

ASSET PROTECTION PLANNING:

VOLUNTEERING FOR TROUBLE?

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I. Non-Trust Asset Protection.

A. 529 Plans – 529 Plans are exempt from attachment by creditors T.C.A. Section 49-7-822.

B. Life Insurance and Annuities

1. T.C.A. 56-7-201. Life insurance payable to surviving spouse and children. Effect of proceeds being payable to estate.

On the death of an insured, any life insurance acquired by the insured or the insured's spouse and payable to the intestate insured's estate benefits the surviving spouse and children and the proceeds shall be divided between them according to the statutes of distribution without being in any manner subject to the debts of the decedent. If the proceeds of the insurance are payable to the estate of a testate decedent or the trustee of a revocable trust of which the decedent was a settlor, the proceeds shall pass as part of the estate or trust and under the dispositive provisions of the will or trust agreement, as ordinary cash, whether or not the will or trust agreement uses any apt or express words referring to the insurance proceeds, but the proceeds shall not be subject to the debts of the decedent unless specifically charged with the debts in the will or trust agreement.

2. T.C.A. § 56-7-203. Life insurance or annuity for or assigned to spouse or children or dependent relatives exempt from claims of creditors.

The net amount payable under any policy of life insurance or under any annuity contract upon the life of any person made for the benefit of, or assigned to, the spouse and/or children, or dependent relatives of the persons, shall be exempt from all claims of the creditors of the person arising out of or based upon any obligation created after January 1, 1932, whether or not the right to change the named beneficiary is reserved by or permitted to that person.

C. Limited Liability Companies

1. Inside Liability Protection

A member, holder of financial interest, governor, manager, employee or other agent of an LLC does not have any personal obligation and is not otherwise personally liable for the acts, debts, liabilities, or obligations of the LLC whether such arise in contract, tort or otherwise. T.C.A. § 48-217-101.

2. Outside Liability Protection

A Creditor can obtain a charging order that requires the LLC to turn over to the creditor any distributions to be made to the member. The creditor cannot reach the LLC's assets or force a sale of the member's membership interest. T.C.A. § 48-218-105 and 48-249-509.

3. There are similar rules for limited partnerships. T.C.A. § 61-3-703.

D. Retirement benefits – IRAs

26-2-105. State pension moneys, certain retirement plan funds or assets, exempt — Claims under qualified domestic relations order.

(b) Except as provided in subsection (c), any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 403(a), 403(b), 408 and 408A, or an Archer medical savings account qualified under § 220 or a health savings account qualified under § 223 of the Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state. All records of the debtor concerning such plan and of the plan concerning the debtor's participation in the plan, or interest in the plan, are exempt from the subpoena process.

E. Tenancy by the Entirety - Under Tennessee law, a married couple can own property (both real and personal property) as tenants by the entirety. See *Bryant v. Bryant*, 522 S.W.3d 392, 400 (Tenn. 2017) (citing *Griffin v. Prince*, 632 S.W.2d 532, 534-35 (Tenn. 1982)). An individual spouse's creditor cannot seize that individual's interest (and then force the sale of the property). Only a joint creditor of both spouses may enforce a lien against the property.

II. Creditor Protection from Trusts

A. Third-Party Created Trusts

1. Virtually all trusts created for others are established as “spendthrift trusts” and enjoy protection from creditors pursuant to T.C.A. § 35-15-502.
2. Types of trusts include inheritance trusts and gift trusts, including opportunity trusts.
3. Creditors cannot force the Trustee to make distributions.
4. After a distribution is made, the creditor can attempt to collect from the Beneficiary.
5. The Trustee can make direct payments to others for the benefit of the beneficiary. T.C.A. §§ 35-15-504 and 506.
6. When a spendthrift trust acquires a “dangerous” asset, consider dividing the trust (T.C.A. § 35-15-417) or decanting the dangerous asset to a new trust (T.C.A. § 35-15-816(c)).

B. Self-Settled Trusts

1. The general rule is that a creditor can reach the maximum amount that can be distributed to the settlor. T.C.A. § 35-15-505(a)(2).
2. There are specific exceptions to the general rule for Tennessee Investment Services Trusts, Tenancy by the Entirety Trusts, Special Needs Trusts, and Inter-Vivos QTIP Trusts.

E. Tennessee Investment Services Trusts (Asset Protection Trusts) T.C.A. § 35-16-101, et seq.

1. Requirements

- a. The trust instrument must:
 - i. be irrevocable,
 - ii. state that Tennessee state law governs validity, construction, and administration of the trust,
 - iii. contain a spendthrift clause, and
 - iv. have at least one qualified trustee. A qualified trustee is a Tennessee resident (not the trustor) or a

Tennessee bank or trust company which performs specified actions.

- b. As of January 1, 2022, the settlor is no longer required to sign an affidavit to establish a self-settled asset protection trust or to make transfers to the trust.
2. The settlor of a Tennessee self-settled asset protection trust is allowed to retain the following rights:
- a. the power to veto a distribution from the trust;
 - b. testamentary limited power to appoint the trust assets;
 - c. the right to receive income from the trust;
 - d. the right to direct the investments of the trust;
 - e. the right to receive principal payments at the discretion of the trustee or other advisor;
 - f. the right to remove and replace the trustee or other advisor;
 - g. live in a home owned by the trust; and
 - h. withdraw up to 5% of the trust principal annually.
3. Tax Consequences
- a. Income Tax
 - i. Trust will usually be a grantor trust
 - ii. Grantor trusts are disregarded for federal income tax purposes
 - iii. Non-grantor trusts may save income taxes for residents of certain other states
 - b. Gift & Estate Tax
 - i. Transfer will usually be structured as an incomplete gift
 - ii. Incomplete gifts are not subject to gift tax, but will be taxable for estate tax purposes upon death

iii. PLR 200944002 - Self-settled asset protection trust not included in Settlor's estate

4. Uses of Tennessee Investment Services Trusts

- a. Asset Protection for certain assets
- b. Part of estate plan for client with certain amount of wealth
- c. Gifting trust for a client that wants certain assurances
- d. Out of state residents – state income tax reduction
- e. Alternative to prenuptial agreement

F. Tenancy by the Entirety Trusts

- 1. A tenancy by the entirety trust (“TBET”) is a trust for a married couple that provide the same protection for state law purposes from the claims of the separate creditors of the husband and wife as would exist if the husband and wife owned the trust assets directly as tenants by the entirety
- 2. Being able to transfer tenants by the entirety property to a TBET without sacrificing creditor protection will make it more feasible for couples to use revocable trusts for their various benefits, including incapacity management, probate avoidance, and privacy.
- 3. A tenancy by the entirety may be created in personal property as well as real property in Tennessee
- 4. Requirements:
 - a. Property must be held as tenants by the entirety prior to the conveyance to the trust.
 - b. Such persons must remain married
 - c. Property must continue to be held in trust
 - d. While both spouses are living, the trust must be revocable by either spouse or by both of them acting together
 - e. Both spouses must be beneficiaries of the trust
 - f. Trust instrument, deed, or other instrument of conveyance must specify that the new statute apply to the property
- 5. After First Spouse's Death

