

Steve Leimberg's Asset Protection Planning Email Newsletter Archive Message #366

Date:19-Apr-18

Subject: Steve Oshins Releases 9th Annual Domestic Asset Protection Trust State Rankings Chart...with Big Changes!

"The [Chart](#) serves as a guide for advisors to help select the appropriate DAPT situs for their clients. Although there are certain subjective aspects of the Chart, the advisor can determine what that advisor feels is most important and can make an independent determination about which situs are favorable and which are less favorable.

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Each year, attorney **Steve Oshins** authors a Domestic Asset Protection Trust State Rankings Chart showing the differences in each state's laws and with links to all states' Domestic Asset Protection Trust ("DAPT") statutes. This year Steve has released the [9th Annual Domestic Asset Protection State Rankings Chart](#).

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Steve authors three different annual state rankings charts and one state income tax chart:

- [The Annual Domestic Asset Protection Trust State Rankings Chart](#)
- [The Annual Dynasty Trust State Rankings Chart](#)
- [The Annual Trust Decanting State Rankings Chart](#)
- [The Annual Non-Grantor Trust State Income Tax Chart](#)

Now, here is Steve Oshins' commentary:

EXECUTIVE SUMMARY:

Asset protection has become one of the hottest areas of law and has become the ideal complement to estate planning. Consequently, the Domestic Asset Protection Trust ("DAPT") has become one of the most popular asset protection tools in the planner's toolbox. As more states have enacted DAPT legislation, practitioners have started doing more DAPTs for their clients.

COMMENT:

The Chart

The [9th Annual Domestic Asset Protection Trust State Rankings Chart](#) was created to serve as a single page guide to various states' DAPT statutes. The states are ranked based on various material factors that are important in selecting a situs for the trust. Although the weights that are applied to different variables are subjective, the methodology used is likely very similar to what most advisors would likely follow.

Michigan and Utah and the Uniform Voidable Transactions Act ("UVTA")

A new variable was added to this year's Chart to take points away from a DAPT jurisdiction that has enacted the UVTA. Michigan and Utah both enacted this Act in 2017, thereby becoming the first DAPT jurisdictions to do so.

In fact, in this author's opinion, the enactment of the UVTA was significant enough to warrant a 12.5% weighting in the Chart, thereby making sure Michigan and Utah are kept outside of the group of jurisdictions that planners should consider when selecting a situs for their DAPTs.

A succinct description of the problem can be found in George Karabjanian's very well-written recent article for WealthManagement.com titled [Two DAPT States Adopt the UVTA](#), where he writes:

With the creation of new Section 10 to the UVTA (the governing law section) and the addition of certain official comments to Section 4 of the UVTA, the Uniform Law Commission is advocating that any transfer to a DAPT is voidable if the transferor's home jurisdiction hasn't enacted DAPT legislation. Specifically, the seventh paragraph of new Comment 8 to Section 4 of the UVTA (the "anti-DAPT provision") provides: '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.'

Toni 1 Trust v. Wacker – New Case from Supreme Court of Alaska

In [Toni 1 Trust v. Wacker, 2018 WL 1125033 \(Alaska, Mar. 2, 2018\)](#), the Supreme Court of Alaska ruled on an Alaska statute purporting to grant the State of Alaska exclusive jurisdiction over fraudulent transfer actions against an Alaska trust. The Court ruled that it cannot.

As I noted in [Steve Oshins on Toni 1 Trust v. Wacker: DAPT Fraudulent Transfer Statutes Not Exclusive, But Yet Again No Discussion about Whether Non-Resident Can use a DAPT, LISI Asset Protection Planning Newsletter #360](#) (March 6, 2018):

Assuming other courts follow this result, it essentially takes away much of the advantage of a DAPT set up in a state with a more favorable statute of limitations. It's that simple.

Does this mean that it doesn't matter anymore whether the chosen DAPT jurisdiction has a short or long statute of limitations? In other words, is a DAPT jurisdiction with a two-year statute of limitations superior or only equivalent to a DAPT set up under the laws of a jurisdiction with a four-year statute? [This analysis, of course, does not factor in other features of the chosen jurisdiction.]

