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Domestic Asset Protection Trusts: A Debtor's Friend and Creditor's Foe

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DOMESTIC ASSET PROTECTION TRUSTS: A DEBTOR'S FRIEND AND CREDITOR'S FOE

ABSTRACT

In 1997, Alaska enacted the first law in the United States legalizing Domestic Asset Protection Trusts (DAPTs), also referred to as self-settled asset protection trusts, as valid legal entities. Under traditional trust law, a debtor cannot shield assets from creditors by placing them in a trust for his or her own benefit. Alaska's statute allowing DAPTs calls the traditional rule into question. This Note will examine use of DAPTs in the United States, including whether or not the recently amended Uniform Voidable Transaction Act would consider any transfer to a DAPT voidable per se, and discuss an approach that intends to prevent misuse of DAPTs to avoid liability.

INTRODUCTION

A trust establishes a legal fiduciary arrangement that allows a settlor—the person who creates a trust—to convey property to a trustee to hold for one or more beneficiaries.[1] A valid trust requires: "(1) intent by the settlor to create a trust; (2) ascertainable beneficiaries who can enforce the trust; and (3) specific property, the res, to be held in trust."[2] As a legal instrument and estate planning tool, the trust has had great success, attributable, at least in part, to its flexibility: given that the essence of the trust is the separation of legal ownership from beneficial ownership, the essential elements of a trust are sufficiently minimal to allow many uses.[3] Indeed, a trust settlor typically does not create a trust unless some obstacle—frequently a legal obstacle—makes it less practical and convenient for the settlor to use some other financial planning method to achieve his objectives.[4] Given the flexible uses to which a trust may be put, settlors have often used trusts to avoid otherwise applicable legal rules—for example, with respect to transmission of wealth between generations.[5]

In the mid-1980s, a number of offshore jurisdictions zeroed in on a new source of trust business: clients who wished to avoid the reach of creditors as opposed to taxing authorities.[6] The Cook Islands' International Trusts Act of 1984 "applies only to international trusts, and not to trusts created for the benefit of residents of the Cook Islands . . . ."[7] The statute renders

1. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, & ESTATES 385, 391 (10th ed. 2017).
2. *Id.* at 401 (emphasis omitted).
3. Stewart E. Sterk, *Asset Protection Trusts: Trust Laws Race to the Bottom*, 85 CORNELL L. REV. 1035, 1041 (1999).
4. *Id.*
5. *Id.*
6. *Id.* at 1048.
7. *Id.*

self-settled trusts fully enforceable and indicates that creditors will be unable to go after the settlor's interest in an international trust even if the settlor maintains the ability to terminate or make changes to the trust.[8] Thus, once a settlor's assets are transferred into a Cook Islands international trust, the settlor's creditors may not go after the settlor-beneficiary's interest in the trust.[9] Most significantly, the statute prevents creditors from claiming that a transfer into a Cook Islands international trust is a fraudulent conveyance.[10] According to the Cook Islands' International Trusts Act of 1984, even if a creditor proves that the settlor transferred assets into a Cook Islands trust *with the intent* to defraud his or her creditor, the creditor may only reach the trust assets if the settlor was insolvent at the time that the creditor's claim arose.[11]

In 1997, in a bid to attract out-of-state trust business, Alaska passed the first Domestic Asset Protection Trust law in the United States.[12] Since then, sixteen other states have enacted laws allowing the creation of Domestic Asset Protection Trusts ("DAPTs").[13] A DAPT, otherwise known as a self-settled spendthrift trust, "is an irrevocable trust established under the laws of one of the few jurisdictions that allow the settlor of the trust to be a discretionary beneficiary and yet still protect the trust assets from the settlor's creditors."[14] In other words, a DAPT is a trust created by an individual for his or her own benefit.[15] DAPTs have become a popular strategy—albeit one not sufficiently tested—for protecting one's assets

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8. *Id.* at 1048–49.
9. *Id.* at 1049.
10. *Id.*
11. *Id.* Even in the rare cases where a transfer to an international trust is deemed fraudulent, the Cook Islands' International Trusts Act of 1984 provides that the creditor must bring his or her fraudulent transfer claim within one year from the date of the fraudulent transfer. *Id.* at 1050. Consequently, under Cook Islands law, the transfers made by the settlor, while he or she is solvent, will not be voidable. *Id.* Additionally, the statute declares that "no Cook Islands court shall enforce or recognize a foreign judgment against a Cook Islands trust, or a settlor, trustee, or beneficiary of the trust, if the judgment is based on the application law inconsistent with the statute." *Id.*
12. Ashlea Ebeling, *Onshore Asset Protection with the Selfie Trust*, FORBES (July 6, 2016, 7:48 AM), https://www.forbes.com/sites/ashleaebeling/2016/07/06/onshore-asset-protection-with-the-selfie-trust/#5fb5d8a81be5.
13. Ashlea Ebeling, *Comparing Domestic Asset Protection Trust States*, FORBES (July 6, 2016, 6:01 AM), https://www.forbes.com/sites/ashleaebeling/2016/07/06/comparing-domestic-asset-protection-trust-states/#6331b40b59fd; *see also* Mark Merric, Daniel G. Worthington, Paul MacArthur & John E. Sullivan, *Best Situs for DAPTs in 2019*, WEALTH MGMT.COM (Dec. 13, 2018), https://www.wealthmanagement.com/estate-planning/best-situs-dapts-2019.
14. Steven J. Oshins, *The Domestic Asset Protection Trust: Combining It with the Double Strategy*, 27 PROB. & PROP. 22, 23 (2013) [hereinafter Oshins, *Combining It with the Double Strategy*].
15. Kellsie J. Nienhuser, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 WYO. L. REV. 551, 552 (2015).

from creditors in the United States.[16] It is common for states, like Alaska, to enact new statutes that create favorable legal environments to attract new business.[17] For example, states often compete for corporate charters by offering attractive governance structures.[18] Delaware also reduced protections available to shareholders and other interested parties in order to entice corporate managers to incorporate their respective companies in the state.[19]

Before the establishment of DAPTs in the United States, wealthy individuals in the United States utilized offshore trusts to hold and protect their assets.[20] The enactment of the Tax Reform Act of 1976 ("Tax Reform Act") in the United States eliminated most of the tax advantages for American settlors of offshore trusts.[21] In an effort to control and reduce the use of foreign trusts to avoid American income taxes, the Tax Reform Act provided that the Internal Revenue Service ("IRS") "would treat for income tax purposes the assets of most foreign trusts settled by Americans as the settlor's assets."[22] The Tax Reform Act thus prevented American citizens from avoiding taxation on their assets in these offshore trusts.[23]

For the most part, American courts view offshore protection trusts unfavorably.[24] In *Federal Trade Communication v. Affordable Media, LLC*, the Federal Trade Commission brought an action to recover fraud proceeds from alleged promoters of a scheme to market fraudulent investments to consumers.[25] After the promoters refused to comply with the preliminary injunction requiring repatriation of assets held outside of the United States in a Cook Islands trust, Judge Lloyd D. George, a district court judge for the District of Nevada, found the promoters in contempt of court.[26]

In *Affordable Media, LLC*, the Ninth Circuit claimed that "[t]he 'asset protection' aspect of these foreign trusts arises from the ability of people . . . to frustrate and impede the United States courts by moving their assets

16. Steven J. Oshins, *The Domestic Asset Protection Trust: Ranking the Jurisdiction*, 26 Prob. & Prop. 40, 40 (2012) [hereinafter Oshins, *Ranking the Jurisdiction*]; *see also* Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 VAND. L. REV. 1741, 1763–66 (2014).

