The Hide and Seek of Creditors and Debtors: Examining the Effectiveness of Domestic Asset Protection Trusts for the Massachusetts Settlor

Nina Dow
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Nina T. Dow
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I. Overview

This paper explores the constitutional complexities of domestic asset protection trusts (DAPTs) and correspondingly attempts to highlight an approach for the creation and execution of a trust in another jurisdiction (foreign trust) whose assets will be protected from a creditor armed with a Massachusetts court judgment. Major challenges to asset protection vehicles remain constitutional in nature and case law directly providing a bright line set of rules is nonexistent to date. Before placing the main issue in context by way of an example, a brief overview of basic trust law is necessary, followed by an explanation of what a DAPT is and its intended purpose.

A trust is a form of ownership where legal and beneficial title to assets, whether tangible or intangible, are divided and usually held by different persons: a trustee who holds legal title and a beneficiary who only holds beneficial title.1 The trustee is in a fiduciary role owing a duty to manage the assets with the beneficiary's best interest in mind.2 To create a trust, three parties are involved: the creator of the trust or "settlor," a trustee, and at least one beneficiary.3 A settlor may also be a trustee and a beneficiary, depending on the trust's objectives which are too numerous for this discussion.4 Major reasons for holding property in a trust include estate planning purposes such as probate avoidance, management of assets in the event of incapacity, privacy of title,5 and protection of assets from creditors under some circumstances.6

This paper will focus solely on the type of trust created for the purpose of managing assets including money. A settlor who creates a trust to manage money for a beneficiary who is

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1 See Patterson v. Patterson, 266 P.3d 828, 835 (Utah 2011) (defining trusts).
3 See id.
4 See id. In a creditor situation, most states will not allow asset protection of a settlor is also the only beneficiary, also called a self settled trust. See id.

A basic revocable living trust, such as the following form, can benefit a client who is interested in privacy, probate avoidance, and ease of management of assets in the event of incapacity. This form also provides a family fund, or continuing trust for younger children that would be administered outside the probate process.

Id.
likely to overspend can have advantages against that beneficiary's creditors. Such trust is called a "spendthrift" trust, which contains a provision restricting a beneficiary from transferring their interest in the trust voluntarily and involuntarily. These protection trusts also usually provide that all distributions to the beneficiary are totally discretionary with the trustee, so that the beneficiary has no rights under state law that might be attached by a creditor. These trusts are likely to be upheld in all jurisdictions, absent showings of fraudulent activity; however, once assets are distributed and are in the hands of the beneficiary, the trust's protection is lost.

Subject to exceptions in certain states, discussed infra, a settlor, if also a beneficiary, cannot shield his assets against creditors in the same way, even if the trust is irrevocable and not under the settlor's control. The creditors of such a trust may reach the assets to the maximum amount that the trustee may transfer to the settlor. Such a trust is known as "self-settled" and is regarded as violative of public policy in a majority of states, including Massachusetts. This is so even when a trustee is an independent third party who has full discretion over trust distributions.

Under current Massachusetts law, if the spendthrift trust is validly created and no fraudulent conveyance is involved then, in most instances, the creditors of a beneficiary will have no greater claim to the trust property than the beneficiary could have. However, any of the trust's income or principal that is actually paid over to a beneficiary becomes the beneficiary's property and is subject to the claims of the beneficiary's creditors. In most cases the property in a spendthrift trust remains exempt from attachment until it is actually paid over to the beneficiary.

Id. See also 76 Am. Jur. 2d Trusts § 102 (2013) ("As a rule, spendthrift trusts for the benefit of the settlor are invalid and do not protect a settlor-beneficiary from creditors or transferees, regardless of whether the settlor intends to defraud his or her creditors or is solvent at the time of the creation of the trust.")

See Ware v. Gulda, 331 Mass. 68, 72 (1954) (holding that a settlor of an irrevocable trust could not shield assets from his creditors even when the trust allowed only discretionary distributions).

See RESTATEMENT (SECOND) OF TRUSTS § 156 (2012) ("Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest."). See also MASS. GEN. LAWS ANN. ch. 203E § 505 (2012).

