

— The Transferor may retain the right to remove a trustee or advisor and appoint a new trustee or advisor who may not be related to the Transferor or a subordinate party with respect to the Transferor (Miss. Code Ann. § 91-9-721(g), Trust Section 6.02(f) and Trust Section 7.05).

### § 1129 Missouri Asset Protection Trust<sup>1</sup>

In 1989, Missouri enacted its domestic asset protection trust statute, such statute was amended and recodified in 2004.<sup>2</sup> The domestic asset protection trust portions of the statute were amended in 2011.<sup>3</sup> It is codified in Missouri Revised Statutes, Title XXXI, Chapter 456, Article 5, Section 505.<sup>4</sup>

#### I. Frequently Asked Questions

(1) *What are the statutory elements to qualify as an asset protection trust under the Missouri statutes?*

The statutory elements are all contained in Mo. Rev. Stat. Ann. §§ 456.5-505.3 and 505.6. See the drafting checklist section below for a summary of what most practitioners believe the elements are under the language of Mo. Rev.

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#### [Section 1129]

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<sup>2</sup>The incorporation and reenactment of the Missouri DAPT statute was intended to clarify the intent to provide creditor protection for self-settled trusts contrary to prior cases that indicated otherwise.

<sup>3</sup>The 2011 amendment clarified that a testamentary limited power of appointment held by the grantor does not constitute a retained right to amend the trust.

The statute does not address a testamentary general power of appointment held by the grantor.

<sup>4</sup>In addition to the Missouri DAPT statute Mo. Rev. Stat. Ann. § 456.5-505, Mo. Rev. Stat. Ann. § 456.5-504 also provides protection by providing that a beneficiary's interest in a trust that is subject to the trustee's discretion does not constitute an interest in property or an enforceable right. This statute does not address the issue of self-settled trusts. The DAPT statute more specifically provides protection for self-settled trusts and most Missouri practitioners rely upon such DAPT statute, but by its terms Mo. Rev. Stat. Ann. § 456.5-504 also applies to self-settled trusts.

Stat. Ann. §§ 456.5-505.3 and 505.6.

Below are the relevant subsections of the Missouri domestic asset protection trust statute (Missouri DAPT statute) contained in Mo. Rev. Stat. Ann. §§ 456.5–505.3, 505.4, and 505.6:

“3. With respect to an irrevocable trust with a spendthrift provision, a spendthrift provision will prevent the settlor’s creditors from satisfying claims from the trust assets except:

- (1) Where the conveyance of assets to the trust was fraudulent as to creditors pursuant to the provisions of chapter 428; or
- (2) To the extent of the settlor’s beneficial interest in the trust assets, if at the time the trust became irrevocable:
  - (a) The settlor was the sole beneficiary of either the income or principal of the trust or retained the power to amend the trust; or
  - (b) The settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument.

4. In the event that a trust meets the requirements set forth in subsection 3 of this section, a settlor’s creditors may not reach the settlor’s beneficial interest in that trust regardless of any testamentary power of appointment retained by the settlor that is exercisable by the settlor in favor of any appointees other than the settlor, the settlor’s estate, the settlor’s creditors, or the creditors of the settlor’s estate.

. . .

6. For purposes of this section:

- (1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and
- (2) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Sections 2041(b)(2), 2513(e) or 2503(b) of the Internal Revenue Code.”<sup>5</sup>

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<sup>5</sup>It is not entirely clear what it means for the settlor to be the sole beneficiary of either the income or principal of the trust. The most conservative approach is to have additional current beneficiaries, as well as remainder beneficiaries. It is also not clear when a settlor has

(2) *What protection mechanism does the Missouri statutes utilize: discretionary trust, spendthrift trust, or other?*

The Missouri statute provides the same protection as that provided by the third party spendthrift statute.<sup>6</sup>

(3) *Are there limitations as to what can be protected under the Missouri statutes, e.g. limited to a specified dollar amount, or to certain kinds of assets?*

There is no dollar limit to what can be contributed to a Missouri trust, nor is there a limitation on the kinds of assets that can be contributed to a Missouri trust.

(4) *What asset requirements, if any, are in the Missouri statutes?*

None.

(5) *Under Missouri statutes, generally, are there any limitations on the kinds of property a trust can hold (e.g. agricultural real property)?*

No.

