

COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES

UPDATED THROUGH JUNE 30, 2012

EDITED BY DAVID G. SHAFTEL

Copyright © 2012, David G. Shaftel. All Rights Reserved.

This June 30, 2012, version of the chart updates the prior December 2011 chart. Included is Virginia's new enacted statute, Ohio's pending statute, and changes to, or further explanation of, the laws of Alaska, Missouri, Nevada, and South Dakota. Also included are comments relating to relevant self-settled provisions in Arizona, Florida, North Carolina, and New York.

The following state editors generously contributed, reviewed and edited their state's subjects for accuracy: **David G. Shaftel** (Alaska); **Marc A. Chorney** (Colorado); **Richard G. Bacon** (Delaware); **Prof. Randall W. Roth** (Hawaii); **Steve Gorin** (Missouri); **Layne T. Rushforth** (Nevada); **Amy K. Kanyuk** and **William Zorn** (New Hampshire); **Brian Layman** and **Michael Stegman** (Ohio); **Jon H. Trudgeon** (Oklahoma); **John Harpootian** (Rhode Island); **John H. Raforth** (South Dakota); **Bryan Howard** (Tennessee); **Thomas Christensen, Jr.** (Utah); **Howard M. Zaritsky** (Virginia); and **Robert H. Leonard** (Wyoming). Similarly, the following attorneys generously reviewed and contributed to the preparation of this chart: **John Roth** (Hawaii); **Bo Loeffler** (Ohio); and **John E. Sullivan III** (reviewed 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, several states had statutory provisions which appear to support the formation of DAPTs. In 1997, Alaska was the first state to enact a usable DAPT statute. In the thirteen years since, ten other states have followed suit. There are now thirteen (arguably, fourteen, if Colorado is included) states that allow for the formation of DAPTs.

Legislatures have taken different approaches. The original statutes are terse and only indicate a public policy (Missouri and Colorado). 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.

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 conflict of laws. The most likely test is whether the nonresident’s domiciliary state has a “strong public policy” against DAPT asset protection. The fact that fourteen states now have DAPT statutes moves this approach from the eccentric anomaly category to an accepted asset protection and transfer tax minimization planning technique. 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.

Virginia’s statute is the most recently enacted addition to our chart. This act is effective as of July 1, 2012. Ohio has pending DAPT provisions. We have included the Ohio provisions in case they are enacted this year.

A number of states which have not enacted full DAPT statutes have “placed their toe in the water”. Arizona, Florida, North Carolina, and New York all have enacted 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 resulting from assets in the trust. Colorado, Kentucky, New Jersey, and Ohio have pending legislation which would provide the same protection. Arizona and New Hampshire protect the assets in a supplemental needs trust from the settlor’s creditors. Arizona, Delaware, Florida, and Virginia have all enacted statutes clarifying that the assets of an inter vivos QTIP trust cannot be reached by the creditors of a donor spouse after the death of the donee spouse. Enactment of protection for self-settled interests like these provides weight to the argument that those states do not have a “strong public policy”

against self-settled trust asset protection, and therefore residents could form a DAPT under another state's law. The same reasoning applies to residents of DAPT states who conclude their state's DAPT statute is not as desirable as the statute of another DAPT state.

The DAPT chart below is designed to give the reader an easy and quick comparison of the various DAPT statutes. 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.

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII MISSOURI	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING
		Page No.	Page No.	Page No.
1.	What requirements must trust meet to come within protection of statute?	1	9	19
2.	May a revocable trust be used for asset protection?	1	10	20
3.	Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	1	10	20
4.	What contacts with state are suggested or required to establish situs?	2	10	20
5.	What interests in principal and income may settlor retain?	2	11	21
6.	What is trustee's distribution authority?	2	11	21
7.	What powers may settlor retain?	3	11	21
8.	Who must serve as trustee to come within protection of statute?	3	12	22
9.	May non-qualified trustees serve?	3	12	22
10.	May trust have distribution advisor, investment advisor, or trust protector?	3	12	22
11.	Are fraudulent transfers excepted from coverage?	4	12	23
12.	Fraudulent transfer action: burden of proof and statute of limitations.	4	13	23
13.	Does statute provide an exception (no asset protection) for a child support claim?	4	13	23
14.	Does the statute provide an exception (no asset protection) for alimony?	4	13	23
15.	Does statute provide an exception (no asset protection) for property division upon divorce?	5	13	24

NO.	SUBJECT	ALASKA COLORADO DELAWARE HAWAII MISSOURI Page No.	NEVADA NEW HAMPSHIRE OHIO OKLAHOMA RHODE ISLAND Page No.	SOUTH DAKOTA TENNESSEE UTAH VIRGINIA WYOMING Page No.
16.	Does statute provide an exception (no asset protection) for tort claims?	5	14	24
17.	Does statute provide other express exceptions (no asset protection)?	5	14	24
18.	Does statute prohibit any claim for forced heirship, legitime or elective share?	5	14	25
19.	Are there provisions for moving trust to state and making it subject to statute?	5	14	25
20.	Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	6	14	26
21.	Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	6	15	26
22.	Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	6	15	26
23.	Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	6	15	26
24.	Does statute authorize a beneficiary to use or occupy real property or intangible personal property owned by trust, if in accordance with trustee's discretion?	6	15	26
25.	Is a non-settlor beneficiary's interest protected from property division at divorce?	7	16	27
26.	Are due diligence procedures required by statute?	7	16	27
27.	Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	7	16	27
28.	Is there statutory authority supporting a trust's non-contestability clause even if probable causes exists for contest?	7	17	27