Creditor's claim against settlor (a) Whether or not a trust contains a spendthrift provision, the following rules shall apply: (1) During the lifetime of the settlor, the property of a revocable trust shall be subject to claims of the settlor's creditors
By way of an example, suppose A, who is domiciled in Massachusetts, creates an irrevocable trust where he is also a beneficiary either alone or with others, with an independent trustee who has full control to decide when A receives any distributions. If A’s creditor files a claim in a Massachusetts court and prevails, the creditor can reach assets inside the trust to satisfy the judgment to the extent of the maximum amount the trustee could have transferred to the settlor, from the settlor's contributions to the trust. However, A might have some other options for insulating his property from these judgments, provided that A is not bankrupt and legal obligations such as alimony payments or child support are not purposely avoided. These pose additional barriers to asset protection that will not be discussed in this paper.\(^{13}\) However, another major barrier to the success of a domestic asset protection trust is a fraudulent conveyance, which will be addressed briefly here. Every state will allow a creditor to prevail against a fraudulent transfer under the Uniform Fraudulent Conveyance Act.\(^{14}\) A transfer by a debtor is fraudulent whether or not the creditor’s claim arose before or after the transfer, if the debtor made the transfer "with the intent to hinder, delay or defraud, without receiving equivalent value in exchange for the transfer and the debtor was engaged or was about to engage in a business transaction for which remaining assets were unreasonably small in relation to the transaction, intended to incur or believed or reasonably believed that he would incur debts beyond his ability to pay as they became due."\(^ {15}\) Since proving the debtor's mental state can be quite difficult, the law provides for eleven "badges of fraud" that can assist creditors to make

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(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit.  
\(^{12}\) See Ware, 331 Mass. at 69-70 (holding that payment of a creditor by the trustee bank was not against public policy); see also State St. Bank & Trust Co. v. Reiser, 7 Mass. App. 633, 633 (1979) (finding that the trustee bank could reach trust assets to pay debts owed).  
\(^{13}\) See 11 U.S.C. § 541 (2010) ("a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."). See also Shapo et al., Settlor Creates Spendthrift Trust for Self § 223 (2012) (highlighting statutes of different states that allow protection of settlor assets in a self-settled trust unless the transfer was fraudulent).  
\(^{15}\) See id.
their case. Many commentators suggest that a settlor can avoid accusations of fraud depending on his particular situation. For example, for the settlor who is already a debtor, transferring assets to a trust after a complaint is filed is obviously a fraudulent transfer. But even if the settlor is not currently facing a claim, the transfer will be set aside if it was reasonably likely that there would be a future debt or claim that could arise. For example, depending on the facts of each case, it is arguable that a settlor who is a doctor or lawyer can reasonably expect claims in the future and therefore, a transfer of assets is scrutinized. To these points, for the settlor who has no pending claim, it is advisable that he not transfer the majority of his assets into a trust, as this may suggest avoidance of potential claims.

II. A Change by Statute - The Birth of Domestic Asset Protection Trusts

Some states enacted statues that allow the creation of self-settled trusts, as previously defined, that effectively insulate assets from creditors' claws, provided the trust is irrevocable and adheres to that particular statute's requirements. Missouri was the first state to enact what are now called "Domestic Asset Protection Trusts" (DAPTs) followed by Alaska, Delaware, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming. Each state has different requirements and Alaska and Delaware claim to offer a level of protection similar to an offshore or overseas trust that is effective since it lies beyond United States jurisdiction. For example, Delaware enacted the Qualified Dispositions in Trust Act that bars any action "for an attachment or other provisional remedy against property that is the subject of a qualified disposition" as long as the transfer was not fraudulent. Delaware requires the trust must: 1) be irrevocable 2) expressly state that Delaware law governs validity.

