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Fraudulent Conveyances Masquerading as Asset Protection Trusts

"Asset Protection Trusts" have long been in use in the Cook Islands and in other foreign locations. When they were used in the Cook Islands they were roundly denounced in the United States as a bold attempt by the settlors to avoid paying their creditors. They were widely regarded as ineffective under the laws of all the states; that law treated the trusts as void per se or as voidable transfers that could be set aside. Persons who used them were sometimes ordered to bring the assets back to the United States and, in a few cases, put in jail for contempt when they refused.

In 1997 Alaska and Delaware enacted laws that apparently authorized the use of such trusts. Since that time fifteen more states have enacted such laws. The thesis of my article is that a self-settled trust in which the settlor is the principal beneficiary, or has the power to become the beneficiary by appointing a malleable trustee, is no different than its predecessors in the Cook Islands. I argue that these trusts are fraudulent conveyances.

The case law is fragmentary but I read it to be hostile to these trusts. The laws have been stimulated by lawyers' and banks' interest in fees that can be earned by the lawyer drafters and by the bank trustees who will hold the principal. The state legislatures seem ignorant of the harm that such trusts can do if they are permitted to stand against the challenges of creditors, particularly nonconsensual creditors such as ex-wives and malpractice plaintiffs.

Viewed with a dispassionate but slightly skeptical eye, transfers to asset protection trusts are fraudulent conveyances pure and simple. I think so and the evidence points that way.[1]

The asset protection trust is a simulacrum of the well-known and thoroughly conventional mode of holding assets for a "beneficiary" by a "trustee" under the terms of an elaborate document.[2] Trusts, of course, are widely used in estate planning and elsewhere in circumstances where one person, the settlor, wishes to make assets available to another on the settlor's terms;[3] a parent might use a trust to put aside assets for a minor child or for several grandchildren to share for their education. Typically the settlor wishes to direct or limit the beneficiary's use of the principal and income because of the beneficiary's tender age or because the settlor fears that the beneficiary will waste the assets or otherwise use them for a purpose contrary to the settlor's wishes.[4]

The prototypical asset protection trust is different. In it the settlor and the beneficiary are the same person. When he is also the beneficiary, the settlor has the direct right to enjoy the assets; even when he is not the beneficiary, the settlor frequently has the indirect right to enjoy the assets by retaining the power to remove any trustee who does not honor the settlor's requests.[5] Invariably these trusts have "spendthrift" terms that purport to remove the trust assets from the reach of the settlor's creditors.[6]

Seventeen states have adopted statutes that authorize asset protection trusts. [7] All of these statutes change the law that prevailed before their enactment. Prior to the adoption of these statutes, the law in all of the states invalidated self-settled spendthrift trusts under a common law principle that found all such provisions to be a violation of public policy or because they were found to be fraudulent conveyances. [8] As elaborated below, these statutes wipe out the contrary common law in the states where they are enacted and they modify the state fraudulent conveyance law to make a creditor's fraudulent conveyance path more difficult. [9]

1. The History of Domestic Asset Protection Trusts

For many years clever Americans have joined like-minded Englishmen in putting assets in trusts in remote former English properties where the law bars creditors from reaching the assets. [10] Of these properties, the Cook Islands in the South Pacific, is the most notable. The Cook Islands became a British Protectorate in the 19th century; currently it is a self-governing entity in "free association" with New Zealand. Residents of the Cook Islands are New Zealand citizens. [11]

The Cook Islands International Trust Act of 1984 makes self-settled trusts fully enforceable, bars creditors from reaching trust assets and precludes creditors from attacking a transfer into a Cook Islands trust as fraudulent. [12] Finally, the statute provides that no Cook Islands court shall recognize a foreign judgment, if the judgment is based upon application of a law inconsistent with the statute. [13] In 1984, the law of every state in the United States would have been "inconsistent." [14] Exactly how much money the Cook Islands trusts attracted from the United States is unknown, but it is a large sum that may have run to the trillions of dollars. [15] In 1997, Delaware and Alaska adopted Domestic Asset Protection Trust (DAPT) statutes. [16] The sponsors of these early statutes were entrepreneurs, lawyers and trust companies, who saw a domestic market for asset protection trusts. [17] While these trusts would not have all of the protection that one could get from a foreign trust, they would be less expensive to set up and use and they removed fears about political turmoil and change at a foreign location. [18]

Fifteen states have followed Delaware and Alaska. Sponsors in the post 1997 states make an argument for adoption that was not available in 1997; they argue that trusts and trust assets will flow to other states that have enacted DAPT legislation unless their local jurisdiction adopts its own DAPT. In these states the argument can be put as a familiar claim that the state and its citizens will lose revenue to other states whose law is somehow more favorable. So here the argument can be put to unsuspecting and uninformed legislators as follows: "We are asking only that you do what other states have done, and what is necessary to protect local interests."

With the argument so focused, advocates of DAPT legislation need not confront the reprehensible fact that this legislation will overturn state public policy that has prevailed in most places for more than a century, namely, the policy that a trust that holds assets available to the settlor is void to the extent that it purports to keep those assets free of the claims of the settlor's creditors. Put differently, the advocates need not justify a law that will stiff ex-wives and deprive successful malpractice plaintiffs from satisfaction out of a settlor /defendant's trust assets.