- a. After the death of the first spouse, property will continue to be exempt from the claims of the decedent's separate creditors
- b. If the survivor can withdraw trust assets, the property will not be protected from the survivor's creditors
- c. In contrast, traditional tenants by the entirety property automatically passes to the survivor upon the death of the first spouse
- d. A TBET is more flexible
 - i. For example, the TBET could convert to an irrevocable trust for the benefit of the survivor, with the remainder to pass to children after the survivor's death
 - ii. Provides better asset protection for the surviving spouse as well as for the children who are remaindermen beneficiaries, e.g. if the survivor remarries.

G. Inter Vivos QTIP Trusts

- 1. Exempt from donee spouse's creditors because it was created by 3rd party.
- 2. Donor spouse can retain mandatory income interest and discretionary principal interest after donee spouse's death - Tennessee law says trust is protected from donor spouse's creditors. T.C.A. § 35-15-505(d). Federal estate tax law says that donor spouse will not have estate tax inclusion. See Treasury Regulation 2523(f)-1(f), Example 11.

H. Foreign Asset Protection Trusts – Tennessee gives no exemption from the general rule that self-settled trusts are subject to creditors. Any protection provided by such trusts is based on the law of the jurisdiction in which the trust is established.

THIRTEENTH ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES

Updated through August 2022

Edited by David G. Shaftel
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This August 2022 version of the chart updates the prior August 2019 chart and marks the twenty-fifth anniversary of modern domestic asset protection trusts.

This updated chart includes a new addition to the DAPT community. Alabama enacted its DAPT statute which was effective April 18, 2021.

Also included are George Karibjanian's updated charts describing the states which have enacted the Uniform Voidable Transactions Act, and those that rejected the Comments to that Act. New subjects addressing "silent trusts" have been added. State editors have added helpful citations to their state provisions and added summaries of several non-DAPT asset protection cases. Also included is a suggested method of analysis of the probability that a DAPT will be successful for a client who resides in a non-DAPT state.

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Similarly, the following attorneys generously reviewed and/or contributed to the preparation of this chart:

Gray Edmondson (a discussion of "self-settled"); **Richard Franklin** (*inter vivos* QTIP trusts); **George D. Karibjanian** (Uniform Voidable Transactions Act and its Comments); and **Matthew Van Heuvelen** (South Dakota).

INTRODUCTION

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

Prior to 1997, Missouri had statutory provisions which supported the formation of DAPTs. In 1997, Alaska was the first state to enact a usable DAPT statute. In the twenty-five years since, eighteen other states have followed suit. Alabama’s statute is the most recently enacted addition to our chart. There are now twenty states that allow for the formation of DAPTs.

Legislatures have taken different approaches. The original Missouri statute was terse and only indicated a public policy. Some of the new statutes amend existing statutes, and others enact new “Acts”. Interest groups within the various states have influenced the extent of the asset protection provided by the statutes. Often a state’s enactments have followed a “camel’s nose in the tent” approach. The first statute may only provide minimal asset protection. Then, several years later the state legislature and interest groups become more comfortable with the DAPT approach, and more comprehensive provisions were enacted.

The DAPT chart includes three subjects which are designed to summarize developing case law dealing with DAPTs. At present, DAPT cases are few. However, it is inevitable that the courts will be asked to resolve controversies involving the interpretation and application of DAPT laws. So far, there are only six DAPT cases. Three cases involve Alaska’s statute and were decided by the Alaska Supreme Court, an Alaska bankruptcy court, and a Washington bankruptcy court. One case involves Delaware’s statute and was decided by the Delaware Court of Chancery. Two cases involved the Nevada statute and were decided by the Nevada Supreme Court and the Utah Supreme Court. The Alaska bankruptcy cases were mixed with fraudulent transfers, and the creditors prevailed. In a recent Alaska case, the Alaska Supreme Court refused to enforce an Alaska statute which stated that Alaska courts have exclusive jurisdiction over fraudulent transfer issues involving Alaska law. The Delaware case involved the application of a statute of limitations to bar the creditors, and the debtor prevailed. A Nevada case held that DAPT assets could not be reached for satisfaction of future spousal support

claims and child support claims. A Utah case applied Utah law to a Nevada DAPT, rather than Nevada's law, in a divorce action.

Planners will want to carefully review the DAPT cases as they are reported. These cases will provide guidance concerning how courts are interpreting a particular state's DAPT law. In addition, often these cases will illustrate implementation errors which need to be avoided.

Two new subjects involving "silent trusts" have been added. The first discusses whether notice of the trust's existence can be withheld, and if so, for how long. The second addresses whether any filings are required when a new trust is formed. The states differ widely with respect to these subjects.

There are no known federal gift or estate tax cases involving DAPTs. However, the Service has issued two private letter rulings: PLR 9837007 (which held that contributions by an Alaska resident to an Alaska DAPT were completed gifts) and PLR 200944002 (which held that the assets of an Alaska DAPT would not be includible in the Alaska settlor's gross estate). Revenue Ruling 2004-64, 2004-2 C.B. 7, held that a trustee's discretion to reimburse the settlor for income tax paid with respect to DAPT income would not alone cause inclusion of the trust assets in the settlor's estate. This revenue ruling is instructive of the Service's attitude with respect to DAPTs.¹

If implemented correctly, the DAPT approach may be used successfully by residents of states with DAPT statutes. An interesting issue remains: whether nonresidents of DAPT states may form a DAPT under one of the DAPT state's laws and obtain the desired asset protection and tax benefits. The analysis of this issue involves the field of conflict of laws. The choice of law rules most frequently discussed in this area are two sections of the Restatement (Second) of the Law, Conflict of Laws. Section 273 discusses when the creditors of a beneficiary can reach the assets of a trust, and directs that this issue is governed by the law of the state chosen by the settlor in the trust instrument. However, cases in the foreign trust area, and the one DAPT case dealing with this subject, refer to section 270(a), which deals with the validity of an *inter vivos* trust. This section's test is

¹ A thorough discussion of the tax consequences of DAPTs may be found in Shaftel, *IRS Letter Ruling Approves Estate Tax Planning Using Domestic Asset Protection Trust*, J. Taxation, Apr. 2010.

whether the nonresident’s state of residence has a “strong public policy” against DAPT asset protection. Since several cases have applied the section 270 rule, it will be important to explore just what is a “strong public policy.” The fact that twenty states now have DAPT statutes moves this approach from the eccentric anomaly category to an accepted asset protection and transfer tax minimization planning technique. DAPT states consist of approximately forty-two percent of the geographical area of the United States and approximately twenty-four percent of the population.² As more and more states enact DAPT statutes, the conclusion that a non-DAPT state has a “strong public policy” against a DAPT trust seems less likely.