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16 See id.
17 See id.
19 See David Westfall et al., Use of Asset Protection Trusts in Estate Planning ¶ 1.13 (2013) (citing jurisdictions that have enacted DAPTs).
21 See DEL. CODE ANN. tit. 12, § 3572(a) (Supp. 1998). A "qualified disposition" occurs even if the trustee has discretionary power to make payments of income and principal to a settlor-beneficiary. See id.; Sterk, supra note 20, at 1053-55.
construction, and administration of trust and 3) contain a spendthrift clause. In the example posed earlier, A, a domicile of Massachusetts, could make arrangements to set up a DAPT in Delaware with A as a discretionary beneficiary. Notwithstanding, practitioners remain cautious in advising clients to set up DAPTs in jurisdictions other than the client's domiciled state because the constitutionality of DAPTs is unclear (discussed infra) and undesired estate and gift tax consequences may result. In the context of estate planning, the Internal Revenue Service (hereinafter "IRS") stated that a transfer of assets to a trust in a jurisdiction that allows DAPTs will be considered a completed gift since the asset is deemed to be out of the creditors' reach and therefore released from the settlor's dominion and control. But as will soon be discussed, a transfer of assets already in existence in the domiciliary state that is transferred to a state that recognizes DAPTs, may not offer protection anyway, under the theory that the assets remain under the jurisdiction of the first state and should therefore, remain under its laws.

III. DAPTs and The Massachusetts Settlor

Overview of Constitutional Threats

Research in this area has uncovered three major scenarios for the specific case, where, absent bankruptcy or fraudulent activity, a Massachusetts settlor (hereinafter "MA settlor") who sets up a DAPT in another state is being pursued by a creditor. Can that creditor go to Delaware, for example, and enforce a final judgment from a Massachusetts court to reach the assets? First, if Massachusetts can show that a trustee is a necessary party in the suit and can enforce jurisdiction over the trustee or the trust's assets, then the judgment is enforceable under the Full Faith & Credit Clause of Article IV of the United States Constitution. Second, assume a final

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22 See Sterk, supra note 20, at 1053-55 (summarizing requirements of statute).
23 See id. (noting estate planning lawyers' skepticism on DAPTs). See also infra, note 24. (noting IRS and its view on tax results).
24 See Rev. Rul. 76-103, 1976-1 C.B. 293. "If and when the grantor's dominion and control of the trust assets ceases such as by the trustee's decision to move the situs of the trust to a State where the grantor's creditors cannot reach the assets, then the gift is complete for Federal gift tax purposes . . . " Id. See also Treas. Reg. § 25.2511-2 (2013). "Cessation of donor's domination and control."
25 See infra, for discussion on constitutionality of DAPTs.
26 See Nevada v. Hall, 440 U.S. 410, 421 (1979). The Supreme Court stated, "The Full Faith and Credit Clause does require each State to give effect to official acts of other States. A judgment entered in one State must be respected in another provided that the first State had jurisdiction
judgment is not yet rendered. Can a Massachusetts court apply its law of prohibiting self-settled trusts to the out-of-state DAPT under choice of law principles? Lastly, in the event where a creditor seeks to satisfy a final judgment against assets held in an out of state DAPT, does the Full Faith and Credit Clause of the United States Constitution compel that state to recognize the Massachusetts judgment even when jurisdiction is lacking? Each of these scenarios will be addressed separately, but the common theme appears to be that exercising proper jurisdiction over a DAPT is a necessary factor for preventing its success.

**Jurisdiction Over Sister State Trusts: Personal and In Rem**

If the trust assets are comprised of real property, the analysis is simple. The law where the land is located prevails. So if the MA settlor placed real property that was purchased in Delaware inside a DAPT, then no out-of-state judgment can be enforced against it.27

*Personal* property however is more complicated. As relating to Massachusetts, one can conclude based on the limited case law available, that if assets never originated in Massachusetts but were always under the jurisdiction of the DAPT state, a Massachusetts court would not have the requisite jurisdiction over those assets or over the trustee.28 In *Hanson v. Danckla*29, the...
Supreme Court held that the court in Florida could not enforce Full Faith and Credit because the assets were not subject to Florida jurisdiction - the assets and trustee were always in Delaware, where the targeted trust was located. In Hanson, the settlor-decedent placed $400,000 in a trust located in Delaware before she became domiciled in Florida. Upon her death, her legatees sought relief in a Florida probate court, arguing that the trust funds in Delaware were to pass through the decedent's residuary clause in her will. The Delaware court refused to honor Full Faith and Credit to the Florida judgment because the trustee was a necessary party to the action but was not under the jurisdiction of Florida. The Court further noted that sufficient minimum contacts to Florida were completely lacking. "The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail." Furthermore, no act that brought on the claim occurred in Delaware. It is interesting that the Florida legatees tried to argue that because the decedent exercised her power of appointment while domiciled in Florida, jurisdiction over the trust should exist. The Court countered this argument stating, "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." To further complicate matters, the Court warns that had the issue been one of choice of law, the acts done in Florida in relation to the trust agreement, may have played a role in favor of the plaintiff-legatees. But in this case the Court stated that there was no personal jurisdiction over the trustee whose duties were carried

