

ACTEC
COMPARISON
OF THE
DOMESTIC ASSET PROTECTION TRUST STATUTES
UPDATED THROUGH APRIL 2014

EDITED BY DAVID G. SHAFTEL

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This April 2014 version of the chart updates the prior June 2012 chart. Over the past two years, numerous DAPT law changes have occurred. This 2014 chart includes Ohio and Mississippi's newly enacted statutes, substantial recent changes to the laws of Tennessee, Utah, and Wyoming, and additional changes to, or explanations of, the laws of Alaska, Delaware, Missouri, South Dakota, and Virginia.

The following ACTEC 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); **Leonard C. Martin** (Mississippi); **Steven B. Gorin** (Missouri); **Layne T. Rushforth** (Nevada); **Amy K. Kanyuk** and **William Zorn** (New Hampshire); **Bowen Loeffler**, **Michael J. Stegman**, and **Brian Layman** (Ohio); **Amy J. Sine** (Oklahoma); **John Harpootian** (Rhode Island); **Bryan Howard** (Tennessee); **Thomas Christensen, Jr.** (Utah); **Howard M. Zaritsky** (Virginia); and **Robert H. Leonard** (Wyoming).

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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, two 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 seventeen years since, thirteen other states have followed suit. There are now sixteen states that allow for the formation of DAPTs.

Ohio’s new statute was adopted in 2013 and became effective March 27, 2013. Mississippi’s 2014 statute is the most recently enacted addition to our chart. This act is effective as of July 1, 2014.

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 sixteen 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.

A number of states which have not enacted full DAPT statutes have “placed their toe in the water”. For example, states such as Arizona, Florida, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Oregon, New York, and Texas 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. Arizona and New Hampshire protect the assets in a supplemental needs trust from the settlor’s creditors. States such as Arizona, Florida, Kentucky, Michigan, and Maryland 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

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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.

This 2014 version of the DAPT chart contains a new subject:

25. 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?

This new subject is the result of recent dialogue among asset protection planners about a creditor who obtains a continuing writ of attachment against a trustee with respect to distributions by the trustee to a debtor-beneficiary. May the trustee safely pay the expenses of the debtor-beneficiary, instead of making distributions directly to the debtor-beneficiary? Alaska, Delaware, Missouri, Ohio, South Dakota, Tennessee, and Wyoming all have enacted statutes which either expressly protect, or appear to protect, a trustee who pays expenses instead of making distributions.

Wyoming’s 2013 amendments create an additional DAPT approach which is not dependent on a spendthrift provision. This alternative approach is based upon distributions which are at the sole discretion of an independent trustee.

There have been two DAPT cases. Both involved Alaska DAPTs and both were in bankruptcy court: *Battley v. Mortensen*, 2011 WL 5025288 (Bankr. DC Alaska 2011), decided May 26, 2011, by the Alaska bankruptcy court; and *Waldron v. Huber (In re Huber)*, 493 B.R. 798; 2013 Bankr. LEXIS 2038; 2013 WL 2154218, decided May 17, 2013, by the bankruptcy court for the Western District of Washington at Tacoma. At present, the editors are not aware of any federal transfer tax cases involving DAPTs.

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.

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NO.	SUBJECT	ALASKA	MISSISSIPPI	OHIO	TENNESSEE
		COLORADO	MISSOURI	OKLAHOMA	UTAH
		DELAWARE	NEVADA	RHODE ISLAND	VIRGINIA
		HAWAII	NEW HAMPSHIRE	SOUTH DAKOTA	WYOMING
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SUBJECT	ALASKA	COLORADO*	DELAWARE	HAWAII
	Citation: Alaska Stat. §§ 13.36.310, 34.40.110	Citation: Colo. Rev. Stat. §§ 38-10-111	Citation: Del. Code Ann. tit. 12, §§ 3570-3576	Citation: H.R.S. 554G
	Effective Date: April 2, 1997	Effective Date: 1861	Effective Date: July 1, 1997	Effective Date: July 1, 2011
	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/hrscurrent
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. AS 34.40.110(a).	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.
2. May a revocable trust be used for asset protection?	No. AS 13.36.368.	No	No	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes, amendments enacted in: 2014, 2013, 2010, 2008, 2006, 2004, 2003, 2001, 2000, and 1998.	No amendments	Yes, amendments enacted in: 2014, 2013, 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

* 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), *In Re Gary Lee Bryan*, 415 B.R. 454 (Bankr. D. Colo. 2009) and *In re the Estate of Sheldon K. Beren*, 2013 Colo. App. LEXIS 1874, P42 (Colo. Ct. App. 2013). 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 26, see Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop., Probate and Trust J. 1 (2005).

