CHAPTER 1

Alaska: The *First* Frontier of DAPTs

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Alaska is at the forefront of domestic asset protection trust (DAPT) law. The Alaska Trust Act, adopted in 1997, was the first legislation in the country providing for robust domestic asset protection. In the 23 years since, domestic asset protection trust laws have been adopted in 19 U.S. jurisdictions.[1] Because of the proliferation of DAPT statutes, DAPTs are no longer novel planning. Indeed, they have become commonplace. Part I of this chapter recounts the factors that motivated the adoption of the Alaska DAPT statute and provides insight into how DAPTs have affected the Alaska business community over the more than 20 years since the statute was passed. Part II of this chapter explores the key provisions of the Alaska DAPT statutes, summarizes the improvements that have been made since original enactment, and examines how courts have treated Alaska DAPTs.

I. Alaska DAPT Legislation: Background, History, and Reaction

As previously noted, prior to 1997, there was no viable domestic option for asset protection in the United States. The originator of the modern approach was Jonathan Blattmachr, the principal drafter of the Alaska Trust Act and champion, along with his brother, Douglas, of its enactment. Jonathan has continued to spearhead updates to the Alaska DAPT statutes and related legislation. The first section of this chapter is based primarily on Jonathan's recollections and insights.

A. Background

It is common knowledge among estate planners that the most effective ways to reduce transfer tax exposure virtually all involve lifetime transfers.[2] Despite the clear tax

1. Two other states, Missouri (Mo. Rev. Stat. § 456.5-505) and Colorado (Colo. Rev. Stat. § 38-10-111), did have statutes that provided for asset protection trusts. However, the statutes were of limited breadth and effect.

2. This is attributable to several factors, such as: (1) appreciation and income occurring after the transfer generally escapes estate taxation; (2) gift tax paid (unlike estate tax) is generally not subject to wealth transfer tax; (3) under Rev. Rul. 93-12, 1993-1 C.B. 202, separate transfers during life to different transferees may be valued separately; and (4) there are techniques to reduce or avoid gift tax liability that cannot be used in the estate tax context, such as GRATs (grantor retained annuity trusts), QPRTs (qualified personal residence trusts), and sales to intentionally defective grantor trusts.

benefits associated with lifetime planning, advisors regularly find clients reluctant to engage in such planning.

Such reticence often stems from one of several reasons, including (1) the client's aversion to the complexity that accompanies sophisticated estate planning, (2) the client's concern about giving up the benefits of owning the property to be transferred, and (3) the client's concern that property transferred during life will not receive a basis adjustment at death.[3]

DAPTs help address the second concern: giving up the benefits of owning the property. Prior to Alaska's modern legislation, it was generally understood that any asset transferred during life to a so-called "self-settled" trust[4] would be included in the gross estate of the settlor, even if the settlor did not expressly retain an interest in the property (e.g., a right to income) or a degree of control that itself would cause the property to be included in his or her gross estate. Inclusion occurred because, throughout the United States, property transferred to a self-settled trust would permanently be subject to the claims of the settlor's creditors—even if there was no motive to hinder, delay, or defraud any of them.[5]

B. Motivation for the Alaska Trust Act

Alaska's DAPT legislation was the first robust DAPT legislation. Its adoption was mainly motivated by two complementary factors: (1) the proliferation of offshore trusts that occurred in the 1990s and (2) a desire to allow estate planning clients to engage in tax-advantageous lifetime planning without having to lose complete access to the trust assets. Alaska DAPTs were proposed as a way to provide a domestic alternative to offshore asset-protection trusts and to encourage lifetime estate planning among clients who could benefit from transfer tax planning but might be unwilling to engage in such planning without possible access to the property transferred in the future, if necessary or desirable.

In 1996, a group of attorneys interested in having such a law passed in the United States met with members of the Alaska legislature and the lieutenant governor of Alaska, as well as personnel of various agencies in the state.