Asset protection planning is in large part based on the “fear factor”. It’s often about structuring one’s assets so that a future creditor is scared that collectability will be difficult. Quick and cheap settlements are preferred to long, expensive trials. A DAPT jurisdiction with a two-year statute of limitations is and always will be [or will at least appear to be] scarier to a creditor than one with a four-year statute where the transfer is past the two-year period, but not past the four-year period.

Only where one assumes that the plaintiff’s litigation attorney is familiar with each and every way to bust through the structure do some of these cases sometimes level the playing field for the creditor. This is why using an expert trust litigator who is familiar with case law of national interest provides an incredible advantage to the creditor.

Because of this new case, the new Chart combines two separate Statute of Limitations variables into one variable and reduces the former combined 10% weight for this variable in half to only 5%. It also reduces the weight applied to the Fraudulent Transfer Standard variable from 7.5% to 5% as a result of this new case.

The Variables and Weights Applied

No single-page chart can include every possible variable. The Chart uses the following nine variables to create the rankings:

1. Does the state have a DAPT statute? [50% weight]

This is simply the minimum requirement necessary to be listed on the Chart. So all DAPT states start with 50 points.

2. Does the state have a state income tax on trusts? [5% weight]

There are 17 DAPT states. Therefore, with so many jurisdictional options, there is no reason to pick a state with a state income tax on trusts. However, since most DAPTs are grantor trusts until the settlor dies (unless it’s an “Incomplete Gift Non-Grantor Trust” or “ING Trust”), this variable only carries 5% weight.

3. Has the state enacted the Uniform Voidable Transactions Act? [12.5% weight]

This penalized Michigan and Utah. See discussion above.

4. What is the statute of limitations for a creditor? [5% weight]

The faster a debtor obtains protection, the better. So states with a longer statute of limitations are penalized.

5. Are divorcing spouses, alimony creditors and/or child support creditors considered exception creditors who can access the DAPT assets? [5% weight]

Divorce is worth 3%, alimony 1% and child support 1%. This reflects the likelihood that it's the ability to potentially move the assets out of the marital estate for divorce purposes that is most important here. Certainly there are fact patterns where protecting assets from alimony and child support might be important, but there are even more circumstances where that might be considered reprehensible. The weight given those items reflects that.

6. Are there any other classes of exception creditors such as preexisting tort creditors? [5% weight]

The more exception creditors, the less protective the DAPT statute. Physicians are a great example. So many physicians want and need asset protection, so it would be bad planning for them to situs their DAPT in a state that has an exception creditor statute for preexisting tort creditors.

7. How easy is it to comply with the statute? Is a new Affidavit of Solvency needed for every new transfer? [7.5% weight]

This might be the most important factor. As long as the advisor gives the client specific instructions and the client follows them, this isn't a problem at all. But, especially for those clients who will make numerous additional transfers to the DAPT, they are likely better off using a jurisdiction that doesn't require a new Affidavit of Solvency for each new transfer. Failure to comply with the state statute can mean that the new transfer to the DAPT is not protected.

8. What is the fraudulent transfer standard? [5% weight]

The more difficult the fraudulent conveyance standard, the more points the state receives. The better states require that a creditor prove by clear and convincing evidence that the transfer was fraudulent.

9. Is the state a favorable Decanting jurisdiction? [5% weight]

Certainly the practitioner can draft decanting language into the trust agreement in order to allow this flexibility. But if that is not done, then the trustee must rely on the applicable state situs for a blueprint of what is allowed and not allowed if the trustee wishes to make changes by decanting the trust. Decanting means that the trust assets are distributed to another trust for the benefit of one or more of the same beneficiaries of the first trust. Since decanting has become so widespread recently, this has been accounted for in the Chart.

Summary

The [Chart](#) serves as a guide for advisors to help select the appropriate DAPT situs for their clients. Although there are certain subjective aspects of the Chart, the advisor can determine what that advisor feels is most important and can make an independent determination about which situs are favorable and which are less favorable.

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HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Steve Oshins

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CITES:

The author highly recommends Dave Shaftel's [ACTEC Comparison of the DAPT Statutes](#) which details the state-by-state differences among DAPT statutes.