In non-DAPT states, statutory enactment of self-settled techniques which provide protection from creditors of the donor similarly detracts from the conclusion that the state has a “strong public policy” against a DAPT. For example, new types of partial DAPT statutes have emerged. These are statutes which specifically abrogate the rule against self-settled spendthrift trusts for lifetime QTIP trusts, lifetime general-power-of-appointment marital deduction trusts, lifetime credit-shelter trusts, spousal lifetime access trusts, and other lifetime arrangements. The non-DAPT states which have enacted these statutes include Arizona, Arkansas, Florida, Georgia, Kentucky, Maryland, North Carolina, Oregon, South Carolina, Texas, and Wisconsin.³ In essence, these statutes provide that the assets of the trust are not to be considered assets contributed by the settlor. As a result, the assets cannot be reached by creditors of the donor spouse after the death of the donee spouse.⁴

Another way in which some states have “placed their toe in the water” with respect to self-settled trust asset protection is to enact statutes which protect the assets in an irrevocable grantor trust from a creditor claim even though an independent trustee, in such trustee’s discretion, may reimburse the settlor for income tax

² Area and population totals from 2020 Decennial Census data. See <https://data.census.gov/cedsci/map?q=Total%20Population>.

³ Ariz. Rev. Stat. Ann. § 14-10505(E); Ark. Code Ann. § 28-73-505(c)(1); Fla. Stat. § 736.0505(3); Ga. Code Ann. § 53-12-82(b); Ky. Rev. Stat. Ann. § 386B.5-020(8)(a); Md. Code Ann., Est. & Trusts § 14.5-1003(a)(2); N.C. Gen. Stat. § 36C-5-505(c); Or. Rev. Stat. § 130.315(4); S.C. Code Ann. § 62-7-505(b)(2); Tex. Prop. Code Ann. § 112.035(g); Wisc. Stat. Ann. § 701.0505(e)1.a. Some DAPT states also have separate statutes of this type (see, e.g., 12 Del. C. § 3536(c)(4); Mich. Comp. Laws § 700.7506(4)(b); N.H. Rev. Stat. § 564-B:5-505A(e)(3)-(4); Ohio Rev. Code § 5805.06(B)(2)(b); Tenn. Code Ann. § 35-15-505(d); Va. Code Ann. § 64.2-747(B)(3); Wyo. Stat. § 4-10-506(f)).

⁴ Franklin, *Lifetime QTIPs—Why They Should be Ubiquitous in Estate Planning*, 50th Annual Heckerling Institute on Estate Planning; Nelson, *Seeking and Finding New Silver Patterns in a Changed Estate Planning Environment: Create Inter Vivos QTIP Planning*, ABA RPTE Section Spring Symposium (Chicago May 2014).

resulting from assets in the trust. The non-DAPT states with these statutes include Arizona, Florida, Kentucky, Maryland, New Jersey, North Carolina, Oregon, New York, and Texas.⁵ Similarly, Arizona protects the assets in a supplemental needs trust from the settlor's creditors.⁶

A section 529 plan is a statutory technique which allows a donor to place funds in a tax-free accumulation account for the educational purposes of the beneficiary. This is a self-settled technique because the donor may withdraw the funds (subject to a penalty). The following non-DAPT states provide asset protection for these accounts from the claims of a creditor of the donor: Colorado, Florida, Illinois, Louisiana, and New Jersey.⁷

Other types of self-settled techniques which provide protection against creditors of the donor exist in non-DAPT states. These techniques include the well-known homestead exemption in Florida, life insurance policies, annuity policies, and IRAs.

Enactment of asset protection for self-settled techniques such as “*Inter Vivos* QTIP Trusts,” tax reimbursement provisions, supplemental needs trusts, 529 accounts, and other self-settled techniques, provides weight to the argument that those states do not have a “strong public policy” against self-settled spendthrift trust asset protection, and therefore residents could form a DAPT under another state’s DAPT law. The same reasoning supports residents of DAPT states who use another DAPT state’s statute because of its superiority.

Reference to the map illustration on the last page of the chart illustrates the DAPT states and the non-DAPT states that have enacted asset protection for self-settled techniques involving *inter vivos* QTIP trusts, spousal lifetime access trusts, tax reimbursement provisions, supplemental needs trusts, or section 529 accounts.

⁵ Ariz. Rev. Stat. Ann. § 14-10505(A)(2); Fla. Stat. § 736.0505(1)(c); Ga. Code Ann. § 53-12-82(a)(2)(B); Idaho Code § 15-7-502(4); Ky. Rev. Stat. Ann. § 386B.5-020(7)(c); Md. Code Ann., Est. & Trusts § 14.5-1003(a)(1); N.J. Stat. Ann. § NJSA 3B:11-1(b); N.Y. Estates, Powers & Trusts Law § 7-3.1(d); N.C. Gen. Stat. § 36C-5-505(a)(2a); Or. Rev. Stat. § 130.315(1)(d); 20 Pa. C.S. § 7745; Tex. Prop. Code Ann. § 112.035(d)(1); Va. Code Ann. § 64.2-747(A)(2). Some DAPT states also have stand-alone statutes of this kind (see, e.g., Alaska Stat. § 34.40.110(m); 12 Del. C. § 3536(c)(2); N.H. Rev. Stat. § 564-B:5-505A(6)).

⁶ Ariz. Rev. Stat. § 14-10503,B; § 14-10505, A,2(c); § 14-10103(17).

⁷ C.R.S. 23-3.1-307.4; Fla. Stat. § 222.22; 15 ILCS 505/16.5, 735 ILCS 5/12-1001(j); La. R.S. 17:3096G; N.J. Stat. § 18A:71B-41.1.

In addition to the two choice of law rules provided by the Restatement, a new choice of law rule was inserted into the Uniform Fraudulent Transfer Act. In 2014, the Uniform Law Commission adopted amendments to the Act, including new Comments. The Act was renamed the Uniform Voidable Transactions Act.

New section 10 of the Uniform Voidable Transactions Act provides that the governing law for determining a voidable transaction is the state law of the debtor's principal residence. New Comment 8 to section 4 states that if a resident of a non-DAPT state which has enacted the Uniform Voidable Transactions Act creates a DAPT in a DAPT state, the transfer would be voidable.