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<p>4. What contacts with state are suggested or required to establish situs?</p>	<p>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. AS 13.36.035(c).</p>	<p>Not addressed by statute.</p>	<p>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.</p>	<p>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.</p>
<p>5. What interests in principal and income may settlor retain?</p>	<p>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. AS 34.40.110(b)(3).</p>	<p>Not addressed by statute.</p>	<p>Settlor may retain interests in: (1) current income; (2) principal, if paid pursuant to trustee's discretion, a standard or an advisor's direction; (3) CRT; (4) up to 5% interest in total return trust; (5) GRAT or GRUT; (6) QPRT; (7) qualified annuity interest; (8) ability to be reimbursed for income taxes attributable to trust; and (9) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust.</p>	<p>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.)</p>
<p>6. What is trustee's distribution authority?</p>	<p>Discretion whether or not governed by a standard. AS 34.40.110(m)(1)</p>	<p>Not addressed by statute.</p>	<p>(1) Discretion; (2) pursuant to a standard; or (3) pursuant to the direction of an advisor who in turn is acting pursuant to the advisor's discretion or a standard.</p>	<p>Discretion to distribute any amount of principal to settlor if trust agreement so authorizes.</p>
	ALASKA	COLORADO	DELAWARE	HAWAII

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7. What powers may settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general lifetime and testamentary powers of appointment; (3) right to appoint and remove trustees, trust protector, and advisors; and (4) right to serve as a co-trustee or advisor. AS 34.40.110(b)(2) and (f).	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.
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. AS 13.36.390(3).	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.
9. May non-qualified trustees serve?	Yes. AS 34.40.110(f),(g).	Not addressed by statute.	Yes, as a cotrustee.	Yes, as long as there is a permitted trustee.
10. May trust have distribution advisor, investment advisor, or trust protector?	Yes. Trust may have trust protector and trustee advisor. Settlor may be advisor if does not have trustee power over discretionary distributions. AS 13.36.370, .375; AS 34.40.110(f),(g),(h).	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.
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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. AS 34.40.110(b)(1).	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, but as to creditors whose claims arise after the qualified disposition, only if an action is brought within four years of such qualified disposition and only if the qualified disposition was made with actual intent to defraud. UTFA applies to creditors whose claims exist at time of qualified disposition.	Creditors can set aside only transfers made with actual intent to hinder, delay, or defraud.
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. AS 34.40.110(b)(1); AS 34.40.110(d).	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).
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. AS 34.40.110(b)(4).	No	Yes	Yes. Protection is not available regarding family court-supervised agreement or order for child support.
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.
	ALASKA	COLORADO	DELAWARE	HAWAII

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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. AS 34.40.110(l).	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.
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	Yes, but only 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.
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.
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. AS 13.12.205(b).	No	Yes	Yes
19. Are there provisions for moving trust to state and making it subject to statute?	Yes AS 13.36.035; AS 13.36.043.	No	Yes	Yes
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes AS 34.40.110(a).	No	Yes	Yes
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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
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes AS 34.40.110(i).	No	Yes	Yes
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. AS 34.40.110(e).	No	Yes	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 AS 34.40.110(a).	No	For a transferor beneficiary limited to a QPRT residence. For a non-transferor beneficiary, as provided under the terms of the governing instrument.	Yes
25. 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 AS 34.40.113.	No	Yes. 12 Del. Code Ann. § 3536(a).	No
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, and may not be considered in property division. AS 34.40.110(l).	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.
27. Are due diligence procedures required by statute?	Yes; affidavit required. AS 34.40.110(j).	No	No	No
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28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes AS 13.36.310(c).	No	Yes	Yes, if the trustee has not acted with intent to defraud, hinder, or delay the creditor.
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	Yes AS 13.36.330.	No	Yes	No
30. Is the trustee given "decanting" authority to modify the trust?	Yes AS 13.36.157, .158, .159.	No	Yes	No, but trustee of trust or holder of a non-conforming power of appointment may conform to the statute.
31. What is allowable duration of trusts?	Up to 1,000 years. AS 34.27.051.	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 years for real property.	No limitation. Rule against perpetuities does not apply to qualifying trusts.
32. 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.
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes; charging order is only remedy. AS 10.50.380; AS 32.11.340.	Yes, charging order is only remedy.	Yes, charging order is only remedy. Del. Code Ann. tit. 6, § 18-703.	No
34. 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. AS 13.36.100.	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 DE except as to matters actually contested in the accounting proceeding.)	Trustee filing and court discharge.
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SUBJECT	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE
	Citation: Miss. Code Ann. §§ 91-9-701—91-9-723	Citation: Mo. Rev. Stat. §§ 456.5-505	Citation: Nev. Rev. Stat. §§ 166.010-166.170	Citation: N.H. Rev. Stat. Ann. § 564-D:1-18
	Effective Date: July 1, 2014	Effective Date: 1989	Effective Date: Oct. 1, 1999	Effective Date: Jan. 2, 2009
	URL: http://www.lexisnexis.com/hottopics/mscode	URL: http://www.moga.mo.gov	URL: http://www.leg.state.nv.us	URL: http://www.gencourt.state.nh.us
1. What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state MS law governs validity, construction and administration of the trust; (3) contain a spendthrift clause	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.	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.
2. May a revocable trust be used for asset protection?	No	No	No	No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	No amendments.	Amendments enacted in 2004 and 2009.	Yes. The Nevada Legislature approved amendments in 2007, 2009, and 2011.	Yes. Amendments enacted in 2011. Further amendments pending in 2014 (SB 289).
4. What contacts with state are suggested or required to establish situs?	Required: (1) some or all of trust assets deposited in state; (2) MS 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.	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.	Required: (1) all or part of assets are in state; (2) NV 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.
	MISSISSIPPI	MISSOURI	NEVADA	NEW HAMPSHIRE

