Steve Leimberg's Asset Protection Planning
Email Newsletter Archive Message #357

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Subject: Sandra D. Glazier, Martin M. Shenkman & Alan Gassman on DAPTs & Klabacka - At the Intersection of Estate Planning and Family Law

“Should your client’s marital planning include use of a domestic asset protection trust (“DAPT”) to safeguard separate assets in the event of a divorce? Given the uncertainty that can exist with respect to the enforceability of pre-and post-marital agreements, and the potential of a DAPT bolstering of separate property status, DAPTs can be an important facet of marital planning. Even when utilized for non-marital purposes, DAPT’s can have a favorable impact on marital and divorce planning. After the Jobs Cut and Tax Act of 2017 the doubling of transfer tax exemptions will facilitate the transfer of more assets to completed gift DAPTs in matrimonial planning.

The Tax Act will also change the historic treatment of alimony for divorces after 2018. This change could also have an impact on existing prenuptial agreements that may have fixed the amounts of alimony in the event of a later divorce. It is precisely this type of unforeseeable risk that supports the recommendation of this newsletter that prenuptial agreements be backstopped by the creation and funding of a DAPT prior to marriage to lessen the potential problems of such unforeseen-risks.

DAPTs have now been adopted in 17 states, with Michigan becoming the newest state to join this trend on March 8, 2017 Nine additional states have recognized some modified or limited version of a self-settle trust as being exempt from creditor claims. These include inter-vivos spousal QTIP trusts whereby a gift is made by one spouse to a QTIP marital trust to benefit the other spouse, followed by a transfer on the death of the beneficiary spouse to a credit shelter type trust formed under the QTIP to benefit the donor spouse, who is deemed not to have contributed to the trust. Some states have enacted statutes that provide an additional measure of asset protection for certain specified trusts or accounts (such *as 529 accounts and special needs trusts). This trend might provide support for rebuking public policy arguments historically utilized to evade or otherwise invalidate the exemption of assets governed by DAPTs from the claims of creditors. This may be of particular importance in divorces where a DAPT is created in a state which doesn't recognize spousal and child support obligations as exceptions to DAPT creditor protections."*

Sandra D. Glazier, Esq,3 **Martin M. Shenkman, Esq.**4 **and Alan Gassman**5 provide members with their commentary on whether a client's marital planning should include the use of a domestic asset protection trust to safeguard separate assets in the event of a divorce.

Here is their commentary:

EXECUTIVE SUMMARY:

Should your client's marital planning include use of a domestic asset protection trust ("DAPT") to safeguard separate assets in the event of a divorce? Given the uncertainty that can exist with respect to the enforceability of pre-and post-marital agreements, and the potential of a DAPT bolstering of separate property status, DAPTs can be an important facet of marital planning. Even when utilized for non-marital purposes, DAPT's can have a favorable impact on marital and divorce planning. After the Jobs Cut and Tax Act of 2017 ("Tax Act") the doubling of transfer tax exemptions will facilitate the transfer of more assets to completed gift DAPTs in matrimonial planning.

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DAPTs have now been adopted in 17 states, with Michigan becoming the newest state to join this trend on March 8, 2017.[6] Nine additional states have recognized some modified or limited version of a self-settle trust as being exempt from creditor claims.[7] These include inter-vivos spousal QTIP trusts whereby a gift is made by one spouse to a QTIP marital trust to benefit the other spouse, followed by a transfer on the death of the beneficiary spouse to a credit shelter type trust formed under the QTIP to benefit the donor spouse, who is deemed not to have contributed to the trust. Some states have enacted statutes that provide an additional measure of asset protection for certain specified trusts or accounts (such as 529 accounts and special needs trusts).[8] This trend might provide support for rebuking public policy arguments historically utilized to evade or otherwise invalidate the exemption of assets governed by DAPTs from the claims of creditors.[9] This may be of particular importance in divorces where a DAPT is created in a state which doesn't recognize spousal and child support obligations as exceptions to DAPT creditor protections.

