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# You Can Have the Car, Just Not the DAPT: Domestic Asset Protection Trusts and the Distribution of Property upon Divorce

## Introduction

Domestic asset protection trusts (DAPTs) are irrevocable trusts of which the settlor is a beneficiary, which are used to protect trust assets from the settlor's creditors.[i] However, it is not always clear if DAPTs should be protecting assets from *all* creditors.

This issue was recently raised by the Utah Supreme Court in *Dahl v. Dahl*.[ii] In this case, Charles Dahl attempted to use a DAPT to eliminate any interest his wife, Kim Dahl, would have in marital property placed in the trust upon divorce.[iii] The Utah Supreme Court ruled in favor of Kim Dahl, holding that the trust was revocable because Charles Dahl reserved the power to amend the trust, and that Kim Dahl was a settlor of the trust.[iv] As a result, Kim Dahl was able to withdraw her share of the marital property.[v] However, the court also noted the following potential conflict:

> Were we to construe the Trust as irrevocable, it would create a serious conflict between trust law and divorce law in Utah. The question of whether a spouse could create an irrevocable trust in which he or she placed marital property, thereby frustrating the equitable distribution of property in the event of a divorce, is not before us in this case. Accordingly, we take no position on a likely outcome of such conflict. Rather, we bring the potential pitfalls to the Legislature's attention.[vi]

The Utah Supreme Court asked the Legislature to consider whether DAPTs should protect marital assets from distribution upon divorce, given the long-established precedent in Utah in favor of the equitable distribution of assets upon divorce.[vii]

In making this observation, the Utah Supreme Court did not merely note an interesting legal theory or a conflict that is unique to Utah. A Missouri law firm attempted to encourage the very behavior that the Utah Supreme Court warned against in an article entitled, "A Legal Guide to Asset Protection Trusts and Divorce," which states:

> Unlike a premarital agreement that becomes a contract prior to marriage, a *domestic asset protection trust can be set up at any time, including after the parties have married*. This is beneficial to your client who may not be able to think about the ramifications of divorce at the outset, but a number of years [later] might be in a different frame of mind regarding the marriage or the potential longevity of the relationship. Your client should be aware that *they should set up this type of trust prior to filing for divorce* and before it is obvious that the relationship is headed to divorce… Depending on the state that the DAPT is settled in, it might provide for less liability to your former spouse than a prenuptial agreement [emphasis added].[viii]

This article actually advertises the potential ability of a spouse to use a DAPT to keep control of marital assets generated during the course of the marriage, that would otherwise be divided upon divorce. It even brazenly admits that it is better to make the transfer "before it is obvious that the relationship is headed to divorce" in order to avoid invalidation of the transfer.

This paper explores whether a husband or wife should be able to protect marital assets from distribution upon divorce by using a DAPT, and examines in which states this behavior may be permitted. Part I contains a brief history of the development of DAPTs. Part II explores public policy considerations for DAPT use generally, and for transfers of marital property to DAPTs to protect assets from distribution at divorce specifically. Part III compares states that effectively address the distribution of DAPT assets upon divorce to statutes that do not

effectively address the issue and to statutes that do not address the issue at all. Finally, Part IV discusses other factors that could affect whether a jurisdiction allows marital property in a DAPT to be protected from distribution at divorce.

## Part I – Background

### *A. A Brief History*

A trust is a legal device that gives title of assets to a trustee who manages the assets for the benefit of the beneficiaries.[ix] Some trusts contain a spendthrift provision, which prohibits beneficiaries from transferring their interest in the trust and prevents the beneficiary's creditors from reaching the trust assets.[x] However, distributions from the trust can be reached by creditors once they are in the hands of a beneficiary.[xi] Thus, the spendthrift clause allows the settlor to give assets to a trust for the benefit of his or her spouse, children, or another third-party, without the worry that the assets will be taken by the creditors of the beneficiaries. This type of trust arrangement is a traditional third-party spendthrift trust.[xii]

What happens, however, if the settlor wants to protect assets from his or her own creditors? A settlor could give property away to a third-party or a third-party spendthrift trust to avoid paying future creditors, but this strategy causes the settlor to lose control and use of the assets.[xiii] Instead, a settlor could give the assets to a trust and name himself or herself as the beneficiary (known as a self-settled spendthrift trust), but traditionally both statutory and case law have considered self-settled spendthrift trusts to be void and against public policy.[xiv] The Fifth Circuit US Court of appeals explained that its policy against self-settled spendthrift trusts was intended to prevent settlors from insulating assets from creditors while retaining access to the assets, and from withdrawing trust funds after their debts are discharged.[xv]

The inability in the US to protect assets from creditors while maintaining ownership has led settlors to put their assets in offshore asset protection trusts (APTs).[xvi] Offshore APTs are located in foreign jurisdictions, such as the Cook Islands and the Caymans, that recognize self-settled spendthrift trusts and protect the trust assets from the settlor's creditors.[xvii] In 1994, it was estimated that more than one trillion dollars had been put in offshore APTs.[xviii] However, not only can offshore APTs be expensive and unreliable, but only assets that are physically moved offshore are protected because offshore APTs are not respected by US courts, precluding the protection of real estate.[xix]

Seeing the demand for a more effective asset protection solution, in 1997 Alaska created the first domestic asset protection trust (DAPT) statute, which permits the creation of self-settled spendthrift trusts in Alaska.[xx] Generally, a DAPT is "an irrevocable trust with an independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor," and the trustee must be a "corporate fiduciary resident of the jurisdiction where the trust is deemed to be located."[xxi] The discretion of the trustee is often controlled through the use of a trust protector, who has enumerated powers such as "the right to veto distributions, the right to hire and fire the trustee, and, in some cases, the right to amend the trust instrument or consent to an amendment."[xxii]

