ALASKA ON THE ASSET PROTECTION TRUST MAP: NOT FAR ENOUGH FOR A REGULATORY ADVANTAGE, BUT TOO FAR FOR CONVENIENCE?

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ABSTRACT

In 1997, Alaska became the first state to recognize self-settled discretionary spendthrift trusts. This groundbreaking legislation was motivated by the legislature's desire to establish Alaska as America's financial center for asset protection. Almost fifteen years have passed since Alaska placed itself on the asset protection map. This Note examines the legislative history of Alaska's 1997 Trust Act and compares it with several other states that have followed its lead, and ultimately seeks to answer whether Alaska has met its goal of becoming the financial center it envisioned.

INTRODUCTION

The subject of Trusts and Estates has been a thorn in the side of law students and practitioners for decades and it is filled with incomprehensible concepts such as the rule against perpetuities[1]—one of only a handful of subjects in which a court will excuse an attorney for lacking mastery.[2] By the 1970s, offshore trusts had come to be seen as a

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1. An explanation of this rule, including all of its intricacies, is outside the scope of this Note. For a succinct explanation of the rule and its history, see W. Barton Leach, *Perpetuities In A Nutshell*, 51 HARV. L. REV. 638, 638–71 (1938).

2. *See, e.g.*, Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961) ("In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.").

way for those with wealth to shield their assets from U.S. tax liabilities.[3] In an attempt to close this tax loophole, Congress passed the Tax Reform Act of 1976,[4] which enabled the Internal Revenue Service (IRS) to treat assets transferred by an American to a foreign trust as the American settlor's assets.[5] Thus, beginning in the mid-1980s, the primary motivation for moving assets offshore changed from tax sheltering to protection from creditors.[6] Seeing a need to create asset protection shelters, several small island jurisdictions, led by the Cook Islands, began to develop a foundational legal structure to support the influx of U.S. assets.[7] In 1997, seeing the opportunity to compete against offshore asset protection trusts by developing a competitive environment, Alaska became the first state to recognize self-settled discretionary spendthrift trusts (also known as self-settled asset protection trusts)[8] as a way to shield a settlor's assets from creditors.[9]

Almost fifteen years have passed since Alaska became the first state to recognize the use of asset protection trusts. Since that time, commentators have written numerous articles about the race to the bottom,[10] the destruction of creditors' rights, and the general money-hungry state of our society.[11] What these materials have not addressed,

3. *See* Burton W. Kanter, *The Foreign Trust - A 'One World' Concept of Tax Planning*, 22 MAJOR TAX PLAN. 467, 469 (1970) (discussing the commonality of using foreign trusts for asset protection).

4. Pub. L. No. 94-455, 90 Stat. 1520 (1976).

5. *See id.* A "settlor" is "[t]he grantor or donor in a deed of settlement" or "one who creates a trust." BLACK'S LAW DICTIONARY 1231 (5th ed. 1979).

6. Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 306–07 (2002) (discussing the formation of offshore asset protection shelters in a number of island jurisdictions).

7. *Id.*

8. There seems to be some slight variation between the titles used to describe these trusts. Domestic asset protection trusts, which are generally identified as DAPTs, are also often labeled by emphasizing a particular feature that the trust provides. For example, a self-settled asset protection trust emphasizes the fact that the settlor is also a beneficiary, while a self-settled discretionary spendthrift trust emphasizes the discretionary authority of the trustee to disburse income and principal to the beneficiaries. Thus, this Note will generally use the asset protection trusts to describe the entire set of trusts which provide asset protection *to the settlor*. *See infra* Part I.A (providing more information on the specific features of various asset protection trusts).

9. ALASKA STAT. § 34.40.110 (2010). This statute became effective on April 2, 1997. ALASKA H. JOURNAL, 20th Leg., 1st Sess., 0918 (Apr. 3, 1997).

10. *See, e.g.*, Christopher Paul, Note, *Innovation or a Race to the Bottom? Trust "Modernization" in New Hampshire*, 7 PIERCE L. REV. 353, 372 (2009) (discussing the possible race to the bottom in the context of New Hampshire's adoption of discretionary asset protection trusts).

11. *See, e.g.*, Michael Sjuggerud, Comment, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 977–78 (2001) (claiming

however, is whether Alaska's decision to become the first state to offer such protection allowed it to reap the benefits intended by its legislature. This Note attempts to answer this question by providing a background on trusts and the current state of the U.S. asset protection landscape.

