ARTICLES

Structuring CRTs as Delaware APTs to Provide Protection from Creditors and Surviving Spouses

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INTRODUCTION

Some attorneys are surprised to learn that a trustor's interest in a charitable remainder trust (CRT), in which the trustor retains the right to receive distributions, is reachable by the trustor's creditors because the CRT is self-settled. Indeed, in two recent cases,[1] bankruptcy trustees were able to include debtors' retained interests in CRTs in their bankruptcy estates, even though the CRTs contained spendthrift clauses. In addition, early in 2005, the IRS announced in Rev. Proc. 2005-24[2] that a CRT will not qualify for tax-favored status in certain circumstances unless the trustor's spouse waives the right to reach its assets if he or she elects against the will.

This article explores how a trustor, Delaware resident or nonresident, may protect the assets of a CRT from the claims of his or her creditors and from the application of Rev. Proc. 2005-24 by meeting the requirements of Delaware's asset protection trust statute (Delaware Act).[3] Such a CRT is referred to herein as a Delaware CRT. As will be discussed, no other domestic asset protection trust (DAPT) statute currently offers both planning options.

THE BAD NEWS

Rule Against Self-Settled Trusts

All U.S. jurisdictions traditionally declined to extend the protection of their spendthrift trust laws to trusts in which the trustor had retained an interest, at

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[1] *Menotte v. Brown (In re Brown)*, 303 F.3d 1261 (11th Cir. 2002); *Lindquist v. Mack (In re Mack)*, 269 B.R. 392 (Bankr. D. Minn. 2001).

[2] 2005-16 I.R.B. 909. In Notice 2006-15, 2006-8 I.R.B. 501, the IRS stated that it will not enforce the waiver requirement of Rev. Proc. 2005-24 until it issues further guidance on this issue.

[3] Del. Code Ann. tit. 12, §§3570–3576.

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least to the extent of that interest. The traditional rule is set forth in §58(2) of the Third Restatement of Trusts as follows, "(2) A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid." [4]

The above rule applies even if creation of the trust was not a fraudulent transfer.[5] The rule has been adopted in §505(a)(2) of the model Uniform Trust Code (UTC)[6] and appeared in §156(1) of the Second Restatement of Trusts.[7]

Some state statutes provide that a transfer in trust for the use of the trustor is void against claims of existing or subsequent creditors.[8] In those states, creditors might be able to reach all of the assets of a self-settled trust, regardless of the interest or interests retained by the trustor. If the pertinent statute provides that creditors may only reach the trustor's interest, however, only that interest is vulnerable.[9]

If a trustor retains a right to distributions from a CRT, the trust is self-settled and his or her interest potentially is subject to claims by his or her creditors. Ironically, some attorneys agonize over whether to include a spendthrift clause in a CRT.[10] They mistakenly think that they must make a choice between including a spendthrift clause (in which case they believe that the trustor's interest will be protected from creditors but the trustor will not be able to transfer a retained interest to charity) or not including a spendthrift clause (in which case they believe that the trustor may transfer a retained interest to charity [11] but that such interest will be reachable by creditors). In fact, although the state law involved in a particular case must be analyzed, the trustor of a self-settled CRT should be able to transfer a retained interest to charity and his or her creditors should be able to reach that interest even if the trust contains a spendthrift clause.[12]

The Cases

In *Lindquist v. Mack (In re Mack)*,[13] a bankruptcy court in Minnesota held that the debtor's retained rights to receive payments from a 7% charitable remainder unitrust (CRUT), to select the trustees, and to amend the CRUT to preserve its tax qualification were includible in his bankruptcy estate because Minnesota common law, Code §664 and the regulations under it, and Minnesota statutory law did not provide an effective anti-alienation provision. In *Linquist*, the debtor funded the CRUT in question in 1997 with stock (that had a $10,000 basis) in a successful family company. The value of the remainder interest was only $21,263. Shortly after the debtor created the CRUT, the trustees sold the stock for $1,655,189 and invested part of the proceeds in a new venture, the failure of which forced the debtor into bankruptcy in 2001.

In *Menotte v. Brown (In re Brown)*,[14] the Eleventh Circuit held that the interest of a debtor, an alcoholic, in a 7% CRUT that she created before she became insolvent and with no intent to defraud creditors, was includible in her bankruptcy estate because self-settled spendthrift trusts could be reached by creditors under applicable Florida law. The court described the impact of its holding as follows:[15]

> When establishing the ICRUA, Appellee made an irrevocable charitable gift of the trust corpus. By including the right to receive income payments for life, Appellee retained a portion of the assets for herself. Whatever interest Appellee retained is her own property, subject to the claims of her creditors. Accordingly, Appellee's right to an income stream is not exempt from her bankruptcy estate and may be reached by her creditors. The corpus of the trust, however, may not be reached by Appellee's creditors.

Rev. Proc. 2005-24

On March 30, 2005, the IRS shocked the estate-planning world by issuing Rev. Proc. 2005-24,[16] which applies to a CRT if, under applicable state law, the grantor's surviving spouse has a right of election exercisable on the grantor's death to receive an elective share of the grantor's estate that can be satisfied

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[4] *Restatement (Third) of Trusts* §58(2) (2003).

[5] *Id.* at cmt e.

[6] UTC §505(a)(2) (2005).

[7] *Restatement (Second) of Trusts* §156(1) (1959). *See* 2A Scott & Fratcher, *The Law of Trusts* §156(1) (4th ed. 1987); Bogert & Bogert, *The Law of Trusts and Trustees* §223 (rev. 2d ed. 1992).

[8] *See, e.g.*, Idaho Code §55-905; Kan. Stat. Ann. §33-101; N.J. Stat. Ann. §25:2-1a; N.Y. Est. Powers & Trusts Law §7-3.1(a); Wash. Rev. Code §19.36.020.

[9] *Restatement (Third) of Trusts* §58 cmt. e; *Restatement (Second) of Trusts* §156 cmt. a, illus. 1.

[10] *See* Silk & Lintott, "Selling CRT Lead Interests," 144 *Tr. & Est.* 37, 40 (Aug. 2005).

[11] *See* Rev. Rul. 86-60, 1986-1 C.B. 302; PLR 200524014.

[12] *See Restatement (Third) of Trusts* §58 cmt. e; *Restatement (Second) of Trusts* §156 cmt. g; Bogert & Bogert, *The Law of Trusts and Trustees* §223 at 450 (rev. 2d ed. 1992); 2A Scott & Fratcher, *The Law of Trusts* §156 at 165, 169 (4th ed. 1987). U.T.C. §505 and its comments do not address this point.

[13] 269 B.R. 412–13 (Bankr. D. Minn. 2001).

[14] 303 F.3d 1261.

[15] *Id.* at 1271.

[16] 2005-16 I.R.B. 909. *See* Leibell & Daniels, "CRT Planning Gets More Difficult," 144 *Tr. & Est.* 18 (May 2005); Teitell, "Inter Vivos CRUTs and CRATs—IRS Opens Pandora's Box with Spousal 'Right of Election'," 43 *Taxwise Giving* 1 (Apr. 2005).

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from assets of the CRT.[17] A state that has enacted §2-209 of the Uniform Probate Code (UPC)[18] provides such elective rights.[19] For post-June 27, 2005, CRTs, the IRS required that the trustor's spouse sign an irrevocable waiver, which satisfies certain formalities and time requirements, of such elective share rights for the CRT to qualify under §664.[20] A pre-June 28, 2005, CRT would qualify unless the trustor's surviving spouse actually exercised a right of election against the CRT.[21] Complying with Rev. Proc. 2005-24 might be difficult for a variety of reasons, including the following: (1) for personal reasons the trustor might not want to raise the subject with his or her spouse; (2) a state that did not provide elective rights might enact them after the creation of the CRT; (3) the trustor and spouse might move from a state that did not provide elective rights to a state that does offer them; or (4) the trustor might get married after the creation of the CRT.

As a result of the negative comments it received on Rev. Proc. 2005-24, the IRS backed down somewhat in Notice 2006-15.[22] In the Notice, the IRS stated that, until it issues further guidance, written waivers of spousal rights in CRTs would not be required. Nevertheless, it warned that the actual exercise of a spousal election against a CRT would result in the CRT's disqualification, emphasizing the need to use a trust that will not be subject to such attacks.

THE GOOD NEWS

As a result of the above cases and revenue procedure, it would be desirable to find a way to protect trustors' interests in CRTs from creditor claims and to comply with Rev. Proc. 2005-24 in all circumstances. Here, the DAPT deserves consideration.

The DAPT Option

Since 1997, eight states (Alaska, Delaware, Missouri, Nevada, Oklahoma, Rhode Island, South Dakota, and Utah) have abolished the rule against self-settled trusts by enacting DAPT statutes that allow trustors to protect assets from their own creditors by placing them in irrevocable self-settled spendthrift trusts that may also make distributions to the trustor and others. Of the DAPT statutes, Alaska, Delaware, South Dakota, and Utah expressly extend protection to self-settled CRTs[23] but Missouri, Nevada, Oklahoma, and Rhode Island do not.[24] Of the DAPT statutes that provide protection to CRTs, Alaska, South Dakota, and Utah, which have enacted the UPC and its §2-209, specifically permit a surviving spouse (whether or not the deceased spouse was a resident) to satisfy a right of election against a DAPT.[25] Hence, if a trustor's state of residence permits a surviving spouse to reach CRT assets by electing against the will, Alaska, South Dakota, and Utah will as well. As discussed below, a Delaware CRT may not be reached to satisfy an elective share, regardless of the trustor's domicile.