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<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 be one of a class of beneficiaries of a trust discretionary as to income or principal. RSMo § 456.5-505.3.</p>	<p>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.</p>	<p>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.</p>
<p>6. What is trustee's distribution authority?</p>	<p>(1) Absolute discretion; (2) pursuant to a standard.</p>	<p>(1) Discretion; or (2) pursuant to a standard. RSMo § 456.8-814. Creditor may not compel exercise of discretion. RSMo § 456.5-504.1.</p>	<p>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.</p>	<p>(1) Discretion; or (2) pursuant to an ascertainable standard.</p>
<p>7. What powers may settlor retain?</p>	<p>Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; (3) power to replace trustee/ advisor with non-related/nonsubordinate party; and (4) serve as an investment advisor.</p>	<p>Settlor may retain a testamentary limited power of appointment. RSMo § 456.5-505.4. Settlor may serve as trustee without negating spendthrift protection. RSMo § 456.5-504.1.</p>	<p>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.</p>	<p>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.</p>
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8. Who must serve as trustee to come within protection of statute?	Resident individual, or is authorized by MS law to act as a trustee and whose activities are subject to supervision by the Mississippi Dept. of Banking and Consumer Finance, the FDIC, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto.	Not addressed by statute. RSMo § 456.1-107 describes when MO law controls.	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.
9. May non-qualified trustees serve?	Yes	Not addressed by statute.	Yes	Yes
10. May trust have distribution advisor, investment advisor, or trust protector?	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. RSMo § 456.8-808. A trust protector is a person other than the settlor, a trustee, or a beneficiary. The statute is flexible regarding powers.	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.
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 intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. RSMo § 456.5-505.3(1).	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.
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<p>12. Fraudulent transfer action: burden of proof and statute of limitations.</p>	<p>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 claim based upon intent to hinder, delay or defraud. Two years after transfer if claim based upon constructive fraud. <u>Future creditors:</u> Two years after transfer.</p>	<p>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. RSMo ch. 428.</p>	<p>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.</p>	<p><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.</p>
<p>13. Does statute provide an exception (no asset protection) for a child support claim?</p>	<p>Yes</p>	<p>Yes RSMo § 456.5-503.2</p>	<p>No</p>	<p>Yes</p>
<p>14. Does the statute provide an exception (no asset protection) for alimony?</p>	<p>Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.</p>	<p>Yes RSMo § 456.5-503.2</p>	<p>No</p>	<p>Yes, but only if ex-spouse was married to settlor before or on date of transfer of assets to trust.</p>
<p>15. Does statute provide an exception (no asset protection) for property division upon divorce?</p>	<p>Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.</p>	<p>No</p>	<p>No</p>	<p>Yes, but only if ex-spouse was married to settlor before or on date of transfer of assets to trust. Otherwise, assets are protected.</p>
<p>16. Does statute provide an exception (no asset protection) for tort claims?</p>	<p>Yes, for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.</p>	<p>No</p>	<p>No</p>	<p>Yes, but only for claims that arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.</p>
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17. Does statute provide other express exceptions (no asset protection)?	Yes. Claim not extinguished (1) if creditor is state of Mississippi or any political subdivision thereof, (2) for any creditor in an amount not to exceed \$1,500,000 if the settlor failed to maintain a \$1,000,000 general liability policy.	Yes, regarding governmental claims, if another governing law supersedes. RSMo § 456.5-503.3	No	No
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes	No	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.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes	No	Yes. NRS 166.180 (added in 2011).	Yes
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes	No	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?	Yes	No	No	No
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	Irrelevant, if the trust complies with RSMo § 456.5-505.3	Yes. NRS 166.045 (added in 2011).	Yes
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23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes	No	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
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, but a creditor may not force a trustee to exercise discretion, and an interest in a trust does not constitute a property interest. RSMo § 456.5-504.1	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.
25. 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?	No	Yes RSMo § 456.5-504.1	Yes. N.R.S. § 166.120	No
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	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.	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. See RSA 564-B:8-814 and <i>Goodlander v. Tamposi</i> , 161 N.H. 490 (2011).
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27. Are due diligence procedures required by statute?	Yes; affidavit required.	No	No	No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	Yes RSMo § 456.7-709.	No	Yes
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No	No	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.
30. Is the trustee given "decanting" authority to modify the trust?	No	Yes RSMo § 456.4-419	Yes. N.R.S. §§ 163.556 and 166.170(a).	Yes. RSA 564-B:4-418.
31. What is allowable duration of trusts?	Rule against perpetuities.	Abolished; generally applicable only after August 28, 2001. RSMo § 456.025.1	Up to 365 years	Perpetual. New Hampshire abolished the rule against perpetuities in 2004. RSA 564:24.
