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Innovation or a Race to the Bottom? Trust "Modernization" in New Hampshire

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I. INTRODUCTION

Late last summer, Governor Lynch signed into law Senate Bill 465, designed to further update New Hampshire's trust law.[1] This bill follows

* This title was inspired by (or stolen from) William L. Cary, who described jurisdictional competition in corporate law as a "race for the bottom, with Delaware in the lead." William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974).

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1. S.B. 465, 2008 Sess. (N.H. 2008), *available at* http://www.gencourt.state.nh.us/legislation/2008/SB0465.html.

similar legislation in Alaska, Delaware, Nevada, and several other states.[2] It adds major new provisions to the existing statutory framework for irrevocable trusts.[3] The bill allows for the creation of so-called self-settled asset protection trusts or domestic asset protection trusts (DAPTs).[4] DAPTs represent the latest chapter in our State's move away from traditional trust and estate principles towards a system of dynastic and (theoretically) creditor-proof trusts.

This legislation results from New Hampshire's desire to retain and attract trust activity.[5] Effective January 2, 2009, the new Qualified Dispositions in Trust Act[6] allows beneficiaries to "self settle" irrevocable spendthrift trusts—for example, put assets into trust for their own benefit, while placing those assets, in many circumstances, out of the reach of most creditors.[7] This article will attempt to answer some questions about these trusts. Will RSA 564–D succeed in increasing New Hampshire's share of the domestic trust business? Will these new trusts prove to be effective against creditors? Finally, what are the policy implications of these new trusts?

II. TRUST REFORM

A. *The Rule Against Perpetuities*

Until 1984, most United States jurisdictions recognized a version of the common law rules against the remoteness of vesting or against the suspension of the power of alienation.[8] These common law restrictions are usually referred to as the Rule Against Perpetuities (RAP).[9] Prior to 1986, the three states that had abolished the RAP "experienced little or no result-

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2. *New Hampshire Enacts Domestic Asset Protection Trust and Related Legislation*, MCGUIREWOODS.COM, July 7, 2008, http://www.mcguirewoods.com/news-resources/news/3383.asp?SearchFor=Domestic%20Asset%20Protection%20Trust.

3. *Id.*

4. *Id.*

5. *See* N.H. S.B. 465. The bill, as enacted, states:

> This act will serve to continue New Hampshire's firm commitment to be the best and most attractive legal environment in the nation for trusts and fiduciary services, an environment that will continue to attract to our state good-paying jobs for trust and investment management, legal and accounting professionals, and other professionals to provide the support and infrastructure required to service this growing sector of the nation's economy.

Id.

6. N.H. REV. STAT. ANN. § 564-D (2008).

7. *Id.* § 564-D:10.

8. *See* GEORGE T. BOGERT ET AL., TRUSTS 184–92 (1987).

9. *Id.* at 188. (In many jurisdictions in the U.S., the traditional common law RAP, a life in being plus twenty-one years, has been modified for practical reasons. In the mid-1980s, the drafters of the Uniform Statutory Rule Against Perpetuities adopted a ninety-year "wait and see" version of the common law RAP.) *Id.*

ing advantage in the jurisdictional competition for trust funds."[10] The generation-skipping transfer tax exemptions in the Tax Reform Act of 1986[11] provided "significant" tax benefits to trusts in states that had abolished the RAP to "continue, free from federal wealth transfer taxation, generation after generation, forever."[12] By the end of 2004, twenty states had significantly weakened or abolished the RAP as applied to interests in trusts.[13] Since then, several states, including New Hampshire, have enacted trust laws enabling transferors to take advantage of the new tax regime, effectively eliminating the RAP.[14]

Whether the weakening or elimination of the RAP as a result of the tax benefits of modified trust law is good public policy is beyond the scope of this essay and is the subject of active debate amongst commentators and practitioners.[15] However, in the years following the 1986 Act, empirical analysis revealed a dramatic increase in reported trust assets for those states that abolished the RAP,[16] and others postulate that "trust funds flow to states with more favorable laws and lower taxes. States that do not provide such benefits will lose trust business."[17] Also, commentators have written extensively on the impact of jurisdictional competition in promoting more efficient regulation.[18]

10. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: an Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373 (2005) [hereinafter *Jurisdictional Competition*]. The three states were Idaho, South Dakota and Wisconsin. *Id.*

11. 26 U.S.C. §§ 2601–2663 (1986).

12. *Jurisdictional Competition*, *supra* note 10, at 371 n.42.

13. *Id.* at 359; *see* Mary Louise Fellows, *Why the Generation Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2511–18 (2006).

14. *Jurisdictional Competition*, *supra* note 10, at 376. The authors state:

> The Delaware statute triggered a race to abolish the Rule. Between 1997 and 2000, Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island authorized perpetual trusts. By late 2005, Colorado, Florida (360 years), Missouri, Nebraska, Nevada (365 years), New Hampshire, Utah (1000 years), Virginia, and Wyoming (1000 years) had followed suit. Legislation designed to abolish the [RAP] is under consideration in several other states.

Id.

15. Lynn Foster, *Fifty-One Flowers*, 29 U. ARK. LITTLE ROCK L. REV 411, 415–37 (2007).

16. *Jurisdictional Competition*, *supra* note 10, at 359 (concluding that over $100 billion in trust assets had moved to take advantage of new trust laws).

17. Robert M. Sitkoff & Max M. Schanzenbach, *Perpetuities, Taxes, and Asset Protection: An Empirical Assessment of the Jurisdictional Competition for Trust Funds*, *in* HARVARD LAW SCHOOL JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS DISCUSSION PAPER SERIES, paper 609, ¶ 1212.2, at 12-30 (2008) [hereinafter *Perpetuities, Taxes, and Asset Protection*], *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1397&context=harvard/olin.

18. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1038–39 (2000) ("In recent decades, legal scholars have moved beyond corporate law to evaluate the effect of interjurisdictional competition in other areas of law, including banking law, [and] environmental law . . . ." (internal citations omitted)).

B. *Spendthrift Trusts*

Most states recognize the validity of "spendthrift" provisions in trusts, allowing the transferor to protect the trust assets from the beneficiaries' potential creditors.[19] It was universally accepted, however, that a spendthrift provision would not protect a transferor's assets from creditors by placing them in a trust where he or she was also the beneficiary (so-called self-settled trusts).[20] Recent caselaw illustrates this notion: while "a spendthrift provision prohibiting involuntary transfers is valid and enforceable, [*a*] *spendthrift provision prohibiting involuntary transfers is not valid if the beneficiary is the settlor.*"[21]

Similarly, under traditional law, a settlor could not avoid creditors by creating a discretionary trust.[22] A discretionary trust is one in which the trust documents give the trustee discretion to pay income or principal to the beneficiary, or pay nothing.[23] Generally, absent fraud, the principal and income of a discretionary trust are out of the reach of creditors on the theory that the beneficiary has no interest in the trust property unless and until the trustee, in his sole discretion, distributes it to the beneficiary.[24] However, the traditional rule is if the discretionary trust beneficiary is also the settlor, the creditor can "reach the maximum amount the trustee, in the proper exercise of fiduciary discretion, could pay for the benefit of the settlor."[25]

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19. A trust's "spendthrift" provision provides that the beneficiary is unable to transfer a right to future payments of income or principal, effectively preventing creditors from claiming trust assets or income not distributed in settlement of claims. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(1) (2003) ("[T]he terms of a trust provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid."). *But see* Tillinghast v. Bradford, 5 R.I. 205, 212 (1858) ("Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice." (emphasis omitted)).

20. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1) (1959) ("Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest."); RESTATEMENT (THIRD) OF TRUSTS § 58(2) (2003) ("A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid.").

21. Speed v. Speed, 430 S.E.2d 348, 349 (Ga. 1993) (internal citation omitted); *accord* Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A., 100 A.D.2d 544, 545–46 (N.Y. App. Div. 1984).

22. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959) ("Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.").

23. *See* BOGERT ET AL., *supra* note 8, at 160.

24. *Id.*

25. RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. f (2003).

1. *Offshore Trusts*

In an effort to attract U.S. domestic trust administration business, a number of foreign jurisdictions developed trust laws eliminating the traditional creditor protection rule in self-settled spendthrift and discretionary trusts.[26] Professor Sterk describes why the Cook Islands is a favorite site for trust assets:

> Consider the Cook Islands' International Trusts Act of 1984. By its terms, the statute applies only to international trusts, not to trusts established for the benefit of residents of the Cook Islands—a sure sign that the purpose of the statute was to attract foreign capital. To that end, the statute includes numerous measures that make the Cook Islands a favorite trust situs for settlors seeking to avoid creditor claims. First, the statute makes self-settled spendthrift trusts fully enforceable. Second, the statute provides that creditors may not reach a settlor's interest in an international trust even if the settlor retains a right to revoke the trust. As a result, once a settlor's assets enter a Cook Islands international trust, the settlor's creditors may not attach the settlor-beneficiary's interest. Third, although the law of the Cook Islands was founded on English law, including the Statute of Elizabeth's prohibition on fraudulent transfers, the statute now virtually precludes creditors from attacking a transfer into a Cook Islands international trust as a fraudulent conveyance. Under the statute, even if a creditor proves that the settlor intended to defraud by transferring assets into a trust, the creditor may not reach the trust assets unless the settlor was insolvent at the time the creditor's claim arose. Moreover, even in the rare case in which a transfer to an international trust is deemed fraudulent, the Cook Islands statute imposes a short statute of limitations on creditor claims: the creditor must bring the action within one year from the date of the fraudulent transfer. As a result, if the settlor of a Cook Islands trust is solvent when she transfers assets into the trust, the transfers will not, under Cook Islands law, be voidable at the behest of creditors. Finally, the statute expressly provides that no Cook Islands court shall enforce or recog-

26. For a discussion of the evolution of foreign trusts from primarily tax avoidance or tax evasion devices into mechanisms to capture assets from settlors wishing to avoid liability from potential creditors, see Sterk, *supra* note 18, at 1048–50. As an example of offshore trusts, Professor Sterk also describes the anti-creditor construction of the trust statutes in the Cook Islands, where the creditor's claims are extinguished, even in some cases, where the creditor can prove, in a Cook Islands court, that the settlor intended to defraud the creditor. *Id.* Courts in the Cook Islands will generally not honor judgments obtained in foreign jurisdictions—including the United States. *Id.*

> nize a foreign judgment against a Cook Islands trust, or a settlor, trustee, or beneficiary of the trust, if the judgment is based upon application of a law inconsistent with the statute.[27]

Other foreign jurisdictions have similar creditor-protective trust regimes.[28] States began to recognize that as much as a trillion dollars of U.S. citizens' assets now reside in foreign trusts.[29] As some states modified trust rules regarding the RAP, many of those same states have modified or eliminated the long-standing rules against creditor protection in self-settled spendthrift and discretionary trusts.[30]

2. *Domestic Asset Protection Trusts*

In the early 1990s a New York trust attorney, on a fishing trip in Alaska with his brother and a friend, an Alaskan attorney, conceived of the idea of reforming Alaska's statutory trust framework to provide for a domestic version of the offshore self-settled asset protection trust as a means to attract trust business to the state.[31] They were successful in implementing their idea.[32] They drafted and contributed to the passage of the Alaska Trust Act in 1997 allowing DAPTs.[33] The partners then formed the Alaska Trust Company to take advantage of the anticipated influx of trust business.[34] Shortly thereafter, Delaware entered the mix and passed similar legislation, intending to compete with Alaska and "to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts."[35] Since then, at least seven more jurisdictions (now including New Hampshire) have authorized DAPTs, each with varying provisions.[36]

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27. *Id.* (internal citations omitted).