Section 10 and the Comments of the Uniform Voidable Transactions Act have created considerable controversy.⁸ The critics argue it is an inappropriate “back door” attempt to change well-established choice of law rules.⁹ Critics are concerned about how much significance a court might give to the Comments.

As of the date of this publication, the Uniform Voidable Transactions Act has been enacted in twenty-two states.¹⁰ Six enacting states (Alabama, Indiana, Michigan, Rhode Island, Utah, and West Virginia) are also DAPT states. The Comments to the Uniform Voidable Transactions Act clarify that in such a situation the DAPT law prevails.¹¹ Two non-DAPT states (Arkansas and New York) expressly rejected the Comments of the Uniform Voidable Transactions Act. See the attached charts provided by George D. Karibjanian titled *State Law*

⁸ For example, see the discussion in Karibjanian, Wehle, Jr., & Lancaster, *History Has Its Eyes on UVTA—A Response to Asset Protection Newsletter #319*, LISI Asset Protection Newsletter #320 (April 18, 2016), www.leimbergservices.com; Richard Nenno & Dan Rubin, *Uniform Voidable Transactions Act: Are Transfers to Self-Settled Spendthrift Trusts by Settlers in Non-APT States Voidable Transfers Per Se?*, LISI Asset Protection Newsletter #327 (August 15, 2016), www.leimbergservices.com; Kettering & Smith, *Comments to Uniform Voidable Transactions Act Should Not be Changed*, LISI Asset Protection Newsletter #329 (August 25, 2016), www.leimbergservices.com; George D. Karibjanian, *The Uniform Voidable Transactions Act Will Affect Your Practice*, 155 *Trusts & Estates* 17 (May 2016); George D. Karibjanian, Richard W. Nenno & Daniel S. Rubin, *The Uniform Voidable Transactions Act: Why Transfers to Self-Settled Spendthrift Trusts by Settlers in Non-APT States Are Not Voidable Transfers Per Se*, *Bloomberg BNA Tax Management Estates, Gifts, and Trusts Journal*, Vol. 42, No. 4, July 14, 2017, p. 173.

⁹ *Id.*

¹⁰ As of the date of this chart, UVTA legislation is pending in South Carolina and Massachusetts.

¹¹ Section 4, Comment 8, of the Uniform Voidable Transactions Act.

Status of the Uniform Voidable Transactions Act, as of August 7, 2022, and the illustration created by the National Conference of Commissioners on Uniform State Laws.

Therefore, attorneys who represent clients in non-DAPT states will need to research whether their client's state of residence is one of the presently fourteen non-DAPT states that has adopted both section 10 and the Comments to the Uniform Voidable Transactions Act. If so, then this issue needs to be considered.

As the enactment of DAPT statutes and other self-settled techniques increases, and counter-legislative responses are enacted (e.g., section 548(e) of the Bankruptcy Act and the Uniform Voidable Transactions Act), we should consider further just what constitutes a self-settled trust. Gray Edmondson has contributed the following discussion to assist us in this analysis.

For self-settled trusts, absent DAPT statutes, spendthrift protections are generally not available.¹² As such, creditors can reach the assets which are eligible to be distributed to the settlor. Section 103(15) of the Uniform Trust Code states that a "settlor" is a person who "creates or contributes property to a trust." When a settlor contributes property to a trust of which he or she is a current beneficiary, a self-settled trust clearly has been created. Many other situations are not so clear. Although the laws of certain states have addressed some of these issues, common situations which occur on a regular basis include, but certainly are not limited to, powers of withdrawal (presently exercisable or lapsed),¹³ *inter vivos* QTIP trusts as discussed elsewhere in this introduction, the right of a trustee to reimburse a settlor's income tax resulting from assets of the trust as discussed elsewhere in this introduction, trusts with a retained power to substitute assets, trusts created by disclaimer, trusts created in litigation settlements, reciprocal trusts, trusts created by the exercise of a power of appointment, and default

¹² See Restatement (Third) of Trusts § 58 and Uniform Trust Code § 505(a)(2).

¹³ See Uniform Trust Code § 505(b) which states that (1) presently exercisable powers are essentially deemed to cause a trust to be self-settled to the extent of the power of withdrawal; and (2) lapsed powers cause the lapsed portion to have been contributed by the powerholder to the extent the lapse amount exceeds the greater of \$5,000, 5% of the trust assets, or the gift tax annual exclusion amount. But see *Irwin Union Bank & Trust Co. v. Long*, 312 N.E.2d 908 (Ind. Ct. App. 1974) and *University National Bank v. Roadarmer*, 827 P.2d 561 (Colo. App. 1991), both of which do not treat a lapsed power of withdrawal as causing the powerholder to become the settlor and also suggesting that even currently exercisable powers are personal and not subject to creditors' rights.

provisions applicable upon failure of a powerholder to exercise a power of appointment.¹⁴ Some states have addressed a number of these potential situations.¹⁵ Others have only addressed a very limited number of these situations. The result is that the landscape is not particularly clear. When a person is deemed to be a settlor in these types of cases, he or she may not have satisfied the requirements of a DAPT statute or other specific statute described above. In such a case, trust assets may be subject to claims of the deemed settlor's creditors.¹⁶

This Comparison of the Domestic Asset Protection Trust Statutes chart will hopefully be useful to academics (law school and continuing legal education), drafters of new DAPT statutes, and the practitioner who is considering a DAPT for the practitioner's client. With respect to the latter user, the reader may want to consider the following categories, which are derived from the above discussion in this introduction: (1) is the client a resident of a DAPT state? (2) If yes, is there another DAPT state that has superior DAPT and asset protection provisions? (3) Is the client a resident of a non-DAPT state that has enacted other self-settled provisions? (4) Has the non-DAPT state enacted the Uniform Voidable Transactions Act but rejected the Comments? (5) Has the non-DAPT state enacted the Uniform Voidable Transactions Act but included the Comments?

Where the practitioner's client falls within the above categories will provide the practitioner and the client with an initial gauge of the probability that the DAPT will be upheld, assuming that it is properly implemented. The included map and list of the Uniform Voidable Transactions Act states will assist the reader in applying the above-described analysis.

¹⁴ Note that Uniform Trust Code § 401 refers to creation of a trust via the "exercise" of a power of appointment but not default provisions that apply in default of exercise. Does this mean that whether a trust is self-settled can depend on whether the new trust is created via the decision to exercise such a power versus accept the trust's default provisions? See also Restatement (Third) of Trusts § 10.

¹⁵ For some of the more comprehensive statutes, see, e.g., Ky. Rev. Stat. Ann. § 386B.5.020; Md. Code Ann., Est. & Trusts § 14.5-507; Tenn. Code Ann. § 35-15-505; Tex. Prop. Code Ann. § 112.035.

