



# A Beverly Hills lunch with Mr Hollywood: An asset protection planner's dream

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**S**o there I was at The Grille on the Alley in Beverly Hills with one of my favorite clients and referral sources Frederick “Mr Hollywood” Cohen.<sup>2</sup> Sitting next to Mr Hollywood was Charlie the Shih Tzu. Charlie has his own special monogrammed Lenox China dog bowl. This is Hollywood after all, so Mr Hollywood had the Beverly Hills’ City Council pass a special ordinance permitting Charlie to eat inside any restaurant in Beverly Hills.

Mr Hollywood is a legendary (according to him) entertainment agent who during a forty plus year career has managed and represented the elite (again, according to him) of the entertainment industry. During our lunch (in-between incessant phone calls, glad handing, back slapping and much hyperbole), Mr Hollywood managed to tell me the sagas of four of his clients. He believed that all of the clients were in need of asset protection planning. I agreed. According to Mr Hollywood, the four clients and their stories are as follows:

## 1. Mr Big Time Movie Producer (Mr Mogul).

Mr Mogul, a major motion picture producer and his wife are the parents of a spendthrift son who, among other things, apparently is in need of serious driving lessons. The son unfortunately ran over his former wife six times after a heated argument on the amount of alimony that was being paid. The son of course claimed it was an accident. However, the state of Illinois claimed it was attempted murder. The child's former wife obtained a seven figure personal injury judgment and the son

is now a guest of the great state of Illinois at Dickson Correctional Institution. Mr and Mrs. Mogul are concerned that upon their death the son's creditors (including the former spouse) may be able to access assets that they want to pass on to the son. Let's call this one the “Chicago Drive Case”.

## 2. The “I Never Met A Woman I Wouldn't Want To Marry” Actor.

One of Mr Hollywood's actor clients is working his way towards his fifth marriage. Mr Hollywood believes the actor is in need of pre-nuptial agreement. Let's call this one “You've Been Pre-Nupped”.<sup>3</sup>

## 3. Ms “I'm Dying And I Don't Want My Husband To Get Anything”.

Mr Hollywood represents a major motion picture actress of years gone by who made fortunes on the silver screen and parlayed those fortunes into some of the biggest and best real estate holdings in Southern California. All of her assets are in her own name. She and her husband now reside in Palm Beach and one afternoon after sipping tea with her friends, at Café Europa on South County Road, she surprised her husband and their 21 year old housekeeper in, shall we say, a compromising position. She wants to do everything she can to keep any of her assets from going to her husband upon her death. Let's call this one “Somewhere Beyond The Sea...I'd Go Sailing”.<sup>4</sup>

## 4. Mr “I Thought Limited Liability Companies Protected My Assets And I'm Too Cheap

## To See A Lawyer”.

Another of Mr Hollywood’s clients is Robert Schecky (“I never told a joke I didn’t steal”) Greenberg.<sup>5</sup> “Schecky” Greenberg is one of the great stand up comics and cheapskates of all time. Schecky stopped by the table and Mr Hollywood made the introductions. Looking for free advice Schecky told us, that instead of using a lawyer, he formed his own single member limited liability companies and placed very significant assets into those limited liability companies. Schecky is the single member of all of those limited liability companies. Schecky has heard rumours that the owners of single member limited liability companies may be at risk to their creditors. Not being a believer in free advice, I said nothing. As he was leaving, Schecky said hello to the table next to us. I heard him say something like, “did you hear the one about the Mohel’s retirement party gift...?”

All of Mr Hollywood’s clients have at least one thing in common. They all need to consult with an asset protection planner. During my conversations with Mr Hollywood, I explained to him that an offshore asset protection trust (the APT) is an excellent starting point for the planning that each of these situations requires. For example, let’s consider the following:

1. In the Chicago Driver’s case, the parents can create an APT which will be funded upon their death. The son’s creditors would not be able to attack any assets placed into the APT following the death of the parents and the parents transfer to the APT does not constitute a fraudulent transfer. The parents are not making a transfer to hinder, delay or otherwise impede their creditors. The parents have complete control over the assets during their lifetime.
2. In pre-nuptial planning an APT can be used for the wealthy spouse, with the wealthy spouse clearly disclosing the existence of the APT in the pre-nuptial agreement. Upon dissolution of marriage, most pre-nuptial agreements are attacked for one reason or another with the attacking spouse seeking to recover some assets from the wealthy spouse. If the attacking spouse is on notice of the existence of an APT his or her attorneys may be reluctant to move forward with such litigation as the trustees of the APT would be prohibited from making distributions to the attacking spouse. The attacking spouse would not be able to complain that assets were secreted

to avoid alimony or other obligations as the attacking spouse had full disclosure of the formation and funding of the APT.