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32. Does state assert income tax against DAPTs formed by non-resident settlors?	No, if it is a grantor trust.	Yes, but only if from real estate, business, etc., sources within MO. RSMo §§ 143.181, 143.331, 143.371, 143.391, focusing on RSMo §§ 143.181.2.	No. Nevada has no state income tax.	No. New Hampshire does not impose any income tax on trusts.
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Charging order is only remedy.		Yes, charging order is only remedy, even as to one-member LLCs and small corporations.	Yes, charging order is only remedy.
34. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	One year after trustee provides report that adequately discloses claims.		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.	Either: (1) one year after trustee provides report that adequately discloses the existence of a potential claim and informs the beneficiary of the time allowed for commencing a proceeding, or (2) three years after trustee provides report that adequately discloses the existence of a potential claim. Limitations period cannot be tolled except by agreement of trustee and beneficiaries or by court order. RSA 564-B:10-1005.
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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
	Citation: Ohio Legacy Trust Act, Chapter 5816 of the Ohio Revised Code Effective Date: March 27, 2013 URL: http://www.legislature.state.oh.us/laws.cfm	Citation: Family Wealth Preservation Act (the "Act"). Okla. Stat. tit. 31 § 11, et seq. Effective Date: June 9, 2004 URL: http://www.lsb.state.ok.us Statute at: //www.oscn.net	Citation: R.I. Gen. Laws §§ 18-9.2-1 - 18-9.2-7 Effective Date: July 1, 1999 URL: http://www.rilin.state.ri.us	Citation: S.D. Cod. Laws §§ 55-16-1 - 55-16-17 Effective Date: March 2, 2005 URL: http://www.legis.state.sd.us
1. What requirements must trust meet to come within protection of statute?	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 that includes the interest of the settlor; (4) appoint at least one qualified trustee. § 5816.02(K)	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.	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).
2. May a revocable trust be used for asset protection?	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	No
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<p>3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?</p>	<p>The vote on the Legacy Trust Act in the 129th Ohio General Assembly was unanimous in both houses, boding well for continued support.</p>	<p>Yes. Most sections of the Act were last amended and superseded effective June 8, 2005.</p>	<p>Yes, amendment enacted in 2007.</p>	<p>Yes. Amendments enacted in 2011, 2010, 2009, 2008, 2007, 2006, and 2012.</p>
<p>4. What contacts with state are suggested or required to establish situs?</p>	<p>Required. OH qualified trustee who maintains or arranges for custody in OH of some or all of the trust estate and whose powers include (a) maintaining records (can be non-exclusive), (b) preparing or arranging for the preparation of income tax returns; or (c) otherwise materially participates in the administration of the trust. § 5816.02(S)</p>	<p>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.</p>	<p>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 administration of the trust.</p>	<p>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).</p>
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<p>5. What interests in principal and income may settlor retain?</p>	<p>Settlor may retain any one or more of these beneficial interests: (1) current income; (2) CRAT or CRUT; (3) beneficiary of distributions of income and principal in discretion of trustee or advisor or according to a standard; (4) use of real or tangible personal property of trust, including QPRT; (5) a qualified interest under I.R.C. § 2702(b), including GRAT, GRUT, CRAT, CRUT or back-end of CLAT OR CLUT; (6) ability to be reimbursed for income tax attributable to trust; (7) ability to have debts, expenses and taxes of settlor's estate paid from trust; and (8) pour-back to estate or trust. § 5816.05.</p>	<p><u>Irrevocable trusts:</u> Not addressed by the Act. <u>Revocable trusts:</u> 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.</p>	<p>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.</p>	<p>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.</p>
<p>6. What is trustee's distribution authority?</p>	<p>Except as provided in trust instrument, trustee or advisor has greatest discretion permitted by law. § 5816.05(G): distributions to settlor may be purely discretionary or according to a standard in the trust instrument (not limited to an ascertainable standard). § 5816.12.</p>	<p><u>Irrevocable trusts:</u> Not addressed by the Act. <u>Revocable trusts:</u> see Item 5, above</p>	<p>Discretion, or pursuant to a standard.</p>	<p>(1) Absolute discretion; (2) pursuant to an ascertainable standard.</p>
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<p>7. What powers may settlor retain?</p>	<p>Settlor may retain: (1) power to veto distributions; (2) power to invade trust principal up to 5% annually; (3) non-general power of appointment (lifetime or testamentary); (4) power to remove and replace a trustee or advisor. § 5816.05</p>	<p><u>Irrevocable trusts:</u> Not addressed by the Act. <u>Revocable trusts:</u> 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.</p>	<p>Settlor may retain: (1) power to veto distributions; and (2) special testamentary power of appointment.</p>	<p>Settlor may retain: (1) power to veto distributions; (2) non-general lifetime power of appointment (3) testamentary power of appointment (general or non-general); (4) 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 (5) serve as investment trust advisor.</p>
<p>8. Who must serve as trustee to come within protection of statute?</p>	<p>Qualified Trustee: resident individual or corporation with trust powers under OH law and whose activities are subject to Ohio Superintendent of Banks, FDIC, Comptroller of Currency, or Office of Thrift Supervision. § 5816.02(S)</p>	<p>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</p>	<p>Resident individual (other than the transferor) or corporation whose activities are subject to supervision by RI Dept. of Business Regulation, FDIC, Comptroller of Currency, or Office of Thrift Supervision.</p>	<p>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.</p>
<p>9. May non-qualified trustees serve?</p>	<p>Yes, but must have at least one qualified trustee. § 5816.02(K)</p>	<p>Yes</p>	<p>Yes</p>	<p>Yes</p>
	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA

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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
<p>10. May trust have distribution advisor, investment advisor, or trust protector?</p>	<p>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 only. §§ 5816.02(A) & 5816.11</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>
<p>11. Are fraudulent transfers excepted from coverage?</p>	<p>Yes. Creditor may avoid a transfer made with the specific intent to avoid the specific creditor. Only the portion of the qualified disposition necessary to satisfy the creditor’s claim is avoided, and the avoided portion is subject to the fees and costs incurred by a trustee in defending the claim (so long as the trustee has not acted in bad faith). §§ 5816.07(A) & 5816.08</p>	<p>Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.</p>	<p>Yes. Uniform Fraudulent Transfer Act applies, and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.</p>	<p>Yes. Sets aside transfers with intent to defraud specific creditor.</p>

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<p>12. Fraudulent transfer action: burden of proof and statute of limitations.</p>	<p>Clear and convincing evidence.</p> <p><u>Future creditors:</u> 18 months after qualified disposition.</p> <p><u>Existing creditors:</u> Later of 18 months after qualified disposition or 6 months after qualified disposition was or could have been discovered, with the limitation that the creditor must make demand on its claim within 3 years after the qualified disposition. The maximum combination of the 3-year demand limitation and the 6-month filing limitation provide an absolute 3.5 year bar. § 5816.07(B) & (C). Furthermore, Ohio Rev. Code § 1301.401 contains a personal property recording mechanism that serves as notice to the world.</p>	<p>Clear and convincing evidence.</p> <p><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.</p>	<p>Clear and convincing evidence.</p> <p><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.</p> <p><u>Future creditors:</u> Four years after transfer.</p>	<p>Clear and convincing evidence.</p> <p><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.</p> <p><u>Future creditors:</u> Two years after transfer.</p>
<p>13. Does statute provide an exception (no asset protection) for a child support claim?</p>	<p>Yes § 5816.03(C)</p>	<p>Yes</p>	<p>Yes, if at the time of transfer a court order for child support existed.</p>	<p>Yes, but only “to the extent of the debt” existing “at the time of transfer.” See SDCL § 55-16-15.</p>
<p>14. Does the statute provide an exception (no asset protection) for alimony?</p>	<p>Yes, if spouse was married to settlor on or before the date of the qualified disposition. §§ 5816.03(C) & 5816.02(U)</p>	<p>No</p>	<p>Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust.</p>	<p>Yes, if ex-spouse was married to settlor before or on date of transfer of assets to trust, but the exception applies only “to the extent of the debt” existing “at the time of transfer.” See SDCL § 55-16-15.</p>
	<p>OHIO</p>	<p>OKLAHOMA</p>	<p>RHODE ISLAND</p>	<p>SOUTH DAKOTA</p>

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SUBJECT	OHIO	OKLAHOMA	RHODE ISLAND	SOUTH DAKOTA
15. Does statute provide an exception (no asset protection) for property division upon divorce?	Yes, if spouse was married to settlor on or before the date of the qualified disposition. §§ 5816.03(C) & 5816.02(U)	No	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, but the exception applies only “to the extent of the debt” existing “at the time of transfer.” Further: (i) a settlor’s separate property is protected in a divorce, regardless of the date of marriage; and (ii) any marital property transferred to an APT is also protected if the settlor’s spouse either receives a specified statutory notice, or provides written consent after having received the information required by the notice. See SDCL § 55-16-15.
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
17. Does statute provide other express exceptions (no asset protection)?	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	No

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18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes § 5816.03(D)	No	No	Yes, for forced heirship and legitime. Silent with respect to elective share.
19. Are there provisions for moving trust to state and making it subject to statute?	Yes § 5816.10(C)(D) & (E)	No	No	Yes
20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?	Yes § 5816.03(B)	Yes. 31 O.S. § 16.	Yes	Yes
21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	Yes. § 5816.09. Furthermore, to maximum constitutional extent, Ohio court shall exercise jurisdiction over case brought before it and shall not decline adjudication because a court of another state has acquired jurisdiction. § 5816.10(H)	No	Yes	DAPT statute does not have any such specific provision, but SDCL § 55-3-47 applies such a rule to all South Dakota trusts.
22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes § 5816.04	No	Yes	Yes
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes, and also provides protection relating to forming and funding entities that become part of the trust estate. § 5816.07(D),(E)&(G)	No	Yes	Yes
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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?	Allowed as a reserved interest of the settlor (not in trustee's discretion. § 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.	Yes
25. 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. Ohio Rev. Code § 5815.24(D)	No	No	Yes. SDCL § 55-1-42 & SDCL § 55-1-43
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes, a beneficiary does not have a property interest in the property of the trust. § 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.	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).
27. Are due diligence procedures required by statute?	Yes, affidavit required. § 5816.06	No	No	No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes § 5816.08(A)(3)(a)	No	Yes	Yes
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	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	No, but see SDCL §§ 55-1-46, et seq.

