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*755 CHANGES IN CLIMATE: THE MOVEMENT OF ASSET PROTECTION TRUSTS FROM INTERNATIONAL TO DOMESTIC SHORES AND ITS EFFECT ON CREDITORS' RIGHTS

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Consider the following hypothetical situation involving an asset protection trust:

In 1995, Maria and her husband James, a wealthy attorney and entrepreneur, began to experience marital difficulties. That same year, James, supposedly out of concern for frivolous lawsuits and unknown creditors, placed most of the family's assets, including marital property, in a domestic asset protection trust and named himself and his "spouse" as beneficiaries.

Five years later, James and Maria file for divorce. During the proceedings, Maria discovers the trust, but is informed that she is not entitled to any of its assets because James did not specifically name her as a beneficiary. When Maria attempts to challenge James' transfer of the family's assets into the trust, she discovers that the law governing the trust prohibits challenges by spousal support claimants. Consequently, Maria receives nothing in the divorce. [FN1]

Also in 2000, James defaults on a substantial business loan. The lending institution discovers James' asset protection trust, and files suit against James for fraudulently transferring his assets out of the financial institution's reach. James moves for dismissal, arguing that the law of the state in which the trust is located governs the dispute, and this state requires creditors to bring fraudulent conveyance claims within four years from the time of transfer. The court agrees with James and grants his motion to dismiss.

***756** The above hypothetical is not uncommon in light of the growing popularity of asset protection trusts. Asset protection trusts are trusts set up in such a way as to avoid the claims of creditors, both voluntary, such as banks and lending institutions, and involuntary, namely spouses, children and tort victims. Before 1997, asset protection and its supporting industry existed only in overseas jurisdictions such as Barbados and the Cayman Islands. In 1997, however, Alaska and Delaware amended their trust laws to resemble offshore asset protection legislation. These trusts, especially since they have landed on American soil, have significantly impacted creditors' rights.

This Comment explores the changing nature of creditors' rights vis-a-vis asset protection trusts, both offshore and domestic. Part I examines the evolution of fraudulent transfer laws, the traditional source of legal protection of creditors' rights, since their inception in sixteenth-century England. Part II focuses on the background and legal treatment of spendthrift trusts, which are commonly used in asset protection because of their ability to keep funds out of creditors' reach. The characteristics of both offshore and domestic asset protection trusts are discussed in Part III, including the recent Alaska and Delaware legislation. Part IV gives a detailed analysis of how courts presently regard offshore asset protection trusts and the debtors who utilize them. Part V of this Comment concludes with speculation about future judicial treatment of domestic asset protection trusts.

I Creditors' Rights Under Fraudulent Transfer Law

The most important concept of creditors' rights is the universal principle that creditors have an interest in the assets of their debtors. As a result, debtors cannot attempt to fraudulently remove these assets from their creditors' reach. [FN2] This principle forms the basis for fraudulent transfer law. Fraudulent transfer laws originated in England and have since been adopted and modified in the United States. Today, state and federal versions of fraudulent conveyance laws exist and all expand or solidify creditors' rights through various methods. [FN3]

***757** A. Statute of Elizabeth

All forms of fraudulent transfer law are based on the English law 13 Statute of Elizabeth (1571). [FN4] This statute prohibits conveyances made with the "intent to delay, hinder or defraud creditors or others of their just and lawful actions." [FN5] Creditors were initially required to prove that the debtor actually intended to defraud his creditors in making the transfer. [FN6] Since establishing the subjective state of mind of the debtor proved to be a difficult task, the English Star Chamber in Twyne's Case allowed for the use of "marks of fraud," a.k.a., "badges of fraud," or objective factors which, when combined, indicated the debtor's fraudulent intent. [FN7] An example of a "mark" would be the transfer of property to a relative or friend directly preceding a judgment against the transferor, especially if the transferor continues to use the property. [FN8] Evidence that the debtor exhibited one or more of these objective factors eased creditors' burden of proving the debtor's intent to "delay, hinder or defraud" in a fraudulent transfer action.

The Statute of Elizabeth does not contain any provision limiting the amount of time in which creditors may reach a transferred asset. [FN9] In the states that have adopted this statute, courts may apply the statute of limitations for fraud, which is usually six ***758** years, or a general statute of limitations of ten years. [FN10] These statutes usually do not begin to run until the creditor discovers fraud or reasonably should have discovered the fraud. Equity courts may use the doctrine of laches to prohibit what would otherwise be an equitable remedy if the creditor has taken too long to bring suit against the debtor. [FN11]

While many early states' common law and statutes mirrored the Statute of Elizabeth, currently only nine states still have statutes based on the English law. [FN12] The Uniform Fraudulent Conveyance Act further builds on the protections afforded creditors under the Statute of Elizabeth.

B. Uniform Fraudulent Conveyance Act

The Uniform Fraudulent Conveyance Act ("UFCA"), created in 1918 by the National Conference of Commissioners of Uniform State Laws (NCCUSL), expanded creditors' rights significantly. Similar to the Statute of Elizabeth, the UFCA voids transfers made with actual intent to "hinder, delay or defraud" both creditors that exist at the time of the transfer as well as creditors who come into existence some time after the transfer. [FN13] The UFCA also invalidates specific constructively fraudulent conveyances, namely those that occur without fair consideration when: (1) the debtor is or becomes insolvent by the transfer; (2) the debtor is left with a small amount of capital; and (3) the debtor intends or believes he will be unable to pay his debts. [FN14] Though not mentioned in the Act, courts still accept badges of fraud as evidence of the debtor's state of mind at the time of the transfer. [FN15] Thus, creditors need not prove the debtor's actual, subjective intent in order to reach hidden assets. The UFCA does not provide a limitations period. Instead, states that have adopted the UFCA may apply their own fraud or default statutes of limitations.

After its initial promulgation, the UFCA was adopted by ***759** twenty- five states and one U.S. territory. [FN16] In recent decades, however, twenty-one states have replaced the UFCA with the NCCUSL's rewritten version of the UFCA, the Uniform Fraudulent Transfer Act. Thus, only four states and one territory continue to have statutes based on the UFCA. [FN17] The impact of the UFCA has been significant. Principally, the UFCA expanded creditors' rights from their English roots and also initiated the development of strong creditor protection law in the United States.

C. Federal Bankruptcy Code

The Bankruptcy Reform Act [FN18] was enacted in 1978 to solidify creditors' rights on a federal scale. In contrast to state fraudulent transfer laws, which apply at any time, the Bankruptcy Code ("Code") is only implicated when the debtor or the debtor's creditors file a petition in a bankruptcy court. [FN19] Being actual law instead of a uniform act, the Code is applied in every federal bankruptcy court instead of just in certain states.

Once the petition is filed, a trustee is appointed to represent the creditors' interests in the distribution of the debtor's assets. [FN20] The bankruptcy trustee has power to void any transfer or transfers of property that are normally voidable by the debtor's creditors. [FN21]

Similar to the UFCA, the Code allows both present and future creditors, vis- a-vis the bankruptcy trustee, to void intentional and constructively fraudulent transfers. [FN22] To void any transfer made by the debtor, the trustee must prove the debtor's actual intent to "hinder, delay or defraud" creditors, or that the debtor: (1) made the transfer for a less than reasonably equivalent value; (2) was insolvent or was rendered insolvent by the transfer; (3) was engaging in or about to engage in a business or transaction that would leave the debtor with an unreasonably small amount of capital; or (4) intended to incur, or was believed by the trustee, ***760** to incur debts for which payment was unlikely. [FN23] The Code's reachback period allows the bankruptcy trustee to invalidate transfers made by the debtor up to one year before bankruptcy is filed, and the trustee has two years from the date of the bankruptcy petition to do so. [FN24]

In sum, the addition of the Code has extended creditors' rights law to the federal level, and thus given creditors more opportunity to reach debtors' assets. Creditor's rights laws were again addressed at the state level with the promulgation of the Uniform Fraudulent Transfer Act.

D. Uniform Fraudulent Transfer Act

In light of the enactment of the Code and the need to rewrite fraudulent conveyance law, the NCCUSL promulgated the Uniform Fraudulent Transfer Act ("UFTA") in 1984. These rules essentially mirror many provisions of the Code and solidify debtor-creditor law on a state level.

Like its predecessors, the UFTA allows both present and future creditors to reach assets that were transferred "with actual intent to hinder, delay, or defraud any creditor of the debtor." [FN25] Present and future creditors mayvoid constructively fraudulent transfers as well, including those transfers made for less than a "reasonably equivalent value" when a debtor (1) was involved in a business or transaction which would leave him with a small amount of capital, or (2) intended, believed, or reasonably should have believed he would incur debts which he would be unable to repay. [FN26] The UFTA also provides a non-exclusive list of "badges of fraud," which may be used to prove a debtor's actual intent. [FN27] In addition, present creditors are allowed to demonstrate a fraudulent conveyance without requiring proof of the debtor's intent in two limited situations: (1) if the transfer was made for less than reasonably equivalent value while the debtor was insolvent or was rendered insolvent by the transfer; and (2) if the debtor, while insolvent, made a transfer to an insider for a previous debt, and the insider reasonably believed ***761** that the debtor was insolvent. [FN28]

Unlike the UFCA, the UFTA provides a statute of limitations. Creditors are given four years to prove that a constructively fraudulent transfer occurred. With regard to intentionally fraudulent transfers, creditors have four years after the transfer occurred or one year after the transfer was or could reasonably have been discovered. [FN29] In situations where the debtor made a transfer to an insider, present creditors are given one year after the transfer occurred to prove that it was fraudulent. [FN30]

Since its enactment, thirty-nine states and the District of Columbia have modeled their fraudulent conveyance laws on the UFTA. [FN31] While the UFTA does not create any substantial expansions in debtor-creditor law, it notably provides creditors with the same rights and protections in state courts as they would have in federal bankruptcy courts without having to endure the bankruptcy process. In sum, several pieces of legislation have been created over time to curtail debtors' ability to transfer assets out of their creditors' reach, with each piece building on the proceding one. In Part II, the evolution and legal significance of spendthrift trusts, another mechanism utilized by debtors to protect assets, will be discussed.

