



WEALTH PLANNING > ESTATE PLANNING

Best Situs for DAPTs in 2021

A ranking of jurisdictions that offer the best asset protection and the UVTA.

Daniel G. Worthington, Mark Merric, John E. Sullivan | Dec 18, 2020



Nineteen states (or 38% of all states) in the United States now have domestic asset protection trust (DAPT) statutes. Some commentators originally thought that DAPT statutes would be limited to smaller populated states, but with Ohio entering the DAPT arena, the DAPT roster gained a populous state that's also a major banking center. Further, Tennessee, Indiana and Missouri all have DAPT statutes, and they're the 16th through the 18th most populous states.¹ While the history of DAPTs is fairly recent in the United States, beginning with Alaska in 1996,² it's anticipated that many more states will adopt DAPT statutes. The two most recent states to adopt DAPT statutes are Indiana and Connecticut.

DAPT Origins

A DAPT is a powerful tool to help clients legally shield assets from creditors, while at the same time permit them to be discretionary beneficiaries of their own trusts. However, recent cases demonstrate some limits on DAPTs' effectiveness when residents from outside a DAPT state create a trust situated in a DAPT state. Further, if a non-DAPT state adopts the Uniform Voidable Transactions Act (UVTA) without modification, this will place significant additional limits on the use of DAPTs by residents of non-DAPT states.

Similar to our 2019 article,³ we again provide rankings of three different asset protection features behind these state laws: (1) discretionary-support trust statutes; (2) anti-alter ego statutes; and (3) DAPT statutes.

To understand how these three types of statutes function, it's important to know the history behind them. Common law discretionary trust protection originated under English law and isn't related to spendthrift

protection. Rather, discretionary trust protection is based on whether a beneficiary has an enforceable right to distributions⁴ and, therefore, whether a potential creditor might stand in the shoes of that beneficiary. If a beneficiary has no enforceable right, then the beneficiary's interest isn't a property interest⁵ and is nothing more than a mere expectancy that a creditor can't attach.⁶ A creditor also can't force the trustee to make a distribution.⁷ That is, a common law discretionary interest is nothing more than a mere expectancy.⁸ "An expectancy is the bare hope of succession to the property of another, such as may be entertained by an heir apparent. Such a hope is inchoate. It doesn't have the attribute of property, and the interest to which it relates is at the time nonexistent and may never exist."⁹

To illustrate the importance of how discretionary protection and anti-alter ego statutes work in combination with a DAPT statute, we'll review the excellent analysis provided by Judge Kathleen Kerrigan of the Tax Court in *Campbell v. Commissioner*.¹⁰

Campbell v. Comm'r

In 2001, John Campbell invested in a custom adjustable rate debt structure (CARDS). He didn't report his CARDS transaction on his 2001 tax return. On March 18, 2002, the Internal Revenue Service issued Notice 2002-21 (Tax Avoidance Using Inflated Basis), requiring taxpayers to report any involvement in CARDS transactions. It appears that John filed his tax return around July 2002 and didn't report his CARDS transaction. On May 10, 2004, which is within the 3-year statutory period, the IRS notified John that his 2001 tax return was being audited.

On April 6, 2004, a month before being notified of the audit, John formed the First Aeolian Islands Trust (the trust) in Nevis and funded it with \$5 million. The beneficiaries of the trust were John, his wife and his family. At the time of forming the trust, John's net worth was approximately \$25 million. Therefore, this was a nest egg approach in which approximately 20% of John's net worth was transferred to the trust.

In November 2006, John made a \$27 million Go Zone investment, which was a Tax Code blessed¹¹ real estate investment allowing up to a 50% current deduction on real estate (that is, the 50% *isn't* depreciated over 391/2 years). The Go Zone real estate investment resulted in a \$10.5 million operating loss. After the investment, John still had approximately \$6.5 million remaining in liquid assets. Unfortunately, the Go Zone real estate investment went bad in 2009 due to the installation of defective drywall throughout the project, making the buildings uninhabitable.

On July 2, 2007, the IRS issued a notice of deficiency on John's 2001 tax return increasing his income from \$201,519 to \$13,886,234 due to the CARDS transaction not being reported. The net operating loss from the 2006 Go Zone was carried back to 2001, leaving a tax deficiency of \$1,135,192, plus an accuracy-related penalty \$113,519.

On March 28, 2014, John submitted an offer and compromise to settle the tax claim for \$12,603. At this time, John had virtually no assets outside of the trust. The IRS computed that John had net realizable equity in the

trust of \$1,493,912.¹² Therefore, the IRS rejected John's offer, and John challenged the IRS' decision in Tax Court. The Tax Court was asked to rule on whether the IRS' rejection of John's \$12,603 offer was arbitrary and capricious.

This is where the case analysis becomes exciting, particularly as to how the Tax Court correctly identified two key issues the IRS would need to prove to determine whether the trust's assets should be included in the settlement offer. The IRS would need to prove: (1) that John as a beneficiary of the self-settled APT had a property interest; and (2) whether John controlled the trust and could reach the trust assets whenever he wanted under an alter ego type of an argument.¹³

To make these determinations, in an earlier proceeding regarding this case, the Tax Court directed the IRS Appeals office "to address State law issues about whether petitioner has property rights in the Trust under state law. Respondent used Connecticut law." It appears that the IRS didn't follow the Tax Court's instruction, as later on in the opinion, the Tax Court noted the IRS "has not presented any evidence supporting the determination that petitioner has a property right in the Trust under State law . . ."

Property Interest?

As the IRS didn't present any evidence of whether the beneficiary's interest was a property interest under Connecticut law, let's do it for them. If a beneficiary has an enforceable right to a distribution, the beneficiary most likely has a property interest.¹⁴ This type of trust is classified as a support trust as contrasted with a discretionary trust under common law.¹⁵

Whether the beneficiary has an enforceable right depends on the distribution language and its interpretation under the law that should govern the trust.¹⁶ The *Campbell* case doesn't detail the distribution language. However, one can guess the type of language that was in the trust based on the fact it was created in April 2004 and that it was created under the laws of Nevis. Nevis follows English common law, so the trust most likely was drafted as a discretionary trust under English law. Further, because the trust was drafted by U.S. attorneys, it most likely had the key elements of a discretionary trust under U.S. law. For analysis purposes, we'll assume that this is the case.

In 2004, the year that the trust in *Campbell* was settled, most U.S. practitioners drafted a discretionary trust with the words "sole, absolute, and/or unfettered discretion" combined with a standard. The most common standard was health, education, maintenance and support. Under the *Restatement Second of Trusts* (*Restatement Second*), such a trust was classified as a discretionary trust, due to the sole, absolute and/or unfettered language.¹⁷

A better drafter would have read past the *Restatement Second* to some of the case law and would have expanded the distribution standard to one that couldn't be interpreted by a court by adding terms like "comfort," "welfare" and "happiness" to the distribution standard. Also, the drafter would have added that the trustee could make unequal distributions among the beneficiaries. Then, under the vast majority of state laws, the trust would be classified as a discretionary trust, the beneficiary wouldn't have an enforceable right to a

distribution¹⁸ and, therefore, the beneficiary wouldn't have a property interest. Thus, for the sake of analysis, let's assume that the *Campbell* trust stated something similar to: "The trustee, in its sole and absolute discretion, may make distributions to the beneficiaries on Schedule A for their health, education, maintenance, support, comfort, welfare and happiness. The trustee may make unequal distributions between the beneficiaries."

