
Comparison of the Twelve Domestic Asset Protection Statutes

Updated Through November, 2008

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Editors' Synopsis: This recently updated chart provides a summary and comparison of the characteristics and attributes of domestic asset protection trusts in those states which have enacted such legislation.

INTRODUCTION

A domestic asset protection trust (hereinafter referred to as a "DAPT") is generally, an irrevocable trust with an independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor. The primary goals of DAPTs are asset protection and, if so designed, transfer tax minimization.

Prior to 1997, several states had statutory provisions which appear to support the formation of DAPTs. In 1997, Alaska was the first state to enact a usable DAPT statute. In the ten years since, other states have followed suit. There are now eleven (arguably 12, if Colorado is included) states that allow for the formation of DAPTs.

Legislatures have taken different approaches. The original statutes are terse and only indicate a public policy (Missouri and Colorado). Some of the new statutes amend existing statutes, and others enact new "Acts." Interest groups within the various states have influenced the extent of the asset protection provided by the statutes.

If implemented correctly, the DAPT approach may be used successfully by residents of states with

DAPT statutes. An interesting issue remains whether non-residents of DAPT states may form a DAPT under one of the DAPT state's laws and obtain the desired asset protection and tax benefits. The analysis of this issue involves the conflict of laws. The most likely test is whether the non-resident's domiciliary state has a "strong public policy" against DAPT asset protection. The fact that twelve states now have DAPT statutes moves this approach from the eccentric anomaly category to an accepted asset protection and transfer tax minimization planning technique. As more and more states enact DAPT statutes, the conclusion that a non-DAPT state has a "strong public policy" against a DAPT trust seems less likely.

The DAPT chart below is designed to give the reader an easy and quick comparison of the various DAPT statutes. A chart, by its very nature, is an oversimplification. The reader is urged to carefully analyze the provisions of a statute before implementing a DAPT.

The following ACTEC Fellows generously reviewed and edited their state's summaries for accuracy: Marc A. Chorney (Colorado); Richard G. Bacon (Delaware); Larry P. Katzenstein (Missouri); Layne Rushforth (Nevada); William Zorn (New Hampshire); Richard B. Kells (Oklahoma); Mary Louise Kennedy (Rhode Island); John H. Raforth (South Dakota); Bryan Howard (Tennessee); Thomas Christensen, Jr. (Utah); and Robert H. Leonard (Wyoming).

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SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
	Citation: Alaska Stat. § 34.40.110	Citation: Colo. Rev. Stat. §§ 38-10-111	Citation: Del. Code Ann. tit. 12, §§ 3570-3576	Citation: Mo. Rev. Stat. §§ 456.5-505
	Effective Date: April 2, 1997	Effective Date: 1861	Effective Date: July 1, 1997	Effective Date: 1989
	URL: http://www.legis.state.ak.us	URL: http://www.state.co.us	URL: http://www.delcode.state.de.us	URL: http://www.moga.mo.gov
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state AK law governs validity, construction, and administration of trust (unless trust is being transferred to AK trustee from non-AK trustee); (3) contain spendthrift clause.	In trust, limited to future creditors.	Trust instrument must: (1) be irrevocable; (2) expressly state that DE law governs validity, construction, and administration of trust (unless trust is being transferred to DE trustee from non-DE trustee); (3) contain spendthrift clause.	Trust instrument must: (1) be irrevocable; (2) contain a spendthrift clause; (3) have more than the settlor as a beneficiary; (4) settlor's interest must be discretionary.
2. May a revocable trust be used for asset protection?	No.	No.	No.	No.
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes, amendments enacted in: 2006, 2004, 2003, 2001, 2000, and 1998.	No amendments.	Yes, amendments enacted in: 2008, 2007, 2006, 2005, 2003, 2002, 2001, 2000, and 1998.	Amendments enacted in 2004.
4. What contacts with state are suggested or required to establish situs?	Suggested: (1) some or all of trust assets deposited in state; (2) AK trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns (can be non-exclusive); (3) part or all of the administration occurs in state, including maintenance of records.	Not addressed by statute.	Required: (1) some or all of trust assets deposited in state; (2) DE trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	Principal place of business or residence of trustee in designated jurisdiction, or presence of all or part of the administration in designated jurisdiction; statute includes procedure for transfer of principal place of business. RSMo § 456.11-1108

** It is unclear whether Colorado's statute qualifies as a DAPT statute. *Compare* In Re Baum, 22 F.3d 1014, 1017 (10th Cir. 1994), with In the Matter of Cohen, 8 P.3d 429 (Colo. 1999). *See also* Howard D. Rosen and Gideon Rothschild, 810 2nd T.M., ASSET PROTECTION PLANNING, A-96 (2008) (contending that the Colorado statute qualifies as a DAPT statute as to future creditors).