17. *See* Sterk, *supra* note 3, at 1038.

18. *Id.*

19. *Id.*

20. Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel*, 45 DUQ. L. REV. 147, 152 (2007).

21. Sterk, *supra* note 3, at 1048.

22. *Id.*

23. *See id.* Despite the changes in how the offshore trust assets are taxed, the offshore trusts remain popular with some American settlors because financial institutions in these former British colonies have maintained the traditional British attitude toward banking secrecy. *Id.* Because of this, offshore trusts can be utilized by American settlors willing to engage in tax evasion; indeed, "[i]f American auditors cannot trace transactions between offshore banks and their clients, the offshore trust becomes an attractive way to launder money to avoid American tax obligations." *Id.*

24. *See* Ausness, *supra* note 20, at 182.

25. Fed. Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1228 (9th Cir. 1999).

26. *Id.* at 1231.

beyond those courts' jurisdictions."[27] The court then suggested it would hesitate to accept an impossibility defense to a contempt charge because of the nature of asset protection trusts.[28] According to the court, "[g]iven that these offshore trusts operate by means of frustrating domestic courts' jurisdiction, we are unsure that we would find that the [defendants'] inability to comply with the district court's order is a defense to a civil contempt charge."[29] The Ninth Circuit was ultimately unconvinced by the defendants' arguments that they could not comply with the district court's order.[30] The Ninth Circuit pointed to foreign laws (such as the Cook Islands' International Trusts Act of 1984) intended to disrupt domestic courts and foreign trustees acting in concert with domestic persons to thwart judicial processes in U.S. courts.[31] Indeed, the Ninth Circuit cautioned courts to be wary of "accepting a defendant's assertions that repatriation or other compliance with a court's order concerning a foreign trust is impossible."[32]

In 1997, Alaska and Delaware began competing with offshore locations for trust business by allowing asset protection trusts.[33] These states are not able to match the vast range of protections available in the Cook Islands and other offshore jurisdictions; however, they offer easier access to the trust's assets, reduced costs associated with trust creation, and fewer risks associated with political stability than some offshore locations.[34] These advantages attract trusts to DAPT states despite offering less asset protection than offshore trusts.[35]

A DAPT provides similar barriers to creditors without some of the problems associated with offshore trusts.[36] Traditionally, DAPTs do not shield the settlor or the beneficiary from claims of creditors.[37] However, the relatively new state statutes allowing DAPTs represent a shift from that traditional rule.[38]

In 2014, the National Conference of Commissioners on Uniform State Laws agreed to a set of amendments to the 1984 Uniform Fraudulent

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27. *Id.* at 1240.

28. Ausness, *supra* note 20, at 182. An impossibility defense is a criminal defense used occasionally when "a defendant's actions would not constitute a crime, even if they were carried out fully and exactly as he intended." Masika v. Commonwealth of Virginia, 757 S.E.2d 571, 573 (Va. App. 2014).

29. *Affordable Media, LLC*, 179 F.3d at 1240.

30. *See id.*

31. *Id.* at 1241.

32. *Id.*

33. Sterk, *supra* note 3, at 1051.

34. *Id.*

35. *See id.*

36. *See id.*

37. *See* Nienhuser, *supra* note 15, at 556.

38. *Id.* at 558.

Transfer Act (UFTA).[39] In addition to other changes, the amendments renamed the UFTA the "Uniform Voidable Transactions Act" (UVTA).[40] As of 2014, the UFTA had been adopted by forty-three states, the District of Columbia, and the U.S. Virgin Islands.[41] The impetus for the amendments to the UFTA was a desire to codify a choice of law rule for fraudulent or voidable transfers, resulting in lower litigation costs, particularly involving disputes over choice of law.[42] Additionally, there are four significant changes to the UFTA reflected in the UVTA:

> 1. A choice of law provision, requiring the voidable transaction law of the debtor's "location" to govern the voidable transaction claim;
>
> 2. The UVTA clarifies that the creditor's burden of proving intent to hinder, delay or defraud is by a "preponderance of evidence" as opposed to "clear and convincing evidence"—a standard used by some courts;
>
> 3. The UVTA identifies "series" LLCs and clarifies that transactions between a series and another series can be viewed as voidable transactions; and
>
> 4. The term fraudulent is replaced with "voidable," reflecting the fact that fraud (in its common law sense) is not a requirement for setting aside a transfer.[43]

The UVTA also includes an updated "Official Comments" section that clarifies the above changes and includes citations to updated case law.[44]

The legal doctrine of "'fraudulent conveyance' . . . defines the limits of a debtor's right to deal with its property [in relation to] its creditors."[45] This doctrine originated in Roman law, and English common law later borrowed from it.[46] In 1571, the English Statute of 13 Elizabeth established the rule for fraudulent conveyances followed today—and laid out in both the UFTA and the UVTA—which "render[] voidable any transfer of property by a debtor made with 'intent to hinder, delay, or defraud' creditors."[47] Because DAPTs provide barriers to creditors seeking access to debtors' assets, one

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39. Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Fraudulent Transfer Act*, 70 BUS. LAW. 777, 777 (2015).

40. *Id.*

41. *Id.* at 779 n.11. There are seven states that have not adopted the UFTA or its successor, the UVTA. *Id.* New York and Maryland retained the Uniform Fraudulent Conveyance Act (the precursor to the UFTA), whereas Alaska, Kentucky, Louisiana, South Carolina, and Virginia have "idiosyncratic" laws concerning fraudulent transfers. *Id.*

42. *Id.* at 780.

43. Mark D. Hildreth & David J. Slenn, *The Uniform Voidable Transactions Act in a Nutshell*, LEXOLOGY (Jul. 27, 2017), https://www.lexology.com/library/detail.aspx?g=8d9b04d9-03ed-4903-89c2-1dd78ce9c668.