28. *See* Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts*, 23 EST. PLAN. 65, 71 (1996). The author claims that, at the time of writing, at least thirteen jurisdictions provide for self-settled asset protection trusts, including the Bahamas, Barbados, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Mauritius, Turks and Caicos, Nevis, and Neue. *Id.* at 71 n.1.

29. *See* Sterk, *supra* note 18, at 1050–51.

30. Robert Sitkoff, *The Rap on RAP*, HARVARD LAW BULLETIN (Winter 2008), http://www.law.harvard.edu/news/bulletin/2008/winter/ask.php ("Nearly half the states have repealed or modified the [RAP] to allow for perpetual trusts. And, 10 states have validated the so-called self-settled asset protection trust . . ." including Alaska, South Dakota, Delaware, Nevada, and Wyoming).

31. For a description of the genesis of the Alaska Trust Company, see *About Us*, ALASKA TRUST CO., http://www.alaskatrust.com/index.php?id=32 (last visited Feb. 27, 2009).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Jurisdictional Competition*, *supra* note 10, at 382 (quoting H.R. 356, 139th Gen. Assemb., 71 Del. Laws 159 (1997)).

36. Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2686–87 (2006).

III. NEW HAMPSHIRE ENTERS THE FRAY

New Hampshire's new Qualified Dispositions in Trust Act, which authorizes DAPTs, has several general requirements for a self-settled trust to qualify for creditor protection. The trust must:

1) be irrevocable;[37]

2) be discretionary;[38]

3) have all or part of the trust corpus located in New Hampshire;[39]

4) incorporate New Hampshire state law;[40]

5) contain a "spendthrift" provision;[41] and

6) appoint a "qualified trustee" e.g., a New Hampshire resident, or a state or federally chartered bank or trust company that has a place of business in New Hampshire and maintains records in the state.[42]

If the above criteria are properly met, creditors may have a difficult time recovering against a DAPT. For instance, the statute provides:

> no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition unless such action is brought pursuant to the provisions of RSA 545–A, the Uniform Fraudulent Transfer Act, or RSA 564–D:15.[43]

The statutory exceptions, RSA 545–A (UFTA) and RSA 546–D:15, do not offer post-disposition creditors much comfort. Absent proof of a void disposition pursuant to the UFTA (more on this below), any claims that arise against the settlor after a qualified disposition are extinguished unless (1) the settler is found to be liable in tort for damages occurring prior to the disposition, or (2) the settlor has liability for spousal support if the settlor was married at the time of the qualified disposition.[44]

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37. N.H. REV. STAT. ANN. § 564-D:2(I)(b) (2008).
38. *Id.* § 564-D:8.
39. *Id.* § 564-D:3.
40. *Id.* § 564-D:2(I)(a).
41. *Id.* § 564-D:2(I)(c).
42. *Id.* § 564-D:3.
43. *Id.* § 564-D:9.
44. *Id.* § 564-D:15(I). The statute states:

> I. Notwithstanding the provisions of RSA 564-D:9 to RSA 564-D:14, inclusive, this chapter does not apply in any respect:

RSA 564–D:10 provides that all creditors' claims are extinguished unless:

> I. The creditor's claim arose before the qualified disposition was made and the action is brought within the limitations period of RSA 545–A, the Uniform Fraudulent Transfer Act, that was in effect on the date of the qualified disposition; or
>
> II. Notwithstanding the provisions of RSA 545–A, the Uniform Fraudulent Transfer Act, the creditor's claim arose on or after the date of the qualified disposition, and the action is brought within four years after such date.[45]

Here, a "claim" has a broad meaning: it includes "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[46]

RSA 564–D:10 thus incorporates the New Hampshire UFTA statutes of limitation—regarding when a creditor's claim is extinguished—of either one year or four years.[47] Generally, after four years (or less) from the date of disposition, a creditor's claims are extinguished, regardless of the transferor's intent.[48]

RSA 564–D, while technically irrevocable and discretionary, does provide the transferor means for significant control over the activities of the trust, and trustee. For instance, the trust will not lose its irrevocability even if the transferor retains the right (among others):

1) to veto distributions;[49]

2) of special powers of appointment;[50]

> (a) To any person to whom the transferor is indebted on account of an antenuptial agreement or an agreement or order of court for the payment of support or alimony in favor of such transferor's spouse, former spouse, or children, or for a division or distribution of property in favor of such transferor's spouse or former spouse, but only to the extent of such debt; or
>
> (b) To any person who suffers death, personal injury, or property damage on or before the date of a qualified disposition by a transferor, which death, personal injury, or property damage is at any time determined to have been caused in whole or in part by the act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable.

Id.

45. *Id.* § 564-D:10.
46. *Id.* § 564-D:1(I).
47. *See id.* § 545-A (2008).
48. *Id*.
49. *Id.* § 564-D:2(II)(a).
50. *Id.* § 564-D:2(II)(b).