(6) *Under Missouri statutes, are there any limitations on non-citizens settling a trust?*

No.<sup>7</sup>

(7) *What, if any, are the exception creditors under the Missouri statutes?*

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“retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument.” The Missouri comment to Mo. Rev. Stat. Ann. § 456.5-505 refers to the requirement that the settlor must be “entitled to trust income or principal in the trustee’s discretion,” and states that a settlor’s interest in a “wholly discretionary” irrevocable trust is clearly protected. The comment also states that the original purpose of this statute was “to allow the settlor of an irrevocable trust to retain an interest in an irrevocable trust that would not result in the inclusion of the assets of that trust in the grantor’s gross

estate for federal estate tax purposes on the grantor’s death.” The comment cites two tax cases both of which contain completely discretionary distribution standards. *See Estate of Wells v. C.I.R.*, T.C. Memo. 1981-574, T.C.M. (P-H) P 81574, 42 T.C.M. (CCH) 1305, 1981 WL 10972 (1981); *Outwin v. Commissioner of Internal Revenue*, 76 T.C. 153, 1981 WL 11352 (1981), acquiescence recommended, AOD-1981-121, 1981 WL 176209 (I.R.S. AOD 1981) and acq., 1981-2 C.B.1.

<sup>6</sup>Mo. Rev. Stat. Ann. §§ 456.5-505.3, 456.5-502.3.

<sup>7</sup>The nexus to Missouri required by the DAPT statute is not explicitly stated in the statute.

Under the Missouri statutes, the exception creditors are (i) a beneficiary's child, spouse, or former spouse who has a judgment against the beneficiary for support or maintenance, but only as to present or future trust income,<sup>8</sup> (ii) a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust, but only as to present or future trust income,<sup>9</sup> and (iii) a claim of the State of Missouri or the United States to the extent a statute of Missouri or federal law so provides.<sup>10</sup>

A separate statute under the Missouri dissolution of marriage statutes provides that no property shall be exempt from attachment or execution (i) in a proceeding instituted by a person for maintenance, or (ii) upon a judgment or order issued to enforce a decree for alimony or for the support and maintenance of children.<sup>11</sup>

(8) *What administrative requirements, if any, are in the Missouri statutes?*

None.

(9) *Missouri has a state income tax, assuming annual net taxable trust income of \$100,000, and also assuming that the trust is a grantor trust for income tax purposes, how would this trust income be taxed under the Missouri tax statutes?*

Under Missouri law, the trust income would be taxed to the grantor, if the grantor was a Missouri resident or if the income was Missouri source income. Missouri has a fiduciary income tax which generally follows the same "pass through" concepts as federal fiduciary income tax.<sup>12</sup> For a resident trust classified as a "grantor trust" under I.R.C. §§ 671 to 678, all items of income, deductions, and credits (including capital gains) would pass through to the individual grantor, and no tax would be reportable or payable by the trust on the trust's fiduciary income tax return. All income, deductions, and credits passing through to the resident grantor would be reported on the grantor's individual resident

<sup>8</sup>Mo. Rev. Stat. Ann. § 456.5- 503.3.

<sup>9</sup>Mo. Rev. Stat. Ann. § 456.5- 503.2.

<sup>10</sup>Mo. Rev. Stat. Ann. § 456.5- 341, 143.351.

<sup>11</sup>Mo. Rev. Stat. Ann.

<sup>12</sup>Mo. Rev. Stat. Ann. §§ 143.

income tax return.<sup>13</sup> If the grantor of the trust is a non-resident of Missouri, only “Missouri source taxable income” would be reportable by the non-resident individual on the non-resident individual income tax return,<sup>14</sup> with this income being subject to Missouri income tax up to 6%. Missouri source taxable income generally consists of income from real or tangible personal property situated in Missouri or income from a business, trade, profession, or occupation carried on in Missouri.<sup>15</sup>

## II. Basic Trust Form

\_\_\_\_\_ FAMILY 2017

### IRREVOCABLE TRUST

THIS IRREVOCABLE TRUST AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2017, by and between \_\_\_\_\_, as Grantor, and \_\_\_\_\_, as the initial Trustee. The Trustee(s), whether singular or plural, serving hereunder from time to time are hereinafter called the “Trustee.”

#### ARTICLE 1. ESTABLISHMENT AND ADMINISTRATION OF TRUST DURING MY LIFETIME

##### 1.1. ADMINISTRATION OF TRUST DURING MY LIFETIME

Until my death, the net income and principal of the Trust may, in the discretion of the Trustee, be paid to or used and applied for the support and maintenance in reasonable comfort, health, and education of \_\_\_\_\_.<sup>16</sup> In addition, the Trustee may, in the Trustee’s sole and absolute discretion, distribute such amounts of the Trust income and principal to me, or for my benefit, as the Trustee deems appropriate, from time to time.<sup>17</sup> The Trustee shall at all times have the right to

<sup>13</sup>Mo. Rev. Stat. Ann. § 143.111.