DAPTs have been touted as less expensive and controversial, easier to use, and more effective than offshore APTs.[xxiii] For example, a DAPT can be more flexible for tax planning purposes because it does not have the same foreign trust reporting compliance obligations.[xxiv]

Today, there are 17 states with DAPT statutes, but there is little case law addressing the validity of these trusts.[xxv] The growth in the number of DAPT statutes without a coinciding increase in case law could indicate that (a) DAPTs are effectively dissuading litigation, (b) few

people are creating DAPTs, or (c) there has not been sufficient time for DAPT conflicts to ripen. In any event, the lack of case law makes it difficult to predict how DAPTs will be treated by US courts.[xxvi] This is especially the case, given that much of the case law that does exist arose from bankruptcy filings.[xxvii] Congress responded to the popularity of DAPTs with the Bankruptcy Abuse Prevention and Consumer Protection Act which extends the bankruptcy statute of limitations to ten years for transfers made to self-settled trusts.[xxviii] While bankruptcy DAPT cases reveal the attitude of some courts towards DAPTs, the bankruptcy issues are often dispositive and little insight is gained as to how courts will interpret DAPT statutes.[xxix]

### *B. Fraudulent Transfers*

It is important to understand that not all transfers to a DAPT are protected from creditors. Fraudulent conveyance laws serve to prevent debtors from "making gifts that render them insolvent" or that "hinder, delay, or defraud creditors." The Uniform Fraudulent Transfer Act (UFTA) is a legal remedy that can be used by a creditor to set aside a transfer.[xxx] The UFTA is specifically concerned with “the validity of transfers that leave an owner insolvent and are intended to defraud creditors.”[xxxi] Fraudulent transfers can be divided into two categories: (i) actual intent fraudulent transfers, and (ii) constructive fraudulent transfers, both of which can make a transfer void under the UFTA.[xxxii] The elements of actual intent fraudulent transfers are: “(i) the defendant effected a transfer; (ii) of an interest in the debtor’s property; (iii) within the applicable statute of limitations; and (iv) the transfer was made with actual intent of the debtor to hinder, delay or defraud the creditor.”[xxxiii] Certain “badges of fraud” can be used to create a presumption of fraudulent intent.[xxxiv] The elements of a constructive fraudulent transfer are met when there is, “a transfer to the defendant of: (i) an interest in the debtor’s property; (ii) within the applicable statute of limitations; and (iii) without reasonably equivalent value in exchange for

the transfer (Bankruptcy Code and UFTA) or fair consideration (UFCA), where the debtor was either: (i) insolvent or left insolvent; (ii) intentionally left unable to pay debts as they matured; or (iii) left with an unreasonably small amount of capital."[xxxv]

Most states have adopted the UFTA in its entirety, but some DAPT statute states have not.[xxxvi] For example, in Alaska and Nevada transfers to DAPTs can be challenged only for actual fraud and not constructive fraud.[xxxvii] Nevada has also implemented a two-year statute of limitations, whereas the UFTA has a four-year statute of limitations.[xxxviii] Delaware and South Dakota chose to include a "more stringent burden of proof" for creditors than the burden of proof found in the UFTA.[xxxix] These seemingly small differences are used by states to differentiate themselves in the DAPT marketplace. For example, one writer concluded that Nevada's two-year statute of limitations combined with the other positive DAPT features in the state, makes Nevada one of the best DAPT states in the country.[xl] However, by not fully implementing the UFTA, these DAPT states have created a system of inconsistent fraudulent conveyance laws nation-wide, which creates economic inefficiencies as creditors must adjust their policies for each state.[xli]

Interestingly, on the opposite side of the policy spectrum, a minority of states, such as California, have found that transfers to DAPTs are fraudulent under the UFTA for present creditors, reasonably foreseeable future creditors, and unknown future creditors.[xlii] This position parts ways with the traditional view that individuals who engage in asset protection for peace of mind overcome fraudulent transfer claims if the transfer was made with no present creditors or reasonably foreseeable future creditors, and if enough assets were retained to remain solvent.[xliii] In 2014, when new amendments to the UFTA were adopted, comments were added that are more in line with the California interpretation of the UFTA than the DAPT state additions.[xliv]

The comments say that self-settled spendthrift trusts are *per se voidable* and that settlors living in states without a DAPT statute cannot protect their assets by creating a DAPT in a state with a DAPT statute .[xlv] It is unclear how these comments are meant to apply to a settlor who is living in a state that has adopted a DAPT statute. It also remains unknown which states will adopt the comments. However, it appears that the comments were not a mistake or an overlooked minority opinion, because when an ACTEC fellow recently attempted to have the comments corrected, no changes were permitted.[xlvi]

Throughout this paper, different types of transfers into DAPTs are analyzed. One of the most effective means for invalidating a transfer is to successfully argue that it was a fraudulent transfer. However, because such an argument requires a separate analysis, the examples used throughout this paper will be assumed not to be fraudulent transfers.

*C. Community and Marital Property*

Common law state marital property law is grounded in English common law, whereas community property states base their marital property law in French, Spanish, and Mexican law.[xlvii] In common law states, marriage assets are "typically defined as one's spouse's property or the other spouse's property" based on how title to the property is held.[xlviii] Community property states, on the other hand, typically define property as "one spouse's separate property, the other spouse's separate property, and their community property" with each spouse having a one half interest in the community property.[xlix] Many common law states have adopted a "dual classification," which classifies property as either marital or separate.[l]

Most common law states use equitable distribution to distribute property upon divorce, whereas community property states do not.[li] In some dual classification states separate or marital

property can be awarded upon divorce through equitable distribution, whereas others only consider marital property for equitable distribution.[lii]

Due to the nuanced nature of this terminology, every permutation of marital, community, and separate property cannot be discussed for each issue in this paper. For simplicity, the terms "marital property" and "community property" are used to refer generally to property to which a spouse would have some rights upon divorce if no asset protection methods were implemented.