3) to receive trust-specified actual or potential income;[51]
4) to receive an annual receipt of up to five percent of the trust assets;[52]
5) to actually or potentially receive trust principal;[53]
6) to remove and appoint a trustee or trust advisors;[54] and
7) to use real property held in a personal residence trust.[55]

Perhaps most significant is the transferor's right to appoint and replace trust advisors and trustees. Under the statute, a trust advisor has authority (if provided for in the trust instrument) to "direct, consent to, or disapprove distribution from the trust."[56] While technically the transferor has relinquished control and dominion over the assets in the trust, the power to appoint trust advisors who in turn have the power to direct or disapprove of distributions to the transferor, in practice and effect confers great authority and control over the trust assets.[57] Unlike the trustee, the trust advisor need not be a New Hampshire resident.[58]

IV. WILL DAPTS "WORK"?

As the reader can conclude, a New Hampshire DAPT may be an attractive vehicle for asset protection, particularly in light of some of the expense and perceived risks associated with its offshore cousins.[59] But will the new DAPTs "work?" That is, will they be effective in attracting trust business to the state? And will the purported credit protection characteristics actually prove effective—especially against judgments obtained in non-DAPT states? What about the policy considerations of New Hampshire's abandonment of the traditional rule against self-settled asset protection trusts? Will the new DAPT statute lead to unintended consequences such as encouraging risky behavior by enabling wealthy transferors to become judgment proof?

51. *Id.* § 564-D:2(II)(c).
52. N.H. REV. STAT. ANN. § 564-D:2(II)(e) (2008).
53. *Id.* § 564-D:2(II)(f).
54. *Id.* § 564-D:2(II)(g).
55. *Id.* § 564-D:2(II)(h).
56. *Id.* § 564-D:4(II).
57. *Id.*
58. *See* N.H. REV. STAT. ANN. § 564-B:1–103(27) (2008).
59. For a more comprehensive description of offshore self-settled trusts, including their benefits and risks, see Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP., PROB. & TR. J. 287, 303 (2002); *see also* J. Richard Duke, *Offshore Trusts: Crossing the "T"s*, 144 TR. & EST. 49 (2005).

A. *Attracting "New" Trust Business*

It is very likely that we will never know if the New Hampshire DAPT, by itself, is successful in markedly increasing (or reducing the decrease of) trust activity in New Hampshire. So far, the empirical evidence from other states is scant. To date, the few states that have enacted DAPT statutes have also enabled dynastic trusts by eliminating the RAP.[60] This complicates the analysis because, in these states, it is difficult to know whether a change in trust activity is due to the DAPT statute or the elimination of the RAP. Also, the dynamics of the movement of trust assets to states that have only eliminated the RAP (i.e., no DAPT statute) is probably different than it is to states that have both because these trust vehicles serve two different purposes. The elimination of RAP presumably attracted new trust business from other states due to generation skipping and other tax advantages. Although DAPTs may also have tax and other advantages, DAPT statutes are designed to attract trust assets primarily for creditor protection—assets that would otherwise flow overseas.[61]

Also, competition with other jurisdictions will likely limit the amount of trust activity RSA 564–D brings to New Hampshire. New Hampshire is at least the ninth state to enable DAPTs, and it currently competes with several well-known trust destination states such as Delaware, Alaska, South Dakota, and Nevada.[62] If these devices are perceived in non-DAPT states as successfully attracting trust business to New Hampshire, jurisdictional competition is likely to further dilute any positive effect New Hampshire's DAPTs have in attracting out-of-state business.

It is currently unsettled as to how effective DAPTs will be in protecting an out-of-state transferor's assets from out-of-state creditors.[63] If, in out-of-state cases, DAPTs prove vulnerable, will New Hampshire's DAPT statute fail to attract out-of-state trust business and will these devices be primarily used only by New Hampshire's citizens?

It is interesting to note that of the approximately nine states that have adopted DAPTs, most are states with small populations. It is reasonable to assume that these states enabled DAPTs in an effort to attract new business from other, more populous non-DAPT states such as California, New York, Texas, and Florida. It may be unlikely that a small state would

60. *See Perpetuities, Taxes, and Asset Protection*, *supra* note 17, at 12-8–12-10.

61. *See generally* Richard W. Nenno & John E. Sullivan, III, *Planning and Defending Domestic Asset-Protection Trusts*, *in* ALI–ABA COURSE OF STUDY: PLANNING TECHNIQUES FOR LARGE ESTATES 797, 811–13 (2008).

62. Richard W. Nenno, *Planning with Domestic Asset Protection Trusts: Part I*, 40 REAL PROP., PROB. & TR. J. 263, 271 (2005).

63. *See infra* Part IV.B.

adopt DAPT provisions if it believed that doing so would draw only in-state trust business, effectively eliminating in-state creditors' rights. Those in favor of DAPT legislation in New Hampshire may argue that, even if DAPTs prove somewhat vulnerable for out-of-state transferors, the additional hurdles out-of-state creditors must face in enforcing a judgment may discourage creditors, or at a minimum encourage speedy settlements. In addition, DAPTs may be attractive to out-of-state transferors for gift and estate tax reasons as well as a substitute for antenuptial agreements.[64]

Obtaining meaningful empirical evidence will be difficult. Because the New Hampshire statute became effective in January 2009, with the U.S. economic situation still unsettled, arguably a great deal of discretionary assets that may have otherwise found their way into DAPTs (New Hampshire's included) either no longer exist or will be used for other purposes. It will be difficult to devise an empirical model that accurately measures the fiscal impact of RSA 564–D in light of difficult-to-control-for exogenous economic variables.