COMMENT:

What are DAPTs? They are self-settled trusts in which the settlor is also named as beneficiary of the trust or may become a beneficiary if certain events occur. It is essentially a self-settled irrevocable spendthrift trust established by a grantor, at least in part, for his or her own benefit and/or the benefit of a spouse or other family members, which is intended to provide (among other things) creditor protection.

The nexus between the grantor, trustees and trust assets subject to the jurisdiction and administration of the state whose DAPT benefits are sought may, however, remain important to the "public policy" analysis. In *Huber*10 Washington's strong public policy against self-settled asset protection trusts was utilized to invalidate the creditor protections otherwise afforded to an Alaska DAPT.11 In *Huber,* the Grantor was a Washington State resident and had no substantial ties or relationship with Alaska under whose governing laws the DAPT was intended to be governed. The vast majority of the DAPT's assets were located in Washington, not Alaska. The sole Alaskan asset was a $10,000 CD. While there was an Alaskan corporate co-trustee, it was largely inactive in the administration and affairs of the DAPT. At its core, *Huber*12 was resolved under a conflict of laws analysis as to whether Washington (where Grantor resided, the bulk of the assets were located, the creditors were located, and the proceedings took place) or Alaskan law (the stated governing law within the DAPT instrument) controlled. The court relied largely upon the Restatement of Trusts13 in reaching its conclusion that Washington law should control, despite the stated governance within the DAPT of Alaskan law. The *Huber* court recognized:

An inter-vivos trust of interests in movables is valid if valid:

> (a) under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in §6.1
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> Comment b clarifies when a state has a substantial relation to the trust and when the law of the designated state will not be applied:
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> b. Law designated by the settlor to govern validity of the trust. Effect will be given to a provision in the trust instrument that the validity of the trust shall be governed by the local law of a particular state, provided that this state has a substantial relation to the trust and that the application of its local law does not violate a strong public policy of the state with which as to the matter at issue the trust has its most significant relationship.
>
> A state has a substantial relation to a trust when it is the state, if any, which the settlor designated as that in which the trust is to be administered, or that of the place of business or domicil *(sic)* of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicil *(sic)* of the settlor, at that time, or that of the domicil *(sic)* of the beneficiaries. There may be other contacts or groupings of contacts which will likewise suffice.14
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> Under the Restatement, the Debtor's choice of Alaska law designated in the Trust should be upheld if Alaska has a substantial relation to the Trust. Restatement § 270(a). Comment b provides that "a state has a substantial relation to a trust if at the time the trust is created: (1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state. These contacts with the state are not exclusive." In the instant case, it

> is undisputed that at the time the Trust was created, the settlor was not domiciled in Alaska, the assets were not located in Alaska, and the beneficiaries were not domiciled in Alaska.[15]

Therefore, making sure that there is a significant and sufficient nexus between the DAPT assets, their administration, the role of the resident independent trustee, and the selected governing law may remain important to obtaining the benefits of creditor-protection when the settlor is a beneficiary of the trust. Many commentators question~~s~~ the Huber decision on the basis that it was a simple fraudulent conveyance issue and should have been decided as such.

Like *Huber,* a 2015 Utah court decision negated the protections of a Nevada DAPT, created by the husband into which marital property was transferred, using a conflict of laws analysis. In *Dahl*[16] the court vitiated the asset protection of the Nevada trust by applying Utah law (as opposed to the stated governing law of Nevada as provided for in the DAPT) premised upon Utah's strong public policy favoring equitable distribution of marital assets.[17] While the court found that under Nevada law the trust would have been deemed irrevocable; under Utah law the trust was revocable (and therefore subject to division in the Utah divorce proceedings). The finding of revocability was determinative in the decision that the assets could be subject to division in the Utah divorce proceedings. The finding of revocability was premised upon the following language contained in the DAPT:

> Trust Irrevocable. The Trust hereby established is irrevocable. Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereof.[18]

Therefore, despite the declaration of irrevocability and applicability of Nevada law, the ability to alter or amend the trust lead the Utah court to find that the trust was revocable and therefore subject to division in the Utah divorce proceedings. It is not clear why such language had been included in the trust instrument. Had language of revocability not been included, would the DAPT been found enforceable? The answer to this question was not resolved.