## Part II - Public Policy Considerations

### *A. Should Domestic Asset Protection Trusts Be Permitted?*

The US is in many ways pro-creditor, and as such a trust intended to keep creditors from receiving payment is often considered contrary to public policy. However, there are several public policy arguments in favor of DAPTs. For example, DAPT supporters see asset protection statutes as a reaction to a broken US tort liability system that allows frivolous lawsuits and juries that award devastating punitive damages.[liii] They argue that, due to this environment, DAPTs are an essential risk management step, as they "safeguard against financial uncertainties and unanticipated litigation" and protect individuals from losing their life savings.[liv] Also, the presence of fraudulent transfer laws could be said to sufficiently protect creditors from the individuals who attempt to abuse DAPT laws.[lv]

From an economic perspective, asset protection encourages the preservation of wealth by decreasing the liability of saving.[lvi] For example, an individual who relies on debt funding may be less likely to be sued than an individual who has saved diligently and is known to have "deep pockets." However, by using a DAPT, a diligent saver can decrease the likelihood that he or she will be the target of litigation, making it more advantageous to save. One could also argue that asset protection is inevitable, and that it is, therefore, preferable to keep trust assets in the US to

benefit local banks and trusts, than for settlors to use offshore APTs that only benefit the foreign jurisdictions.[lvii]

On the other hand, DAPTs can appear to be an opportunity for the "crafty" to shield their assets. Even well-meaning settlors may be incentivized to engage in riskier behavior because the settlor no longer bears the cost of those risks.[lviii] Opponents of DAPTs point out that "[a]n orderly system of liability is too important to society to allow vast amounts of wealth to be placed out of reach of creditors."[lix]

Stewart Sterk warned that because trusts can be moved from state to state, state governments may create "[excessive] incentive[s] to attract new business" such as removing safeguards that prevent trust abuse.[lx] The Delaware state legislature admitted that it intended "to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts."[lxi] Sterk noted that when the majority of a state's DAPTs are created by non-state residents, the state is exporting losses to out-of-state creditors while enjoying increased local financial assets.[lxii]

The above arguments show the complexity of DAPT public policy and that the societal acceptability of DAPTs has yet to be settled. However, given the stream of DAPT statute adoption since 1997, some states must have determined that the benefits of DAPTs outweigh the costs, at least at a state level. Therefore, it is likely that DAPT statutes will be implemented in additional states.[lxiii]

*B. Should Asset Protection from Property Division Upon Divorce be Permitted?*

While the above arguments refer to DAPT statutes generally, each DAPT statute is unique.[lxiv] It is, therefore, possible that some DAPT statutes are more offensive to public policy than others. One difference between DAPT statutes is whether a husband or wife can place

marital property in a DAPT to protect it from property division upon divorce.[lxv] Currently, most states have adopted a system of equitable distribution of assets upon divorce, based on the concept that marriage is a partnership in which both spouses are contributors regardless of their income.[lxvi] If the main purpose of equitable distribution is to decrease sex discrimination, as suggested by Henry H. Foster, it is questionable that this objective can be accomplished if a husband or wife can retain property that would otherwise be awarded to his or her spouse upon divorce by placing it in a DAPT.[lxvii] It is offensive to sensibilities of fairness and equity to allow one partner to unilaterally benefit from assets that were produced through the efforts of two people.

Not only does the ability to place marital or community property in a DAPT affect spouses during a divorce, it could also affect them during the marriage. A recent study found that a husband or wife's property rights affected the individual's bargaining power within the household.[lxviii] Another study found that the equal management of resources promotes relationship stability and equality.[lxix] The unilateral decision of one spouse to put marital or community property in a DAPT could negatively affect the other spouse's bargaining power in the household and decrease the stability of the relationship.

In the article "Fear Not the Asset Protection Trust," Adam J. Hirsch concludes that DAPTs can enhance utility and be a positive force in the market.[lxx] However, Hirsch admits that the reasons to permit DAPTs with voluntary creditors, such as a bank, do not apply to involuntary creditors, such as persons with claims for alimony and child support, because involuntary lenders "cannot decline to "lend" to a debtor."[lxxi] For example, an individual who depends upon child support to take care of his or her family did not have the same ability to decline to enter into that financial arrangement as a bank that chooses whether to extend a loan.

Therefore, Hirsch suggests it is necessary to eliminate all avenues to protect assets from involuntary creditors.[lxxii] Like alimony or child support, when assets are distributed during a divorce there is only one individual from whom assets can be collected, and a party may not have the ability to decline to enter into the financial consequences of a divorce. Therefore, Hirsch's arguments could be used to argue that the distribution of assets upon divorce should also be exempted from asset protection.

The arguments in favor of allowing asset protection for marital or community property in a DAPT are many of the same arguments for DAPT use generally. However protecting one's life savings from one's life partner is less sympathetic than protecting them from frivolous or unforeseeable litigation. Some argue that allowing DAPTs to preserve property that would otherwise go to one's spouse upon divorce encourages saving and prevents money from moving off-shore, but these benefits are not sufficient to overcome the need for equality and fairness in dividing marital assets upon divorce. From a public policy perspective, states that adopt DAPT statutes should not permit asset protection of marital assets upon divorce.

