

Asset Protection Trusts

Domestic Asset Protection Trusts (DAPTs) - available only in a small number of states including South Dakota - are a formidable planning strategy that legally shields assets from third-party liability (including spouses in a divorce proceeding) and lawsuits while permitting settlors (the person establishing the trust) to retain some control over the trust assets and enjoy a discretionary benefit during their lifetime.

An individual can establish a DAPT that is fully discretionary, meaning settlors can receive financial benefit from the trust (income and discretionary principal distributions), and protect trust assets from creditor claims and lawsuits, while maintaining control over the investment management function through the directed trust structure. South Dakota has one of the oldest and most progressive self-settled Domestic Asset Protection provisions in the United States. With its two year "look back" fraudulent conveyance statute, South Dakota's provision is among the shortest in the country.

Bringing Together Domestic and Offshore Strategies

South Dakota Codified Law (SDCL) § 55-3-47 provides a mechanism to have both domestic and offshore asset protection within one trust instrument. If a judgment is obtained in any action brought against a trustee of a South Dakota trust for payment, where a foreign court declines to apply the law of South Dakota relative to the asset protection nature of the trust in determining the validity, construction, or administration of such trust, or the effect of a spendthrift provision, the statute clearly indicates that the trust company has no power or authority under South Dakota law to recognize or pay the judgment. Under the statute, the only power granted to the trust company is to resign and appoint a successor trust company in accordance with the terms of the trust instrument, and convey the trust property to the successor trustee. Presumably, the judgment obtained would then be returned unsatisfied and the creditor would need to commence the action against the successor trustee.

In this instance, it is important to note that there is nothing in the statute preventing a South Dakota trust company from transferring the trust and its assets to an offshore successor trust company, properly named in the document, thereby creating a very formidable asset protection strategy utilizing both domestic and offshore asset protection in one trust instrument. By operation of law and under appropriate trust provisions, the trust assets can be transferred offshore only when needed. Until the offshore asset protection is needed, the trust is administered in South Dakota and assets are held in the United States. Therefore, the settlor truly enjoys the best of both worlds by avoiding the negative attributes associated with having a trust administered in an offshore jurisdiction (high costs, unstable governments, potential restrictive access to assets) while availing themselves of the protection benefits of an offshore jurisdiction, should the need arise.

By combining domestic and offshore strategies, South Dakota law appears to render the debate over offshore vs. domestic asset protection moot and gives settlors an easy to understand and compelling option for obtaining asset protection.