In 2003, the *Restatement of Trusts (Third) (Restatement Third)* was published. In many areas of trust law, it was a restatement of the existing trust law, but in this area, it sought to change almost all discretionary trust law by following and expanding a distinct minority line of cases referred to as the "hybrid trusts law cases" that existed in four to possibly five states.¹⁹ Under this new and highly controversial theory, all discretionary trusts, except possibly a trust with no standard and guidelines, created an enforceable right for a beneficiary to sue the trustee to force a distribution. The only question under the *Restatement Third* is how much of the trust assets a beneficiary could reach. On a side note, as the *Restatement Third* attempts to redefine almost all trusts as discretionary trusts so that discretionary beneficiaries have an enforceable right to a distribution, this article uses the term "common law discretionary trust" to mean that a beneficiary doesn't have an enforceable right to force a distribution.

Prior to 2004, Connecticut courts would most likely have followed the Connecticut Supreme Court case of *Zeoli v. Comm'r of Social Services*, in which discretionary language combined with a standard resulted in the trust being classified as a discretionary trust.²⁰ However, in 2004, the Connecticut Supreme Court changed the rules by becoming the fourth state to adopt the distinct minority line of cases in *Cocoran v. Department of Social Services*.²¹ Therefore, under this minority line of cases, Connecticut law changed most likely to John's detriment so that the above language would now be classified as support trust language and most likely create a property interest under state law.

However, again we admire Judge Kerrigan's analysis in *Campbell*. The Tax Court noted that "IRC § 6331 is broad and reveals on its face that Congress meant to reach every interest in *property* that a taxpayer may have."²² The court went on to state that first the court needs to look at state law to "determine what rights a taxpayer has in property and then turns to Federal law to determine whether a taxpayer's rights in that property qualify as property or rights under Federal tax law." Yes, Judge Kerrigan correctly stated "federal property law," and we're aware that when many of us older estate planners went to law school, there was no such thing as federal property law—only state property law. However, since that time, federal property law has developed.²³ So, the pivotal question that must be answered is: When is a beneficiary's interest a property interest under federal law?

"Beware of Federal Super Creditors,"²⁴ an article previously published in this journal, contains a detailed analysis of property interests, including trust property interests under federal law. "Bundle of Sticks," p. 23, and portions of the below text, are excerpted and paraphrased from that article.

Bundle of Sticks

Rights associated with each type of interest

Rights associated with each type of interest

To the extent of the person's interest	Tenancy by the entirety	Mandatory or support distribution interest	Limited liability company or limited partner interest	Discretionary distribution interest
Use of property	Yes	Yes	Yes	No
Exclude third parties	Yes	Yes	Yes	No
Right to share income	Yes	Yes	Yes	No
Right of survivorship	Yes	No	No	No
Right to mortgage with consent of joint tenant	Yes	No	No	No
Right to sell property with consent of joint tenant	Yes	No	Depends	No
Right of unilateral alienation	No	Yes	Depends	No

— Mark Merric

In *United States v. Craft*,²⁵ the U.S. Supreme Court used “a bundle of sticks” analysis when it determined that a debtor had sufficient rights to constitute “property” for a federal tax lien under Internal Revenue Code Section 6321. The Supreme Court noted that tenancy by the entirety property has six of the seven criteria that it associated with a property interest. Moreover, in dictum, the Court mentioned that three of those criteria—the right to use property, exclude third parties from property and share in the income—may be sufficient to constitute “property” for federal income tax purposes.

In “Bundle of Sticks,” the bundle of sticks analysis is used to compare a tenancy by the entirety interest, mandatory or support distribution interest, limited liability company or limited partner interest and discretionary distribution interest

DISCRETIONARY DISTRIBUTION INTEREST.

The bolded criteria in the chart are sufficient to constitute “property” for a federal tax lien to attach. The right of survivorship and the right to alienate or encumber, with or without the consent of the spouse, aren’t essential to the category of “property” in terms of a federal property interest. With a mandatory distribution interest²⁶ or a support distribution interest, to the extent of a beneficiary’s interest, an individual has the right to share in the income and use of the trust property. The key difference between a common law discretionary distribution interest and the mandatory or support trust distribution interest that’s classified as “property” is that a beneficiary doesn’t have an enforceable right to a distribution and, therefore, doesn’t hold a property interest under federal law. Therefore, under Connecticut law, which adopted the minority hybrid line of cases, depending on the actual distribution language in the *Campbell* case, there’s a good chance that John held a property interest under federal property law.

Discretionary-Support Statutes

In response to the *Restatement Third* adopting a new and highly controversial view of trust law, practitioners began the promulgation of discretionary-support statutes that codified and turbocharged the asset protection of a discretionary interest under the *Restatement Second*. Further, at the same time, anti-alter ego statutes were promulgated, leading to our three-tier analysis regarding APT law: (1) the discretionary-support trust statute; (2) the alter ego statute; and (3) the DAPT statute.

A discretionary-support statute has the following four key components:

1. A discretionary distribution interest that doesn’t create an enforceable right for a beneficiary to force a distribution;
2. An elevated judicial review standard for a discretionary trust;
3. No creditor may attach a discretionary interest; and
4. A detailed definition of a discretionary trust.

That is, a common law discretionary interest is nothing more than a mere expectancy and is similar to inheriting under a will.²⁷

So, let’s say that under a discretionary-support statute, state law only provides that a common law discretionary interest isn’t a property interest but doesn’t provide that the beneficiary doesn’t have an enforceable right to a distribution.²⁸ In *Campbell*, would this statute have protected John’s discretionary interest, assuming the distribution language in the trust met the definition of a common law discretionary trust for state law purposes?

Unfortunately, this language by itself shouldn’t be sufficient to protect the beneficiary’s interest under federal property law. This is because, as Judge Kerrigan stated, the Tax Court looks to the rights or the bundle of sticks under state law. However, federal property law determines whether such bundle of sticks rises to the level of a

under state law. However, federal property law determines whether such bundle of sticks rises to the level of a property interest. The crux is the “rights under state law,” meaning the beneficiary doesn’t have an enforceable right under state law. The key isn’t the result, which is the consequence of being classified as a discretionary interest that isn’t a property interest. Therefore, a discretionary-support statute needs to state that the beneficiary doesn’t have an enforceable right to a distribution, as this is the reason the beneficiary doesn’t hold a property interest.

If the discretionary-support statute only states that the beneficiary holding a discretionary interest doesn’t have an enforceable right to sue the trustee, would this be sufficient to prevent the discretionary interest from being a property interest under federal law? It’s on this point where some of the discretionary-support statutes deviate from common law. Under common law, there must be a logical reason why a common law discretionary trust doesn’t create an enforceable right in the beneficiary.

Under common law, there was a dual judicial review standard depending on whether the trust was classified as a support trust or a discretionary trust. A court could review any trustee’s discretion of a support trust for reasonableness. However, a court’s ability to review a trustee’s discretion with a common law discretionary interest was limited to if the trustee: (1) had an improper motive; (2) acted dishonestly; or (3) failed to use its judgment.²⁹ This elevated standard of judicial review greatly restricts a court’s ability to question the trustee’s sole, absolute or unfettered discretion to very specific circumstances. This restricted standard also results in the beneficiary in most practical situations being unable to sue the trustee to force a distribution. Hence, the statement that the beneficiary doesn’t have an enforceable right to a distribution emerges.