## Part III - State Statute Comparisons of Property Division upon Divorce

DAPT statutes vary greatly as to which creditors can access DAPT assets. Some statutes directly address property division upon divorce, while other DAPT statutes contain no language regarding property division upon divorce. Of the 17 states that allow DAPTs, nine address the distribution of assets upon divorce in the statute.[lxxiii] The statutes in Alaska, Ohio, Hawaii, Mississippi, New Hampshire, and Delaware have effective statutory language that should prevent a spouse from protecting marital property from disposition upon divorce. The statutes in Rhode Island, South Dakota, and Tennessee have some concerning holes that make these statutes ineffective.

*A. Statutes that Effectively Address the Distribution of Assets upon Divorce*

Alaska and Hawaii have the most successful statutes at clearly invalidating any asset protection in the event of a divorce of marital property transferred into a DAPT. However, the statutes in Mississippi, New Hampshire, Delaware, and Ohio also effectively address the distribution of assets upon divorce.

The Alaska statute states that the subsection that protects assets from being subject to division upon the divorce of a beneficiary "does not apply to a settlor's interest in a self-settled trust" if the assets were transferred into the DAPT "after the settlor's marriage" or "within 30 days before the settlor's marriage unless the settlor gives written notice to the other party of the marriage of the transfer."[lxxiv] This statute automatically prohibits asset protection from divorce proceedings if the transfer was made after the marriage or within 30 days of the marriage. This clearly would result in any property created during the marriage that was subsequently transferred into the DAPT being accessible for property division upon divorce. The addition of not protecting assets transferred within 30 days of the marriage unless the other party receives written notice ensures that a husband or wife won't make a transfer to a DAPT immediately prior to the marriage and then hide it from his or her partner.

Hawaii's statute is similar to the Alaska statute. It provides that the DAPT limitations on creditors do not apply to property subject to division in a divorce for a transferor-beneficiary if the transfer was made "after the transferor's marriage or entry into a civil union" or "[w]ithin thirty days prior to the transferor's marriage or civil union unless the transferor gives written notice to the other party to the marriage or civil union of the transfer."[lxxv] Hawaii's statute accomplishes the same outcomes as Alaska's statute, except it extends its DAPT exception to civil unions as well as marriages.

The language used in the Alaska and Hawaii statutes is a clearer prohibition than the language used by Mississippi, New Hampshire, Delaware, and Ohio. The Mississippi statute provides that the statute's limitations on the claims of creditors do not apply to "any person to whom the transferor is indebted on account of an agreement or order of the court for… a division or distribution of property in favor of the transferor's spouse or former spouse, but only to the extent of such debt."[lxxvi] New Hampshire uses nearly identical language as Mississippi, except it expands the exception to also apply to "any person to whom the transferor is indebted on account of an antenuptial agreement."[lxxvii] Delaware also uses nearly identical language as Mississippi, except that the division or distribution of property must be "incident to a judicial proceeding with respect to a separation or divorce," which narrows the circumstances under which this statute will apply.[lxxviii] The Ohio statute uses unique language, but it accomplishes essentially the same result as the Mississippi statute. The Ohio statute states that "a transferor's interest in property that is the subject of a qualified disposition may be attached or otherwise involuntarily alienated in connection with any debt that the transferor owes pursuant to an agreement or court order for…[t]he division or distribution of property in favor of the transferor's spouse or former spouse."[lxxix] For all four states, a "spouse" or "former spouse" means persons to whom the transferor was married at, or before the time the assets were placed in the DAPT.[lxxx] Therefore, all four statutes successfully prohibit the protection of assets placed in a DAPT during a marriage.

The Mississippi, New Hampshire, Delaware, and Ohio statutes are only slightly less successful at accomplishing this goal than the Alaska and Hawaii statutes, because the provisions in these four statutes are not activated until the transferor is indebted on account of an agreement or court order, whereas in the Alaska and Hawaii statutes the subsection that protects assets from

being subject to division upon divorce never applies to a settlor's interest in a self-settled trust if the assets were transferred after the marriage. Therefore, the Alaska and Hawaii statutes provide additional immediacy and clarity.

*B. Statutes that Do Not Effectively Address the Distribution of Assets upon Divorce*

The Tennessee, Rhode Island, and South Dakota statutes contain provisions that undermine the effectiveness of their exceptions to asset protection for property division upon divorce.

The Tennessee statute states that "the limitation on creditors in law or equity shall not apply and such creditors' claims shall not be extinguished if the transferor is indebted on account of … [a] written agreement, judgment or order of a court for division of marital property of a spouse or former spouse, but only to the extent of such debt, legally mandated interest and the reasonable cost of collection."[lxxxi] While this statute gives spouses the added benefit of the ability to collect legally mandated interest and reasonable collection costs from the DAPT, it also makes it more difficult for an individual to access funds from a spouse's DAPT. The statutes provides that a claim can only be asserted against the trustee if there is a final non-appealable determination by a court that the debt is past due and the court determines that "the claimant has made reasonable attempts to collect the debt from any other sources of the transferor or that such attempts would be futile."[lxxxii] The additional requirements of a non-appealable determination could bar some individuals who do not have the funds to secure such a determination, and delays receipt of DAPT trust assets. Therefore, this statute is less effective at allowing access to marital property that has been transferred into a DAPT during marriage for distribution upon divorce and should not be used as a model for other states.

Rhode Island's statute is even more problematic. It states that the DAPT statute will not defeat a claim brought by, "[a]ny person to whom the transferor is *indebted on or before the date of a qualified disposition* on account of an agreement or order of court for… a division or distribution of property in favor of the transferor's spouse or former spouse, but only to the extent of the debt [emphasis added]," where a qualified disposition is a "disposition by or from a transferor to a trustee."[lxxxiii] The plain language of this statute indicates that this provision only applies to spouses or former spouses who already have a court order for the distribution of property when the assets are transferred into the trust, but it does not prevent a spouse from transferring assets into a DAPT during the marriage to keep the assets from being distributed in a future divorce.