The Alaska legislature believed that the legislation would result in more trusts being created in Alaska, which would burnish the reputation of the state as financially sophisticated. This, the thinking went, would encourage more funds to be deposited in the state, which could be used to provide financing for Alaska residents and businesses. Although the proposed legislation passed the legislature unanimously in 1996, Alaska Governor Tony Knowles vetoed the bill. Apparently, he was

3. Under 26 U.S.C. § 1015, the basis of property received by gift is generally (subject to certain exceptions) the same in the hands of the gift recipient as it was in the hands of the donor. However, some commentators have argued that the basis of property gifted to a trust that is a grantor trust with respect to the settlor should still receive a basis adjustment at death. *See* Jonathan Blattmachr, Mitchell M. Gans & Hugh H. Jacobson, *Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor's Death*, 97 J. Tax'n 149, 153–56 (2002). A lifetime transfer of an asset whose basis is higher than its current value may be beneficial. I.R.C. § 1015.

4. In other words, a trust of which the settlor is a beneficiary or one that the individual created (or as the English say, settled) for himself or herself.

5. *See, e.g.*, N.Y. Est. Powers & Trusts Law § 7-3.1(a) ("A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator."). However, this result was different for a trust created by someone who was not a beneficiary of the trust. *See In re* Remington, 14 B.R. 496 (Bankr. D.N.J. 1980).

misinformed about the impact of the proposed legislation. The legislation was reintroduced as HB 101 at the beginning of the 1997 legislative session, again passed unanimously, and was signed into law by Governor Knowles on April 1, 1997, as the Alaska Trust Act.

The Alaska law was not introduced to assist individuals wishing to defraud creditors. Indeed, a transfer to an Alaska self-settled trust is void if defrauding known creditors is a motivation for creating the trust. The four-year statute of limitations to challenge a transfer as fraudulent (see section II.E later in this chapter) is testament to a policy that carefully weighs the rights of creditors. The legislation was enacted, and subsequently amended from time to time, to permit Alaskans and other Americans to engage in basic and sophisticated estate tax planning without having to give up all benefits of their property.

C. Disputes and Issues Prior to Passage of Legislation

One issue raised was whether it was appropriate to permit individuals to protect their assets from future creditors. It was noted that many such assets were already so protected under then existing law. For example, although the Bankruptcy Code is a federal law, it provides that individuals may choose to exempt property in bankruptcy using the exemptions under state or federal law. Many states have exemptions that are not available under the U.S. Bankruptcy Code. For example, some states (such as Florida and Texas) allow virtually limitless exemptions for homes regardless of their value. Also, under federal law, qualified retirement plans and individual retirement accounts (IRAs) are generally protected from creditors. It was noted that, unless it constitutes a fraudulent transfer, any gratuitous transfer of assets exempts them if transferred to another person, including the transferor's spouse. Hence, a decision was made that property transferred to a trust of which the transferor was a discretionary beneficiary (that is, one not entitled to trust property but only eligible to receive it in the discretion of an independent trustee) should be allowed to be exempt from the transferor's creditors provided there was no intent to defraud a known creditor.

Concerns were also expressed by the Alaska Child Support Services agency about parents attempting to use an Alaska self-settled trust to avoid paying child support. This concern led to the inclusion of a provision in AS 34.40.110 that the protection from creditor claims would not apply if the settlor were more than 30 days delinquent in child-support payments at the time of transfer to the trust.