Unfortunately, a legislature doesn’t need a direct, logical reason for implementing a law. It merely may define a discretionary trust and then state that the beneficiary doesn’t have an enforceable right to a distribution. We think that this definition and statement should be sufficient under federal property law so that a common law discretionary trust doesn’t create a property interest. However, we can’t make such a statement with certainty. It’s for this reason we believe the top tier discretionary-support statutes should include a dual judicial review standard.

Regarding the third element of a discretionary-support statute, the *Campbell* Tax Court decision doesn’t discuss the ability of the IRS to attach a trust distribution interest of the beneficiary. This again is one of the areas in which the *Restatement Third* and the Uniform Trust Code (UTC) reduce the asset protection of a discretionary trust. Under common law, a discretionary interest wasn’t a property interest. Therefore, no creditor could attach the interest.³⁰ As noted above, the *Restatement Third* attempts to reverse the definition of a discretionary trust by creating an enforceable right to a distribution—a property interest—in almost all discretionary trusts.

The UTC allows exception creditors to attach a discretionary trust. This begs the question: Unless the discretionary interest is a property interest, how can a creditor attach the beneficiary’s interest? This appears to be one of the inconsistencies in the national version of the UTC, which some states have corrected. Regardless, Connecticut’s UTC Section 501 holds that a discretionary interest may be attached by exception creditors. While Connecticut’s UTC doesn’t include federal and state claims as exception creditors, this is irrelevant because the IRS is a super federal creditor.

A super federal creditor has its own statute of recovery. It doesn't recover under a state statute, and federal law preempts state law. This is why certain federal creditors are able to recover from state-protected asset protection vehicles such as retirement plans, tenancies by the entirety and even trust interests. The only exception to a federal super creditor's reach appears to be a common law discretionary trust interest because it shouldn't be a property interest under federal law. Therefore, regardless of whether a discretionary interest is a property interest, there was another avenue of recovery for the IRS. However, this wasn't the question that was presented to the *Campbell* Tax Court. The question was whether the trust assets or a portion thereof should be included in the offer settlement to the IRS. Judge Kerrigan was thus correct in focusing on whether the taxpayer had a property interest in the trust.

The fourth criteria is a detailed definition of a "discretionary trust." South Dakota was the first state to promulgate a comprehensive definition of a discretionary trust. Indiana, Oklahoma, Nevada and Tennessee subsequently adopted that definition. These statutes focus on the common understanding of what the word "may" means. That is, the word "may" means that it's in the trustee's discretion. Terms such as "sole," "absolute" or "unfettered" aren't necessary under these discretionary-support statutes to create a common law discretionary trust.

Further, these statutes provide detailed examples of distribution language. Trust companies have found these examples to be incredibly helpful as they provide much more precision in trust classification than was found by trying to read hundreds of cases across the nation. Conversely, Alaska, Delaware and Wyoming use a more simplistic approach. They attempt to define "may" as meaning absolute discretion without a detailed explanation. While this approach should work, it leaves a court with more flexibility to interpret the distribution provisions of a trust.

Anti-Alter Ego Statutes

The *Campbell* Tax Court next looked at the alter ego issue and noted that the settlor had the power to remove the trustee, but only with the consent of the protector. We're not aware of any case that holds that the mere ability to remove and replace a trustee with someone who's independent is sufficient control to invoke an alter ego argument. The Tax Court held that John, the settlor/beneficiary, maintained no control over the trustee to make distributions or investments. Further, it stated, "Through the Trust Protector petitioner can request that the trustee be changed, but he cannot force such action." Therefore John's power to remove/replace a trustee is slightly less than that found in most APTs and underscores one of the reasons for the necessity of anti-alter ego statutes.

Naturally, there's no guarantee that a judge somewhere, someday, won't find that an unconditional removal/replacement power over a trustee may well be too much control. This result is particularly the case should there be other factors indicating some other degree of influence over the trust, such as the settlor/beneficiary holds a power of appointment, the settlor is the manager or president of an entity owned by the trust, the settlor requests that certain distributions be made to certain beneficiaries or the trustee agrees or the settlor requests the trustee to invest in certain assets and the trustee agrees. These were the reasons anti-alter ego statutes have been adopted. These statutes don't completely eliminate the alter ego argument; rather,

they list quite a few factors that alone or in combination don't rise to the level of supporting an alter ego piercing of the trust.

More About Campbell

The Tax Court appears to be selecting Connecticut law for interpretation of the federal property rights under the trust. However, from the opinion, this isn't certain. Most likely, under conflict-of-law-principles, Nevis would be the proper law to determine the rights of the beneficiaries under the Nevis trust.³¹

Rankings

Here are our results when ranking DAPT statutes in these three categories: (1) discretionary-support statutes; (2) anti-alter ego statutes; and (3) DAPT statutes (that is, qualified disposition statutes).

Discretionary-support statutes. *Top tier:* Alaska, Indiana, Nevada, Oklahoma, South Dakota and Wyoming. *Second tier:* Delaware, Michigan, Mississippi, Ohio and Tennessee. (See "Discretionary-Support Statute Rankings: 2021," p. 29.)

Discretionary-Support Statute Rankings: 2021

Six jurisdictions made the top tier

Jurisdictions listed alphabetically within each tier	No enforceable right to distribution	Detailed definition of discretionary trust	No creditor may attach discretionary interest	Elevated review discretionary trust
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First tier

Alaska	Yes	No ¹	Yes	Yes
Indiana	Yes	Yes	Yes	Yes
Nevada	Yes	No ⁴	Yes	Yes ⁷
Oklahoma	Yes	Yes	Yes	Yes
South Dakota	Yes	Yes	Yes	Yes
Wyoming	Yes	No ¹	Yes	Yes

Second tier

Delaware	No	No	Yes	Probably ³
Michigan	Yes	No ¹	Yes	No
Mississippi	Yes	No	No	Yes
Ohio	No	Restricted ⁶	Yes	Maybe ⁸
Tennessee	Yes	Yes	Uncertain ²	Yes

Third tier

Connecticut	No	No	No	No
Hawaii	No	No	No	No
Missouri	Yes	No	No	No

Endnotes

1. Alaska, Michigan and Wyoming use a broad and possibly over simplistic definition of "trust" whenever a trustee has discretion to make a distribution. Query whether the trust in *In re Daniel Kloiber Dynasty Trust*, 2014 WL 3924309 (Del. Chancery unpublished, Aug. 6, 2014), can be a discretionary trust under these states' laws.
2. Tennessee Uniform Trust Code (UTC) Section 501 appears to possibly allow an exception creditor to attach a discretionary trust.
3. Title 12, 2014 Delaware Code Section 3315(a) states, "Where discretion is conferred upon the fiduciary with respect to the exercise of a power, its exercise by the fiduciary shall be considered to be proper unless the court determines that the discretion has been abused within the meaning of § 187 of the *Restatement (Second) of Trusts*, not §§ 50 and 60 of the *Restatement (Third) of Trusts*." While this is a step in the right direction, Delaware's approach is a far cry from certainty when compared with a statute that specifically lists that judicial review is limited to (1) improper motive; (2) dishonesty; and (3) failure to use judgment.
4. Nevada doesn't have a detailed definition. For example, Nevada Revised Statute (NRS) Section 163.017(b) classifies a distribution interest as a support interest, "If it contains a standard for distribution for the support of a person which may be interpreted by the trustee as necessary." This statement adds further concern, as leaving it up to a court to decide when the distribution language will create an enforceable right gives little guidance on how to draft a support trust or discretionary trust.
5. *In re Goodlander*, 20 A.3d 199 (N.H. 2011) favorably interpreted New Hampshire UTC Section 814(a) so that discretionary current distribution interest wasn't found to be either an enforceable right or a property interest in the context of marital property. Further, Section 814 was amended to state the same.
6. Richard Covey, in *Practical Drafting* (April 2007), at p. 8.918, criticized the Ohio UTC due to its very limited definition of "discretionary trust." An Ohio "wholly discretionary trust" (one that isn't a special needs trust) can't have any standards or guidelines. Also, a beneficiary can't have a power to become a trustee or a co-trustee. In this respect the drafter needs to watch removal/replacement powers or add a clause preventing the beneficiary from serving as a trustee. As a wholly discretionary trust can't have an ascertainable standard, it prevents the beneficiary/trustee model of a beneficiary-controlled trust.
7. NRS Section 163.017 regarding a support trust uses the phrase *Restatement (Second)*