II Spendthrift Trusts

A. Background

Spendthrift trusts are a unique aspect of American law based on ancient methods of keeping fortunes within the family. [FN32] The term "spendthrift" refers to a trust or a clause in a trust which restrains both the voluntary and involuntary alienation of the ***762** beneficiary's interest in the trust. [FN33] The restraint on voluntary alienation prohibits the beneficiary from voluntarily transferring his rights to future payments of income or principal. The restraint on involuntary alienation precludes creditors of the beneficiary from reaching his interest in satisfaction of their claims. [FN34]

These trusts have roots in both early nineteenth century statutes and common law. However, widespread legal recognition and the debate over the validity of the spendthrift trust did not occur until later in the century following the 1875 Supreme Court case of Nichols v. Eaton. [FN35] The validity of spendthrift trusts was firmly established soon afterward in the landmark decision of Broadway National Bank v. Adams. [FN36] In that case, the Massachusetts Supreme Court explained that the public policy favoring the alienation of property is not harmed so long as creditors are not being defrauded. [FN37]

While originally used to protect the assets of fiscally irresponsible beneficiaries, hence the term "spendthrift," the use of these trusts has expanded into a protective device against the creditors of responsible beneficiaries. [FN38] Today, spendthrift trusts are recognized ***763** and enforced in almost all jurisdictions, either by common law, statute, or both. [FN39]

B. Piercing Trusts

As a general rule, courts will recognize and enforce spendthrift trusts created by the settlor for the benefit of a third party, so long as creation of the trust is not fraudulent. [FN40] Any property or assets held in trust for a beneficiary are immune to creditors' claims until they are allocated to the beneficiary. [FN41] Once the beneficiary is paid, creditors are entitled to all or a portion of that payment to satisfy their claims. [FN42] Creditors are also allowed to seize "fruits" of the trust, namely property purchased by the beneficiary with his trust proceeds. [FN43]

Over the years, state courts and legislatures have carved out certain public policy exceptions in which involuntary creditors may reach the beneficiary's interest in a spendthrift trust before it is received by the beneficiary. [FN44] Both state courts and statutes allow for the piercing of a spendthrift trust for spousal and child ***764** support, particularly if claimants are dependents of the beneficiary, [FN45] but may not accord the same treatment for alimony claims. [FN46] Only three states currently allow tort judgment creditors to pierce spendthrift trusts. [FN47] In addition, necessary service providers, such as hospitals and federal and state government agencies, are allowed to reach a debtor's assets for payment. [FN48] The reasoning behind these exceptions is that unlike voluntary creditors, involuntary creditors do not have the ability to determine whether a debtor is a beneficiary under a spendthrift trust, and must accept the debtor's existing financial situation at the time the claim arises. [FN49]

C. Rule Against Self-Settled Spendthrift Trusts

Courts generally will not enforce a spendthrift trust against the voluntary and involuntary creditors of a beneficiary if the trust is self- settled. It is well-established in United States' statutory and common law that any trust where the settlor names himself beneficiary ***765** is void against present and future creditors. [FN50] Courts applying this rule usually cite the public policy against allowing a person "to create for his own benefit an interest in [his] property that cannot be reached by his creditors." [FN51] In addition to spendthrift trusts, several other methods of asset protection have evolved in the field of estate planning. Part III will explore the various forms of asset protection trusts as well as the court's treatments of these trusts.

III Asset Protection

A. Overview

A subset of estate planning, asset protection is a method of organizing one's assets to shield them from the reach of potential creditors. [FN52] Engaging in asset protection is legal so long as the resulting asset protection device is not fraudulent. Asset protection can legitimately serve as a safeguard against financial uncertainties and unanticipated litigation. [FN53] Asset protection is not limited to interests held in trust but is commonly used in other contexts. [FN54]

Asset protection trusts are generally utilized by wealthy individuals, corporations, and professionals who may potentially incur large judgments against them. [FN55] Asset protection is an expensive venture; anyone considering the creation of an offshore trust should have a net worth of at least $500,000 and be prepared to incur start-up costs of at least $15,000 for a $1 million ***766** account along with a one percent yearly administration fee. [FN56] The aggregate amount held in these trusts is tremendous. Experts estimate that the numbers are somewhere between $1 trillion and $5 trillion. [FN57]

Until 1997, asset protection was exclusively utilized in foreign jurisdictions such as Barbados, the Bahamas, and the Cook, Channel and Cayman Islands. However, in 1997, Alaska and Delaware enacted laws to facilitate asset protection in their states. The growing popularity of asset protection and its supporting industry most likely occurred in response to economic and social factors including the increase of litigation and legal liability, and the failure of traditional methods such as transferring assets into family limited partnerships or lower liability spouses. [FN58]

B. Offshore Asset Protection Trusts

1. Common Characteristics

Offshore asset protection trusts are usually irrevocable spendthrift trusts created under the laws of foreign jurisdictions to protect a settlor's assets from potential creditors. [FN59] Normally the beneficiaries of such trusts are the settlor's family members or the settlor himself. The trustee is a trust company or financial institution located in the foreign jurisdiction. [FN60] The duration of the trust varies, with three possibilities: (1) a short period of time, such as ten years, with a reversionary interest in the settlor; (2) a longer time period that is tied to the lives of the settlor or beneficiaries; or (3) the amount of time established by the laws of the trust jurisdiction. [FN61]

The trustee is usually given almost complete discretion over the management of the trust. However, the settlor retains control over the trust through various methods, including: (1) naming himself as the trust's "protector" with the power to appoint additional or new trustees; (2) being a member of a "committee ***767** of advisors" that advises the trustee on trust management issues; or (3) providing the trustee with a non-binding "letter of intent" that describes the settlor's preferences for trust distributions. [FN62]

The trust instrument usually contains language directing that the law of the situs will govern the trust and that any interpretation of the trust will be determined in that jurisdiction. However, the trust may contain a flight clause, which enables the movement of the trust to another jurisdiction for different reasons, such as pending litigation against the trust by creditors. [FN63]

Offshore trusts also often include anti-duress provisions. Effective immediately upon a situation of duress, these provisions remove any powers retained by the settlor over the trust and placethem in the trustee. [FN64] The trustee is granted full power over the trust and may ignore any subsequent orders concerning the trust. [FN65]

The trust will specify which types of situations will cause the anti-duress provision to take effect, including the issuance of a court order from a jurisdiction other than the one governing the trust. [FN66] Thus, if a United States court orders the settlor to repatriate the trust's assets to the United States for bankruptcy or judgment purposes, the trustee may choose not to follow this order. Any demand by the settlor to follow the court's order has no effect because the settlor no longer has any control over the trust and its assets.

Additionally, many trusts also contain a provision allowing the settlor to regain control once the duress situation

has passed. [FN67] Thus, anti- duress provisions give the settlor the best of both worlds by taking away his control over the trust while its assets are in jeopardy, and then giving him back his control once the threat has passed.

***768** 2. Optimum Protection from Creditors

Most experts agree that offshore asset protection trusts currently provide settlors the maximum amount of protection from creditors for a number of reasons. [FN68] First, because foreign jurisdictions do not recognize United States judgments or other legal processes, the American rule against self-settled spendthrift trusts does not apply. In addition, most foreign jurisdictions have repealed the rule against perpetuities and allow the trust to continue indefinitely. [FN69] Fraudulent conveyance laws are also relaxed in foreign jurisdictions. For example, most countries have repealed the Statute of Elizabeth and replaced it with versions more favorable to debtors. [FN70] In general, much of the offshore asset protection legislation was written with the intent of providing laws that are more debtor- friendly and less creditor-protective than United States law. [FN71]

As a result, creditors are significantly limited in reaching the assets of their debtors who have placed them in overseas jurisdictions. Since United States judgments against debtors are not enforceable in foreign jurisdictions, creditors must travel to the country in which the trust is located and relitigate their claims under foreign laws. [FN72] Once in these jurisdictions, the laws make judgment collection difficult and expensive. [FN73] Most foreign attorneys demand that all of their fees be paid up front. Foreign courts may also require creditors to pay the debtor's estimated court costs before litigation commences. [FN74] Creditors must prove the debtor's actual, subjective intent to "delay, hinder or defraud" and are unable to use any badges of fraud to do so. [FN75] These jurisdictions also require a higher standard of proof than that normally utilized in American civil cases. [FN76] Additionally, the statute of limitations for enforcing judgments begins to run from the moment the conveyance occurs and usually expires one ***769** to two years later. [FN77] A trust's flight clause may further complicate matters by moving the trust to a jurisdiction with even weaker fraudulent conveyance laws and shorter statutes of limitations. These laws are especially harsh on involuntary creditors, who normally do not have financial and legal resources comparable to those of banks and lending institutions, and thus involuntary creditors may be unable to collect from their debtors at all.

C. Domestic Asset Protection Trusts

Prior to 1997, asset protection trusts did not exist in the United States, largely because of extensive creditor protection laws and the rule against self-settled spendthrift trusts. In 1997, however, Delaware and Alaska enacted legislation mirroring the laws of overseas jurisdictions. [FN78] Whether these laws will withstand challenges by creditors is open to speculation since American courts have not yet addressed the legality of domestic asset protection trusts.