NO.	SUBJECT	ALASKA	NEVADA	SOUTH DAKOTA
		COLORADO	NEW HAMPSHIRE	TENNESSEE
		DELAWARE	OHIO	UTAH
		HAWAII	OKLAHOMA	VIRGINIA
		MISSOURI	RHODE ISLAND	WYOMING
		Page No.	Page No.	Page No.
29.	Is the trustee given "decanting" authority to modify the trust?	7	17	27
30.	What is allowable duration of trusts?	7	17	28
31.	Does state assert income tax against DAPTs formed by non-resident settlors?	7	17	28
32.	Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	8	18	28
33.	What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	8	18	28

SUBJECT	ALASKA	COLORADO*	DELAWARE	HAWAII	MISSOURI
	Citation: Alaska Stat. § 34.40.110	Citation: Colo. Rev. Stat. §§ 38-10-111	Citation: Del. Code Ann. tit. 12, §§ 3570-3576	Citation: H.R.S. 554G	Citation: Mo. Rev. Stat. §§ 456.5-505
	Effective Date: April 2, 1997	Effective Date: 1861	Effective Date: July 1, 1997	Effective Date: July 1, 2011	Effective Date: 1989
	URL: http://www.legis.state.ak.us	URL: http://www.state.co.us	URL: http://www.delcode.state.de.us	URL: http://capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1447&year=2011	URL: http://www.moga.mo.gov

1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state AK law governs validity, construction, and administration of trust (unless trust is being transferred to AK trustee from non-AK trustee); (3) contain spendthrift clause.	In trust, limited to future creditors.	Trust instrument must: (1) be irrevocable; (2) expressly state that DE law governs validity, construction, and administration of trust (unless trust is being transferred to DE trustee from non-DE trustee); (3) contain spendthrift clause.	Trust must be irrevocable and expressly incorporate HI law covering the validity, construction, and administration of the trust.	Trust instrument must: (1) be irrevocable; (2) contain a spendthrift clause; (3) have more than the settlor as a beneficiary; (4) settlor's interest must be discretionary.
2. May a revocable trust be used for asset protection?	No	No	No	No	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes, amendments enacted in: 2010, 2008, 2006, 2004, 2003, 2001, 2000, and 1998.	No amendments	Yes, amendments enacted in: 2011, 2010, 2009, 2008, 2007, 2006, 2005, 2003, 2002, 2001, 2000, and 1998.	Statute did not provide an attractive option when first enacted in 2010. As of July 2011, however, the statute is much stronger, reflecting considerable legislative support for DAPTs.	Amendments enacted in 2004.

* It is unclear whether Colorado's statute qualifies as a DAPT statute and assertion of the statute as such is typically made only defensively. Compare *In Re Baum*, 22 F.3d 1014 (10th Cir. 1994), with *In the Matter of Cohen*, 8 P.3d 429 (Colo. 1999), and *In Re Gary Lee Bryan*, 415 B.R. 454 (Bankr. D. Colo. 2009). See also, Rosen and Rothschild, 810 3rd T.M. Asset Protection Planning, VII A.2d and Nenno & Sullivan, 868 T.M. Domestic Asset Protection Trusts, I C. As to Subject 25, see Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop., Probate and Trust J. 1 (2005).