Part I provides a brief explanation of trusts and their uses through an examination of the history of asset protection trusts offshore. Part II examines the legislative history of Alaska's 1997 Trust Act and attempts to parse the legislature's various considerations and its primary motivations for passing the Act. Part II also examines the Act's substance and subsequent amendments. Part III describes the aftermath of the Act's passage, including other states' reactions and subsequent challenges to domestic asset protection trusts. Finally, in light of the preceding sections, this Note concludes by providing insight regarding whether Alaska has achieved the goals it set out during the Trust Act's passage.

I. TRUST BASICS

A. What is a Trust?

In Anglo-American law, a trust can be thought of as "a relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another."[12] The definition denotes three basic elements: (1) a trustee; (2) a beneficiary, or *cestui que* trust; and (3) the trust property, or trust *res*.[13] Trusts were developed in England with the purposes of reducing burdens generally associated with holding land, providing a means by which religious institutions could make profits from their land, and

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that the adoption of asset protection trusts by states encourages social stratification while incentivizing the wealthy to neglect their debt obligations).

12. GEORGE GLEASON BOGERT, HANDBOOK OF THE LAW OF TRUSTS 1 (1921). There are a number of definitions for trusts including:

> a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

RESTATEMENT (THIRD) OF TRUSTS § 2 (2003). For a survey of various definitions given to trusts, see Walter G. Hart, *What is a Trust?*, 15 LAW. Q. REV. 294, 294–98 (1899).

13. Paul M. Roder, *American Asset Protection Trusts: Alaska and Delaware Move "Offshore" Trusts Onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1261 (1999).

making assets easier to transfer.[14] Today, a "trust[] can be created for any legal purpose so long as the purpose does not violate public policy."[15] While there are many reasons to create a trust, in the U.S. trusts are generally created either for tax benefits or asset protection.[16]

There are four general types of asset protection trusts. Spendthrift trusts are generally used to protect beneficiaries from creditors.[17] A spendthrift trust is a "[t]rust[] in which the interest of a beneficiary cannot be assigned by him or reached by his creditors."[18] An example would be a parent who would like to provide for his or her children and chooses to place his or her assets in a trust for them because, for one reason or another, he or she does not want them to take ownership of the assets. Under these circumstances, a party with a claim against the children would be unable to reach the trust assets under the theory that the settlor (parent) is the owner of the property and can do with it as he or she wishes. Thus, nothing the children do can force the parent to part with his or her property outside of the parent's will.[19]

A second type of trust is the support and maintenance trust, which limits payment to the beneficiary of only as much income as is required for the support, maintenance, and education of the beneficiary.[20] What qualifies as a support and maintenance item is laid out in the trust instrument. Here, creditors are barred under the theory that only those purposes laid out in the trust instrument can trigger a distribution.[21]

A third type is the discretionary trust, where a third party trustee has sole discretion over disbursement. The trustee has the authority to distribute some, all, or even none of the assets of the trust. Here, a creditor would be barred because the trustee can simply refuse to make any disbursements to the beneficiaries that would go towards resolution of a creditor's claim.[22]

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14. BOGERT, *supra* note 12, at 6.
15. Roder, *supra* note 13, at 1261.
16. *Id.* at 1262. Often times, asset protection will trigger tax benefits. The specific tax avoidance and deferral mechanisms of trusts are generally outside the scope of this Note.
17. The spendthrift trust is generally seen as a way to protect "irresponsible" or "hapless" beneficiaries. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 452 (1998).
18. AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 151, at 83 (4th ed. 1987).
19. Roder, *supra* note 13, at 1262–63.
20. *Id.*
21. *Id.*
22. *Id.*

Finally, there is the protective trust with a forfeiture clause. This trust can be seen as a hybrid of both the spendthrift and discretionary trusts. Upon a triggering event, any interest in the trust is forfeited by the beneficiary and reverts solely to the trustee, who then gains full discretion.[23] A major drawback to a trust with a forfeiture clause is the possibility that an unforeseen triggering event could frustrate the settlor's purpose.[24]

B. Offshore Trusts

Prior to the passage of the Alaska Trust Act in 1997, U.S. based trusts did not afford creditor protection to the settlor of the trust. American professionals susceptible to malpractice suits had for years sought the protection of offshore asset protection trusts.[25] The laws of offshore jurisdictions were friendlier to these professionals because these jurisdictions did not have the traditional creditor protections that had long been a staple of U.S. trust law.[26] The Cook Islands became a leader in the area of offshore asset protection trusts.[27] Beginning with the foundation of a standard spendthrift trust, these jurisdictions made major changes, including offering settlors the ability to transfer money into a trust, the ability to appoint a trustee who has discretion over how to distribute the income to the beneficiaries, and, in the case of a self-settled trust, the ability to make the settlor a beneficiary.[28] Other primary protections offered by the Cook Islands, for example, included raising the level of proof for fraudulent transfer claims,[29] expressly providing that the Cook Island courts would not "enforce or recognize a foreign judgment against an international trust,"[30] and flight clauses, which essentially authorized the trustee to "change the situs of the trust, change the applicable law, and move the trust assets to a new jurisdiction, if a claim against the trust threaten[ed] to be successful."[31] Such provisions, including confidentiality of settlors, were basically designed to guarantee that assets held in an offshore asset protection trust would be completely unavailable to creditors.