B. *Asset Protection Effectiveness*

1. *Non-DAPT States*

While the economic impact on the State is uncertain, so too are the asset-protection features of New Hampshire's DAPT. To date, the author is unaware of any domestic appellate court that has enforced a judgment against a qualified disposition in a DAPT. However, DAPTs are new devices that have yet to be tested. Several commentators have written about the "durability" of the asset protection features of DAPTs, speculating that, for public policy reasons, courts in non-DAPT states may ignore the choice of law provisions in out-of-state DAPTs.[65]

Imagine the hypothetical case of a Connecticut physician. She properly establishes a New Hampshire DAPT, placing both personal and real property, including her primary Connecticut residence, in the trust. She continues to live in her home, and collects annual distributions generated from the trust assets. Five years later, she misdiagnoses a Connecticut patient, causing him serious harm. The patient obtains a judgment against

64. *See infra* Part IV.C.2.

65. *Jurisdictional Competition*, *supra* note 10, at 384 n.88. The author states:

> Although there are not yet any definitive appellate decisions involving domestic APTs, there is a cautionary scholarly literature that explores bankruptcy law, fraudulent conveyance law, choice-of-law rules, federal constitutional considerations (such as the Full Faith and Credit Clause), and other doctrinal bases for refusing enforcement. This literature also takes on the normative policy question.

Id.

the physician. Will the patient be able to enforce the judgment against the trust assets? If the Connecticut courts respect the New Hampshire choice of law clause in the trust documents, under RSA 564–D, the answer is no. But the real question remains: will the Connecticut court apply New Hampshire law?

"The ability of these trusts to truly protect a settlor's assets . . . may be uncertain. One basis for this uncertainty lies in the potential for a conflict of laws."[66] The *Restatement (Second) of Conflicts of Laws* states:

> The chief purpose in making decisions as to the applicable law is to carry out the intention of the creator of the trust in the disposal of his property. It is important that his intention, to the extent to which it can be ascertained, should not be defeated, unless this is required by the policy of a state which has such an interest in defeating his intention, as to the particular issue involved, that its local law should be applied.[67]

Connecticut is a non-DAPT state. As explained in *In re Brooks*, while "Connecticut courts generally respect the expressed will of the settlor [of a trust] as to the controlling law, [t]here are, however, exceptions."[68] "Connecticut will not . . . enforce the law of another jurisdiction nor the rights arising thereunder, which . . . contravene [Connecticut] public policy."[69] Furthermore, "Connecticut courts have held that . . . the legality of the trust of personalty [is determined] by the law of the settlor's domicil [sic]."[70] While the *Brooks* case concerned a federal bankruptcy court's application of Connecticut law regarding the assets in a self-settled offshore discretionary trust, it seems likely that the Connecticut state court would reach the same conclusion in our hypothetical: that the New Hampshire DAPT is contrary to Connecticut public policy and Connecticut law applies regardless of the choice of law provision in the trust.

A case from New York sheds additional light on our Connecticut hypothetical. In *In re Portnoy*, a debtor, Larry Portnoy, created an offshore self-settled spendthrift discretionary trust in the Jersey Channel Islands (Jersey).[71] The New York Bankruptcy Court applied New York law in

66. Meaghan R. Hogan, *Once More Unto the Breach: Planning for a Conflict of Laws with Alaska and Delaware Self-Settled Spendthrift Trusts*, PROB. & PROP., Mar./Apr. 2000, at 27, 28.

67. RESTATEMENT (SECOND) OF CONFLICTS OF LAW ch. 10 (1971) (introductory note).

68. *In re* Brooks, 217 B.R. 98, 101 (Bankr. D. Conn. 1998) (quoting Cantor v. Dep't of Income Maint., 531 A.2d 608, 610 (Conn. Super. Ct. 1985)) (internal quotation marks omitted).

69. *Id.* (citing Dick v. Dick, 355 A.2d 110, 117 (Conn. 1974)) (internal quotation marks omitted).

70. *Id.* (quoting Stetson v. Morgan Guar. Trust Co. of N.Y., 164 A.2d 239, 240 (Conn. Super. Ct. 1960)) (internal quotation marks omitted).

71. *In re* Portnoy, 201 B.R. 685, 698 (Bankr. S.D.N.Y. 1996).

spite of the Jersey choice of law provision in the trust document.[72] The court denied Portnoy's claim for discharge under Chapter 7, concluding that the "application of Jersey's substantive law would offend strong New York and federal bankruptcy policies if it were applied."[73]

As both *Brooks* and *Portnoy* illustrate, regardless of the trust document's choice of law provisions, attaching the Connecticut (or other non-DAPT state) assets, particularly the real estate,[74] may not pose a particular problem for a creditor. But the next question is: will New Hampshire respect the Connecticut court's judgment under Full Faith and Credit principles if the debtor wishes to enforce the judgment against assets held in New Hampshire? The answer is uncertain.[75]

Connecticut is not alone. Many states continue to embrace the traditional view, as expressed in the *Restatement (Second) of Trusts*[76] and the *Restatement (Third) of Trusts*,[77] that creditors can reach a debtor's self-settled trust assets to the extent that a trustee could distribute assets to the debtor.[78] Other states go even further. In California, for instance, creditor restraints against irrevocable, self-settled, spendthrift trusts are invalid by statute.[79] The California statute reads in part, "If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor."[80] Washington has a similar statute, stating "[t]hat all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of

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72. *See id.* (discussing how application of the Jersey law would offend New York and federal banking policies).

73. *Id.*; *see also In re* Cameron, 223 B.R. 20, 25 (Bankr. S.D. Fla. 1998). The court in *Cameron* stated:

> [I]t is irrelevant that in creating the discretionary trust for her benefit the settlor did not intend to defraud her creditors or was solvent at the time of the creation of the trust. It is against public policy to permit the settlor beneficiary to tie up her own property in such a way that she can still enjoy it but prevent her creditors from reaching it.

In re Cameron, 223 B.R. at 25 (quoting Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A., 100 A.D.2d 544, 546 (N.Y. App. Div. 1984)).