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30. Is the trustee given "decanting" authority to modify the trust?	Yes. Ohio Rev. Code § 5808.18	No	No	Yes
31. What is allowable duration of trusts?	Allows opting out of the rule against perpetuities. Ohio Rev. Code § 2131.09	Rule against perpetuities.	Abolished rule against perpetuities.	Abolished rule against perpetuities.
32. Does state assert income tax against DAPTs formed by non-resident settlors?	No, unless the settlor later becomes resident in Ohio and the trust has at least one beneficiary resident in Ohio. Ohio Rev. Code § 5747.01(I)(3)(a)(ii).	Yes	No	No
33. Have state limited partnership and LLC statutes been amended to provide maximum creditor protection?	Yes, charging order is only remedy. Ohio Rev. Code § 1705.19	Yes, charging order is only remedy. 18 O.S. § 2034.	Yes, charging order is only remedy.	Yes; charging order is only remedy. Other legal and equitable remedies expressly barred.
34. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	Discharge occurs 2 years after delivery of statement that discloses the facts giving rise to the claim. Ohio Rev. Code § 5810.05	Two years after trustee provides report that adequately discloses claims.	Trustee application and court discharge.	180 days after trustee provides accounting, or by order of court for supervised trusts.

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SUBJECT	TENNESSEE	UTAH	VIRGINIA	WYOMING
	Citation: Tenn. Code Ann. § 35-16-101	Citation: Utah Code Ann. § 25-6-14 (repealed and re-enacted in 2013)	Citation: Va. Code §§ 64.2-745.1 and 64.2-745.2 (amended 2012)	Citation: <u>Qualified Spendthrift Trust (OST)</u> : Wyo. Stat. §§ 4-10-502 and 4-10-510 – 523 <u>Discretionary Asset Protection Trust (Discretionary APT)</u> : Wyo. Stat. §§ 4-10-504 and 4-10-506(c)
	Effective Date: July 1, 2007	Prior Effective Date: December 31, 2003 New Effective Date: March 28, 2013	Effective Date: July 1, 2012	Effective Date: <u>OST</u> : July 1, 2007 <u>Discretionary APT</u> : July 1, 2013
	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=bi1&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 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 Utah law; and (4) must require that at least one trustee be resident of Utah or Utah trust company.	(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.	<u>OST</u> : 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. <u>Discretionary APT</u> : Trust instrument must: (1) provide for discretionary distributions of trust income and/or principal to the settlor; (2) trust must be governed by Wyoming law.
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TENNESSEE	UTAH	VIRGINIA	WYOMING
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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).	<u>QST</u> and <u>Discretionary APT</u> : No
3. Has the state legislature consistently supported DAPTs and related estate planning by continued amendments?	Yes. Amendments enacted in 2008, 2010, and 2013.	Yes. Repealed and re-enacted in 2013.	This statute is the first enactment for broad approval of self-settled spendthrift trusts.	<u>QST</u> and <u>Discretionary APT</u> : Yes. Amendments enacted in 2005, 2007, 2008, 2011, and 2013.
4. What contacts with state are suggested or required to establish situs?	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: Utah resident or Utah trust company as trustee or co-trustee.	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).	<u>QST</u> : 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. <u>Discretionary APT</u> : Required: Wyoming regulated financial institution trustee which: (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.
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<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.</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>	<p><u>QST</u>: 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) principal distributions, (7) ability to be reimbursed for income taxes attributable to trust, (8) ability to have debts, expenses and taxes of the settlor's estate paid from the trust.</p> <p><u>Discretionary APT</u>: Settlor may retain ability to receive discretionary distributions of trust income and principal.</p>
<p>6. What is trustee's distribution authority?</p>	<p>(1) Absolute discretion; (2) pursuant to a standard.</p>	<p>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.</p>	<p>Absolute discretion. Va. Code § 64.2-745.2(A).</p>	<p><u>QST</u> and <u>Discretionary APT</u>: (1) Absolute discretion; (2) pursuant to a standard.</p>
	<p>TENNESSEE</p>	<p>UTAH</p>	<p>VIRGINIA</p>	<p>WYOMING</p>