New Hampshire	Yes ⁵	No	No	No
Rhode Island	No	No	Case law	Case law
Utah	No	No	No	No
Virginia	No	No	Yes	No
West Virginia	No	No	No	No

7. NRS Section 103.4107 regarding a support trust uses the classical *Restatement (Second) of Trusts* (Restatement Second) review standard for a support trust. Conversely, NRS Section 163.419(1) allows a broader review standard than the *Restatement Second* adding “bad faith” and a new term, “willful misconduct,” to the discretionary review standard. At the same time, NRS Section 163.419(2) states the trustee doesn’t have to act reasonably.
8. OH St. Section 5808.14 provides a review standard of “reasonableness, good faith” for a discretionary trust. However, it only applies the uncertain term of “good faith” for a wholly discretionary trust.

— Mark Merric & Daniel G. Worthington

Anti-alter ego statutes. *Top tier:* Mississippi, South Dakota and Tennessee. *Second tier:* Indiana, Nevada and Oklahoma. (See “Anti-Alter Ego Statute Rankings: 2021,” p. 32.)

Anti-Alter Ego Statute Rankings: 2021

Just six states have enacted these laws

Jurisdictions listed alphabetically within each tier	Settlor serves as trustee or co-trustee	Beneficiary serves as trustee or co-trustee	Settlor or beneficiary has management duty in entity owned by trust	Individual related by blood or adoption is appointed trustee	Agent, accountant, attorney, financial advisor or friend of settlor or beneficiary is appointed as trustee	Business associate of settlor or beneficiary is appointed as trustee	Beneficiary holds any power of appointment over the trust	Trustee may loan property to settlor or beneficiary for less than full and adequate consideration	Trust contains broad purposes or highly discretionary language	Trust has only one beneficiary who may receive distributions	Beneficiary serves as co-trustee, trust advisor or trust protector	Isolated occurrences as trustee when in fact settlor is a beneficiary	Settlor requesting distributions be made from trust to a beneficiary	Settlor requesting that trustee invest in certain property
First tier														
Mississippi	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
South Dakota	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Tennessee	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Second tier														
Indiana	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Nevada	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	Yes	Yes	Yes
Oklahoma	Special trustee ¹	Yes	Yes	Yes	Yes	No	No	No	No	No	No	Yes	Yes	Yes

Endnotes

¹ The Oklahoma statute allows the settlor to serve as a trust protector, trust administrator and special trustee.

— Mark Merric & Daniel G. Worthington

DAPT statutes: *Top tier:* Nevada, Ohio and South Dakota. *Second tier:* Alaska, Delaware, Tennessee and Wyoming. While Nevada and South Dakota are very close, we note that Ohio most likely has the leading edge DAPT statute at this time. (See “DAPT Statute Rankings: 2021,” p. 35.)

DAPT Statute Rankings: 2021

Nevada, Ohio and South Dakota made the top tier of domestic asset protection trust laws

Jurisdictions listed alphabetically within each tier	Type of exception creditor*	Only remedy is a fraudulent conveyance	No hinder or delay	Only that specific creditor	Burden of proof	Present creditor length of time	Future creditor length of time	Notice provision	Forcing litigation to the DAPT jurisdiction	Automatic removal of trustees
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First tier

Nevada	None	Yes	Yes	Yes	Clear and convincing	2 years/6 months	2 years	Yes	Yes	Yes
Ohio	1,2,4	Yes	Yes	Yes	Clear and convincing	18 months/6 months	18 months	Yes	Yes	Yes
South Dakota	None if notice ¹	Yes	Yes	Yes	Clear and convincing	2 years/6 months	2 years	Yes	Yes	Yes

Second tier

Alaska	4	Yes	Yes	Yes	Clear and convincing	4/1 years	4 years	No	Yes	No
Delaware	1,2,4	Yes	Yes	Yes	Clear and convincing	4/1 years	4 years	No	Permissive ²	Yes
Tennessee	1,2,4	Yes	Yes	Yes	Clear and convincing	2 years/6 months	2 years	No	No	Yes
Wyoming	1	Yes	Yes	No	Clear and convincing	4/1 years	4 years	No	No	Yes

Third tier

Connecticut	1,2,3,4,6	Yes	No	No	Clear and convincing	4/1 years	4 years	No	No	No
Hawaii	1,2,3,4	Yes	No	No	Clear and convincing	4/1 years	2 years	No	No	Yes

Indiana	1,4,5	Yes			Clear and convincing	2 years/6 months	2 years	Yes	No	Np
Michigan	1 always; 2,4 if no agreement ³	Yes	No ⁴	No ⁴	Preponderance	2/1 years	2 years	No	No	No
Mississippi	1,2,3,4	Yes	No	No	Clear and convincing	2/? years	2 years	Yes	No	No
Missouri	1,2,3	No	No	No	Clear and convincing	4/1 years	1/4 years	No	No	No
New Hampshire	1,2,4	No	No	No	Preponderance	4/1 years	4 years	No	No	No
Oklahoma	1	No	No	No	Clear and convincing	4/1 years	4 years	No	No	No
Rhode Island	1,2,4	Yes	No	No	Clear and convincing	4/1 years	4 years	No	No	No
Utah	1	Yes	No	No	Preponderance ⁵	2/1 years	1/2 years	Yes	No	No
Virginia	1,2,3	No	No	No	Clear and convincing	5/? years	5/? years	No	No	No
West Virginia	1,2,3,5?	Probably	No	No	Clear and convincing	4 years	4 years	No	No	No

***Exception Creditor Key**

- 1—Child support
- 2—Maintenance
- 3—Governmental claims
- 4—Marital property
- 5—Any property on loan application
- 6—Personal Injury

Endnotes

1. S.D.L. Section 55-16-15 provides that if the settlor transfers marital property to a domestic asset protection trust (DAPT), notifies the settlor's spouse and the spouse doesn't object, then the settlor spouse won't be an exception creditor.
2. *In re Daniel Kloiber Dynasty Trust*, 2014 WL 3924309 (Del. Chan., unpublished, Aug. 6, 2014), held that "exclusive jurisdiction" allowed the Delaware courts to permissively decide whether to accept a case. The court noted that Delaware cases were inconsistent in attorneys' fees protecting a beneficial interest.
3. The Michigan DAPT allows spouses to agree the qualified disposition isn't subject to either maintenance or a marital property settlement. However, child support may never be waived.
4. An accompanying bill, HR 5504, specifically reverses the fraudulent conveyance provisions of Michigan's qualified disposition statute so that any creditor may recover under the hinder, delay or defraud criteria.
5. As to any transfer to a settlor/beneficiary, the creditor must prove by a preponderance of the evidence.