Once the DAPT legislation has been enacted, the advocates' tune is the same but the lyrics change. Post adoption, the advertising of banks and prospective counsel, large and small, no longer focus on the state's comparative advantage, but on "creditors." The advertisements of the large institutions offering trust services such as Wilmington Trust, PNC, City National Bank, and Alaska Trust Co., point directly at "creditors." For example, PNC states that, "Delaware law permits you to establish a special type of irrevocable trust that, when properly done, may protect your assets from creditors." [19] The sophisticated parties describe the purpose of the asset protection trust in the same general terms without specific reference to "tort lawyers" or "divorce." Several of them market their services specifically to persons in "high-risk" professions, such as doctors and lawyers, and individuals with a high net worth. [20]

Smaller firms are more direct. For example, Asset Protection Planners explicitly offer services to protect assets "in divorce and tort lawsuits." [21] Many other firms openly advertise the same services. [22] These statements, designed to attract prospective settlors, reveal the purpose of asset protection trusts. Ironically, the most revealing internet advertisement disclaims any interest in defeating parties "in divorce and tort lawsuits."[23] This statement derives its power from its insincere denial: "This material was not intended or written to be used for the purposes of avoiding tax penalties …"[24] Is this the lady "doth protest too much"? Taken as a whole, the multiple pages of internet listings, some subtle, some strident, and some with false denials, make plain that keeping assets out of the hands of creditors, particularly tort plaintiffs and former wives, is a principal purpose of these trusts.[25] The lyrics here do not warn of out of state competition; subtly or openly, they point to "creditors" as the DAPT target.

2. Changes to Fraudulent Conveyance Law in the Asset Protection Statutes

Many of the 17 Asset Protection Trust laws have provisions that modify the local fraudulent conveyance laws.[26] Under the current Uniform Voidable Conveyance law (promulgated in 2014 and designed to make modest changes in the existing fraudulent conveyance statutes) and under the existing uniform fraudulent conveyance laws adopted in most of the states, a creditor may recover assets transferred by a debtor to a third party under certain circumstances.[27]

Section 4(a)(1) permits the recovery if the creditor can show that the transferring debtor acted with "actual intent to hinder, delay or defraud."[28] Section 4(a)(2) does not require actual intent, only "constructive" intent.[29] Section 4 applies both to creditors existing at the time of the transfer and to creditors whose claims arise thereafter.

Section 5 permits recovery only from creditors existing at the time of the transfer, but it does not require the aggrieved creditor to show actual intent.[30] Also under Section 5, the aggrieved creditor needs to show that the debtor did not "receive reasonable equivalent value" for the transfer and that the debtor was "insolvent at that time or the debtor became insolvent as a result of the transfer …."[31]

Section 9 of the Uniform Voidable Transactions Act (UVTA) generally requires the creditor to commence suit within four years of the transfer.[32] But, in cases under 4(a)(1), if the "transfer … could not reasonably have been discovered by the claimant" within the four years, the period extends until one year after the actual discovery or after the transfer "could reasonably have been discovered by the claimant."[33]

The asset protection laws generally weaken the local fraudulent conveyance rules by using some combination of the following: 1) Shortening the four year statute of limitations, 2) Cutting off the one-year extension for cases where the claimant has not discovered the conveyance and could not reasonably have done so within four years,[34] or 3) Barring the use of constructive intent, so forcing the claimant to meet the test of actual intent.[35]

Several states also restrict the claimant to Section 4(a)(1) by permitting recovery only on proof of "actual intent." Two prominent states that follow this rule are Alaska and Michigan.[36] Alaska, a state that has never adopted any uniform law on fraudulent conveyances, requires that creditors who bring a claim show actual intent.[37]

Because there are no cases applying these shortened statutes and only a limited number dealing with actual intent, it is hard to know the effect of these attempts to degrade the fraudulent conveyance law. I suggest below that the actual intent test will be relatively easy to meet in view of the skepticism that many courts will have and because the advertising and sales information reveal a pervasive intent to hamper creditors. I suspect that the short statutes of limitations will be a more powerful restriction on a creditor's fraudulent conveyance claim.

3. Proving Actual Intent

When there is no wolf at the settlor's door, how does one prove that the settlor of an asset protection trust had actual intent to "hinder, delay or defraud any creditor?" Like any creditor suing under Section 4, such a plaintiff could turn to the "badges of fraud" that are listed in 4(b).[38] Several of the badges seem made to order for an asset protection trust. The first, (b)(1), lists transfers to an "insider"; if the settlor is also the beneficiary, directly or indirectly, that surely applies.[39] The same is true of the second, (b)(2), “the debtor retained possession or control,” that is exactly what most self-settled trusts accomplish. [40] It seems likely that the third badge, that the transfer be “concealed,” is also met, for the establishment of and transfers to a DAPT are both private acts that cannot be observed, particularly when the assets are intangible and there is no requirement of any public notice or filing. [41] Other badges might attach in particular cases, but the first three will attach in nearly every asset protection trust case.

In many cases there will be direct evidence of the settlor's actual intention. Some evidence arises from the advertising of lawyers and trust companies. An internet search under the terms “domestic asset protection trusts” brings up several dozen statements of lawyers and trust companies that are offering their services as lawyers, trustees or both in connection with establishing and representing such trusts. These statements sometimes make explicit reference to protection against “creditors” and to the desirability of keeping one's assets out of the hands of those creditors. More subtle, other statements refer only to the explosive growth of litigation in modern American society; these leave it to the reader's imagination to understand how a successful tort plaintiff would consume a significant part of the reader's wealth. A jury might be willing to infer actual intent from a settlor's admission that he had perused this literature on the internet even before he talked with his lawyer or banker.