23. *Id.* at 1264.
24. *Id.*
25. *Id.* at 1254. Professionals particularly susceptible to malpractice suits include doctors, lawyers, accountants, business officers, and directors.
26. *See* Danforth, *supra* note 6, at 306–07.
27. *Id.* at 307–08.
28. *Id.*
29. *Id.* at 308–09.
30. *Id.* at 309.
31. *Id.* at 310.

Despite these advantages, the asset protection trusts offered by offshore jurisdictions are not without their drawbacks. A major factor when considering the use of a foreign asset protection trust is the risk associated with political or economic instability of the foreign jurisdiction.[32] Additional considerations include the extremely thorough reporting standards required by the IRS for assets held in offshore trusts as well as possible tax implications.[33] Even with these potential drawbacks, the IRS reported in 2009 that upwards of $5 trillion is held in offshore "tax havens."[34] With the potential to benefit from both fees associated with servicing asset protection trusts and the potential influx of professional jobs created by the need to handle these trusts, the Alaska Legislature took aim at the market.

II. ALASKA AND ASSET PROTECTION TRUSTS

A. Background: Domestic Asset Protection Trusts

Until 1997, no state permitted self-settled asset protection trusts. Put another way, no state allowed settlors to shield the assets they put in trust for themselves from creditors, finding it against public policy.[35] Establishing offshore asset protection trust equivalents in the United States was opposed on three basic grounds. The first, and perhaps strongest, was that society would create a moral hazard by allowing a settlor to shield assets from potential future creditors.[36] This argument is based on the fact that many U.S. civil penalties are monetary in nature.[37] To allow a settlor to shield assets placed in a trust while maintaining effective control over the distribution of the assets would eliminate any

32. *Id.*

33. *See generally* 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 18.23[C][1] (2d ed. 1999) (providing an in-depth analysis of IRS implications of offshore trusts).

34. *See Abusive Offshore Tax Avoidance Scheme - Talking Points*, IRS, http://www.irs.gov/businesses/small/article/0,,id=106568,00.html (last updated Jan. 31, 2012). In 1994, it was estimated that there was approximately $1 trillion held in offshore asset protection trusts. James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 140 (1997).

35. David G. Shaftel, *Domestic Asset Protection Trusts: Key Issues and Answers*, SHAFTEL LAW OFFICES, http://shaftellaw.com/article21.html (last visited Mar. 9, 2012). This public policy allowed the IRS to argue that because creditors could reach a settlor's assets in a trust, transfers to domestic asset protection trusts were thus incomplete and taxable as part of the settlor's estate. *Id.*

36. Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudential Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147, 184–85 (2007).

37. *Id.*

incentive for the settlor to refrain from reckless or grossly negligent behavior.[38] Some even argued that the only reason for creating a self-settled spendthrift trust would be to commence in fraud.[39] Second, asset protection trusts would usurp federal and state exempt property statutes.[40] A prime example would be states that have homestead acts and restrict either the type or value of home that can be shielded from creditors. Through the use of an asset protection trust, a settlor could theoretically transfer any amount and type of property to the trust and thereby shield the assets from creditors' claims without limit.[41] Finally, some argued that asset protection trusts would only be utilized by the wealthy due to the costs associated with setting up and maintaining an asset protection trust.[42] As such, the increase in availability of such trusts would only further advantage the upper class while offering no protection to the lower.[43]

Arguments in favor of offering asset protection trusts in the U.S. are equally robust, with the most favored being the idea that such trusts provide protection from meritless claims.[44] Numerous examples exist whereby the existing legal checks on meritless claims do not work or wrongful parties escapes liability.[45] While it is possible that such cases are anomalous and that the majority of individuals or institutions will never face such claims, such a possibility should not prevent those who

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38. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 504–06 (2000).

39. *See* GEORGE T. BOGERT, TRUSTS § 40 (6th ed. 1987).

40. Darsi Newman Sirknen, *Domestic Asset Protection Trusts, What's The Big Deal?*, 8 TRANSACTIONS: TENN. J. BUS. L. 133, 142–43 (2006).