Creating a Delaware CRT

To create an asset protection trust (APT) under the Delaware Act (Delaware APT), a trustor must create an irrevocable trust that contains a spendthrift clause; provides that Delaware law governs the trust's validity, construction, and administration; and appoints at least one Delaware trustee.[26] The Delaware trustee must perform certain duties and must be either an individual who resides in Delaware or a corporation that is authorized to conduct trust business in Delaware and is regulated by the Delaware Bank Commissioner or a federal agency.[27] The trust may have non-Delaware co-trustees[28] and Delaware or non-Delaware advisers with authority to replace advisers and Delaware trustees, participate in investment decisions, and/or perform other duties.[29] The trustor may not be a trustee.[30]

The Delaware Act specifically permits the trustor to have an interest in a CRT[31] and to have the powers to consent to or direct investment changes[32] and to replace trustees or advisers with persons who are not related or subordinate to the trustor within the meaning of §672(c).[33] It also expressly authorizes the trustor to have a power, exercisable by will or instrument effective at death, to appoint trust assets to anyone

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[17] Rev. Proc. 2005-24, 2005-16 I.R.B. 909, §1.01.

[18] UPC §2-209 (1993).

[19] Rev. Proc. 2005-24, 2005-16 I.R.B. 909, §2.02.

[20] Rev. Proc. 2005-24, 2005-16 I.R.B. 909, §3.03.

[21] Rev. Proc. 2005-24, 2005-16 I.R.B. 909, §3.01.

[22] 2006-8 I.R.B. 501.

[23] Alaska Stat. §34.40.110(b)(3)(A); Del. Code Ann. tit. 12, §3570(10)b4; 2005 SD S.B. 93 §2(2)(d); Utah Code Ann. §25-6-14(1)(e)(iii).

[24] Mo. Rev. Stat. §456.5-505; Nev. Rev. Stat. §166.040(1)(b); Okla. Stat. tit. 31, §§10–18; R.I. Gen. Laws §18-9.2-2(9)(ii).

[25] Alaska Stat. §§13.12.202(d), 13.12.205(2)(A), 13.12.209; S.D. Code §§29A-2-202(d), 29A-2-205(2)(i), 29A-2-209; Utah Code Ann. §§75-2-202(4), 75-2-205(2)(a)(ii), 75-2-209.

[26] Del. Code Ann. tit. 12, §§3570(10)a–c, 3570(9)a–b.

[27] *Id.* at §3570(9)a–b.

[28] *Id.* at §3570(9)f.

[29] *Id.* at §3570(9)c.

[30] *Id.* at §§3570(9)c, 3571.

[31] *Id.* at §3570(10)b4.

[32] *Id.* at §3570(9)d.

[33] *Id.* at §3570(10)b7.

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other than the trustor, the trustor's creditors, the trustor's estate, or the creditors of the trustor's estate.[34] Thus, a Delaware CRT may give the trustor powers, exercisable by will, to revoke the interests of subsequent noncharitable beneficiaries and to change the charitable remainder beneficiaries.

Who May Defeat a Delaware CRT

The Delaware Act bars original actions and actions to enforce judgments, including judgments entered elsewhere, and it requires any action involving a Delaware CRT to be brought in the Delaware Court of Chancery.[35] Any action to set aside such a trust must be based on §1304 or §1305 of the Delaware Uniform Fraudulent Transfer Act (UFTA).[36] The following four categories of creditors may defeat Delaware CRTs.[37]

(1) Pre-Transfer Claims

If a creditor's claim arose before the trust was created, the creditor must bring suit within four years after the trust's creation or, if later, within one year after the creditor discovered (or should have discovered) the trust and must prove, by clear and convincing evidence, that creation of the trust was a fraudulent transfer.[38] The impact of the one-year date of discovery rule may be minimized or negated if the trustor notifies known pre-transfer creditors of the trust's existence.

(2) Post-Transfer Claims

If a creditor's claim arose after the trust was created, the creditor must bring suit within four years after the trust's creation and must prove, by clear and convincing evidence, that creation of the trust was a fraudulent transfer.[39]

(3) Family Claims

A person whose claim results from an agreement or court order providing for alimony, child support, or property division may reach the assets of a Delaware CRT, but only a spouse who was married to the trustor of the trust before it was created may avail himself or herself of this exception.[40] The surviving spouse of a Delaware decedent never has been able to reach trust assets by electing against the will,[41] and Delaware law does not defer to the law of a decedent's domicile to determine a surviving spouse's elective share rights.[42] Since the passage of the Delaware Act, Delaware attorneys have been of the view that a spouse may reach the assets of a Delaware APT only for the specified purposes (i.e., alimony, child support, or property division) and that, because those purposes do not include elective share rights, the surviving spouse of the trustor of a Delaware APT could not reach the assets of the trust by electing against the will, whether or not the trustor lived in Delaware at death. To respond to Rev. Proc. 2005-24, 2005 legislation has made this explicit. Thus, the final sentence of the pertinent section of the Delaware Act provides that a Delaware APT may not be reached to satisfy a claim for elective share.[43]

(4) Tort Claims

A person who suffers death, personal injury, or property damage before a Delaware CRT is established for which the trustor is liable may reach the trust assets.[44]

Under an old Delaware law, creditors may not attach assets held by a bank, including as trustee, to satisfy their claims.[45] Hence, Delaware CRT distributions to Delaware bank or trust accounts will not be reachable by creditors.

Moving Existing CRTs to Delaware

A trustee may create a Delaware CRT either by establishing a Delaware CRT or by effectuating the transfer to Delaware of a trust that meets the requirements of the Delaware Act,[46] except that the trust does not have to provide that Delaware law governs.[47] If a trustee of a CRT creates a Delaware CRT after June 30, 1997, the time that the trust exists before it is moved to Delaware counts toward the four-year period for pursuing post-transfer claims against the trust.[48] Thus, the trustor and trustee of an existing CRT should consider moving it to Delaware if asset protection or Rev. Proc. 2005-24 is a concern.

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[34] *Id.* at §3570(10)b2.
[35] *Id.* at §3572(a).
[36] Del. Code Ann. tit. 6, §§1301–1311.
[37] Del. Code Ann. tit. 12, §§3572(b), 3573.
[38] *Id.* at §3572(b)(1).
[39] *Id.* at §3572(b)(2).
[40] *Id.* at §§3573(1), 3570(7).
[41] *Id.* at §§901(a), 908(b).
[42] *Id.* at §901(b).
[43] *Id.* at §3573, as amended by 2005 Del. S.B. 150 §15.
[44] *Id.* at §3573(2).
[45] Del. Code Ann. tit. 10, §3502; *Provident Trust Co. v. Banks*, 9 A.2d 260 (Del. Ch. 1939).
[46] Del. Code Ann. tit. 12, §3570(8).
[47] *Id.* at §3570(10)d.
[48] *Id.* at §§3572(c), 3575.

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AVOIDING FRAUDULENT TRANSFERS WHEN CREATING DELAWARE CRTs

When creating an irrevocable trust, including a Delaware CRT, a trustor must be mindful of the fraudulent-transfer rules.[49] Many creditors' counsel argue that transfers to APTs are inherently fraudulent because they are designed to frustrate known existing creditors and a potentially vast array of foreseeable or unknown future creditors. APTs can be used validly though, even in the face of existing claims.

These issues have been examined at length on other occasions.[50] Among other things, these materials emphasize two key points, one of which applies to both present and future creditors and one of which is uniquely relevant to future creditors.

First, clients should consider the likely needs of known and reasonably foreseeable future creditors and segregate from their Delaware CRTs enough assets and/or future earning capacity to satisfy those needs. A transferor's solvency will be subjected to more rigorous scrutiny, however, if a complaining creditor held claims that arose before the transfer (i.e., the plaintiff is a present creditor).

Second, future creditors with actual or constructive knowledge of a prior transfer have no basis to complain about it. Trustors should therefore look for ways to disclose a transfer whenever possible.

In sum, a trustor may protect against future reversals by placing assets in a Delaware CRT, provided that he or she retains solvency, is not acting with particular creditors in mind, and is not subject to likely or anticipated claims.

DEFENDING DELAWARE CRTs AGAINST CREDITOR ATTACKS

Jurisdiction questions, conflict-of-laws concerns, the Full Faith and Credit Clause, the Due Process Clause, the Supremacy Clause, and bankruptcy issues are relevant when a creditor: (1) obtains a judgment against the trustor of a Delaware CRT in a court in a non-DAPT state (non-DAPT court) and tries to enforce it against the Delaware CRT in a Delaware court; or (2) seeks a judgment against a Delaware CRT or a trustee of a Delaware CRT in a non-DAPT court. Such a creditor faces at least eight substantial hurdles.

Hurdle 1: Judgments Against Trustors Alone Will Not Work

Creditors who obtain judgments against trustors but not trustees of Delaware CRTs will not have access to assets of such trusts. Because the trust fund is titled in the name of the trustee and not the trustor-debtor, efforts to levy or attach the trustor's property will not reach the trust fund. Accordingly, judgment creditors who want to attach a trust fund will be forced to start an action that somehow attacks the validity of the trustee's title.