29 See id.
30 See id. at 248.
31 See id. at 238. 32 See id. at 240.
33 See id. at 255. Further, the facts indicated that the decedent had retained the right to income and the ability to amend the trust with a special power of appointment. See id. at 238. The decedent also retained the right to revoke or amend the trust and also change the trustee. See id. at 238-39.
34 Id. at 251. 35 See id.
36 See id. at 253.
37 Id.
out only in Delaware; a determining factor of whether or not Full Faith and Credit should be given to the Florida judgment.\textsuperscript{38}

In \textit{Nile v. Nile}\textsuperscript{39} the Supreme Judicial Court of Massachusetts held that a court had personal jurisdiction over a trustee and trust located in New Hampshire during probate litigation pending in a New Hampshire court.\textsuperscript{40} The court felt it was equitable to enforce such jurisdiction in order to "reach and apply" the trust assets because the decedent's trustees were sufficiently connected to Massachusetts.\textsuperscript{41} In \textit{Nile}, the decedent's son, Robert, sought to enforce a post divorce agreement that was changed when his father remarried and thereafter excluded him as beneficiary of trust assets.\textsuperscript{42} The trust was revocable by the decedent and he was also the trustee. After his death, his successor trustees were directed to carry out the new terms of the trust.\textsuperscript{43} Robert, armed with a valid claim from Massachusetts, tried to assert the judgment against the successor trustees who argued that Massachusetts has a long-arm statute that does not subject personal jurisdiction over foreign trustees, resulting in a lack of contacts with Massachusetts to justify jurisdiction.\textsuperscript{44} Furthermore, they argued the statute did not apply to them because a trustee is not a personal representative. The statute states: "person" is defined as "an individual, his executor, administrator \textit{or other personal representative}, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this commonwealth and whether or not organized under the laws of this commonwealth."\textsuperscript{45} Although the court concluded that the term "personal representative" does not include trustees, under the facts of the Nile case, the Supreme Judicial Court held that "the trustees performed similar functions as personal representatives and are treated accordingly."\textsuperscript{46} The facts the court relied on were during the decedent's lifetime he was the trust's settlor and only beneficiary who retained the ability to revoke and amend the terms thereby making the trust vulnerable to

\begin{footnotesize}
\textsuperscript{38} See id. at 254.
\textsuperscript{39} 432 Mass. 390 (2000).
\textsuperscript{40} See id. at 392 (affirming the lower court's opinion). \textsuperscript{41} See id. at 399.
\textsuperscript{42} See id. at 393 (stating key facts of the case at issue). \textsuperscript{43} See id.
\textsuperscript{44} See id. at 395 (summarizing key arguments).
\textsuperscript{46} See \textit{Nile}, 432 Mass. 390 at 395.
\end{footnotesize}
creditors' reach.\textsuperscript{47} The trustees, as successors, are in the same position as the decedent. The court noted, "In this respect the defendant-trustees have a status comparable to that of personal representatives, and public policy requires that they be treated accordingly."\textsuperscript{48} The next issue for the court was alleged lack of minimum contacts with Massachusetts.\textsuperscript{49} The court countered this argument by highlighting decedent's acts in Massachusetts that relate to the trust. He agreed to, and entered into, the contract at issue in Massachusetts for the benefit of beneficiaries who are domiciled in the state. He also consented for a Massachusetts probate court to approve the trust's terms, the purpose of which was to benefit Massachusetts residents including Robert his son. The court also places emphasis on the fact that the primary asset in the trust was located in Massachusetts and remains under such jurisdiction even after the asset was sold and later used to fund the trust in New Hampshire.\textsuperscript{50} The court concluded:

His contacts with Massachusetts were both substantial and sufficient for the Superior Court to exercise personal jurisdiction over his personal representatives . . . 
It is immaterial that Nile's successor trustees had no contacts with Massachusetts. Nile had the requisite contact, so jurisdiction extends to the trustees as his personal representatives.\textsuperscript{51}

\textsuperscript{47} See id.
\textsuperscript{48} Id. See also State St. Bank & Trust Co. v. Reiser, 389 N.E.2d 768 (Mass. Ct. App. 1979).
We hold, therefore, that where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit.