41. *Id.* at 143.

42. *Id.* One writer even goes so far as to argue that the adoption of self-settled asset protection trusts by a number of states has "facilitate[d] continued social stratification by discouraging wealthy debtors from repaying their debts even when they have the ability to do so." Sjuggerud, *supra* note 11, at 977–78. Proponents of asset protection trusts respond by stating that "[a]lmost all estate planning lawyers, almost all of the time, represent honorable, law-abiding clients, men and women who daily contribute to society by their productivity and with their generosity, who pay their bills and their taxes, and who are not deadbeats, cheats, frauds, or criminals." Duncan E. Osborne et al., *Asset Protection: Trust Planning*, SJ036 ALI-ABA 1419, 1428 (ALI-ABA C.L.E. Annual Advanced Course of Study Nov. 17–21, 2003).

43. Professor Lischer counters this argument by pointing out that "protection from liability is available to any person who desires such protection. A person can become judgment proof by becoming poor." Lischer, *supra* note 38, at 529.

44. *See* Sirknen, *supra* note 40, at 143–53.

45. *See, e.g.*, Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 331–32 (Tex. 1998) (holding that a manufacturer was strictly liable for an injury to the victim even though the victim admitted ignoring several conspicuously placed warning signs and a pictograph).

want to protect themselves from the possibility of doing so. Additionally, one might argue that if meritless claims were actually the pressing issue that many believe it to be, the legislature would surely do something about the problem. In fact, that there have been so many proposals and that today there are a number of states that have adopted asset protection trust laws[46] indicates at least some legislative support. The fact that legislatures are creating greater protections through trust laws can be seen as a tacit acknowledgment of the problems at hand.

Another major argument favoring domestic asset protection trusts is that they combine asset protection opportunities that are already available. Between homestead acts, ERISA, offshore asset protection trusts, and family limited partnerships, many if not all of the protections afforded by domestic asset protection trust laws are already attainable. The difference, however, is the ability to make them more accessible by lowering transaction costs.[47] This leads to the final and primary motivation for the Alaska Legislature as it considered the Alaska Trust Act: keeping assets in the U.S. provides a means to stimulate local and state economies.

B. Legislative History of Alaska's 1997 Statute

In the early 1990s, a New York trust attorney, his brother, and an Alaskan attorney conceived the idea that Alaska could be an onshore

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46. *See* DAVID G. SHAFTEL, COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES 13 (2010), *available at* http://shaftellaw.com/docs/comparison_domestic_apt_statutes.pdf (noting from 1997–2008 twelve states allowed for creation of asset protection trusts).

47. David Shaftel, an Alaska trusts and estates attorney, provides this extremely helpful hypothetical of a typical case of a couple that would benefit from a domestic asset protection trust:

> [The] clients are a couple in their 50s. One or both is a small business owner, executive, or professional. Their net worth is in the range of $3 million to $10 million. Substantial estate taxes could be saved if your clients made annual exclusion and applicable credit gifts to irrevocable trusts for their children and/or grandchildren. These gifts will not render the clients insolvent, nor will they be transfers made with an intent to evade existing creditors. The gifts could be structured so that they qualify for valuation discounts, and the growth of the gift assets would be excluded from your clients' estates. Based on your clients' net worth and their anticipated future earnings, it appears that these gifted amounts would not be needed by them. Nevertheless, your clients are reluctant to give away significant assets at this point in their lives. They tell you that they might need these assets in the future if they have an unexpected financial reversal.

David Shaftel, *Alaska's Experience With Self-Settled Discretionary Spendthrift Trusts*, 29 EST. PLN. 506, 507–08 (2002).

alternative to offshore asset protection trusts.[48] What followed in the legislature was a debate over whether and how Alaska should break from every other state and provide the first self-settled asset protection trust. A brief journey through the legislative history will show that economic growth was a primary motivation spurring legislative discussion.[49]

On February 10, 1997 proponents and sponsors of House Bill 101 met to discuss and debate the merits of Alaska becoming the first state to offer the protection of a self-settled asset protection trust that could run in perpetuity.[50] The prime sponsor of the bill, Representative Al Vezey, began by explaining that the initial motivation for the bill came while seeking ways to stimulate Alaska's economy.[51] Representative Vezey's vision for Alaska was to see it become not only the financial center of America, but perhaps the entire world.[52] To this end, his office sought to find a way to change the laws of Alaska to encourage financial markets to relocate and headquarter in Alaska.[53] He also noted that the trust landscape over the past one hundred years had tilted in favor of creditors' rights and towards the weakening of trusts, allowing, in some cases, creditors who came into being some fifty years after the establishment of a trust to invade the trust under a "fraudulent transfer" exception.[54]