1. Alaska Trust Act

As stated above, Alaska enacted a trust act in 1997 permitting the creation of asset protection trusts within the state. The Act provides substantial protections to debtors by allowing some self-settled spendthrift trusts, by narrowing fraudulent conveyance laws, and by its choice of law provisions.

a. No rule Against Self-Settled Spendthrift Trusts

Alaska's recent legislation governing trusts uses a number of methods to place extensive limitations on the rights of creditors to seize assets held in trust. First, the legislation allows for the creation of a self-settled spendthrift trust. [FN79] Alaska law further ***770** provides that neither present nor future creditors can reach the beneficiary's interest in such a trust, with some exceptions. [FN80] Additionally, creditors can only pierce an Alaska trust in the following situations: (1) a fraudulent transfer occurs under Alaska law; (2) the trust allows the settlor to revoke or terminate the trust without consent of an adverse party; (3) the trust requires that all or part of the income or

principal, or both, be distributed to the settlor; or (4) the settlor is in default of thirty days or more on child support payments at the time of the transfer. [FN81] Alaska law specifically provides that a creditor cannot challenge a transfer into trust made to avoid or defeat support claims or similar judgments. [FN82]

b. Fraudulent Conveyance Law

The Alaska Trust Act potentially weakens the ability of creditors to reach assets under fraudulent conveyance law. According to Alaska law, a fraudulent transfer occurs when "made with the intent to hinder, delay, or defraud creditors or other persons." [FN83] Creditors may have to prove the debtor's subjective intent regarding the transfer without the assistance of objective factors since this provision does not specifically provide that creditors may use badges of fraud. [FN84] While Alaska courts have typically allowed the use of badges of fraud in fraudulent conveyance actions, [FN85] absent a court decision interpreting this statute, it is unclear whether the Alaska law prevents actions based on constructive fraud. [FN86]

The amount of time in which creditors may bring fraudulent ***771** transfer actions closely resembles that of the UFTA. That is, present creditors may bring a claim either four years from the time of transfer or one year from the date the transfer would have reasonably been discovered. [FN87] Future creditors must bring a claim within four years of the time of transfer, regardless of their knowledge about the transfer. [FN88]

c. Choice of Law

The 1997 Act permits the settlor to choose Alaska law to govern "the internal affairs of trusts," which include "the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts." [FN89] The Act outlines specific requirements as to when a trust with an Alaska jurisdiction provision is considered valid and effective. [FN90] Alaska courts are also granted jurisdiction over non-Alaska trusts under certain circumstances. [FN91] Furthermore, ***772** a self-settled spendthrift trust created in another state or country may have its situs moved to Alaska so long as the trust is valid and effective under Alaska law. [FN92] This provision was most likely created to encourage settlors with overseas asset protection trusts to move their assets to a more stable jurisdiction with potentially better trust laws.

2. Delaware's Qualified Dispositions in Trust Act

Delaware also passed legislation permitting asset protection trusts in 1997. Like Alaska, Delaware's laws address self-settled spendthrift trusts, the rights of involuntary creditors, the role of fraudulent conveyance laws, and settlor's choice of law rights. However, as will be discussed, Delaware law differs from Alaska law in several respects within these areas.

a. Less Debtor-Friendly Than the Alaska Trust Act

The recently created trust laws in Delaware closely resemble those of Alaska and offshore asset protection jurisdictions. However, some important differences exist regarding creditor protection. First, Delaware retains the rule against self-settled spendthrift trusts with regard to present creditors, but repeals it in relation to future creditors. [FN93] Delaware rule also places limitations on the settlor's control over the trustee and distributions from the trust. [FN94] It strictly requires that a qualified disposition (Delaware's term for trust) meet the following conditions: (1) expressly state that Delaware law governs; (2) have a spendthrift ***773** clause; and (3) be irrevocable. [FN95] Thus creditors who wish to pierce a Delaware trust must first prove that the trust does not meet at least one of these three requirements.

b. Protection for Involuntary Creditors

Unlike Alaska law, Delaware recognizes the rights of involuntary creditors by according preferred status to certain

creditors. Priority over the trust assets is given to (1) former spouses and children of the debtor for alimony and support payments and (2) tort victims injured by the debtor on or before the date of the trust's creation. [FN96] In this sense, the Delaware law is both conscientious in retaining the general public policy of protecting a special class of creditors, and progressive in expanding this class to include tort victims.

c. Fraudulent Conveyance Law

Like Alaska, the Delaware law limits creditors' actions against debtors for fraudulent conveyances. The exclusive means of invalidating a trust are provided under Delaware's version of the UFTA [FN97] which applies even if the settlor's powers exceed those required for a valid Delaware trust. [FN98] However, creditors are only limited to using the UFTA if the trust meets the three requirements under the 1997 legislation. If the trust does not meet all of these requirements, creditors are free to choose laws that are more favorable to their position. The statute of limitations for actions is identical to the one provided by the UFTA. That is, present creditors are limited to bringing a claim against a Delaware trust within four years or after the trust was discovered or one year after the trust could have reasonably been discovered, [FN99] and future creditors must bring a claim within four years of the ***774** creation of the trust regardless of when it was discovered. [FN100]

d. Choice of Law

If the language of the trust so provides, Delaware law governs a dispute involving a qualified disposition. [FN101] Unlike Alaska law, the Delaware Act does not contain a detailed provision specifying which affairs are governed by Delaware law. However, the Delaware Act does require that a challenge to a transfer into trust only occur under Delaware's fraudulent transfer law. [FN102] It is important to remember, however, that creditors are not limited to the UFTA if the three requirements of a qualified disposition are not met.

3. Other States

Currently only Alaska and Delaware have revised their trust laws to resemble offshore asset protection legislation, while a small number of states have laws favorable to the creation of asset protection trusts. For example, Missouri allows for the creation of a self-settled spendthrift trust if the trust is discretionary, and outlines creditor piercing requirements similar to that of Alaska and Delaware. [FN103] Similarly, Colorado's trust law arguably provides debtor protection in a self-settled spendthrift trust, at least with regard to future creditors. [FN104] In addition, six states have repealed the rule against perpetuities with regard to interests held in trust, but still retain the rule against self-settled spendthrift trusts. [FN105]

Whether these or other states will follow the lead of Alaska and Delaware and significantly amend their trust laws to favor debtors remains unclear. [FN106] These states are most likely waiting ***775** to see how a court will treat an Alaska or Delaware trust.

If other states elect to not enact asset protection legislation, offshore asset protection trusts are likely to continue to be utilized. However, in recent years, courts have pierced offshore asset protection trusts through various mechanisms. Overseas and domestic courts' treatment of offshore asset protection trusts will be the focus of Part III of this Comment.

III Court Treatment Of Offshore Asset Protection Trusts

A. Overseas Courts

Despite strict asset protection laws, some foreign courts are hesitant to provide relief for debtors who place their assets offshore to evade paying large judgments. For example, in a recent case, two wealthy California developers placed a large amount of assets in a Cook Islands' trust after the initiation of litigation for improper construction of a condominium complex. [FN107] After the condominium owners received a $7.1 million judgment against the

developers in the United States, the litigation resumed in the Cook Islands. [FN108] Even though Cook Islands law provided that the claim would normally have been time-barred after two years, a judge in the Cook Islands held that the statute of limitations did not begin to run until the issuance of the California judgment. Thus, the homeowners were given adequate time to challenge the trust as a fraudulent conveyance. [FN109]

In another overseas example, a Kuwaiti sheikh placed $450 million in a Bahamian trust to conceal it from creditors seeking judgment from a series of fraudulent real estate deals. [FN110] Even though the claim would have been barred by the statute of limitations, the Bahamian court disregarded the statute on grounds of ***776** fairness and held in favor of the creditors. [FN111]

While only a small sampling, these cases are a fair indication of the judicial treatment accorded to the creators of these trusts. These decisions demonstrate that overseas courts have little tolerance for the use of offshore trusts for evasion purposes, especially when large amounts of money are involved. Should these situations arise in the United States, domestic courts will most likely follow suit for similar policy reasons.

B. Domestic Courts

In addition to overseas courts, United States courts have recently begun to address offshore asset protection trusts in a variety of litigation contexts. These cases indicate that domestic courts in general look unfavorably on the use of these trusts, especially when they are used to avoid paying large judgments or support to former spouses.

As noted above, parties often create offshore asset protection trusts to prevent their spouses from getting a share of the family assets in the event of divorce. While foreign laws appear to make these trusts impenetrable, domestic courts have utilized a variety of legal theories to aid a spouse in receiving their share of trust assets.

1. Divorce

a. Incarceration of the Holder of an Offshore Trust

One of the first cases involving an offshore asset protection trust that was created to avoid paying spousal support occurred in 1993 between John Dick, a wealthy developer, and his ex-wife Elisabeth. Before the divorce, Mr. Dick had accumulated more than $42 million in an offshore account on the Isle of Jersey in the English Channel Islands. [FN112] Because his assets were tied up overseas, Mr. Dick claimed to be unable to pay the $35,000-per-month temporary support ordered by a Los Angeles County court. [FN113] Mr. Dick was subsequently jailed under a rarely used 1862 law, which allowed for the incarceration of debtors to prevent ***777** them from fleeing. [FN114] After spending twenty-two days in jail and millions of dollars in litigation, Mr. Dick finally agreed to a $1 million settlement. [FN115]

b. In Personam Jurisdiction Over the Holder of the Offshore Trust

In another divorce involving an overseas choice of law provision, a New York court looked to state law to address a spousal support claim. Riechers v. Riechers involved a New York doctor who, as a result of three malpractice suits over a four-year period, created an irrevocable trust in the Cook Islands which specified that Cook Islands law governed the trust. [FN116] He named himself, his children and "Spouse of the Settlor" as beneficiaries. [FN117] In the Riechers' divorce, the New York Superior Court accepted the trust's choice of law provision without protest. [FN118] Even if it had jurisdiction over the trust, the court noted, the trust had been established for the legitimate purpose of protecting the family's assets. [FN119]

The court, however, allowed Mrs. Riechers to pierce her ex-husband's trust by asserting in personam jurisdiction over Dr. Riechers and applying New York marital property law, which required equitable distribution of marital property. [FN120] Under this law, Mrs. Riechers was entitled to one half of the marital assets of the Cook Islands trust. [FN121]