\textit{Id.} at 638.
The court also made a distinction between a testamentary trust and an intervivos revocable trust and how the former is not vulnerable to creditor's attacks. See id. at 638. \textit{But see Actec Comparison of the Domestic Asset Protection Trust Statutes, American College of Trust and Estate Counsel} (ed. David G. Shaftel) (2010) [hereinafter ACTEC] (discovering that since many states have enacted DAPTs statutes, the public policy argument is weakened). \textsuperscript{49} See Nile, 432 Mass. at 396.

Before personal jurisdiction can be exercised over a foreign defendant under [Massachusetts law] due process requires that "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action."

\textit{Id.}
\textsuperscript{50} See id.
\textsuperscript{51} See id.
The *Nile* case is quite different from the facts in *Hanson* where the defendant had no contact with Florida at the time that her trust in Delaware was set up. Therefore, Florida had no basis to subject personal jurisdiction over the Delaware trustee.\(^{52}\)

**Choice of Law and Full Faith & Credit**

In *Russell v. Lovell*,\(^ {53}\) as a matter of first impression, the Supreme Judicial Court analyzed which state's law applied in determining the age of majority for purposes of terminating a guardianship. At issue was property held by the guardian that arguably was owed to the ward because he turned 18, the age of majority in Vermont, where he was domiciled at the time of litigation. Massachusetts law, however, terminates the guardianship when the ward is 21. The court stated that property in the hands of a guardian was similar to that of a trust and that its analysis would be identical.\(^ {54}\) Therefore, the law of the state that is most substantially related to the trust should prevail. The court found that even though the ward was domiciled in Vermont, the domicile of the trustee, his place of business, the property, creation and administration were all in Massachusetts.\(^ {55}\) As a result, the substantial relationship test favored Massachusetts law and barred the recognition of Vermont's statute under Full Faith & Credit.\(^ {56}\) The court recognized that intent of the parties is also to be taken into consideration. There is an implication that the Restatement and many DAPT statutes agree with this notion, since both legal authorities direct that the settlor's choice of law will be given effect. In *Russell*, the Supreme Judicial Court analogized a guardian-ward relationship to that of trust-trustee, and stated, "It is valid to assume that one who creates a guardianship in Massachusetts would expect that Massachusetts law would apply."\(^ {57}\) As a result of the court's analysis, it is arguable that Massachusetts law, with respect to the invalidity of self-settled trusts, may not even be applied under choice of law principles if, analogous to the Russell case, a settlor who is domiciled in Massachusetts creates a DAPT in a sister state with the intention that the other state's law apply and whose trustee and

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\(^{52}\) See *Hanson*, 357 U.S. at 249-50.


\(^{54}\) See *id.* at 796. "Property in the custody of a guardian is to an extent similar to property held by a trustee." *Id.* \(^ {55}\) See *id.*

\(^{55}\) See *id.* at 797.

\(^{57}\) *Id.*
trust property originate in that state. It is in this type of case that a creditor will not be able to reach a judgment on the merits since choice of law in his favor will not apply.

**Full Faith & Credit: How Strong are Its Claws Absent Jurisdiction?**

Assume for a moment that Massachusetts does not have jurisdiction over the trust or trustee in Delaware. Must Delaware recognize a final judgment rendered in Massachusetts under the Full Faith & Credit Clause, regardless? In cases that involve fraud or bankruptcy, the argument that a DAPT violates the public policy of a settlor's domiciliary state may have merit, but the law is not clear; it is suggested that since many states have enacted DAPTs, this argument has lost its bite in court. Therefore, usually in cases involving the absence of jurisdiction, a sister state's public policy is one argument that bars enforcement of a Massachusetts judgment. Furthermore, a finding of fraud and a situation involving bankruptcy are reflective of violating public policy. Therefore, the research implies that in a situation absent those two things, no public policy is violated.

