

DOMESTIC ASSET PROTECTION TRUST

Michigan's Qualified Dispositions in Trust Act, effective March 8, 2017, allows for the creation of a Domestic Asset Protection Trust ("DAPT") that can shield assets from creditors if the requirements are met. The trust must be irrevocable. The person setting up a DAPT (the "Settlor") can put his or her own resources into the trust, have these assets used for the Settlor's benefit, and yet not have these assets reachable by the Settlor's future creditors. However, the Settlor cannot be the trustee.

Using a DAPT as a planning option is important for individuals with significant at-risk assets and a high risk of potential liability. Examples might include doctors, lawyers, real estate developers, business owners who sign financial statements or guarantee corporate debt, celebrities and owners of watercraft or aircraft. A DAPT can also be a valuable pre-marital planning tool, if funded more than 30 days prior to the marriage or if both parties to the marriage agree. Individuals setting up an irrevocable trust for a different purpose, or decanting a discretionary irrevocable trust already in existence, might also consider adding DAPT provisions for additional asset protection.

The Settlor of a DAPT may retain the right to:

- receive income,
- receive discretionary distributions of income or principal,
- receive annuity payments from the trust that are not more than five percent of the trust's initial value,
- receive annuity or unitrust payments from charitable remainder trusts or grantor retained annuity trusts,
- veto trust distributions,
- direct investment decisions,
- remove and replace trustees, and
- exercise a special testamentary power of appointment over the DAPT.

Any or all of these rights are permitted by the statute. However, the more used, the greater the risk of the arrangement being challenged as voidable. Further, certain rights impact whether the transfer is a completed gift or will be included in the Settlor's estate for federal estate tax purposes. Which rights to use should be determined in consultation with a qualified attorney after evaluating any tax implications.

As noted above, the Settlor cannot be the trustee. The statute permits a friend, family member or subordinate party to serve as the trustee. This is generally not recommended. A "friendly" trustee can give the appearance of the Settlor retaining control over the trust. This may increase the risk the DAPT could be set aside by a judge or jury. A subordinate trustee may cause unexpected income tax results as a grantor trust. A professional trustee may be best suited to administer the technical provisions of a DAPT. In any case a DAPT qualified trustee must be a resident of Michigan (or authorized to administer a trust in Michigan, in the case of an entity), must administer part or all of the trust in Michigan and must arrange for custody of part or all of the trust property in Michigan.

In order for assets in a DAPT to be protected, the intent of the transfer to the DAPT may not be to hinder, delay or defraud a creditor. The Settlor must sign an affidavit of solvency to this effect. If all the DAPT requirements are fulfilled, transfers are generally protected from creditors after two years from the date of the transfer, regardless of when the creditor claim arose. If the claim arose before the transfer and was fraudulently concealed, the transfer is generally protected following the later of two years from the date of transfer or one year after the transfer could be reasonably discovered by the creditor. In both instances, bankruptcy is a notable exception. The U.S. Bankruptcy Code can invalidate transfers made within ten years of the bankruptcy, rendering the invalidly transferred assets reachable by the creditors. Further, a claim by a creditor under the Uniform Voidable Transactions Act can be brought within the later of six years from the date of the transfer or, if fraudulently concealed, two years from the date of discovery.

The new ability to create a DAPT in Michigan provides a valuable opportunity for people who are comfortable with giving up certain control over assets in exchange for asset protection. For an evaluation of whether a DAPT is the right choice for you, contact **Rebecca Wrock** or any other of our **Estate Planning Attorneys**.