In discussing the current trusts and estates landscape and the potential economic benefits to Alaska, it appears that with regards to creditors' rights, the legislators focused primarily on the potential claims of children and spouses.[55] Chairman Rokeberg noted that a very similar version of this bill had been vetoed the previous year over concerns of the possibility of a settlor establishing a trust to escape child support.[56] The bill from the previous year had been met with broad acceptance from the Alaska Legislature, passing both houses with only one opposing vote in each chamber.[57] When Representative Vezey was asked about concern from the administration regarding the previously

48. Paul, *supra* note 10, at 358.
49. *See HB 101 - Trusts & Property Transfers in Trust*, ALASKA H. LABOR & COMMERCE COMM. MINUTES, 20th Leg. (Feb. 10, 1997) [hereinafter *House Minutes*]; *HB 101 – Trusts & Property Transfers in Trust*, ALASKA S. JUDICIARY COMM. MINUTES, 20th Leg. (Mar. 7, 1997) [hereinafter *Senate Minutes*].
50. *See House Minutes*, *supra* note 49; *see also Senate Minutes*, *supra* note 49.
51. *See House Minutes*, *supra* note 49 (statement of Rep. Al Vezey).
52. *Id.*
53. *Id.*
54. *Id.*
55. *See generally id.*; *Senate Minutes*, *supra* note 49.
56. *House Minutes*, *supra* note 49 (statement of Chairman Rokeberg).
57. *See id.* (statement of Rep. Al Vezey).

presented bill, he replied that one would have to have a vivid imagination to believe that a trust could be used by a settlor to avoid obligations of child support, and the current draft of the bill had been amended to address that specific concern.[58] Even with all the discussion about the potential for shielding from child support claims, as well as discussions regarding the types of people that would pay to set up trusts and the average net worth of those generally interested in asset protection trusts,[59] the legislature allowed the bill to pass with the chance that a settlor might avoid child support in certain circumstances.[60] The bill settled on a thirty-day window, requiring at the time of the trust formation that the settlor not be in arrears in child support payments by thirty days or more.[61] While protection of children and spouses is important, it is curious that the legislators did not specifically mention the potential usurpation of other creditors' rights.[62]

The general reasoning behind the need to shield specific claimants is that it is difficult to make distinctions between creditors when it comes to the protections afforded by trusts. The legislators decided that because the trust would be subject to the laws of Alaska as interpreted by Alaska's courts, no injustice would occur.[63] This was partially based on the fact that Alaska has a very small body of common law and case law dealing with trusts, which they also saw as an advantage compared to other competing jurisdictions.[64] This explains a major reason for the debate on whether a trust should be invadable for child support. The ability of a child claimant to invade the trust not only affects a potential child support claimant; it opens the possibility that other claimants might be able to invade the trust,[65] and a trust subject to invasion carries with it potential tax implications.[66]

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58. *See id.*
59. *See id.* (statement of Richard Hempesch, Attorney).
60. *See id.* (statement of Vincent Usera, Assistant Att'y Gen.)
61. *See id.*
62. *See generally id.*; *see also Senate Minutes*, *supra* note 49. Robert Manley, Attorney, did mention the case of O.J. Simpson and pointed out that such a scenario playing out with an Alaska trust would not happen because O.J. Simpson already had a creditor's judgment against him at the time he set up his trust in the Isle of Man. *House Minutes*, *supra* note 49 (statement of Robert Manley, Attorney).
63. *See generally House Minutes*, *supra* note 49.
64. *See id.* (statement of Rep. Al Vezey) ("We don't have 200 years of court presidencies [sic] and supreme court rulings to muddy the waters in terms of what our laws mean.").
65. *See id.*
66. This is because, for IRS purposes, only a completed gift can be excluded from a settlor's estate. For example, the IRS looks at the settlor/beneficiary's discretion with regards to allocation of transferred assets. If a beneficiary's

The child support protections received extensive discussion. An attorney testified and noted that under the current draft, so long as the initial conveyance by the settlor was not found to be fraudulent and the four-year statute of limitations had run, the assets of the trust would be shielded.[67] Discussion also noted that in cases where the settlor is also the beneficiary, the principle that the beneficiary is not the owner of the trust's assets and therefore cannot alienate them was reduced to a legal fiction.[68]

In further discussing the prospects of luring investment and economic growth to Alaska, members of the legislature also considered the fact that most of the asset protection business was largely going to foreign countries that not only had strong trust laws but also allowed the preservation of assets for future generations in perpetuity.[69]