44. *Id.*

45. Kettering, *supra* note 39, at 778.

46. *Id.*

47. *Id.*; *see also* UNIF. FRAUDULENT TRANSFER ACT § 4(A)(1) (1984); UNIF. VOIDABLE TRANSACTIONS ACT § 4(A)(1) (2014).

must consider whether transfers to DAPTs are fraudulent since the barriers they create can serve to "hinder, delay, or defraud" creditors.

Part I of this Note provides a brief overview of some basic trust law concepts. Part II discusses DAPTs, their purposes and how their treatment differs within the seventeen states that have enacted statutes allowing them. Part III addresses fraudulent transfer law, first in the 1984 UFTA and, more recently, in the UVTA introduced in 2014, and how these statutes handle DAPTs. Part IV examines and weighs public policy arguments for and against prohibiting the use of DAPTs, and different issues of liability introduced by DAPTs. Finally, Part V discusses solutions addressing the public policy concerns surrounding DAPTs, specifically issues surrounding corporate irresponsibility and piercing the corporate veil. Part V also suggests how a combination of amending DAPT statutes and adopting the UVTA will disincentivize corporate officers from engaging in misbehavior and mitigate the public policy concerns.

I. TRUST LAW CONCEPTS, DEFINITIONS, AND BACKGROUND INFORMATION

A trust is a property management arrangement commonly used in estate planning.[48] Specifically, a trust is an "asset-management device that divides the burdens and benefits of ownership of property between a trustee, on the one hand, and beneficiaries, on the other."[49] This division of ownership interests between the trustee and the beneficiaries generates a fiduciary relationship between them.[50] There are several elements required when creating a trust.[51] A trust requires a settlor, a trustee, and a beneficiary; three different persons, however, are not necessary for a trust.[52] A settlor is "someone who makes a settlement of property; especially, one who sets up a trust."[53] A beneficiary is someone who is "designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.), or to receive something as a result of a legal arrangement or instrument."[54] A trustee is "someone who stands in a fiduciary or confidential relation to another; especially one who, having legal title to property, holds it in trust

48. Patrick M. Wilson, *Protecting Investors from their Investments: Encouraging States to Make Assets in Domestic Asset Protection Trusts Available to Creditors who have Successfully Pierced the Corporate Veil*, 44 NEW ENG. L. REV. 791, 796 (2010).

49. Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts,* 53 HASTINGS L.J. 287, 290 (2002).

50. *Id.*

51. Wilson, *supra* note 48, at 796.

52. *Id.* at 796 n.18.

53. *Settlor,* BLACK'S LAW DICTIONARY (10th ed. 2014). A settlor is sometimes also referred to as a "grantor." *Id.*

54. *Beneficiary,* BLACK'S LAW DICTIONARY (10th ed. 2014).

for the benefit of another and owes a fiduciary duty to that beneficiary."[55] Typically,

> a trustee's duties are to convert to cash all debts and securities that are not qualified legal investments, to reinvest the cash in proper securities, to protect and preserve the trust property, and to ensure that it is employed solely for the beneficiary, in accordance with the directions contained in the trust instrument.[56]

When an individual establishes a trust, he (the property owner) transfers his assets to a trustee.[57] This transfer is typically coupled with "a written trust instrument that sets forth the terms of the trust, including both the dispositive provisions (i.e., the instructions for how the trustee is to dispose of the assets) and the administrative provisions (which specify most powers and obligations of the trustee in managing the assets)."[58] The terms of the trust instrument outline the rights and obligations of the trustee and the beneficiaries based on principles developed through decisions by courts of equity defining and enforcing the interests of trust beneficiaries.[59] Trust law may also be altered by state statute.[60] Several states have enacted statutes allowing DAPTs, which allow the settlor to be a beneficiary of his or her own trust, a shift from traditional trust law.[61]

II. DOMESTIC ASSET PROTECTION TRUSTS IN THE UNITED STATES

Historically, prior to the enactment of state statutes permitting DAPTs, courts found DAPTs inherently fraudulent because they allow debtors to protect themselves and their assets from the claims of creditors.[62] Therefore, for the most part, courts have found DAPTs to be unenforceable; consequently, once a court finds a spendthrift provision unenforceable, creditors are able obtain judgments from the trust assets.[63]

Recently, however, a number of states enacted statutes that allow settlors to legally shield assets from creditors in DAPTs.[64] There are currently seventeen states in the United States that have enacted such statutes.[65]

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55. *Trustee,* BLACK'S LAW DICTIONARY (10th ed. 2014).
56. *Id.*
57. Danforth, *supra* note 49, at 290.
58. *Id.*
59. *Id.*
60. *See id.* at 291.
61. Wilson, *supra* note 48, at 798.
62. Nienhuser, *supra* note 15, at 552.
63. *Id.*
64. *Id.*
65. Ebeling, *supra* note 12. Alaska and Delaware legalized DAPTs in 1997; Rhode Island and Nevada legalized DAPTs in 1999; Utah legalized DAPTs in 2003; Oklahoma legalized DAPTs in 2004; South Dakota and Missouri legalized DAPTs in 2005; Wyoming and Tennessee legalized

The Alaska statute allowing DAPTs—the first in the United States—became effective April 2, 1997.[66] Alaska's statute allows "a trust settlor to include an enforceable restriction on the power of creditors to reach the settlor's discretionary interest in the trust principal or income," so long as the following four criteria are met: "(1) the transfer into the trust was not fraudulent; (2) the settlor did not reserve a right to revoke; (3) the trust instrument does not require any distribution of the trust income or principal to the settlor; and (4) the settlor is not, at the time of the transfer, in default by thirty or more days on payments due under a child support judgment or order."[67] This means that if a settlor establishes a discretionary trust where the trustee has ultimate control over distribution of all or part of the income to the settlor, the settlor's creditors may not reach the trust principal unless that transfer into the trust was fraudulent.[68] Furthermore, Alaska's fraudulent conveyance law is unfriendly to creditors.[69] Alaska has not adopted the UVTA, the UFTA, or the UFTA's predecessor, the Uniform Fraudulent Conveyance Act ("UFCA").[70] In fact, the Alaska fraudulent conveyance statute requires proof of actual fraud and does not include any conception of constructive fraud.[71] Under the Alaska DAPT statute, a creditor is unable to make "any fraudulent transfer claim after four years from the time of the transfer, even if the creditor's claim did not arise until after the transfer."[72] Therefore, if a settlor establishes an Alaska DAPT, "anticipating and seeking to avoid possible future liability," the settlor will be successful in thwarting his creditors "so long as the liability does not arise—or the creditor does not [bring a claim]—within four years after the settlor makes the transfer of property into the trust."[73]

Alaska became an even more attractive situs (or place of administration of a trust) to trust settlors following the 1998 amendments to its DAPT statute.[74] These amendments allowed the settlor of an existing trust established in another state or foreign jurisdiction to change the trust's situs to Alaska.[75] The legislature also "made it clear that a fraudulent transfer into an Alaska trust would not be set aside in toto, but 'only to the extent

DAPTs in 2007; New Hampshire legalized DAPTs in 2009; Hawaii legalized DAPTs in 2010; Virginia legalized DAPTs in 2012; Ohio legalized DAPTs in 2013; Mississippi legalized DAPTs in 2014; and West Virginia legalized DAPTs in 2016. *Id.*

66. Randall J. Gingiss, *Putting a Stop to Asset Protection Trusts*, 51 BAYLOR L. REV. 987, 1008 (1999).

67. Sterk, *supra* note 3, at 1051.

68. *Id.* at 1051–52.

