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ASSET PROTECTION MEMORANDUM

TO: CPAs, Clients & Associates

FROM: David L. Silverman, Esq.
Shirlee Aminoff, Esq.

DATE: April 2, 2010

RE: Trust May Compliment Prenuptial Agreement

The prenuptial agreement effectively protects against the vagaries of marital dissolution. However, even a well-drafted prenuptial agreement will not always succeed in fully accomplishing this objective. For example, the agreement will likely not prevent separate property from becoming marital property if assets are commingled. Nor is there any assurance that a prenuptial agreement will not be declared invalid in whole or in part if circumstances have changed during a long marriage, or if the equities of the case run against the party in whose favor enforcement of the prenuptial agreement would inure. Fortunately, the prenuptial agreement need not stand alone: Inherited family wealth and to a lesser extent assets acquired before marriage may be protected by a trust.

Typically, a trust designed to protect family wealth would be created by a parent for the benefit of the either spouse. Unlike a prenup, the trust could be implemented at any time, even after marriage, and could exist without the knowledge other spouse. Trust distributions could be within the unreviewable discretion of the trustee, who might be the parent implementing the trust. Generally, inherited property, even that acquired during marriage, remains separate property. During the pendency of a divorce proceeding, the trustee could cease making distributions. Since the beneficiary could not force the trustee to make a distribution during the divorce, a fortiori the

creditor-spouse could not. A creditor's rights cannot exceed those of the debtor. (However, an exception might exist for court-ordered child support or alimony payments. A court might invade even a discretionary trust to satisfy these obligations.)

Where a spouse has herself accumulated significant wealth before marriage, asset protection need also not stop with the prenup. Although NY EPTL § 7-3.1 has long provided that trusts created by the grantor for her own benefit which purport to shield trust assets from creditors are unenforceable, not all domestic jurisdictions continue to adhere to this common law view. A decade ago, one attempting to circumvent the EPTL prohibition against "self-settled" spendthrift trusts might have ventured to a remote venue with a tropical — or vaguely sinister — name. Today, one need venture no further than Delaware. This does not mean that a New York court would not look askance upon such a trust. Nonetheless, a New York court seeking to invade the trust might find it difficult to convince a Delaware court in whose jurisdiction the assets reside of the inapplicability of the Full Faith and Credit Clause.