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58 See Sterk, *supra* note 20, at 1035 (saying its vital to follow settlor's intent).

59 See Sterk, *supra* note 20, (discussing various court views but involving fraud and bankruptcy only).

The settlor's intent to have the law of the foreign jurisdiction--whether Alaska, Delaware, or an offshore jurisdiction--is typically beyond dispute, because virtually all asset protection trust instruments expressly select the law of the favored jurisdiction. If intent is determinative, all courts would have to honor spendthrift provisions in an asset protection trust, even if the trust settlor is also the protected beneficiary.

*Id.* at 1083. See also ACTEC, *supra* note 48. See also Sterk, *supra* note 20, at 1046-47 (implying in the absence of fraud, or bankruptcy, placing assets in a DAPT does not violate public policy of the settlor's state and that fraud is usually proven when assets are transferred in close time proximity to the creditor's claim).

See also Nile, 432 Mass. at 395 (stating that since jurisdiction was appropriate over trustee because he acted in the same capacity as settlor, not enforcing the forum state's judgment would violate public policy).

60 See Nile, 432 Mass. at 395. (stating how self-settled trusts violate MA public policy). See also Sterk, *supra* note 20, at 1088. "A review of the authorities thus reveals that whatever courts say about honoring the law that the parties choose or the law of the situs of the trust, courts have not permitted trust settlors to frustrate important forum policies with their choice of law or trust situs." *Id.*

61 See Sterk, *supra* note 20 (limiting public policy argument to incidents of fraud or bankruptcy motives).
With the public policy argument aside, absent jurisdiction, a creditor prevailing against a DAPT seems unlikely. If there is no jurisdiction, a trustee of a DAPT cannot be joined in the suit and therefore, if a final judgment comes knocking on the door of a sister state, the judgment is susceptible to collateral attack for lack of due process.\textsuperscript{62} To this point, Full Faith & Credit by the sister state need not be granted.\textsuperscript{63} According to the Restatement (Second) of Conflict of Laws s. 103, "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."\textsuperscript{64} Agreeing with this statement is Scott on Trusts as shown by the following excerpt:

In some situations, however, the court that has primary supervision over the administration of the trust may regard the judgment as an \textit{undue interference with its power to control trust administration}. It may take the position that the court rendering the judgment applied its own local law, though it should have applied the law of the state of primary supervision, or that it incorrectly applied the law of the state of primary supervision. The question then is whether the court of primary supervision is bound to give full faith and credit to the judgment. The final determination of this question rests, of course, with the Supreme Court of the United States.\textsuperscript{65}

**Restriction on Remedies: All is Not Lost**

Assume that in the continuing example, Massachusetts prevails against Delaware, the DAPT state. Is all lost for Delaware? No, it is not. The overall process of obeying the judgment including time and manner, are within Delaware's control.\textsuperscript{66} In other words, "[E]nforcement measures do not travel with the sister state judgment as preclusive effects do" as the Supreme Court stated in \textit{Baker v. General Motors}.\textsuperscript{67} The rationale for this holding is that the Full Faith and Credit Clause reflects merely a rule of evidence that the Massachusetts judgment is a valid

\textsuperscript{63} See \textit{id.}
\textsuperscript{64} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} \textsection{} 103.
\textsuperscript{65} Scott on trusts. (emphasis added)
\textsuperscript{66} \textit{See} \textit{Baker v. General Motors Corp.}, 522 U.S. 222 (1998).
\textsuperscript{67} \textit{Id.} at 665.
one, worthy of recognition out-of-state. However, the manner of enforcement is preserved for Delaware.\textsuperscript{68} For example, the statute of limitations for enforcing a judgment out-of-state is critical. What if Massachusetts law states that the judgment is valid after ten years but in Delaware, the law states that the judgment expires after six? Here, Delaware will prevail as the statute of limitations is procedural, not substantive, and therefore falls out of the purview of Full Faith & Credit.\textsuperscript{69}