One can readily imagine the conversation between the prospective client and the lawyer or trust company officer concerning the prospective “creditors.” There we would expect an even more elaborate explanation of the threats posed by malpractice lawyers or by lawyers suing for negligent injury of all kinds.

Some of these conversations would be privileged, but that would not be true of discussions with a banker. Some of the DAPT statutes specifically provide that the establishing of such a trust is not enough alone to show actual intent to hinder, delay, etc. Evidence of the lawyer's or bank's advertising and evidence of the discussion with either would prove more than mere establishment of the trust; the language of the lawyer's or bank's statements, known to the settlor, together with any conversations would constitute evidence of intent not derived just from inference from establishing a trust. [42]

4. Actual Intent and Future Creditors

Most of the interesting challenges to DAPTs will be made against future creditors under Section 4(a)(1) as adopted by the state whose law applies. There are several reasons for this. First, except in the most egregious (and strong) cases, the defendant will be a “future” not a “present” creditor. I am assuming that a debtor who sets up a trust after a tax lien has been issued or after a malpractice claim has been filed, will be easy prey for the plaintiff.

The cases I have in mind are those where a physician sets up a trust in contemplation of malpractice that has not yet occurred or where a husband sets up a trust when a divorce proceeding has not yet commenced. In those cases, the injured patient or angry spouse will be future creditors excluded from Section 5's coverage, but these claimants will enjoy the one year potential extension because they will be suing under Section 4(a)(1) alleging actual intent. [43]

Whether “future creditors” include only those known to the settlor at the time of the transfer and those with a foreseeable connection to the settlor at the time of the transfer or also include others, not then known or foreseen, is a much debated point. [44] Section 4's title specifically refers to **“future” creditors**. [45] The middle clause in Section 4(a) invites application “whether **the** creditor's claim arose before or after the transfer was made or the obligation was incurred …” [46] And 4(a)(1) requires actual intent to hinder … **“any”** creditor. [47] Nothing in Section 4 indicates that the drafters intended to require that the settlor have a specific person or group in mind when the transfer occurs. The drafters could have limited the Section by requiring that the debtor have in mind some person or group of persons who might become creditors in the future, but they did not do that. Of course, the case is easier to make when the settlor is concerned about a particular existing creditor, but that is not our case; here we are looking at future creditors who by hypothesis cannot have a present claim or, except in the most unusual hypothetical case, be a known threat to the debtor.

Commentators disagree on the definition of a “future creditor.” For example, one law review article asserts “most courts are unwilling to void transfers whose purpose and effect is to shelter assets from creditors that were unknown at the time of the transfer.” [48] Other writers come to the same conclusion' [49] but some do not. [50]

A 2012 case in the California Court of Appeal, *Kilker v. Stillman*,[51] has the most elaborate and persuasive discussion of the identity of a "future" creditor under 4(a)(1) in a fraudulent conveyance case.[52] There, Stillman issued a negligently prepared soils report to Kilker to justify the construction of a swimming pool.[53] After the negligence became known to Kilker, he asserted a claim against Stillman and the two agreed to a $92,000 settlement of Kilker's negligence claim, but Stillman did not pay.[54] When Kilker attempted to seize a piece of Stillman's real property, Stillman claimed that he did not own the property because he had conveyed the real property and nearly all of his other assets to three trusts governed by Nevada law.[55] The Court of Appeal affirms the trial court's finding that the conveyance was voidable as fraudulent under the Uniform Fraudulent Transfer Act (UFTA) as enacted in California.[56] It rejects Stillman's argument that the property could not be reached under Section 4(a)(1) because Stillman was not a present or future creditor under Section 4(a)(1):

> [Stillman's] argument is not supported by the language of section [4(a)]. The statute does not include the terms "future creditor" or "future potential creditor." Section [4(a)] does not require that, from the debtor's perspective, a creditor who challenges a transfer as fraudulent under the UFTA to have been reasonably foreseeable as the debtor's creditor before pursuing remedies under the UFTA. Furthermore, the statute does not require that the debtor intended to hinder, delay or defraud the specific creditor who challenges a transfer of an asset as violative of the UFTA. On the contrary, [4(a)] provides that a current creditor can challenge a transfer as fraudulent, regardless whether the creditor had claim at the time of the transfer, if that creditor can prove, inter alia, the transfer was made to hinder, delay, or defraud *any* creditor.[57]

5. Jurisdiction and Choice of Law

A settlor located in one of the seventeen DAPT states will presumably choose the law of his state of residence and state courts will honor that choice because of the settlor's location. Even in those cases, the settlor is not assured of victory. As I indicate above, most DAPT statutes modify the fraudulent conveyance law and allow that law, as modified, to apply to transfers to a DAPT.[58] Unless the abbreviated statute of limitations cuts off the creditor's fraudulent conveyance claim, the claim may be asserted despite a local DAPT statute.

