

ASSET PROTECTION TRUSTS — the New Game in Town

By Douglas G. Chalgian, CELA ©2017



With little fanfare, at the close of 2016, the Michigan Legislature passed (and Governor Snyder signed) legislation that created a new and dramatically different estate planning option for Michigan residents. These new laws allow for so-called domestic asset protection trusts (DAPT). Here's what you need to know:

What is a DAPT?

A domestic asset protection trust is a trust that allows a person to create an irrevocable trust, title assets in the trust, have those assets provide for their future needs, while also protecting those assets from that person's future creditors.

This is new to Michigan law. Previously, Michigan law, like the law in most states, allowed creditors to go after assets that were put in trust by a debtor, to the extent those assets could be used for that debtor's benefit. That is, without these new laws, you could not have your cake (be supported by the assets you placed in trust) and eat it too (tell your creditors to take a hike). Now you can.

What's the catch?

Initially the concept sounds too good to be true. And for most people, it is. In order to avail oneself of the benefits of a DAPT, you have to have assets that you can put in trust, with the understanding that those assets will only be used for your support and maintenance, or distributed to you at the discretion of the trustee. That means, unlike assets that you retain unfettered control over, you give up control of the assets you put in a DAPT, and the extent they are used for your benefit in the future is limited. That's a big problem for most people. Which is why DAPTs are really best suited for people who have a lot of assets, some of which they really don't need, and just want to put away for later in case something really bad happens—like they get sued for a lot of money for something their insurance doesn't cover. Otherwise, why would anyone give up control of their money?

It is also important to understand that you can't use a DAPT to protect assets from creditors who already exist. So if someone already knows they owe money to someone else, or have reason to expect that they are about to get sued, setting up a DAPT won't help. It's too late. A DAPT only benefits

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people who can afford to put money away for their future and who do so at a time when they don't already have creditors lurking.

Where else do these trusts exist?

Self-settled asset protection trusts have been around a long time. Some foreign countries, especially small island nations, have served as havens for this type of planning for years. Trusts created under the laws of these foreign jurisdictions would be foreign or "offshore" asset protection trusts. In the United States, including Michigan, only 15 states currently have these types of laws. These would be the places that allow for "domestic" asset protection trusts.

Not about Medicaid

People are often concerned about the costs of nursing homes, and will be given advice about how to "protect assets" and qualify for government assistance with long-term care costs. DAPTs provide no protection for people who want help with their care costs. These concepts should not be confused with one another.

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Conclusion

Michigan is becoming an exciting place for estate planning lawyers. Since the passage of the new Michigan Trust Code in 2010, there have been several important developments in Michigan law that have put Michigan on the cutting edge of places to engage in estate planning. The addition of DAPTs is certainly one of those developments. And while DAPT planning is exciting and new, people should not be too quick to believe that such options are right for them. Anyone who wants to understand the potential benefits of DAPTs, or how they might benefit from other important developments in Michigan estate planning law, should meet with a qualified attorney to discuss their estate planning needs.

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Mr. Chalgian previously served on the Commission on Services to the Aging. He was one of about a dozen attorneys on the Michigan Trust Code Drafting Committee, and has been selected three times as one of the top 100 lawyers in Michigan by Super Lawyers Magazine. Mr. Chalgian writes and speaks regularly on the topics of estate planning, elder law, and probate court litigation.