D. Feedback from the Estate Planning Bar (Then and Now)

Approximately one month after the Alaska Trust Act was signed into law, Delaware enacted somewhat similar legislation. Initially, many estate planning lawyers expressed concern as to whether DAPT legislation would accomplish its purpose of gross estate exclusion. However, the drafters of the Alaska legislation were confident that it would. This was based in part on developed case law and revenue rulings (which the IRS is bound to follow). This conclusion was reinforced by the issuance of Rev. Rul. 2004-64. And ultimately, in Priv. Ltr. Rul. 200944002, the IRS expressly agreed that unless an Alaska self-settled trust was created to defraud creditors, it would not be included in the transferor's gross estate if the settlor did not retain any interest or control that would otherwise cause estate tax inclusion such as under Internal Revenue Code (IRC)

§ 2036. Although under 26 U.S.C. § 6110(k)(3) a private letter ruling may not be cited or used as precedent, it appears to have been correctly decided.[6]

Although, as indicated, members of the estate planning bar expressed doubt about the efficacy of the Alaska legislation (and that of Delaware), those doubts apparently have largely dissipated. Now 19 states have passed DAPT legislation. Moreover, many states have attempted to make the legislation even more effective by shortening the statute of limitations for bringing a claim that the property transmitted to the trust was a fraudulent transfer. However, Alaska has not shortened the limitations period. Indeed, as mentioned earlier, the purpose of the Alaska legislation was not to assist property owners to "bilk" creditors but merely to allow individuals to engage in more efficient estate planning.

However, DAPTs are now used frequently to protect assets from the claims of the owner's creditors, provided the settlor is not attempting to hinder, delay, and defraud creditors, and not just for estate tax planning reasons. Indeed, all states that have adopted legislation similar to Alaska's permit asset protection, even if the transfers to the trust are not complete for federal gift tax purposes and, therefore, will be included in the transferor's gross estate at death.

Inherent in DAPTs is a tension between, on the one hand, providing the settlor enough benefit from (and access to) DAPT assets that the settlor is willing to transfer to the trust, and, on the other hand, ensuring that such access or benefits are restricted enough to provide robust protection from creditors. But greater access may mean that the trust will not provide significant protection from creditors. More access means more risk.[7] In addition to supporting efforts to continue to improve DAPT statutes, members of the estate planning bar have begun to develop alternative (non-DAPT) ways to protect assets in a trust from which the settlor may benefit.[8]

E. Benefits of DAPT Legislation to the State of Alaska

It is not always easy to determine if an industry in a state actually benefits that state. The State of Alaska derives most of its tax revenue from an oil severance tax and there has been no state income tax on individuals for many years. However, the legislation has increased profitability of Alaska's banks and trust companies, which do pay state income taxes. Certainly, estate planning professionals, such as lawyers and accountants, have experienced a significant increase in business from the adoption of the Alaska Trust Act. Furthermore, the legislation has helped the state shed its reputation as a financial backwater. The self-settled trust legislation and similar laws have made Alaska a prominent jurisdiction for estate and tax planning. It has resulted in a significant increase in cash held in Alaska banks and similar institutions, which has provided liquidity to individuals and businesses located in the state.

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6. For discussions on this ruling, see Gideon Rothschild, Douglas J. Blattmachr, Mitchell M. Gans & Jonathan G. Blattmachr, *IRS Rules Self-Settled Alaska Trust Will Not Be in Grantor's Estate*, 37 Est. Plan. 3 (2010), and David G. Shaftel, *IRS Letter Ruling Approves Estate Tax Planning Using Domestic Asset Protection Trusts*, 112 J. Tax'n 213 (2010).

7. *See, e.g.*, discussion in Jonathan D. Blattmachr, Matthew D. Blattmachr & Jonathan G. Blattmachr, *Avoiding the Adverse Effects of* Huber, 157 Tr. & Ests. 20 (2013).

8. *See, e.g.*, Abigail E. O'Connor, Mitchell Gans & Jonathan Blattmachr, *SPATs: A Flexible Asset Protection Alternative to DAPTs*, 46 Est. Plan. 3 (2019) (noting that a trust, over which a nonfiduciary holds a power to appoint trust assets to the settlor, is not self-settled). *Cf.* Alexander A. Bove, Jr., *Using the Power of Appointment to Protect Assets—More Power Than You Ever Imagined*, 36 ACTEC L.J. 333 (2010–2011) (suggesting the settlor give a third party the power to appoint the trust assets to a new trust for the donor's spouse).