69. *Id.* at 1052.

70. *Id.*

71. *Id. see infra* note 107–120 and accompanying text.

72. *Id.*

73. *Id.*

74. *Id.* at 1053.

75. *Id.*

necessary to satisfy the settlor's debt to the creditor or other person at whose instance the trust or property transfer is voided or set aside.'"[76]

Each jurisdiction that allows DAPTs has a statute of limitations period that determines how long is necessary between the date of transfer to the DAPT and the date on which the transferred asset will be protected from the settlor's creditors.[77] The statute of limitations differs for preexisting creditors versus non-preexisting creditors.[78] In Utah, for example, there is no statute of limitations for a future creditor.[79] In Nevada, on the other hand, the statute of limitations for a future creditor is two years.[80] Indeed, all states that allow DAPTs, except for Nevada, have certain "exception creditor" statutes that allow specific classes of creditors to access the trust assets even though most creditors would normally be barred by statute.[81] Exception creditors might include divorcing spouses or a child support creditor.[82]

Steven J. Oshins, a Nevada practitioner who frequently utilizes DAPTs for his clients, ranks Nevada as the DAPT jurisdiction most favorable to debtors.[83] Nevada has a short statute of limitations period and does not include any exception creditors and thus, no special classes of creditors that can pierce through the trust.[84]

While viewed as a favorable tool for debtors, DAPTs may impose exorbitant expenses upon a creditor who is attempting to access a debtor's DAPT assets under fraudulent transfer law or general trust law.[85] An asset protection plan is considered successful if it either "(1) causes the potential plaintiff to avoid filing a lawsuit altogether or if it (2) causes the potential plaintiff to settle the dispute for less money than the amount that would have been owed on the debt."[86] Nevada is noteworthy in that unlike most other DAPT jurisdictions, Nevada does not exempt divorcing spouses from the protections of the DAPT.[87]

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76. *Id.*

77. Oshins, *Combining It with the Double Strategy*, *supra* note 14, at 23.

78. Oshins, *Ranking the Jurisdiction*, *supra* note 16, at 40.

79. Steven J. Oshins, *8th Annual Domestic Asset Protection Trust State Rankings Chart* (Apr. 2017), https://docs.wixstatic.com/ugd/b211fb_27c14ad60a414a2986e667d0fcd79049.pdf. This chart, created by Steven J. Oshins, a Las Vegas-based DAPT lawyer, ranks the states that allow DAPTs from most debtor-friendly (Nevada) to least debtor-friendly (Utah). *Id.* Note that Oklahoma, Virginia, and West Virginia are not ranked. *Id.*

80. *Id.*

81. Oshins, *Combining It with the Double Strategy*, *supra* note 14, at 23.

82. *Id.*

83. Oshins, *Ranking the Jurisdiction*, *supra* note 16, at 41.

84. *Id.*

85. *See* David J. Cook, *Hitting Bottom in 17 States and the Suppression of Liability*, 43 OHIO N.U. L. REV. 277, 279 (2017).

86. Oshins, *supra* note 9, at 23.

87. *Id.*

III. FRAUDULENT TRANSFER LAW AND TRANSFERS OF ASSETS TO TRUSTS

Some scholars and practitioners compare asset protection planning to tax planning: "To do tax planning properly and legally, it must be done within the rules set forth in the tax code and tax regulations. In asset protection planning, the parallel rules are, in essence, the laws of fraudulent transfer."[88] Thus, one cannot discuss DAPTs and other asset protection planning devices without considering how they relate to the law of fraudulent transfers.

In the United States, the asset protection characteristics of DAPTs were not available to trust settlors who were also beneficiaries of the trust until 1997.[89] This rule originates from a fifteenth century English statute[90] which declared that "all deeds of gift and goods and chattels made or to be made [in] trust, to the use of that person or persons that made the same deed of gift, be void and of none effect."[91] The spirit of this rule was later encapsulated in the UFTA and, more recently, UVTA.[92]

One of the key reasons for states adopting the UFTA was to make state law conform with the Bankruptcy Reform Act's changes in federal bankruptcy fraudulent transfer law.[93] The purpose of the UFTA is to "protect unsecured and undersecured creditors from the effects of debtor transfers designed to frustrate creditors' efforts to collect on debts."[94]

Under the UFTA, a creditor may "reach a settlor's beneficial interest in a trust even if the settlor did not intend to defraud creditors with his initial transfer into the trust."[95] Scholar Stewart Sterk provides the following example:

> Suppose, however, the settlor creates a trust in which she disguises her beneficial interest. Imagine, for instance, an irrevocable trust in which the settlor declares herself trustee, retains discretion to make income payments among her three children, and reserves the power to appoint the principal from among her children at the time of her death. In this case, the legal limitations on self-settled trusts would not apply, because the settlor has not retained an enforceable beneficial interest in the trust. Moreover, the

88. Duncan E. Osborne & John A. Terrill, II, *Fundamentals of Asset Protection Planning*, 31 ACTEC J. 319, 321 (2006).

89. Danforth, *supra* note 49, at 292.

90. *Id.* at 292–93.

91. *Id.* (citing Fraudulent Deed of Gifts Act of 1487, 3 Hen. 7, c. 4 (1487)).

92. *See generally* UNIF. FRAUDULENT TRANSFER ACT (1984); UNIF. VOIDABLE TRANSACTIONS ACT (2014).

93. *See* John E. Sullivan, III, *Future Creditors and Fraudulent Transfers: When a Claimant Doesn't have a Claim, When a Transfer Isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 DEL. J. CORP. L. 955, 960 (1997).

94. *Id.* at 961.