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<p>7. What powers may settlor retain?</p>	<p>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.</p>	<p>Settlor may retain: (1) power to veto distributions; (2) testamentary special power of appointment; (3) power to appoint nonsubordinate 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.</p>	<p>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).</p>	<p><u>QST:</u> 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.</p> <p><u>Discretionary APT:</u> Settlor may retain same powers as for QST, except power to veto distributions.</p>
<p>8. Who must serve as trustee to come within protection of statute?</p>	<p>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.</p>	<p>At least one trustee must be Utah resident or Utah trust company. Settlor can be co-trustee.</p>	<p>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).</p>	<p><u>QST:</u> Resident individual or a person authorized by Wyoming law to act as trustee or a regulated financial institution.</p> <p><u>Discretionary APT:</u> Wyoming regulated financial institution.</p>
<p>9. May non-qualified trustees serve?</p>	<p>Yes</p>	<p>Yes.</p>	<p>Yes. See Va. Code § 64.2-745.2(A) (using nonexclusive terminology for the requirement of a qualified trustee).</p>	<p><u>QST:</u> Yes</p> <p><u>Discretionary APT:</u> No</p>
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<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.</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.</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><u>QST</u> and <u>Discretionary APT</u>: 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.</p>
<p>11. Are fraudulent transfers excepted from coverage?</p>	<p>Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.</p>	<p>Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.</p>	<p>Yes. Va. Code § 64.2-745.1(C).</p>	<p><u>QST</u> and <u>Discretionary APT</u>: Yes. Uniform Fraudulent Transfer Act applies and sets aside transfers with intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent.</p>
<p>12. Fraudulent transfer action: burden of proof and statute of limitations.</p>	<p>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 claim based upon intent to hinder, delay or defraud. Two years after transfer if claim based upon constructive fraud. <u>Future creditors</u>: Two years after transfer.</p>	<p>Burden not addressed by statute. <u>Existing creditors</u>: (a) 120 days after notice to known or unknown creditors of settlor of transfer to trust; or (b) without notice then two years after transfer, or one year after transfer was or could reasonably have been discovered.</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><u>QST</u>: Clear and convincing evidence. <u>Discretionary APT</u>: Burden not addressed by statute.</p>
	TENNESSEE	UTAH	VIRGINIA	WYOMING

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13. Does statute provide an exception (no asset protection) for a child support claim?	Yes	No, but before distribution to settlor, trustee must give 30 days advance notice to child support creditor. However, even if notice not given, child support creditor cannot force distribution from trust or attach trust assets	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).	<u>QST</u> : Yes <u>Discretionary APT</u> : No
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	No	No	<u>QST</u> and <u>Discretionary APT</u> : No
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.	No	No	<u>QST</u> and <u>Discretionary APT</u> : No
16. Does statute provide an exception (no asset protection) for tort claims?	No	No	No	<u>QST</u> and <u>Discretionary APT</u> : No
	TENNESSEE	UTAH	VIRGINIA	WYOMING