74. Hogan, *supra* note 66, at 31 ("The rules surrounding the validity of a trust of real estate are simple. In general, for disputes involving real property, the law of the situs state is the governing law.").

75. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 255 (1958) ("Since Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit—even against parties over whom Florida's jurisdiction was unquestioned.").

76. RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).

77. RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. f (2000).

78. Massachusetts is one example. *See, e.g.*, Ware v. Gulda, 117 N.E.2d 137, 138 (Mass. 1954) ("The established policy of this Commonwealth long has been that a settlor cannot place property in trust for his own benefit and keep it beyond the reach of creditors.").

79. CAL. PROB. CODE § 15304(a) (West 1991).

80. *Id.*

goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person."[81] It appears very possible that courts in states with such laws would, as a matter of pubic policy, apply their own law and disregard the debtor protection features of a New Hampshire DAPT.

2. *Federal Supremacy*

Principles of federal supremacy may also affect the validity of debtor protections in DAPTs, particularly in bankruptcy.[82] In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress included a ten-year look back period to allow the bankruptcy estate to set aside fraudulent transfers made to a DAPT.[83] The *Portnoy* court noted, "[w]hereas property interests are created and defined by state law . . . it is federal bankruptcy law which determines the outer boundary of what may constitute property of the estate pursuant to section 541 of the Bankruptcy Code," and that "federal principles should guide consideration of which jurisdiction's substantive law applies in cases arising out of federal law."[84]

There is evidence that federal courts are hostile to offshore self-settled asset protection trusts.[85] For example, in *FTC v. Affordable Media*, the Ninth Circuit upheld a federal district court's civil contempt order against the defendants (the Andersons) for failing to repatriate assets held in a Cook Island trust after the plaintiff charged them with fraud.[86] The Andersons claimed that compliance with the court's order was impossible because the foreign trustee, in accordance with the terms of the trust, refused to repatriate trust assets to the United States.[87] While the court noted that "[a] party's inability to comply with a judicial order constitute[d] a defense to a charge of civil contempt,"[88] it also recognized that the Andersons' trust document contained an "anti-duress" clause, which divested the Andersons of any property interests in the trust property in the event of an adverse judgment against them.[89] In assessing the Andersons' impossibility defense, the court found that the Andersons failed to prove impossibility, thus

81. WASH. REV. CODE § 19.36.020 (2006).
82. *See* 11 U.S.C. § 548(e)(1) (2006).
83. *Id.*
84. *In re* Portnoy, 201 B.R. 685, 696–97 (Bankr. S.D.N.Y. 1996) (internal citation omitted).
85. *See, e.g.*, FTC v. Affordable Media, L.L.C., 179 F.3d 1228, 1238–44 (9th Cir. 1999) (holding that the district court did not err in holding the defendants in contempt for refusing to repatriate their assets in an off-shore trust).
86. *Id.* at 1244.
87. *Id.* at 1239.
88. *Id.* at 1239–40.
89. *Id.* at 1240 n.9.

"leaving for another day the resolution of [the] more difficult question of" whether "the Andersons' inability to comply with the district court's order is a defense to a civil contempt charge."[90] The court seemingly reached this conclusion because the Andersons' "impossibility" of complying with the court's repatriation order was self-imposed, and the nature of offshore trusts was specifically designed to "thwart the United States courts."[91] As such,

> the domestic courts will have to be especially chary of accepting a defendant's assertions that repatriation or other compliance with a court's order concerning a foreign trust is impossible. Consequently, the burden on the defendant of proving impossibility as a defense to a contempt charge will be especially high.[92]

Similarly, in *In re Lawrence*, the bankruptcy court issued a default judgment causing property in Lawrence's Mauritian trust to be included in his bankruptcy estate.[93] Mr. Lawrence was an active options trader and sustained large margin debts with Bear Stearns after the stock market fall on Black Monday, October 19, 1987.[94] After forty-two months of being "mired" in arbitration, Mr. Lawrence apparently decided that his prospects were not good.[95] He established a Jersey trust (later moved to Mauritius—a jurisdiction even more friendly to debtors), in which he deposited between four and seven million dollars—estimated at ninety percent of his net worth.[96] About three months later, the arbitrator awarded Bear Sterns over twenty million dollars.[97] Mr. Lawrence later filed a voluntary Chapter

90. *Id.* at 1240. Also, it is unclear as to which remedy the court may apply to enforce a civil contempt order when the debtor is asserting an impossibility defense. Professor Sterk wrote:

> In *Affordable Media* itself, for instance, the district court ordered the Andersons released from custody before the Ninth Circuit heard oral argument on their appeal. Penalties for civil contempt are designed to coerce the contemnor into compliance with the court's order. If incarceration will not induce compliance, the foundation for imprisonment collapses. Moreover, a settlor's failure to purge his contempt after sitting in jail for months or even weeks may establish to a court's satisfaction that the settlor is indeed unable to arrange repatriation of trust assets, establishing a defense to civil contempt. Finally, even if a court remains convinced that the settlor has the power to arrange repatriation and that enough incarceration might induce the settlor to repatriate, the court might simply believe that indefinite incarceration is inappropriate without express statutory sanction.

Sterk, *supra* note 18, at 1039–40 (internal citations omitted).

91. FTC v. Affordable Media, L.L.C., 179 F.3d 1228, 1241 (9th Cir. 1999).

92. *Id.*

93. 227 B.R. 907, 917 (Bankr. S.D. Fla. 1998).

94. Sterk, *supra* note 18, at 1035.

95. *Id.*

96. *Id.*

97. *In re* Lawrence, 227 B.R. at 911, 918.