95. Sterk, *supra* note 3, at 1044.

> settlor's creditors would not be entitled to reach the children's interests. On the other hand, the settlor could use her power to allocate income and appoint the principal to assure that her children are attentive to her needs and desires. Fraudulent transfer law, however, may enable the settlor's creditors to invalidate her transfer to the trust.[96]

Section 4 of the UFTA, "Transfers Fraudulent as to Present and Future Creditors," reads:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor[.][97]

This language highlights the tension between asset protection planning and the UFTA.[98] Indeed, if the UFTA's terms are to be interpreted both literally and broadly, then "asset protection planning is nothing but an illicit attempt to defraud creditors."[99] Accordingly, a transfer may "be fraudulent as to a creditor with no claim outstanding against the transferor at the time of the transfer."[100] "Both the statutory language and history of the UFTA support the view that a transfer can be fraudulent even if the transferor had no creditors at the time of the transfer."[101] As a result, if "a creditor can prove that the settlor transferred property into trust with the intent to defraud some present or future creditor, any creditor—even one whose claim had not arisen, and was not anticipated, at the time the transfer was made—may set aside the transfer [as fraudulent]."[102] Transferors, however, are not obligated to account for future debts that are not reasonably foreseeable—they must only take into account reasonably foreseeable future liabilities.[103] Passage of time, notice to prospective creditors, and other concepts limit the scope of Section 4(a) of the UFTA and its availability to future creditors.[104]

The UFTA addresses two types of fraud, referred to as "actual" and "constructive" fraud.[105] In the case of actual fraud, the only relevant factor is the transferor's intent at the time of the transfer.[106] The UFTA allows the

96. *Id.*
97. UNIF. FRAUDULENT TRANSFER ACT § 4(A) (1984).
98. *See* Sullivan, III, *supra* note 93, at 957.
99. *Id.*
100. Sterk, *supra* note 3, at 1045.
101. *Id.* at 1045–46.
102. *Id.* at 1046.
103. *See* Sullivan, III, *supra* note 93, at 958.
104. *Id.*
105. *Id.* at 962–63.
106. *Id.* at 963.

fact finder to consider a range of factors referred to as "badges of fraud" to prove actual fraud.[107] The "badges of fraud" include whether:

1) the transfer or obligation was to an insider;

2) the debtor retained possession or control of the property transferred after the transfer;

3) the transfer or obligation was disclosed or concealed;

4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

5) the transfer was of substantially all the debtor's assets;

6) the debtor absconded;

7) the debtor removed or concealed assets;

8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[108]

These badges of fraud provide circumstantial evidence from which the fact finder may infer fraudulent intent.[109] Courts permit these logical inferences because of the difficulty involved in proving fraudulent intent.[110] Since defendants rarely admit fraudulent intent and often only a defendant knows his own motivation at the time of a transfer, it is unlikely that a plaintiff will discover any direct proof of bad motives.[111] Accordingly, the law permits "the badges [of fraud] to act as a substitute for direct proof of intent and allows, but does not require, the fact finder [to infer] bad intent from them."[112] It is important to note that no single badge of fraud establishes a presumption of bad intent; any badge, however, may contribute to proving fraudulent intent.[113] Consequently, even the most damning badge of fraud—that is, a transfer made during the pendency of a lawsuit—is frequently insufficient to prove fraudulent intent without

107. *Id.* at 968.
108. UNIF. FRAUDULENT TRANSFER ACT § 4(B)(1)–(11) (1984).
109. *See* Sullivan, III, *supra* note 93, at 969–70.
110. *Id.* at 970.
111. *Id.*
112. *Id.*
113. *Id.* at 971.

additional badges of fraud.[114] Additionally, the law requires the fact finder to consider any evidence negating the defendant's fraudulent intent.[115]

Constructive fraud, on the other hand, focuses on economic effect and does not consider intent.[116] Instead, to prove constructive fraud, the UFTA requires creditors to prove that the debtor transferred an asset or incurred a debt "without receiving a reasonably equivalent value in exchange for the transfer or obligation"[117] and the debtor "was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction [; or] intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due."[118]

The language of Section 4(a) of the UVTA is nearly identical to that of the UFTA; the UVTA simply substitutes the word "voidable" for "fraudulent."[119] The Official Comments for Section 4 of the UVTA are more comprehensive than those of the UFTA. Official Comment 2 to Section 4 of the UVTA reads:

> Section 4, unlike § 5, protects creditors of a debtor whose claims arise after as well as before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no requirement in § 4(a)(1) that the intent referred to be directed at a creditor existing or identified at the time of transfer or incurrence. For example, promptly after the invention in Pennsylvania of the spendthrift trust, the assets and beneficial interest of which are immune from attachment by the beneficiary's creditors, courts held that a debtor's establishment of a spendthrift trust for the debtor's own benefit is a voidable transfer under the Statute of 13 Elizabeth, without regard to whether the transaction is directed at an existing or identified creditor . . . Likewise, for centuries § 4(a)(1) and its predecessors have been employed to invalidate nonpossessory property interests that are thought to be potentially deceptive, without regard to whether the deception is directed at an existing or identified creditor . . . Section 4(a)(1) has the meaning elaborated in the preceding paragraph, but it is of course possible that a jurisdiction in which this Act is in force might enact other legislation that modifies the results of the particular examples given to illustrate that meaning. For example, some states have enacted legislation authorizing the establishment and funding of self-

114. *Id.*

115. *Id.*

116. *Id.* at 965.

117. UNIF. FRAUDULENT TRANSFER ACT § 4(A)(2) (1984).

118. *Id.*; *see also* Sullivan, III, *supra* note 93, at 965.

119. Section 4(a)(1) of the UVTA reads: "[a] transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor[']s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]" UNIF. VOIDABLE TRANSACTIONS ACT § 4(A)(1) (2014).

> settled spendthrift trusts, subject to specified conditions. In such a state, such legislation will supersede the historical interpretation referred to in the preceding paragraph, either expressly or by necessary implication, with respect to allowed transfers to such a statutorily-validated trust.[120]

Before 1997, when Alaska enacted the first statute validating DAPTs, American courts universally held transfers to such trusts as ineffective against creditors.[121] Indeed, black letter law considers a transfer to a self-settled spendthrift trust "repugnant to fraudulent transfer law."[122]

However, Kenneth Kettering, the Reporter for the Drafting Committee on Amendments to the Uniform Voidable Transactions Act, explains that the comments are "carefully worded to recognize that it is not necessarily the case that all courts in all states will always follow that historical interpretation."[123] Comment 8 to Section 4 of the UVTA addresses the jurisdictional issues that arise with fraudulent transfer law and the establishment of DAPTs.[124] This comment directly addresses jurisdictions that allow DAPTs and how courts might handle transfers made to those DAPTs.[125] Additionally, "the original motivation for the 2014 amendments was to codify a choice of law rule for voidable transfers"; the amendments address this by adding a new Section 10 in the UVTA.[126] Neither the UFTA nor its predecessor, the UFCA, mention choice of law.[127] As a result, choice of law issues concerning claims brought under the UFTA and UFCA were

120. UNIF. VOIDABLE TRANSACTIONS ACT § 4 cmt. 2 (2014).

121. Kenneth C. Kettering, *The Comments to the Uniform Voidable Transactions Act Relating to Self-Settled Spendthrift Trusts are Correct*, 42 Ests., Gifts & Trs. J. 1, 3 (2017).