Hurdle 2: Non-DAPT Court Might Lack Jurisdiction

A creditor may obtain a valid judgment against a trustee of a Delaware CRT or an attachment of assets of a Delaware CRT in a non-DAPT court only if that court has jurisdiction.[51] Such jurisdiction might be based on in rem jurisdiction over trust assets or personal jurisdiction over a trustee.

In Rem Jurisdiction

A non-DAPT court will have in rem jurisdiction over trust assets that are held in the court's jurisdiction.[52] To prevent a non-DAPT court from having in rem jurisdiction over Delaware CRT assets, the trustee should hold all assets in Delaware because "A court sitting in [one state]. . . cannot assert jurisdiction over the corpus of a trust with a situs outside the State."[53]

Personal Jurisdiction

State courts, federal courts sitting in diversity,[54] and federal courts considering federal questions[55] may exercise personal jurisdiction over a defendant only if constitutional due process requirements are satisfied.[56] The classic *International Shoe Co. v. Washington* test is whether a nonresident defendant

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[49] We would like to thank John E. Sullivan, III, Esq., of Cleveland, Ohio, for his considerable contributions to our understanding of fraudulent-transfer law and the constitutional and related issues discussed below.

[50] Nenno & Sullivan, "Delaware Asset Protection Trusts: Avoiding Fraudulent Transfers and Attorney Liability," 32 *Est. Plan.* 22 (Jan. 2005); Sullivan, "Future Creditors and Fraudulent Transfers: When a Claimant Doesn't Have a Claim, When a Transfer Isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner," 22 *Del. J. Corp. L.* 955 (1997); Sullivan, "The Often Overlooked Role of Disclosure in Asset Protection Planning," in *Asset Protection Strategies (Planning with Domestic and Offshore Entities)* 367 (Bove ed., 2002).

[51] *Restatement (Second) of Conflict of Laws* §104 cmt. a (1971). *See Waitzman Est.*, 507 So. 2d 24, 25 (Miss. 1987).

[52] *Hanson v. Denckla*, 357 U.S. 235, 246 (1958).

[53] *Walker v. W. Mich. Nat'l Bank & Trust*, 324 F. Supp. 2d 529, 534 n.3 (D. Del. 2004).

[54] 28 USC §1332.

[55] *Id.* at §1331.

[56] *See, e.g., Ins. Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This discussion assumes that local long-arm stat-

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has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." [57] A court can satisfy this test under either of two theories.[58]

The first is known as the "general jurisdiction" theory. Under this analysis, a nonresident defendant's ongoing contacts with the forum state can be so pervasive that jurisdiction is appropriate even in connection with suits over matters separate and distinct from those contacts.[59] A defendant's contacts with the forum must be "a continuous and systematic, [even if] limited, part of its general business." [60]

The other theory is the "specific personal jurisdiction" doctrine. Under this view, jurisdiction is established if: (1) there is a nexus between the defendant, the forum, and the matter in dispute;[61] and (2) the nonresident defendant's link to the forum arises from the defendant's "purposefully avail[ing] itself of the privilege of conducting activities within the forum state." [62]

Courts consider various factors to determine whether sufficient minimum contacts exist to establish personal jurisdiction. These are catalogued, in part, in *World-Wide Volkswagen Corp. v. Woodson.*[63] Not all acts within a state create an adequate nexus for jurisdiction. As a general proposition, occasional trips into a state or receipt of payments issued from inside a state will be insufficient.[64] And the fact that "several bits of trust administration" [65] may be carried on is also routinely inadequate to establish jurisdiction.

A non-DAPT court might be able to adjudicate a creditor's claim if it has personal jurisdiction over a trustee. One way a non-Delaware trustor may avoid this pitfall with Delaware CRTs is to use only a Delaware trustee with little or no contact with the home state (or, if different, the trustor's state of employment or business). If the trustor wants a co-trustee from outside Delaware, then the co-trustee should be from outside the trustor's home state (or state of business). This gives courts in the trustor's home or work state substantially less basis to assert general jurisdiction over the trustees, and the court may be able to assert only specific personal jurisdiction over them. This, however, is not always an easy task. Although the issue turns on the specific facts of each case, many opinions show that specific personal jurisdiction may not be established over an out-of-state trustee merely because of routine trustee activities like mailings and phone calls from the defendant trustee's state into the plaintiff's state.

The leading case in this area is *Hanson v. Denckla* [66] which involved a controversy concerning the right to part of the principal of a trust established in Delaware by a Pennsylvania trustor who subsequently moved to Florida. The U.S. Supreme Court held that a Delaware court was under no obligation to give full faith and credit to a judgment of a Florida court that lacked jurisdiction over the trust's assets and the trustee.[67]

> [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. The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.

Critics question *Hanson*'s continued vitality, but it still is good law because it has never been overruled and has instead been followed by recent cases.[68] The circumstances in which a federal district court in a non-DAPT state may assert personal jurisdiction over a trustee of a Delaware CRT under diversity jurisdiction[69] usually will be as described above.[70]

If the trustee of a Delaware CRT has extensive contacts in the non-DAPT court's jurisdiction, the court

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utes also have been satisfied, which is another prerequisite for the exercise of personal jurisdiction over out-of-state defendants by a state court or a federal court sitting in diversity. *See, e.g., Walker v. W. Mich. Nat'l Bank & Trust*, 324 F. Supp. 2d 529 (D. Del. 2004). *See also* Fed. R. Civ. P. 4(k)(2); *Delgado v. Reef Resort Ltd.*, 364 F.3d 642 (5th Cir. 2004).

[57] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[58] *See generally Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984).

[59] *See, e.g., Rose v. Firstar Bank*, 819 A.2d 1247, 1250 (R.I. 2003).

[60] *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 415 (1984) (citations and quotations omitted).

[61] *Rose v. Firstar Bank*, 819 A.2d 1247, 1251 (R.I. 2003).

[62] *Id. See also Walker v. W. Mich. Nat'l Bank & Trust*, 324 F. Supp. 2d 533 (D. Del. 2004).

[63] 444 U.S. 286, 295-298 (1980).

[64] *See Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984).

[65] *Hanson v. Denckla*, 357 U.S. 235, 252 (1958).

[66] 357 U.S. 235 (1958).

[67] *Id.* at 253–54.

[68] *In re Estate of Ducey*, 878 P.2d 749, 752 (Mont. 1990); *In re Frumkin*, 874 S.W.2d 40 (Tenn. Ct. App. 1993) and 912 S.W.2d 138 (Tenn. App. 1995); *Dreher v. Smithson (In re George M. Naylor Revocable Ins. Tr.)*, 986 P.2d 721 (Or. Ct. App. 1999); *Rose v. Firstar Bank*, 819 A.2d 1247, 1255 (R.I. 2003); *Nastro v. D'Onofrio*, 263 F. Supp. 2d. 446, 453 (D. Conn. 2003); *Walker v. W. Mich. Nat'l Bank & Trust*, 324 F. Supp. 2d 534 (D. Del. 2004); *Walker v. N. Trust Co.*, 2004 U.S. Dist. Lexis 15012 (D. Del 2004).

[69] 28 USC §1332.

[70] Fed. R. Civ. P. 4(k)(1)(A).

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will have jurisdiction, but if all trustees and trust assets are located in Delaware and if the trustees have insufficient contacts in the non-DAPT jurisdiction, the non-DAPT court will lack jurisdiction.

Hurdle 3: Non-DAPT Court Should/ Must Decline Jurisdiction

Section 267 of the Second Restatement of Conflict of Laws provides that the courts of the state in which the trust is administered usually supervise the administration of a trust of interests in movables.[71] Thus, if a Delaware CRT is administered in Delaware, the Delaware courts will have primary supervision over the administration of the trust and can exercise jurisdiction as to all questions that may arise in the administration of the trust.[72] Even if a non-DAPT court has jurisdiction over a Delaware CRT or its trustee, it should abstain and defer to Delaware's courts in dealing with matters regarding the administration of the trust.[73]

Section 7-203 of the UPC,[74] which codifies these principles, is in effect in at least 11 states.[75] Case law confirms that courts are cautious about construing trust questions governed by the laws of other states, and that consequently they often abstain from exercising jurisdiction. For example, in *Bartlett v. Dumaine*,[76] the New Hampshire Supreme Court deferred to Massachusetts courts in a suit regarding the duties of trustees of a Massachusetts trust to account to its beneficiaries, even though the New Hampshire court had personal jurisdiction over all interested parties. Scott cites other cases from California, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Texas that reached comparable results.[77]

Hurdle 4: Venue May Be Bad

An out-of-state trustee may contest venue, even when personal jurisdiction exists. Although a plaintiff's choice of venue typically should not be disturbed absent a compelling reason to do so,[78] many overworked judges consider their crowded dockets to be reason enough to change venue, especially if any other plausible justification exists. Even the Supreme Court has euphemistically but nonetheless expressly noted that docket control is a valid factor to consider.[79] Accordingly, out-of-state trustees might still get a suit transferred out of the plaintiff's chosen court simply because the judge is too busy.

Hurdle 5: Non-DAPT Court Should Apply Delaware Law

Rules for Delaware CRTs

Section 270 of the Second Restatement of Conflict of Laws provides in relevant part:[80]

> An inter vivos trust of interests in movables is valid if valid . . . under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in §6 . . .