7 bankruptcy petition.[98] He was subsequently jailed for failing to comply with the bankruptcy court's order to turn over the trust res to the trustee.[99]

While the asset-protection features of a New Hampshire DAPT will likely extinguish creditors' claims—assuming the requirements of the UFTA are met—against trust property if the parties and the property are all located in New Hampshire,[100] as discussed above, the effectiveness of DAPTs for out-of-state residents and regarding out-of-state property is very uncertain. These trusts appear vulnerable to attack from other jurisdictions. It may be reasonable to assume that New Hampshire residents may create DAPTs with assets that might have fled the jurisdiction for offshore trusts.[101] But legal uncertainty and the fact that at least nine jurisdictions have versions of DAPTs make it impossible to conclude that RSA 564–D will help generate a significant increase in trust business from non-DAPT states.

C. *Other Advantages of DAPTS*

1. *Federal Gift and Estate Tax Benefits*

It may be possible for a transferor to avoid certain estate taxes with a DAPT.[102] Section 2036(a)(1) of the Internal Revenue Code requires the transferor of an *inter vivos* trust to include the value of transferred assets in his gross estate for federal estate tax purposes.[103] However, if the transferor's assets are not within the reach of creditors—i.e., if the transferor has lost "dominion and control" over the trust corpus—it follows that these assets are not in the decedent's estate, but represent a completed gift, subject to gift tax exclusions.[104] If DAPT assets are regarded by the Internal Revenue Service as completed gifts, then a transferor-beneficiary may place assets into the DAPT and continue to enjoy the discretionary benefits of the assets, while excluding these assets from his estate—a potentially powerful tax planning tool and likely to attract significant out-of-state trust business.

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98. *Id.* at 910.
99. Lawrence v. U.S. Bankr. Ct., 153 F. App'x 552, 553 (11th Cir. 2005).
100. *See generally* Grand China, Inc. v. United Nat'l Ins. Co., 938 A.2d 905 (N.H. 2007) (reinforcing New Hampshire's judicial deference on matters of public policy to the legislature).
101. *See* John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. L. 423, 433 (1998) ("America stands virtually alone in its rigid and virtually absolute adherence to the rule against self-settled trusts.").
102. *See* 26 U.S.C. § 2036(a)(1) (2006).
103. *Id.*
104. *See* Rev. Rul. 76-103, 1976-1 C.B. 293.

2. *DAPTs in Lieu of Antenuptial Agreements*

An interesting feature of the New Hampshire DAPT is not apparent at first glance. The statute appears to protect spouses and ex-spouses by allowing these "creditors" to enforce judgments such as divisions of property or support payments against the assets of a DAPT.[105] However, this protection is illusory for post-disposition spouses. For purposes of the statute, "spouse" and "former spouse" are defined as "mean[ing] only persons to whom the transferor was married at, or before, the time the qualified disposition is made."[106] This distinction may encourage in-state residents to establish DAPTs prior to marriage instead of executing antenuptial agreements, thus avoiding their sometimes onerous requirements.[107]

V. POLICY ISSUES

What then are the policy implications? Even with a tenuous assumption that RSA 564–D will increase New Hampshire's trust business, is it wise to abandon the traditional rule, still embraced by most jurisdictions, that it is against public policy to protect self-settled trust assets from creditors? Commentators have posited the following arguments against DAPTs:

1) Spendthrift trusts are immoral.[108] Professor Haskell's "conclusion [is that] that the [t]estator's use of the spendthrift provision, and the law which upholds it, are not morally defensible."[109] He reaches this conclusion because the principles of "[a]utonomy and duty to family . . . do not permit a person to do injury to others. The impediment to creditors is such an injury."[110] In characterizing Professor Bogert's conclusion that DAPTs are per se fraudulent, Professor Adam Hirsch asks: "[w]hy might an individual

105. *See* N.H. REV. STAT. ANN. § 564-D:15(I)(a) (2008).
106. *Id.* § 564-D:1(VIII).
107. Antenuptial agreements, to prove effective, generally require (among other things) full financial disclosure and provisions allowing the prospective spouse the time and opportunity to consult an independent attorney. *See* Robert Roy, *Enforceability of Premarital Agreements Governing Support or Property Rights upon Divorce or Separation as Affected by Circumstances Surrounding Execution—Modern Status*, 53 A.L.R. 4th 85, § 3 (1987). Of course, the prospective spouse must agree. DAPTs, on the other hand, do not require disclosure or consent. *See* Roy, *supra*, at 85, § 1[a].
108. *See* Paul G. Haskell, *Teaching Moral Analysis in Law School*, 66 NOTRE DAME L. REV. 1025, 1046–47 (1991) (discussing the moral dilemmas associated with spendthrift trusts).
109. *Id.* at 1047.
110. *Id.*

wish to disable herself and her creditors from reaching a portion of her property other than to defraud them"?[111]

2) A debtor should pay his debts.[112] "[T]here is something disturbing about a country that would allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle."[113]

3) DAPTs further erode the traditional liability system[114]:

> Another objection to [DAPTs] is that allowing debtors to use such trusts to shelter their assets from potential creditors threatens the system of civil enforcement of obligations by undercutting the deterrent effect of our liability system and that the better way to address the excesses of the tort system is through tort reform, not by recognizing [DAPTs].[115]

Some argue that DAPTs may distort traditional liability principles by encouraging riskier debtor behavior.[116]

Many of the states that permit spendthrift trusts where the beneficiary is not the settlor provide exceptions and allow certain types of creditors to enforce claims against a beneficiary by taking assets in the trust.[117] Presumably, states that have these exceptions provide them for public policy reasons: "[T]he difficulty comes not so much from the existence of spendthrift trusts as from their generally unrestrained extent."[118] Under New Hampshire DAPT law, even valid claims of involuntary creditors such as post-disposition tort victims or spouses will be extinguished.[119]

Of course, some commentators argue in favor of DAPTs. Besides the obvious purpose to attract trust business, other policy considerations favoring DAPTs may include the following:

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111. Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 86 (Spring 1995).