The wording in the Rhode Island statute is especially interesting when compared to the Mississippi, New Hampshire, and Delaware statutes. The Rhode Island statute is very similar to these three statutes, except for the addition of the requirement to be "indebted on or before the date of a qualified disposition." The Delaware statute was written first in 1997, followed by the Rhode Island statute in 1999, the New Hampshire statute in 2009, and finally the Mississippi statute in 2014.[lxxxiv] The similarity of the language of the statutes makes it likely that the Rhode Island legislature modified the language in the Delaware statute to require the transferor to be "indebted on or before the date of a qualified disposition," but that then the New Hampshire and Mississippi legislatures returned to the original Delaware language as a model.[lxxxv] It is possible that the Mississippi and New Hampshire legislatures recognized the failure of the Rhode Island language to address transfers made to a DAPT during a marriage. Likewise, it would be wise for other states to avoid using the Rhode Island statute as a model.

Finally, South Dakota's statute, which became effective in 2005, is the most problematic. Using language very similar to Rhode Island's statute, it states that "*subject to subdivision (2) of this section*, this chapter does not apply in any respect *to any person to whom at the time of transfer the transferor is indebted* on account of an agreement or order of court for the payment of support or alimony in favor of the transferor's spouse, former spouse, or children, or for a division or distribution of property in favor of the transferor's spouse or former spouse, to the extent of the debt [emphasis added]."[lxxxvi] Then in subdivision (2), the South Dakota statute expressly states that the DAPT chapter *does* apply when the transferor is married at the time of the transfer to "(a) any of the transferor's separate property transferred to the trust; and (b) any marital property transferred to the trust if the spouse or former spouse was provided with notice in the form set forth in subdivision (3) of this section, or executed a written consent to the transfer after being provided the information set forth in the notice."[lxxxvii] Clearly, the legislature in South Dakota either did not value the policy arguments for creating an exception in DAPTs for marital property transferred to the DAPT during the marriage or saw this issue as an opportunity for South Dakota to gain an economic advantage over other DAPT statute states.

The notice required in subdivision (3) must include the sentence "YOUR RIGHTS TO THIS PROPERTY MAY BE AFFECTED DURING YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF CHILD SUPPORT OR ALIMONY OR A DIVISION OR DISTRIBUTION OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR SPOUSE," which appears sufficiently clear to alert a spouse to the consequences of the transfer. However, the South Dakota statute shifts the burden to the non-settlor spouse to object to the transfer within a limited period of time, or else they are deemed to have consented to the transfer.[lxxxviii] So while the South Dakota statute does put a non-settlor spouse on notice to the

consequences of a transfer into a DAPT, it also requires immediate action to avoid consenting to the transfer. This is a dangerous provision, because if a couple is not currently engaging in divorce proceedings, a husband or wife may choose not to object to a transfer of assets into a DAPT because they do not believe there will be a divorce in the future, or to avoid causing conflict in the marriage. This second line of reasoning is particularly likely if a marriage is in crisis, but the non-settlor spouse does not want to get divorced. Therefore, because a husband or wife may be influenced to not object to a transfer when the transfer occurs, even though they would object to such a transfer at the time of a divorce, the South Dakota statute does not effectively protect the equitable distribution of marital assets upon divorce.

Of the nine statutes that address the distribution of assets upon divorce, six states have statutory language that is effective in not allowing asset protection for marital assets transferred into a DAPT during the marriage. The statutes in Alaska and Hawaii accomplish this in the clearest and most readily available manner. As such, the provisions regarding the distribution of assets upon divorce in these two statutes are proposed as the models that should be used by other states implementing or revising a DAPT statute. The language used in Ohio, Mississippi, New Hampshire, and Delaware are also acceptable models. States should not us the language in the Tennessee, Rhode Island, or South Dakota statutes as a model because the Tennessee statute has extra requirements that could keep some from successfully accessing the trust property, the Rhode Island statute does not successfully protect transfers of marital property made during the marriage, and the South Dakota statute expressly permits the protection of assets from division upon divorce for marital assets transferred into a DAPT during the course of the marriage.

*C. Statutes that Do Not Address the Distribution of Assets upon Divorce*

There are eight statutes that do not contain any language to provide an exception to asset protection for the distribution of assets upon divorce. These statutes are Colorado, Missouri, Nevada, Oklahoma, Utah, Virginia, West Virginia, and Wyoming. Therefore, it is possible that if a husband or wife transfers marital or community property into a DAPT during the marriage, the assets will be protected from distribution upon divorce in these states. However, the DAPT statute is not the only source of law that must be considered. As the Utah Supreme Court pointed out in *Dahl*, a state's trust law may conflict with other state laws.[lxxxix] Therefore, the following paragraphs explore state laws that could affect whether a DAPT protects assets from distribution upon divorce in some of these eight states.

The values in conflict in the *Dahl* case were asset protection and equitable distribution of assets upon divorce.[xc] The Utah Supreme Court said that this was a "serious conflict" and that "Utah has a long-established policy in favor of the equitable distribution of marital assets in divorce cases."[xci] This conflict could also exist in Colorado, Missouri, Oklahoma, Virginia, West Virginia, and Wyoming, because these states are also equitable distribution states.[xcii] However, it is unknown if the courts in these states would see the same "serious conflict" expressed by the Supreme Court of Utah. It is also unknown whether this conflict would be enough to allow a state to reach marital property in a DAPT for equitable distribution. Until further case law is available, there is at least the possibility in Colorado, Missouri, Oklahoma, Virginia, West Virginia, Wyoming, and Utah that marital property placed in a DAPT could be accessed for equitable distribution upon divorce.