The "validity" of trust clauses addresses matters such as whether or not the trust violates the rule against perpetuities or a rule against accumulations.[81] Section 270 permits a court to consider the strong public policy of the jurisdiction with which a trust has its most significant relationship (which may or may not be the law designated by the trust instrument) in assessing the validity of a trust. According to the authorities, the strong-public-policy issues that justify a departure from §270's general rule involve trust provisions designed to defeat a surviving spouse's right of election and that violate a jurisdiction's restrictions on testamentary gifts to charity,[82] but they do not include jurisdictional differences in the rule against per-

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[71] *Restatement (Second) of Conflict of Laws* §267. *See* 5A Scott & Fratcher, *The Law of Trusts* §571 at 178–79 (4th ed. 1989).

[72] *Restatement (Second) of Conflict of Laws* §267 cmt. e.

[73] *Id.*

[74] UPC §7-203 (1974).

[75] Alaska Stat. §13.36.045; Ariz. Rev. Stat. §14-7205; Colo. Rev. Stat. §15-16-203; Fla. Stat. §737.203; Haw. Rev. Stat. §560:7-203; Idaho Code §15-7-203; Mich. Comp. Laws §700.7203; N.C. Gen. Stat. §36A-25.1; N.D. Cent. Code §30.1-33-03; S.C. Code Ann. §62-7-203; Utah Code Ann. §75-7-204.

[76] 523 A.2d 1, 14–15 (N.H. 1986).

[77] 5A Scott & Fratcher, *The Law of Trusts* §570 at 176 n.29 (4th ed. 1989).

[78] *W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 555 N.E.2d 214, 217–18 (Mass. 1999).

[79] *American Dredging Co. v. Miller*, 510 U.S. 443, 447–48 (1994) (venue may be "inappropriate because of considerations affecting the court's own administrative and legal problems").

[80] *Restatement (Second) of Conflict of Laws* §270. *See* 5A Scott & Fratcher, *The Law of Trusts* §§555, 587, 597-603 (4th ed. 1989); Bogert & Bogert, *The Law of Trusts and Trustees* §297 (rev. 2d ed. 1992).

[81] *Restatement (Second) of Conflict of Laws* §269 cmt. d; Bogert & Bogert, *The Law of Trusts and Trustees* §293 at 253-54 (rev. 2d ed. 1992).

[82] *Restatement (Second) of Conflict of Laws* §269 cmts. c, i, §270 cmts. b, e; 5A Scott & Fratcher, *The Law of Trusts* §601 (4th

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petuities.[83] The comments to the Second Restatement of Conflict of Laws, Scott, and Bogert do not address whether the recognition of self-settled spendthrift trusts formed under the law of one state violates a strong public policy of another state, and we have found no cases or rulings that address this point.

As just mentioned, the comments to §270 suggest that the designation of a law to govern an inter vivos trust might be disregarded if it would frustrate a surviving spouse's elective share rights. For a variety of reasons, such a public policy probably is not as strong as it once was.[84] Nevertheless, the Restatement, Scott, and Bogert all indicate that there should be such an exception,[85] but they cite no supporting cases and the three pertinent cases that we have found go the other way.[86]

The dichotomy between a commentator's personal views and the results actually reached by courts is demonstrated by Scott's discussion of *National Shawmut Bank v. Cumming*:[87]

> If . . . there is a statute in the state of the settlor's domicile that gives the settlor's surviving spouse a forced share of the property, it might well be held that for this purpose the state of his domicile, rather than the state of the place of administration, has the most significant relationship with the trust. It would seem that because the purpose of the statute is to protect the surviving spouse of the decedent, he should not be able to avoid this policy by creating a trust to be administered in another state in which no such protection is given to the surviving spouse. But it was held otherwise in *National Shawmut Bank v. Cumming*. In that case a resident of Vermont transferred securities to a bank in Massachusetts in trust to pay the income to him for life, to pay him such amounts of principal as he might direct, on his death to pay the income to certain persons, and on the death of the survivor to pay the principal to his nephews and nieces. He reserved power to amend or revoke the trust. He died domiciled in Vermont. His widow brought a proceeding in Massachusetts seeking to recover her distributive share of the trust assets on the ground that under the law of Vermont she was so entitled. It was held that the law of Massachusetts was applicable and that under the law of Massachusetts the widow was not entitled in claiming her distributive share to include the assets of a revocable trust.

Scott continues that, "[i]t would seem, however, that the Massachusetts court might well have held that it would not apply its local law to persons who were not domiciled in Massachusetts but would apply the law of Vermont in which the settlor and his wife were domiciled."[88]

The fact remains that the court did not.

A commentator discusses the other two pertinent cases as follows:[89]

> The courts of at least one other jurisdiction—Illinois—have embraced the principle articulated in *Shawmut Bank* that the law of the situs of a trust should control with respect to elective share issues. In the first Illinois case to address this issue, *Rose v. St. Louis Union Trust Company*, an Illinois decedent established an irrevocable trust with a Missouri corporation as trustee. The trust was administered in Missouri, and the trust instrument specified the application of Missouri law to its administration. Under these circumstances, the court ruled that the validity of the trust with respect to the surviving spouse's elective share rights would be determined under Missouri law, which it further determined precluded the spouse from having any rights to the trust property.
>
> In *Johnson v. La Grange State Bank*, the Supreme Court of Illinois extended its ruling in *Rose* to assets held in a revocable trust. As described earlier in this article, shortly before her death the decedent in *Johnson* established a revocable trust in Illinois, naming herself as trustee and La Grange State Bank, an Illinois

ed. 1989); Bogert & Bogert, *The Law of Trusts and Trustees* §294 at 268-70, §297 at 298–99, §301 at 330 (rev. 2d ed. 1992).

[83] *Restatement (Second) of Conflict of Laws* §269 cmt. i.

[84] Domsky, "Till Death Do Us Part. . .After That, My Dear, You're on Your Own: A Practitioner's Guide to Disinheriting a Spouse in Illinois," 29 *S. Ill. U.L.J.* 207 (Winter 2005).

[85] *Restatement (Second) of Conflict of Laws* §270 cmts. b, e; 5A Scott & Fratcher, *The Law of Trusts* §601 at 317-18 (4th ed. 1989). Bogert & Bogert, *The Law of Trusts and Trustees* §294 at 268-70, §297 at 298–99, §301 at 330 (rev. 2d ed. 1992).

[86] *National Shawmut Bank v. Cumming*, 91 N.E.2d 337 (Mass. 1950); *Rose v. St. Louis Union Trust Co.*, 253 N.E.2d 417 (Ill. 1969); *Johnson v. La Grange State Bank*, 383 N.E.2d 185 (Ill. 1978).

[87] 5A Scott & Fratcher, *The Law of Trusts* §601 at 317-18 (footnotes omitted) (4th ed. 1989).

[88] *Id.* at 318.

[89] Danforth, "Estate Planning Implications of Surviving Spouse's Elective Share Rights," 22 *Tax Mgmt. Est., Gifts & Tr. J.* 235, 242 (Nov. 1997) (footnotes omitted). *See* Domsky, "Till Death Do Us Part. . .After That, My Dear, You're on Your Own: A Practitioner's Guide to Disinheriting a Spouse in Illinois," 29 *S. Ill. U.L.J.* 207, 225-230 (Winter 2005).

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trust company, as successor trustee. She then moved to Florida and lived there at her death. The decedent's husband brought an action in an Illinois court to set aside the revocable trust insofar as it deprived him of his elective share rights under Florida law. The Supreme Court of Illinois ruled that the trust assets were not subject to the surviving spouse's elective share claim. In reaching its decision, the court made the following comment on the relevance of Illinois law:

> As our appellate court properly noted, the trust was created in this State, the corpus has remained here, the [surviving spouse] was domiciled here at the time of the decedent's death, and the principal defendants are located in this State.

Based on these factors, the court applied Illinois law and determined that the trust assets were not subject to the spouse's claim.

Because a Delaware CRT would be created to obtain a charitable deduction, to sell assets without immediate capital gain taxation, to provide for charity, and to avoid Rev. Proc. 2005-24 and because the policy against thwarting a surviving spouse's elective share rights is not as abhorrent as it once was believed to be, a Delaware CRT should not be reachable to satisfy an elective share, even if the matter is adjudicated in a non-DAPT court.

Nevertheless, the "validity" of a Delaware CRT is not the real issue. After all, trustors routinely create valid self-settled trusts, e.g., revocable trusts and CRTs, and concerns about DAPTs do not revolve around things like the rule against perpetuities or accumulations. The pertinent question is the extent, if any, to which creditors (possibly including surviving spouses) may reach the assets of such a trust. For trusts that hold personal property, the analytical starting point is §273 —not §270— of the Second Restatement of Conflict of Laws, which states in pertinent part:[90]

> Whether the interest of a beneficiary of a trust of movables is assignable by him and can be reached by his creditors is determined . . . in the case of an inter vivos trust, by the local law of the state . . . in which the settlor has manifested an intention that the trust is to be administered . . . .

[90] *Restatement (Second) of Conflict of Laws* §273. *See* 5A Scott & Fratcher, *The Law of Trusts* §§625-28 (4th ed. 1989); Bogert & Bogert, *The Law of Trusts and Trustees* §293 at 260–61 (rev. 2d ed. 1992).