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
4. What contacts with state are suggested or required to establish situs?	Suggested: (1) some or all of trust assets deposited in state; (2) AK trustee whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns (can be non-exclusive); (3) part or all of the administration occurs in state, including maintenance of records.	Not addressed by statute.	Required: (1) some or all of trust assets deposited in state; (2) DE trustee whose powers include (a) maintaining records (can be nonexclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	There must be at least one trustee who is a HI resident, or a bank or trust company that has HI as its principal place of business, and such trustee must materially participate in administering the trust.	Principal place of business or residence of trustee in designated jurisdiction, or presence of all or part of the administration in designated jurisdiction; statute includes procedure for transfer of principal place of business. RSMo § 456.1-108
5. What interests in principal and income may settlor retain?	Settlor may retain interests in: (1) CRT; (2) total-return trust; (3) GRAT or GRUT; (4) QPRT; (5) IRA; and (6) ability to be reimbursed for income taxes attributable to trust.	Not addressed by statute.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total return trust; (4) GRAT or GRUT; (5) QPRT; (6) qualified annuity interest; (7) ability to be reimbursed for income taxes attributable to trust; and (8) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust.	Right to current income; up to 5% of principal annually; reimbursement for income taxes on trust income; ability to receive discretionary distributions in any amount. (Settlor may also serve as investment advisor.)	Settlor may be one of a class of beneficiaries of a trust discretionary as to income or principal. RSMo § 456.5-505.3
6. What is trustee's distribution authority?	Discretion whether or not governed by a standard.	Not addressed by statute.	(1) Discretion; or (2) pursuant to a standard.	Discretion to distribute any amount of principal to settlor if trust agreement so authorizes.	(1) Discretion; or (2) pursuant to a standard. RSMo § 456.8-814
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) right to appoint and remove trustees, trust protector, and advisors.	Not addressed by statute.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/ advisor.	Veto power over distributions; non-general testamentary power of appointment; power to remove and replace trustees and advisors; testamentary power of appointment for debts, administration expenses, and estate/ inheritance taxes.	Settlor may retain a testamentary limited power of appointment.
8. Who must serve as trustee to come within protection of statute?	Alaska trustee not required, but suggested to establish situs. Resident individual or trust company or bank that possesses trust powers and has principal place of business in Alaska.	Not addressed by statute.	Resident individual or corporation whose activities are subject to supervision by Delaware Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	Individual HI resident(s), other than the transferor, and/or a bank or trust company that has HI as its principal place of business.	Not addressed by statute.
9. May non-qualified trustees serve?	Yes	Not addressed by statute.	Yes, as a cotrustee.	Yes, as long as there is a permitted trustee.	Not addressed by statute.
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have trust protector (who must be disinterested third party) and trustee advisor. Settlor may be advisor if does not have trustee power over discretionary distributions.	Not addressed by statute.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor. The term “advisor” includes a protector.	Yes. Settlor may appoint one or more trust advisors or protectors, including advisors with power to (i) remove and appoint trustees, advisors, trust committee members, or protectors, (ii) direct, consent to, or disapprove of distributions from the trust, and (iii) serve as investment advisor.	Yes (pending at RSMo § 456.8-808)
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
11. Are fraudulent transfers excepted from coverage?	Yes. Alaska has not adopted Uniform Fraudulent Transfer Act. Alaska statute sets aside transfers made with intent to defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with actual intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. However, future creditors may set aside transfer only if transfer made with intent to defraud.	Creditors can set aside only transfers made with actual intent to hinder, delay, or defraud.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. RSMo § 456.5-505.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered, but future creditor must establish claim within four years after transfer. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Claims must arise before the transfer is made and be brought within two years. See #16 regarding certain tort victims. Creditor has burden to show actual fraudulent intent by preponderance of evidence (or clear and convincing evidence in limited circumstances).	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes, if settlor was 30 days or more in default of making payment at time of transfer of assets to trust.	No	Yes	Yes. Protection is not available regarding family court-supervised agreement or order for child support.	Yes RSMo § 456.5-503.2
14. Does the statute provide an exception (no asset protection) for alimony?	No	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	Yes. Protection is not available regarding family court-supervised agreement or order for support or alimony to the transferor's spouse or former spouse.	Yes RSMo § 456.5-503.2
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if assets were transferred to trust during or less than 30 days prior to marriage. Otherwise, assets are protected.	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes. Protection is not available regarding family court-supervised agreement or order for a division or distribution of property to the transferor's spouse or former spouse.	No
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No. But statute does not provide asset protection if the plaintiff suffered death, personal injury, or property damage on or before date of permitted transfer.	No
17. Does statute provide other express exceptions (no asset protection)?	No	No	No	Yes, secured loans to the transferor based on express or implied representations that trust assets would be available as security in the event of default; also, the transferor's tax liabilities to the State of Hawaii.	Yes if another governing law supersedes.
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes, assets excluded from augmented estate if transfer made more than 30 days before marriage or with spouse's consent.	No	Yes	Yes	No
19. Are there provisions for moving trust to state and making it subject to statute?	Yes	No	Yes	Yes	No
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	No	Yes	Yes	No
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No	No	Yes	Yes	No
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	No	Yes	Yes	No
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes, and also provides protection for funding limited partnerships and LLCs.	No	Yes	Yes	No
24. 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	No	No, except for QPRT residence.	Yes	No
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, and may not be considered in property division.	Increases in value of and income from separate property after marriage are marital property.	Yes, but may be considered in property division in certain instances.	Yes, but may be considered in property settlement.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	Yes; affidavit required.	No	No	No	No
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	No	Yes	Yes, if the trustee has not acted with intent to defraud, hinder, or delay the creditor.	Yes RSMo § 456.7-709.
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	Yes	No	Yes	No	No
29. Is the trustee given "decanting" authority to modify the trust?	Yes AS 13.36.157	No	Yes	No, but trustee of trust or holder of a non-conforming power of appointment may conform to the statute.	Yes RSMo § 456.4-419
30. What is allowable duration of trusts?	Up to 1,000 years	Up to 1,000 years	No limit for personal property, including LLC and LP interests, even if LLC or LP owns real property; otherwise, 110 yrs for real property.	No limitation. Rule against perpetuities does not apply to qualifying trusts.	Abolished; generally applicable only after August 28, 2001. RSMo § 456.025.1
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No	Yes	No. However, does impose its income tax upon trusts that accumulate income for Delaware residents.	Trust is subject to HI income taxes generally, but not on income and capital gains accumulated for the benefit of non-residents.	Yes, if from sources within Missouri. Probably no if from marketable securities.
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy.	Yes, charging order is only remedy.	Yes, charging order is only remedy. Del. Code Ann. tit. 6, § 18-703	No	Although charging order is only remedy, foreclosure is not expressly precluded. RSMo §§ 347.119, 359.421.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	(1) Trustee petition and court discharge; or (2) six months after trustee provides report that adequately discloses claims.	Six months after trustee provides report that adequately discloses claims, and shows termination of the trust relationship between the trustee and the beneficiary.	Trustee filing and court discharge. Discharge occurs two years after delivery of statement that discloses the facts giving rise to the claim. (Accountings do not have <i>res judicata</i> effect in Delaware except as to matters actually contested in the accounting proceeding.)	Trustee filing and court discharge.	One year after trustee provides report that adequately discloses claims. RSMo § 456.10-1005.
	ALASKA	COLORADO	DELAWARE	HAWAII	MISSOURI