Nevada is unique, because it is the only DAPT statute state that is also a community property state (although Alaska has an elective community property system).[xciii] This is relevant

because in community property states, each spouse owns a one half interest in community assets, and property division upon divorce is not determined by equitable distribution.[xciv] Also, during the marriage, there may be restrictions on whether a spouse may assign or convey his or her one half interest to a third party.[xcv] Nevada's statute provides that "[n]either spouse may sell, convey or encumber the community real property unless both join in the execution of the deed," "[n]either spouse may create a security interest… in, or sell, community household goods, furnishings or appliances unless both join in executing the security agreement or contract of sale, if any," and "[n]either spouse may acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of a business where both spouses participate in its management without the consent of the other."[xcvi] Therefore, while the Nevada DAPT statute does not explicitly prevent a spouse from placing community property in a DAPT during marriage to protect it from property division upon divorce, there are restrictions on the types of community property that can be conveyed without the permission of the other spouse. While it is likely that a husband or wife could convey his or her one half interest in community property to a DAPT without the permission of their spouse as long as the property does not fall into one of the categories outlined above, it is less clear whether a Nevada court would permit a husband or wife to gain ownership of his or her spouse's one half interest in community property by placing it into a DAPT. Community property states do allow the transmutation of community property to separate property and vice versa, but such a change in title will "at a minimum garner scrutiny on property division in divorce."[xcvii] Therefore, a Nevada court could find that there is a conflict of values between asset protection and community property principles, if a husband or wife attempts to gain ownership of his or her spouse's one half interest in community property by placing it into a DAPT.

There may also be other Nevada statutes that conflict with the Nevada DAPT statute.[xcviii] Nevada Revised Statutes Annotated § 166.170 says that "[a] creditor may not bring an action with respect to transfer of property to a spendthrift trust unless a creditor can prove by clear and convincing evidence that… the transfer violates a legal obligation owed to the creditor under a contract or valid court order that is legally enforceable by the creditor." "A Comparison of the Leading Trust Jurisdictions" argues that this language should give spouses with alimony and child-support claims the ability to reach DAPT assets.[xcix] One could argue that this provision would likewise give a spouse the ability to reach DAPT assets for property division upon divorce, however, this language may only be applicable to legal obligations that exist at the time of the transfer.

In West Virginia when creating a DAPT the settlor must execute a qualified affidavit under oath stating that he or she is "not indebted on account of an agreement or order of court for… a division or distribution of property incident to a judicial proceeding with respect to a divorce or annulment in favor of such transferor's spouse or former spouse, except for any such indebtedness expressly identified in the affidavit or an attachment to the affidavit."[c] The transfer to a DAPT may be set aside if the qualified affidavit contains a material misstatement of fact, but it is unlikely a settlor would lie in the affidavit.[ci] The settlor is only required to list to whom he or she is indebted with respect to a divorce or annulment, and then there will be no material misstatement of fact in the qualified affidavit. Therefore, the qualified affidavit has no teeth for creating an exception for property division upon divorce. Additionally, like the Rhode Island statute, the qualified affidavit only asks for indebtedness that exists at the time of the transfer which does not prevent a husband or wife from transferring assets into a DAPT during the course of the marriage.

Since the DAPT statutes in Colorado, Missouri, Nevada, Oklahoma, Utah, Virginia, West Virginia, and Wyoming do not directly address the distribution of assets upon divorce, it is difficult to predict how a court would hold, especially when there are potential conflicts with non-DAPT state statutes. These states should consider adding language to their DAPT statutes that addresses this issue.

## Part IV. Other Factors that Affect Judgments

It should be noted that in addition to statutory considerations, the case law of each DAPT state also impacts whether that state would allow a DAPT to protect marital assets from distribution upon divorce. While there are few cases involving DAPTs, there are cases addressing marital property given to third parties during the course of the marriage. It is likely that there will be similarities between the manner in which a court has treated transfers of marital property to third parties and how it will treat transfers of marital property into a DAPT. The following are a few examples of the types of cases that could affect a court's decision.

In an Alaskan case, *Brooks v. Brooks,* during the course of his marriage to Leora Brooks, Vern Brooks gave $120,000 in gifts to his four sons.[cii] The Alaskan Supreme court was asked to determine whether the trial court was correct in treating this gift as a martial asset and awarding Leora Brooks an additional $60,000 to credit her for her half of the value of the gifts.[ciii] In its analysis, the court referred to "the most current thinking on this issue," section 6(a) of the Uniform Marital Property Act (1983), which stated that a gift to a third person out of marital property is valid when "both spouses act together in making the gift," and is voidable at the option of the non-participating spouse if both spouses did not act together in making the gift.[civ] The court adopted this rule from the Uniform Marital Property Act and remanded the case.[cv] The Alaskan Supreme Court instructed the trial court to determine whether Leora had knowledge of

and gave consent to using marital assets to make these gift, or whether she consented only because she believed the gifts were being made from Vern's separate assets.[cvi]

Alaska's DAPT statute clearly outlines the outcome of transferring marital property to a DAPT during marriage to avoid distribution upon divorce, so *Brooks v. Brooks* isn't necessary to determine how an Alaskan court would treat such a transfer. However, the rule adopted from the Uniform Marital Property Act in the *Brooks* case could be adopted by other states. Though this rule focuses on gifting to a third person, a gift to a trust works in very similar ways. Therefore, it is possible that a court would adopt the rule that for a transfer of marital property to a DAPT to be valid, "both spouses must act together in making" the transfer, and that "if both spouses do not act together in making" the transfer, "it is voidable at the option of the non-participating spouse."[cvii]

In *Anderson v. Anderson*, a Kentucky case, the court held that, "a man may not make a voluntary transfer of either his real or personal estate with the intent to prevent his wife, or intended wife, from sharing in such property at his death and that the wife, on the husband's death, may assert her marital rights in such property in the hands of the donee."[cviii] While this focuses on marital rights to property at death, death and divorce both represent the dissolution of a marriage, therefore it's possible that a similar rule could be applied to the distribution of assets upon divorce. This rule differs from the Alaska rule, because a husband or wife must intend to prevent his or her spouse from sharing in the property rights, which could be more difficult to prove.