Unlike §270, §273 and its comments do not contemplate that a different rule might apply if the law of the trust's situs violates a strong public policy of another state. Consequently, Delaware law should be determinative with respect to the ability of creditors (again possibly including surviving spouses) to reach the assets of a Delaware CRT without further inquiry.

Impact of UTC on Choice of Law

Section 505(a)(2) of the UTC[91] does not give effect to self-settled spendthrift trusts, and UTC §105(b)(5)[92] does not permit a governing instrument to depart from that rule. This, however, does not necessarily prevent a trustor who lives in a UTC state from creating an effective Delaware CRT. UTC §107(1)[93] lets a trustor choose the law governing the meaning and effect of the terms of his or her trust, unless such designation is contrary to a strong public policy of the jurisdiction that has the most significant relationship to the matter at issue. The UTC does not specify the strong public policies that will invalidate a designation. It appears, however, that §105(b)(5) does not "trump" §107(1).[94] As noted above, Restatement §273 does not qualify a trustor's right to designate the law governing restraints on alienation[95] and any policy against planning to avoid a surviving spouse's elective share rights is weaker than it once may have been, particularly when defeating elective rights was not the principal objective.

Further, under the UTC, another state's strong public policy may not bar application of Delaware law unless that other state has the "most significant relationship" to the trust.[96] When there is a potential strong-public-policy exception to the trustor's chosen law, the UTC sets guidelines for determining which state has the most significant relationship to a trust.[97] These factors can be managed or addressed in ways that maximize Delaware's relation to a trust and/or minimize another state's relation. For example, a trust can be created in Delaware by executing it there, movable assets can be relocated to Delaware, and a trustee invariably is in Delaware. Justified expectations, certainty, predictability, and uniformity all favor applying Delaware law to a trust administered in Delaware by a Delaware trustee. Other considerations also point to the primacy of Delaware's connection to a Delaware CRT and hence justify applying Delaware

[91] UTC §505(a)(2).

[92] *Id.* at §105(b)(5).

[93] *Id.* at §107(1).

[94] Covey & Hastings, "The Uniform Trust Code—Part I," *Prac. Drafting* 7420, 7425 (Oct. 2003).

[95] *See Restatement (Second) of Conflict of Laws* §273.

[96] UTC §107(1).

[97] *Id.* at §107 cmt.

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law to a Delaware CRT (e.g., a trustor's or beneficiary's residence may be transient, thus diminishing his or her state's interest, whereas an institutional trustee has a permanent presence in Delaware, thus amplifying its interest).

Hurdle 6: Delaware Court Might Not Have to Give Full Faith and Credit to Judgment of Non-DAPT Court

In this country, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." [98]

Respect Due Statutes

Full faith and credit applies to both the statutes and judgments of another state, but it does not operate in the same manner with respect to them. In contrasting the application of full faith and credit to statutes and to judgments, the Supreme Court recently stated in *Franchise Tax Board of Cal. v. Hyatt* [99] that:

> [O]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

Although the forum court often will have constitutional discretion to apply or ignore a sister state's statutes, the facts of some cases will suggest strongly, or perhaps require, as in *Phillips Petroleum Co. v. Shutts*, [100] the application of another state's law rather than forum law. On the one hand, a forum court in a defendant's home state may have a strong argument for applying forum law because of the defendant's residence and because the plaintiff, whatever his or her residence, chose the forum. On the other hand, the argument for applying forum law is weaker when a defendant's contact with the forum is limited and the defendant's conduct took place outside the forum state. This has potentially significant impact for out-of-state trustees with limited and minimal ties to the forum state.

[98] U.S. Const. art. IV, §1.

[99] 538 U.S. 488, 494 (2003).

[100] 472 U.S. 797 (1985).

Delaware's Statutory Safeguard

The Delaware Act provides a potential safeguard that may negate any attempt by a non-DAPT court to ignore Delaware law. Specifically, the Delaware Act provides that the trustee of a Delaware CRT will cease to act if a court decides that Delaware law does not govern the validity, construction, or administration of the trust or the effect of its spendthrift clause, and that a new trustee will take over, pursuant to either a designation made in the trust instrument or an order by Delaware's Chancery Court.[101] If such a change of trustee occurs, then the non-DAPT court will need to determine whether it has personal jurisdiction over the newly appointed trustee. An interesting question is whether an attempted change of trustee pursuant to the Delaware Act will be effective if a non-DAPT court holds that Delaware law should not apply in the first place. Nonetheless, just sorting out this question could cause real difficulties for a plaintiff, particularly if a new trustee is appointed by a Delaware Chancery Court order.

Respect Due Judgments

As noted above, "the full faith and credit command 'is exacting' with respect to a final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons covered by the judgment," [102] but a Delaware court might not have to give full faith and credit to a judgment rendered by a non-DAPT court. Section 103 of the Second Restatement of Conflict of Laws states:[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.

Section 103's comments emphasize that it has an extremely narrow scope of application.[104] Nevertheless, authorities indicate that §103 might apply if a Delaware court is asked to give full faith and credit to a judgment rendered by a non-DAPT court with respect to a Delaware CRT.

As noted above, *Hanson* held that Delaware did not have to give full faith and credit to a judgment of a Florida court that lacked jurisdiction over the trustee

[101] Del. Code Ann. tit. 12, §3572(g).

[102] *Franchise Tax Board of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003).

[103] *Restatement (Second) of Conflict of Laws* §103. *Accord Bartlett v. Dumaine*, 523 A.2d 1 (N.H. 1986).

[104] *Id.* at cmts. a–b.

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and the trust property. Scott goes further and says that Florida unduly interfered with the administration of the trust by the Delaware courts [105] and suggests that Delaware would not have had to give full faith and credit to the Florida judgment even if the Florida court had jurisdiction over the trustee and all beneficiaries.[106] Scott's view is supported by *Hanson*, which affirmed the decision of the Delaware Supreme Court in *Lewis v. Hanson*. In the state court ruling, the Delaware Supreme Court unequivocally stated that Delaware courts would not have been required to give full faith and credit to the Florida judgment even if the Florida courts had jurisdiction over the trustee and/or the trust property.[107]

The New Hampshire Supreme Court applied the above principles in the 1986 *Bartlett* case.[108] There, the beneficiaries of a New Hampshire trust (the Dumaine Trust) and a Massachusetts trust (the Dexter Trust) sued the trustees of the two trusts. After affirming findings that the claims against the trustees of the New Hampshire trust were meritless,[109] the court dismissed the request for an accounting for the Massachusetts trust, even though it had personal jurisdiction over all interested parties.[110] The court stated, "[t]here is ample evidence that the Massachusetts Supreme Judicial Court would consider a decision by this court regarding the Dexter trustees' duty to account as improper interference with the Commonwealth's important interests." [111]

Hurdle 7: Delaware Can and Does Limit Remedies Available for Judgments Given Full Faith and Credit

Even if Delaware must give a judgment full faith and credit, it can and does restrict the remedies available to most judgment creditors, who must prove a fraudulent transfer before they can collect.

Delaware may regulate the method by which other states' judgments are enforced within its borders. As noted by the Supreme Court in *Baker v. General Motors Corp.*:[112]

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister State judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.

Full faith and credit merely creates a rule of evidence that a plaintiff's out-of-state judgment is valid, while the rules for enforcing a judgment are established by the state in which enforcement is sought.[113] The Restatement,[114] case law,[115] and both the model and Delaware versions of the Uniform Enforcement of Foreign Judgments Act provide that a judgment from another state may be satisfied only pursuant to the procedures established by local law,[116] and, as a matter of federal practice, judgments rendered by federal courts outside Delaware are enforceable by Delaware's federal courts only to the same extent and in the same manner as judgments rendered in Delaware.[117] Hence, although a state has limited authority to ignore another state's judgment, it has broad authority to regulate how that judgment is enforced.

The Delaware Act works within these limits. It restricts a plaintiff's actions, rather than his or her claims, and bars any action to enforce judgments against or collect funds from a Delaware CRT unless that action is brought within the appropriate time periods and under the procedures allowed by the Delaware Act.[118] This comports with case law.[119]

Moreover, the Delaware Act does not distinguish between Delaware judgments and those of other states. No action to enforce any judgment against a Delaware trustee or CRT, whether rendered in Delaware or elsewhere, may proceed unless brought within the appropriate periods prescribed by the Delaware Act and pursuant to the prescribed remedy, which is to prove a fraudulent transfer to a trustee by clear and convincing evidence.[120] This provides the "even-handed control" required by *Baker*. Because

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[105] 5A Scott & Fratcher, *The Law of Trusts* §573 at 193 (4th ed. 1989).

[106] *Id.* at 194.

[107] 128 A.2d 819, 835 (Del. 1957).

[108] 523 A.2d 1 (N.H. 1986).

[109] *Id.* at 14.

[110] *Id.*

[111] *Id.* at 15.

[112] 522 U.S. 222, 235 (1998).

[113] *Id.* at 241–42 (Scalia, J., concurring). *See also In re Cochrane*, 178 B.R. 1011, 1018 n.8 (Bankr. D. Minn. 1995).

[114] *Restatement (Second) of Conflict of Laws* §142; *id.* at cmt. d.

[115] *Nastro v. D'Onofrio*, 822 A.2d 286, 291 (Conn. App. Ct. 2003).