¹⁶ For a discussion of these topics, see Gray Edmondson, *The Not so Obvious, But Highly Ubiquitous, Self-Settled Trust*, ACTEC Annual Meeting, Asset Protection Committee (La Quinta, CA, March 20, 2019), https://www.actec.org/assets/1/6/Asset_Protection_A19_Materials.pdf.

The DAPT chart below is designed to give the reader an easy and quick comparison of the various DAPT statutes. The intent of this chart is to provide an unbiased, objective, and non-marketing analysis. A “ranking” of the statutes is deliberately omitted in order to avoid any “marketing” taint.

A chart, by its very nature, is an oversimplification. The reader is urged to carefully analyze the provisions of a statute before implementing a DAPT.

The publication and dissemination of this Chart does not constitute the rendering of legal, accounting, or other professional advice. The editors disclaim any liability with respect to the use of this Chart.

SUBJECT	TENNESSEE	UTAH	VIRGINIA
	Citation: Tenn. Code Ann. § 35-16-101	Citation: Utah Code Ann. § 25-6-501, <i>et seq.</i>	Citation: Va. Code §§ 64.2-745.1 and 64.2-745.2 (amended 2012)
	Effective Date: July 1, 2007	Effective Date: December 31, 2003	Effective Date: July 1, 2012
	URL: http://www.legislature.state.tn.u-s	URL: http://www.le.utah.gov	URL: http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=SB11&Submit2=Go
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state TN law governs validity, construction and administration of the trust; (3) contain a spendthrift clause; (4) must have at least one “qualified trustee”.	Trust instrument must: (1) be irrevocable; (2) contain spendthrift clause; (3) state that the trust is governed by UT law; (4) require that at least one trustee be resident of UT or UT trust company; and (5) require 30 days’ notice to all persons to whom settlor owes a domestic support obligation prior to any distribution to the settlor. Utah Code § 25-6-502(5).	(1) The trust is irrevocable; (2) there must be, at all times when distributions could be made to the settlor pursuant to the settlor’s qualified interest, at least one beneficiary other than the settlor; (3) the trust must have at all times at least one qualified trustee, who may be, but need not be, an independent qualified trustee; (4) the trust instrument must expressly incorporate the laws of the Commonwealth to govern the validity, construction, and administration of the trust; (5) the trust instrument must include a spendthrift provision. Va. Code § 64.2-745.2.
2. May a revocable trust be used for asset protection?	No.	No.	No. Va. Code §§ 64.2-745.2(A) and 64.2-747(A)(1).
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. Amendments enacted in 2008, 2010, 2013, 0219 and 2021.	Yes. Enacted in 2003. Repealed and re-enacted in 2013. Amended in 2019.	This statute is the first enactment for broad approval of self-settled spendthrift trusts.
	TENNESSEE	UTAH	VIRGINIA

SUBJECT	TENNESSEE	UTAH	VIRGINIA
<p>4. What contacts with state are suggested or required to establish situs?</p>	<p>Required: (1) some or all of trust assets deposited in state; (2) TN trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.</p>	<p>Required: UT resident or UT trust company as trustee or co-trustee. Utah Code § 25-6-502(5)(c).</p>	<p>Required: The VA qualified trustee must (1) maintain or arrange for custody within the Commonwealth of some or all of the property that has been transferred to the trust by the settlor, (2) maintain records within the Commonwealth for the trust on an exclusive or non-exclusive basis, (3) prepare or arrange for the preparation within the Commonwealth of fiduciary income tax returns for the trust, or (4) otherwise materially participate within the Commonwealth in the administration of the trust. Va. Code § 64.2-745.2(A).</p>
<p>5. What interests in principal and income may settlor retain?</p>	<p>Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT; (5) ability to be reimbursed for income taxes attributable to trust, and (6) ability to have debts, expenses and taxes of the settlor's estate paid from the trust.</p>	<p>Settlor may retain interest in CRT, GRAT, GRUT, QPRT and use of real or personal property of trust. Utah Code § 25-6-502(7)(g) and (h).</p>	<p>Settlor may retain any interests in: (1) CRT; (2) up to 5% interest in total-return trust; (3) QPRT; (4) GRAT; (5) ability to have debts, expenses and taxes of the settlor's estate paid from the trust; and (6) ability to be reimbursed for income taxes attributable to trust. Va. Code §§ 64.2-745.2(A) and 64.2-745.2(D).</p>
	TENNESSEE	UTAH	VIRGINIA

SUBJECT		TENNESSEE	UTAH	VIRGINIA
6.	What is trustee's distribution authority?	(1) Absolute discretion; (2) pursuant to a standard.	As provided in the trust instrument, which may be subject to direction from a trust protector, or veto by the settlor or a trust protector. Utah Code § 25-6-502(7)(c) and (e).	Absolute discretion. Va. Code § 64.2-745.2(A).
7.	What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general power of appointment (lifetime or testamentary); (3) power to replace trustee/advisor with non-related/nonsubordinate party; and (4) serve as an investment advisor. TCA §§ 35-16-109 and 35-16-111.	Settlor may retain: (1) power to veto distributions; (2) <i>inter vivos</i> or testamentary special power of appointment; (3) power to appoint non-subordinate advisors/ protectors; (4) right to serve as investment advisor; (5) right to receive principal of trust subject to ascertainable standard; and (6) use real or personal property of trust. Utah Code § 25-6-502(7).	Settlor may retain: (1) a testamentary special power of appointment; (2) a right to remove a trustee and to appoint a new trustee. <u>Note:</u> The settlor may NOT have the right to disapprove distributions from the trust. Va. Code § 64.2-745.2(A), (D).
8.	Who must serve as trustee to come within protection of statute?	Resident individual, or is authorized by TN law to act as a trustee and whose activities are subject to supervision by the Tennessee Dept. of Financial Institutions, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto.	At least one trustee must be UT resident or UT trust company. Utah Code § 25-6-502(5)(c). Settlor can be co-trustee, but may not make distribution decisions. Utah Code § 25-6-502(7)(a). However, settlor may participate in distribution decisions to a limited degree. Utah Code § 25-6-502(7)(b).	There must always be at least one "qualified trustee," who must be a natural person residing within the Commonwealth or a legal entity authorized to engage in trust business within the Commonwealth. Va. Code § 64.2-745.2(A).
9.	May non-qualified trustees serve?	Yes.	Yes. Utah Code § 25-6-502(5)(c).	Yes. See Va. Code § 64.2-745.2(A) (using nonexclusive terminology for the requirement of a qualified trustee).
		TENNESSEE	UTAH	VIRGINIA