3. Aging actress can create an APT and transfer assets to that APT during her lifetime. In the US, APTs are normally created in jurisdictions that do not recognise or impose “forced inheritance” laws. In the US, forced inheritance laws are the rule. Therefore, during her lifetime, the actress may utilise the assets and upon her death her cheating husband will be “cut out” of any interest in her estate.

An example of an interesting case concerning APTs created by third parties (spouses, parents, etc.), for the benefit of another person is the case of *US v. Raymond Grant and Arlene Grant* (the Grant case). On 27 May 2008, United States District Court Judge from the Seventh District of Florida, Alaverto Jordan issued an “Order on Motion for Order to Show Cause” in the Grant case. The Judge refused to hold Arlene Grant in contempt for her failure to comply with the court’s 2005 order to repatriate assets from the offshore trust.

Arlene Grant’s deceased husband, Raymond, was the settlor of the two APTs. Arlene Grant was the beneficiary. This saga started on 31 March 2003, when Judge Jordan entered a Final Judgment against both the Grants in the amount USD36,280,930.43 for Federal Income Taxes owed. The Judge also granted a Motion for Repatriation and ordered Ms Grant to appoint a Trustee in the United States for the two APTs or, in the alternative to repatriate assets held in those APTs.

Ms Grant could not repatriate the assets. The government then sought an Order to Show Cause why Ms Grant should not be held in contempt of the Repatriation Order.

The Judge held for Ms Grant and refused to hold Ms Grant in contempt. The Judge ruled that Ms Grant sufficiently established that she was not able to comply with the Order. The Judge found that, “Ms Grant made significant efforts to repatriate the funds to the United States ...” The Judge enumerated: (i) the efforts that Ms Grant made to repatriate the assets; and (ii) certain of the responses by the trustees and the trustees’ lawyers to Ms Grant’s efforts. For example, the trustees’ lawyers advised Ms Grant by letter:

“That any attempted exercise by you of your right to remove our client as trustee of the trust and to appoint a

US resident trustee in this place would not be a valid exercise and would therefore be voided and of no effect, which means that our client would remain the trustee of the trust notwithstanding your attempted exercise of your power”.

In addition Ms Grant was advised by the other trustee that “the trustees of the above trust have considered your request to transfer the entire trust fund to you. We wish to advise you at this time we cannot comply with your request”.

Ms Grant also sent letters to various financial institutions asking those institutions to serve as transferee trustees. All such requests were rejected.

The court also stated that although the funds had not been repatriated, the court believed that the failure of Ms Grant to repatriate the funds was not for “lack of effort”. Therefore, the court was “reluctant to fault Ms Grant for her trustee’s denial of her request to repatriate funds” and the court found that “Ms Grant had sufficiently established that she is not able to repatriate funds”.

The outcome of the Grant Case indicates the effectiveness of APTs for asset protection planning purposes. Of course, any case is limited to its particular facts and circumstances, however, I believe that generally APTs are far more effective than other forms of asset protection such as US domestic asset protection trusts, limited liability companies, corporations, family limited partnerships and the like. I believe the result of this case would have been far different if the Grants had used other US domestic based asset protection techniques. I also believe that if Ms Grant had been the settlor of the trust, she very possibly would have been held in contempt. In this case, Ms Grant was merely a beneficiary. Otherwise, the creditors would have access to the assets.

The facts of the Grant case (the most important fact to the Grant case - Ms Grant did not create the trust) demonstrates that beneficiaries of a trust created by a third party may in fact enjoy the utilisation of assets held in most types of APT and avoid payment of such beneficiaries’ creditors.

US courts have jurisdiction over the trustees of the self settled US trusts or other US based domestic asset protection planning vehicles. That one factor alone is enough to significantly diminish asset protection. That is why I believe that

“domestic asset protection” is an oxymoron unless the goal is to protect assets “for” creditors instead of “from” creditors.

It is crucial to note that each case is subject to and conditioned upon the facts and circumstances unique to that case. The facts of the Grant Case permitted Ms Grant to avoid the contempt citation. Therefore she was also able to maintain and protect her assets.

Let's revisit the dilemma of Robert “Schecky” Greenberg and his single member limited liability companies. On 24 June 2010 the Florida Supreme Court eviscerated the concept of asset protection utilising single member limited liability companies (LLCs) in its ruling in *Olmstead, et al. v. Federal Trade Commission* (the Olmstead Case). On 29 September 2010, the United States Court of Appeals for the Eleventh Circuit affirmed this decision and stated that the district court may enter an order “compelling the defendants to surrender all right, title and interest (‘right, title and interest’) in their single member LLCs”.

The Florida Supreme Court held in the “Olmstead Case” that a court may **“order a judgment-debtor to surrender all right, title and interest in the debtor’s single member limited liability company to satisfy an outstanding judgment.”** This holding means that using a single member LLC for asset protection purposes can no longer in itself be relied upon in Florida as providing protection against claims of the single member’s creditors.