Even though DAPTs have been around since 1997 (and offshore asset protection trusts long before that), there have been relatively few cases providing guidance with regard to DAPT enforceability. As a consequence, naysayers continue to suggest their shortcomings and risk. For example, the Uniform Voidable Transfers Act ("UVTA") Section 4, Comment 8, provides that a transfer to a self-settled domestic asset protection trust is voidable if the transferor's home state does not have DAPT legislation. The Comment provides the following example:

> By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y.

Despite the naysayers, the number of states permitting DAPTs continues to grow. 17 states with DAPT legislation is not an insignificant number. The trend in the growth of the number of states with DAPT legislation is also notable. Therefore, in appropriate circumstances, with proper caution to clients, and reasonable safeguards, DAPTs might be a useful tool in the planner's tool kit. Foreign asset protection trusts ("FAPTs") may be less subject to invasion, because court cases and statutes in these jurisdictions make it clear that the courts there will apply the jurisdiction enlisted in the instruments as opposed to the law of the settlor's residence when attempts to force distribution and invasion of the trust occur.[19]

U.S. based DAPT statutes tend to require use of at least one resident trustee (and in some jurisdictions that trustee may need to be one vested with distribution authority) in order to avail the trust of the jurisdiction's statutory creditor protections. A portion of the trust assets may be required to be located in the DAPT's governing state to provide nexus. Some states require certain prerequisites and formalities, such as affidavits of solvency, in order for transfers to the DAPT to be afforded creditor protection. Other states are less stringent or formal with regard to such requirements. Suffice it to say, it may be important to not only review the requirements set forth in a state's DAPT statutes, but also those implicated under applicable fraudulent transfers or conveyances statutes in that state. In assessing the pros and cons of the growing number of states that permit self-settled trusts, practitioners may find an annual chart created by attorney Steve Oshins helpful.[20] [21]

Benefits may be retained by the grantor. The extent to which benefits may be retained by a grantor while still being afforded creditor protection (in the

DAPT state) will largely depend upon the state's DAPT statute. Depending upon the "strings" attached, the creation of a DAPT may or may not constitute a completed gift.[22]

The potential implications of bankruptcy policies, exceptions and preclusions are generally beyond the scope of this newsletter.[23] However, it may be worth noting that under 11 U.S.C. § 541(c)(2) DAPT assets will generally pass outside of the bankruptcy estate and be sheltered from creditors if applicable state laws operate to prevent creditors from having access, unless the 10 year fraudulent transfer statute (11 U.S.C. §548(e)(1)) applies to enable the court to set aside the transfer to an DAPT made with the intent to hinder, delay or defraud the creditor. For purposes of analyzing the impact of these bankruptcy code provisions, the applicable state law would be that law which would be applied by state courts if the creditor sued the debtor other than in the bankruptcy court arena.

The focus of this newsletter is not on bankruptcy ramifications or the potential tax benefits or consequences, but rather upon other practical planning opportunities and options which might be addressed through use of a DAPT. Besides providing general creditor protection, DAPTs may be considered a backstop to further enhance the security of a prenuptial agreement. In this application, one might consider whether a sufficient nexus to a DAPT state exists, or alternatively whether greater benefit might be derived from the use of an offshore FAPT. Key to this analysis may be whether the DAPT and divorce jurisdictions recognize DAPTs as being exempt from the claims of a spouse or children (such as Michigan's DAPT statute).[24]

If there wasn't a sufficient nexus between the grantor and the DAPT jurisdiction at the time the DAPT was created the state court judge may nonetheless consider the existence of the DAPT assets in the division of the marital estate or in otherwise establishing support obligations of the grantor. Many commentators believe that naming an institutional trustee in the DAPT state, and complying with the requirements of the DAPT statute, should be sufficient to establish nexus.