SUBJECT	TENNESSEE	UTAH	VIRGINIA
<p>10. May trust have distribution advisor, investment advisor, or trust protector?</p>	<p>Yes. Trust may have: (1) advisors who have authority to remove and appoint qualified trustees or trust advisors; (2) advisors who have authority to direct, consent to or disapprove distributions from the trust; and (3) investment advisors. The term “advisor” includes a trust protector. TCA § 35-16-108.</p>	<p>Yes. Trust may have non-subordinate advisors/protectors who can remove or appoint trustees; direct, consent to, or disapprove distributions; or serve as investment directors. Settlor may be investment director. Utah Code § 25-6-502(7)(c) and (d).</p>	<p>Not addressed expressly, but it does state that the discretion of a qualified trustee cannot be subject to the direction of someone who, were that person a trustee, could not be a qualified trustee, and protects trust advisers and trust directors from liability. Va. Code § 64.2-745.2(A).</p>
<p>11. Are fraudulent transfers excepted from coverage?</p>	<p>Yes. Uniform Voidable Transactions Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. [Statute needs clarification with respect to actual intent amendment in 2013.]</p>	<p>Yes. Uniform Voidable Transactions Act applies. Utah Code § 25-6-502(9). See Utah Code §§ 25-6-101 through 25-6-407.</p>	<p>Yes. Va. Code § 64.2-745.1(C).</p>

TENNESSEE	UTAH	VIRGINIA
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SUBJECT	TENNESSEE	UTAH	VIRGINIA
<p>12. Fraudulent transfer action: burden of proof and statute of limitations.</p>	<p>Clear and convincing evidence. <u>Existing creditors:</u> 18 months after transfer, or six months after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. 18 months after transfer if claim based upon constructive fraud. <u>Future creditors:</u> 18 months after transfer. [See Item 11] TCA § 35-16-104.</p>	<p>Burden is on creditor. Clear and convincing evidence. Utah Code § 25-6-502(6)(e).</p> <p>Limitations period is 2 years after transfer (or one year after transfer is or reasonably could have been discovered by creditor). However, period may be shortened to 120 days after notice is mailed to known creditors or published as to unknown creditors. Utah Code § 25-6-502(9).</p>	<p>Clear and convincing evidence. <i>Bruce v. Dean</i>, 140 S.E. 277, 149 Va. 39 (1927); <i>Mills v. Miller Harness Co., Inc.</i>, 326 S.E.2d 665, 229 Va. 155 (1985); <i>In re Coleman</i>, 285 B.R. 892 (2002). Suit must be brought within five years from recordation of transfer or, if not recorded, within five years from the time the same was or should have been discovered. Va. Code § 64.2-745.1(D).</p>
<p>13. Has this state adopted the 2014 amendments and Comments of the Uniform Voidable Transactions Act?</p>	<p>No.</p>	<p>Yes. Utah Code §§ 25-6-101 through 25-6-407.</p>	<p>No.</p>
<p>14. Does statute provide an exception (no asset protection) for a child support claim?¹⁴</p>	<p>Yes. TCA § 35-16-104.</p>	<p>No, but before distribution to settlor, trustee must give 30 days advance notice to domestic support obligation creditor. Utah Code § 25-6-502(5)(g). “Domestic support obligation” is: a child support order, a spousal support order, or an unsatisfied divorce property division claim. Utah Code § 25-6-502(1)(b).</p>	<p>Yes. Va. Code § 64.2-744(A) protecting rights of a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance).</p>

¹⁴ Readers are cautioned that case law in a jurisdiction may create exceptions to asset protection, especially in family law area.

TENNESSEE	UTAH	VIRGINIA
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SUBJECT	TENNESSEE	UTAH	VIRGINIA
15. Does the statute provide an exception (no asset protection) for alimony?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Pre-marital transfers to the trust are protected. TCA § 35-16-104.	No, but see Subject 14, above.	No.
16. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Pre-marital transfers to the trust are protected. TCA § 35-16-104.	No, but see Subject 14, above.	No.
17. Does statute provide an exception (no asset protection) for tort claims?	No.	No.	No.
18. Does statute provide other express exceptions (no asset protection)?	No.	No.	Yes. No spendthrift protection against: (A) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust. Va. Code § 64.2-744(B). (B) the United States, the Commonwealth, any city, county, or town. Va. Code § 64.2-744(C). (C) claims under a statute or regulation of the United States or the Commonwealth that requires a beneficiary to reimburse the Commonwealth or any agency or instrumentality thereof, for public assistance. Va. Code § 64.2-745(A).
	TENNESSEE	UTAH	VIRGINIA

SUBJECT	TENNESSEE	UTAH	VIRGINIA
19. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes.	No.	No.
20. Are there provisions for moving trust to state and making it subject to statute?	Yes.	Yes, under provisions of the Utah Uniform Trust Code. Utah Code § 75-7-107(5).	Yes. Va. Code § 64.2-745.1(G) states that “The movement to the Commonwealth of the administration of an existing trust, which, after such movement to the Commonwealth, meets for the first time all of the requirements of a qualified self-settled spendthrift trust, shall be treated, for purposes of this section, as a transfer to this trust by the settlor on the date of such movement of all of the assets previously transferred to the trust by the settlor.”
21. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes.	Yes. Utah Code § 25-6-502(5)(d).	No.
TENNESSEE	UTAH	VIRGINIA	

SUBJECT	TENNESSEE	UTAH	VIRGINIA
22. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	Yes.	No.	No.
23. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes.	Yes. Utah Code § 25-6-502(5)(a).	No.
24. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes. TCA § 35-16-104(e).	Yes. Utah Code § 25-6-502(8).	Yes. Va. Code § 64.2-745.1(E).
25. Does statute authorize a beneficiary to use or occupy real property or tangible personal property owned by trust, if in accordance with trustee's discretion?	Yes.	Yes. Utah Code § 25-6-502(7)(h).	No.
26. May a trustee pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor?	Yes. TCA § 35-15-504.	Yes, because not expressly prohibited in statute.	No.
TENNESSEE	UTAH	VIRGINIA	

SUBJECT	TENNESSEE	UTAH	VIRGINIA
27. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes.	Perhaps, but the answer is not clear. Consider <i>Goggin v. Goggin</i> , 299 P.3d 1079 (Utah 2013); <i>Dahl v. Dahl</i> , 459 P.3d 276 (Utah 2015); <i>Clearfield State Bank v. Contos</i> , 562 P.2d 622 (Utah 1977); <i>Estate of Knickerbocker</i> , 912 P.2d 969 (Utah 1996); <i>Endrody v. Endrody</i> , 914 P.2d 1166 (Utah Ct. App. 1996).	Yes. Va. Code §§ 64.2-743 – 64.2-744.
28. Are due diligence procedures required by statute?	No.	Yes, affidavit required. Utah Code § 25-6-502(5)(l).	No.
29. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes. TCA § 35-16-106(b)(1)(A).	No lien, but costs and fees may be paid from trust. See Utah Code § 75-7-1004(2).	No.
30. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No. TCA § 35-15-1014(b).	No. See Utah Code § 75-7-112.	No.
TENNESSEE	UTAH	VIRGINIA	