112. Nenno, *supra* note 62, at 272.

113. Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1259 (2000).

114. Nenno & Sullivan, *supra* note 61, at 811 ("Clients may obtain protection from creditors by entering into a variety of other self-settled vehicles. These vehicles include tenancy-by-the-entirety property, retirement plans, family limited partnerships ('FLPs') and limited-liability companies ('LLCs'), homesteads, life insurance policies, annuity contracts, and transfers to or in trust for 'cooperative' friends or family members.").

115. *Id.* at 807.

116. *See* Hirsch, *supra* note 111, at 87 ("[T]hey encourage debtors who have them to take excessive credit risks. Because spendthrift trust beneficiaries have fewer (alienable) assets to lose, they have a greater incentive to borrow more. They can enjoy the upside benefits of borrowing, safe in the knowledge that their downside liability remains limited to their out-of-trust assets.").

117. *Id.* at 76–78.

118. *Id.* at 72.

119. N.H. REV. STAT. ANN. §§ 564-D:10, 564-D:15 (2008).

1) If DAPTs are unavailable, beneficiaries who accumulate their own wealth are "disfavored" relative to beneficiaries who inherited wealth in a traditional spendthrift trust.[120]

2) Beneficiaries' interests other than the settlor are "ignored."[121] If creditors are allowed to attack the assets self-settled trusts, beneficiaries who were not transferors may lose.

3) The U.S. already recognizes the validity of certain types self-settled trusts that are immune from most creditors.[122]

4) Creditors are afforded protection by the provisions of the New Hampshire UFTA.[123]

5) Legally preventing DAPTs interferes with one's right of contract and free alienation of property.[124]

This policy debate promises to continue.

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120. Nenno & Sullivan, *supra* note 61, at 811 (citing Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 347(2002)).

121. *Id.* at 809. *But see* 3 AUSTIN W. SCOTT, WILLIAM F. FRATCHER, & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 15.4.3, at 967–68 n.12 (5th ed. 2007). The authors state:

> It has also been argued that the Restatement position is "theoretically unsound," particularly insofar as it seems to allow creditors greater access to the assets of a self-settled trust than the settlor would have had. The obvious response is that it is simply not true that the Restatement position allows the settlor's creditors *greater* access than the settlor might have had. The Restatement position allows creditors the *same* access (but to the maximum extent) that the settlor might have had. It may be that the trustee would not always or ever have exercised the discretion to the fullest extent in favor of the settlor, but there seem ample justifications for allowing creditors to get what the settlor *might* have gotten. Just beneath the surface of the Restatement position is the intuition that a significant percentage of settlors who create trusts on their own behalf do so in large part to evade creditors. Given how "asset protection trusts" are now marketed this intuition seems plainly accurate. No doubt another component of the thinking behind the Restatement position is the knowledge that most settlors (who either are their own trustees or have selected their trustees and retained the right to replace them) have little difficulty obtaining trust distributions, of almost any magnitude.

SCOTT, FRATCHER, & ASCHER, *supra*, at 967–68 n.12 (internal citation omitted).

122. Sullivan, *supra* note 101, at 428–29 ("[T]he rule against self-settled trusts was not absolute, as U.S. law recognized certain exceptions. The most notable of these exceptions is in the area of pension and retirement trusts, such as retirement plans funded pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) and Individual Retirement Accounts (IRAs).").

123. *See* N.H. REV. STAT. ANN. §§ 545-A:4, 545-A:5 (2008) (as incorporated by § 564-D:10) (providing that creditors can assert valid claims, if timely brought, if the purpose of disposition was to avoid creditor, or absent intent if brought within four years of disposition).

124. Hirsch, *supra* note 111, at 86. The author states:

> By creating her own voluntary and involuntary disabling restraints, an individual can deprive herself of the opportunity to overspend or overborrow, and thereby shield herself from financially destructive impulses that she anticipates having to contend with in the future. As a consequence, she spares herself from eventual regret. This strategy, known today as precommitment or self-paternalism, is of course the same one that Ulysses followed when he lashed himself to the mast of his ship, lest he succumb to the song of the Sirens.

Id.

VI. CONCLUSION

It will be interesting to observe, over time, how the various states enforce the creditor protection provisions of out-of-state DAPTs. Whatever the reader's position on the virtues of DAPTs—or lack thereof—may be, New Hampshire has "entered the fray," attempting to attract and retain trust business. Because it will be difficult to collect and interpret any meaningful empirical data, assessing the success (or failure) of New Hampshire's DAPT statute in achieving its legislative goals of increasing New Hampshire's trust business is unlikely.

If, as seems possible, non-DAPT states sometimes disregard DAPT choice of law provisions and DAPT states apply full faith and credit to non-DAPT state judgments, DAPTs will probably not attract any significant out-of-state business. However, DAPTs may offset this potential weakness in attracting out-of-state business by capturing in-state assets that may otherwise have traveled to offshore trusts by placing additional burdens on creditors, providing possible tax advantages, and substituting for antenuptial agreements. Nonetheless, the statutory framework in other jurisdictions will not remain static. If other states perceive that they are either losing or failing to attract trust business, it seems likely that more states will decide to compete by authorizing DAPTs and eliminating the RAP, possibly competing away any advantage New Hampshire may offer out-of-state settlors.

Will New Hampshire succeed in attracting and retaining trust business by eliminating the long-standing principles against dynastic and self-settled spendthrift trusts? We'll likely never know.