— Mark Merric & Daniel G. Worthington

Finally, we must consider the UVTA. While only six DAPT states have adopted this statute, its adoption absent modification by a DAPT state would be fairly fatal to any DAPT state seeking business from settlors who reside outside that state.

UVTA Update

In 2014, The National Conference of Commissioners on Uniform State Laws adopted the UVTA.³² The UVTA was intended to amend and replace the Uniform Fraudulent Transfer Act (UFTA) and differs from the UFTA in significant ways. Importantly, the UVTA fundamentally changes the treatment of transfers to DAPTs by its residents in jurisdictions that have adopted it. This is especially true with respect to creditors' rights regarding transfers to DAPTs. This change should be of great concern to clients and practitioners alike. It's our position that any jurisdiction that has or is considering adopting the UVTA should either amend or exclude certain of its provisions to preserve DAPTs as an effective estate planning and asset protection technique.

Promoters of the UVTA praised it for removing the word "fraudulent" in favor of the more innocuous word "voidable," thus clarifying for the public the misperception that elements of fraud were needed to undo the transfer. By itself, that seemed to be an improvement over the UVTA's less clear predecessor. One proponent of the UVTA has stated: "[T]he renaming should not be taken to imply that the UVTA is a new and different act, or that the amendments make major changes to the substance of the UFTA. Nothing could be further from the truth. The UVTA is not a new act; it is the UFTA, renamed and lightly amended."³³

This statement is disingenuous where DAPTs are concerned. The most significant problems with the UVTA are associated with Section 10 and its comments, wherein liberties were taken to make “voidable” otherwise legitimate transfers to DAPTs when a grantor resides in a jurisdiction that’s adopted the UVTA with these comments. These comments possibly extend rights to creditors who were “neither existing or anticipated” by the grantor at the time of the transfer.³⁴

Twenty-one jurisdictions have adopted the UVTA in some form, and four jurisdictions have introduced the legislation. Ironically, six jurisdictions that have adopted the UVTA also have adopted DAPT statutes. “UVTA Jurisdictions,” p. 27, lists jurisdictions and when they adopted or introduced the UVTA.³⁵

UVTA Jurisdictions

Where and when the Uniform Voidable Transactions Act was adopted or introduced

Jurisdiction	Year	Bill number	Status	DAPT statute
New York	2020	AB 5622	Enacted	No
Nebraska	2019	LB 70	Enacted	No
West Virginia	2018	HB 4233	Enacted	Yes
Rhode Island	2018	HB 7334	Enacted	Yes
Alabama	2018	SB 152	Enacted	No
Pennsylvania	2018	SB 629	Enacted	No
Arkansas	2017	HB 2139	Enacted	Yes
Vermont	2017	HB 35	Enacted	No
Indiana	2017	SB 316	Enacted	Yes
Washington	2017	SB 5085	Enacted	No
Utah	2017	SB 58	Enacted	Yes
Michigan	2017	SB 982	Enacted	Yes

Iowa	2016	HF 2400	Enacted	No
North Dakota	2015	HB 1135	Enacted	No
New Mexico	2015	HB 85	Enacted	No
Idaho	2015	HB 92	Enacted	No
Minnesota	2015	HF 1342/SF 1816	Enacted	No
North Carolina	2015	SB 123	Enacted	No
California	2015	SB 161	Enacted	No
Kentucky	2015	SB 204	Enacted	No
Georgia	2015	SB 65	Enacted	No
New Jersey	2020	AB 3384	Introduced	No
Wisconsin	2020	AB 719/SB 643	Introduced	No
Massachusetts	2020	HB 58	Introduced	No
South Carolina	2020	SB 262	Introduced	No

— *Daniel G. Worthington*

Voidable Transfers

The UVTA's provisions and comments look to reach further than fraudulent transfers by potentially undermining legitimate transfers to DAPTs by settlors who reside in jurisdictions where the law has been adopted. In such cases, these transfers to DAPTs may become "voidable."³⁶

More specifically, gratuitous comments by the reporter of the Uniform Law Commission of the National Conference of Commissioners on Uniform State Law, in Section 4 of the UVTA, imply that such transfers to DAPTs are "per se voidable." This position is contrary to most legal precedent on such questions and has been criticized broadly by practitioners and academics alike.³⁷ In an attempt to allay these concerns, one promoter of the UVTA has suggested that "The Comments, in short, are no more than a law journal article on steroids.

The Comments ... are not law, and courts are no more bound by them than they are by any other law journal article.”³⁸ However, if that’s indeed the case, then why include the controversial comments at all? We believe that some, but not all, have seen through the smoke and have elected not to include Section 10 and its comments in their state statutes. We find this approach to be most beneficial for those seeking to maintain the rights of citizens to protect their assets using the DAPT statutes.³⁹

While the comments to UVTA Section 4 imply that transfers to DAPTs may be per se voidable, what’s the basis for this position? The comments only cite several older Pennsylvania cases that have been eroded over the years by subsequent decisions. Thus, the comments are no longer based in current generally accepted legal principles or cases.⁴⁰ Note that the U.S. Supreme Court in *Schreyer v. Scott* stated that debtors are free to take steps to protect assets from creditors that were neither in existence prior to, nor reasonably anticipated at, the time of transfer.⁴¹ Consequently, many advisors believe that unless specific case law or statutes exist in the state, no strong public policy argument would exist.

A lack of DAPT legislation in a state, whether it’s adopted the UVTA or not, doesn’t necessarily create a presumption of a strong public policy against the laws of DAPT states. In a full faith and credit (FFC) claim against a DAPT state trustee, the DAPT state shouldn’t be required to afford deference to the domicile state’s judgment. This should be the law unless the transfer falls within the fraudulent transfer window of the DAPT jurisdiction or the transfer applies to an exception creditor. Because a collections action would often be taken against the trustee of the DAPT in the DAPT jurisdiction,⁴² this may frequently be the case even in states that adopt the comments of the UVTA.

Post-judgment collections issues will depend on the applicable DAPT state’s law. If assets are held in a DAPT state, each state has a constitutional right to regulate and restrict the manner in which judgments are collected, provided that the rules apply to both in-state and out-of-state creditors. The stringent fraudulent transfer standards of most DAPT statutes are just that: a restriction and regulation of post-judgment collections actions, which prevent any collection unless the creditor shows that the debtor violated those standards.⁴³

Sufficient Contacts

In a conflict-of-laws analysis regarding a DAPT, a trust settlor can designate the laws that govern the trust so long as there are sufficient contacts with the state. UVTA Section 10 states that “a claim for relief ... is governed by the law of the jurisdiction in which the debtor is located when the transfer is made, or the obligation is incurred,”⁴⁴ ostensibly without regard to whether a different jurisdiction is chosen in a DAPT. This is a significant break from the traditional rule that a settlor can choose which state’s trust laws apply so long as there are sufficient contacts with the state.⁴⁵ The “sufficient contacts” requirement was a major issue in a bad-facts case—*In re Huber*.⁴⁶ The *Huber* court held that Washington, not Alaska, had the most significant relationship with an Alaska DAPT, and thus, Washington law applied. The settlor, Donald Huber, a Washington resident, established an Alaska DAPT, which named an Alaskan corporate trustee in the DAPT state (Alaska) but named the settlor’s son, based in Washington, as co-trustee. The settlor’s son made frequent distributions to the settlor. This activity was one of the many factors that made the Alaska trustee look like a “straw man.” The Alaska trustee did very little. To support its ultimate conclusions, the *Huber* court cited to the *Restatement (Second) of Conflicts of Laws* Section 270(a), which states that:

[t]he local law of the state designated by the settlor to govern the validity of the trust [governs], provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship.