SUBJECT	TENNESSEE	UTAH	VIRGINIA
31. Is the trustee given “decanting” authority to modify the trust?	Yes. TCA § 35-15-816(c).	No, but procedure for modifying trust available under UT Uniform Trust Code. Utah Code §§ 75-7-410 through 417. No express statutory authority for decanting, but decanting may be permissible even without such authority.	Yes. See Va. Code § 64.2-778.1 (effec. July 1, 2012).
32. What is allowable duration of trusts?	Up to 360 years.	Up to 1,000 years. Utah Code § 75-2-1203.	USRAP adopted. Va. Code §§ 55-12.1 to 55-12.6. Rule does not apply to personal property held in trust if the trust instrument, by its terms, provides that the rule shall not apply to such trust. Va. Code § 55-13.3(C).
33. Does state assert income tax against DAPTs formed by non-resident settlors?	No. There is no TN income tax.	Yes, if trust is administered in UT or if trust has UT source income. Utah Code §§ 59-10-201, 205.	Yes. See VA Code Ann. § 58.1-302.
34. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes for LLCs; charging order is only remedy. No for LPs.	Yes, charging order is only remedy. Utah Code § 48-3a-503.	Yes. On LLC, see Va. Code § 13.1-1041.1(D). On Limited Partnership, see Va. Code § 50-73.46.1(D).
	TENNESSEE	UTAH	VIRGINIA

SUBJECT	TENNESSEE	UTAH	VIRGINIA
<p>35. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?</p>	<p>One year after the earlier of: (1) the date the beneficiary was sent information (previously it was a report) that disclosed facts indicating the existence of a potential claim against the trustee; or (2) the date the beneficiary possessed actual knowledge of facts indicating the existence of a potential claim against the trustee.</p>	<p>Six months after trustee provides report that adequately discloses claims and informs beneficiary of the six-month period. Utah Code § 75-7-1005.</p>	<p>Rules similar to Sections 411 to 414 of the Uniform Trust Code for termination of trust. See Va. Code §§ 64.2-729 to 64.2-733. No specific procedure for being discharged from liability on a trust.</p>
<p>36. Are there cases that have occurred in this state's courts which involve DAPT statutes (regardless of the DAPT state law involved)?</p>	<p>No.</p>	<p><i>Dahl v. Dahl</i>, 459 P.3d 276 (Utah 2015), involved a divorce action in which the wife challenged the husband's prior transfer of marital assets into a NV DAPT. However, the UT court applied UT law, rather than NV law, based upon UT's strong public policy in favor of equitable distribution of marital assets on divorce. Based on language in the trust, the court found that the trust was revocable and that the trust assets were subject to equitable distribution in the divorce proceeding.</p>	<p>No.</p>
<p>37. Are there cases involving this state's DAPT law (regardless of the state court where the case was heard)?</p>	<p>No.</p>	<p>No.</p>	<p>No.</p>
	TENNESSEE	UTAH	VIRGINIA

SUBJECT	TENNESSEE	UTAH	VIRGINIA
38. Are there cases that involve this state’s asset protection laws which may affect the implementation of a DAPT?	No.	No.	No.
39. Has the IRS challenged the transfer tax effects of a DAPT created under this state’s law?	No.	No.	No.
40. May a creditor reach assets subject to a presently exercisable general power of appointment held by a non-settlor beneficiary?	No. TCA § 35-15-505(e), including Comments.	Probably, but not clear.	Yes, but only to the extent that the powerholder’s property is insufficient. Va. Code Sec. 64.2-2736(A).
41. Does state allow settlor to eliminate or waive notice to beneficiaries of the existence of the trust?	No. TCA § 35-15-813(e).	Probably, but the answer is not entirely clear. See Utah Code §75-7-811.	Va. Code § 64.2-775(B)(3) directs the trustee of an irrevocable trust to provide notice to qualified beneficiaries, and upon request of a beneficiary to furnish the beneficiary with a copy of the trust instrument. However, Va. Code § 64.2-703(B) states that “the trust terms shall prevail over any provision of this chapter except [a list of sections that does not include §64.2-775).” Thus, a DAPT instrument executed on or after October 1, 2012, can relieve the trustee of the duty to notify the qualified beneficiaries of the trust’s existence and the duty to provide the beneficiaries with copies of the trust instrument.
	TENNESSEE	UTAH	VIRGINIA