[116] Unif. Enforcement of Foreign Judgments Act §2, 13 U.L.A. 160, *et seq.* (2002); Del. Code Ann. tit. 10, §4782. *See also Nastro v. D'Onofrio*, 822 A.2d 286, 291 (Conn. App. Ct. 2003) (similar).

[117] *Powles v. Kandrasiewicz*, 886 F. Supp. 1261, 1266 (W.D.N.C. 1995); Fed. R. Civ. P. 69.

[118] Del. Code Ann. tit. 12, §3572(a).

[119] *Matanuska Valley Lines, Inc. v. Molitor*, 365 F.2d 358 (9th Cir. 1966).

[120] Del. Code Ann. tit. 12, §3572; Del. Code Ann. tit. 6,

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the Constitution does not require states to adopt one set of collections procedures for its own citizens and another more favorable set for citizens of other states, the Delaware Act satisfies the Full Faith and Credit Clause.

Subject to certain limited exceptions, creditors seeking to attach funds in a Delaware APT must prove by clear and convincing evidence that the funds were fraudulently transferred into trust.[121] The exceptions are for a handful of preferred creditors: persons who benefit from child or spousal support orders; spouse or ex-spouses holding property division orders (other than orders for forced heirship, legitime, or elective share); and persons whose claims for death, personal injury, or property damage arose before the transfer in question.[122] Any other creditor will have his or her remedies severely limited.

Hurdle 8: Delaware CRTs Should Survive Bankruptcy

A collections effort aimed at a Delaware CRT probably means that the trustor's nontrust assets are minimal and/or inadequate to satisfy his or her debts. If so, then a creditor's ability to reach the trustor's trust interest might be determined in bankruptcy court, either pursuant to a trustor's voluntary petition [123] or to one or more creditors' involuntary petition against the trustor.[124]

The Limited Nature of Bankruptcy

Any discussion of Delaware CRTs and bankruptcy must begin with the important observation that the Bankruptcy Code only applies to debtors who are in bankruptcy. Moreover, bankruptcy is normally a voluntary process. Although involuntary Chapter 7 and Chapter 11 bankruptcies theoretically can be commenced by a small handful of creditors owed a combined total of as little as $12,300 in minimal debt,[125] such involuntaries are rare. In fact, data provided by the U.S. Courts web site shows that involuntaries are a miniscule percentage of all bankruptcies. During 2000–2004, inclusive, a total of 7,524,483 bankruptcies were filed, of which only 3,622 were involuntaries.[126] Thus, over five years, involuntaries amounted to only 0.00048136% of all filings.

Involuntary bankruptcies are tempting to creditors because:

- The Bankruptcy Code and a related statute give the bankruptcy court exclusive jurisdiction over all of the debtor's legal and equitable interests, wherever situate.[127]
- The Bankruptcy Rules provide for nationwide service of process in any adversary proceedings.[128]
- The combined effect of the Bankruptcy Rules and Federal Rules of Civil Procedure is to allow bankruptcy trustees and creditors nationwide subpoena power.[129]
- Bankruptcy Rules contemplate a very liberal approach to discovery regarding any act or asset that might pertain to the debtor or the debtor's bankruptcy estate.[130]

Nonetheless, there are good reasons why involuntaries are so rare, most of which boil down to the near certainty of significant additional costs with, in many cases, little or no prospect of a return justifying that investment. These factors include:

- Various persons, including debtors, parties-in-interest, and nonpetitioning partners in a partnership, may challenge involuntary petitions.[131]
- Involuntary petitions are subject to motions to dismiss, motions for change of venue,[132] and, potentially, detailed pre-trial discovery.[133]
- Certain creditors do not count.[134]
- Certain claims do not count.[135]

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§§1304, 1305, 1309.

[121] Del. Code Ann. tit. 12, §3572(a).

[122] *Id.* at §3573.

[123] 11 USC §301.

[124] *Id.* at §303.

[125] *See id.* at §303(a)–(b). The statutory text refers to a $10,000 threshold, but that figure is periodically adjusted for inflation under 11 USC §104 and now stands at $12,300.

[126] *See* "Judicial Facts and Figures," published by the Administrative Office of the U.S. Courts, *available at* www.uscourts.gov/judicialfactsfigures/table5.01.pdf (last visited Feb. 22, 2006).

[127] 28 USC §1334(e); 11 USC §541(a)(1).

[128] Bankr. R. 7004(d).

[129] Bankr. R. 9016, incorporating by reference Fed. R. Civ. P. 45. *See also* Fed. R. Civ. P. 45(a)(3).

[130] 11 USC §341; Bankr. R. 2004; *Matter of Wilcher*, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985).

[131] *See generally* 11 USC §303(d); Bankr. R. 1011.

[132] *See* Bankr. R. 1011(b), 1014; Fed. R. Civ. P. 12.

[133] *See* Bankr. R. 9014(c) (applying to contested matters most discovery rules of Bankr. R. 7026–7037).

[134] Bankr. R. 1003(a).

[135] 11 USC §303(b)(1); *In re Sims*, 994 F.2d 210, 220–21 (5th Cir. 1993). *See also In re All Media Props., Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981); 2 *Collier on Bankruptcy* ¶303.08[11][a] (1993). *See* 11 USC §§303(b)(1), (h)(1).

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- A debtor must "generally" fail to pay his or her debts when they are due.[136]

In addition, if an involuntary bankruptcy petition is denied or dismissed other than by agreement of all parties, the court "may" make the petitioning creditors pay the debtors costs and reasonable attorney fees,[137] even if the petition was filed in good faith.[138] Indeed, if an involuntary bankruptcy petition is dismissed, a rebuttable presumption arises that the court should award attorney fees and/or costs to the debtor.[139] Finally, if the involuntary petition was filed in bad faith, the court may also award compensatory damages for injuries proximately caused by the involuntary filing as well as punitive damages.[140]

Bankruptcy Code §541's Trust Exclusion

The filing of a bankruptcy petition creates a bankruptcy estate that includes "all legal or equitable interests of the debtor in property as of the commencement of the case," [141] but certain assets or interests are excluded [142] or exempted [143] from the debtor's estate. For debtors with interests in Delaware CRTs, the most important exclusion is Bankruptcy Code §541(c)(2), which states, "[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."

This means that a debtor's equitable interest in a valid spendthrift trust is excluded from his or her bankruptcy estate.[144]

Traditionally, Bankruptcy Code §541(c)(2) was used to exclude a debtor's beneficial interest in spendthrift trusts funded by third parties,[145] and, at one time, there was great controversy about whether Bankruptcy Code §541(c)(2) excluded from the bankruptcy estate a debtor's spendthrift interest in an ERISA trust.[146] However, in *Patterson v. Shumate* [147] the Supreme Court held that a debtor's interest in an ERISA-qualified plan was excludable from his bankruptcy estate and that Bankruptcy Code §541(c)(2) "entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." [148] *Patterson* and its progeny apply to retirement and pension funds even though ERISA plans, IRAs, and similar plans are essentially self-settled spendthrift trusts for the benefit of the trustor-debtor.[149]

Bankruptcy Code §541(c)(2) and Applicable Nonbankruptcy Law

The test for determining whether Bankruptcy Code §541(c)(2) applies, "... normally has three parts: First, does the debtor have a beneficial interest in a trust? Second, is there a restriction on the transfer of that interest? Third, is the restriction enforceable under nonbankruptcy law?" [150]

The trustor's interest in a Delaware CRT will meet the first two requirements because the trustor will have a beneficial interest in the trust and because, to qualify under the Delaware Act, the trust must contain a spendthrift clause. Consequently, the focus of the inquiry will be the third prong of the test, which requires the spendthrift provision to be enforceable under applicable nonbankruptcy law. In the case of a Delaware CRT, the applicable law will be state law because bankruptcy law looks to state law to determine a debtor's—and hence the bankruptcy estate's—interest in property unless federal law requires otherwise.[151] This, in turn, raises two related questions. First, which state's law applies? Second, what does applicable law provide?

In the case of Delaware CRTs, the answer to the second question is rather straightforward — a debtor's interest in a self-settled spendthrift trust is off-limits to the trustor's own creditors, subject to exceptions for a handful of preferred creditors and except to the extent that funds were fraudulently transferred into trust.[152] The real issue, then, is determining which state's law to apply.

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[136] 11 USC §303(h)(1); *In re Moss*, 249 B.R. 411 (Bankr. N.D. Tex. 2000). *See, e.g., id.* and cases cited therein.

[137] 11 USC §303(i)(1).

[138] *See, e.g., In re Advance Press & Litho, Inc.*, 46 B.R. 700, 702 (D. Colo. 1984).

[139] *See, e.g., In re Denver Cmty. Dev. Credit Union*, Case No. 04-23761 HRT (Bankr. D. Colo. 2004), and cases cited therein, *available at www.cob.uscourts.gov/opinions/04-23761sanctionsorder.pdf* (last visited Feb. 22, 2006).

[140] 11 USC §303(i)(2).

[141] *Id.* at §541(a)(1).

[142] *See id.* at §541(b), (c)(2).

[143] *Id.* at §522.

[144] 2 Cowans, *Bankruptcy Law and Practice* §5.9 at 86 (1998).

[145] *See, e.g., First Nw. Trust Co. v. IRS*, 622 F.2d 387 (8th Cir. 1980); *Mann v. Kreiss*, 72 B.R. 933, 942 (Bankr. E.D.N.Y. 1987).