IV. A Suggested Approach for Massachusetts Settlors

*Attached to this paper is Exhibit A, which outlines how a DAPT should be set up in Delaware. For purposes of continuing the example used throughout this paper, a Massachusetts settlor needs to strictly follow the Delaware statute in setting up the trust, adhering to who can be trustee, explicitly stating his or her powers, and considering exceptions that fall outside the trust’s protection such as the enforcement child support or alimony obligations. As the research in this paper shows, a Massachusetts settlor who properly creates a DAPT requiring a Delaware-domiciled trustee, who has no minimum contacts in Massachusetts, or if a corporate trustee, has never purposely availed itself to Massachusetts in form of solicitation or otherwise, as shown in Hanson, and who places in trust either real property or movable assets originating in Delaware, in a transfer free of fraudulent intent and outside the scope of bankruptcy, has an arguable claim against a creditor. In this case just described, a court will likely find no jurisdiction over the trustee or trust and therefore, will decline to follow Massachusetts law in a conflict of law scenario. Neither can the creditor force Delaware to recognize a final judgment from a Massachusetts court under an argument that the Delaware statute violates public policy since absent fraudulent intent or bankruptcy, assets sitting in a trust alone, do not offend or interfere with Massachusetts policy objectives.

\textsuperscript{68} See id. at 241-42 (Scalia, J., concurring).
\textsuperscript{69} See Matanuska Val. Lines, Inc. v. Molitor, 365 F.2d 358, 359-60 (9th Cir. 1966). "It has long been established that the enforcement of a judgment of a sister state may be barred by application of the statute of limitations of the forum state." Id.
Delaware DAPT Requirements

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 spend-thrift clause.

Establishing Situs: Requirements; Recommendations for Contacts

(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.

Interests in Principal and Income That the Settlor May Retain

(1) current income;
(2) CRT;
(3) up to 5% interest in total return trust;
(4) GRAT or GRUT;
(5) QPRT;
(6) qualified annuity interest;
(7) ability to be reimbursed for income taxes attributable to trust; and
(8) the ability to have debts, expenses and taxes of the settlor's estate paid from the trust.

Trustees's Distribution Authority

(1) Discretion; or
(2) pursuant to a standard.

Powers that Settlor May Retain

(1) power to veto distributions;
(2) non-general testamentary power of appointment;
and
(3) power to replace trustee/advisor.

Who Must Serve as Trustee to Receive Protection from Statute

Resident individual or corporation whose activities are subject to supervision by Delaware Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift
Supervision.

**May Non-Qualified Trustee Serve?**

Yes, as co-trustee

**How are Fraudulent Transfers Treated**

Uniform Fraudulent Transfer Act applies and sets aside transfers with actual intent to hinder, delay or defraud, and transfers made with constructive fraudulent intent. However, future creditors may set aside transfer only if transfer made with intent to defraud

**Fraudulent Transfers: Burden of Proof and Statute of Limitations**

Clear and convincing evidence.

If creditors are existing creditors, 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.

Future creditors: Four years after transfer

**Exceptions for Protection**

Child support
Alimony, if ex-spouse was married to settlor before or on date of transfer of assets to trust
Property division upon divorce where the ex-spouse was married to settlor before or on the date of transfer. Otherwise, assets are protected.

Tort claims, if claims arise as a result of death, personal injury, or property damage occurring before or on the date of transfer.

**Does the Statute Prohibit any claim for forced heirship, legitime or elective share?**

Yes

**Does the Statute authorize a beneficiary to use or occupy real property or tangible personal property owned by trust, if in accordance with trustee's discretion?**

No, except for QPRT residences

**Is a Non-Settlor Beneficiary's interest protected from property division at divorce?**
Yes but may be considered in property division under certain circumstances

*Is the trustee given decanting authority to modify the trust?*

YES

Does the state assert income tax against DAPTs formed by non-resident settlers?

No, however does impose income tax upon trusts that accumulate income for Delaware residents

**Procedures and Timing of Accounting and Discharge from Liability**

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 res judicata effect in Delaware except as to matters actually contested in the accounting proceeding.)

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