***778** c. Threats of Litigation

In many high-profile divorce cases, the potential for lengthy litigation is an effective motivation for settlement. In divorces where a spouse has transferred assets into offshore trusts, this remains an important factor in reaching assets transferred overseas. For instance, Peggy Rosenkranz, the former wife of Delphi Financial Corporation's founder and CEO Robert Rosenkranz, faced this situation in 1995. [FN122] Before the couple's marriage began to crumble, Mr. Rosenkranz had transferred over $180 million of assets into a Cayman Islands trust. [FN123] However, after threats of fraud and racketeering claims, Mr. Rosenkranz finally settled with his ex-wife for $50 million. [FN124]

In a similar case, Barbara Westrate faced the impossible task of reaching assets transferred by her former husband to a trust in the Cook Islands. [FN125] Mrs. Westrate had no idea that her former husband had created this trust a few months after meeting with a domestic relations lawyer, or that the instrument did not specifically name her as a beneficiary. [FN126] Frustrated by their inability to reach the trust assets, Mrs. Westrate's lawyers turned to professional responsibility law and argued that her former husband's attorneys had violated the crime-fraud exception to the attorney-client privilege. [FN127] A Florida judge held that a prima facie case existed for this exception, but the case settled before trial, leaving unresolved issues concerning Mr. Westrate's concealment of assets from his former wife. [FN128]

d. Problem Unique to the Extremely Wealthy?

While many of these cases are unusual in the sense that they involve extremely wealthy people battling over millions, the underlying issues remain important to all. In each case, the spouse with considerable control over family assets used offshore asset protection trusts to avoid paying support to a former spouse. Former spouses were faced with the potential of pursuing expensive litigation in the United States and possibly overseas. As a ***779** response, courts have become more creative in reaching trust assets, especially through the use of state law.

Furthermore, the introduction of domestic trust legislation will most likely remove the use of asset protection devices from the world of the wealthy. The ease and affordability of domestic trusts will make their use more prevalent among individuals whose holdings are not as considerable as the Westgates or Rosencranzes. The increased use of these trusts may give rise to more situations where one spouse attempts to hide assets from the other. Given the current attitude of courts toward those who use this method, however, spouses who utilize asset protection trusts to hide marital assets may not necessarily be successful. With the exception of Alaska, whose laws protect trust assets from spousal support claims, most states will likely allow former spouses to reach assets placed in domestic asset protection trusts, especially if the trust is self-settled.

2. Bankruptcy and Other Federal Cases

Most of the litigation concerning offshore asset protection trusts has thus far occurred in federal bankruptcy courts. Recently, the Ninth Circuit Court of Appeals joined the bankruptcy courts in adjudicating offshore trust issues.

In these cases, bankruptcy trustees have either attempted to challenge the creation of the trust as a fraudulent conveyance or have simply sought to have the trust included in the bankruptcy estate. So far, these trustees have been successful. As will be discussed, these courts seem to agree that debtors who have created offshore asset protection trusts with fraudulent intentions do not deserve favorable treatment under United States law.

a.In re Portnoy

The first bankruptcy case concerning an offshore asset protection trust involved Larry Portnoy, a financially troubled business owner, who created a trust on the Isle of Jersey a few years after receiving a $1 million loan from

Marine Bank. [FN129] Upon Portnoy's default on the loan, Marine sued for payment and received a judgment in its favor. [FN130] Portnoy avoided paying the judgment and later filed for bankruptcy. [FN131]

***780** In the bankruptcy proceeding, the bank argued under the continuous concealment doctrine, which is similar to fraudulent conveyance, that Portnoy intended to "hinder, delay, or defraud" his creditors through the creation of the offshore trust. [FN132] Even though Portnoy had transferred all of his available assets to an offshore trust, Marine argued, he still retained unlimited control over the income while simultaneously attempting to conceal the existence of the trust. [FN133] In a detailed analysis, the court agreed with Marine and included the trust assets in Portnoy's bankruptcy estate.

Before the bankruptcy court could rule on the issue of continuous concealment, it had to determine whether Jersey or New York law applied to the dispute. Portnoy had provided in his trust that Jersey law would control over all matters of trust interpretation. [FN134] At the beginning of its analysis, the court noted that it retained jurisdiction over the determination of whether a debtor is entitled to a discharge of his or her debts, regardless of the location of the trust property. [FN135] Because the laws of the respective jurisdictions conflicted, the court looked to federal common law, which dictated application of the law of the jurisdiction with the most interest in the litigation. [FN136] After weighing the interests of each "state," the court ultimately decided that even though the trust was settled and administered in the Isle of Jersey, New York had the stronger interest in the matter. The court reasoned that New York law should apply because (1) Portnoy and his creditors were domiciled in the United States; (2) Portnoy's creditors had no contact with the Isle of Jersey; (3) Portnoy had the greatest contact with the United States; and (4) Portnoy could reasonably assume that United States law would apply to trust interpretation. [FN137]

Another important reason cited by the court was that the trust had the most significant impact in the United States, not overseas. [FN138] The court also placed great importance on the conflict of laws principle that a court cannot enforce a foreign statute if doing ***781** so would affront the public policy of the forum state. [FN139] In this case, the court determined that New York's public policy against self-settled spendthrift trusts would be greatly offended if the court allowed Portnoy to shield his assets from his creditors while still retaining significant control over them. [FN140] In other words, the court refused to recognize the validity of a self-settled spendthrift trust created in a foreign jurisdiction.

In response, Portnoy argued that the trust was not self-settled and thus fell under the spendthrift trust exception to the Bankruptcy Code. [FN141] The court disagreed, and determined the trust was created solely for Portnoy's benefit. [FN142] Consequently, the trust was included in Portnoy's bankruptcy estate and used to discharge his debt to Marine Bank. [FN143]

b.In re Brooks

In this case, the debtor, B.V. Brooks, transferred stock certificates to his wife, who subsequently placed them in self-settled spendthrift trusts in the Jersey Channel Islands with a requirement that the laws of these jurisdictions apply to matters of trust interpretation. [FN144] When an involuntary bankruptcy proceeding was filed against Brooks, the trustee sought to include the offshore trusts in the bankruptcy estate. [FN145]

As in Portnoy, the Brooks court faced the dilemma of determining which law to apply, either the law of the trust situs, the Jersey Channel Islands, or the law of the settlor's domicile, Connecticut. [FN146] The court recognized the general rule that intent of the settlor should control matters of trust interpretation, but also noted the exception to this rule where the enforcement of that jurisdiction's law would contravene the public policy of the court. [FN147] Using a reasoning similar to the analysis in Portnoy, the Brooks court concluded that it could not enforce a self-settled ***782** spendthrift trust without disrupting the principles of state and federal law. [FN148]

Brooks also attempted to argue that the trusts were not self-settled because he had not personally created them and thus fell under the spendthrift exception. [FN149] The court disagreed, stating that Brooks' transfer of stock to his wife immediately preceding the creation of the offshore trusts was not detached enough to remove Brooks from settlor consideration. [FN150] Accordingly, the trusts were unenforceable under Connecticut law and were included in Brooks' bankruptcy estate. [FN151]

c.In re Lawrence

Stephan Jay Lawrence was a successful Wall Street options trader who transferred his assets to a trust in the Jersey Channel Islands approximately two months before a large arbitration judgment was issued against him. [FN152] One month before the judgment, Lawrence amended the trust to be spendthrift and changed the governing law to the Republic of Mauritius, a jurisdiction even more debtor-friendly than the Jersey Channel Islands. [FN153] Lawrence subsequently filed for bankruptcy, and the trustee filed a motion to compel answers to interrogatories regarding the offshore trust. [FN154]

In earlier proceedings, Lawrence asserted that his intent behind the creation of the trust was simply for retirement and charitable purposes. [FN155] He further argued that the nature of the trust was such that he had little control over his assets and could not access them for purposes of paying the award. [FN156] Most of the control over the trust, he contended, belonged to the Mauritian trustee, who had the power to exclude Lawrence as a beneficiary, name new beneficiaries, distribute the trust corpus within his discretion, and disregard any requests for information from the beneficiaries. [FN157] The court found that, regardless of the foreign trustee's control, Lawrence still retained the power to remove ***783** and replace trustees and could be reappointed as beneficiary if he were so removed by the Mauritian trustee. [FN158]

Throughout the opinion, the bankruptcy court did little to hide its disbelief of Lawrence's arguments that his hands were tied in accessing the assets of his trust. Instead, the court found the inaccessibility argument to be the precise reason why Lawrence created the trust in the first place. As the court explained, "[t]he purpose of the trust was clearly to shield the Debtor's assets from a creditor which the Debtor feared was about to obtain a staggering $20 Million arbitration award against him." [FN159] The fact that the trust was created only three months prior to the award was also an important factor in the court's determination. [FN160] The court ultimately granted the trustee's motion and ordered Lawrence to produce the information requested by the trustee. [FN161]

After determining that Florida law applied, the court found that because the offshore trust violated Florida's law against self-settled spendthrift trusts, it did not fall under the spendthrift trust exception to the Bankruptcy Code and must be included in Lawrence's bankruptcy estate. [FN162]

Unlike the Portnoy and Brooks courts, the court in Lawrence did not engage in a detailed conflict of laws or public policy analysis, but simply used the two cases to support its conclusion that state and federal bankruptcy law had a greater interest in the trust. [FN163] Yet the opinion clearly demonstrates that courts will not support pre-bankruptcy exemption planning, especially in the context of an offshore asset protection trust. [FN164]

d. Federal Trade Commission v. Affordable Media, LLC

Initiated in a federal district court in Nevada, this case involved litigation filed by the Federal Trade Commission against a husband and wife who had engaged in fraudulent telemarketing investments. [FN165] Prior to their telemarketing venture, Michael and Denyse Anderson had set up an irrevocable trust in the ***784** Cook Islands, naming themselves as co-trustees. [FN166] The Nevada district court issued an injunction against the Andersons, ordering them to repatriate their assets from the Cook Islands trust to the United States. [FN167]