122. *Id.* at 4.

123. *Id.* at 5.

124. Comment 8 to Section 4 of the UVTA reads:

Because the laws of different jurisdictions differ in their tolerance of particular creditor-thwarting devices, choice of law considerations may be important in interpreting § 4(a)(1) as in force in a given jurisdiction. For example, as noted in Comment 2, the language of § 4(a)(1) historically has been interpreted to render voidable a transfer to a self-settled spendthrift trust. Suppose that jurisdiction X, in which this Act is in force, also has in force a statute permitting an individual to establish a self-settled spendthrift trust and transfer assets thereto, subject to stated conditions. If an individual Debtor whose principal residence is in X establishes such a trust and transfers assets thereto, then under § 10 of this Act the voidable transfer law of X applies to that transfer. That transfer cannot be considered voidable in itself under § 4(a)(1) as in force in X, for the legislature of X, having authorized the establishment of such trusts, must have expected them to be used. (Other facts might still render the transfer voidable under X's enactment of § 4(a)(1).) By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y.

UNIF. VOIDABLE TRANSACTIONS ACT § 4 cmt. 8 (2014).

125. *See id.*

126. Kettering, *supra* note 39, at 794.

127. *Id.* Kettering argues that the reason why the UFTA did not contain a choice of law rule was "mere inertia." *Id.* at 796.

addressed by common law.[128] The motivation behind establishing a statutory rule for choice of law is that voidable transfer law has become an important concern for lawyers structuring transactions for their clients.[129] The inability to predict which jurisdiction's voidable transfer law will apply to a transaction added to the cost of transactions and the costs associated with litigation.[130]

Other practitioners and advocates for the use of asset protection trusts in estate planning argue that all of the Official Comments to the UVTA should be deleted and replaced with language "that reflects the actual state of the law."[131] The comments state that a transfer to a DAPT is a voidable transfer per se, and, therefore, an individual who does not live in a state that allows DAPTs "cannot protect assets from even a mere potential future (and unknown) creditor by creating a [DAPT] in a state that recognizes [DAPTs]."[132] Critics argue that the comments are "erroneous and do not in any way reflect the actual state of the law in this regard" and that "states considering adopting the UVTA should delete and disavow the comments and replace them with language that reflects the actual state of the law."[133] They attribute the flawed comments to the Reporter's personal feelings about DAPTs: "[r]egrettably, the Reporter's comments about [DAPTs] appear to reflect his individual disapproval of these vehicles and, perhaps, on that basis, seriously misstate the law."[134]

A recently published article responds to such criticism and argues that the Official Comments to the UVTA "merely point out that, for more than 150 years, courts have unanimously held that such a transfer [to a DAPT] is not consistent with fraudulent transfer law."[135] The article further explains that "legislatures do not enact comments to a uniform act, and courts are not bound by them."[136] Instead, these comments "will state the drafters' purposes in choosing particular statutory language, and judges find the comments instructive when interpreting such new language."[137] Most importantly, the basic rule of the UFTA and UVTA is not newly drafted and its language has not changed for almost 500 years; the basic rule has "declared voidable any transfer of property by a debtor made with 'intent to

128. *Id.* at 794.
129. *Id.* at 795.
130. *Id.*
131. George D. Karibjanian, Richard W. Nenno, & Daniel S. Rubin, *The Uniform Voidable Transactions Act: Why Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States are not Voidable Transfers* Per Se, BLOOMBERG BNA: TAX MGMT. EST., GIFTS & TR. J. 2 (2017), https://www.mosessinger.com/uploads/17tmeg4revisedKaribjanian-Nenno-Rubin.pdf.
132. *Id.*
133. *Id.*
134. *Id.* at 4.
135. *Id.* at 1–2.
136. *Id.* at 2.
137. *Id.*

hinder, delay, or defraud' any creditor of the debtor."[138] Indeed, the comments simply compile cases that have applied that approximately 500-year-old language.[139]

IV. PUBLIC POLICY ARGUMENTS AGAINST AND IN FAVOR OF DAPTS

There are significant incentives that favor allowing DAPTs.[140] For example, the United States benefits economically from state statutes allowing DAPTs because they bring trust business to local banks, lawyers, and trust companies.[141] As a multi-billion-dollar-a-year business, DAPTs can lead to additional revenue for local banks, trust companies, and estate planners.[142] DAPTs' popularity is attributed to the fact that trusts provide beneficiaries with more privacy and autonomy than other estate planning and wealth management strategies.[143] The state statutes allowing DAPTs also encourage significant domestic investment and render offshore trusts unnecessary.[144] Some scholars, however, argue that there is no consistent evidence that allowing DAPTs boosts a state's trust business.[145]

Another argument for DAPTs indicates that the "traditional rule against [DAPTs] favors inherited wealth over earned wealth."[146] For example, most states permit wealthy individuals to create a spendthrift trust that is designed to benefit another individual—for example, a child or grandchild.[147] In doing so, the settlor prophylactically protects his wealth from the younger generation's creditors.[148] Conversely, individuals who become wealthy on their own—*i.e.*, not through inheritance or a spendthrift trust—are unable to similarly protect themselves from creditors.[149] By allowing self-settled spendthrift trusts, states eliminate the disparity between protections afforded to those persons who acquire wealth and those who inherit it.[150]

DAPTs also allow professionals and small business owners to participate in socially beneficial activities without a stifling concern of

138. *Id.*
139. *Id.*
140. *See* Nienhuser, *supra* note 15, at 564.
141. *Id.*
142. Nicole F. Stowell, Erik Johanson & Carl Pacini, *The Use of Wills and Asset Protection Trusts in Fraud and Other Financial Crimes*, 65 DRAKE L. REV. 509, 526 (2017).
143. *Id.* at 527.
144. Nienhuser, *supra* note 15, at 564.
145. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 411 (2005).
146. *See* Ausness, *supra* note 20, at 187.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

being bankrupted due to massive civil liability.[151] Unlike large businesses that can protect themselves from excessive liability, "individuals like physicians, lawyers, stockbrokers, financial planners, architects, farmers, and small business owners" do not enjoy the same protections.[152] Additionally, juries are increasingly willing to award large punitive damages; the prospect of exposure to enormous damage awards effectively deters individuals "from engaging in socially useful, but risky, activities."[153]

On the other hand, DAPTs have received significant criticism.[154] Opponents argue that DAPTs "give unexampled opportunity to unscrupulous persons to shelter their property before engaging in speculative business enterprises . . . ."[155] Indeed, DAPTs encourage individuals to engage in careless or questionable behavior with the comfort that they are protected from losing their shielded assets.[156] While spendthrift trusts were originally utilized to protect the assets of fiscally irresponsible beneficiaries and to keep fortunes within the family, the use of these trusts has expanded into a protective device against creditors of responsible beneficiaries.[157] DAPTs take this one step further because they shield both the settlor and the settlor-as-beneficiary from liability.

