

# Resolving The *Dabl* Conundrum: The Public Policy Conflict Between Asset Protection Trusts and The Equitable Division of Marital Assets

by Alexander Chang and Bart J. Johnsen

Utah has a strong public policy favoring the equitable distribution of marital assets upon divorce. *See Dabl v. Dabl*, 2015 UT 79, ¶ 25, 495 P.3d 276. The Utah Legislature has also endorsed the asset protection trust (APT), allowing a settlor to be an irrevocable trust’s beneficiary and receive spendthrift protections from their creditors. *See* Utah Code Ann. § 25-6-502. However, a public policy conflict arises between trust and divorce law when, upon divorce, only one spouse is the beneficiary of an APT that contains marital property.

In *Dabl*, the Utah Supreme Court narrowly avoided addressing this conflict when an APT was the subject of a divorce proceeding. *See Dabl v. Dabl*, 2015 UT 79. The supreme court was able to reach the marital property inside the trust without invalidating the APT statute because the trust was revocable under Utah law, and the divorce court could reach the property of a revocable trust. *Id.* ¶ 32. The supreme court noted that an irrevocable APT funded by marital assets in a divorce proceeding would “create a serious conflict between trust law and divorce law.” *Id.* ¶ 39 n.13.

The resolution to this conflict seems black-and-white: either the courts are powerless to equitably distribute marital assets inside APTs, or the APT statute and its nearly two decades-long statutory history is at least partially invalid. In the absence of the Utah Legislature’s intervention, the courts must navigate this issue carefully when inevitably faced with this conflict in the near future.

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## The Asset Protection Trust and Its Features

APTs are typically irrevocable, self-settled spendthrift trusts – an aberration of the centuries-old common law rule that a settlor’s creditors can reach trust assets if the settlor is also a trust beneficiary. *See* RESTATEMENT (SECOND) OF TRUSTS § 156 (AM. L. INST.1959) (“[W]here a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum among which the trustee under the terms of the trust could pay to him or apply for his benefit.”). Seventeen jurisdictions, including Utah, have overridden the common law by statute, allowing a settlor to also be a trust beneficiary without sacrificing protection from creditors. *See* Utah Code Ann. § 25-6-502.

Key protective features of a properly-constructed APT include that a creditor’s sole remedy – in law or in equity – is a fraudulent/voidable transfer action under the Uniform Voidable Transfers Act (UVTA). *See* Utah Code Ann. § 25-6-202, -502(3), -502(9)(a). Furthermore, APTs have a reduced statute of limitations for a voidable transfer claim, requiring the claim to be brought within two years instead of the UVTA’s four. *Compare* Utah Code Ann. § 25-6-502(9)(c), *with* Utah Code Ann. § 26-5-305. Utah’s APT statute also features a unique notice provision that reduces timeliness of a UVTA claim to just 120 days if the transferor gives actual or publication notice of the transfer to creditors. *See* Utah Code Ann. § 25-6- 502(9)(c)(ii).

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Most importantly, the settlor may substantially benefit from and indirectly control trust property. The statute allows a settlor to use real or personal property of the trust without compensation, serve as co-trustee, consent to or veto distributions, and pay property taxes, insurance premiums, maintenance expenses, or other expenses of trust property. *See* Utah Code Ann. § 25-6-502(7). An APT can essentially be structured so that the settlor enjoys a luxury lifestyle using trust assets while being practically judgment-proof.

### The *Dahl* Conundrum

In *Dahl*, wife and husband contributed marital property to a Nevada APT that named Dr. Dahl and his “spouse” as the beneficiaries. *Dahl*, 2015 UT 79, ¶ 34. Upon their divorce, the wife’s beneficiary status was terminated by operation of the trust agreement’s

language. *Id.* The wife sought a declaratory judgment, arguing the trust was void or the trust was revocable. *Id.* ¶ 7. Fortunately for the wife (and the court), the Nevada APT included a provision that allowed the husband to unilaterally amend any provision of the trust. *Id.* ¶¶ 29–32. Analyzed under Utah law, the unlimited power to amend a trust includes the power to terminate, making the Dahl trust revocable and its protections from creditors invalid. *Id.* The court deftly dodged the “serious conflict” that would occur if the APT was otherwise irrevocable, while pointing the finger to the legislature to act. *Id.* ¶ 39 n.13.