In *Mortensen,* the debtor put a piece of Alaska real property into an Alaska APT only to have the transfer voided four years later by a Bankruptcy judge in Alaska.[59] The bankruptcy trustee, who challenged the conveyance, got the benefit of the Bankruptcy Code's ten-year statute of limitations, but had the burden of showing actual intent to satisfy Section 548(e) of the Code.[60] That section applies specifically to self-settled trusts.[61] It is unclear what *Mortensen* says about how a state court in a DAPT would behave in similar circumstances, but it portends hostility in bankruptcy, for the court found actual intent by Mortensen despite minimal evidence, and the court relied on evidence of congressional intent showing that 548(e) was adopted explicitly to counteract DAPT statutes.[62] The ten-year statute of limitations combined with Congress' stated intention to neuter DAPTs in bankruptcy will make bankruptcy anathema for settlors of DAPT trusts.[63]

What are the prospects for residents of non-DAPT states who attempt to enjoy DAPT legislation by a choice of law term in their trust documents? Assume a wealthy California resident sets up a DAPT with the Wilmington Trust in Delaware. The trust will, of course, choose Delaware law and might even refer to the Delaware DAPT statute by name. But the challenge is likely to be made by a creditor in California, not Delaware. Since, by hypothesis, the settlor/defendant is a California resident, the courts of California will have jurisdiction, and any litigation is likely to occur there.

The first and perhaps the largest issue in this case will be choice of law. Which law governs, California or Delaware? The plaintiff/creditor will urge California since that law has a public policy against self-settled trusts. The defendant/settlor will urge Delaware since the Delaware DAPT permits self-settled trusts. If the court applies California substantive law, the defendant probably loses. If the court applies Delaware substantive law, the plaintiff probably loses but, as we see in *Mortensen*, a fraudulent conveyance claim can sometimes upset a DAPT even on its home turf. [64]

In *Waldron v. Huber*, [65] a bankruptcy court sitting in Washington, applied Washington law to void the trust that was set up in Alaska with an Alaskan trustee. [66] Huber, the settlor, was a resident of Washington and the only connection with Alaska was the trustee's presence there. Having chosen Washington law, it was no surprise that the court inferred a public policy against self-settled trusts from a Washington statute that prohibits self-settled trusts. [67]

The court cites Section 270 of the Restatement of Conflicts 2d to support its opinion. The trust chose Alaska law but, under Section 270, law so chosen will be followed only if the "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 …" [68] Of course, Alaska had a minimal relation with the trust and Washington had a significant one, so the court followed the Restatement's direction and disregarded the choice of Alaska law. [69]

The court does not mention or cite Section 273 of the Restatement even though that section identifies "the law of the state chosen by the settlor" to determine whether the interest of a beneficiary of a trust of movables can be reached by his creditors. Section 273 omits Section 270's proviso that directs the court to disregard the settlor's choice of another state's law if the forum state has a strong contrary public policy.

The Restatement gives no explicit guidance about which section should govern when a settlor is claiming the protection of Section 273 (the law of the state chosen without regard to its connection to the trust) and the creditor/plaintiff is asserting invalidity under Section 270 [70] (because of the forum law's contrary public policy). Because Section 273 is more specific and refers directly to the "reach of creditors," one's instinct is to give superiority to the specificity of that section. [71] On the other hand, Section 270 determines the "validity" of the entire trust. If the trust is "invalid," perhaps one need not consider the restraints on alienation, for there is no valid trust of which they could be a part. [72]

The American Law Institute (ALI) seems to point to Section 270 by its reference in Comment d to the Section's applicability to "questions of substantial validity." [73] The ALI also cites *Huber* in the notes to Section 270 without criticism or cross-reference to Section 273. [74]

Being a skeptic about the entire DAPT process, I favor the use of Section 270 to determine the governing law when a settlor uses the APT from a state where he does not reside and where there is no other substantial connection to the foreign state. If, as I suggest above, all APT's are fraudulent conveyances, we should not give them the benefit of the doubt.

A second non substantive issue that can arise in some of these cases involves the jurisdiction of the court in California over a trustee in Delaware. Would that court have personal jurisdiction over the Delaware trustee so that its findings on choice of law and other issues would bind the trustee? There is a series of cases that would support a trustee's argument, such as *Hanson v. Denckla*, a prominent case that arguably supports the trustee's argument against personal jurisdiction. [75] On the other hand, Wilmington Trust's solicitation of settlors in California might be a sufficient contact with California to warrant personal jurisdiction over the out of state trustee. [76] If the California court takes umbrage at an out of state trust company's effort to short change a California creditor, the court will be disposed to find jurisdiction.

6. LLC's, Homestead Exemptions and other Barriers to Creditors' Recovery

In his defense of APTs, Dick Nenno, a Delaware lawyer, asks why trusts should be treated differently from LLCs, homestead exemptions and other devices that move assets beyond a creditor's reach. [77] If one assumes that these devices can never be fraudulent conveyances, the question is a good one. In my opinion establishing an LLC or buying a large "homestead" in a jurisdiction that has an unlimited or exceedingly generous exemption for homesteads can be a fraudulent conveyance just as well as the establishing of an asset protection trust. The 2005 amendments to the bankruptcy code, in effect, treat as a fraudulent conveyance, any amount over $146,450 in a homestead that was acquired within 1215 days before the filing. [78] This Section, 522(p), is aimed at debtors who move to a state with a generous homestead exemption and buy an expensive home in the three years before filing. [79]

Any LLC that is established concurrently with the opening of a DAPT should receive the same treatment as the DAPT receives; if one is a fraudulent conveyance, the other must be also, for putting an LLC into the trust is the last step in a more elaborate design. The combination of trust and LLC—that is sometimes suggested in the DAPT literature—confirms the settlor's intent to hinder his creditors. [80]

Whether establishing an LLC unrelated to a trust can be a fraudulent conveyance is less clear. A traditional and widely accepted purpose not only of LLCs, but also of corporations, is to immunize the owners' personal assets from business liabilities. If the owners leave sufficient assets or adequate insurance against loss in the LLC or corporation, there is no intent to hinder future creditors.