Thus, when Washington had both a substantial relationship with Donald and a long-standing public policy position against self-settled DAPTs, the court “disregard[ed] the settlor’s choice of Alaska law, which is obviously more favorable to him, and [applied] Washington law in determining the Trustee’s claim regarding validity of the Trust.”

In a conflict-of-laws analysis regarding a DAPT, a trust settlor can designate the laws that govern the trust so long as there are sufficient contacts with the state.⁴⁷ The sufficient contacts requirement was a major issue as in *Huber*.⁴⁸ Additionally, IRC Section 270(a) states that IRC Section 273 applies so long as the law doesn’t violate a strong public policy of the state that has the most significant relationship to the trust. One of the ways that the UVTA attempts to thwart transfers to DAPTs is the application of Section 10, the governing law provision.

Location of Debtor

UVTA Section 10 states that debtors are “located” in the jurisdiction of their “principal residence.” However, this can create a conflict with DAPT laws. Consequently, if a resident of a UVTA state makes a transfer to an out-of-state trustee in a DAPT state, and if the transfer is found to be fraudulent (or “voidable”) under the UVTA and its comments but is found to be valid under applicable DAPT standards, then there will be an inevitable conflict of laws. This conflict is sharpened because UVTA Section 10 and its comments effectively reject the right of another state to assert its interest and its laws in connection with a disputed transfer, regardless of which state has the most significant relationship to that transfer. Moreover, the UVTA’s comments even suggest that a true principal residence of a debtor in a DAPT state can be overlooked if a court concludes that a debtor’s residence is “notional,” “short term” or an act of “asset tourism.” The UVTA comments actually invite courts to fish for reasons to ignore the UVTA’s own statutory rule giving priority to the laws of a settlor’s principal residence. As a result, individuals who in good faith move into a DAPT jurisdiction, settle a DAPT under that jurisdiction’s laws and then unexpectedly move out of that jurisdiction could have their DAPT judicially invalidated, even though the DAPT transaction occurred entirely within a DAPT state.

As before, it’s important to note that comments don’t have the force of law, and states can (and in the case of the UVTA should) revise the uniform law to suit their own situations, if they even adopt it in the first place.

State Reaction

As discussed in a recent article by Al W. King III, many state legislatures and advisors have expressed that DAPT states shouldn’t be required to afford FFC to the domicile state’s judgment even if the DAPT state adopts the UVTA.⁴⁹

One example is the non-inclusion of the comments from the UVTA statute.⁵⁰ This non-inclusion is a result of advisors working with their legislatures on statutory solutions to the shortcomings of the UVTA.⁵¹ For example, Indiana rejected the UVTA comments: “However, in interpreting solely this chapter, comments released by a committee of the National Conference of Commissioners on Uniform State Laws shall not be considered as authority.”⁵² Arkansas specifically rejected certain comments of the UVTA in its legislative history.⁵³

Some states included language in their statutes in anticipation of the UVTA that their DAPT statute shall govern in the event of any conflict.⁵⁴ This additional language provides state courts with yet another provision to rely on in the event of conflict resulting from a judgment in a UVTA state. States that have passed the UVTA should consider amendments, and states looking to pass the UVTA should use caution, particularly the DAPT states. Choice of trust situs and wealth preservation have long been trust planning concepts that should be protected.⁵⁵

Despite the UVTA, many advisors suggest that a DAPT will still be upheld, even if the settlor is living in a UVTA state, when a state court determines that a voidable transaction has occurred.⁵⁶ The creditor would seek to enforce that judgment in the DAPT state that hasn’t passed the UVTA. The first issue that a court in a DAPT state must decide is whether it must recognize the UVTA state’s judgment under FFC principles.

In a recent case, the Supreme Court of South Dakota in *In re Cleopatra Cameron Gift Trust*⁵⁷ “rejected even the specter of an argument that would allow support creditors to reach trust funds protected by a spendthrift provision.” A California judgment pierced the spendthrift provision of a third-party trust moved to South Dakota by the grantor. South Dakota rejected the enforcement of a California claim in South Dakota, where the legislature has rejected such enforcement. As such, the South Dakota Supreme Court held that a South Dakota court wasn’t required to submit to a California judgment to compel direct payments from a trust because the method of self-executing enforcement wasn’t authorized by South Dakota law.⁵⁸

The fact that more than 21 states now have DAPT or DAPT-like statutes “moves this approach from the eccentric anomaly” category to an accepted and legitimate “asset protection and transfer tax minimization planning technique.”⁵⁹ This trend undercuts the conclusion that these states have a public policy against a DAPT trust.

In our view, and notwithstanding the UVTA, states should continue to follow the established rule of law, which is that a settlor may designate the law governing a trust unless it can be shown that: (1) trust situs and trust administrative ties to the relevant DAPT state aren’t substantial; and (2) creating a DAPT in a DAPT state violates a strong public policy of the settlor’s domicile state. Unless both of these criteria are satisfied, the DAPT should generally be upheld,⁶⁰ subject to any exception creditor rule, DAPT-specific fraudulent transfer rule or other exception provided by the governing DAPT statute.

We believe that states that are considering adopting the UVTA should beware of the difficulties that the UVTA potentially creates, and states that have already adopted the UVTA should consider amending or removing Section 4, Comment 2 and Section 10 and its comments.

Like any comparison of jurisdictions article, different authors will have different conclusions regarding what are the most important factors when evaluating a jurisdiction. Because about half of the U.S. population will experience at least one divorce, protection against marital claims is one of the most significant factors when evaluating the strength of a trust statute. The key to protecting against a marital claim may well be whether a beneficiary has an enforceable right to a distribution. This protection typically isn't found in DAPT statutes but is instead found in the discretionary-support legislation enacted by many states (or, in some instances, in state common law). Some of the more important DAPT protective features include limiting a creditor's claim solely to a fraudulent conveyance, debtor-friendly fraudulent transfer law and forcing litigation into the DAPT state.