However, the *Dahl* conundrum persists to this day. Theoretically, a Dr. Dahl could transfer the entire marital estate to a properly-drafted APT, wait two years before filing for divorce, and deprive Ms. Dahl of her equitable share. Ms. Dahl’s only remedy to reach

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the trust assets is a voidable transfer action – she cannot allege alter ego, fraud in the inducement/restitution, or any other cause for relief “in law or equity” under the APT statute. *See* Utah Code Ann. § 25-6-502(3)(a). Thus, two years after Dr. Dahl’s transfer, Ms. Dahl’s sole legal recourse to reach the trust assets is time-barred by the APT’s shortened statute of limitations for voidable transfer claims.

But why stop there? Dr. Dahl could, using the notice provision under Utah Code Section 25-6-502(9), legally rob Ms. Dahl blind, and all before their first wedding anniversary. In *Dahl*, the APT trust agreement’s language automatically removed Ms. Dahl as a beneficiary if Dr. Dahl ever divorced her, despite Ms. Dahl also conveying her interest in marital property to the trust. *See Dahl v. Dahl*, 2015 UT 79, ¶¶ 27, 34, 495 P.3d 276. A Dr. Dahl could also draft a similar APT naming himself and his “spouse” as beneficiaries under the guise of “protecting the family’s money.” Ms. Dahl – within the trusting confines of marriage and unaware of the complex legal trap set by her soon-to-be-ex-husband – transfers both marital assets and her separate property inheritance from her late father. Ms. Dahl then publishes notice of her transfer to unknown creditors, reducing the statute of limitations for a voidable transfer action to just 120 days. Dr. Dahl files for divorce a little after 120 days.

### Ms. Dahl Likely Cannot Void Her Own Transfer

Under the UVTA, the “debtor” (the transferor) is a person who is liable on a claim, and a claim is broadly defined as “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.” Utah Code Ann. § 25-6-102(3). The debtor is liable to their creditor (the person who has a claim) if they make a transfer with actual intent to hinder, delay, or defraud any creditor of the transferor. *See* Utah Code Ann. § 25-6-202(1)(a). The debtor is also liable if the transfer was made without consideration of equivalent value and the transferor intended to incur debts beyond their ability to pay as they come due. *See* Utah Code Ann. § 25-6-202(1)(b). The most natural reading of the statute presumes that the debtor and creditor are two separate individuals.

Here, however, Ms. Dahl’s voidable transfer action – brought outside the confines of the bankruptcy code’s exceptional statutory expansion of standing under 11 U.S.C. § 544 – requires her to awkwardly allege that she is liable to herself as a creditor, triggering significant questions of standing. *See Haymond v.*

*Bonneville Billing & Collections, Inc.*, 2004 UT 27, ¶¶ 1, 7, 89 P.3d 171 (affirming dismissal of plaintiff’s claims for lack of standing because her injuries were “largely self-inflicted” – plaintiff’s claims rested on the defendants’ collection activities after the plaintiff wrote a check without sufficient funds); *Republic Outdoor Adv., LC v. Utah Dep’t of Transp.*, 2011 UT App 198, ¶ 30 n.12, 444 P.3d 547; *but see Bagley v. Bagley*, 2016 UT 48, 387 P.3d 1000 (personal representative sues herself as tortfeasor under the wrongful death statute). Even if she did have standing, Ms. Dahl may also have a difficult time proving that her transfer to the APT had actual intent to hinder, delay, or defraud herself or another creditor. Equally challenging is proving that she intended to incur debts beyond her ability to pay as they come due after the transfer – debts that she somehow owes to herself upon Dr. Dahl’s petition for divorce.

### Ms. Dahl’s Voidable Transfer Claim is Time-Barred

Assuming her claim is otherwise valid, Ms. Dahl’s claim is also time-barred by the 120-day statute of limitations after her publication of notice of the transfer. Under Utah Code Section 25-6-502(9)(c)(ii), unknown creditors of the debtor must bring a voidable transfer claim within 120 days after the debtor publishes notice of the transfer. Ms. Dahl is arguably an unknown future creditor of her own transfer to the APT. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) (An “unknown” creditor is one whose “interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].”).