The Andersons' trust contained an anti-duress provision, which went into effect immediately upon the issuance of the district court's order. [FN168] Under the duress provision, the Andersons were removed as co- trustees, and the remaining trustee refused to follow the court's order. [FN169] The district court subsequently found the Andersons in contempt. [FN170]

Upon appeal to the Ninth Circuit, the Andersons argued that the terms of the trust rendered it impossible for them to comply with the contempt order. [FN171] In its opinion, the court recognized that impossibility is a valid defense to a contempt order and that the party asserting impossibility carries the burden of proving their lack of control. [FN172] In the context of asset protection, this is an especially high burden to meet, since the court is immediately suspicious of the settlor's intentions. [FN173] In this case, the court considered the Andersons' impossibility defense

to be the precise goal behind the creation of the trust, and thus refused to provide relief for the self-created impossibility. [FN174] In reaching its decision, the court focused on the Andersons' conduct after the issuance of the injunction. It was significant that not only was the couple removed as co-trustees under the anti- duress provision, but they attempted to resign as protectors of the trust as well. [FN175] Under the provisions of the trust, the protectors had the power to appoint new trustees and dictate when and where an anti-duress provision could take effect. [FN176] Essentially, the protectors had the power over the entire trust, including the ability to force the trustee to repatriate the trust assets. The Andersons' attempted resignation only validated this fact. As a result, the Ninth Circuit agreed with the district court that the couple retained ***785** too much power over the trust and upheld the district court's finding of contempt against the Andersons. [FN177]

e. In re Lawrence--Part II

In the second case involving the adjudication of Lawrence's bankruptcy, the bankruptcy court followed the initiative of the Ninth Circuit in Anderson and held Lawrence in contempt for refusing to follow an earlier order to turn over the assets of his offshore trust and fully disclose all of his trust transactions. [FN178] Like the Ninth Circuit, the court rejected Lawrence's argument that he lacked the ability to repatriate his assets to his bankruptcy estate. [FN179] Comparing Lawrence's situation to that of the Andersons, the court found that Lawrence was not entitled to the impossibility defense because his impossibility was self-created. [FN180] To provide relief in such a situation, the court remarked, "would be tantamount to succumbing to the pleas for sympathy from an orphan who has killed his own parents!" [FN181] The court considered Lawrence's failure to turn over his trust or disclose transactions involving the trust to be part of a continuous effort to hinder, delay and defraud his bankruptcy creditors. [FN182] As a result, Lawrence was heavily fined for his actions in the bankruptcy proceedings and was subsequently ordered incarcerated until he turned over the entire trust amount. [FN183]

f. An Emerging Pattern of Protecting Creditors' Rights

The growing consensus among federal courts is that asset protection trusts may not be used to avoid payment of court judgments or other debts. Trust owners who have attempted to do so have received heavy fines and possibly spent a few nights in jail. In these situations, trust instruments have been closely scrutinized for indications of settlor control in the roles of beneficiary, trustee, and especially protector. Any indication of self-created impossibility precluded a finding that the settlor was truly unable of complying with a court order to repatriate trust assets. Additionally, all of the courts faced with a conflict of laws issue determined ***786** that the domestic interests outweighed a foreign choice of law provision. Thus if the trust was self-settled and spendthrift in nature, it was invalid under the laws of the governing state. In sum, these cases give creditors assistance in planning their collection strategies against evasive debtors, and provide a helpful framework for later courts to build upon when faced with cases involving asset protection trusts.

The final part of this Comment will discuss the various legal issues surrounding contesting asset protection trusts. First, creditors' potential causes of actions against debtors will be reviewed. Once the creditor selects a course of action, the court must then determine jurisdiction, which law controls, and when other states must honor that court's judgment. Finally, this Comment will evaluate the circumstances under which a creditor or debtor may be able to initiate criminal or civil proceedings against attorneys who facilitate the creation of asset protection trusts.

IV Possible Court Treatment Of Domestic Asset Protection Trusts

A. Causes of Action

1. Poorly Designed Trust

A trust that gives its settlor too much control is particularly susceptible to a creditor's attempt to pierce the trust's assets. [FN184] Piercing may occur when (1) the settlor retains the power of appointment over the trustee or

trustees; (2) the settlor names himself as a beneficiary or gives someone the ability to later expand the class of beneficiaries to include the settlor; or (3) the settlor appoints himself as the protector of the trust or retains the ability to appoint or discharge protectors. [FN185] Settlor control over the trust may also be found if the trust's assets are shares or interests in corporations in which the settlor has significant managerial input. [FN186]

In an action where a court orders a debtor to turn over trust assets and the debtor refuses, creditors should narrow their focus to the trust instrument for indications of settlor control. If a ***787** debtor attempts to assert that he cannot comply with the order, creditors can use the trust instrument and the debtor's powers contained therein as evidence of a self-created impossibility. If the asserted impossibility is truly possible, then the creditors will most likely receive their proper assets.

2. Fraudulent Conveyance

Cited as the "most powerful weapon" against errant debtors, creditors may also use a fraudulent conveyance action to void either a transfer into a domestic trust or the creation of the trust itself. [FN187] The laws of each state will inevitably vary, but creditors in each jurisdiction will most likely have to prove that the debtor had actual or constructive intent to defraud his creditors when the transfer was made. In states with the UFTA, present creditors may have more types of proof available to them than future creditors for proving constructive fraud. Yet creditors that bring actions in states with the UFCA may have a longer period of time to prove an intentional or constructively fraudulent conveyance. Involuntary creditors may have fewer piercing opportunities, either because their claims arise past the allotted time period or are specifically precluded by state statute.

3. Void As Against Public Policy

Since most states retain the rule against self-settled spendthrift trusts, a creditor may also bring an action attacking the validity of a domestic asset protection trust based on its self-settled nature. Cases such as Portnoy and Brooks indicate courts' willingness to use this rule, either directly or indirectly, to strike down an offshore asset protection trust. However, if other states follow Alaska and Delaware's lead in repealing the rule against self-settled trusts, a breakdown in the respect for and use of this rule may result.

B. Legal Issues

1. Jurisdiction

Although creditors no longer need to worry about piercing trusts with foreign jurisdictional provisions, domestic asset protection raises new issues regarding which domestic court should have power over the trust. If the language of the trust does not ***788** provide this information, then a court has a few options for exercising its jurisdiction. The court may claim jurisdiction if the trust property, such as land or securities, is located in the forum state. [FN188] The court may also exercise jurisdiction over a trust if one of its parties, such as the trustee or a beneficiary, is located in the forum state. [FN189] Additionally, given the weight accorded to the creditor's interests in Portnoy, the location of the creditor may be determinative. [FN190]

Jurisdiction may not be as much of an issue in federal bankruptcy courts, since these courts' primary inquiry of whether the debtor is entitled to a discharge of his debts is not influenced by the location of the trust property. [FN191] The location of the property or parties to the trust becomes much more important when the court has to determine which law to apply to the matter.

2. Conflict of Laws

Once the proper forum has been determined, the sitting court must decide which law to apply. As a general rule,

states must respect the settlor's intent regarding which law governs the trust. [FN192] The governing law, however, may only apply to certain trust matters, such as validity, construction and administration. [FN193] Because a fraudulent conveyance action is arguably not within one of these categories, the designated laws may not apply to this cause of action. [FN194] Recall, however, that Alaska and Delaware laws specifically provide that their respective laws must be applied in fraudulent conveyance actions, so long as certain trust requirements are met. [FN195] Creditors are only able to use other fraudulent transfer laws if a trust falls short of these requirements. If the settlor is careful in creating the trust, this is probably an unlikely occurrence.

Convincing a court to apply laws other than those designated by the settlor would have to arise from an attack on the validity ***789** of the trust itself. Naturally, if the validity of an Alaska or Delaware trust were attacked in their own state courts, the trust would most likely be upheld. Thus a declaration of the invalidity of a trust would have to come from the application of the laws of a state other than Alaska or Delaware.

Based on past decisions regarding this issue, courts will most likely approach the matter by applying the conflicts of law principles regarding trusts. [FN196] For trusts held in land, validity is usually determined according to the law of the trust situs. [FN197] Thus if the trust's situs is Alaska or Delaware, the trust will most likely survive a validity challenge. For trusts of moveable assets, such as money, stock certificates, or bank accounts, general principles dictate that the law of the state designated by the debtor should apply provided that: (1) the designated state has a substantial relation to the trust, and (2) the state's law does not offend any public policies of the state to which the trust has its most significant relationship. [FN198] Factors to be considered in determining whether a trust has a significant relationship with a state include: (a) protecting the justified expectations of creditors, (b) the basic policies underlying creditor-debtor law, and (c) theease in the determination and application of the law to the matter. [FN199]

When considering these principles, a court could easily decide that the laws of the forum state should apply to the matter, especially if: (1) the settlor is not domiciled in the state designated by the trust, (2) the settlor's creditors are not domiciled in the designated state, (3) the creditors have little contact with the designated ***790** state, and (4) the settlor had a reasonable belief that the laws of the forum state could apply to the matter. [FN200] Alternatively, a court could determine, after consideration of these factors, that the forum state has a significant relationship to the trust and that upholding the validity of the trust would offend that state's laws against self-settled spendthrift trusts. In this situation, the trust would be declared invalid and its assets available to the proper creditors.