Endnotes

1. https://simple.wikipedia.org/wiki/List_of_U.S._states_by_population#:~:~:-text=List%20of%20U.S.%20states%20by%20population%20%20,%20%205.91%25%20%208%20more%20rows%20.
2. Prior to 1996, 18 nations had provided offshore asset protection trust statutes.
3. Mark Merric, Daniel G. Worthington, Paul MacArthur and John E. Sullivan III, "Best Situs for DAPTs in 2019," *Trusts & Estates* (January 2019).
4. *Restatement (Second) of Trusts (Restatement Second)* Section 155(1) and Comment (1)(b).
5. Mark Merric, "How to Draft Distribution Standards for Discretionary Dynasty Trusts—Part II," *Estate Planning Magazine* (March 2009). Endnote 41 in the Merric article cited herein lists cases from 16 states in which a discretionary distribution interest isn't a property interest, http://internationalcounselor.com/thirdpartytrust_article.html.
6. *Ibid.* Endnotes 42 and 43 in Merric, *ibid.*, list cases from 18 states in which a discretionary interest couldn't be attached at common law. Please note that the *Restatement (Third) of Trusts (Restatement Third)* and the Uniform Trust Code (UTC) reverse common law in this area allowing a creditor to attach a discretionary interest. However, five UTC states have modified the national version of the UTC to retain common law in this area.
7. *Restatement Second* Section 155(1) and Comment b.
8. *United States v. O'Shaughnessy*, 517 N.W.2d 574 (Minn. 1994); *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); *In re Canfield's Estate*, 181 P.2d 732 (Cal. App. 1947); *In re Horton*, 668 N.W.2d 208 (Minn. App. 2003); *Fortune v. First Union Nat. Bank*, 371 S.E.2d 483 (N.C. 1988).
9. *Dryfoos v. Dryfoos*, 2000 WL 1196339 (Conn. Super. 2000) (unreported case).
10. *Campbell v. Commissioner*, T.C. Memo. 2019-4.

11. “Tax Code blessed” means that this investment and deduction was specifically authorized by the Internal Revenue Code to help develop certain impoverished neighborhoods.
12. The facts don’t state how Campbell’s computation of \$1,493,912 equity was made. The general rule in a non-domestic asset protection trust (DAPT) state would be that it’s the maximum amount a trustee may distribute within its discretion, which would be the entire trust. This may be the case as the trust may have also suffered some investment loss. Conversely, based on the \$5 million investment, the amount may be the value of the trust assets divided by the number of beneficiaries.
13. The most common term when referring to this type of equitable claim is “alter ego,” derived from the corporate pierce-the-veil cases. However, occasionally the term “dominion and control” may be found in practitioners’ commentaries. Also, when dealing with the implications of tax cases, the term “sham transaction” or “sham trust” is used.
14. *LaSalle National Bank v. U.S.*, 636 F. Supp. 874 (Dist. Ct. Ill. 1986); *First of America Trust Company v. U.S.*, 1993 WL 326784 (C. Dist. Ill. 1993) (unreported); *Pulizzotto v. U.S.*, 1990 WL 120670 (Dist. N.J. 1990) (unreported); *Magavern v. U.S.*, 415 F. Supp. 217 (W.D.N.Y. 1976); *U.S. v. Delano*, 182 F. Supp.2d 1020 (D. Colo. 2001); *U.S. v. Taylor*, 254 F. Supp. 752 (D.C.Cal. 1966).
15. The term “common law definition” is used as the *Restatement Third* attempts to rewrite the definition of a “discretionary trust” to mean the opposite of what it did under common law. Under common law, the beneficiary of a discretionary interest doesn’t have an enforceable right to a distribution. Under the *Restatement Third* all, if not almost all, discretionary interests are enforceable rights to a distribution. We’re unaware of any court adopting the Restatement Third’s new and controversial view of trust law.
16. The issue of conflict of laws, and whether the law of Nevis or Connecticut should apply, is beyond the scope of this article. However, assuming that the trustee was in Nevis, the protector wasn’t in the United States and the assets or a portion of the trust assets were outside of the United States, we would favor application of the law of Nevis.
17. *Restatement Second* Section 155(1) stating that where the terms of the trust provide that the trustee “apply for a beneficiary . . . in his uncontrolled discretion. . . .”
18. The *Restatement Third*’s new and for the most part unsupported view of discretionary trust law wasn’t published until 2003, and the courts haven’t followed this new view of trust law. In fact, South Dakota specifically prevents a court from looking to Sections 50, 56, 58, 59 or 60 of the Restatement Third, and the Tennessee Editor Notes to the Comments note that they’re not following the Restatement Third or the original approach expressed in the 2004 UTC.
19. Iowa—*Strojek v. Mills v. Hardin County Bd. of Supervisors*, 602 N.W.2d 566 (Iowa App. 1999); Ohio—*Bureau of Support in Dep’t of Mental Hygiene & Correction v. Kreitzer*, 243 N.E.2d 83 (Ohio 1968); Nebraska—*Smith v. Smith*, 517 N.W.2d 394 (Neb 1994); North Dakota—*Bohac v. Graham*, 424 N.W.2d at p. 144 (N.D. 1988); and possibly Pennsylvania—*Lang v. Com., Dept. of Public Welfare*, 528 A.2d 1335 (Pa. 1987).

20. *Zeoli v. Commissioner of Social Services*, 179 Conn. 83 (1979). See also *In re Cocoran*, 859 A.2d 533 (Conn. 2004); *Dryfoos v. Dryfoos*, 2000 WL 1196339 (Conn. Super 2000) (unreported); *Carlisle v. Carlisle*, 1994 WL 592243 (Conn. Super 1994) (unreported); *Klodney v. Klodney*, 503 A.2d 625 (Conn. App. 1986).

21. *Cocoran*, *ibid.*

22. *Campbell*, *supra* note 10, citing *Drye v. U.S.*, 528 U.S. 49 (1999); *U.S. v. Nat'l Bank of Commerce*, 472 U.S. 713 (1985).

23. It first began with *U.S. v. Rodgers*, 461 U.S. 677 (1983), followed by *Drye*, *ibid.* and *U.S. v. Craft*, 535 U.S. 274 (2002).

24. Mark Merric, Michael J. Bland and Mark Monasky, “Beware of Federal Super Creditors,” *Trusts & Estates*(July 2010).

25. *Craft*, *supra* note 23.

26. A “mandatory distribution interest” is generally defined as a distribution interest in which the trustee is required to distribute all of the income or a specified amount within one year. Under the Restatement Second, a mandatory distribution interest is a subset of a support trust. The more common definition of a “support trust” is that the trustee must distribute the income pursuant to an ascertainable standard.

27. See *supra* note 8.

28. This previously was the approach of one of the top trust law jurisdictions.

29. *Supra* note 3, endnote 33 cites 21 cases from 14 states and two countries adopting the standard. Also see *Restatement Second* Section 187 Comment j and Section 122. While this isn't the only discretionary distribution interest judicial review standard under common law, it was the most common.

30. *Ibid.*, at note 4.

31. *Commerce Bank v. Bolander and Whittet*, 239 P.3d 83 (Kan. Ct. App. 2007). Gideon Rothschild, Daniel S. Rubin and Johnathan G. Blattmachr, “A Few Bad Apples Should Not Spoil the Bunch,” 32 *Vand. L. Rev.* 763, 764 (1999); Barry S. Engel, David L. Lockwood and Mark Merric, *The Asset Protection Planning Guide: A State-of-the-Art Approach to Integrated Estate Planning*, Commerce Clearing House (2000), at p. 399.

32. Uniform Law Commission, Uniform Voidable Transactions Act (UVTA), www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014_AUV-TA_Final%20Act_2016mar8.pdf.

33. Kenneth C. Kettering, “The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform

Fraudulent Transfer Act,” *The Business Lawyer* (Summer 2015), at pp. 778, 779.

34. *Schreyer v. Scott*, 134 U.S. 405, 414-415 (1890). The U.S. Supreme Court held that individuals have a right to protect against future issues, stating, “Under such circumstances, the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more than any business man has a right to do, to provide against future misfortune when he is abundantly able to do so.”

35. www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49.