In *Windsor v. Leonard,* a Maryland case, Virginia Windsor transferred $190,000 to a revocable trust and named various friends and charities as beneficiaries. Her remaining estate was valued at $110,000, of which she left 10% to her husband, LCDR Windsor. LCDR

renounced his rights under the will, elected to take one half of the net estate, and argued that the net estate should include the $190,000 trust corpus.[cix] The court held that to determine if an inter-vivos transfer was an "improper circumvention of marital rights", the following factors must be balanced: "completeness of the transfer; motive for the transfer; participation by the transferee in the alleged fraud on the surviving spouse; amount of time between the transfer and death; [and] degree to which the surviving spouse is left without an interest in the decedent's property or other means for support."[cx] The court determined by applying this test that there was no basis to include the $190,000 trust corpus.[cxi] A court could also apply the *Windsor* balancing test to transfers of marital assets to a DAPT.

These three case law examples demonstrate the importance of examining each DAPT states' case law. The case law can be used to predict the types of tests a court might use to evaluate a transfer of marital property to a DAPT in regards to the distribution of assets upon divorce. When a state's DAPT statute, other statutes, case law, and fraudulent transfer laws are considered together, it can be very difficult to predict how a court would hold regarding the distribution of assets upon divorce, which is why there is value in clearly wording DAPT statutes.

## Conclusion

The Utah Supreme Court in *Dahl v. Dahl* highlighted an important conflict of values that occurs when a DAPT allows marital assets to be protected from distribution upon divorce.[cxii] Allowing an exception from asset protection for marital property placed in a DAPT to avoid distribution upon divorce has the potential to decrease sex discrimination, increase marriage equity and stability, and avoid negative consequences for involuntary lenders . As such, states should use language similar to the language used in Alaska or Hawaii, as these statutes are the

most effective at creating this exception. The statutes used in Mississippi, New Hampshire, Delaware, and Ohio are also acceptable alternatives.

The DAPT statutes used in Tennessee, Rhode Island, and South Dakota contain language that attempts to deal with property division upon divorce, but fails to prevent a husband or wife from using a DAPT to withhold property from his or her spouse marital property. Therefore, the language used in these statutes should be avoided. These states, as well as the eight states that do not address property division upon divorce, could benefit from re-evaluating the consequences of their current statute. As Alaska has shown, a state can still be a competitive, driving force in the DAPT industry, while preventing  spouses from attempting to keep more assets than is their due under equitable distribution.

[i] David G. Shaftel, *Tenth Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes,* ACTEC 1, 1 (2016).
David G. Shaftel and David H. Bundy, *Domestic Asset Protection Trusts Created by Nonresident Settlors,* 1, 2-3 (2005).
[ii] *Dahl v. Dahl*, 345 P.3d 566, footnote 13 (Utah 2015).
[iii] *Id.* at 583.
[iv] *Id.* at 581.
[v] *Id.*
[vi] *Id.* at 618.
[vii] *Id.* at 579.
[viii] Stange Law Firm, PC., *A Legal Guide to Domestic Asset Protection Trusts and Divorce,* June 15, 2017, http://www.lawfirms.com/resources/divorce/a-legal-guide-domestic-asset-protection-trusts-divorce.
[ix] Michael A. Speilman & Kahn Kleinman, *Understanding Asset Protection Planning,* American Bar Association 1, 29 (2007).
[x] Nienhuser, *supra*, at 554.
[xi] Speilman & Kleinman, *supra*, at 20.
[xii] Elizabeth Brickfield, Var Lordahl & Matthew Policastro, *The Myths and Realities of Nevada Self-Settled Asset Protection Trusts,* Nev. Lawyer 10, 11 (2015).
[xiii] *Id.*
[xiv] Inga Ivsan, *Emerging Challenges in Asset Protection Planning,* 24 U. Miami Bus. L. Rev. 135, 141 (2015-2016).
[xv] Nienhuser, *supra*, at 556.
[xvi] *Id.* at 557, footnote 50.
[xvii] *Id.* at footnote 52.
Ronald J. Mann, *A Fresh Look at State Asset Protection Statutes*, 67 Vand. L. Rev. 1741, 1745 (2014).
[xviii] Nienhuser, *supra*, at 557.
[xix] Mann, *supra,* at 1746.
[xx] Speilman & Kleinman, *supra*, at 20.
Mann, *supra,* at 1747.
[xxi] Speilman & Kleinman, *supra*, at 20.
Shaftel, *supra*, at 1.
[xxii] Speilman & Kleinman, *supra*, at 20.
[xxiii] Mann, *supra,* at 1747.
Speilman & Kleinman, *supra*, at 20.
[xxiv] Speilman & Kleinman, *supra*, at 22.
[xxv] Shaftel, *supra*, at 1, 3, 5, 17, 29, and 40.
Alexander B. Shiffman, *The Domestic Asset Protection Trust and its Federalism Implications,* 13 Cardozo Pub. L. Pol'y & Ethics J. 853, 868 (2014-2015).
[xxvi] Ivsan, *supra*, at 173.
[xxvii] Shiffman, *supra*, at 868.
[xxviii] Mann, *supra,* at 1756.
[xxix] *Battley v. Mortensen*, 2011 WL 5025288 (Bankr. D.C. Alaska 2011).