Representative Vezey brought attention to what the members considered to be the primary competition to Alaska's aggressive entry into the trust market: offshore trusts.[70] Vezey explained that there was a tremendous market for asset protection and preservation of wealth, and the Cayman Islands was home to more than thirty major banks administering funds and servicing trusts.[71] The legislators, aware of the amount of wealth that had flowed to these foreign jurisdictions, sought the positive benefits such wealth brought.[72] Attorney Richard Hompesch specifically made mention of his trip to the Cook Islands and how impressed he was to see the thriving economy of a small island nation "with a population less than the Fairbanks North Star Borough."[73] As the conversation turned to Alaska's competitive prowess against places such as the Cook Islands, Mr. Hompesch pointed out that although the

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creditors can reach the transferred assets, in theory, it means that the settlor/beneficiary has the authority to force the trust to pay the creditors. The IRS views such authority to mean that the original "gift" to the trust was incomplete. Therefore, if a creditor is allowed to invade the trust, the trust is also subject to taxes a completed gift would otherwise not be subject to. *See generally* I.R.S. Priv. Ltr. Rul. 201208026 (Sept. 28, 2011) (citing I.R.C. 25.2511-2(b) "provid[ing], in part, that as to any property or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, the give is complete."

67. *House Minutes*, *supra* note 49 (statement of Robert Manley, Attorney).

68. *See id.* (statement of Vincent Usera, Assistant Att'y Gen.).

69. *See id.* (statements of Rep. Al Vezey, Assistant Att'y Gen. Vincent Usera, and Chairman Rokeberg). This reasoning was also used to encourage consideration of repealing Alaska's rule against perpetuities statute. *Id.*

70. *Id.* (statement of Rep. Al Vezey).

71. *Id.*

72. *See id.* (statements of Richard Hompesch, Attorney, Robert Manley, Attorney, and Rep. Al Vezey).

73. *Id.* (statement of Richard Hompesch, Attorney).

differences between the two were extreme, Alaska had the advantage of being promoted through the Internet, so "attorneys all over the United States will become interested in this act and will be interested in setting up trusts in Alaska."[74] In the discussions, the legislators were warned against expecting any significant amount of wealth to come from these offshore shelters to Alaska.[75] While the bill would allow Alaska to have a measurable advantage over its sister states, this advantage would not extend to offshore jurisdictions that were not subject to the Full Faith and Credit Clause.[76] There was mention, however, of the possibility of attracting foreign wealth to Alaska using, as a competitive advantage, the political stability of the United States broadly, and Alaska specifically, in contrast to that of the island nations that were currently the go-to trust capitals.[77]

The discussion also included the competitive advantages held by both Delaware and South Dakota for housing corporations and national credit card companies, respectively.[78] Mr. Manley, state chairman of the American College of Trusts and State Counsels, testified that he was in favor of the legislation because it was an opportunity to bring a thriving industry to Alaska, and statutory modification had been the approach that other states had used to gain their competitive advantages.[79] South Dakota, for example, had recently eliminated the rule against perpetuities in an effort to enter the trusts market and had previously repealed its law regarding maximum interest rate charges, which opened the door for national credit card companies to set up processing centers in South Dakota. In addition, Mr. Manley spoke of his experience with other trust friendly jurisdictions. He discussed the status of the Cook Islands before they entered the trust market as "a small place somewhere out of New Zealand."[80] However, because of their trust business, the Cook Islands had attracted rich and famous people who want a certain caliber of accommodations, which created a direct boost to the economy.[81]

Legislators also turned their attention to the area of fraudulent transfers. Specifically, they discussed Missouri, which had attempted to pass a similar trust act years prior but had not realized the hoped for

74. *Id.*
75. *See Senate Minutes*, supra note 49 (statement of Jeffrey Schoenblum, Professor).
76. *See id.*
77. *House Minutes*, *supra* note 49 (statement of Robert Manley, Attorney).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

benefits.[82] A major reason for Missouri's failure was the uncertainty surrounding the idea of fraudulent transfers.[83] Without a clear way to test whether a transfer to a trust is fraudulent or not, a father setting up a trust for his son's education who whispers to his attorney "[a]nd you know what, if I go broke at least I know my kids are going to college" could be deemed to have intended to defraud future creditors.[84]

Another policy argument in favor of Alaska establishing itself as the self-settled asset protection headquarters was the fact that through many different courses of action, it was possible that a person could achieve similar types of protection.[85] Kevin Walsh, an accountant from Fairbanks, testified that in shielding assets from future creditors, the legislature was ensuring that these trust creators would receive the same protection that people receive when they:

> [give] to charity, transfer stock or other assets to [their] children, make transfers to corporations and retirement plans, buy an insurance policy, invest in a limited partnership [or] in a limited liability company, create a[n] . . . estate, [or] impair [their] property with a covenant or an easement. All of these things may add to the detriment of some future creditor . . . .[86]

Mr. Walsh noted that if the goal of the trust legislation was to allow people to protect assets for the future, such instruments were already plentiful; what made this bill unique was its ability to afford protection and use of the asset to the settlor in the present.[87]

Finally, there were still areas that were unclear for the legislature, including exactly how corporate securities would work and the percentage of assets that would actually be held in Alaska. While these amounts were said to be "unquantifiable," Representative Vezey pointed out that "in managing money the new wealth that the industry creates for managers are the fees [] charged. . . . irrespective of where the assets are located."[88] Regarding the ambiguity surrounding the requirement of where the assets physically would be located, Chairman

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* (statement of Kevin Walsh, CPA); *see also infra* Part II.A (providing a general list of alternative instruments that can be employed to achieve similar protections to a domestic self-settled asset protection trust).
86. *See House Minutes*, *supra* note 49 (statement of Kevin Walsh, CPA). Mr. Walsh also added that he did not believe the current bill as written added onto the detriment of future potential creditors in the same way that the current list did. *Id.*
87. *See id.*
88. *See id.* (statement of Rep. Al Vezey).

Rokeberg asked whether, if there was at least "$1 here[,] the fact [is] that the use of the law [of] the state of Alaska would undoubtedly generate a substantial amount of legal business?"[89] An attorney responded, "I believe so."[90]

While the minutes of the legislative sessions do not contain the thoughts of all the members of the Alaska Legislature, they do suggest that a primary motivation for debate and ultimate passage of the bill was the economic growth of Alaska.

C. Substance of Alaska's 1997 Act

Several provisions made Alaska's Act groundbreaking with respect to U.S. trust law. First was the fact that Alaska authorized self-settled discretionary spendthrift trusts. In contrast to the *Restatement (Third) of Trusts* position that when a beneficiary is appointed as the sole trustee, a claimant can generally reach the maximum amount that the beneficiary could distribute to himself,[91] Alaska's asset protection trust statute provided that the spendthrift provision would be valid even in such cases.[92] This was a significant departure from the general public policy of restricting the owner of property from creating, for his own benefit, an interest in his property that he can shield from creditors.[93] The Act specifically provides that "[a] person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust . . . may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee."[94] The limitation on distributions for tax purposes is that a settlor who is also a beneficiary should have no authority to make distributions to himself, but instead distributions to the settlor should be subject to the "sole and absolute discretion of an independent trustee."[95] So while a settlor could

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89. *See id.* (statement of Chairman Rokeberg).

90. *See id.* (statement of Richard Thwaites, Attorney).

91. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 3, 69 (2003) . The general legal principle behind this inability to be the sole trustee and sole beneficiary is the merger doctrine. *See id.* § 3 cmt. d, § 69; Julian v. Nw. Trust Co., 255 N.W. 622, 623 (Minn. 1934).

92. *See* ALASKA STAT. §§ 34.40.110–310 (2010). This distinction goes back to the public policy argument that a settlor should not be able to transfer assets into a trust, thus shielding the assets from creditors, yet maintain control over how those assets are to be disbursed. *See supra* Part II.A.

93. *See* David G. Shaftel, *Domestic Asset Protection Trusts: Key Issues and Answers*, SHAFTEL LAW OFFICES, http://shaftellaw.com/article21.html (last visited Apr. 16, 2012).

94. ALASKA STAT. § 34.40.110(a).

95. David G. Shaftel, *Newest Developments in Alaska Law Encourage Use of Alaska Trusts*, 26 EST. PLAN. 51, 57 (1999).

make discretionary distributions to himself, he would be doing it at the cost of tax consequences on the assets in the trust as part of the settlor's estate.[96] A settlor could maneuver around this by appointing himself as a co-trustee with limited distribution authority and allowing the other co-trustee, an independent third party, to have complete discretionary distribution authority.[97]

Additionally, Alaska provided that *no creditor* of the settlor is able to reach the trust's assets; this includes child support agencies, spouses, and ex-spouses. While this was criticized and debated during the legislative process, Alaska's Child Support Enforcement Division negotiated with the legislature to make such protection dependent on the completion of the gift.[98] That is, the spendthrift provision only shields against creditors who arise *subsequent* to the establishment of the trust and not against child support claims arising before the establishment.[99] The Act provides that "the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the beneficiary's interest in the trust."[100]

While the Alaska Legislature was able to provide many of the substantial protections it had hoped for, it was unable to provide any benefits that were unique to Alaska as compared to what other states could potentially provide. A notable issue with all domestic asset protection trusts is the fact that a court in a different jurisdiction, one that does not recognize self-settled asset protection trusts, might grant creditors access to the Alaska trust.[101]

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96. *See id*; *see also* GIDEON ROTHSCHILD ET AL., IRS RULES SELF-SETTLED ALASKA TRUST WILL NOT BE IN GRANTOR'S ESTATE 9–13 (2010), *available at* http://www.alaskatrust.com/assets/files/articles/why_alaska_trust/Self_Settled.pdf.