3. Full Faith and Credit

Once a court has determined which law applies to the matter and issues a judgment, the Full Faith and Credit Clause [FN201] requires other states to recognize the judgment upholding the validity of the domestic asset protection trust, even though the trust's provisions strongly conflict with the laws of those other states. Conversely, the Full Faith and Credit Clause would also compel courts in Alaska and Delaware to recognize judgments of other states invalidating a domestic asset protection trust because it violates one or more of that state's fundamental trust laws. Since very few exceptions exist in which a state may not be required to enforce a sister state's judgment, states will usually have to recognize the judgments of other states regarding the validity or invalidity of a domestic asset protection trust. [FN202]

A possible ramification of a court's recognition of the validity of a domestic asset protection trust would be the erosion of the previously well- settled rule against self-settled spendthrift trusts. On the other hand, consistent invalidation of these trusts may cause states like Alaska and Delaware to consider repealing this rule, and dissuade other states from following along the same course.

C. Attorney Liability

Debtors who utilize asset protection trusts may not be the only ones incurring liability for their fraudulent actions. Attorneys and estate planners may also face liability for assisting in the creation of an asset protection trust or aiding a conveyance into ***791** trust with knowledge of their client's fraudulent intent. In some states, asset protection

professionals face potential civil or criminal liability for conspiracy to commit fraud, racketeering, or tax evasion. [FN203] A few states also allow creditors to attach and recover from a debtor's attorney or anyone else who may have assisted the debtor with the fraudulent conveyance. [FN204] Attorneys may also be charged with violating the code of professional responsibility, either through their actions as co-conspirator, or by the violation of the fiduciary duty to fully disclose to clients the details and ramifications of asset protection trusts. [FN205] Finally, attorneys and estate planners should not rule out the possibility of malpractice suits by clients who are punished for use of asset protection trusts. [FN206]

Conclusion

The movement of asset protection trusts from international to domestic shores has made the creditor's task of reaching an errant debtor's assets much more difficult. As a result, creditors must perform more thorough background checks to catch whether a potential debtor is a settlor or beneficiary, or both, of an asset protection trust. Creditors may respond to this increased cost by raising interest rates, increasing fees, or by simply being more selective in their choice of debtors. Involuntary creditors, on the other hand, cannot perform due diligence on a spouse, parent, or tortfeasor. Instead, these creditors must rely on the states to continue to utilize public policy exceptions to the spendthrift trust doctrine.

The duty of state and federal courts, as already initiated by some jurisdictions, is to remain suspicious of asset protection trusts and the settlors' motives behind the creation of these trusts. Trust instruments must be closely scrutinized for indications of settlor control, especially when the settlor is claiming impossibility to an order to turn over trust assets. On the other side ***792** of the bench, attorneys and estate planners who assist in the creation of these trusts must practice with care, ensuring that their clients fully understand the rules and ramifications of these trusts and are not using them to avoid paying debts.

Above all, it is important to realize that creditors' rights are continually adjusting to the changing times and environment. Since its inception, creditor-debtor law has expanded from a single statute to two uniform acts and a federal bankruptcy code. As a response to more debtor- favorable legislation, creditors may have to push for even stronger fraudulent conveyance laws, introduction of more badges of fraud, and perhaps a rebuttable presumption that an asset protection trust is fraudulent. These measures would strengthen creditors' rights against asset protection and ensure that they are even more prepared for any further changes in climate.

[FNa1]. J.D./M.B.A. 2002, the University of Oregon. The author wishes to thank Professor Susan N. Gary for her enthusiasm and guidance, family and friends for support and advice, and all of the authors cited for their provision of a helpful framework.

[FN1]. This hypothetical is loosely based on a case involving an offshore asset protection trust. See Debra Baker, Island Castaway, A.B.A. J., Oct. 1998, at 54. With the introduction of asset protection trusts in the United States, this situation could feasibly occur with a domestic asset protection trust as well.

[FN2]. See James J. White & Raymond T. Nimmer, Cases and Materials on Bankruptcy ß 2, at 2-5 (2d ed. 1992).

[FN3]. This Comment assumes, with statutory support, that any "conveyance" in fraudulent conveyance law includes a transfer into trust. See Uniform Fraudulent Conveyance Act ("UFCA") ß 1 (1918); 11 U.S.C. ß 548(a) (1994); Uniform Fraudulent Transfer Act ("UFTA") ß 1 (1984), 7A U.L.A. 276 (1999).

[FN4]. See Karen Gebbia-Pinetti, As Certain as Debt and Taxes: Estate Planning, Asset-Protection Trusts, and Conflicting State Law, SC60 A.L.I.- A.B.A. 179, 216 (1998).

[FN5]. Id. at 219 (quoting 13 Eliz., ch. 5 ß 1 (1571)).

[FN6]. See id.

[FN7]. Twyne's Case, 76 Eng. Rep. 809 (Star Chamber 1601).

[FN8]. See id. at 812; see also Elena Marty-Nelson, Offshore Asset Protection Trusts: Having Your Cake and Eating it Too, 47 Rutgers L. Rev. 11 (1994). Professor Nelson lists the badges of fraud most commonly used by courts to identify fraudulent transfers:

1. The lack of inadequacy of consideration;
2. The family, friendship, or close relationship among parties;
3. The retention of possession, benefit or use of the property in question;
4. The financial condition of the defendant both before and after the transfer in question;
5. The existence or cumulative effect of a pattern of transactions or a course of conduct after the onset of financial difficulties; [and]
6. The general chronology of events.

Id. at 54.

[FN9]. See Gebbia-Pinetti, supra note 4, at 219-20.

[FN10]. Id. at 235.

[FN11]. Id.

[FN12]. See id. at 217.

[FN13]. See UFCA ß ß 4-7; see also Gebbia-Pinetti, supra note 4, at 217.

[FN14]. See UFCA ß ß 4-6.

[FN15]. See, e.g., MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Serv. Co., 910 F. Supp. 913 (S.D.N.Y. 1995) (listing six situations giving rise to the inference of fraud); see also Gebbia-Pinetti, supra note 4, at 220.

[FN16]. See Gebbia-Pinetti, supra note 4, at 217.

[FN17]. The UFCA remains in force in Maryland, New York, Tennessee, Wyoming and the Virgin Islands. See 7A:II U.L.A. 1 (Supp. 1999).

[FN18]. 11 U.S.C. ß ß 101-1330 (1994).

[FN19]. See id. ß ß 548 and 303(a) & (b); see also Douglas J. Whaley, Problems and Materials on Commercial Law 708 (5th ed. 1997).

[FN20]. See Whaley, supra note 19, at 708.

[FN21]. 11 U.S.C. ß 544(a)(1) & (2).

[FN22]. See id. ß 548(a)(1) & (2).

[FN23]. See id.

[FN24]. Id. ß ß 546(a) & 548(a).

[FN25]. UFTA ß 4(a)(1), 7A U.L.A. 301 (1999).

[FN26]. Id. ß 4(a)(2), 7A U.L.A. 301.

[FN27]. Id. ß 4(b), 7A U.L.A. 302 (listing 11 factors to which consideration may be given for determining the debtor's actual intent).

[FN28]. Id. ß 5, 7A U.L.A. 330. These options are not available for future creditors.

[FN29]. Id. ß 9(a) & (b), 7A U.L.A. 359.

[FN30]. Id. ß 9(c), 7A U.L.A. 359.

[FN31]. For the entire list of states that have adopted the UFTA, see 7A:II U.L.A. 9 (Supp. 1999).

[FN32]. See Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 631 (6th ed. 2000). Spendthrift trusts are invalid in England, but a substitute version exists in a "protective trust." Under a protective trust, any attempted alienation by the beneficiary or attempted seizure by the beneficiary's creditors converts the trust into one that applies the income for the benefit of the beneficiary or her family in the discretion of the trustee. This form of trust may also be present in states that do not recognize spendthrift trusts or trust clauses. For more information on the history and statutory treatment of protective trusts, see George G. Bogert et al., Cases and Text on the Law of Trusts 179-80 n.14 (6th ed. 1991).

[FN33]. 2A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts ß 151, at 83 (4th ed. 1987). An example of a spendthrift clause reads:

I direct that neither the principal nor the income of the trust estate, nor any benefit accruing to any beneficiary under the terms of the trusts created, shall be liable for the debts of any beneficiary, nor shall same be subject to

attachment, seizure, execution or judgment by any creditor of any beneficiary, or under any other process, writ or proceedings in law or in equity, and no beneficiary of said trusts shall have the power to sell, assign, transfer or encumber, or in any manner to alienate, anticipate, commute or dispose of his or her interest in the corpus of or the income from the trust estate, or any part thereof.
Sherrow v. Brookover, 189 N.E.2d 90, 91 (Ohio 1963).

[FN34]. Scott & Fratcher, supra note 33, ß 150, at 75.

[FN35]. 91 U.S. 719 (1875). In dicta, Justice Miller espoused:
Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.
Id. at 727; see also Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 Wash. U. L.Q. 1, 95 n.17 (1995).

[FN36]. 133 Mass. 170, 174 (1882) ("[A]ny... person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him..., and shall not be subject to [seizure] by his creditors in advance of its payment to him.").

[FN37]. See id.

[FN38]. See Amy Lynn Wagenfeld, Note, Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows, 32 Vand. J. Transnat'l L. 831, 839-40 (1999).

[FN39]. See, e.g., S.D. Codified Laws ß 43-10-12 (Michie 1997) ("The beneficiary of a trust for the receipt of the rents and profits of real property... may be restrained from disposing of his interest in such trust during his life or for a term of years by the instrument creating the trust"); Ariz. Rev. Stat. Ann. ß 14-7701A (West 1995) ("[I]f a trust instrument provides that a beneficiary's interest in income is not subject to voluntary or involuntary transfer, the beneficiary's interest in income under the trust shall not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary"). But see Sherrow v. Brookover, 189 N.E.2d 90 (Ohio 1963) (holding spendthrift clause in trust invalid), overruled by Scott v. Bank One Trust Co., 577 N.E.2d 1077 (Ohio 1991).