Florida is not the only jurisdiction which permits judgment creditors to levy upon a single member’s membership interest in a LLC. The result of such levy gives the judgment creditor the ability to actually become the owner of the limited liability company with all ownership rights and benefits including but not limited to: (i) the ability to continue operating the LLC; (ii) liquidating the LLC or (iii) selling some or all of the LLC’s assets.

This is yet another example of creditor friendly courts across the country circumventing statutory law which results in favourable determinations for creditors. A ruling by the United States Bankruptcy Court in the 2003 Colorado case known as the “Albright Case” was the harbinger of a trend to disregard single member LLCs for asset protection

purposes. In the Maryland case of *In Re: Modanlo* the United States Bankruptcy Court in 2006 followed the reasoning set forth in Albright.

Further, in 2002 the United States Supreme Court in the case of *US v. Craft*<sup>6</sup> expanded a creditor’s ability under certain circumstances, to avoid the traditional protection afforded to ownership of assets as tenants by the entirety with the result being a diminution in the protection afforded by tenants by the entirety ownership.

Now, with the stroke of its pen, the Florida Supreme Court has put single member LLC owners on notice to take this holding and its implications very seriously. Owners of single member LLCs should immediately consult with their advisors to determine how to best restructure ownership of the single member LLC in order to avoid possible disastrous asset protection consequences based on the Olmstead Holding.

Various state bar associations, including the Florida Bar, are contemplating petitioning their legislatures in an effort to clarify the law and have the legislature approve laws which would limit a “charging order” as the exclusive remedy available to a creditor holding a judgment against the single member of a single member LLC. As we all know, legislatures are not known for alacrity in modifying laws especially laws that have been interpreted by the supreme court of a given jurisdiction.

Waiting for a legislature to act is a dangerous strategy in the world of asset protection.

Therefore, alternative asset protection vehicles should be considered in lieu of the single member LLC.

Asset protection planners must take into consideration these issues when now dealing with single member LLCs. In many instances, time may be of the essence in arranging for a modification of the ownership of a single member LLC as transferring a portion of the single member LLC could also raise fraudulent transfer issues if such transfer is deemed made to hinder delay or otherwise avoid claims of creditors.

The opportunity for offshore planning in this arena is interesting as the utilization of an offshore structure to hold the interest of the second member of a limited liability company may provide a viable, sustainable and supportable method to avoid the

potential disastrous consequences of Olmstead and other cases. Utilising a second member for a limited liability company would in most jurisdictions limit the ability of a creditor to access membership interests and such creditor would be limited to a charging order against the transferable interest of a judgment debtor. The transferable interest is the right of the member or the member’s transferee to receive distributions from the limited liability company.

Furthermore, utilising an offshore limited liability company or other offshore structure as a member in a domestic limited liability company could very possibly place that second member beyond the jurisdiction of US courts in the event of litigation affecting membership interests.

### Offshore Asset Protection Trusts (APT) as owner of additional members in a limited liability company

Utilisation of an offshore entity owned by an APT to own a membership interest in a domestic US LLC can provide additional asset protection. As far back as 24 August 1992 *Business Week Magazine* published an article entitled “*Endangered Assets? Try an Island Strong Box.*” This article maintained the simple premise that the APT is beyond the jurisdiction of United States courts. That conclusion should be relevant to all practitioners attempting to guide their clients in the area of asset protection and wealth preservation.

The APT affords protection (subject to fraudulent transfer tax and other considerations) against creditors’ claims by permitting the client to legally protect assets, while at the same time providing for an efficient, systematic estate plan which takes into consideration various estate tax saving devices and the overall estate planning objectives of the individuals.

An APT is a trust established outside of the jurisdiction of the United States. The trust is normally US income, estate and gift tax neutral. The APT is not a United States federal income tax avoidance device. Rather, for purposes of US income taxes, the APT is structured as a grantor trust. The individual creating the APT, known as the grantor or settlor, reports all of his or her worldwide income on his or her federal income tax return, including interest, dividends and the like earned by the APT. The grantor

must comply with certain US Treasury Reporting and compliance requirements. Failure to meet US Treasury Reporting requirements can result in adverse tax consequence and possible assessments of federal civil tax and criminal penalties.

APTs must be discretionary trusts wherein the trustee has the discretion to take various actions, vis-a-vis, the trust without the discretion of the grantor. A United States court cannot force the trustee to exercise his discretion nor is a trustee obligated to recognise an instruction from the grant to which would require the trustee to pay assets of the trust over to a creditor of the grantor as such actions would abrogate the discretionary provisions of the trust. Trustees are prohibited from acting under duress (i.e. forcibly by US court order) and/or making payments to "excepted persons" such as creditors. A US person cannot, however, avoid contempt citations for non-payment of alimony and child support by placing assets into an APT. Practitioners must be careful of such attempts to avoid payment of alimony and child support.