<sup>14</sup>Mo. Rev. Stat. Ann. §§ 143.041, 143.181, 143.381, 143.391.

<sup>15</sup>Mo. Rev. Stat. Ann. § 143.181.

<sup>16</sup>Individuals other than the grantor are also included as additional beneficiaries to satisfy the requirement that the grantor was

not the “sole beneficiary of either the income or principal of the trust.” See n. 18.

<sup>17</sup>Grantor’s interest in the trust is completely discretionary. See n. 4. If non-grantor trust status is desired, then the trust should provide that such discretionary distributions to the grantor are subject to the consent of another

exclude any such beneficiaries from any such discretionary distribution and to make equal or unequal distributions among them. In making such distributions the Trustee may take into consideration other income and resources available to the beneficiaries or any of them.

#### ARTICLE 2. DIVISION OF TRUST AFTER MY DEATH

As soon as practicable after the date of my death, the Trustee shall divide and distribute the remaining trust assets (the “Residue”) as provided in this Article. [The drafting attorney should specify the remainder beneficiaries.]<sup>18</sup>

#### ARTICLE 3. DESIGNATION, REPLACEMENT, AND COMPENSATION OF TRUSTEES

[The drafting attorney will add under this Article such attorney’s regular and customary Trustee provisions.]

#### ARTICLE 4. GENERAL ADMINISTRATIVE PROVISIONS

[The drafting attorney will add under this Article such attorney’s regular and customary trust administration provisions, as well as the following specific provisions.]

##### 4.1. IRREVOCABILITY

This Trust and each trust or separate share created herein are hereby expressly declared to be irrevocable, and I hereby expressly waive all rights and powers, whether alone or in conjunction with others, and regardless of when or from what source I may heretofore or hereafter have acquired such rights or powers, to alter, amend, revoke or terminate any trust or separate share herein created, or to alter, amend or change the terms and conditions of this Irrevocable Trust Agreement, in whole or in part.<sup>19</sup>

##### 4.1.1. TRUST PROPERTY RELINQUISHED

By this trust instrument, I, during the term hereof, hereby renounce any interest, either vested or contingent, in the income or principal of the Trust or any separate share herein created, and relinquish all possession or enjoyment of, or the right to income from, the property of the Trust or separate shares herein created, and all right

beneficiary. *See* n. 26 and 27.

<sup>18</sup>Provision for contingent remainder beneficiaries to take the remaining assets upon the grant-

or’s death. *See* n. 4.

<sup>19</sup>Trust is irrevocable and grantor retains no power to amend the trust. *See* n. 15 and 19.

and power, whether alone or in conjunction with others, to designate the persons who shall possess and enjoy the property of the Trust or separate shares, or the income therefrom, other than as permitted in Article 1.1. Notwithstanding any other provision in this trust instrument, in no event shall any portion of the principal or income of the Trust revert or be distributed to me, my estate, be applied or distributed so as to discharge or mitigate my legal obligations to support or maintain the beneficiary(ies) hereof, nor otherwise be used or applied for my benefit or to discharge any of my legal obligations, other than as permitted in Article 1.1.

#### 4.2. GOVERNING LAW; SEVERABILITY

Missouri law shall govern the (i) validity of the trust, (ii) administration of the trust, (iii) meaning, interpretation, and construction of the trust terms, and (iv) effect of the trust terms. The Trustees shall administer the trust in Missouri, until such time as the Trustees file with the records of the trust a written statement signed by the Trustees designating that the trust is to be thereafter administered in another state.<sup>20</sup>

If any provision of this trust instrument shall be invalid or unenforceable, the remaining provisions hereof shall subsist and be carried into effect.