If the grantor was not a resident of the DAPT jurisdiction, or if the DAPT jurisdiction in question does not preclude the claims of a spouse (or child) for support or division of assets in the context of divorce, one might consider use of a so called "Jones clause" which could provide that the trust will be accessible solely to the ex-spouse as ordered by a court of competent jurisdiction, as an exception to the general creditor protection, especially where the purposes of the DAPT is for third party creditor protection or other estate planning purposes.

Consider the following scenarios when use of a DAPT might prove beneficial:

- Grantor is planning to wed and has a fiancé who is reticent to enter into a prenuptial agreement. Some state statutes explicitly recognize non-marital asset funding of a DAPT, without spousal consent, if done more than 30 days before the parties wed.[25]. Even if the spouse-to-be is willing to execute a prenuptial agreement, given the number of prenuptial agreements that are challenged, implementing a DAPT (or other irrevocable trust plan) as far in advance of the marriage as possible may well provide additional protection. The asset disclosures to one's fiancé generally required to create enforceable waivers under a prenuptial agreement are not prerequisites to the creation of a DAPT. Nonetheless, the existence and specific terms of the DAPT, and the value (and possibly specifics of) its assets should be disclosed prior to the signing of a prenuptial agreement. Some matrimonial attorneys would suggest appending the entire trust agreement and a trust balance sheet to the prenuptial agreement to preclude any challenge based on lack of knowledge or disclosure. Further, regardless of a 30-day advance disclosure requirement in any applicable statute, the further in advance of the marriage that the DAPT is executed and funded the better.

- Grantor resides in or moves to a jurisdiction where the enforcement of prenuptial and postnuptial agreements may be questionable. The enforceability of a prenuptial waiver of statutory rights to invade separate property, granted a court under statutorily approved circumstances, was recently called into question in Michigan.[26] This erosion of the enforceability of property agreements follows other cases which held certain postnuptial agreements to be unenforceable as a matter of public policy.[27] While the Michigan legislature is currently considering a statutory solution to reverse the ramifications of this case, DAPTs may provide a viable solution to part of the problem created by these (hopefully aberrant) cases and for situations and as belt and suspenders for situations where the formalities may not be follow or enforceability of prenuptial agreements allowed for any reason. In some states, family law courts may agree that assets under a properly managed DAPT are not considered the property of a donor spouse. In jurisdictions which recognize the donor spouse’s DAPT interest as separate property, such treatment can have a significant impact upon the ultimate division of the marital estate and/or the establishment of support obligations.

- Perhaps the Grantor is a beneficiary under a trust that is scheduled to terminate or has a vested right of withdrawal, or is scheduled to receive major distribution. While it might be possible to address these issues through a non-judicial trust modification, decanting, or moving the trust to an offshore jurisdiction, what if these options aren’t available? Use of a DAPT might create or extend a period during which the assets can be afforded spendthrift and/or other creditor protections.

- Grantor was a minor when an annual exclusion Internal Revenue Code §2503(c) GST trust was created for his benefit, which of necessity terminates at age 21. Use of a DAPT could extend spendthrift provisions not otherwise available under the §2503(c) GST trust.

- Grantor inherits, receives or otherwise has an interest in a closely held family business whose operation could be adversely impacted should Grantor’s creditors or spouse attempt to claim an interest in the entity. While the benefits of an LLC might eliminate some of the adverse constraints of such a claim if only a charging lien is available, further and enhanced protection might be afforded by a DAPT. This type of planning might be further enhanced by fractionalizing business assets (e.g. real estate, intellectual property rights, etc.) into separate LLCs (e.g. a real estate LLC that leases real estate to the operating entity) and thereafter transferring certain rights (perhaps preferably in the passive entities) to a DAPT and then leasing (licensing, etc. as appropriate) rights to the operating entity, etc.