An article by two law professors has concluded that legislation similar to AS 34.40.110 has been an important factor in increasing trust business where such laws—together with other related laws, such as extending the period that property may remain in trust—have been enacted.[9]

F. Corporate Trustee Reaction

Corporate trustees have become more sensitive to the estate planning and tax aspects of self-settled trust legislation, including more specifically the benefits of long-term trusts in general. They also appreciate that there is significant competition from other states, and those in Alaska have tried to keep the state at the forefront of providing the most efficient legislation. Corporate trustees make distributions to the settlor when appropriate and consistent with the terms of the trust and the law. The trustees are aware that making distributions in a manner that would suggest they are merely agents of the settlor will be detrimental to maintaining the integrity of the trust and may forfeit its asset-protection and tax-protection features.

G. Infrastructure Supporting DAPT Legislation

A group of professionals in the state—including representatives of the estate bar, accounting, banking, trust, and charitable entities—have formed an organization to review all proposals to change Alaska laws that may affect estate planning. Moreover, the courts have become more involved with trust matters, as there are now more significant trusts in the state.

II. Alaska DAPT Statutory Framework and Case Law

This section begins by describing the most important aspects of the Alaska DAPT statutory framework as well as related Alaska law. Next, there is a brief description of the significant updates to the DAPT statutes that have been made since 1997 as well as an examination of Alaska DAPT case law. Finally, the chapter closes with a discussion of some drafting and implementation considerations.

A. Application of Alaska Law

As a threshold matter, taking advantage of Alaska's DAPT statutes requires that Alaska law apply.[10] Generally, a choice-of-law clause is necessary for this purpose, but it is not sufficient. Under AS 13.36.035(c)(1), a choice-of-law clause will be respected if (1) some of the trust assets are held in Alaska by a trustee who is a "qualified person" (see the following paragraph), (2) the qualified person trustee has certain required powers, and (3) part or all of the administration occurs within the state of Alaska.[11]

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9. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356 (2005).

10. AS 13.36.035(d) provides that a choice-of-law clause will govern the validity, construction, and administration of a trust, including (1) the capacity of the settlor, (2) the powers, obligations, liabilities, and rights of trustees, and (3) the existence and extent of powers and rights of trustees and beneficiaries.

11. Alaska Stat. § 13.36.035(c)(4). This includes physically maintaining trust records within the state of Alaska. *Id.*

A qualified person is a bank or trust company with a principal place of business in Alaska or an individual who is a resident of Alaska.[12] That Alaska-qualified trustee must have the power to "maintain records for the trust on an exclusive or nonexclusive basis" and the power to prepare or arrange for the "preparation of, on an exclusive or nonexclusive basis" income tax returns that must be filed by the trust.[13]

In 2014, section (f) was added to AS 13.36.035 in order to facilitate the changing of situs of trusts created in other jurisdictions to Alaska.

B. Key Provisions of the Alaska DAPT Statutes

Under AS 34.40.110(a), a settlor can remain a beneficiary of an irrevocable trust—and a spendthrift restriction in the trust with respect to trust beneficiaries (settlor included) will be respected—as long as certain conditions are met. A beneficiary must be a discretionary beneficiary for the asset protection to apply, but such discretion may be governed by an ascertainable standard. A beneficiary may use or occupy trust property (such as a home) without violating the spendthrift clause (and thereby subjecting trust assets to the purview of creditors).[14] Additionally, a settlor can retain an ability to be reimbursed for income taxes generated by assets held by the trust,[15] and such provision may be discretionary or mandatory.[16]

The extent of the settlor's beneficial interest in the trust is flexible. However, such beneficial interest must be explicitly detailed in the trust instrument. Under AS 34.40.110(i), a settlor "may not benefit from, direct a distribution of, or use trust property except as may be stated in the trust instrument." Any agreement (express or implied) not set forth in the trust instrument between the independent trustee and the settlor-beneficiary is void.[17]