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
	Citation: Nev. Rev. Stat. §§ 166.010-166.170	Citation: N.H. Rev. Stat. Ann. § 564-D:1-18	Citation: Proposed Chapter 5816 of the Ohio Revised Code HB 479	Citation: Family Wealth Preservation Act (the "Act"). Okla. Stat. tit. 31 § 11, et seq.	Citation: R.I. Gen Laws §§ 18-9.2-1 - 18-9.2-7
	Effective Date: Oct. 1, 1999	Effective Date: Jan. 2, 2009	Effective Date: [PENDING]	Effective Date: June 9, 2004	Effective Date: July 1, 1999
	URL: http://www.leg.state.nv.us	URL: http://www.gencourt.state.nh.us	URL: http://www.legislature.state.oh.us/laws.cfm	URL: http://www.lsb.state.ok.us Statute at: http://www.oscn.net	URL: http://www.rilin.state.ri.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) all or part of corpus of trust must be located in NV, domicile of settlor must be in NV, or trust instrument must appoint NV trustee; and (3) distributions to settlor must be approved by someone other than the settlor.	Trust instrument must: (1) be irrevocable; (2) expressly state that NH law governs validity, construction, and administration of trust (unless trust is being transferred to NH trustee from non-NH trustee); (3) contain spendthrift clause.	5816.02(K) Trust instrument must: (1) be irrevocable; (2) expressly state that OH law wholly or partially governs validity, construction, and administration of trust; (3) contain spendthrift clause.	Trust instrument may be revocable or irrevocable. Trust instrument must: (1) expressly state OK law governs; (2) have at all times as a trustee or co-trustee an OK-based bank that maintains a trust department or an OK-based trust company; (3) have only qualified beneficiaries [ancestors or lineal descendants of grantor (including adopted lineal descendants if they were under age 18 when adopted), spouse of the grantor, charities, or trusts for such beneficiaries]; (4) recite that income subject to income tax laws of OK; (5) limited to \$1,000,000 of assets plus growth.	Trust instrument must: (1) be irrevocable; (2) expressly state RI law governs validity, construction, and administration of trust; (3) contain spendthrift clause.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
2. May a revocable trust be used for asset protection?	No	No	No	Yes. Settlor may revoke or amend trust and take back assets. No court or other judicial body may compel such revocation or amendment.	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. The Nevada Legislature approved amendments in 2007, 2009, and 2011.	Yes. Amendments enacted in 2011.	Time will tell.	Yes. Most sections of the Act were last amended and superseded effective June 8, 2005.	Yes, amendment enacted in 2007.
4. What contacts with state are suggested or required to establish situs?	Required: (1) all or part of assets are in state; (2) Nevada trustee whose powers include: (a) maintaining records, (b) preparing income tax returns; (3) all or part of administration in state.	Required: (1) some or all of trust assets deposited in state; (2) NH trustee whose powers include (a) maintaining records (can be nonexclusive), (b) preparing or arranging for the preparation of income tax returns; (3) or, otherwise materially participates in the administration of the trust.	5816.02(S)—required: (1) some or all of trust assets custodied in state; (2) OH 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.	Required: (1) OK-based trustee; (2) majority of value of assets comprised of OK assets defined at 31 O.S. § 11 to include real or tangible personal property or any interest therein having situs in OK and stocks, bonds, debentures, and obligations of the State, OK-based companies, and accounts in OK-based banks.	Required: (1) some or all of trust assets deposited in state; (2) RI 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.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
5. What interests in principal and income may settlor retain?	The settlor may retain any right except the power to make distributions to himself without the consent of another person. N.R.S. § 166.040(3). The settlor's interest in a QPRT, GRAT, CRT, or a trustee IRA are also protected. N.R.S. § 166.040(2)(c) through (f), added in 2011.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; (4) QPRT; (5) GRAT or GRUT; (6) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust; (7) ability to be reimbursed for income taxes attributable to trust.	5816.05—Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% annually; (4) QPRT; (5) ability to be reimbursed for income tax attributable to trust; and (6) ability to have debts, expenses and taxes of settlor's estate paid from trust; and (7) pour back to estate or trust.	Irrevocable trusts: not addressed by the Act. Revocable trusts: see Item 7. If settlor revokes or partially revokes the trust, the exemptions provided do not extend to assets received by settlor. The value of the property received by the settlor will increase the amount of future additions the settlor may make to the trust.	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to five percent interest in total return trust; QPRT; ability to be reimbursed for income taxes attributable to trust.
6. What is trustee's distribution authority?	As provided in the trust agreement, which may include absolute discretion or discretion limited by an ascertainable standard, and it may be subject to approval or veto powers retained by the settlor or given to the trust protector or other advisor.	(1) Discretion; or (2) pursuant to an ascertainable standard.	5816.12 Except as provided in trust instrument, greatest discretion permitted by law.	Irrevocable trusts: not addressed by the Act. Revocable trusts: see Item 5, above.	Discretion, or pursuant to a standard.
7. What powers may settlor retain?	Settlor may retain any power except the power to make distributions to himself without the consent of another person, including: (1) power to veto distributions; and (2) special testamentary power of appointment or other similar power.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to remove and replace trustee/advisor with nonrelated/nonsubordinate party; and (4) right to serve as trust advisor.	5816.05—Settlor may retain: (1) power to veto distributions; (2) non-general power of appointment (lifetime or testamentary); (3) power to remove/replace trustee/advisor.	Irrevocable trusts: not addressed by the Act. Revocable trusts: settlor may revoke or amend, but otherwise powers not addressed by the Act. The Oklahoma Trust Act addresses trustee and co-trustee powers and liabilities. 60 O.S. § 175.1, et seq.	Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
8. Who must serve as trustee to come within protection of statute?	Resident individual or trust company or bank that maintains office in Nevada.	Resident individual or a state or federally chartered bank or trust company having a place of business in New Hampshire.	5816.02(S)—Qualified Trustee: resident individual or corporation whose activities are subject to Ohio Superintendent of Banks, FDIC, Comptroller of Currency, or Office of Thrift Supervision.	At all times, the trustee or co-trustee shall be an OK-based bank or an OK-based trust company chartered under OK law or nationally chartered), and having a place of business in OK	Resident individual (other than the transferor) or corporation whose active-ties are subject to super-vision by RI Dept. of Business Regulation, FDIC, Comptroller of Currency, or Office of Thrift Supervision.
9. May non-qualified trustees serve?	Yes	Yes	5816.02(K)—Yes, but must have at least one qualified trustee.	Yes	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes	Yes. “Trust advisor” includes a trust protector or any other person who holds one or more trust powers. Trust advisor’s powers may be defined in the trust agreement and are not limited by the statute. If grantor serves as trust advisor, powers cannot include a general power of appointment.	5816.02(A) & 5816.11. Yes. Trust may have one or more advisors who may remove and appoint trustees or who have authority to direct, consent to, or disapprove investments, distributions or other decisions. The term “advisor” includes a protector. Settlor may be advisor in connection with investments.	Not addressed by the Act. See Oklahoma Trust Act (60 O.S. § 175.1, et seq.) and Oklahoma Prudent Investor Act (60 O.S. § 175.60, et seq., esp. § 175.69, which specifically permits investment advisors. Distribution advisors and trust protectors are permitted.	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor. The term “advisor” includes a protector.