This is not intended to advocate the use of a DAPT in lieu of a prenuptial or postnuptial agreement or even an LLC. Rather the use of a DAPT may be a useful "belt and suspenders" to the protection of assets – particularly those which represent (or can be (re-characterized as) separate property interests.

As alluded to above, a Michigan resident might derive real benefit from a Michigan DAPT[28], given current uncertainties regarding the enforceability of various provisions contained in prenuptial agreements (following the issuance of the 2017 *Allard* III decision[29]) and postnuptial agreement (following the *Wright*[30] and *Cheff*[31] decisions) in the context of Michigan divorces. Many other states that acknowledge the viability of pre- and post-nuptial agreements, nonetheless leave open potential opportunities for a court to determine that the agreement (or a provision therein) will not be enforced for a variety of reasons which have been left to the discretion or province of the court.

Some arguments against the enforceability of DAPTS (and perhaps pre and/or postnuptial agreements to the extent they may be found to encourage divorce) have relied upon statements of "public policy".[32] The *Wright*[33] and *Cheff*[34] decisions each invalidated post-nuptials because the agreements were found to encourage divorce (having been executed during a period when the parties were not separated and divorce was not then presently contemplated and would place a party in a better position if divorce was to ultimately occur). Both decisions were premised upon such agreements (under those facts and circumstances) being determined to be void as against public policy. It is against this backdrop that the importance of the mounting number of states that have recognized some form of self-settled asset protection trusts or accounts, may be of import, especially in those states that do not exempt spouses, alimony and child support obligations from the list of creditors whose attempts to compel distribution will be barred.

The recent Nevada case, *Klabacka v. Nelson*[35], may not only provide guidance but also some solace to practitioners when addressing "public policy" arguments that might undermine the enforceability of a properly funded DAPT. Essentially, Nevada (like Michigan) does not exempt claims of spouses or children from creditor protection (assuming that the DAPT is either created more than 30 days before marriage and the support debt isn't in arrears at the time of creation or if the DAPT is created with the express written agreement of the spouse). In *Klabacka,* the parties entered into a separate property agreement which resulted in the conversion of community property into separate property interests. Each of the parties then funded their own respective self-settled spendthrift trusts with such separate property. In the divorce, the wife sought to equalize their respective estates (including the values of their respective DAPTs). Even though the trial court found that the parties' clearly intended to create spendthrift trusts that would provide maximum protection from the claims of creditors, the trial court was found, by the appellate court, to have erred when it found that it had the ability to equalize the value of the DAPT and order that support, attorney and expert witness fee obligations were to be paid from husband's DAPT where the transfers of trust property weren't fraudulent or in violation of a legal obligation owed to the creditor under a contract or a valid court order that was legally enforceable by that creditor. The appellate court held that the statutes precluded the trial court's action in: (1) equalizing the DAPTs, and (2) in ordering husband's DAPT to be invaded to satisfy his court ordered personal obligations to his wife. The appellate court specifically negated the trial court's reliance on statutes from South Dakota and Wyoming, as well as case law from Florida, which specifically allow self-settled spendthrift trust assets to be reached to satisfy child and spousal support. The appellate court repudiated reliance on public policy concerns, utilized in other jurisdictions to invade spend thrift trusts to satisfy support obligations (whether they be for alimony or child support), because the statute itself enunciated Nevada's public policy when it explicitly excluded the involuntary distribution and use of spendthrift trust assets to satisfy a beneficiary's support obligations. The appellate court noted that:

> … Nevada's self-settled spendthrift framework [is] unique; indeed, the "key difference" among Nevada's self-settled spendthrift statutes and statutes of other states with [self settled spendthrift trusts], including Florida, South Dakota, and Wyoming, "is that Nevada abandoned the interests of child- and spousal-support creditors, as well as involuntary tort creditors," seemingly in an effort to "attract the trust business of those individuals seeking maximum asset protection"36
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> …Nevada's statutory framework explicitly protects spendthrift trust assets from the personal obligations of beneficiaries – 37

Also at issue was whether breaches in trust formalities could give rise to wife's right to invade or invalidate the trust. The court also found that breaching trust formalities of an otherwise validly created DAPT did not cause loss of creditor protection. Rather, it created a cause of action for a civil suit against the trustee for whatever costs and damage occurred. Unlike corporate governance cases, the trustee's failure to properly administer and follow the formalities of the DAPTs did not give rise to the claimant (spouse's) ability to treat the trust as husband's alter ego.