As long as the trust instrument so provides, a settlor may enjoy asset protection even though the settlor has the authority to appoint, remove, and replace a trustee, trust protector, or trust advisor.[18] Indeed, the settlor may retain the right to serve as a cotrustee or advisor to the trust.[19] The settlor may also retain certain tax-qualified interests (see

12. AS 13.36.390(3) provides that a qualified person is:

    (A) an individual who, except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause shown, resides in this state, whose true and permanent home is in this state, who does not have a present intention of moving from this state, and who has the intention of returning to this state when away;

    (B) a trust company that is organized under AS 06.26 and that has its principal place of business in this state; or

    (C) a bank that is organized under AS 06.05, or a national banking association that is organized under 12 U.S.C. § 216d, if the bank or national banking association possesses and exercises trust powers and has its principal place of business in this state.

13. Alaska Stat. § 13.36.035(c)(3).

14. Alaska Stat. § 34.40.110(a). Such a spendthrift restriction is "considered to be a restriction on the transfer of the transferor's beneficial interest in the trust . . . that is enforceable under applicable nonbankruptcy law within the meaning of [the Bankruptcy Code] . . . ." *Id.*

15. Alaska Stat. § 34.40.110(m)(2).

16. *Id.* Of course, if the trust *requires* reimbursement for income tax liability, the trust corpus will be included in the gross estate of the transferor under IRC § 2036(a)(1). *See* Rev. Rul. 2004-64. However, such a reimbursement clause will not jeopardize the asset protection provided by AS 34.40.110.

17. Alaska Stat. § 34.40.110(i).

18. Alaska Stat. § 34.40.110(h).

19. Alaska Stat. § 34.40.110(f). In addition to a settlor's ability to act as a DAPT cotrustee or advisor, a nonsettlor beneficiary may act as a sole trustee, cotrustee, or advisor. Alaska Stat. § 34.40.110(g).

section G later in this part). Also, the settlor may retain a right to veto a proposed distribution from the trust or retain a limited (nongeneral) power of appointment over trust assets; however, if a settlor retains either of these, then the settlor will not have made a completed gift to the trust, meaning that the trust assets will be included in his or her gross estate.

With proper implementation, a settlor may form a trust, remain a discretionary beneficiary of the trust, and act as a cotrustee or advisor, all while insulating trust assets from the claims of creditors of the settlor and those of the other trust beneficiaries.

C. Extent of Asset Protection

Alaska Statute 34.40.113, which was added to the Alaska DAPT provisions in 2013, clarifies the scope of the protection conferred by AS 34.40.110(a). Specifically, AS 34.40.113 provides that:

1. A discretionary interest in an irrevocable trust is not a property interest or an enforceable right. Instead, the statute provides that such a discretionary interest is "an expectancy that a creditor of a beneficiary may not attach or otherwise reach."[20]
2. A creditor cannot force a trustee to distribute trust assets to a discretionary beneficiary.[21]
3. A trustee is not liable to a creditor for applying trust assets for the benefit of a discretionary beneficiary—even if the beneficiary has an outstanding creditor at the time of the application.[22]
4. A creditor cannot maintain a court action that would interfere with a trustee's discretion to apply trust assets for the benefit of a discretionary beneficiary.[23]
5. A creditor may not obtain any relief that would prevent a trustee from making a discretionary payment to a third party on behalf of a discretionary beneficiary.[24]

D. Exception Creditors

The only exception creditor (that is, someone who may attach the trust assets) in Alaska is related to child support. If, upon formation of the trust, the settlor is in default by 30 or more days of making a required child-support payment, the asset protection provided by AS 34.40.110(a) would not apply.[25]

E. Cause of Action for Fraudulent Transfer

Under AS 34.40.110(b)(1), a creditor may bring a cause of action to have a claim satisfied using trust assets if the creditor can show, by clear and convincing evidence, that the transfer was made with an intent to defraud the creditor. If the creditor is a creditor of the settlor at the time of the transfer into trust, then an action under a fraudulent