Additionally, settlors stand to benefit from DAPTs because they may permit them to shield their trust property from involuntary creditors like tort claimants.[158] Thus, DAPTs can act as "a safeguard against financial uncertainties and unanticipated litigation."[159] For those who view the United States litigation system as pro-plaintiff, frequently providing plaintiffs with "more than their fair share when it comes monetary judgments," DAPTs may effectively protect their settlors from meritless claims and frivolous litigation.[160] With the view that wealthy or "deep pocket" defendants risk becoming frequent targets of tort litigation, DAPTs

151. *Id.*
152. *Id.* at 187–88.
153. *Id.* at 188.
154. Nienhuser, *supra* note 15, at 561.
155. Ausness, *supra* note 20, at 184.
156. *See* Kevin R. McKinnis, *The Good, the Bad, and a New Kind of Prenup: An Analysis of the Ohio Legacy Trust Act and What Asset Protection Trusts Will Mean for Ohio*, 61 CLEV. ST. L. REV. 1105, 1125 (2013).
157. Susanna C. Brennan, *Changes in Climate: The Movement of Asset Protection Trusts from International to Domestic Shores and its Effect on Creditors' Rights*, 79 OR. L. REV. 755, 761 (2000).
158. Nienhuser, *supra* note 15, at 563.
159. *Id.* (citing Susanna C. Brennan, *Changes in Climate: The Movement of Asset Protection Trusts from International to Domestic Shores and its Effect on Creditor's Rights*, 79 OR. L. REV. 755, 765 (2000) ("The growing popularity of asset protection and its supporting industry most likely occurred in response to economic and social factors including the increase in litigation and legal liability.").
160. *Id.*

serve less as a vehicle to avoid debts and more as a shield for wealthy individuals who fear "losing everything they have spent years earning."[161]

The approach described above is "liability suppression, front and center."[162] The suggestion that "a person should not pay an unjust bill [embraces a position] of civil and legal disorder."[163] However, a response to this argument explains:

> To many Americans, parking tickets, taxes and cell phone bills are "unjust," but they are nonetheless paid timely. If [author] worries about "deep pockets," this worry is unfounded. The inference is that "deep pockets" attract shakedown lawsuits. The other inference that some "tort litigation" is meritless which presumptively might include all mass torts . . . . The uninsured class of claims is the intentional torts, and that includes sexual assaults, hate crimes, domestic violence and mayhem, murder, battery, toxic torts, and the endless lists of financial injuries. If the property of the perpetrator is immunized, these wrongdoers further exacerbate the anguish, pain, and permanent losses suffered by the victims of uninsured torts who are cheated out of any recompense, including a sense of justice in the collection of the judgment. DAPTs suppress liability by rendering the defendant near "judgment proof," precluding potential enforcement, and deterring counsel from accepting an uncollectible case. [Author] suggests that plaintiffs bring "meritless claims" which threaten "individuals [with] losing everything they have spent years earning.[164]

Furthermore, "DAPTs provide a closely aligned method to immunize the assets of a debtor from the enforcement of a civil judgment and therefore suppress the burgeoning liability footprint in the face of tort claimants who face terrible barriers seeking compensation for grievous losses."[165] Similar to a tort claimant, many worker's compensation carriers, first party insurers, medical, health care, and rehabilitation providers file claims for compensation that arise from an accident, personal injury settlement or judgments for their advances.[166]

Creditors may take on enormous legal expenses when seeking to access their debtors' assets under the UVTA or general trust law.[167] Moreover, "DAPTs are quintessential asset protection schemes that seek to, and even succeed in, thwarting an involuntary creditor from access to the assets of the recalcitrant debtor to satisfy a large tort judgment."[168] Indeed, states allowing DAPTs address the increased demand for trust business and incoming flow of capital that are attractive to the business and trust

161. *Id.* at 563–64.
162. Cook, *supra* note 85, at 280.
163. *Id.* at 281.
164. *Id.*
165. Cook, *supra* note 85, at 282.
166. *Id.*
167. *Id.* at 279.
168. *Id.*

communities.[169] "Suppression of liability, by statute no less, is the marketing ploy that the liability districts peddle for the benefit of their 'trust business.'"[170]

Other critics argue that DAPTs are "inherently fraudulent."[171] If DAPTs were enforceable, it would provide ample "opportunity to unscrupulous persons to shelter their property before engaging in speculative business enterprises, to mislead creditors into thinking that the settlor still owned the property since he appeared to be receiving its income, and thereby work a gross fraud on creditors who might place reliance on the former prosperity and financial stability of the debtor."[172]

Finally, although a DAPT settlor's assets are protected from creditors, the trustee of the DAPT may be at risk for suit in their personal capacity as a trustee.[173] Currently, it is unclear whether courts will "respect the asset protection objective or, if they do, leave trustees holding the proverbial bag."[174] Every American jurisdiction except for Mississippi and West Virginia has adopted either the Uniform Trust Code or the Uniform Probate Code (or other statutes like them); these uniform laws "separate the trust entity from the trustee, severing the liability of the trust from the liability of the trustee, and allowing suit against the trustee in its representative capacity as opposed to its personal capacity."[175] The Alaska, Delaware, South Dakota, and Utah DAPT provisions prohibit actions against the trustee of valid asset protection trusts.[176]

The Uniform Probate Code or Uniform Trust Code do not require a claimant to proceed against a trustee in his representative capacity, but allows a claimant to do so.[177] This does, however, create a potential risk for trustees of DAPTs in jurisdictions that do not provide specific trustee protection: a creditor action brought against the trustee in its personal capacity may result in the protection of assets, but the risk is that the trustee is not protected and will be held personally liable for the claim with no ability to recover from the trust.[178]

169. *Id.* at 288.
170. *Id.* at 288–89.
171. Ausness, *supra* note 20, at 184.
172. *Id.* (citing GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 40 (6th ed. 1987)).
173. Erin C. V. Bailey, *Asset Protection Trusts Protect the Assets – But What About the Trustees?*, 21 PROB. & PROP. 58, 58 (2007).
174. *Id.*
175. *Id.* at 59 (noting that "[i]n these states, trustees are only held personally liable in tort and contract actions if the trustee is personally at fault in a tort action or the trustee failed to disclose that it was acting in its representative capacity in a contract.").
176. *Id.*
177. *Id.*
178. *Id.* at 58–59.