In any case the exposure of an LLC or corporation to fraudulent conveyance liability will expire at the end of four years after the owners' original investment. Only assets acquired by the LLC or corporation from its owners would constitute “transfers” from the owners. Other assets earned by the LLC or corporation will have come from transfers from clients and customers.

Conclusion

The Domestic Asset Protection Trust is an unusual mutation. It is the direct descendant of Foreign Asset Protection Trusts in the Cook Islands and elsewhere that seemed to lie on the border of criminality. Before the birth of the domestic variant, such foreign trusts were loudly denounced and often criticized in the academic literature. [81] Settlors of such foreign trusts were sometimes held in contempt and, occasionally, put in jail for a contemptuous failure to bring assets back from the Cook Islands to pay their debts. [82] How then do we explain seventeen states' adoption of local law to permit what was so detestable abroad? How do we explain prominent firms' solicitation of prospective settlors?

I am at a loss, but, I, at least, think such trusts of the domestic variety also lie on the border of criminality. The kindest thing that can be said of state legislatures that adopt these acts are the words attributed to Jesus concerning his Roman executioners: “Father, forgive them, for they know not what they do.” [83]

Footnotes

* Robert A. Sullivan Professor of Law, University of Michigan Law School. I thank Matt Fagan, Michigan ’17, for his research for this Article.

1 *See* In re Mortensen, 2011 WL 5025249 (Bankr. D. Alaska 2011); In re Huber, 2013 WL 6184972 (Bankr. W.D. Wash. 2013), decision aff'd, 2014 WL 3404964 (W.D. Wash. 2014); *see also* Kilker v. Stillman, 233 Cal. App. 4th 320, 182 Cal. Rptr. 3d 712 (4th Dist. 2015); *see also* In re Zukerkorn, 484 B.R. 182 (B.A.P. 9th Cir. 2012).

2 *See generally*, Kenneth L. Jordan, Domestic Asset-Protection Trusts, Morgan Stanley at 2 (2012) accessed at: http://www.morganstanleyfa.com/public/projectfiles/3368068a-3af2-4587-a8bb-aa88cef9c68c.pdf.

3 *See* What Is a Trust?, Fidelity (2017) accessed at: https://www.fidelity.com/estate-planning-inheritance/estate-planning/trusts ("Other benefits of trusts include: Control of your wealth. You can specify the terms of a trust precisely, controlling when and to whom distributions may be made").

4 *See* generally Id.

5 For a discussion of these issues, *see* Eason, Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection, 27 Cardozo L. Rev. 2621 at 2630 (2005).

6 Id. at 2627.

7 The seventeen states are: Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Oklahoma, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wyoming.

8 *See* George G. Bogert & George T. Bogert, Law of Trusts § 40 (5th ed. 1973); *see* C.J.S., Fraudulent Conveyances § 219; *see also* Sterk, Asset Protection Trusts: Trust Law's Race to the Bottom?, 85 Cornell L. Rev. 1035 (2000); *see also* Veit, Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore?, 16 Alaska L. Rev. 269 (1999).

9 Michigan Legislature, Qualified Dispositions in Trust Act of 2016, Public Act (2016) accessed at: http://www.legislature.mi.gov/(S(wu5dqtgomnkwekystwwepwty))/mileg.aspx?page=getObject&objectName=mcl-566-34-amended (The most recent Domestic Asset Protection Trust ('DAPT') statute comes from Michigan. In that statute, the legislature amended the Uniform Fraudulent Transfer Act to only allow a showing of actual fraud in order to void a transfer. A showing of actual fraud is a very difficult standard and most jurisdictions also allow a showing of constructive fraud). Alaska is another state that only recognizes actual fraud, *see* Sterk, Asset Protection Trusts: Trust Law's Race to the Bottom, 85 Cornell L. Rev. 1035 (2000).

10 Sterk at 1048; *see also generally*, Leslie Wayne, Cook Islands, a Paradise of Untouchable Assets, The New York Times (Dec. 14, 2013).

11 Health Specialists Limited, Joint Evaluation of the Paris Declaration Phase 2 Cook Islands Country Evaluation, Organization for Economic Cooperation and Development (OECD) (Dec. 2010) accessed at: https://www.oecd.org/countries/cookislands/47651740.pdf.

12 *See generally*, International Trusts Act (1984) (Cook Islands); *see also* Sterk at 1048.

13 Id.

14 The first statute permitting DAPTs in the United States was the Alaska Trust Act, enacted in 1997; *see* Wagenfeld, Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows, 32 Vand. J. Transnat'l L. 831, 858 (1999).

15 Frederick E. Allen, Super Rich Hide $21 Trillion Offshore, Study Says, Forbes (Jul. 23, 2012) accessed at: https://www.forbes.com/sites/frederickallen/2012/07/23/super-rich-hide-21-trillion-offshore-study-says/#670fc5566ba6.