Furthermore, the statute of limitations on Ms. Dahl’s voidable transfer claim is likely not subject to equitable tolling because Ms. Dahl has knowledge of the transfer and the terms of the trust agreement. *See Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981) (“Mere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff’s failure to file a claim within the relevant statutory period.”); *but see Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 25, 108 P.3d 741 (equitable tolling available in “exceptional circumstances” where “the application of the general rule would be irrational or unjust.”); *Fitzgerald v. Spearhead Invs., LLC*, 2021 UT 34, ¶ 16, 493 P.3d 644 (equitable tolling available when “plaintiff knew of the existence of his cause of action but the defendant’s conduct caused him to delay in bringing [suit].”). Ms. Dahl’s time-barred voidable transfer claim is thrown out before she can argue the merits.

## Ms. Dahl Has No Legal Recourse to Reach the Trust Assets

As previously mentioned, Ms. Dahl's sole remedy to reach the trust assets is a voidable transfer action under Utah Code Section 25-6-502(3)(a). Ms. Dahl is also not an exception creditor of the APT's spendthrift provision. *See* Utah Code Ann. § 75-5-503. Because Ms. Dahl either has no standing to allege a voidable transfer claim against herself or her claim is time-barred, Ms. Dahl has no legal remedy to reach the trust assets.

Certainly, the divorce court may find that Dr. Dahl dissipated marital assets and award Ms. Dahl a hefty judgment against the husband. *See Jefferies v. Jefferies*, 895 P.2d 835, 838 (Utah Ct. App. 1995) (holding that a transfer made pursuant to the Uniform Transfers to Minors Act was irrevocable and the children's assets were beyond the jurisdiction of the court, but the transferor could be held accountable for dissipation of marital assets); *Andersen v. Andersen*, 757 P.2d 476, 479 (Utah Ct. App. 1988) (awarding a monetary judgment against the spouse dissipating the marital assets); *see also Riechers v. Riechers*, 679 N.Y.S.2d 233 (Sup. Ct. 1998) (awarding wife a judgment for half of husband's foreign APT's assets). Ms. Dahl may also sue under other causes of action (i.e., fraud) to obtain a judgment, and Dr. Dahl would have some difficulty filing a bankruptcy to discharge the judgment. *See* 11 U.S.C. § 541 (preempting federal law allows the bankruptcy trustee to bring a voidable transfer claim within ten years if the transfer was made to a self-settled trust).

However, the wife is also unable to collect on the judgment if everything is inside the trust. Ms. Dahl may garnish her ex-husband's wages and attach any property that he foolishly left outside of the trust, but she is otherwise denied the "just and equitable adjustment of economic resources so that [she] can reconstruct [her life] on a happy and useful basis." *Wilson v. Wilson*, 296 P.2d 977, 979 (Utah 1956). Meanwhile, Dr. Dahl can continue to live in the family home rent free and use the trust's assets for his own benefit. The result is harrowing: one spouse readily enjoys the spoils of their fraud, waiting for the other now destitute spouse to beg for scraps in a settlement.

Even if Dr. Dahl did not defraud and rob Ms. Dahl in such a shameless manner, the existence of APTs remains a problem for equitable division of assets. An APT that allows only Dr. Dahl use and control of marital assets post-divorce is contrary to the intent of court-facilitated separation of married couples. *See*

*Gardner v. Gardner*, 748 P.2d 1076, 1079 (Utah 1988) ("The purpose of divorce is to end marriage and allow the parties to make as much of a clean break from each other as is reasonably possible."). APTs can practically operate as a non-consensual pre- or post-nuptial contract. One spouse can unilaterally isolate marital property into a complex legal instrument that cannot be upset by a divorce tribunal bound by statutory trust law, destroying one of the fundamental purposes of family law courts.

## Legislative Response and Other Jurisdictions

In 2019, perhaps in response to *Dahl*, the Utah Legislature passed an amendment to the APT statute, mandating that an APT trustee must give thirty days' notice to all persons who have a spousal-support order against the settlor before making any distributions to the settlor as a beneficiary. *See* Asset Protection Trust Amendments, 2019 Utah Laws 526. The amendment does not address equitable division of marital assets in the event of divorce – on the contrary, it appears that the Legislature intends for marital property inside APTs to be beyond the reach of divorce courts. *See* Utah Code Ann. § 25-6-502(5)(g). The legislature did not answer the supreme court's call to act.