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5. What interests in principal and income may settlor retain?	Settlor may retain interests in: (1) CRT; (2) total-return trust; (3) GRAT or GRUT; (4) QPRT; (5) IRA.	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) GRAT or GRUT; (5) QPRT; (6) qualified annuity interest; (7) ability to be reimbursed for income taxes attributable to trust; and (8) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust.	Settlor may be one of a class of beneficiaries of a trust discretionary as to income or principal. RSMo § 456.5-505.3
6. What is trustee's distribution authority?	Absolute discretion.	Not addressed by statute.	(1) Discretion; or (2) pursuant to a standard.	Not directly addressed by statute.
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) right to appoint trust protector of trustee advisor.	Not addressed by statute.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor.	None.
8. Who must serve as trustee to come within protection of statute?	Alaska trustee not required, but suggested to establish situs. Resident individual or trust company or bank that possesses trust powers and has principal place of business in Alaska.	Not addressed by statute.	Resident individual or corporation whose activities are subject to supervision by Delaware Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	Not addressed by statute.
9. May non-qualified trustees serve?	Yes.	Not addressed by statute.	Yes, as a co-trustee.	Not addressed by statute.
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have trust protector (who must be disinterested third party) and trustee advisor. Settlor may be advisor if does not have trustee power over discretionary distributions.	Not addressed by statute.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or	Not addressed by statute.

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10. (Continued)			disapprove distributions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a protector.	
11. Are fraudulent transfers excepted from coverage?	Yes. Alaska has not adopted Uniform Fraudulent Transfer Act. Alaska statute sets aside transfers made with intent to defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with actual intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. However, future creditors may set aside transfer only if transfer made with intent to defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. RSMo § 456.5-505.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Burden not addressed by statute. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered, but future creditor must establish claim within four years after transfer. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes, if settlor was 30 days or more in default of making payment at time of transfer of assets to trust.	No.	Yes.	Yes. RSMo § 456.5-503.2
14. Does the statute provide an exception (no asset protection) for alimony?	No.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes. RSMo § 456.5-503.2

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SUBJECT	ALASKA	COLORADO**	DELAWARE	MISSOURI
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if assets were transferred to trust during or less than 30 days prior to marriage. Otherwise, assets are protected.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	No.
16. Does statute provide an exception (no asset protection) for tort claims?	No.	No.	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No.
17. Does statute provide other express exceptions (no asset protection)?	No.	No.	No.	Yes if another governing law supercedes.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	No.	No.	Yes.	No.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes.	No.	Yes.	No.
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes.	No.	Yes.	No.
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	No.	Yes.	No.

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22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes.	No.	Yes.	No.
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes, and also provides protection for funding limited partnerships and LLCs.	No.	Yes.	No.
24. Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	Yes.	No.	No, except for QPRT residence.	No.
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, and may not be considered in property division.	Increases in the value of and income from separate property after marriage are marital property.	Yes, but may be considered in property division.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	Yes; affidavit required.	No.	No.	No.
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes.	No.	Yes.	Yes. RSMo § 456.7-709.

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28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	Yes.	No.	Yes.	No.
29. Is the trustee given "decanting" authority to modify the trust?	Yes.	No.	Yes.	No.
30. What is allowable duration of trusts?	Up to 1,000 years.	Up to 1,000 years.	Abolished rule against perpetuities for personal property (which includes LLC and LP interests). 110 years for real property.	Abolished rule against perpetuities when trustee has power of sale; generally effective for trusts created only on or after August 28, 2001. RSMo § 456.025.1
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No.	Yes.	No. However, does impose its income tax upon trusts that accumulate income for Delaware residents.	Yes, if from sources within Missouri. Probably no if from marketable securities.
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	(1) Trustee petition and court discharge; or (2) six months after trustee provides report that adequately discloses claims.	Six months after receipt of a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary.	Trustee filing and court discharge. Discharge occurs two years after delivery of statement that discloses the facts giving rise to the claim. (Accountings do not have <i>res judicata</i> effect in Delaware except as to matters actually contested in the accounting proceeding.)	One year after trustee provides report that adequately discloses claims. RSMo § 456.10-1005.