20. Alaska Stat. § 34.40.113(b).
21. Alaska Stat. § 34.40.113(c).
22. Alaska Stat. § 34.40.113(d).
23. Alaska Stat. § 34.40.113(e).
24. Alaska Stat. § 34.40.113(f).
25. Alaska Stat. § 34.40.110(b)(4).

transfer theory must generally be brought within four years of the transfer to the trust.[26] However, in certain circumstances, a creditor who was a creditor at the time of the transfer into trust may have the statute of limitations period extended, to within one year of the time the transfer was discovered (or reasonably should have been discovered) by the creditor.[27]

F. Protection for Trustees, Attorneys, Etc.

Alaska DAPT statutes prevent a creditor from asserting a cause of action or claim for relief against a trustee—or any advisor involved in the preparation or funding of the trust—for conspiracy to commit a fraudulent conveyance, aiding and abetting a fraudulent conveyance, or participating in the trust transaction.[28] And as long as a trustee is not acting in bad faith, if a transfer to a trust is set aside or voided, the trustee has a lien against trust property sufficient to pay for the trustee's defense.[29]

G. Types of Alaska DAPTs

Alaska self-settled trusts must be irrevocable.[30] And, as a general rule, the settlor cannot retain a right to receive income or principal from the trust.[31] However, there are some very important exceptions. For instance, charitable remainder trusts,[32] grantor retained annuity trusts,[33] qualified personal residence trusts,[34] and total return unitrusts[35] can still enjoy the asset protection conferred by AS 34.40.110(a).

H. Solvency Affidavit Requirement

Before transferring assets to an Alaska DAPT, a settlor must sign an affidavit (a sworn statement) stating, among other things, that the settlor has title to the assets being transferred, that the transfer will not cause the settlor to become insolvent, that the settlor has no intent to defraud a creditor by transferring assets to the trust, and that the settlor is not in default of any child-support obligations by more than 30 days. In addition, the settlor must, in an attachment attached to the affidavit, identify pending or threatened court cases or administrative proceedings in which the settlor is or may be found to be liable.[36] This became part of the Alaska DAPT legislation to try to reduce the risk of someone attempting to use the statute to defraud creditors.

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26. Alaska Stat. § 34.40.110(d)(1).
27. Alaska Stat. § 34.40.110(d)(2).
28. Alaska Stat. § 34.40.110(e).
29. Alaska Stat. § 13.36.310.
30. Alaska Stat. § 34.40.110(b)(2).
31. Alaska Stat. § 34.40.110(b)(3).
32. Alaska Stat. § 34.40.110(b)(3)(A). A charitable remainder trust is described in IRC § 664.
33. Alaska Stat. § 34.40.110(b)(3)(D). A grantor retained annuity trust (GRAT) is described in Treasury Regulation 25.2702-3.
34. Alaska Stat. § 34.40.110(b)(3)(C). A personal residence trust is described in Treasury Regulation 25.2702-5.
35. Alaska Stat. § 34.40.110(b)(3)(B).
36. Alaska Stat. § 34.40.110(j).

I. Marriage and Divorce Considerations

Alaska statutes do not give a former spouse the right to make a claim against the trust for alimony. Assets that are transferred to an Alaska DAPT more than 30 days before the marriage are (1) not subject to property division at divorce,[37] and (2) not considered an asset of the beneficiary in equitable division.[38] In addition, at death, DAPT assets transferred to the DAPT more than 30 days prior to marriage are excluded from the augmented estate when calculating the surviving spouse's elective share. During life, spouses can agree in writing that assets transferred to a DAPT are not subject to equitable division upon divorce[39] or will be excluded from the augmented estate.[40]

J. Income Tax Considerations

Alaska does not have a state income tax on individuals or trusts. Therefore, no Alaska-sitused trust will generate Alaska income tax under current Alaska law. For federal income tax purposes, a self-settled trust almost always will be a grantor trust under the Internal Revenue Code (see, for example, IRC § 677), for as long as the settlor is a discretionary beneficiary. Therefore, all items of income would flow through to the grantor to be taxed by the settlor's state of residence to the same extent that the settlor would have been taxed had the trust not been created.