[FN40]. See Scott & Fratcher, supra note 33, ß 156, at 167.

[FN41]. See id. ß 152.5, at 120.

[FN42]. See id. ß 152.5, at 121.

[FN43]. See White & Nimmer, supra note 2, ß 2, at 7.

[FN44]. See Scott & Fratcher, supra note 33, ß 157, at 186-222; see also Restatement (Second) of Trusts ß 157 (1957). Section 157 states:
Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support, or by the wife for alimony;
(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;
(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
(d) by the United States or a State to satisfy a claim against the beneficiary.
Id. But see Mont. Code Ann. ß 72-33-301 (West 1999) (disallowing any creditor to reach the beneficiary's interest in income except where the trust is self-settled).

[FN45]. See, e.g., Okla. Stat. Ann. tit. 60, ß 175.25(A)(1)(a) (West 1994) (beneficiary income subject to enforceable claims for support of a husband, wife or child of the beneficiary); Cal. Prob. Code ß 15305(c) (West 1991) (allowing a court, if equitable and reasonable under the circumstances, to compel trustee to pay a judgment for support of the beneficiary's spouse, former spouse or minor child); see also Eaton v. Eaton, 125 A. 433 (N.H. 1924) (holding that supports of dependents are a part of the beneficiary's own support); Shelley v. Shelley, 354 P.2d 282 (Or. 1960) (analogizing dependents to creditors of the beneficiary).

[FN46]. See Bogert, supra note 32, at 187 ("A claim for alimony is on weaker footing since it rests on a divorce decree rather than a common law duty.").

[FN47]. See, e.g., La. Rev. Stat. Ann. ß 9:2005(3) (West 1991) (permitting seizure of beneficiary's income for "[a]n offense or quasi-offense committed by the beneficiary or by a person for whose acts the beneficiary is individually responsible"); Ga. Code Ann. ß 53-12-28(c) (1999) (spendthrift provision in trust invalid against tort judgment claims unless the beneficiary is physically or mentally impaired); Del. Code Ann. tit. 12, ß 3573(2) (Michie 1995 & Supp. 1999) (allowing any person who suffers death, personal injury or property damage at the hands of the transferor on or before the creation of a trust to satisfy judgments against the trust); see also Laurene M. Brooks, Comment, A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature, 73 Marq. L. Rev. 109 (1989).

[FN48]. See Ky. Rev. Stat. Ann. ß 381.180(6)(b) (Michie 1998) (interest of beneficiary subject to an enforceable claim against the beneficiary for necessary services or supplies rendered to the beneficiary); see also Ga. Code Ann. ß 53-12-28(c)(3) (1999) (spendthrift provision in trust invalid against governmental claims unless the beneficiary is physically or mentally impaired); see also Marty-Nelson, supra note 8, at 38-41.

[FN49]. See Scott & Fratcher, supra note 33, ß 157, at 186.

[FN50]. See id. ß 156, at 164-65; see also Restatement (Second) of Trusts ß 156(1) (1957) ("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.").

[FN51]. Scott & Fratcher, supra note 33, ß 156, at 168.

[FN52]. Wagenfeld, supra note 38, at 836.

[FN53]. See id. at 837.

[FN54]. See id.; see also Ritchie W. Taylor, Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?, 13 BYU J. Pub. L. 163, 165 (1998). Other forms of asset protection include limited

partnerships and family limited partnerships, custodial accounts, joint ownership of assets between spouses, gifts, incorporating assets, and investment in tax-exempt assets.

[FN55]. See Baker, supra note 1, at 55; Wagenfeld, supra note 38, at 846; see also Joel C. Dobris, Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore, 62 Alb. L. Rev. 543, 564 n.94 (1988) (suggesting that the low end of asset protection is its use by senior citizens to beat Medicaid).

[FN56]. See Marty-Nelson, supra note 8, at 68.

[FN57]. See Baker, supra note 1, at 55; see also Marty-Nelson, supra note 8, at 14.

[FN58]. See Wagenfeld, supra note 38, at 836; see also Taylor, supra note 54, at 165 ("Transfers to spouses no longer remain a viable option for most Americans due to America's extraordinary divorce rate, and [due] to the unwillingness of most spouses to relinquish all legal control and ownership of assets to their spouses or children.").

[FN59]. Wagenfeld, supra note 38, at 848.

[FN60]. Id.

[FN61]. Marty-Nelson, supra note 8, at 13.

[FN62]. Wagenfeld, supra note 38, at 848 n.125; Taylor, supra note 54, at 166.

[FN63]. See Baker, supra note 1, at 56. Other situations where a flight clause allows for the removal of the trust to a different jurisdiction include: (1) political instability or economic unrest in the trust situs; (2) proposed enactment of unfavorable gift, income or estate tax laws by the situs nation; or (3) the prospect that the trust situs may enter into a treaty with the United States which may undermine the security of the trust. Marty-Nelson, supra note 8, at 66-67.

[FN64]. See David C. Lee, Offshore Asset Protection Trusts: Testing the Limits of Judicial Tolerance in Estate Planning, 15 Bankr. Dev. J. 451, 461-63 (1999).

[FN65]. See id. at 462-63.

[FN66]. See id.

[FN67]. See id. at 463.

[FN68]. See Wagenfeld, supra note 38, at 835, 849.

[FN69]. See Taylor, supra note 54, at 166-67.

[FN70]. See id. at 169.

[FN71]. See Marty-Nelson, supra note 8, at 79.

[FN72]. See Baker, supra note 1, at 56, 57.

[FN73]. See id. at 56; see also Brigid McMenamin, Flimsy Shelters, Forbes, Sept. 8, 1997, at 94 ("Claimants trying to [pierce] overseas trusts... almost always lose, unless they are going after a drug kingpin or a big-time criminal.").

[FN74]. See Marty-Nelson, supra note 8, at 60.

[FN75]. See id.

[FN76]. See id. at 60-61.

[FN77]. See Baker, supra note 1, at 56.

[FN78]. See generally Alaska Stat. ß ß 13.36.005-.060, 13.36.300- .390, 34.27.050, & 34.40.110 (Michie 1999); Del. Code Ann. tit. 12, ß ß 3570-3576 (Michie 1995 & Supp. 1998) [Editor's note: Delaware legislature amended the Delaware Code in 2000, but the hard copy is not available when this article is published.].
One of the motives behind this legislation was to imitate the substantial economic benefits produced by the offshore asset protection industry. See Wagenfeld, supra note 38, at 875 n.325 (quoting Alaska State Representative Al Vezey, R-North Pole, a sponsor of the Alaska legislation, as inspired by "large sums of money going over to the Cayman Islands"). Alaska's new trust laws also have considerable tax benefits. See Jonathan G. Blattmachr et al., New Alaska Trust Act Provides Many Estate Planning Opportunities, 24 Est. Plan. 347 (1997).

[FN79]. The Act does not specifically provide for the creation of a self- settled spendthrift trust, but does not prohibit it either. See Alaska Stat. ß 34.40.110(a) & (b). The Act also repeals the rule against perpetuities in relation to an interest held in trust. See id. ß 34.27.050(a)(3).

[FN80]. See id. ß 34.40.110(b).

[FN81]. Id. ß 34.40.110(b)(1)-(b)(4).

[FN82]. Id. ß 13.36.310(a). An Alaska trust or property transfer into an Alaska trust may not be voided on the grounds that "the trust or transfer avoids or defeats a right, claim, or interest conferred by law on a person by reason of a personal or business relationship with the settlor or by way of a marital or similar right." Id.

[FN83]. Id. ß 34.40.010.

[FN84]. See id.

[FN85]. See, e.g., First Nat'l Bank v. Enzler, 537 P.2d 517, 522 (Alaska 1975) (listing eight long-recognized instances where fraud may be found absent the debtor's actual intent).

[FN86]. For the argument that Section 34.40.010 of the Alaska Statutes does bar constructive fraud as grounds for a fraudulent conveyance action, see Wagenfeld, supra note 38, at 855.

[FN87]. Alaska Stat. ß 34.40.110(d)(1).

[FN88]. Id. ß 34.40.110(d)(2).

[FN89]. Id. ß 13.36.035(a).

[FN90]. Section 13.36.035(c) states:

A provision that the laws of this state govern the validity, construction, and administration of the trust and that the trust is subject to the jurisdiction of this state is valid, effective, and conclusive for the trust if

(1) some or all of the trust assets are deposited in this state and are being administered by a qualified person; in this paragraph, "deposited in this state" includes being held in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in this state;

(2) a trustee is a qualified person who is designated as a trustee under the governing instrument or by a court having jurisdiction over the trust;

(3) the powers of the trustee identified under (2) of this subsection include or are limited to

(A) maintaining records for the trust on an exclusive basis or a nonexclusive basis; and

(B) preparing or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that must be filed by the trust; and

(4) part or all of the administration occurs in this state, including physically maintaining trust records in this state.

Id. ß 13.36.035(c). A "qualified person" is defined as (1) a person who permanently resides in Alaska; (2) a trust company organized under Alaska law and principally located in Alaska; or (3) a bank organized under Alaska or national banking association principally located in Alaska. Id. ß 13.36.390(1).

[FN91]. Id. ß 13.36.045(a). These circumstances include:

(1) all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration;

(2) the interests of justice otherwise would seriously be impaired; or

(3) the trust satisfies AS 13.36.035(c).

Id.

[FN92]. See id. ß 13.36.043.

[FN93]. See Del. Code Ann. tit. 12, ß 3570(9)(c); see also 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, 442 (1998) (explaining that as long as the settlor does not violate the UFTA when creating a Delaware trust, the trust is safe from any claims arising after the date of creation).