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SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
	Citation: Nev. Rev. Stat. §§ 166.010-166.170	Citation: N.H. Rev. Stat. Ann. § 564-D: 1 -18	Citation: Okla. Stat. tit. 31 § 11, et seq.	Citation: R.I. Gen Laws §§ 18-9.2-1 - 18-9.2-7
	Effective Date: Oct. 1, 1999	Effective Date: Jan. 2, 2009	Effective Date: June 9, 2004	Effective Date: July 1, 1999
	URL: http://www.leg.state.nv.us	URL: http://www.gencourt.state.nh.us	URL: http://www.lsb.state.ok.us	URL: http://www.rilin.state.ri.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) all or part of corpus of trust must be located in Nevada, domicile of settlor must be in Nevada, or trust instrument must appoint Nevada trustee; and (3) distributions to settlor must be approved by someone other than the settlor.	Trust instrument must: (1) be irrevocable; (2) expressly state that NH law governs validity, construction, and administration of trust (unless trust is being transferred to NH trustee from non-NH trustee); (3) contain spendthrift clause.	Trust instrument may be revocable or irrevocable. Trust instrument must: (1) expressly state Oklahoma law governs; (2) have qualified beneficiaries (ancestors or descendants of grantor, spouse of the grantor, charities, or trusts for such beneficiaries); (3) recite that income subject to income tax laws of Oklahoma; (4) limited to \$1,000,000 of assets plus growth.	Trust instrument must: (1) be irrevocable; (2) expressly state R.I. Law governs validity, construction, and administration of trust; (3) contain spendthrift clause.
2. May a revocable trust be used for asset protection?	No.	No.	Yes. Settlor may revoke or amend trust and take back assets. No court or other judicial body may compel such revocation or amendment.	No.
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. The 2007 legislature approved minor amendments.	No amendments. Statute first enacted in 2008.	Yes, amendment enacted in 2005.	Yes, amendment enacted in 2007.
4. What contacts with state are suggested or required to establish situs?	Required: (1) all or part of assets are in state; (2) Nevada trustee whose powers include: (a) maintaining records, (b) preparing income tax returns; (3) all or part	Required: (1) some or all of trust assets deposited in state; (2) NH trustee whose powers include (a) maintaining records (can be nonexclusive), (b) preparing or	Required: (1) Oklahoma trustee; (2) majority of value of assets comprised of Oklahoma assets.	Required: (1) some or all of trust assets deposited in state; (2) R.I. trustee whose powers include: (a) maintaining records (can be non-exclusive), (b) preparing or

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4. (Continued)	of administration in state.	arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.		arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.
5. What interests in principal and income may settlor retain?	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; (4) QPRT; (5) GRAT or GRUT; (6) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust; (7) ability to be reimbursed for income taxes attributable to trust.	Irrevocable trusts: not addressed by statute. Revocable trusts: see Item 7.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; QPRT; ability to be reimbursed for income taxes attributable to trust.
6. What is trustee's distribution authority?	Absolute discretion.	(1) Discretion; or (2) pursuant to an ascertainable standard.	Irrevocable trusts: not addressed by statute. Revocable trusts: see Item 7.	Discretion, or pursuant to a standard.
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment or other similar power.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor with nonrelated/nonsubordinate party.	Irrevocable trusts: not addressed by statute. Revocable trusts: settlor may revoke or amend.	Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment.
8. Who must serve as trustee to come within protection of statute?	Resident individual or trust company or bank that maintains office in Nevada.	Resident individual or a state or federally chartered bank or trust company having a place of business in New Hampshire.	Oklahoma based bank or credit union insured by FDIC or NCUA or Oklahoma based trust company chartered under Oklahoma law or nationally chartered, and has place of business in Oklahoma.	Resident individual (other than the transferor) or corporation whose activities are subject to supervision by R.I. Dept. of Business Regulation, FDIC, Comptroller of Currency, or Office of Thrift Supervision.

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9. May non-qualified trustees serve?	Yes.	Yes.	Yes.	Yes.
10. May trust have distribution advisor, investment advisor, or trust protector?	Not addressed by statute.	Yes. Trust may have one or more trust advisors who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. "Trust advisor" includes a trust protector or any other person who holds one or more trust powers.	Not addressed by statute.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor. The term "advisor" includes a protector.
11. Are fraudulent transfers excepted from coverage?	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Future creditors:</u> Two years after transfer. <u>Existing creditors:</u> Two years after transfer, or, if longer, six months after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud (rather than constructive fraud). 2007 amendment (effective 10/1/2007) provides that transfer is deemed discovered when reflected in a public record.	<u>Case law:</u> Actual fraud must be proved by clear and convincing evidence; constructive fraud by a preponderance of the evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.