K. Complementary Statutory Provisions

There are certain aspects of Alaska law that are not exclusive to DAPTs but are attractive to would-be DAPT settlors and complementary to Alaska DAPT formation and administration. For example: Alaska's noncontestability clause provision (AS 13.36.330) is very robust and allows enforcement of clauses even when probable cause exists for contest; an independent trustee has substantial decanting authority (that is, to pay trust assets over to another trust) under AS 13.36.157, AS 13.36.158, and AS 13.36.159; Alaska trusts can last for up to 1,000 years;[41] a charging order is a judgment creditor's exclusive remedy against a general or limited partner of a limited partnership or a member of an LLC.[42]

L. Changes since Inception

The Alaska legislature has supported Alaska DAPT statutes by making regular improvements to their provisions. Amendments were made in 1998, 2000, 2001, 2003, 2004, 2006, 2009, 2010, 2013, and 2014. A number of key provisions have been added to the Act since its inception. A few highlights include:

1. In 2003, the solvency affidavit requirement (AS 34.40.110(j)) was added.
2. In 2008, an important addition was made to AS 34.40.110(b)(1), which clarified that "a settlor's expressed intention to protect assets from a beneficiary's potential future creditors is not evidence of an intent to defraud."

37. Alaska Stat. § 34.40.110(*l*).
38. *Id.*
39. *Id.*
40. Alaska Stat. § 13.12.205(b).
41. Alaska Stat. § 34.37.051.
42. *See* Alaska Stat. § 32.11.340 (for limited partnerships) and § 10.50.380 (for LLCs).

3. In 2010, the "clear and convincing evidence" standard was added to the fraudulent transfer provision (AS 34.40.110(b)(1)).
4. In 2013, the clarifications of the scope of the creditor protection afforded by statute (AS 34.40.113) were added. (See preceding section C.)
5. In 2014, provisions were added to facilitate the transfer of trusts to Alaska situs (AS 13.36.035(f), (g), and (h)).

M. Case Law

Case law interpreting Alaska DAPT statutes is quite limited. There have been two cases decided directly in bankruptcy (*Battley v. Mortensen*[43] decided in 2011 and *Waldron v. Huber*[44] decided in 2013). In addition, there was one case, *Toni I Trust v. Wacker*,[45] decided in 2018 by the Alaska Supreme Court.

The bankruptcy cases are both consistent with the adage that bad facts make bad law. In *Mortensen*, the debtor (Mortensen) transferred real property to a trust that he had created on his own using a published template he had found.[46] The trust instrument contained an express provision that a purpose of the trust was to protect assets from creditors. Mortensen completed an affidavit as required by AS 34.40.110(j), and then deeded real property and cash worth $140,000 to the trust.[47] At the time of the transfer to the trust, Mortensen was heavily indebted and was earning limited income. The bankruptcy court found that the transfer to the trust could only have been made with an intent to defraud existing creditors.[48] While Mortensen's financial situation itself provided ample evidence to support a finding of fraudulent intent, the bankruptcy court found additionally that "a settlor's expressed intention to protect assets placed into a self-settled trust from a beneficiary's potential future creditors can be evidence of an intent to defraud." This directly contradicts AS 34.40.110(b)(1), which provides that a statement of intent to protect assets from creditors is not evidence of intent to defraud.

In *Huber*, an Alaska DAPT was established to which the settlor (Huber) transferred ownership of interests in a number of real estate development projects. At the time of the transfer, there was threatened litigation against Huber. Except for a small cash account located in Alaska, the underlying property for all of the development projects was located outside of Alaska. The trust made regular monthly distributions to the settlor in the amount of $14,500—these monthly distributions continued even after Huber filed for Chapter 11 bankruptcy protection. There was ample written evidence (e-mails, documents, and pleadings) to suggest there could have been a finding that Huber was intending to defraud the creditors by setting up the trust. Much like in *Mortensen*, the *Huber* DAPT should not have enjoyed asset protection under Alaska's DAPT law because the facts were themselves consistent with a fraudulent transfer. But the bankruptcy court in *Huber* went further and challenged the application of Alaska law, finding insufficient contacts with the state of Alaska.