16 *See* 2 Del. C § 3570 (2014); *see* AlasKa Stat. § 34.40.110 (2014); *see also* Amy Lynn Wagenfeld, Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows, 32, *supra* n. 15.

17 *See* Dukeminier & Sitkoff, Wills, Trusts, and Estates, Aspen Casebook Series at 705 (2013).

18 *See supra* n. 17.

19 PNC, Asset Protection Trusts (2016), accessed at: https://www.pnc.com/en/personal-banking/wealth-management/asset-protection/asset-protection-trusts.html.

20 Donlevy-Rosen & Rosen, P.A., Asset Protection Basics (2017) accessed at: https://protectyou.com/frequently-asked-questions/?gclid=CjwKEAiArvTFBRCLq5-7-MSJ0jMSJABHBvp0KVTsyGJPtrBLZo4a6tOat9bicWeEt9OK1U2EsxTNhBoCiQXw_wcB.

21 Asset Protection Planners, Asset Protection Articles (2017) accessed at: https://www.assetprotectionplanners.com/articles/?c1=GAW_SE_NW&source=USA_ASP_GEN&cr2=Search_-_USA_-_Asset_Protection_-_General_Hide_-_KW_-_

22 *See* Sundvick Legacy Center, Asset Protection in Nevada, Sundvick (2017) accessed at: http://www.sundvicklegacycenter.com/Henderson-Nevada-Asset-Protection.php.; *see also* Smith & Shapiro, Nevada Asset Protection Lawyer, Law Offices of Smith & Shapiro (2017) accessed at: http://www.smithshapiro.com/asset-protection.html; *see also* Helsell Fetterman, Asset Protection Planning, Law Offices of Helsell Fetterman (2017) accessed at: http://www.helsell.com/faq/faq-asset-protection-planning/.

23 *See supra*n. 21.

24 *See generally*, Kenneth L. Jordan, Domestic Asset-Protection Trusts, Morgan Stanley at 2 (2012) accessed at: http://www.morganstanleyfa.com/public/projectfiles/3368068a-3af2-4587-a8bb-aa88cef9c68c.pdf.; *see also* J.R. Matsen, International and US Tax Considerations, The Law Offices of J.R. Matsen (2017) accessed at: http://www.jrmatsen.com/international-and-us-tax-considerations/.

25 *See* City National Bank, Delaware Trust Services accessed at: https://www.cnb.com/wealth-management/trust-services/individual/delaware-trusts.asp.; *see also* PNC, Asset Protection Trusts, accessed at: https://www.pnc.com/en/personal-banking/wealth-management/asset-protection/asset-protection-trusts.html.

26 Eight of the seventeen statutes shorten the statutes of limitation for bringing claims while others, most notably in the newest DAPT state, Michigan, remove the ability for creditors to bring claims through constructive fraud.

27 *See generally* Uniform Voidable Transactions Act, §§ 4-5 (2014); *see also generally* Uniform Fraudulent Transfer Act, §§ 4-5 (1984); *see also generally* Uniform Fraudulent Conveyances Act, §§ 4-5 (1918). The first uniform act was the Uniform Fraudulent Conveyances Act, that Act was replaced by the Uniform Fraudulent Transfer Act which was amended in 2014 by the Uniform Voidable Transactions Act in a very limited way. Every state in the United States except Virginia, Alaska, and South Carolina has adopted at least one of these formulations of the uniform law. Section 4 of the Uniform Fraudulent Transfer Act has the same language as section 4 of the Uniform Voidable Transactions Act. Section 4 of the Uniform Fraudulent Conveyances Act has similar, but not identical, language to the Uniform Voidable Transactions Act.

28 § 4(a)(1). Transfer or Obligation Voidable as to Present or Future Creditor, Uniform Voidable Transactions Act (2014).

29 § 4(a)(2) (2014).

30 § 5. Transfer or Obligation Voidable as to Present Creditor, Uniform Voidable Transactions Act (2014).

31 Id.

32 § 9. Extinguishment of Claim for Relief, Uniform Voidable Transactions Act (2014).

33 Id.

34 Several states require any fraudulent conveyance plaintiff to sue within six months in some cases. Ohio, Mississippi, and Oklahoma all give creditors six months to file suit after reasonable discovery of a fraudulent conveyance. *See* Steve Oshins, 7th Annual Domestic Asset Protection.

35 The most common restriction in the 17 Asset Protection Trust laws is to shorten the limitations period from four years to two. *See* Michigan Legislature, Qualified Dispositions in Trust Act of 2016, Public Act (2016) accessed at: http://www.legislature.mi.gov/(S(wu5dqtgomnkwekystwwepwty))/mileg.aspx?page=getObject&objectName=mcl-566-34-amended; *see also* Steve Oshins, 7th Annual Domestic Asset Protection Trust State Rankings Chart, Law Offices of Oshins & Associates, LLC (February 18, 2017), accessed at: https://media.wix.com/ugd/b211fb_d786f6cb9cda4f90bf13d7ed8dae9318.pdf.