Michigan's Qualified Dispositions in Trust Act, like Nevada's statutory regime, explicitly provides that if the requirements of the Act are met, and

> … the trust beneficiary is the transferor of the qualified disposition, the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition is not considered marital property, is not considered, directly or indirectly, part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance38…

The Act further provides that:

> (2) Except as otherwise provided in this act, the interest of a beneficiary in a trust or portion of a trust that is a qualified disposition is not subject to a process of attachment issued against the beneficiary, and may not be taken in execution under any form of legal process directed against the beneficiary, trustee, trust estate, or any part of the income of the trust estate, but the whole of the trust estate and the income of the trust estate must go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear and discharged of and from all obligations of the beneficiary.
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> (3) The trustee of a qualified disposition shall disregard and oppose an assignment or other act, voluntary or involuntary, that is attempted contrary to this section.***39

Just as Nevada established its public policy against invasion of a self-settled spendthrift trust vis-à-vis its enactment of its statutes, essentially so has Michigan.

The *Klabacka* holding is a positive development for DAPTs and suggests that the very protective Nevada and Michigan statutes that exclude a divorcing spouse as an exception creditor will be respected. Unfortunately, the decision does not address the most worrisome DAPT issue, which is whether a resident of a non-DAPT jurisdiction, who creates a trust in a DAPT jurisdiction such as Nevada, will have that trust respected (i.e. will achieve the hoped-for asset protection goals).

Given the discretion that might otherwise be afforded to a court in divorce proceedings to negate terms contained within a prenuptial agreement, the use of a DAPT, in addition to the prenuptial agreement, to protect separate property interests warrants consideration.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

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[4] Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes, updated through August 2017, Edited by David G. Shaftel, www.actec.org/assets/.../Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust.

[7] Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes, updated through August 2017, Edited by David G. Shaftel, supra.

[8] *Ibid.*

[9] *See In re Huber,* 493 B.R. 798 (W.D. Wash, 5/17/2013).

[10] *In re Huber, ibid.*

“[11]Specifically, pursuant to RCW 19.36.020, transfers made to self-settled trusts are void as against existing or future creditors. Carroll v. Carroll, 18 Wash.2d 171, 175, 138 P.2d 653 (1943).” *In re Huber, ibid* at 809.

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[13]Restatement (Second) of Conflict of Laws, §270(a) (1971).

[14] *In re Huber, supra* at 807-808.

[15] *In re Huber, ibid* at 808, internal citations omitted.

[16] *Dahl v. Dahl,* --- P.3d ----2015 WL 5098249, 794 Utah Adv. Rep. 5, 2015 UT 79 (8/27/2015).

[17] In *Dahl, Ibid* at *5, the court held that '[u]nder Utah choice-of-law rules, we will generally enforce a choice-of-law provision contained in a trust document, unless doing so would undermine a strong public policy of the State of Utah. See UTAH CODE § 75–7–107 & cmt."

[18] *Ibid* at *6.

[19] *Branch Banking & Trust Co. v. Hamilton Greens, LLC*, 2014 WL 1493086 (S.D. Fla. Mar. 24, 2014). Full Opinion at http://goo.gl/2Ca9bw; *See TrustCo Bank v. Mathews*, 2015 WL 295373 (Del. Ch., Jan. 22, 2015).

[20] "2017 Steve Oshins Releases 8th Annual Domestic Asset Protection Trust State Rankings Chart...with a Huge Surprise!" Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #342, April 24, 2017.