#### 4.3. SPENDTHRIFT CLAUSE

No beneficiary shall have power to assign, transfer, encumber or otherwise anticipate or dispose of any interest he or she may have in any trust estate governed by this trust instrument, either principal or income, and any such assignment, transfer, encumbrance, or other attempted anticipation or disposition thereof shall be void and of no effect. No interest or right of any beneficiary in any such trust estate hereunder, either principal or income, shall be subject to garnishment, attachment or any other legal or equitable process based on or otherwise

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<sup>20</sup>This provides that the meaning and effect of the trust terms are to be governed by Missouri law and directs the Trustee to administer the trust in Missouri. This increases

the chances of Missouri law being applied to controversies litigated in and out of Missouri. *See* n. 24 and 25.

relating to any debt or liability of such beneficiary.<sup>21</sup>

#### ARTICLE 5. TRUSTEE'S POWERS

[The drafting attorney will add under this Article such attorney's regular and customary Trustee powers.]

IN WITNESS WHEREOF, the parties have executed this trust instrument as of the day and year first above written.

[Grantor and Trustee signatures and acknowledgments follow here.]

### III. The Drafting Checklist

#### 1. Statutory Elements

\_\_\_ The trust must be irrevocable.<sup>22</sup>

\_\_\_ The trust must contain a spendthrift clause.<sup>23</sup>

\_\_\_ The transfer of assets to the trust must not be fraudulent as to creditors pursuant to the provisions of chapter 428, Missouri Revised Statutes.<sup>24</sup>

\_\_\_ The trust must provide that individuals other than the grantor are also current permissible distributees of income and principal and provide for contingent remainder beneficiaries to take the remaining assets upon the grantor's death.<sup>25</sup>

\_\_\_ The grantor may not retain the power to amend the trust.<sup>26</sup>

\_\_\_ The grantor should not have a right of withdrawal.<sup>27</sup>

\_\_\_ The grantor's interest in the trust should be completely discretionary.<sup>28</sup>

#### 2. Drafting Suggestions

\_\_\_ With respect to the Trustee, consider all possible arguments against spendthrift protection before naming the

<sup>21</sup>Spendthrift clause. *See* n. 16.

<sup>22</sup>Mo. Rev. Stat. Ann. § 456.5-505.3.

<sup>23</sup>Mo. Rev. Stat. Ann. § 456.5-505.3.

<sup>24</sup>Mo. Rev. Stat. Ann. § 456.5-505.3(1).

<sup>25</sup>Mo. Rev. Stat. Ann. § 456.5-505.3(2)(a).

<sup>26</sup>Mo. Rev. Stat. Ann. § 456.5-505.3(2)(a).

<sup>27</sup>Mo. Rev. Stat. Ann. § 456.5-505.6.

<sup>28</sup>Mo. Rev. Stat. Ann. § 456.5-505.3(2)(b).



grantor as a Trustee.<sup>29</sup>

— With respect to trust assets, the trust should not be funded with real estate, or any other assets, located in a state that does not recognize the validity of DAPTs,<sup>30</sup>

— The trust should provide that Missouri law governs the (i) validity of the trust, (ii) the administration of the trust, (iii) the construction of the trust terms, and (iv) the legal effect of the trust terms.<sup>31</sup>

— The trust should direct the Trustee to administer the trust in Missouri.<sup>32</sup>

— The trust form below is a grantor trust for income tax purposes.<sup>33</sup> If non-grantor trust status is desired, the trust may be drafted to provide that all distributions are subject to the consent of an adverse party (another current beneficiary or a vested remainder beneficiary).<sup>34</sup>

### 3. Due Diligence Issues

— Follow all due diligence procedures that you would follow with any asset protection trust, such as:

- (a) Confirm that the transfer of assets to the trust does not violate the Missouri Uniform Fraudulent Transfer Act.
- (b) Have the grantor complete a questionnaire listing all of the grantor's assets and liabilities (current and potential), to determine that the grantor is not insolvent.

<sup>29</sup>The Trustee should not reside or do business in a state that does not recognize the validity of DAPTs. This avoids the possibility that a court in a state that does not recognize the validity of DAPTs could obtain personal jurisdiction over the Trustee. If possible, the Trustee should be an individual who is a Missouri resident or a Missouri bank or trust company that only does business in Missouri.

<sup>30</sup>This avoids the possibility that a court in a state that does not recognize the validity of DAPTs could obtain in rem jurisdiction over the trust assets. If possible,

the trust should only be funded with assets located in Missouri.

<sup>31</sup>If a trust provides that the meaning and effect of its terms are to be governed by Missouri law, this increases the chances of Missouri law being applied to controversies litigated in Missouri.

<sup>32</sup>If a trust directs the Trustee to administer the trust in Missouri, this increases the chances of Missouri law being applied to controversies litigated outside of Missouri.

<sup>33</sup>I.R.C. § 677.

<sup>34</sup>I.R.C. § 677(a).