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Can a SD Asset Protection Trust Protect Against Execution to Satisfy a Foreign Judgment?

Most trusts include a “spendthrift” clause, preventing trust beneficiaries from demanding the trustee make distributions above those mandated by the trust language, or from pledging a beneficiary’s distribution rights to secure credit. The spendthrift clause prohibits creditors from compelling the trustee to make discretionary distributions to satisfy a beneficiary’s debt. The common law and statutes in most jurisdictions give a trust settlor’s judgment creditors the power to execute against trust assets to the extent of the settlor’s right to receive them. The rule is expressed in the Uniform Trust Code (adopted in 30+ states), which provides that, with “respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount [of trust assets] that can be distributed to or for the settlor’s benefit.”

South Dakota’s spendthrift statute is uniquely specific and significantly more settlor-friendly: “If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level. Moreover, no court may order a trustee to distribute past due mandatory distributions directly to a creditor.” The South Dakota legislature has supercharged the state’s spendthrift statute by adopting a statutory framework that consciously overrides the common law rule and omits any provision similar to the UTC language quoted above. South Dakota law further enhances spendthrift clauses by prohibiting courts from reviewing the trustee’s discretion in making distributions except in very narrow circumstances, such as allegations of the trustee’s fraud or violation of the trust agreement. South Dakota law includes a robust “fraudulent conveyance” statute under which a transfer to trust may be voided, as does the federal bankruptcy code, thus protecting existing creditors for a settlor’s misuse of asset protection statutes at the time of the transfer to trust. After the settlor establishes the trust, however, South Dakota law gives heft to the spendthrift clause, providing that:

Notwithstanding any other provision of law, 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 ... against property that is the subject of a South Dakota trust or for avoidance of a transfer to a South Dakota trust unless the settlor’s transfer of property was made with the intent to defraud that specific creditor. A court of this state has exclusive jurisdiction over an action brought under a claim for relief that is based on a transfer of property to a trust that is the subject of this section. A court of this state may award attorneys’ fees and costs to the prevailing party in such an action. In any action described in this section, the burden to prove the matter by clear and convincing evidence is upon the creditor.

In a case involving a trust established by the beneficiary’s father in which the beneficiary, consistent with the trust terms, changed the trust situs from California to South Dakota, the South Dakota Supreme Court made clear that, although it will respect the court orders that interpret and apply the law of sister states, South Dakota’s stringent statutory spendthrift framework applies when it comes to enforcing foreign judgments against trust beneficiaries. Quoting a concurring opinion authored by the late US Supreme Court Antonin Scalia, the South Dakota Supreme Court reasoned that:

the power of the Full Faith and Credit Clause [of the United States Constitution] is to make the judgment of ‘one State conclusive evidence in the courts of another State[.]’ ... Yet despite the preclusive power of one state’s judgment, it ‘can only be executed in [the forum state] as its laws may permit.’

The South Dakota Supreme Court has made clear that, although it will give full faith and credit to the orders of courts in sister states, South Dakota law will apply when a creditor attempts to satisfy a foreign judgment against assets held in a trust with a South Dakota situs.

This summary is not legal advice. Consult with your attorney prior to establishing a DAPT.