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13. Does statute provide an exception (no asset protection) for a child support claim?	No.	Yes.	Yes.	Yes, if at the time of transfer a court order for child support existed.
14. Does the statute provide an exception (no asset protection) for alimony?	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.
15. Does statute provide an exception (no asset protection) for property division upon divorce?	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	No.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.
16. Does statute provide an exception (no asset protection) for tort claims?	No.	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No.	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.
17. Does statute provide other express exceptions (no asset protection)?	No.	No.	Yes, statute does not protect excess over \$1,000,000 of contributed property.	No.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	No.	Yes, unless the transferor made the qualified disposition for the purpose of defeating the surviving spouse's elective share rights.	No.	No.
19. Are there provisions for moving trust to state and making it subject to statute?	No.	No.	No.	No.
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	No.	Yes.	Yes.	Yes.

SUBJECT	NEVADA	NEW HAMPSHIRE	OKLAHOMA	RHODE ISLAND
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	No.	No.	Yes.
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	No.	Yes.	No.	Yes.
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	No.	Yes.	No.	Yes.
24. Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	No.	No, except for QPRT residence.	No.	No, except for QPRT residence.
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, if property is retained in a spendthrift trust for the beneficiary. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	No, however case law establishes that only vested and defined trust interests are included in the valuation of marital estates.	Yes, if property is retained in a spendthrift trust for the beneficiary. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	Yes, but may be considered in property division.

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26. Are due diligence procedures required by statute?	No.	No.	No.	No.
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	No.	Yes.	No.	Yes.
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No.	No.	No.	No.
29. Is the trustee given "decanting" authority to modify the trust?	No.	Yes. N.H. Rev. Stat. Ann. § 564-B: 4-418.	No.	No.
30. What is allowable duration of trusts?	Up to 365 years.	Abolished rule against perpetuities if the trust instrument expressly exempts the instrument from the rule against perpetuities and a trustee has the power to sell.	Rule against perpetuities.	Abolished rule against perpetuities.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No. Nevada has no state income tax.	Yes	Yes	No
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	Trustee petition and court discharge.	One year after trustee provides report that adequately discloses claims. N.H. Rev. Stat. Ann. § 564-B: 10-1005.	Two years after trustee provides report that adequately discloses claims.	Trustee application and court discharge.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
	Citation: S.D. Codified Laws §§ 55-16-1 - 55-16-17 Effective Date: March 2, 2005 URL: http://www.legis.state.sd.us	Citation: Tenn. Code Ann. § 35-16-101 Effective Date: July 1, 2007 URL: http://www.legislature.state.tn.us	Citation: Utah Code Ann. § 25-6-14 Effective Date: December 31, 2003 URL: http://www.le.utah.gov	Citation: Wyo. Stat. §§ 4-1-505 and 4-10-510 - 523 Effective Date: July 1, 2007 URL: http://legisweb.state.wy.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state that S.D. law governs validity, construction, and administration of trust (unless trust is being transferred to S.D. trustee from non-S.D. trustee); (3) contain spendthrift clause; specifically refer to S.D. Act.	Trust instrument must: (1) be irrevocable; (2) expressly state TN law governs validity, construction and administration of the trust; (3) contain a spendthrift clause.	Trust instrument must: (1) be irrevocable; (2) contain spendthrift clause.	Trust instrument must: (1) state that trust is a "qualified spendthrift trust" under § 4-10-510 of Wyoming statutes; (2) be irrevocable; (3) expressly state Wyoming law governs validity, construction and administration of the trust; (4) contain a spendthrift clause; (5) settlor must have personal liability insurance equal to lesser of \$1,000,000 or value of trust assets.
2. May a revocable trust be used for asset protection?	No.	No.	No.	No.
3. Has the state legislature consistently supported DAPT's and related estate planning by continued amendments?	No amendments.	Yes. Amendments enacted in 2008. Public Chapter No. 1010.	No amendments.	No amendments to DAPT statute which was enacted in 2007. However, Legislature has annually supported estate and trust legislation.
4. What contacts with state are suggested or required to establish situs?	Suggested: (1) some or all of trust assets deposited in state; (2) S.D. trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or otherwise materially participates in the administration of the trust.	Required: (1) some or all of trust assets deposited in state; (2) Tennessee trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	Required: (1) Utah trust company; (2) some or all of the assets held in certain types of accounts in state.	Required: Wyoming trustee who: (a) maintains custody of some or all of trust assets in state; (b) maintains records (can be non-exclusive); (c) prepares or arranges for the preparation of income tax returns; (d) or, otherwise materially participates in the administration of the trust.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
5. What interests in principal and income may settlor retain?	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) GRAT or GRUT; (5) QPRT.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT.	Settlor may retain interest in CRT.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT.
6. What is trustee's distribution authority?	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to a standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to a standard.