[21] An article that details the state-by-state requirements for affidavits appears in Alan Gassman & Dena Daniels, *The Affability of Affidavits in Domestic Asset Protection Trust Planning,* Steve Leimberg's Asset Protection Palnning Email Newsletter – Archive Message #293.

[22] For decades, it was assumed that the transfer of assets to a DAPT might be an incomplete gift. . However, the IRS has held in PLR 9837007 and PLR 200944002 that transfers to a DAPT could be completed gifts for gift tax purposes. *See*, CCA 201208026 and Steve Leimberg's Asset Protection Planning Newsletter #287 by Alan Gassman, Leslie Share, Ken Crotty and Kacie Hohnadell.

Battley v. Mortensen, 2011 WL 5025249 (Bankr. D.C. Alaska 5/26/2011), motion for reconsideration denied.2011 WL 5025252 (Bankr, D.C. Alaska 7/8/2011) essentially represented the first Alaska case addressing its DAPT statute. This case reminds us that state statutes do not pre-empt federal statutes. Here §548(3) of the Bankruptcy Code essentially imposed a 10-

year SOL with regard to fraudulent transfers made to a self-settled trust. To establish an avoidable transfer under § 548(e), the trustee must show that the debtor made the transfer with the actual intent to hinder, delay and defraud present or future creditors by a preponderance of the evidence.54 Here, the trust's express purpose was to hinder, delay and defraud present and future creditors. However, there is additional evidence which demonstrates that Mortensen's transfer of the Seldovia property to the trust was made with the intent to hinder, delay and defraud present and future creditors.

In another case, *TrustCo Bank v. Matthews*, 2015 WL 295373 (Del. Ch. 1/22/2015), the court conducted (but did not conclude) its choice of laws analysis, finding that the statute of limitations under both New York and Delaware law barred the banks attempt to void transfers to three Delaware DAPTs by the debtor in a collection action relating to financing of projects in Florida. Here the grantor of the DAPTs was a New York and then Florida resident, the DAPTs were funded after the debt in question was incurred, but disclosed to the creditor more than 2 years before the collection action.

But, it may be important to note that *In re Reuter,* 499 B.R. 655, 678 (Bankr. W.D. Mo 2013) the bankruptcy court upheld the protections of the Missouri DAPT and found the assets of a DAPT not to be property of the bankruptcy estate, where there was no claim that the transfers to the DAPT constituted an attempt to hinder the rights of creditors such that they constituted a fraudulent conveyance

[24] *See* MCL 700.1045(a) & (b)(i)-(ii).

[25] *See* Michigan statue MCL 700.1045(4)(b)(i; Alaska statute § 34.40.110(l); and, South Dakota statute § 55-16-15(2).

[26] *See Allard v. Allard*, 318 Mich App 583 (2017) ("*Allard* III").

[27] *See Wright v Wright*, 279 Mich App 291, 761 NW2d 443 (4/22/2008; and, *Cheff v Cheff,* unpublished Mich App per curium decision no. 300231, (4/24/2012).

[28] Known as the Qualified Dispositions in Trust Act", MCL 700.1041, et seq.

[29] *Allard v. Allard*, 318 Mich App 583 (2017) ("*Allard* III").

[30] *Wright v Wright*, 279 Mich App 291, 761 NW2d 443 (4/22/2008).

[31] *Cheff v Cheff,* unpublished Mich App per curium decision no. 300231, (4/24/2012).

[32] *See Waldron v. Huber,* 493 B.R. 798 (W.D. Wash, 5/17/2013). See also, *Dahl v. Dahl,* 215 Utah 79 (2015).

[33] *Wright*, *supra* at 298.

[34] *Cheff, supra* at *4.

[35] *Klabacka v. Nelson*, 394 P. 3d. 940 (5/25/17).

[36] *Ibid*, at p. 951.

[37] *Ibid,* at p. 952.

[38] MCL 700.1045(4)(b).

[39] MCL 700.1049 (2) and (3).