[146] *See, e.g., Meehan v. Wallace (In re Meehan)*, 102 F.3d 1209, 1212 n.7 (11th Cir. 1997) (collecting cases).

[147] 504 U.S. 753 (1992).

[148] *Id.* at 758.

[149] *See* Sullivan, "Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts," 23 *Del. J. Corp. L.* 423, 429–32 (1998); 2 Cowans, *Bankruptcy Law and Practice* §9.2(j) at 86 (1998).

[150] *Taunt v. Gen. Retirement Sys. (In re Wilcox)*, 233 F.3d 899, 904 (6th Cir. 2000).

[151] 2 Cowans, *Bankruptcy Law and Practice* §9.2(a) at 339-40 (1998). *Accord McNeilly v. Geremia (In re McNeilly)*, 249 B.R. 576, 580 (B.A.P. 1st Cir. 2000). *See also Schwen v. Ramette (In re Schwen)*, 240 B.R. 754, 757 (Bankr. D. Minn. 1999).

[152] *See* Del. Code Ann. tit. 12, §§3572–3573.

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The two most notable approaches for determining which state's law is applicable under Bankruptcy Code §541(c)(2) are the *Klaxon* rule and the *Spindle* rule. The *Klaxon* rule is based on *Klaxon v. Stentor Elec. Mfg. Co.* [153] Under it, when determining which state's law applies to a spendthrift trust, bankruptcy courts follow the forum's choice of law rules.[154]

Under the *Spindle* rule, some bankruptcy courts rely on the 1884 Supreme Court case of *Spindle v. Shreve* [155] and simply declare that the law governing a trust is the law of the state in which it was created and/or is administered.[156] On the one hand, *Spindle* and its rule predate *Erie R.R. v. Tompkins* by more than half a century and are unmoored from any state conflict-of-law doctrine, and arguably ignore the Rules of Decision Act because of their failure to heed state conflicts doctrine. The *Spindle* rule is therefore open to criticism as an unwelcome throwback to *Swift v. Tyson* and its discredited notions of overarching federal common law.[157] On the other hand, the *Spindle* rule may well be defensible on the grounds that it merely establishes a federal standard to determine a federal question (i.e., what nonbankruptcy law is "applicable"); it offers the advantage of relative simplicity; and, as shown by the citations in the prior footnotes, is popular with many courts.

Whatever approach is selected, debtors claiming the benefit of Bankruptcy Code §541(c)(2) bear the burden of showing that it applies,[158] which means trustors of Delaware CRTs must convince the court that Delaware law applies. This, though, is a burden that should be carried. In *Klaxon* cases, a debtor often will revisit the same factors and issues considered above in connection with Hurdle 5. For the same reasons outlined above, Delaware's law should apply. The controlling nature of Delaware law is even clearer under the *Spindle* rule. All that must be shown is that the trust was created in and is administered in Delaware, and perhaps that there is an express choice of Delaware law in the trust instrument. These facts can be evidenced in virtually every case involving a Delaware CRT. Hence, whether the *Klaxon* rule or the *Spindle* rule is used, Delaware law should apply.

Creditors, of course, will argue that the "applicable nonbankruptcy law" for Bankruptcy Code §541(c)(2) purposes is the law of a jurisdiction that does not recognize self-settled spendthrift trusts, such as the law of the forum, which is almost always the same as a bankrupt debtor's domicile. Scott indicates that the creditor would be unsuccessful.[159]

Moreover, bankruptcy courts routinely conclude that non-forum law governs a trust, notwithstanding a debtor's actual or apparent domicile in the forum.[160] Similarly, bankruptcy courts routinely determine the exemption of tenancy-by-the-entireties property based on the law of the jurisdiction in which the entireties estate was created, and not the law of the debtor's domicile.[161] This latter point is significant because, under the relevant exemption language, bankruptcy courts again are directed to base their decisions on "applicable nonbankruptcy law." [162] Because words and phrases used in one part of the Bankruptcy Code are presumed to have the same meaning in all code sections,[163] the bankruptcy courts' use of out-of-state law to determine entireties rights is a strong signal that they will also look to out-of-state law to determine Delaware CRT rights, provided the law in question is "applicable" under the relevant choice-of-law rules.

We are not aware of any case in which a bankruptcy judge has considered whether Bankruptcy

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[153] 313 U.S. 487, 496–97 (1941).

[154] *See, e.g., Sattin v. Brooks (In re Brooks)*, 217 B.R. 98, 101 (Bankr. D. Conn. 1998); *Marine Midland Bank v. Portnoy (In re Portnoy)*, 201 B.R. 685, 697 (Bankr. S.D.N.Y. 1996); *In re Gillette*, 248 B.R. 845, 849 (Bankr. M.D. Fla. 1999).

[155] 111 U.S. 542, 547 (1884).

[156] *See, e.g., Heidkamp v. Galliher (In re Hunger)*, 272 B.R. 792, 795 (Bankr. M.D. Fla. 2002); *In re Hunter*, 261 B.R. 789, 791 (Bankr. M.D. Fla. 2001); *Schwen v. Ramette (In re Schwen)*, 240 B.R. 754, 757 (Bankr. D. Minn. 1999); *In re Gower*, 184 B.R. 163, 165 (Bankr. M.D. Fla. 1995); *McCauley v. Hersloff*, 147 B.R. 262, 264 (Bankr. M.D. Fla. 1992); *In re Graham*, 1989 Bankr. Lexis 1283 (Bankr. D. Vt. 1989); *In re Anselmi*, 52 B.R. 479, 490 (Bankr. D. Wyo. 1985).

[157] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), discussing and overruling *Swift v. Tyson*, 41 U.S. 1 (1842).

[158] *Rhiel v. Adams (In re Adams)*, 302 B.R. 535, 540 (B.A.P. 6th Cir. 2003).

[159] 5A Scott & Fratcher, *The Law of Trusts* §626(e) at 422 (4th ed. 1989).

[160] *See, e.g., In re Newman*, 903 F.2d 1150, 1152 n.2 (7th Cir. 1990); *In re Hecht*, 54 B.R. 379, 382–83 (Bankr. S.D.N.Y. 1985), *aff'd sub nom. Togut v. Hecht*, 69 B.R. 290, 291 (S.D.N.Y. 1987); *Heidkamp v. Galliher (In re Hunger)*, 272 B.R. 792, 795 (Bankr. M.D. Fla. 2002 *In re Hunter*, 261 B.R. 789, 791 (Bankr. M.D. Fla. 2001); *Schwen v. Ramette (In re Schwen)*, 240 B.R. 754, 757 (Bankr. D. Minn. 1999); *Dzikowski v. Edmonds (In re Cameron)*, 223 B.R. 20, 24 (Bankr. S.D. Fla. 1998); *In re Gower*, 184 B.R. 163, 165 (Bankr. M.D. Fla. 1995); *In re Herzig*, 167 B.R. 707, 709 (Bankr. D. Mass. 1994); *McCauley v. Hersloff*, 147 B.R. 262, 264 (Bankr. M.D. Fla. 1992); *In re Sanders*, 89 B.R. 266, 269 (Bankr. S.D. Ga. 1988); *In re Kragness*, 58 B.R. 939 (Bankr. D. Or. 1986); *In re Hall*, 22 B.R. 942, 943 (Bankr. M.D. Fla. 1982); *In re Remington*, 14 B.R. 496, 502 (Bankr. D.N.J. 1981).

[161] *See, e.g., In re Nelms*, 2005 Bankr. Lexis 138 (Bankr. E.D. Mich. 2005); *McNeilly v. Geremia (In re McNeilly)*, 249 B.R. 576, 580-81 (B.A.P. 1st Cir. 2000); *In re Wiza*, 248 B.R. 470, 473–74 (Bankr. D.N.H. 2000); *In re Gillette*, 248 B.R. 845, 849-50 (Bankr. M.D. Fla. 1999); *In re Cochrane*, 178 B.R. 1011, 1020 (Bankr. D. Minn. 1995); *In re Anselmi*, 52 B.R. 479, 490 (Bankr. D. Wyo. 1985); *In re Hayden*, 41 B.R. 21, 23 (Bankr. E.D. Ky. 1983).

[162] 11 USC §522(b)(2)(B).

[163] *See Patterson v. Shumate*, 504 U.S. 753, 758 (1992)..

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Code §541(c)(2) applies to a DAPT. Nevertheless, courts that refused to extend Bankruptcy Code §541(c)(2) to other self-settled spendthrift trusts did so because applicable state law held that these devices were ineffective against the trustor's own creditors.[164] This, of course, returns to the question of what state's law would be applicable. Various commentators believe that the law designated within a DAPT will apply, and that DAPTs would be excluded from the bankruptcy estate.[165] More significantly, bankruptcy judges plainly have suggested during seminars that DAPT laws will deserve recognition in various circumstances.

During a nationally televised program conducted on November 5, 2002, Chief Bankruptcy Judge Mahoney of the U.S. Bankruptcy Court for the Southern District of Alabama was asked if U.S. courts will honor the DAPT statutes.[166] She responded:

> The full faith and credit issue is going to be a really tough one for courts, and it's really hard to say we're not going to recognize a Delaware trust, we're not going to recognize another state's valid law even though it's offensive to our law. I can think of situations like that right now in different arenas where something that's a hotly contested or emotional issue in one state is dealt with differently in another state but we still recognize it and so I see some really interesting cases coming up.