[xxx] Ivsan, *supra*, at 146.
[xxxi] *Id.*
[xxxii] Speilman & Kleinman, *supra*, at 7.
Shiffman, *supra*, at 860.
[xxxiii] Speilman & Kleinman, *supra*, at 7.
[xxxiv] *Id.*
[xxxv] *Id.*
[xxxvi] Jocelyn Margolin Borowsky et al., *A Comparison of the Leading Trust Jurisdictions*, 37 EGTJ 233, 236 (2012).
[xxxvii] Adam J. Hirsch, *Fear Not the Asset Protection Trust,* 27 Cardozo L. Rev. 2685, 2690 (2006).
[xxxviii] *Id.*
[xxxix] *Id.* at 2690-91.
[xl] Brickfield, Lordahl & Policastro, *supra*, at 11.
[xli] Hirsch, *supra*, at 2690-2691.
[xlii] Ivsan, *supra*, at 155.
[xliii] *Id.* at 147.
[xliv] Shaftel, *supra*, at 2.
[xlv] *Id.*
[xlvi] *Id.*
[xlvii] Thomas M. Featherston, Jr., *His, Her, or Their Property: A Primer on Marital Property Law in the Community Property States.* American Bar Association 1, 1-2 (2012).
[xlviii] *Id.* at 2.
[xlix] *Id.*
[l] Louis S. Harrison & Katarinna McBride, *After ATRA, The Escalating Importance of Classifying Yours, Mine and Ours*, 1, 2, and footnote 3.
[li] Featherston, *supra,* at 2.
[lii] Sally Burnett Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N. C. L. Rev. 247, 248-249 (1983).
[liii] Mann, *supra,* at 1749.
Ivsan, *supra*, at 141.
[liv] Nienhuser, *supra*, at 563-64.
Speilman & Kleinman, *supra*, at 1-2.
[lv] Ivsan, *supra*, at 147.
[lvi] *Id.* at 138.
[lvii] Nienhuser, *supra*, at 564.
[lviii] Mann, *supra,* at 1742.
Nienhuser, *supra*, at 561.
Hirsch, *supra*, at 2693.
[lix] Mann, *supra,* at 1743-44.
[lx] *Id.* at 1748.
[lxi] Hirsch, *supra*, at 2687.
[lxii] Mann, *supra,* at 1748.
[lxiii] *Id.* at 1756.
[lxiv] Shaftel, *supra*, at 1-46.
[lxv] *Id.* at 5, 17, 29, and 40.

[lxvi] Sharp, *supra*, at 247.
[lxvii] Henry H. Foster, *Commentary on Equitable Distribution*, 26 N. Y. L. Sch. L. Rev. 1, 2 (1981).
[lxviii] Shing-Yi Wang, *Property Rights and Intra-Household Bargaining*, J. Dev. Econ. 1, 19 (2014).
[lxix] Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 Ind. L. Rev. 853, 853 and 855 (2015).
[lxx] Hirsch, *supra*, at 2709-10.
[lxxi] *Id.*
[lxxii] *Id.* at 2695-96.
[lxxiii] Shaftel, *supra*, at 1, 5, 17, 29, and 40.
[lxxiv] Alaska Stat. § 34.40.110(l) (2016).
[lxxv] Haw. Rev. Stat. Ann. § 554G-9 (LexisNexis 2017).
[lxxvi] Miss. Code Ann. § 91-9-707 (2017).
[lxxvii] N.H. Rev. Stat. Ann. § 564-D:15 (LexisNexis 2017).
[lxxviii] Del. Code Ann. tit. 12, § 3573(1) (2017).
Borowsky, *supra*, at 240.
[lxxix] ORC Ann. 5816.03
[lxxx] Miss. Code Ann. § 91-9-703(l).
Del. Code Ann. tit. 12, § 3570(9).
[lxxxi] Tenn. Code Ann. § 35-16-104 (2017).
[lxxxii] *Id.*
[lxxxiii] R.I. Gen. Laws § 18-9.2-5 (2017)
*Id.* §18-9.2-2.
[lxxxiv] Shaftel, *supra*, at 12 and 23.
[lxxxv] R.I. Gen. Laws § 18-9.2-5.
Miss. Code Ann. § 91-9-707.
N.H. Rev. Stat. Ann. § 564-D:15.
Del. Code Ann. tit. 12, § 3573(1).
[lxxxvi] S.D. Codified Laws § 55-16-15
[lxxxvii] S.D. Codified Laws § 55-16-15
[lxxxviii] S.D. Codified Laws § 55-16-15
[lxxxix] *Dahl*, 345 P.3d at 618.
*Id.* at footnote 13.
[xc] *Id.*
[xci] *Id.* at 579.
[xcii] Featherston, *supra,* at 2.
[xciii] *Id.* at 1.
[xciv] *Id.* at 3.
[xcv] *Id.* at 7.
[xcvi] Nev. Rev. Stat. Ann. § 123.230 (Lexis-Nexis 2017).
[xcvii] Harrison & McBride, *supra*, at 3-4.
[xcviii] Borowsky, *supra*, at 6.
[xcix] *Id.*
[c] W. Va. Code Ann. § 44D-5-503b(e) (LexisNexis 2017).
[ci] *Id.* § 44D-5-503a(c)

[cii] *Brooks v. Brooks*, 733 P.2d 1044, 1054 (Alaska 1987).
[ciii] *Id.* at 1054-55.
[civ] *Id.* at 1055.
[cv] *Id.*
[cvi] *Id.* at 1055-56.
[cvii] *Id.* at 1055.
[cviii] *Anderson v. Anderson*, 583 S.W.2d 504, 505 (Ky. Ct. App. 1979).
[cix] *Windsor v. Leonard*, 475 F.2d 932, 933 (D.C. Cir. 1973).
[cx] *Id.* at 934.
[cxi] *Id.*
[cxii] *Dahl*, 345 P.3d at footnote 13.