A properly drafted and established APT is designed to take advantage of the laws of the offshore jurisdiction which do not recognise United States debtor/creditor laws or judgments, rendered by United States courts. Unless a creditor is willing to go through an expensive court process in the offshore jurisdiction in order to attempt to obtain information about an APT, the trustee may remain silent. Additionally, there is no guarantee that the creditor will prevail.

APTs provide additional safety features which protect assets from creditors' attack. These include, but are not limited to, "flee", "anti-duress", and "spendthrift" provisions. The "flee" provisions authorise the trustee to change the location of the APT to another offshore jurisdiction and to automatically change the trustee in the event a US judgment creditor attempts to bring an action against the APT. The trustee is under no duty to disclose to any creditor that the "flee" provisions have been implemented. Obviously, these provisions have a chilling effect on a creditors' collection efforts, as the creditor has no idea where in the world the new trustee is located. "Anti-duress" provisions normally prohibit the trustee from making any distributions directly or indirectly from the trust to any creditor of the

grantor. "Spendthrift" provisions further prohibit the trustee from making distributions from the trust for the benefit of any creditor of any beneficiary of the trust including beneficiaries who are the spouse or children of the grantor.

The APT also incorporates an estate plan which distributes assets to certain named beneficiaries upon death. If a spouse or minor child is to receive assets, the assets can be maintained and administered in trust for the benefit of such beneficiaries in accordance with the grantor's desire. If at the time of death there are no outstanding claims against the grantor, the trust can provide that the assets are to be brought onshore to be administered by a US based trust company or distribute them directly to the beneficiaries.

By having an APT own the membership interest in the offshore limited liability company which becomes an additional member in a domestic limited liability company. You are providing a modicum of asset protection on that particular membership interest. You are placing the membership interest beyond the jurisdiction of the US courts in a holding structure that is not controlled by the ultimate beneficial owner.<sup>7</sup>

Professor Elena Marty Nelson of the Nova Southeastern University Shepherd Broad Law Center wrote an article entitled "Offshore Asset Protection Trust; Having your Cake and Eating it Too," which appeared in the Rutgers University Law Review (47 Rutgers L. Rev. 11). In discussing practical barriers posed by APTs to creditors, Professor Nelson simply summarises the advantages of APTs".

Suppose that after time consuming and costly litigation in US courts, a creditor finally receives a favourable judgment against the debtor. When the creditor tries to collect, however, he discovers that the debtor's assets are tied up in an offshore trust, governed by the unfamiliar laws of an alien land. Upon pressing his claim, the judgment creditor will likewise face an unknown foreign legal system replete with laws designed to frustrate creditors. As a noted New York trust and estate planning specialist sees it: These trusts are probably immune, creditors of the person who created the trust probably can collect against it or foreclose it. The island countries tried to make sure of it when they rewrote their laws to protect these trusts from attachment.

A well founded asset protection plan must take into consideration a particular client's overall situation including current claims, solvency, fraudulent transfer laws and the like. There is no "one size fits all" solution to asset protection. Each client's overall situation must be considered in light of all facts and circumstances. A planner must develop a plan based on a particular client's situation. A planner must gather as much information as possible concerning any given client and that client's creditor status.

However, utilisation of a properly formed, implemented and utilised APT may in fact be the single best method to attempt to protect assets from creditors.

## END NOTES:

- 1. The basis for this article was presentations made by the author at the 17th World Offshore Convention in San Juan, Puerto Rico in November, 2010. This article does not take into consideration any United States federal income tax issues. Tax issues are beyond the scope of this article. The information contained herein is provided for information purposes only and should not be construed as legal advice. Readers of this article should not act or refrain from acting based upon this information contained herein without first contacting an attorney.*
- 2. All names have been changed to protect the innocent.*
- 3. Care must be given in the drafting of an APT when the possibility of a matrimonial controversy exists. Many cases hold that the settlor of an APT may be held in contempt if during the settlor's lifetime the settlor cannot repatriate assets to pay matrimonial court awarded obligations. The result of such contempt will result in possible incarceration. Therefore clauses must be added to the trust specifically permitting the trustee to satisfy such matrimonial obligations during the settlor's lifetime if the settlor's assets are insufficient to satisfy those obligations.*
- 4. With respect to the late, great Bobby Darin.*
- 5. All names have been changed to protect the innocent.*
- 6. 122 S. Ct. 114*
- 7. Each client's case is conditioned upon facts and circumstances unique to that client and the client's planning needs. Please contact me if you or your clients need additional information on asset protection planning matters in light of problem situations occasioned by the Olmstead holding.*