More recently, Bankruptcy Judge Hyman of the U.S. Bankruptcy Court for the Southern District of Florida was asked the same question, and he responded:[167]

> Other than [Section] 707, 727, or 548, the bankruptcy court looks to state law and is bound by state law. Before this legislation, we were asked to look at other types of trusts where the debtor was the settlor and beneficiary of a trust. We didn't look to federal law to determine whether the creditors could reach the assets. We looked to state law and the state where the trust is domiciled generally. So, this would be no different.

When asked if the Supremacy Clause would change the result, he opined, "[f]rankly, I don't understand that argument because. . . if there was a valid spendthrift clause and state law said creditors could not get to the assets, then the courts had to follow that state law."[168]

Lastly, the Delaware Act expressly provides that the spendthrift clause in a Delaware CRT is to be considered a restriction described in Bankruptcy Code §541(c)(2).[169] Although this statement of Delaware's legislative intent may not prevent a bankruptcy court from undertaking a *Klaxon* or *Spindle* conflict-of-laws analysis, it will nonetheless be a significant factor to consider anytime a court assesses the relative importance that competing jurisdictions place on their respective policy interests. Delaware has made plain that it intends its APTs to survive bankruptcy, and therefore bankruptcy courts (and nonbankruptcy courts as well) must tread warily lest they show unconstitutional disregard for Delaware's interest.

BAPA and Bankruptcy Code §548(e)'s 10-Year Look-Back Rule

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPA), which addresses the bankruptcy treatment of self-settled trusts.[170] Under new §548(e) of the Bankruptcy Code, which applies to bankruptcies commenced on or after April 20, 2005,[171] trustees may sue to avoid a transfer to a "self-settled trust or similar device" made on or within 10 years before the date of the filing of a bankruptcy petition if, in addition to other technical criteria, the transfer was made "with actual intent to hinder, delay, or defraud" any creditor to which the debtor was or became indebted on or after the date that such transfer was made.

We don't know how bankruptcy courts will interpret Bankruptcy Code §548(e). However, the worst-case scenario is that it merely creates a 10-year limitations period for avoidance actions based on fraudu-

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[164] *See Menotte v. Brown (In re Brown)*, 303 F.3d 1261, 1265-70 (11th Cir. 2002); *Shurley v. Tex. Commerce Bank-Austin, N.A. (In re Shurley)*, 115 F.3d 333, 337–42 (5th Cir. 1997); *Lindquist v. Mack (In re Mack)*, 269 B.R. 392 (Bankr. D. Minn. 2001); *Aylward v. Landry (In re Landry)*, 226 B.R. 507, 512 (Bankr. D. Mass. 1998).

[165] Bacon & Terrill, "Domestic Asset Protection Trusts Work—Should They?," 26 *Tax Mgmt. Est., Gifts & Tr. J.* 123, 130–31 (May 2001); Blattmachr & Rivlin, "A New Paradigm in Estate Planning: The Non-Estate Tax Aspects of Estate Planning," 140 *Tr. & Est.* 38, 38–39 (Mar. 2001); McCoskey, "Death and Debtors: What Every Probate Lawyer Should Know About Bankruptcy," 34 *Real Prop. Prob. & Tr. J.* 669, 691 (Winter 2000).

[166] Honorable Margaret A. Mahoney, Remarks at ALI-ABA, Asset Protection Planning, Live Nationwide via Satellite on the American Law Network (Nov. 5, 2002).

[167] Honorable Paul G. Hyman, Jr., Remarks during panel discussion on Tax and Asset Protection Issues Involved in Bankruptcy at the American Bar Association's Joint Tax Section and Real Property, Probate and Trust Law Sections Fall CLE Meeting (Oct. 1, 2004).

[168] *Id.*

[169] Del. Code Ann. tit. 12, §3570(10)c.

[170] 2005 S.B. 256, P.L. 109-8 (Apr. 20, 2005).

[171] B.A.P.A. §1406.

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lent transfers. If this is the case, then any transfer that was defensible on substantive grounds before Bankruptcy Code §548(e) is still defensible today. Consequently, transactions that follow the guidelines discussed above in connection with Hurdle 7 and fraudulent transfers should survive scrutiny under this new bankruptcy provision.

The best-case scenario is that Bankruptcy Code §548(e) requires proof that a debtor-transferor had specific creditors in mind when making an alleged fraudulent transfer. In an analysis co-authored by the Honorable William Houston Brown, a bankruptcy judge in the Western District of Tennessee, the authors note that Bankruptcy Code §548(e):[172]

> . . . is expressed in a way that seems to indicate that the trustee must prove that the debtor made the transfer to the self-settled trust with the intent to hinder, delay, or defraud a specific creditor or creditors to whom the debtor was indebted at the time of the transfer or to whom the debtor became indebted after the transfer. . . In other words, the trustee would need to show the existence of actual creditors and relate the debtor's intent to those creditors, rather than merely showing that the debtor created or transferred to an asset protection device.

Delaware CRTs will benefit if this view is correct. Typical U.S. fraudulent-transfer law allows creditors to assert a theory of fraud on future creditors, even if the debtor made a transfer without a specific creditor in mind. These claims are already difficult to prove, particularly if the debtor remained solvent after the transfer. However, under Judge Brown's reading, this type of claim moves from the realm of the difficult into that of the near impossible—only claims involving specific, actual creditors could prevail under Bankruptcy Code §548(e), and cases that cannot link a transfer to such creditors cannot succeed. Because good planning is not motivated by a desire to "stiff" a particular creditor, but is instead general "rainy day" planning to protect against unforeseen disasters, it's hard to see how a future creditor can link himself or herself to a prior transfer and satisfy the standard set by Judge Brown's interpretation.

Ultimately, transferors who intentionally retain post-transfer solvency, who disclose transfers whenever possible, who do not make transfers on the eve of risky new ventures, and who do not obtain credit under false pretenses will have plans that are defensible under either reading of Bankruptcy Code §548(e).

[172] Brown & Ahern, *2005 Bankruptcy Reform Legislation with Analysis* 77 (2005).

Post-Petition Distribution

If a trustor's interest in a Delaware CRT is excluded from the bankruptcy estate under Bankruptcy Code §§541(c)(2) and 548(e), it must then be determined whether any trust distributions to the trustor after the filing of the bankruptcy petition will become part of the bankruptcy estate. The relevant Bankruptcy Code provision is §541(a)(5), which provides in pertinent part as follows:[173]

> Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—
>
> (A) by bequest, devise, or inheritance.

To be included in the bankruptcy estate under Bankruptcy Code §541(a)(5)(A), a Delaware CRT distribution must meet two requirements. First, the debtor must receive it within 180 days after the filing of the bankruptcy petition (not at all times thereafter). Second, it must result from a "bequest, devise, or inheritance."

Because the Bankruptcy Code does not define "bequest," "devise," or "inheritance," courts considering Bankruptcy Code §541(a)(5)(A) look to applicable state law and, in the absence thereof, to *Black's Law Dictionary*,[174] which defines the terms as follows:

- A "bequest" is "the act of giving property (usually personal property) by will."
- A "devise" is "the act of giving property by will."
- An "inheritance" is "property received from an ancestor under the laws of intestacy."

It's hard to see how an interest in an inter vivos trust fits into any of these categories, and courts agree. For instance, in *Newman*,[175] income distributions received by the debtor from two irrevocable inter vivos spendthrift trusts within 180 days after the filing of the bankruptcy petition were not includable in his bankruptcy estate. Principal interests are also protected. Thus, both *Zimmerman v. Spencer (In re Spencer)* [176] and *Roth*[177] held that principal payable to a debtor from an inter vivos trust due to the death of a

[173] 11 USC §541(a)(5).

[174] *Black's Law Dictionary* (8th ed. 2004). *See also In re Roth*, 289 B.R. 161, 166 (Bankr. D. Kan. 2003).

[175] 903 F.2d 1150 (7th Cir. 1990).

[176] 306 B.R. 328, 333–36 (Bankr. C.D. Cal. 2004).

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parent within 180 days after the filing of a bankruptcy petition did not come into the bankruptcy estate.

CONCLUSION

Critics of DAPTs—offshore APT proponents and APT opponents—contend that U.S. constitutional strictures, such as the Full Faith and Credit Clause, the Due Process Clause, and the Supremacy Clause, fatally compromise a DAPT's ability to protect assets. As shown above, however, these critics offer too superficial an analysis.

Accordingly, by keeping the right to transfer all or part of a retained interest in a CRT to charity and by structuring the CRT as an Alaska, Delaware, South Dakota, or Utah APT, a trustor may make additional charitable gifts and secure his or her CRT payments from future financial reversals. Shouldn't every CRT be structured in this manner? There seems to be no downside, and the alternative—creating the CRT in a non-DAPT jurisdiction (where the trustor's retained interest will be completely vulnerable to creditor claims)—is a poor alternative indeed.

Furthermore, a CRT that is structured as a Delaware APT should not be reachable by a disgruntled surviving spouse who elects against the will of a Delaware or non-Delaware trustor in any circumstances and thereby should satisfy the requirements of Rev. Proc. 2005-24. Although a Delaware CRT might alone suffice to comply with that procedure, it would be prudent, for the time being, to obtain spousal waivers and to institute other safeguards.

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[177] 289 B.R. 161, 169 (Bankr. D. Kan. 2003).

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