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17. 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).	<u>QST:</u> Yes. (1) Financial institution with which the settlor has listed qualified trust property on the financial institution's application or financial statement used to obtain or maintain credit from the financial institution 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. <u>Discretionary APT:</u> No
18. Does statute prohibit any claim for forced heirship, legitime or elective share?	Yes	No	No	<u>QST and Discretionary APT:</u> 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, 2011 WY 157, 265 P.3d 222.)</i>
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<p>19. Are there provisions for moving trust to state and making it subject to statute?</p>	<p>Yes</p>	<p>Yes, under provisions of the Utah Uniform Trust Code.</p>	<p>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.”</p>	<p><u>OST:</u> 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. <u>Discretionary APT:</u> Yes, if trust meets discretionary distributions standard and acquires a Wyoming regulated financial institution qualified trustee.</p>
<p>20. Does statute provide that spendthrift clause is transfer restriction described in Section 541(c)(2) of the Bankruptcy Code?</p>	<p>Yes</p>	<p>Yes</p>	<p>No</p>	<p><u>OST:</u> Yes <u>Discretionary APT:</u> No. Spendthrift clause is not required.</p>
<p>21. Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?</p>	<p>Yes</p>	<p>No</p>	<p>No</p>	<p><u>OST:</u> Yes <u>Discretionary APT:</u> No</p>
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22. Does statute provide that express/implied understandings regarding distributions to settlor are invalid?	Yes	Yes	No	<u>QST</u> and <u>Discretionary APT</u> : No
23. Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes	Yes	Yes. Va. Code § 64.2-745.1(E).	<u>QST</u> : Yes <u>Discretionary APT</u> : 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	Yes	No	<u>QST</u> and <u>Discretionary APT</u> : No, except for QPRT residence.
25. 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 § 35-15-504	No	No	<u>QST</u> and <u>Discretionary APT</u> : Yes Wyo. Stat. § 4-10-504(b)
26. Is a non-settlor beneficiary's interest protected from property division at divorce?	Yes	Yes, UCA § 75-7-502.	Yes. Va. Code §§ 64.2-743 – 64.2-744.	<u>QST</u> and <u>Discretionary APT</u> : Yes, but may be considered in property division.
27. Are due diligence procedures required by statute?	Yes; affidavit required.	Yes, affidavit required.	No	<u>QST</u> : Yes; affidavit required. <u>Discretionary APT</u> : No
28. Is the trustee given a lien against trust assets for costs and fees incurred to defend the trust?	Yes	No direct lien, but cost and fees may be paid from trust. See UCA § 75-7-1004.	No	<u>QST</u> and <u>Discretionary APT</u> : Yes
29. Is there statutory authority supporting a trust's non-contestability clause even if probable cause exists for contest?	No	No	No	<u>QST</u> and <u>Discretionary APT</u> : No
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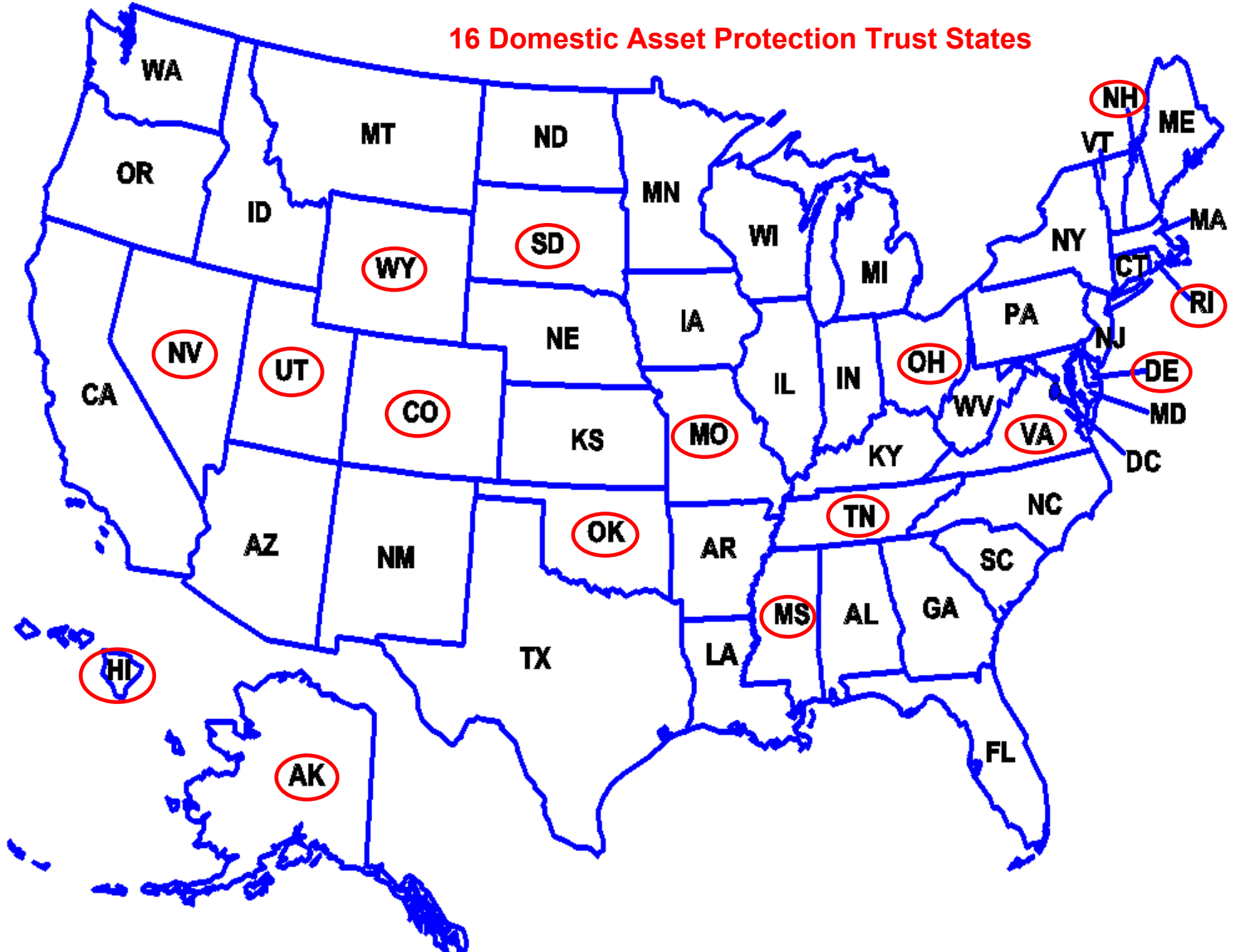
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30. Is the trustee given "decanting" authority to modify the trust?	Yes	No, but procedure for modifying trust available under Utah Uniform Trust Code and relatively easy to do if settlor is living.	Yes. See Va. Code § 64.2-778.1 (effec. July 1, 2012).	<u>QST</u> and <u>Discretionary APT</u> : Yes, if trustee has authority to make discretionary distributions of trust income and principal, trustee may distribute in further trust. Trust protector may also have power to decant or modify trust.
31. What is allowable duration of trusts?	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).	<u>QST</u> and <u>Discretionary APT</u> : Up to 1,000 years, except for real property.
32. Does state assert income tax against DAPTs formed by non-resident settlors?	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.	<u>QST</u> and <u>Discretionary APT</u> : No
33. 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.	Yes. On LLC, see Va. Code § 13.1-1041.1(D). On Limited Partnership, see Va. Code § 50-73.46.1(D).	<u>QST</u> and <u>Discretionary APT</u> : Yes; charging order is exclusive remedy for all LPs and LLCs, including single member LLCs.
34. What is the procedure and time period for a trustee to provide an accounting and be discharged from liability?	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 §§ 64.2-729 to 64.2-733. No specific procedure for being discharged from liability on a trust.	<u>QST</u> and <u>Discretionary APT</u> : Two years after trustee provides report that adequately discloses claims.
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