

Asset Protection Trusts (APTs)

South Dakota adopted asset protection laws in 2005, which are set-out in a separate statutory provision, *Qualified Dispositions in Trust*,¹ and are amongst the strongest in the US.

Asset Protection Requirements

In order to fall within the Asset Protection Trust (APT) statute, the trust must have a qualifying South Dakota trustee,² the trust must have a South Dakota governing law clause,³ the trust must be irrevocable,⁴ and, the trust must have a spendthrift⁵ clause

South Dakota Trustee

Under the APT statute, the trustee must be a Qualified Person, such as an individual resident in South Dakota or a trust company licensed under South Dakota or Federal law with its principal place of business in South Dakota.⁶ The settlor may not be a trustee.⁷

South Dakota Governing Law

The trust instrument must incorporate the laws of South Dakota to govern the validity, construction, and administration of the trust. In order for the governing law clause to be valid, some or all the trust assets must be deposited in South Dakota or physical evidence of such assets must be held in South Dakota, the trustee must be a Qualified Person, and the administration of the trust must occur wholly or partly in South Dakota, including keeping trust records and preparing tax returns.⁸

Trust Instrument Irrevocability

Under the APT statute, the trust instrument must be irrevocable, and will not be deemed revocable because of certain specifically enumerated retained interests or powers.⁹ Under the APT statute, the settlor may retain the following interests: beneficial interests in current and retained trust income, up to 5% interest annually; and income from GRATs, GRUTs, QPRTs, and CRTs; and may receive principal distributions at the discretion of the trustee or pursuant to an ascertainable standard. In addition, the settlor may hold the following powers: powers to veto distributions; limited powers of appointment; testamentary powers of appointment; powers to remove and appoint trustees, protectors or trust advisors, excluding the power to appoint a trustee that is a related or subordinate person. The settlor may also serve as a non-controlling member of a distribution committee, and the settlor may serve as investment advisor.

ATP Spendthrift Clause

The APT statute requires an express spendthrift¹⁰ provision prohibiting the settlor or beneficiary from alienating interests in the trust, voluntarily or involuntarily.

¹ Qualified Dispositions in Trust, Title 55 Chapter 16, South Dakota Codified Laws (SDCL)

²Id., 55-16-2, see also 55-16-3 and 55-16-4

³ Id., 55-16-2(1)

⁴ Id., 55-16-2(2)

⁵ Id., 55-16-2(3)

⁶ Id., Chapter 55-3-41 SDCL

⁷ Id., Chapter 55-16-3 SDCL

⁸ Id., Chapter 55-3-39 SDCL

⁹ Id., Chapter 55-16-2(2) SDCL

¹⁰ Id., 55-16-2(3)

Creditor Claims - Fraudulent Transfer

A creditor may only attach trust property or set-aside the funding of the trust if the transfer was made with the intent to defraud that specific creditor,¹¹ which must be proven by “clear and convincing” evidence.¹²

For pre-existing creditors, the claim must be brought within the later of 2 years after the transfer or 6 months after the transfer is or reasonably could have been discovered.¹³ A person is deemed to have discovered the transfer at the time a Bill of Sale is filed.¹⁴ In the case of a transferor that is non-resident in South Dakota, the Bill of Sale must be filed in the county where the trustee maintains a principal place of business.¹⁵ For creditors whose claims arise after the transfer into trust, the claim must be brought within 2 years after the transfer.¹⁶

Exception Creditors

Certain classes of creditors, known as “exception creditors” with pre-existing claims prior to the date of transfer (child support, alimony, division of marital property, etc.), may reach assets held in trusts created under the APT statute.¹⁷

Avoidance of Qualified Disposition

Where a claim against a Qualified Disposition is successful, the disposition may be avoided only to the extent of the debt.¹⁸

Public Policy

The asset protection statute contains a public policy statement that states that the substantive provisions of the asset protection statute, SDCL 55-16-9 to 55-16-13, are so inseparably interwoven with substantive rights that a deprivation of legal rights would result if another jurisdiction’s laws to the contrary are applied.¹⁹

Foreign Judgements

South Dakota courts have exclusive jurisdiction over actions brought against dispositions to trusts governed under the asset protection statute, Qualified Dispositions in Trust.²⁰ Foreign *forced heirship* claims and claims for *legitime* under foreign law may not be asserted against a South Dakota APT.²¹ Foreign judgements are not enforceable in South Dakota where they conflict with South Dakota public policy.

¹¹ Id., 55-16-9

¹² Id., 55-16-10(3)

¹³ Id., Chapter 55-16-10(1) (SDCL)

¹⁴ Id., 55-16-10(4)

¹⁵ Id., 55-16-10(5)(b)

¹⁶ Id., Chapter 55-16-10(2) (SDCL)

¹⁷ Id., Chapter 55-16-15(1) (SDCL)

¹⁸ Id., Chapter 55-16-16 (SDCL)

¹⁹ Id., 55-16-10

²⁰ Id., 55-16-13

²¹ Id., 55-16-15(5)