11. Are fraudulent transfers excepted from coverage?	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with actual intent to hinder, delay or defraud, and constructively fraudulent transfers.	5816.07(A)—Yes. Sets aside transfers with specific intent to defraud specific creditor bringing claim.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Future creditors:</u> Two years after transfer. <u>Existing creditors:</u> Two years after transfer, or, if longer, six months after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud (rather than constructive fraud). A transfer is deemed discovered when reflected in a public record.	<u>Case law:</u> Actual fraud must be proved by clear and convincing evidence; constructive fraud by a preponderance of the evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	5816.07(C)—Clear and convincing evidence. <u>Future creditors:</u> 18 months after transfer Existing creditors: (1) 18 months after transfer or (2) 6 months after transfer was or could have been discovered (recording constitutes constructive notice—see proposed 1301.401).	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	Clear and convincing evidence. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.
13. Does statute provide an exception (no asset protection) for a child support claim?	No	Yes	Yes. 5816.03(C).	Yes	Yes, if at the time of transfer a court order for child support existed.
14. Does the statute provide an exception (no asset protection) for alimony?	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.	5816.03(C). Yes. If ex-spouse was married to settlor on or before qualified disposition.	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.
15. Does statute provide an exception (no asset protection) for property division upon divorce?	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Other-wise, assets are protected.	5816.03(C). Yes. If ex-spouse was married to settlor on or before qualified disposition.	No	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
16. Does statute provide an exception (no asset protection) for tort claims?	No	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.	No	No	Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.
17. Does statute provide other express exceptions (no asset protection)?	No	No	No	Yes. "Except for any additional property contributed to the preservation trust by the grantor having an aggregate fair market value, determined as of the date of each contribution, minus liabilities to which the property is subject, in excess of One Million Dollars (\$1,000,000)." 31 O.S. § 12.	No
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	No, but Nevada law does not recognize such claims.	Yes, unless the transferor made the qualified disposition for the purpose of defeating the surviving spouse's elective share rights.	Yes. 5816.03(D).	No	No
19. Are there provisions for moving trust to state and making it subject to statute?	Yes. NRS 166.180 (added in 2011).	Yes	Yes. 5816.03(C) and (E).	No	No
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	No	Yes	Yes. 5816.03(B).	Yes. 31 O.S. § 16.	Yes
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No	No	Yes. 5816.09.	No	Yes
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes. NRS 166.045 (added in 2011).	Yes	Yes. 5816.04.	No	Yes
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes. A trustee or an advisor of the settlor or trustee is liable only if it is established by clear and convincing evidence that damages directly resulted from the advisor's violation of the law knowingly and in bad faith. N.R.S. §§ 166.170(5) and (6).	Yes	5816.07(D), (E), and (G). Yes, and also provides protection relating to entity planning to fund trust.	No	Yes
24. 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. N.R.S. § 166.040(2)(h), added in 2011.	Use of QPRT residence specifically authorized. Use and occupancy of other property not addressed in the statute.	Yes. 5816.05(J).	No. Not addressed in the Act. Oklahoma Trust Act would allow trust agreements to authorize use and occupancy of property with trustee discretion. 60 O.S. § 175.1, et seq.	No, except for QPRT residence.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, if property is retained in a spendthrift trust for the beneficiary. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	Yes. Under the NH Uniform Trust Code, if a beneficiary is eligible to receive distributions in the trustee's discretion (regardless of whether there is a standard to guide the trustee), the beneficiary's interest is neither a property interest nor an enforceable right but a mere expectancy. <i>See</i> RSA 564-B:8-814 and <i>Goodlander v. Tamposi</i> , 161 N.H. 490 (2011).	Yes. 5816.13.	Yes. The Act does not address, but if property is retained in a spendthrift trust for the beneficiary it is protected. Even if not retained in trust, property received by gift or inheritance is the beneficiary's separate property; however, trust income and assets can be considered a resource for purposes of determining alimony and child support.	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	No	No	5816.06. Yes, affidavit required.	No	No
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	No	Yes	Yes. 5816.08(A)(3)(a).	No	Yes
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	N.R.S. 163.00195 requires a court to enforce a no-contest clause contained in a trust, but there is a statutory exception for a legal action challenging the validity of the trust document (or any trust-related document) where the <i>“legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the trust, any document referenced in or affected by the trust, or other trust-related instrument is invalid.”</i>	Yes. RSA 564-B:10-1014.	Case law, not statutory: <i>Bradford v. Bradford</i> , Ex'r, 19 Ohio St. 546 (1869); <i>Irwin v. Jacques</i> , 71 Ohio St. 395 (1905); <i>Kirkbride v. Hickok</i> (1951), 155 Ohio St. 293.	No	No
29. Is the trustee given "decanting" authority to modify the trust?	Yes. N.R.S. §§ 163.556 and 166.170(a).	Yes. RSA 564-B:4-418.	Yes. 5808.18 (effec. 3/22/12).	No	No
30. What is allowable duration of trusts?	Up to 365 years	Abolished rule against perpetuities. RSA 564:24.	2131.09. Opt-out and 1,000 years for exercise of nongeneral power of appointment (included in OAMMA).	Rule against perpetuities.	Abolished rule against perpetuities.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No. Nevada has no state income tax.	No.	5747.01(l)(3)(a)(ii). No, unless the settlor later domiciles in Ohio and the trust has at least one beneficiary domiciled in Ohio.	Yes	No
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy, even as to one-member LLCs and small corporations.	Yes, charging order is only remedy.	1705.19. LLC statute amended to provide that charging order is only remedy (effec. 5/4/12)	Yes, charging order is only remedy. 18 O.S. § 2034.	Yes, charging order is only remedy.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	N.R.S. 165.139 mandates an annual trustee's account upon a beneficiary's request, but N.R.S. 165.145 permits an account to be provided confidentially to a third-party "reviewer" where the trust directs or permits a trustee not to give an account to a beneficiary. Unless the trust instrument provides for a shorter period, a trustee's account is deemed approved if no written objection is given within 120 days or when a petition for approval is granted by court order after notice and hearing.	One year after trustee provides report that adequately discloses claims. Limitations period cannot be tolled except by agreement of trustee and beneficiaries or by court order. RSA 564-B:10-1005.	5810.05. Discharge occurs two years after delivery of statement that discloses the facts giving rise to the claim.	Two years after trustee provides report that adequately discloses claims.	Trustee application and court discharge.
	NEVADA	NEW HAMPSHIRE	OHIO	OKLAHOMA	RHODE ISLAND