36. See George D. Karibjanian, Gerald J.J. Wehle and Robert Lancaster, “A Memo to the States—The UVTA Is Flawed ... So Fix It!!!” *LISI Asset Protection Planning Newsletter* #367 (May 2018); Al W. King III, “Tips From the Pros: Be Aware of the Uniform Voidable Transactions Act,” *Trusts & Estates* (October 2016); George D. Karibjanian, “The Uniform Voidable Transactions Act Will Affect Your Practice,” *Trusts & Estates* (May 2016); George D. Karibjanian, Gerald J.J. Wehle, Robert Lancaster and Michael A. Sneeringer, “New Uniform Voidable Transactions Act: Good for the Creditors’ Bar, But Bad for the Estate Planning Bar?” *Part Two, LISI Asset Protection Planning Newsletter* #317 (March 15, 2016); George D. Karibjanian, Gerald J.J. Wehle and Robert Lancaster, “History Has Its Eyes on UVTA—A Response to *Asset Protection Newsletter* #319,” *LISI Asset Protection Planning Newsletter* #320 (April 18, 2016); Richard W. Nenno and Daniel S. Rubin, “Uniform Voidable Transfers Act: Are Transfers to Self-Settled Spendthrift Trusts by Settlers in Non-APT States Voidable Transfers Per Se?” *LISI Asset Protection Planning Newsletter* #327 (Aug. 15, 2016).

37. *Ibid.*

38. Karibjanian, Wehle and Lancaster, *supra* note 36, citing Professor Jay D. Adkins’ response to criticism of the UVTA comments.

39. See *ibid.*, which also provides an excellent commentary on ways states should codify the UVTA.

40. See Al W. King III, “Be Aware of the Uniform Voidable Transactions Act,” *Trusts & Estates* (October 2016); see also Section 4, Comment 2 of the UVTA, citing *MacKason’s Appeal*, 42 Pa. 330, 338-39 (1862); *Ghormley v. Smith*, 139 Pa. 584, 591 (1891); *Patrick v. Smith*, 2 Pa. Super. 113, 119 (Super. Ct. 1896).

41. *Schreyer*, *supra* note 34.

42. Note that if a DAPT jurisdiction adopts the UVTA and specifically includes Section 10 Governing Law, and Section 4, Comment 2, this could prove problematic and possibly prevent legitimate wealth preservation planning using DAPTs in that state; see *supra* note 36.

43. See Richard Nenno and John Sullivan III, “Domestic Asset Protection Trusts,” *BNA* 868-1 TM (2010), at p. A-53 et seq. Note also *ibid.*

44. See *supra* note 29.

45. See King, *supra* note 40. See also *Restatement (Second) of Conflict of Laws* Sections 270 and 273 (1971). See also *Riechers v. Riechers*, 679 N.Y.S.2d 233, 236 (N.Y. Sup. Cnty 1998). In dictum, the court stated, “a cause of action would not lie to set aside the trust since the trust was established for the legitimate purpose of protecting family assets for the benefit of the Riechers family members.” The defendant-husband established an irrevocable trust in the Cook Islands, holding 99% of a Colorado limited partnership owning over \$4 million of marital assets. The court held that it didn’t have jurisdiction over the corpus of the offshore trust. Nevertheless, the court ruled that the trust assets were part of the marital estate and were subject to inclusion in the calculation of the total marital assets. See also *TrustCo Bank v. Susan M. Mathews*, C.A. No. 8374-VCP, V.C. Parsons (Del. Ch. Jan. 22, 2015), in which a New York bank made a loan to a Florida limited liability company (LLC) with a personal guarantee by the defendant to construct self-storage facilities in Florida. The lender sued three Delaware DAPTs, contending that the defendant fraudulently transferred assets. The defendant claimed that the Delaware or Florida 4-year statute of limitations (SOL) should apply and not New York’s 6-year SOL. The court applied the 4-year Florida SOL and held that the plaintiffs’ fraudulent transfer claims were time-barred, finding that Florida and Delaware had more significant relationships than New York; Florida’s contacts included foreclosed real estate and business; Delaware contacts included Delaware trusts and Delaware trustees. The court further held that if New York had been deemed to have a more significant relationship, then Delaware’s “borrowing statute” (which states if a cause of action arises outside of Delaware, then either the applicable Delaware limitations period applies or that of the state where the cause of action arose, whichever is shorter) would apply, and thus, Delaware’s SOL would apply.

46. *In re Huber*, 201 B.R. 685 (Bankr. W.D. Wash. May 17, 2013). Additionally, an Alaska LLC (99% owned by the DAPT and 1% owned by the settlor’s son) held entities and real property located in Washington; the settlor’s son, based in Washington, was also the manager of the LLC. The case also featured fraud and bankruptcy issues and provides a useful lesson on how not to structure a DAPT to receive maximum situs protection and how not to administer a DAPT considering the substantial presence test of *Restatement (Second) of Conflict of Laws* Section 273.

47. *Ibid.*

48. *Ibid.*

49. Al W. King III, “The Uniform Voidable Transactions Act—Continue to Be Aware!” *Trusts & Estates* (September 2020).

50. See the “New York City Bar Association (City Bar) Report on Legislation,” which specifically provided commentary that it rejected the comments of the UVTA, https://s3.amazonaws.com/documents.nycbar.org/files/2007 UVTABillMemo_Commercial&Bankruptcy_FINAL_10.6.16.pdf.

51. George D. Karibjanian, Gerald J.J. Wehle and Robert L. Lancaster, “A Memo to the States—The UVTA Is Flawed ... So Fix It!!!” *LISI Estate Planning Newsletter* #367 (May 2, 2018).

52. Indiana Code 32-18-2-23.

53. Arkansas Act 1086, Section 2.

54. *See, for example*, S.D. Codified Laws Section 55-16-9; see also similarly exclusive jurisdiction statutes in some DAPT states such as Alaska (Alaska Stat. Section 34.40.110(k)), Delaware (12 Del. C. Section 3572), Nevada (Nev. Rev. Stat. Ann. Section 166.120) and South Dakota (S.D. Codified Laws Section 55-16-13).

55. King, *supra* note 40.

56. George D. Karibjanian, “Two DAPT States Adopt the UVTa—Smart Move or Falling for the Long Con?” www.wealthmanagement.com (April 11, 2017).

57. *In re Cleopatra Cameron Gift Trust*, 219 S.D. 35 (2019).

58. *Ibid.*

59. *See Cleopatra*, *supra* note 57.

60. Al W. King III, “Defend Against Attacks on DAPTs?” *Trusts & Estates* (October 2014), at p. 11. Creditors may argue that there was a fraudulent conveyance to the trust. For this claim to prevail, the creditor must prove that there was intent to hinder, delay or defraud a specific creditor. This argument, generally, is subject to a “clear and convincing” or “preponderance of the evidence” standard of proof, which varies depending on the DAPT state’s statute. There’s also a SOL for a fraudulent conveyance (usually two to four years), depending on state statute, after which time a cause of action or claim for relief with respect to a transfer of the settlor’s assets to a DAPT is extinguished, and the creditor may not be able to reach the assets. If the creditor is an existing creditor at the time the DAPT is established, that creditor may also have the period of time starting from when the creditor discovers or reasonably could have discovered the transfer to bring its claim (usually six months to a year), depending on state statute. Note that Nevada’s and South Dakota’s fraudulent conveyance periods are two years, and Alaska’s, Delaware’s, New Hampshire’s and Wyoming’s are four years. South Dakota and Nevada now have notice by publication statutes that begins the time at the publication of notice instead of when reasonably discovered.

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