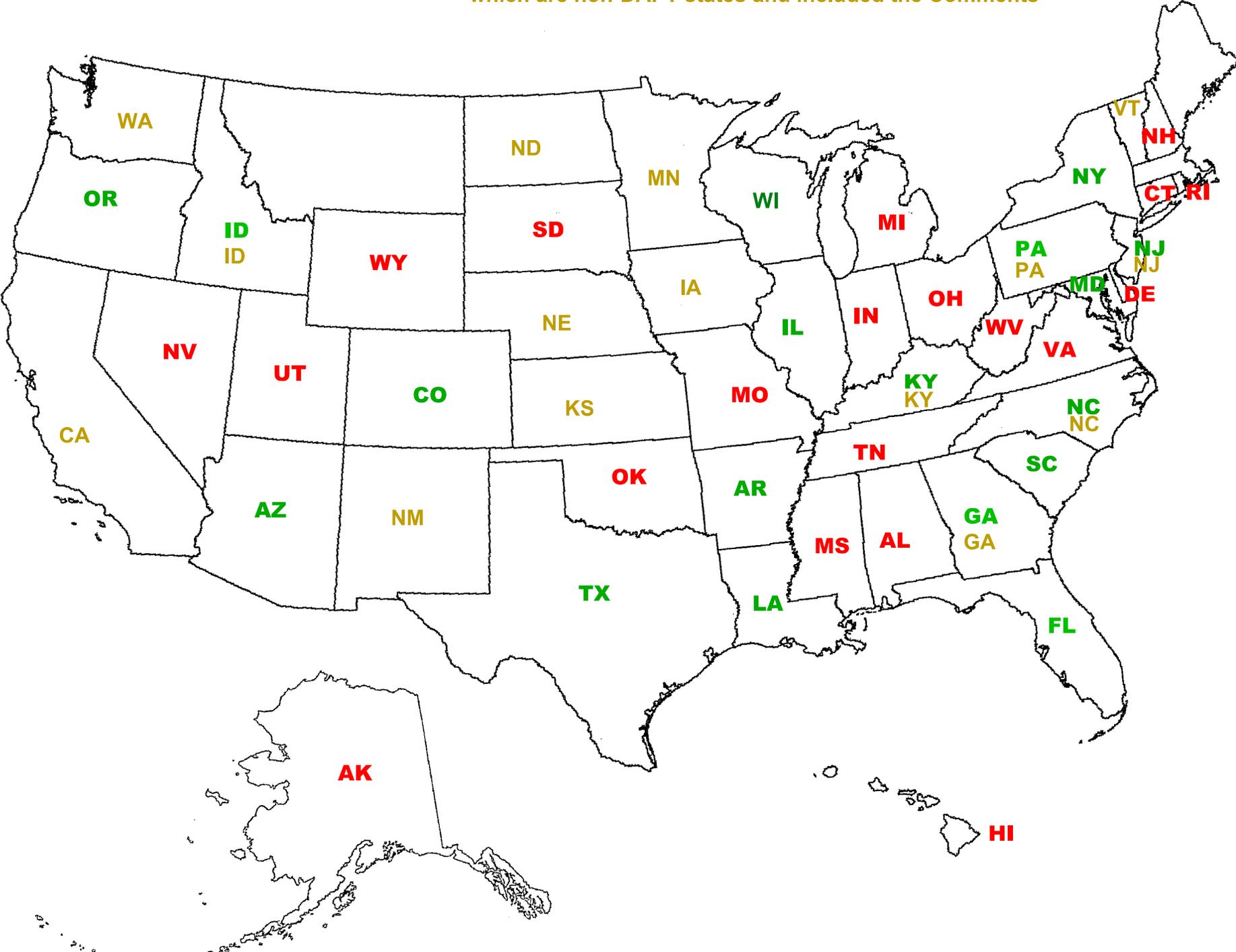
SUBJECT	TENNESSEE	UTAH	VIRGINIA
<p>42. Does state require any filings that give notice to third parties that the trust exists?</p>	<p>No. However, making a public filing (e.g., recording a deed) may accelerate the statute of limitations. TCA § 35-16-104(b)(2).</p>	<p>No.</p>	<p>No.</p>
	TENNESSEE	UTAH	VIRGINIA

Status as of August 2022:

20 Domestic Asset Protection Trust States

17 Non-DAPT States With Various Self-Settled Techniques

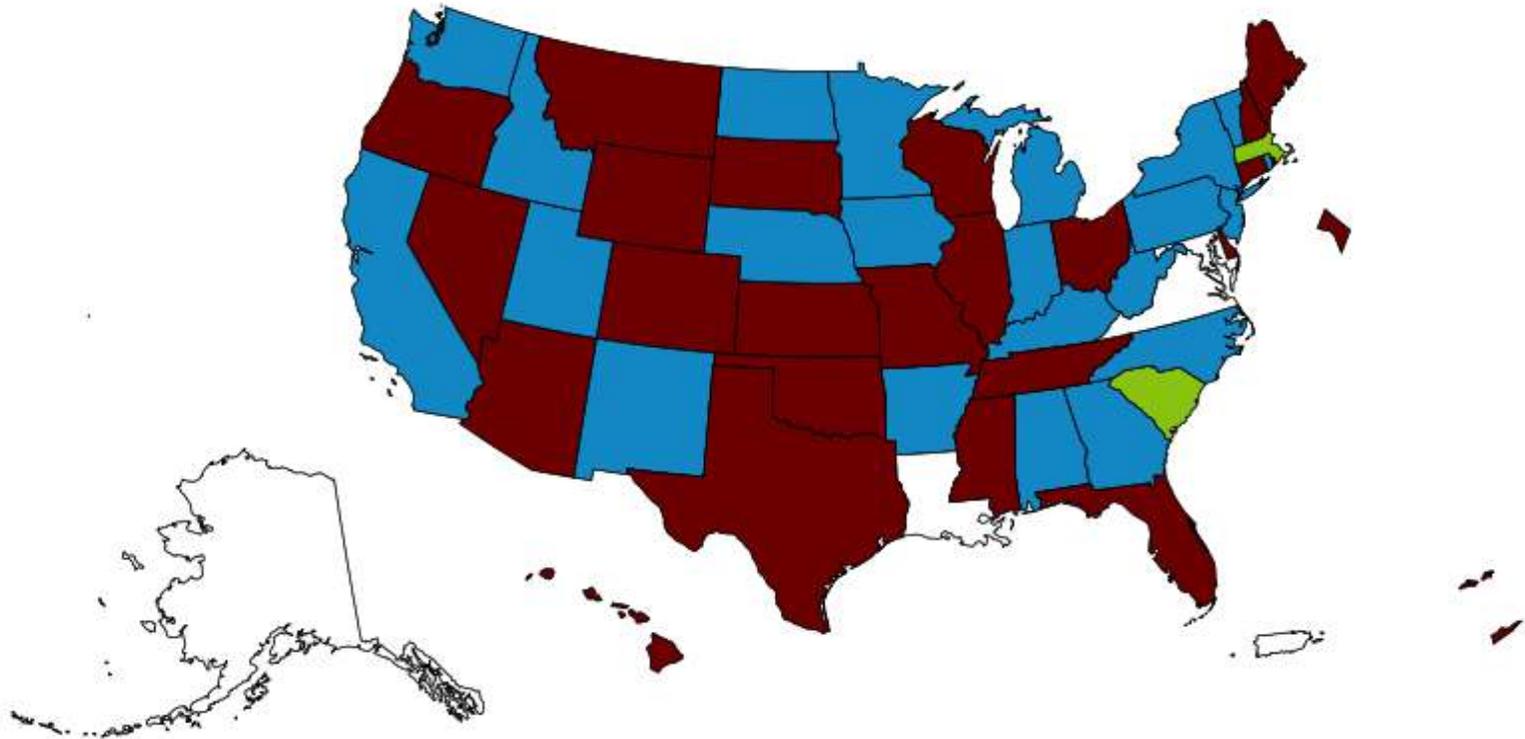
14 Uniform Voidable Transactions Act states,
which are non-DAPT states and included the Comments



2014 | Voidable Transactions Act

Consumer Protection & Labor | Business Regulation | Civil Procedure & Courts

Map	Bill List	Summary	Enactment History
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Enactment Map ● Introduced ● Enacted ● Prior Version Enacted

Description

Description

The Uniform Voidable Transactions Act (UVTA), formerly named the Uniform Fraudulent Transfer Act (UFTA), strengthens creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor's creditors. The 2014 amendments address a few narrowly-defined issues and are not a comprehensive revision of the 1984 act. For further information about the UVTA, please contact Legislative Program Director Kaitlin Wolff at 312-450-6615 or kwolff@uniformlaws.org.