Other jurisdictions provide little guidance, as the *Dahl* conundrum has not arisen in an APT jurisdiction. However, the prevailing rule in non-APT jurisdictions is that the corpus of an irrevocable trust is not marital property subject to division in a divorce, but if either spouse has a beneficial interest in the trust, then their interest can be divided. *See Findlen v. Findlen*, 1997 ME 130,

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¶ 15, 695 A.2d 1216 (holding that the trial court could not divide an irrevocable trust's assets for the benefit of husband and wife, but it could divide the parties' interest in the trust); *In re Chamberlin*, 918 A.2d 1,5 (N.H. 2007) (holding that the irrevocable trust's assets were not marital property because the assets did not belong to either spouse at divorce, but that one spouse's right to receive interest payments from an irrevocable trust is marital property); *Lipsey v. Lipsey*, 983 S.W.2d 345, 351 (Tex. App. 1998) (holding that a spouse could create a self-settled trust from separate property and such income remains separate property so long as the income is not distributed during marriage and there is no right to compel distribution).

Ultimately, the solution to the *Dahl* conundrum must likely come from the courts when the issue is inevitably presented again in contentious divorce litigation. The solution should be narrow and nuanced, walking a fine line between Utah's strong public policy in favor of equitable division of marital assets and the legislature's continuing and robust endorsement of the APT as a valid legal instrument.

### A Potential Solution

A court facing the *Dahl* conundrum should find that an irrevocable trust funded by marital assets is void for being against public policy if the trust grants, presently or in the future, only one spouse use and enjoyment of trust property or control of the trust after the divorce.

Voiding a trust for being against public policy is not a new legal frontier. Under Utah's APT statute, a trust funded with assets derived from unlawful activities is against public policy and thus void. *See* Utah Code Ann. § 25-6-502(5)(k); *see also* Utah Code Ann. § 75-7-404. A trust may also be void if the performance of the intended trust or provision directs the trustee to commit a criminal or tortious act. *See* RESTATEMENT (SECOND) OF TRUSTS § 61(A) (AM. L INST. 1959). The key distinction between voidable and void is whether the trust affects only people who have an interest in impeaching it, or whether the trust is injurious to the public interest. *See Ockey v. Lehmer*, 2008 UT 37, ¶ 19, 189 P.3d 51; *Baldwin v. Burton*, 850 P.2d 1188, 1193 (Utah 1993); *see also* BLACK'S LAW DICTIONARY 1604 (8th ed. 2004) ("A contract is void *ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.").

A *Dahl* conundrum APT is injurious to the public. Upholding such a trust would likely spawn a large marital fraud industry, with Utah's 120-day statute of limitations notice provision attracting soon-to-be-ex-spouses eagerly searching for a shortcut to annul their marital bonds without having marital assets subject to equitable division. It may also become standard practice for wealthier spouses to shield "their" marital property in an APT as a workaround of the divorce courts, nullifying state-supervised equitable division of assets and all its public policy justifications.

However, outright declaring that all irrevocable trusts funded with marital assets are contrary to public policy is likely too broad – such a ruling would harm innocent and bona fide third-party beneficiaries, such as charitable trusts or trusts for the couple's children. Thus, a court's ruling should apply only to those trusts which allow one spouse to use trust property or control the trust in exclusion of the other at the divorce or anytime thereafter.

In practice, this requires the divorce court to carefully review the trust agreement, as APTs can be – and often are – structured in a manner where a non-fiduciary trust protector, appointed by the settlor, can turn on or off settlor powers or even add or remove trust beneficiaries, including the settlor. Indeed, trust protectors can play a key role in the trust, ranging from controlling the trustee (e.g., approving or objecting distributions, trustee compensation, appointment or removal of trustees, approving or objecting trustee investment actions, etc.) to modifying and amending the trust. The divorce court should pay close attention to the use and control, directly or indirectly, of the trust property, not necessarily whether a spouse is a beneficiary. Additionally, a trust which gives only one spouse substantial powers (i.e., appointing themselves as trustee or authorizing compensation to themselves as "guardian" of a child beneficiary) should be viewed with deep suspicion.

### Conclusion

Asset protection trusts, for better or for worse, are likely here to stay in Utah. The conflict between APTs and the equitable division of marital assets in divorce is looming and inevitable and courts should be prepared to consider the issue when it arises. The resolution, however, does not necessarily require the court to forsake one law for another. A court can and should nimbly craft a ruling that accepts both APTs and the just and equitable division of marital assets in divorce.