Other states, such as Ohio, have shortened the statute of limitations to less than two years. *See* § 5816 Ohio Legacy Trust Act, § 5816.07: Restrictions on actions, remedies, and claims, Ohio State Legislature (2014) accessed at: http://law.justia.com/codes/ohio/2014/title-58/chapter-5816/section-5816.07/. A few states have not adopted any of the statutes that govern fraudulent conveyances. In those states there may not be any applicable statute of limitations. For example a fraudulent conveyance in Virginia is time-barred only by the doctrine of laches; using that doctrine, some Virginia courts have reached as far back as 10 years. *See* McBeth and Davis, Bulls, Bears, and Pigs: Revisiting the Legal Minefield of Virginia Fraudulent Transfer Law, 46 U. Rich. L. Rev. 273 (2011); Atkinson v. Solenberger, 112 Va. 667, 669, 72 S.E. 727, 728 (1911) (suit instituted nine years after conveyance was recorded); Flook v. Armentrout's Adm'r, 100 Va. 638, 639–640, 42 S.E. 686, 686 (1902) (suit brought ten years after conveyance was recorded).

36 *See supra* n. 10.

37 *See* Sterk, Asset Protection Trusts: Trust Law's Race to the Bottom, 85 Cornell L. Rev. 1035 (2000).

38 § 4(b). Transfer or Obligation Voidable as to Present or Future Creditor, Uniform Voidable Transactions Act (2014).

39 § 4(b)(1) (2014).

40 § 4(b)(2) (2014).

41 § 4(b)(3) (2014).

42 The court in In re Ellison, 2016 WL 5349715 (Bankr. C.D. Cal. 2016), aff'd, 2017 WL 3976304 (B.A.P. 9th Cir. 2017) found that actual intent to hinder or delay could be inferred from the debtor's meeting with asset protection counsel at least when the meeting was coupled with the debtor's admission that he was concerned about keeping his home. *See also* Mortensen *supra* n.1, the act of putting assets in a self-settled trust "to protect assets" showed "actual intention" to "hinder, delay …." *See* too Huber *supra* n—, correspondence after the trust was executed acknowledged that protecting assets was a principal purpose of the trust.

43 The use against DAPTs by Sections 4 and 5 is explicitly nullified by terms of some of the DAPT acts that allow only actual intent cases under Section 4(a)(1).

44 For the proposition that a nameless future creditor constitutes a future creditor under the UVTA, *see* Kilker v. Stillman, 233 Cal. App. 4th 320, 182 Cal. Rptr. 3d 712 (4th Dist. 2015) (also discussed below and holding that a future creditor need not be reasonably foreseeable); *compare with* In re Oberst, 91 B.R. 97, Bankr. L. Rep. (CCH) P 72462 (Bankr. C.D. Cal. 1988) (also discussed below, this case has indicated a belief that future creditors must be those reasonably foreseeable). Law literature is similarly inconsistent. On one hand, scholars such as Robert Danforth suggest that the longer a future creditor waits to bring a claim after a transfer has taken place, the less likely they will be considered a "future creditor" under the UVTA; *see infra* n. 49. *Compare with* Neal L. Wolf, The Right of "Future Creditors" Successfully

to Maintain Actions Under the Fraudulent Conveyance Statutes—Part One, Koren Estate and Personal Financial Planning Update (July 2003) (arguing that judges take certain factors into account when determining what constitutes a future creditor, mainly by determining the "fishiness" of a transaction).

45 § 4. Transfer or Obligation Voidable as to Present or Future Creditor, Uniform Voidable Transactions Act (2014).

46 § 4(a) (2014).

47 § 4(a)(1) (2014).

48 Danforth, Rethinking the Law of Creditors' Rights in Trust, 53 Hastings L.J. 287 (2002).

49 This assertion is even echoed recently in a treatise on trusts. *See* Amy Jetel, § 2.4. Voidable transaction law does not protect unknown future creditors, Asset Protection: Domestic and International Law and Tactics (March 2017). These assertions are grounded primarily in the fact that the language of Section 4 requires a showing of intent. Until recently, the creation of a spendthrift asset protection trust had been deemed to show such an intent on its own—often times referred to by courts as fraudulent per se. *See* Appeal of Mackason, 42 Pa. 330, 1862 WL 5101 (1862) (first of a number of cases holding that transfers to self-settled spendthrift trusts were fraudulent per se). *See also supra* n. 47.

50 *See* Resnick, Finding the Shoes that Fit: How Derivative Is the Trustee's Power to Avoid Fraudulent Conveyances Under Section 544(b) of the Bankruptcy Code?, 31 Cardozo L. Rev. 1 at 209–210 (2009).

51 In re Oberst, 91 B.R. 97, Bankr. L. Rep. (CCH) P 72462 (Bankr. C.D. Cal. 1988) is sometimes cited as a case passing on the identity of future creditors. The transferor in that case was seeking to avoid a writ of execution when she made the transfer, so any discussion of the status of future creditors was dictum.

Cf. Klabacka v. Nelson, 394 P.3d 940 (Nev. 2017). In 2001 Eric and Lynita set up separate Asset Protection Trusts under Nevada law. Each trust contained substantial property that apparently had been community property earlier. Eric sued for divorce in 2009 and Lynita asserted various claims against his trust. The court upholds the spendthrift aspects of Eric's trust and rejects most of Lynita's claims. In particular it reads the legislative intention of the Nevada legislature to protect "trust assets from unknown future creditors" (at 14). It so turns away Lynita's claim for her support and for child support from Eric's trust. Perhaps because the applicable two-year statute had run, Lynita apparently did not pursue a claim under Nevada fraudulent transfer law. Section 166.170 (1)(b) of the Nevada law specifically allows a suit up to two years after the transfer, "if the person becomes a creditor after the transfer is made …" This explicit authority for a future creditor to sue would have overridden the legislative history of the DAPT legislation.

