

## Utah's New Domestic Asset Protection Statute Makes State a Top Choice to Shield Assets *Requirements, Peculiarities and Opportunities*

By Geoff N. Germane (ggermane@kmclaw.com)  
Kirton McConkie

A new Utah law taking effect May 14, 2013 will provide some of the strongest options in the country for those looking to shield assets from creditors or predatory litigation. The Domestic Asset Protection Trust (DAPT) is a significant improvement over existing law.

Utah is technically not new to the asset protection game—it has had a law allowing for self-settled trusts with some creditor protection on the books since 2003. The protection provided by the statute, however, was subject to so many restrictions and exceptions practitioners rarely, if ever, relied on it. The 2013 General Session of the Utah Legislature saw the enactment of a new domestic “Asset Protection Trust” statute to not only address the deficiencies of the 2003 law, but to also authorized the creation of trusts with such significant asset protection features that Utah should now be considered among the best jurisdictions in the nation for self-settled spendthrift trusts. The new statute will replace Utah Code Annotated 25-6-14 and is referred to the DAPT law.

In recent years, Nevada, South Dakota, Alaska and Delaware have largely been considered the states of choice in this area. Utah's new law, however, should earn it an invitation into the upper echelon of asset protection trust jurisdictions. Following are some of the features of the new DAPT law, set to take effect on May 14, 2013.

### **What the DAPT Law Requires and What it Doesn't**

While the new DAPT law allows for a broad array of scenarios and settlors, there are certain minimum requirements (some rather obvious, some less so) that must be met by every trust seeking the law's protection. Here is a sampling of the “musts:”

- The trust instrument must provide the trust is governed by Utah law and established under the DAPT Law.
- The settlor must not be insolvent or become insolvent by funding the trust and must not be in default of making a payment due under any child support judgment or order at the time of funding.

- At least one trustee must be a Utah resident or a Utah trust company. Note: the 2003 law required that a Utah trust company be used; this departure from the requirement for an institutional trustee is not insignificant.
- The trust must contain a spendthrift provision.
- The settlor must not have the ability to revoke, amend or terminate the trust (or any part) or withdraw property from the trust without the consent of a person whose interest in the trust would be adversely affected by the exercise of the power by the settlor.
- The trust may not give the settlor discretion over distributions of trust property.
- The trust instrument must require that, at least 30 days before making any distribution to the settlor as beneficiary, the trustee notify in writing every person who has a child support judgment or order against the settlor.
- The settlor may not be contemplating filing for bankruptcy at the time of funding the trust.
- The settlor may not intend to hinder, delay, or defraud a known creditor by transferring assets to the trust.
- The settlor must sign a sworn affidavit whenever funding the trust, attesting to compliance with many of the above requirements as well as a few others.

Interestingly, the DAPT law does not include several requirements one might expect to see:

- There is no requirement that the trust hold any assets in Utah. An earlier draft of the statute contained such a requirement, but it was removed in creating the version passed by the legislature.
- There is no requirement the settlor not fund the trust with the intent to hinder, delay, or defraud a future creditor. What's more, the statute specifically provides that a settlor's expressed intention to protect trust assets from potential future creditors is not evidence of an intent to hinder, delay or defraud a known creditor.

### **Other Notable Features**

The protection offered by the DAPT law is highlighted by a number of very interesting provisions, including the following:

- If the trustee fails to provide notice to a holder of a child support judgment or order against the settlor, such a holder still cannot satisfy the claim out of trust property or force a distribution from the trust.
- One who does not become a creditor until *after* the transfer of assets to a trust meeting the requirements of the DAPT law may not maintain a cause of action for fraudulent transfer of a settlor's assets to the trust. Virtually all other states with DAPT statutes allow future creditors to bring a claim with a specified period after an asset transfer.

- The statute of limitations for known and unknown creditors can be reduced from an already short two years to only 120 days by either mailing (in the case of known creditors) or publishing (in the case of unknown creditors) a notice meeting certain requirements.
- A settlor-beneficiary can live in real estate owned by the trust without exposing the property to creditors if the trust instrument authorizes the use.
- An institutional trustee is not required, but under Utah law (UCA 7-5-1(1)(c)(vi)), a non-institutional trustee may only act on an occasional or isolated basis and may not represent itself to be engaged in the trust business in Utah.

These features cause stark changes to the application of the Uniform Fraudulent Transfers Act (UFTA) to a transfer where the transferee is a trust created under the DAPT law. For example, under the UFTA:

- Intent to hinder, delay or defraud a future (or unknown) creditor is a basis for avoiding the transfer unless the transfer is to a Utah DAPT.
- Transferring assets without receiving reasonably equivalent value in exchange and then engaging in business without sufficient assets or incurring debts without ability to pay them can be grounds for avoiding transfers even if the claim doesn't arise until after the transfer, unless the transfer is to a Utah DAPT.
- A known creditor can bring a claim to avoid a transfer for up to four years, unless the transfer was to a Utah DAPT, in which case the creditor only has two years.
- An unknown creditor with an antecedent claim (as to the transfer) can bring a claim to avoid a transfer for up to four years, unless the transfer was to a Utah DAPT, in which case the unknown creditor only has two years or no years (see next example).
- An unknown creditor with a claim based on an act or omission that occurred after the transfer can bring a claim to avoid a transfer for up to four years, unless the transfer was to a Utah DAPT, in which case the creditor is barred entirely.

## **Potential Uses**

With the current \$5.25 million applicable exclusion from federal estate and gift taxes, many potential clients will not want or need to move assets outside the transfer tax system, but will want to move assets out of the reach of creditors and predators. The protections offered by the DAPT law make possible numerous practical uses:

- To hold an unencumbered primary residence and make sure it is always available for the family's use.
- To hold existing or new investments, such as investment real estate.
- To hold existing or new business ventures with modest appreciation, such as those tied to the service of the owner (sole proprietorships, dentists, etc.) and a DAPT trust can be drafted to

accommodate future appreciation, such that if the business interests or other transferred assets begin to appreciate in value, the settlor could invoke certain provisions of the trust to cause the assets (and the future appreciation) to move outside the settlor's taxable estate.

- As an augmentation for revocable trust plans. Assets in excess of a client's debts might be placed in a Utah DAPT, while the rest might be placed in revocable trust.
- To replace spousal-lifetime access trusts or other irrevocable trust strategies where a business interest will be sold in an installment sale.

If you have questions about the requirements or uses of the DAPT law, whether in general or in regards to a specific client situation, please contact Geoff Germane of Kirton McConkie at [ggermane@kmclaw.com](mailto:ggermane@kmclaw.com) or (801) 426-2127.