



## Domestic Asset Protection Trusts (DAPT) – *Capital First*

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You've worked hard to accumulate wealth. Protecting your wealth from creditors is an important component of a well-designed financial and estate plan. According to IFG Trust Services Inc., the odds of being sued are 10% in any given year and 33% in an individual's lifetime. Persons of wealth are far more likely to be sued than others. To paraphrase the Willie Sutton rule, "people sue the wealthy because that's where the money is."

The quest for asset protection can be traced to the pharaohs of Egypt hiding their worldly wealth in the pyramids, to pirates burying looted treasure in caves, and eventually evolving into today's jurisdictional protection. Traditional jurisdictions have included Switzerland, the Cayman Islands, Isle of Man, and the Virgin Islands to name a few popular asset protection "havens."

Through the progressive efforts of several state legislatures, effective domestic asset protection is now available without having to move assets outside the United States. Currently 17 states have some form of domestic asset protection statutes. While opinions as to ranking them vary among legal experts, Alaska, South Dakota, Nevada, and Delaware are considered "Tier #1" states.

## 1. HOW ASSET PROTECTION WORKS:

Creditors are generally required to enforce a monetary judgement by bringing their action into the jurisdiction where the assets are located. By moving assets to an “asset protection” jurisdiction, creditors must evaluate the cost, time, legal fees, and inconvenience of bringing a suit into a jurisdiction with robust statutes protecting properly settled trust and a debtor favored state. (See state ranking chart.)

11th Annual Domestic Asset Protection Trust State Rankings Chart											
Rank	State	Statute (50% weight)	Uniform Voidable Transactions Act (12.5% weight)	Statute of Limitations (Future Creditor) (2.5% weight)	Statute of Limitations (Preexisting Creditor) (2.5% weight)	Spouse/ Child Support Exception Creditors (Spouse 3%, Alimony 1%, Child Support 1% weight)	Preexisting Torts Exception Creditors/Other Exception Creditors (5% weight)	Ease of Use – New Affidavit of Solvency required for every new transfer? (7.5% weight)	Fraudulent Transfer Standard (10% weight)	Decanting State Ranking (5% weight)	Total Score
1	NV	<a href="#">§§166.010 to 166.170</a>	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	No	No	No Affidavit Required	Clear and convincing	Ranked #2	99
2	SD	<a href="#">§§55-16-1 to 16</a>	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support (only if indebted at time of transfer)	No	No Affidavit Required	Clear and convincing	Ranked #1	98
3	OH	<a href="#">Ch. 5816</a>	No	1.5 Yrs.	1.5 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required (with exceptions)	Clear and convincing	Ranked #6	85
4	MO	<a href="#">§456.5-505</a>	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Alimony; Child Support	State/U.S. to extent state/federal law provides	No Affidavit Required	Clear and convincing	Ranked #7	84.5
5	CT	<a href="#">Public Act No. 19-137</a>	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support (only if indebted at time of transfer)	Preexisting Torts	No Affidavit Required	Clear and convincing	None	84
6(tie)	DE	<a href="#">Tit. 12, §§3570-3576</a>	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #3	83.5
6(tie)	TN	<a href="#">§§35-16-101 to 112</a>	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required	Clear and convincing	Ranked #4	83.5
8	AK	<a href="#">§34.40.110; §13.36.310</a>	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No	Affidavit Required	Clear and convincing	Ranked #8 (tie)	82.5
9	RI	<a href="#">§18-9.2</a>	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #14	82
10	IN	<a href="#">§30-4-8</a>	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Child Support	Property listed on app. to obtain credit – but only as to that lender	Affidavit Required	Clear and convincing	Ranked #10 (tie)	80.5

\*11th Annual Domestic Asset Protection Trust State Rankings Chart created in April 2020. Original State Rankings Chart created in April 2010. Copyright © 2010-2020 by Steve Oshins (soshins@oshins.com / www.oshins.com / (702) 341-6000, ext. 2). All rights reserved.  
 †The Decanting State Ranking column is based on the 7th Annual Trust Decanting State Rankings Chart (Jan. 2020) at <http://www.oshins.com/state-rankings-charts>.

## 2. CREATING A DOMESTIC ASSET PROTECTION TRUST:

Each “asset protection state” has specific requirements to establish a valid DAPT. Using South Dakota as an example, the trust is required to have at least one South Dakota resident. The South Dakota trustee can be an individual or corporation. The trust document should provide that the trust situs is South Dakota. Under certain circumstances, an affidavit of solvency is required to prevent abusive use of the asset protection statute.

The trust provides that South Dakota statutes apply in their entirety and include a spendthrift provision within the trust document. Additional information specific to individual states can be seen in the rankings chart shown herein.

### 3. LIMITATIONS:

A critical consideration in the selection of a domestic asset protection jurisdiction concerns time periods, or “tolling periods,” which bar claims of creditors based on the filing of claims. South Dakota has a two-year tolling period for claims and a separate provision addressing discovery of claims. Persons interested in establishing a South Dakota DAPT should consult with a South Dakota attorney with respect to tolling periods for their individual situation.

### 4. PROSPECTIVE CANDIDATES:

Persons who might consider utilizing a DAPT trust are those individuals engaged in “high risk” occupations. Examples often include MDs, attorneys, small business owners, landlords, and persons engaged in dangerous activities that might result in injury to others.

On the other end of the prospective candidates list are persons who wish to protect separate assets from spousal claims. The foregoing is often debated as matter of public policy; however, the statutes do include domestic matters and warrant mentioning.

### CONCLUSION:

DAPTs are a viable option for persons who fear creditor claims from past and current activities as well as domestic claims from spouses and children. Extreme care should be taken throughout the establishment process and include full disclosure of relevant facts when working with a qualified attorney in the specific jurisdiction chosen.

It should also be mentioned that many states have additional “trust friendly” statutes, which can be incorporated into the DAPT. Examples include zero state tax in certain tier 1 states and “quiet trust” provisions that ensure complete privacy of the trust’s existence as well as directed trust statutes, which allow for the separation of fiduciary duties and allow the individual financial advisor to manage the trust assets under a separate appointment within the trust document.



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