

# Domestic Asset Protection Trusts

A Practice and  
Resource Manual

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Editor



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## CHAPTER 20

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# Choosing a DAPT State

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Your client is interested in forming a domestic asset protection trust. You are asked to advise as to which state's DAPT statute should be used. How do you choose?

Eighteen of the 19 DAPT states have enacted their statutes over the past 20 years. Initially, the statutes varied quite significantly. Often the state legislature was "just putting its toe in the water," and not yet really comfortable with the asset protection and tax concepts involved. However, over time and after receiving positive input, many states "upgraded" their statutes. Also, new coverage ideas and implementation techniques were developed. States copied or shared these developments. As a result, many of the present statutes have very similar foundational provisions. In other words, most of the DAPT state statutes are solid and competitive.

However, there are still differences that make certain state statutes undesirable for some planning situations and purposes. Also, there are a few unique planning techniques. For example, in Oklahoma revocable trusts can be used for asset protection planning.

For the above reasons, a "ranking" of DAPT statutes is subjective and easily succumbs to marketing goals. Rather than a ranking approach, we suggest that the planner first consider a number of factors, and then examine the statutes themselves. An aid to such examination can be found in the American College of Trust and Estate Counsel's *Comparison of Domestic Asset Protection Statutes*, updated through August 2019.<sup>1</sup>

The following are suggested factors, not necessarily in order of importance, for the planner to consider. For the sake of this discussion, we are assuming that the client is a resident of a non-DAPT state. However, the following type of analysis can also be used for a client who resides in a DAPT state but would rather have the trust governed by the law of a DAPT state that has stronger DAPT provisions and/or stronger associated asset protection and estate planning laws.

### 1. Location.

How easy is it for the client, the client's estate planning attorney, and trustees to go to the DAPT state to confer with attorneys and trust companies

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1. This comparison chart can be found on the following websites: <http://shaftellaw.com/docs/article-40-fixed.pdf> and <http://www.bovelanga.com/our-team/attorneys/alexander-a-bove-jr/books-and-texts-by-alexander-bove/>.

there, to sign documents, and to transfer assets? A client who is a resident of a non-DAPT state will want to have as many contacts as possible with the DAPT state. These contacts establish a stronger position supporting the application of DAPT state law.

**2. Administrative Trustee in DAPT State.**

Most DAPT statutes require that there be at least one trustee who is either an individual residing in the DAPT state or a bank or trust company with its principal office in the DAPT state. The administrative trustee's duties are often limited to maintaining records, preparing or arranging for tax returns, and accomplishing a certain amount of administration. These duties can be nonexclusive. Does the client have a relative or a friend residing in the DAPT state who would accomplish these duties? If not, see the factor immediately below.

**3. Trust Companies.**

The availability of quality trust companies located in the DAPT state is important. As noted above, the DAPT state administrative trustee can be either an individual, bank, or trust company. The duties of the administrative trustee can be quite limited. Alternatively, the client may desire that the DAPT state trustee also have distribution and/or investment powers.

**4. Attorneys.**

What is the availability of knowledgeable DAPT state attorneys to review or draft the trust instrument and assist with additional planning matters?

**5. State Legislature's Willingness to Update Their Statutes.**

As the law in this area develops, it is important that the DAPT state's laws be upgraded. Does the history of enactment and amendments indicate such a willingness?

**6. What Exceptions from Asset Protection?**

The various statutes vary as to whether they have carved out areas (exceptions) from the asset protection provided by the statutes. These include child support, alimony, property division on divorce, tort claims, and other areas. Each state's statutes need to be examined. It should be noted that often exceptions only apply to transfers that occurred before the DAPT was formed and assets transferred to it.

**7. Divorce.**

Will the DAPT trust protect assets from either the settlor's ex-spouse or the ex-spouse of one of the beneficiaries? Again, statutes vary considerably in this area and need to be examined.

**8. Fraudulent Transfer Act.**

With one exception, all of the DAPT states have a version of the Uniform Fraudulent Transfer Act, or its more recent amended version entitled the Uniform Voidable Transaction Act. As a result, asset protection will not apply if a fraudulent transfer has occurred. These enactments vary considerably with respect to the length of the statute of limitations, the burden of proof, and similar matters.

**9. Trustee's Ability to Apply Assets.**

A number of states have enacted statutes that allow the trustee to pay income or principal directly for the benefit of a beneficiary, even though the beneficiary has outstanding creditors. That is, the creditors cannot obtain an order of attachment or maintain a similar action or proceeding that would

interfere with the trustee's discretion to apply income and principal on behalf of a beneficiary, whether the beneficiary be the settlor or another beneficiary of the trust.

**10. Other Estate Planning Statutes.**

Does the state have other friendly estate planning provisions? For example, provisions relating to limited partnerships, limited liability companies, decanting, and similar matters?

**11. State Income Tax.**

Does the state assert an income tax that would apply to the income generated by assets of a trust formed by a non-resident?

**12. Duration of Trust.**

States have varied in their extension or abolition of the rule against perpetuities.

**13. State Cases Relating to DAPTs and to Asset Protection in General.**

There are only six cases as of the date of publication that directly apply to the asset protection provided by DAPTs. However, there may be other asset protection cases that provide an indication of how a state court might rule in a DAPT case with mixed facts. Consultation with a knowledgeable attorney in the DAPT state will be valuable.

**14. Transfer Tax Planning.**

Is one purpose or the primary purpose of the DAPT to facilitate transfer tax planning? How ironclad must this be for the client? Arguments have been made that exceptions to asset protection may weaken the exclusion of the DAPT trust assets from the client's gross estate.<sup>2</sup>

Review of the above factors should provide a good start to narrowing down and selecting a DAPT state for a non-resident client, and even for one who resides in a DAPT state but would like to find a stronger DAPT statute. For a comparison of all 19 statutes using 40 factors, the reader is directed to the Twelfth ACTEC Comparison of Domestic Asset Protection Statutes.<sup>3</sup>

2. See David G. Shaftel, *IRS Letter Ruling Approves Estate Tax Planning Using Domestic Asset Protection Trusts*, 112 J. TAX'N 212, 219 (Apr. 2010), [http://shaftellaw.com/docs/article\\_31.pdf](http://shaftellaw.com/docs/article_31.pdf); Gideon Rothschild, Douglas J. Blattmachr, Mitchell M. Gans & Jonathan G. Blattmachr, *IRS Rules Self-Settled Alaska Trust Will Not Be in Grantor's Estate*, 37 EST. PLAN. 3 (Jan. 2010), [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/523/](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/523/).

3. See *supra* note 1.