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
	Citation: S.D. Codified Laws §§ 55-16-1 - 55-16-17	Citation: Tenn. Code Ann. § 35-16-101	Citation: Utah Code Ann. § 25-6-14	Citation: Va. Code § 55-545.05 (amended 2012), §§ 55-545.03:2 and 55-545.03:3	Citation: Wyo. Stat. §§ 4-1-505 and 4-10-510 - 523
	Effective Date: March 2, 2005	Effective Date: July 1, 2007	Effective Date: December 31, 2003	Effective Date: July 1, 2012	Effective Date: July 1, 2007
	URL: http://www.legis.state.sd.us	URL: http://www.legislature.state.tn.us	URL: http://www.le.utah.gov	URL: http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=SB11&Submit2=Go	URL: http://legisweb.state.wy.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state that SD law governs validity, construction, and administration of trust (unless trust is being transferred to SD trustee from non-SD trustee); (3) contain spendthrift clause; (4) must have a “qualified person” as a trustee. See SDCL §§ 55-16-1(6) (defining “qualified disposition”), 55-16-2 (defining “trust instrument”), 55-16-3 (defining “qualified person” by cross-reference to other statutes), and 55-16-4 (more regarding qualified persons).	Trust instrument must: (1) be irrevocable; (2) expressly state TN law governs validity, construction and administration of the trust; (3) contain a spendthrift clause.	Trust instrument must: (1) be irrevocable; (2) contain spendthrift clause.	(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 55.545.03:3(A).	Trust instrument must: (1) state that trust is a "qualified spendthrift trust" under § 4-10-510 of Wyoming statutes; (2) be irrevocable; (3) expressly state Wyoming law governs validity, construction and administration of the trust; (4) contain a spendthrift clause; (5) settlor must have personal liability insurance equal to lesser of \$1,000,000 or value of trust assets.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
2. May a revocable trust be used for asset protection?	No	No	No	No. Va. Code § 55-545.03:3(A).	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. Amendments enacted in 2011, 2010, 2009, 2008, 2007, 2006, and 2012.	Yes. Amendments enacted in 2008 and 2010.	No amendments	This statute is the first enactment for broad approval of self-settled spendthrift trusts.	Yes. Amendments enacted in 2008 and 2011.
4. What contacts with state are suggested or required to establish situs?	Suggested: (1) some or all of trust assets deposited in state; (2) SD 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. See also SDCL § 55-3-39 (dealing with minimum contacts needed to justify choice of law).	Required: (1) some or all of trust assets deposited in state; (2) Tennessee 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.	Required: (1) Utah trust company; (2) some or all of the assets held in certain types of accounts in state.	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 § 55-455.03(A).	Required: Wyoming trustee who: (a) maintains custody of some or all of trust assets in state; (b) maintains records (can be non-exclusive); (c) prepares or arranges for the preparation of income tax returns; (d) or, otherwise materially participates in the administration of the trust.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
5. What interests in principal and income may settlor retain?	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest annually; (4) GRAT or GRUT; (5) QPRT; and (6) pour back to estate or trust.	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.	Settlor may retain interest in CRT.	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 § 55-545.03:3(D).	Settlor may retain interests in: (1) current income; (2) CRT; (3) up to 5% interest in total-return trust; (4) QPRT, (5) GRAT or GRUT.
6. What is trustee's distribution authority?	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to a standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard.	(1) Absolute discretion; (2) pursuant to an ascertainable standard. Va. Code § 55-545.03:3(A), (D).	(1) Absolute discretion; (2) pursuant to a standard.
7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general power of appointment (life-time or testamentary); (3) power to replace trustee/advisor with anybody, except that a trustee must not be related or subordinate within the meaning of I.R.C. § 672(c); and (4) serve as investment trust advisor.	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to replace trustee/ advisor with non-related/nonsub-ordinate party; and (4) serve as an investment advisor.	Settlor may retain: (1) power to veto distributions; (2) testamentary special power of appointment; and (3) power to appoint nonsubordinate advisors/ protectors.	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 §§ 55-545.03(A), (D).	Settlor may retain: (1) power to veto distributions; (2) <i>inter vivos</i> or testamentary general or limited power of appointment; (3) power to add or remove a trustee, trust protector, or trust advisor; (4) serve as an investment advisor.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
8. Who must serve as trustee to come within protection of statute?	Resident individual or corporation whose activities are subject to supervision by SD Division of Banking, FDIC, Comptroller of Currency, or Office of Thrift Supervision. SD trustee automatically ceases to serve if it fails to meet these requirements.	Resident individual, or is authorized by Tennessee 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.	Institution authorized to engage in trust business in Utah, including Utah depository institutions, non-Utah depository institutions authorized to do business in Utah, and certain other institutions.	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 § 55-545.03(A).	Resident individual or a person authorized by Wyoming law to act as trustee or a regulated financial institution.