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43. Battley v. Mortensen (*In re* Mortensen), 2011 Bankr. LEXIS 5560 (Bankr. D. Alaska, May 26, 2011).
44. Waldron v. Huber (*In re* Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013).
45. Toni I Trust v. Wacker, 413 P.3d 1199 (Alaska 2018).
46. *Mortensen*, 2011 Bankr. LEXIS 5560, at *5.
47. *Id.* at *8. In fact, the case probably should have been decided otherwise because, in substance, the settlor's mother should have been considered the settlor as she provided assets to the named settlor to create the trust. However, this point apparently was not argued before the court.
48. *Id.* at *20.

In *Toni I Trust v. Wacker*,[49] an action was filed in Alaska state court for a declaratory judgment that Alaska courts have exclusive jurisdiction over fraudulent transfers under AS 34.40.110. The Alaska Supreme Court determined that the Alaska statute's claim of exclusive jurisdiction could not be so broad as to deny parties access to federal courts, unless federal law permitted such exclusive jurisdiction. The court found that any other result would conflict with the Supremacy Clause of the Constitution.

N. Drafting Considerations

1. Retained Rights and Flexibility

As previously noted, AS 34.40.110(i) requires that a settlor-beneficiary's rights and privileges must spring from the trust instrument. For this reason, it is advisable that the trust instrument clearly define the scope of the settlor's retained interests. But, of course, no matter how carefully considered and drafted such settlor's retained interest is, changes in a settlor's circumstances or changes in the law may make it advantageous to change a settlor's powers, rights, or benefits after the trust is originally signed. In order to maximize flexibility, the trust instrument may grant powers to an independent trustee or to a trust protector to enhance, restrict, or terminate a settlor's retained interest in the trust.

2. Trustee Choice and Provisions

It is difficult to overstate the importance of trustee choice and trustee role. If the independent trustee (that is, one who is not a beneficiary) is not sufficiently independent from the settlor, an "implied agreement" argument may jeopardize the asset protection of the trust. The trustee's state of residence may subject trust assets to income tax in the trustee's home state. If a settlor is a cotrustee, it is important that tax-sensitive duties are exclusively in the hands of the independent trustee. But outside of such tax-sensitive duties, it is possible to give a settlor-trustee broad management and investment authority without causing estate inclusion or exposure to creditors.

O. Other Considerations

1. Incontestability

Alaska statutes allow for very strong incontestability provisions, but blanket incontestability clauses can be problematic. For instance, consider whether a clause is drafted so broadly that seeking court assistance for interpreting an instrument could trigger that clause.

2. Situs Portability

Consider adding provisions specifically authorizing a trustee to change trust situs.

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49. *Toni I Trust*, 413 P.3d 1199. See discussion in Jonathan Blattmachr, Matthew Blattmachr, Martin Shenkman & Alan Gassman, *Toni 1 Trust v. Wacker: Reports of the Death of DAPTs for Non-DAPT Residents Is Exaggerated*, Steve Leimberg's Asset Protection Planning (Leimberg Information Services, Inc.), March 19, 2018.

III. Conclusion

The passage of the Alaska Trust Act in 1997 began a new era in U.S. estate planning. Since then, many states have followed suit and domestic asset protection trusts have become an increasingly important tool for estate planners. The Alaska legislature continues to refine Alaska DAPT provisions incrementally, in response to the active participation of the estate planning bar in Alaska. In addition to DAPT legislation, other aspects of Alaska law make the state an especially attractive jurisdiction for sophisticated and flexible estate planning.