52 Kilker v. Stillman, 233 Cal. App. 4th 320, 182 Cal. Rptr. 3d 712 (4th Dist. 2015).

53 Id.

54 Id.

55 Id.

56 Id.

57 Id.

58 *See supra* n. 36.

59 In re Mortensen, 2011 WL 5025249 (Bankr. D. Alaska 2011).

60 Id.

61 § 548. Fraudulent transfers and obligations 11 U.S.C.A. § 548 (West).

62 *See* Mann, A Fresh Look at State Asset Protection Trust Statutes, 67 Vand. L. Rev. 1741, 1756 (2014).

63 Id. Mann. This article provides an analysis of the legislative intent behind the statute. "Lest there be any doubt about the motivation for the enactment, the House Report explains it as a response designed to close the 'self-settled trust loophole.' H.R. Rep. No. 109-31, pt. 1, at 109th Cong., 1st Sess. 449 (2005) (comment of Rep. Cannon). Representative Delahunt captured the perspective of those supporting the provision when he commented: 'This loophole [i.e., the tolerance for state APT laws] is, in my judgment, evidence of how the current bankruptcy system provides two bankruptcy laws, one for the well-connected and one for middle class families.'" H.R. Rep. No. 109-31, pt. 1, at 109th Cong., 1st Sess. 449 (2005) (comment of Rep. Delahunt).

64 Id.

65 In re Huber, 493 B.R. 798 (Bankr. W.D. Wash. 2013).

66 In Dahl v. Dahl, 2015 UT 79, 2015 WL 5098249 (Utah 2015), the Utah Supreme Court disregards the trust's choice of Nevada law. It finds strong public policy in Utah for fair division of marital property, and concludes that the divorced wife, who did not sign the trust documents, nevertheless was a "settlor" as to her marital property in the trust and allows her to modify the trust to take those assets from the trust. The court does not cite the Restatement, but it uses the language of Section 270.

67 Id.

68 Restatement Second, Conflict of Laws § 270.

69 *See* In re Huber, 493 B.R. 798 (Bankr. W.D. Wash. 2013).

70 Id.

71 Id.

72 *See* § 270, Restatement (Second) of Conflict of Laws, Cmt (b) suggesting that the designation of a foreign jurisdiction to deprive a surviving spouse of her "forced share of his estate" could be set aside under § 270.

73 Restatement Second, Conflict of Laws § 270, comment b.

74 *See* § 270, case citations.

75 *See* Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (holding that exercise of personal jurisdiction over a foreign trustee must be based on some act by which the trustee "purposely avails itself of the privilege of conducting activities within the forum State").

76 Id.

77 Dick Nenno & Dan Rubin, Are Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Voidable Transfers Per Se?, Asset Protection Planning Newsletter (Aug. 15, 2016).

78 § 522(p). Exemptions 11 U.S.C.A. § 522(p) (West).

79 Id.

80 According to prominent trusts and estates attorney Steve Oshins, "By combining the DAPT with the Double LLC strategy, the client should be in a much stronger position to negotiate a more favorable settlement or not have to face the creditor at all." Steven J. Oshins, The Domestic Asset Protection Trust: Combining it with the Double LLC Strategy, 27 American Bar Association 1 (2013) accessed at: http://www.americanbar.org/publications/probate_property_magazine_2012/2013/january_february_2013/article_oshins_domestic_asset_protection_trust.html.

81 *See generally* Marty-Nelson, Offshore Asset Protection Trusts: Having Your Cake and Eating It Too, 47 Rutgers L. Rev. 11, 25 (1994); *see also generally* Sterk, Asset Protection Trusts: Trust Law's Race to the Bottom, 85 Cornell L. Rev. 1035 (2000). *See also*, Leslie Wayne, Cook Islands, a Paradise of Untouchable Assets, The New York Times (Dec. 14, 2013) accessed at: http://www.nytimes.com/2013/12/15/business/international/paradise-of-untouchable-assets.html.

82 *See* F.T.C. v. Affordable Media, 179 F.3d 1228, 1999-1 Trade Cas. (CCH) ¶ 72547 (9th Cir. 1999) (debtor was jailed for refusing to repatriate assets). *See also* In re Brooks, 217 B.R. 98, 32 Bankr. Ct. Dec. (CRR) 23 (Bankr. D. Conn. 1998) (the offshore trust was disregarded and the debtor's assets were seized by a US court); Westrate v. Westrate (1998) (court accused the husband of fraud and threatened him with criminal penalties. The assets were included in the marital estate); In re Lawrence, 279 F.3d 1294 (11th Cir. 2002) (debtor was jailed for more than six years for refusing to repatriate assets); Bank of America, N.A. v. Weese, 277 B.R. 241, 48 Collier Bankr. Cas. 2d (MB) 182 (D. Md. 2002) (debtors paid a settlement of over $12 million in order to avoid incarceration). For a list of cases similar to this, please *see* McCullough Sparks, Court Cases Defeating Offshore Trusts, accessed at: http://www.assetprotectionatty.com/court-cases-defeating-offshore-trusts/.

83 Luke 23:34.

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