[FN94]. See Del. Code Ann. tit. 12, ß 3570(9)(b). A trust is not considered a qualified disposition under Delaware law if: (1) the transferor has the power to veto a distribution from the trust; (2) the transferor retains testamentary special power of appointment or similar powers; (3) the transferor receives income from the trust; or (4) the trust is discretionary. Id. "Transferor" is defined as "a person who, as an owner of property, as a holder of a general power of appointment, or as a trustee, directly or indirectly makes a disposition or causes a disposition to be made." Id. ß 3570(7). The statute does not prevent the transferor from naming himself as beneficiary of the trust and thus entitled to receive trust income. See generally id. ß ß 3570-3576.

[FN95]. Id. ß 3570(9)(a).

[FN96]. Id. ß 3573; see also Sullivan, supra note 93, at 452.

[FN97]. See Del. Code Ann. tit. 12, ß 3572(a). "[N]o action of any kind... shall 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 shall be brought pursuant to [Delaware's version of the UFTA]." Id.; see also Sullivan, supra note 93, at 445.

[FN98]. See Del. Code Ann. tit. 12, ß 3571. Section 3571 provides that "[a] qualified disposition shall remain subject to Section 3572 of this title notwithstanding a transferor's retention of any or all of the powers and rights described in ß 3570(9)(b) of this title." Id.

[FN99]. Id. ß 3572(b)(1).

[FN100]. Id. ß 3572(b)(2).

[FN101]. See id. ß 3570(10)(a).

[FN102]. See id. ß 3572(a).

[FN103]. See Mo. Rev. Stat. ß 456.080 (1992 & Supp. 2000); see also Robert L. Manley, Estate Planning with Self Settled Spendthrift Trusts: Steering Clear of Debts and Taxes, SD36 A.L.I.-A.B.A. 91, 96 (1999).

[FN104]. See Colo. Rev. Stat. ß 38-10-111 (1999) ("All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, or real property, made in trust for the use of the person making the same shall be void as against the creditors existing of such person" (emphasis added)); see also Joseph G. Hodges, Jr. & Eugene P. Zuspann II, Can Some Colorado Trusts Provide Protection from Claims of Creditors?, 28 Colo. Law. 61 (Aug. 1999).

[FN105]. States that have repealed the rule against perpetuities are Arizona, Idaho, Illinois, Maryland, South Dakota, and Wisconsin. See Manley, supra note 103, at 118.

[FN106]. Experts speculate that South Dakota will be the first state to follow in Alaska and Delaware's footsteps. See Douglas J. Blattmachr & Richard W. Hompesch II, Alaska v. Delaware: Heavyweight Competition in New Trust Laws, Prob. & Prop., Jan./Feb. 1998, at 32, 38 ("Before the passage of the Alaska Trust Act, Delaware [which has since revised its trust laws] and South Dakota had in many ways the best trust laws of any state and were the undisputed leaders in the domestic trust industry.").

[FN107]. See Brigid McMenamin, Your Trust Has a Hole, Forbes, June 15, 1998, at 240.

[FN108]. See id.

[FN109]. See id.

[FN110]. See id.

[FN111]. See id.

[FN112]. See id.; Charlie Brennan, Battle Over Dick Estate to Resume: Tech Center Developer Jailed on Island for Failing to Pay Ex-Wife $2.4 Million in Alimony, Rocky Mountain News, Dec. 3, 1993, at 18A.

[FN113]. See Brennan, supra note 112, at 18A.

[FN114]. See McMenamin, supra note 107, at 240.

[FN115]. See id.

[FN116]. Riechers v. Riechers, 679 N.Y.S.2d 233, 235-36 (1998).

[FN117]. Id. at 235.

[FN118]. Id. at 236.

[FN119]. Id.

[FN120]. Id.

[FN121]. Id. In this case, Mrs. Riechers had already initiated litigation in the Cook Islands, and the Cook Islands court issued an injunction preventing Dr. Riechers from removing his assets from the trust or eliminating any of its beneficiaries. Id. at 235. Thus the Cook Islands court appeared sympathetic toward Mrs. Riechers' claims. Accordingly, whether this court will actually enforce the New York court's judgment or whether Mrs. Riechers will eventually be successful in her overseas litigation remains uncertain. The New York court did little to erase this

concern, simply declaring that "the ultimate determination of the entitlement to the corpus of the Trust remains with the High Court of Cook Islands...." Id. at 236. Before making this statement, the court did not discuss whether the characteristics of offshore trust legislation would make this task a virtual impossibility, given the different legal environment of overseas jurisdictions.

[FN122]. See Brigid McMenamin, 'Til Divorce Do Us Part, Forbes, Oct. 14, 1996, at 52.

[FN123]. See id.

[FN124]. See id.

[FN125]. See Baker, supra note 1, at 55; see also Jeff Stidham, Husband Hid $12 Million, Spouse Says, Tampa Tribune, May 26, 1997, at 1.

[FN126]. See Baker, supra note 1, at 55.

[FN127]. See id.; see also Model Rules of Professional Conduct Rule 1.6 (1983).

[FN128]. See Baker, supra note 1, at 55.

[FN129]. In re Portnoy, 201 B.R. 685, 689 (Bankr. S.D.N.Y. 1996).

[FN130]. Id. at 690.

[FN131]. Id. at 691.

[FN132]. Id. at 695.

[FN133]. Id.

[FN134]. Id. at 689.

[FN135]. Id. at 696.

[FN136]. Id. at 697.

[FN137]. Id. at 698.

[FN138]. Id.

[FN139]. Id. at 698-700.

[FN140]. Id.

[FN141]. Id. at 701. The spendthrift trust exception to the Bankruptcy Code states: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. ß 541(c)(2) (1994).

[FN142]. In re Portnoy, 201 B.R. at 701.

[FN143]. Id. at 701-02.

[FN144]. In re Brooks, 217 B.R. 98, 101 (Bankr. D. Conn. 1998).

[FN145]. Id.

[FN146]. Id. at 100-01.

[FN147]. Id. at 101.

[FN148]. Id. at 101-02.

[FN149]. Id. at 100.

[FN150]. Id. at 103.

[FN151]. Id. at 104.

[FN152]. In re Lawrence, 227 B.R. 907, 911-12 (Bankr. S.D. Fla. 1998).

[FN153]. Id. at 912.

[FN154]. Id. at 909-910.

[FN155]. Id. at 912-913.

[FN156]. In re Lawrence, 238 B.R. 498, 501 (Bankr. S.D. Fla. 1999).

[FN157]. Lawrence, 227 B.R. at 912 n.12.

[FN158]. Id.

[FN159]. Id. at 914.

[FN160]. Id.

[FN161]. Id. at 918.

[FN162]. Id. at 916-17.

[FN163]. Id. at 917.

[FN164]. Id.

[FN165]. Fed. Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1231- 33 (9th Cir. 1999).

[FN166]. Id. at 1232.

[FN167]. Id.

[FN168]. Id.

[FN169]. Id.

[FN170]. Id. at 1233.

[FN171]. Id. at 1239.

[FN172]. Id.

[FN173]. See id. at 1240-41.

[FN174]. Id. at 1241.

[FN175]. Id. at 1242-43.

[FN176]. Id.

[FN177]. Id. at 1241-43.

[FN178]. In re Lawrence, 238 B.R. 498, 501 (Bankr. S.D. Fla. 1999).

[FN179]. Id. at 500.

[FN180]. Id. at 501.

[FN181]. Id.

[FN182]. Id.

[FN183]. Id.

[FN184]. See Alan R. Jahde & Michael P. Franzmann, What Are Creditors' Rights Against Asset Protection Trusts? 26 Est. Plan. 410 (1999).

[FN185]. See id.

[FN186]. See id.

[FN187]. See id. at 411.

[FN188]. 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts ß 565, at 153 (4th ed. 1987).

[FN189]. Id. at 152.

[FN190]. See In re Portnoy, 201 B.R. 685, 698 (Bankr. S.D.N.Y. 1996).

[FN191]. See id. at 696.

[FN192]. Scott & Fratcher, supra note 188, ß 575, at 201-02.

[FN193]. See Gebbia-Pinetti, supra note 4, at 237-53 (suggesting that a settlor's choice of law provision applies only to internal affairs of the trust, not fraudulent transfer actions).

[FN194]. See id.

[FN195]. See Alaska Stat. ß 34.40.110(b)(1); Del. Code Ann. tit. 12, ß 3571.

[FN196]. See, e.g., In re Portnoy, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); In re Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998).

[FN197]. Restatement (Second) Conflict of Laws ß 280 (1969):
Whether the interest of a beneficiary of a trust of an interest in land is assignable by him and can be reached by his creditors is determined by the law that would be applied by the courts of the situs as long as the land remains subject to the trust.

[FN198]. Id. ß 270(a). Section 270 lists eight factors for determining a significant relationship:
(a) [T]he needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.
Id. ß 6(2).

[FN199]. Jahde & Franzmann, supra note 184, at 412.

[FN200]. See In re Portnoy, 201 B.R. 685, 698 (Bankr. S.D.N.Y. 1996).

[FN201]. U.S. Const. art. IV, ß 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.").

[FN202]. For further discussion of the application of the Full Faith and Credit Clause to the enforcement of domestic asset protection trusts, see Gebbia-Pinetti, supra note 4, at 253-54.

[FN203]. See Jahde & Franzmann, supra note 184, at 410; see also Frederick J. Tansill, Offshore Asset Protection Trusts: Emphasizing Non-Tax Issues, SB45 A.L.I.-A.B.A. 389, 487 (1998) (outlining possible civil, criminal and ethical violations for attorneys who have assisted in fraudulent asset protection planning).

[FN204]. See Stacey K. Lee, Piercing Offshore Asset Protection Trusts in the Cayman Islands: The Creditors' View,

11 Transnat'l Law. 463, 522 (1998) (explaining the requirements under Arizona law for a claim against the debtor's attorney for conspiracy to commit fraud).

[FN205]. See id.

[FN206]. See Tansill, supra note 203, at 497.

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