V. DAPTS AND PIERCING THE CORPORATE VEIL

A compelling approach to curbing corporate malfeasance and liability avoidance using DAPTs is to amend DAPT statutes to permit the assets contained within a corporate officer's DAPT to be accessible to victims of corporate irresponsibility who are able to successfully pierce the corporate veil of the officer's corporation.[179] Corporate irresponsibility and malfeasance has resulted in "devastating financial losses" for many Americans.[180] This approach, by allowing victims [of corporate malfeasance] to access corporate officers' assets located within DAPTs, may have the added benefit of deterring fraudulent behavior by corporate officers.[181]

A plaintiff must pierce the corporate veil in order to place individual liability on corporate officers, shareholders, and directors for corporate actions.[182] However, "[p]iercing the corporate veil is not favored and in general, courts are reluctant to do so."[183] In order to pierce the corporate veil, plaintiffs must establish that "(1) 'the owner exercised complete domination over the corporation with respect to the transaction at issue,' such that it is an alter ego of the corporation, and (2) 'such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.'"[184] A plaintiff may only pierce the corporate veil after showing that a corporation's owner or corporate officer has engaged in fraud or is using the corporation as an instrument or alter ego.[185] Plaintiffs may also pierce the corporate veil either "when the unity of interest and ownership that separates the corporation from corporate individuals is no longer present . . . [or] when adhering to the falsity of that separate existence between the corporation and individuals would promote injustice."[186]

Amending state DAPT statutes to add a section "that allows victims, who have successfully pierced the corporate veil of a settlor's corporation, to access the trust assets to satisfy their claims" may both disincentivize officer malfeasance and provide justice for victims of corporate fraud.[187] Additionally, because of the high bar required to pierce the corporate

179. Wilson, *supra* note 48, at 792.

180. *Id.* at 794. Wilson discusses Bernie Madoff, a prominent securities trader whose corporate misdeeds resulted in investors' losses in excess of $50 billion. Victims of Madoff's Ponzi scheme only had access to approximately $1 billion worth of Madoff's assets for their recovery which illustrates the financial devastation experienced by victims of corporate malfeasance. *See id.*

181. *Id.* at 795.

182. *Id.* at 800.

183. Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 379 (7th Cir. 2008).

184. Michaels v. Banks, 959 F. Supp. 2d. 244, 245 (N.D.N.Y. 2013) (quoting MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58, 63 (2d Cir. 2001)).

185. Wilson, *supra* note 48, at 801.

186. *Id.*

187. *Id.* at 804.

veil,[188] DAPTs would not be stripped of their liability shielding powers. Further, states should amend their DAPT legislation because of the "lack of sufficient means to access DAPT assets, public policy considerations, the promotion of justice, and because such an amendment would not impose hardship upon settlors or legislatures."[189]

The public policy concerns addressed in Part IV of this Note—such as the ability of socially-beneficial professionals to protect hard-earned assets versus the ability of individuals to engage in reckless business or investment behaviors while sheltering their assets from creditors—are partially mitigated by these proposed amendments. "Federal legislation that would prohibit or restrict asset protection trusts is problematic."[190] Historically, Congress has allowed states to determine which "debtor assets should be exempt from creditor claims"; indeed, these state exemptions typically survive in federal bankruptcy proceedings.[191] Enacting federal statutes that establish restraints on asset protection trusts would represent a break with Congress's longstanding stance.[192] Additionally, any attempt by Congress to place restrictions on asset protection trusts would be controversial.[193] By amending state DAPT statutes to allow creditors who have successfully pierced the corporate veil to access corporate officers' assets in DAPTs, legislatures limit the ability of corporate bad actors to shield assets while still maintaining attractive jurisdictional incentives for trust settlors.[194] Since the standard for piercing the corporate veil is so high, only the DAPT assets of those corporate officers who have engaged in serious corporate malfeasance would be available to their creditors.

Finally, every state should also adopt the UVTA. Those states who allow DAPTs and choose to adopt the UVTA should include a provision that acknowledges the tension between DAPTs' enforceability and fraudulent transfer law. In doing so, states will recognize the importance of creditors' rights while still maintaining its status as an attractive trust situs. It is important for non-DAPT states to also adopt the UVTA to enact the new choice of law rule codified in the new Section 10 of the UVTA.[195] As discussed above in Part III, codifying the choice of law rule regarding fraudulent transfers protects creditors by allowing them to structure transactions with predictability, which will reduce transaction costs as well as potential future litigation fees.[196]

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188. *See Judson Atkinson Candies, Inc.*, 529 F.3d at 379.
189. Wilson*, supra* note 48, at 804.
190. Sterk, *supra* note 3, at 1114.
191. *Id.*
192. *Id.*
193. *Id.*
194. *See* Wilson, *supra* note 48, at 815–16.
195. *See* Kettering, *supra* note 39, at 794.
196. *Id.* at 795–96.

CONCLUSION

Applying the foregoing analysis, DAPTs pose a threat to creditors, allowing debtors to transfer money to trusts "with actual intent to hinder, delay, or defraud any creditor of the debtor" and shield their assets.[197] The UVTA acknowledges that certain states allow DAPTs, but attempts to protect creditors from debtors who might be taking advantage of DAPTs to escape liability or to frustrate their creditors into settling for less money. Accordingly, there are strong public policy arguments against allowing DAPTs, and are even advertised by practitioners as a method of frustrating creditors.[198] Finally, because DAPTs are a fairly recent development, whether transfers to DAPTs will survive "challenges by creditors is open to speculation . . . ."[199]

Individual states should amend their DAPT statutes to allow assets contained within a corporate officer's DAPT to be accessible to victims of corporate irresponsibility who successfully pierce the corporate veil of the officer's corporation as it seeks to disincentivize corporate malfeasance without creating hardship for legislatures.[200] By adopting the UVTA, states will establish a more predictable choice of law rule that will serve to reduce litigation and transaction costs.

Nora Hood[*]

197. UNIF. VOIDABLE TRANSACTIONS ACT § 4(A)(1) (2014).
198. *See* Oshins, *Combining It with the Double Strategy*, *supra* note 14, at 23.
199. Brennan, *supra* note 157, at 769.
200. Wilson, *supra* note 48, at 812–16.

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