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor with nonrelated/nonsubordinate party.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to replace trustee/advisor with nonrelated/nonsubordinate party; and (4) serve as an investment advisor.	Settlor may retain: (1) power to veto distributions; (2) testamentary special power of appointment; and (3) power to appoint nonsubordinate advisors/protectors.	Settlor may retain: (1) power to veto distributions; (2) inter vivos or testamentary general or limited power of appointment; (3) power to add or remove a trustee, trust protector, or trust advisor; (4) serve as an investment advisor.
8. Who must serve as trustee to come within protection of statute?	Resident individual or corporation whose activities are subject to supervision by S.D. Division of Banking, FDIC, Comptroller of Currency, or Office of Thrift Supervision. S.D. trustee automatically ceases to serve if it fails to meet these requirements.	Resident individual, or is authorized by Tennessee law to act as a trustee and whose activities are subject to supervision by the Tennessee Dept. of Financial Institutions, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto.	Institution authorized to engage in trust business in Utah, including Utah depository institutions, non-Utah depository institutions authorized to do business in Utah, and certain other institutions.	Resident individual or a person authorized by Wyoming law to act as trustee or a regulated financial institution.
9. May non-qualified trustees serve?	Yes	Yes	Yes. Individual co-trustees may serve.	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor.	Yes. Trust may have: (1) advisors who have authority to remove and appoint qualified trustees or trust advisors; (2) advisors who have authority to direct, consent to or disapprove distributions from the trust; and (3) investment advisors. The term "advisor" includes a trust protector.	Yes. Trust may have non-subordinate advisors/protectors who can remove or appoint trustees; direct, consent to, or disapprove distributions; or serve as investment directors. Settlor may be investment director.	Yes. Trust may have trust protector who can remove or appoint trustees; direct, consent to, or disapprove distributions; change governing law; change beneficiary's interests; and grant or terminate powers of appointment. Trust may have advisors. Settlor may be an advisor.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
11. Are fraudulent transfers excepted from coverage?	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Burden not addressed by statute. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Burden not addressed by statute. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes.	Yes.	Yes.	Yes.
14. Does the statute provide an exception (no asset protection) for alimony?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes.	No.
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes.	No.
16. Does statute provide an exception (no asset protection) for tort claims?	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No.	Yes, see Item 17, below.	No.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
17. Does statute provide other express exceptions (no asset protection)?	No.	No.	Yes: (1) claim is decision or ruling resulting from judicial, arbitration, mediation, or administrative proceeding commenced prior to or within three years after trust created; (2) public assistance; (3) taxes; (4) violation of certain written representations or agreements; (5) fraud.	Yes. (1) Qualified trust property that is listed upon an application or financial statement used to obtain or maintain credit other than for the benefit of the qualified spendthrift trust; (2) property of a qualified spendthrift trust that was transferred to the trust by a settlor who received the property by a fraudulent transfer.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	No.	No.	No.	No.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes.	Implied, based on a trustee's power to make contributions to a DAPT.	Yes.	Yes, permits transfer of trust property from trust created in another jurisdiction with similar creditor protection for settlor with creditor protection relating back to date of funding of trust created in other jurisdiction. Irrevocable trusts from other states may also elect to become qualified spendthrift trusts if they incorporate law of Wyoming, obtain qualified trustee, and have spendthrift clause.
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes.	Yes.	Yes.	Yes.

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21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	Yes.	No.	Yes.
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes.	Yes.	No.	No.
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes.	Yes.	Yes.	Yes.
24. Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	Yes.	Yes.	No.	No, except for QPRT residence.
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	No.	Yes, but may be considered in property division.	No.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	No.	Yes; affidavit required.	No.	Yes; affidavit required.

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	WYOMING
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes.	Yes.	Yes.	Yes.
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No.	No.	No.	No.
29. Is the trustee given "decanting" authority to modify the trust?	Yes.	Yes.	No.	No, but trust protector may have a similar power.
30. What is allowable duration of trusts?	Abolished rule against perpetuities.	Up to 360 years.	Up to 1,000 years.	Up to 1,000 years, except for real property.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No.	No, if the beneficiaries are nonresidents. If the beneficiaries are residents, a tax is levied on dividends and interest.	No, except for Utah source income, such as rental income from Utah real property.	No.
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy.	Yes for LLCs; charging order is only remedy. No for LPs.	Yes, charging order is only remedy.	Yes; charging order is exclusive remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	180 days after trustee provides accounting, or by order of court for supervised trusts.	One year after trustee provides report that adequately discloses claims.	Six months after trustee provides report that adequately discloses claims.	Two years after trustee provides report that adequately discloses claims.