes assets. The innovation of the new law is that the trust creator may retain one or more of the following powers with respect to the

Investment Services Trust while not compromising asset protection:

- The right to receive income from the trust and the right to receive distributions of trust principal made at the discretion of the trustee or a trust advisor.
- The power to veto proposed distributions.
- The ability to live in a home owned by the trust.
- The right to remove and replace the trustee.
- Control over all investment decisions, including the decision to hire and fire investment managers.
- The power to direct or redirect where trust assets will be distributed upon the death of the trust creator.

The trustee of an Investment Services Trust must be either an individual who is a Tennessee resident or a Tennessee bank or trust company. Although the trust creator may not serve as trustee, his spouse, child, or close friend may be appointed as trustee provided that he or she is a Tennessee resident. Prior to making a contribution to an Investment Services Trust, the trust creator must sign an affidavit that provides that the trust creator is solvent and does not anticipate becoming insolvent, that the contribution is not being made with the intent to defraud creditors, and that he or she is not involved in a pending lawsuit.

An Investment Services Trust does not provide asset protection with respect to creditors of the trust creator until four years from the date assets are

contributed. Unlike other jurisdictions, there are no exceptions to the asset protection offered by Investment Services Trusts for certain classes of claims such as taxes, alimony or child support. Although the new law appears to offer very strong asset protection, it remains to be seen how well that protection will stand up in practice. There is some concern that an out-of-state court will not respect Investment Services Trusts. Also, certain provisions under bankruptcy law exist which, if successfully applied to Investment Services Trusts, would allow bankruptcy creditors 10 years from the date of a contribution to reach trust assets.

In summary, Tennessee now offers enhanced asset protection through the use of Investment Services Trusts. Although these trusts offer great opportunities to protect one's nest egg, they require an analysis of many complex issues, including federal and state gift, estate and inheritance tax laws and laws concerning fraudulent conveyances. Those interested in taking advantage of the benefits of an Investment Services Trust should do so only with the assistance of experienced counsel.



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