9. May non-qualified trustees serve?	Yes	Yes	Yes. Individual co-trustees may serve.	Yes. See Va. Code § 55-545.03(B) (using nonexclusive terminology for the requirement of a qualified trustee).	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have one or more advisors (other than trustor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment advisor, including trustor.	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.	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.	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 §§ 55-545.03:3(A); 55-545.03:2(E).	Yes. Trust may have trust protector who can remove or appoint trustees; direct, consent to, or disapprove distributions; change governing law; change beneficiary's interests; and grant or terminate powers of appointment. Trust may have advisors. Settlor may be an advisor.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
11. Are fraudulent transfers excepted from coverage?	Yes. Sets aside transfers with intent to defraud specific creditor.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.	Yes. Va. Code § 55-545.03:2(D).	Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.
12. Fraudulent transfer action: burden of proof and statute of limitations.	Clear and convincing evidence. <u>Existing creditors:</u> Two years after transfer, or six months after transfer was or could reasonably have been discovered if creditor (1) asserted specific claim before transfer; or (2) if creditor files another action within two years that asserts claim before transfer. <u>Future creditors:</u> Two years after transfer.	Burden not addressed by statute. <u>Existing creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Four years after transfer.	Clear and convincing evidence. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.	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 § 55-545.03:2(D).	Burden not addressed by statute. <u>Existing creditors and future creditors:</u> Four years after transfer, or one year after transfer was or could reasonably have been discovered if claim based upon intent to hinder, delay or defraud. Four years after transfer if claim based upon constructive fraud.
13. Does statute provide an exception (no asset protection) for a child support claim?	Yes	Yes	Yes	Yes. Va. Code § 55-545.03(B) (protecting rights of a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance).	Yes
14. 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.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust	Yes	No	No
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
15. 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. Otherwise, assets are protected.	Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.	Yes	No	No
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	Yes, see Item 17, below.	No	No
17. Does statute provide other express exceptions (no asset protection)?	No	No	Yes: (1) claim is decision or ruling resulting from judicial, arbitration, mediation, or administrative proceeding commenced prior to or within three years after trust created; (2) public assistance; (3) taxes; (4) violation of certain written representations or agreements; (5) fraud.	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 § 55-545.03(B). (B) the United States, the Commonwealth, any city, county, or town. Va. Code § 55-545.03(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 § 55-545.03:1.	Yes. (1) Qualified trust property that is listed upon an application or financial statement used to obtain or maintain credit other than for the benefit of the qualified spendthrift trust; (2) property of a qualified spendthrift trust that was transferred to the trust by a settlor who received the property by a fraudulent transfer.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes, for forced heirship and legitime. Silent with respect to elective share.	Yes	No	No	No, but in 2011 the Wyoming Supreme Court held that assets transferred to a trust are not subject to the elective share of a surviving spouse under the Wyoming Uniform Trust Code and Wyoming law does not provide for a forced heirship or legitime. (<i>In re The Estate of Deanna Bess George</i> , 2011 WY 157, 265 P.3d 222.)
19. Are there provisions for moving trust to state and making it subject to statute?	Yes	Yes	Yes	Yes. Va. Code § 55-545.03:2(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.”	Yes, permits transfer of trust property from trust created in another jurisdiction with similar creditor protection for settlor with creditor protection relating back to date of funding of trust created in other jurisdiction. Irrevocable trusts from other states may also elect to become qualified spendthrift trusts if they incorporate law of WY, obtain qualified trustee, and have spendthrift clause.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	Yes	Yes	No	Yes
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	DAPT statute does not have any such specific provision, but SDCL § 55-3-47 applies such a rule to all South Dakota trusts.	Yes	No	No	Yes
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	Yes	No	No	No
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes	Yes	Yes	Yes. Va. Code § 55-545.03:2(E).	Yes
24. 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	No	No	No, except for QPRT residence.
	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
25. Is a non-settlor beneficiary's interest protected from property division at divorce?	Nothing in DAPT statute. But see SDCL §§ 55-1-43 (discretionary interests are not property), 55-1-26 (powers of appointment are not property), 55-1-27 (certain remainders not property), 55-1-30 (distribution and remainder interests irrelevant to divorce).	Yes	No	Yes. Va. Code §§ 55-545.01 to 55-545.03 (no exception from spendthrift protection for divorces).	Yes, but may be considered in property division.
26. Are due diligence procedures required by statute?	No	Yes; affidavit required.	No	No	Yes; affidavit required.
27. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	Yes	Yes	No	Yes
28. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No, but see SDCL §§ 55-1-46, et seq.	No	No	No	No
29. Is the trustee given "decanting" authority to modify the trust?	Yes	Yes	No	Yes. See Va. Code §§ 55.548.16:1 (effec. July 1, 2012).	No, but trust protector may have a similar power.

SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
--------------	-----------	------	----------	---------

SUBJECT	SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
30. What is allowable duration of trusts?	Abolished rule against perpetuities.	Up to 360 years.	Up to 1,000 years.	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).	Up to 1,000 years, except for real property.
31. Does state assert income tax against DAPTs formed by non-resident settlors?	No	No, if the beneficiaries are non-residents. If the beneficiaries are residents, a tax is levied on dividends and interest.	No, except for Utah source income, such as rental income from Utah real property.	Yes. See VA Code Ann. § 58.1-302.	No
32. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy. Other legal and equitable remedies expressly barred.	Yes for LLCs; charging order is only remedy. No for LPs.	Yes, charging order is only remedy.	Yes. On LLC, see Va. Code §§ 13.1-1041.1(D). On Limited Partnership, see Va. Code §§ 50-73.46:1(D).	Yes; charging order is exclusive remedy for all LPs and LLCs, including single member LLCs.
33. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	180 days after trustee provides accounting, or by order of court for supervised trusts.	One year after trustee provides report that adequately discloses claims.	Six months after trustee provides report that adequately discloses claims.	Rules similar to Sections 411 to 414 of the Uniform Trust Code for termination of trust. See Va. Code §§ 55-544.11 to 55-544.14. No specific procedure for being discharged from liability on a trust.	Two years after trustee provides report that adequately discloses claims.

SOUTH DAKOTA	TENNESSEE	UTAH	VIRGINIA	WYOMING
--------------	-----------	------	----------	---------