97. *See* Shaftel, *supra* note 95, at 53.

98. *See House Minutes*, *supra* note 49 (statement of Richard Thwaites, Attorney) (noting that completed gifts are not invadable).

99. *See supra* Part II.B (providing an overview of legislative discussions on the issue of child support and the thirty day rule that was adopted in an effort to protect child support claimants); *see also* ALASKA STAT. § 34.40.110(b)(4) (2011).

100. ALASKA STAT. § 34.40.110(b). This provision is subject to four exceptions: (1) that the settlor's intent was not to defraud; (2) that the settlor may not terminate the trust without consent of any person who has a substantial beneficial interest; (3) that the trust does not require all income be distributed to the settlor; and (4) that the settlor is not thirty days or more in arrears on child support payments. ALASKA STAT. § 34.40.110(b)(1)–(4).

101. Alaska has attempted to explicitly combat this by allowing the settlor to name Alaska as the choice of law governing the trust and through a statute that states that Alaska's courts have exclusive jurisdiction over trusts in its state.

D. Subsequent Amendments

The following subsections detail some of the subsequent amendments to and interpretations of Alaska's Trust Act. It is not a comprehensive list, but it shows Alaska's continued willingness to maintain and increase its advantage in the increasingly competitive domestic trust market.

1. 2003 Amendments

A unique aspect of the Alaska's trust law doesn't come from the specific wording of the 1997 Act alone, but the wording combined with the 2003 amendments to the statute restricting transfers of trust interests,[102] as compared against the Uniform Fraudulent Transfers Act (UFTA),[103] which has been adopted by most states.[104] The primary challenge of the UFTA comes from the circumstances under which a transfer is fraudulent. First, a transfer is deemed fraudulent under the UFTA if the debtor made the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor."[105] In discussing Alaska's fraud statute, an attorney testified to the difficulty with the phrase "intent to hinder."[106] In 2003, Alaska made further groundbreaking change to its asset protection trust statute when it corrected what was seen as a major defect in previous self-settled trust legislation: it

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102. Act of October 8, 2003, 2003 Alaska Sess. Laws ch. 138. The 2003 amendments require the settlor to sign an affidavit to the following:

> (1) the settlor has full right, title, and authority to transfer the assets to the trust; (2) the transfer of the assets to the trust will not render the settlor insolvent; (3) the settlor does not intend to defraud a creditor by transferring the assets to the trust; (4) the settlor does not have any pending or threatened court actions against the settlor, except for those court actions identified by the settlor on an attachment to the affidavit; (5) the settlor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit; (6) at the time of the transfer of the assets to the trust, the settlor is not currently in default of a child support obligation by more than thirty (30) days; (7) the settlor does not contemplate filing for relief under the provisions of 11 U.S.C. (Bankruptcy Code); and (8) the assets being transferred to the trust were not derived from unlawful activities.

Id. at 5–6 (codified at ALASKA STAT. § 34.40.110(j)).

103. Uniform Fraudulent Transfers Act, 7A-2 U.L.A. 274 (1984) [hereinafter UFTA].

104. As of 2010, forty-four states have adopted the Uniform Fraudulent Transfers Act. *Fraudulent Transfer Act,* UNIFORM L. COMMISSION, http://www.nccusl.org/Act.aspx?title=Fraudulent Transfer Act (last visited Jan. 27, 2012).

105. *See* UFTA, *supra* note 103, § 4. This applies to *both* current and future creditors. *Id.* at § 4(a).

106. *See House Minutes*, *supra* note 49 (statement of Robert Manley, Attorney).

redefined the statute of limitations for "pre-existing creditors." In other states, pre-existing creditors generally have a statute of limitations of some time period after the creation of the trust or some period of time after they should have discovered the asset transfer, whichever is longer.[107] This potentially opened the door to claimants that do not discover their cause of action for decades following the transfer of assets.[108] To correct this, Alaska's statute now limits the length of time to four years from the transfer date and does away with the notion of reasonably discoverable.[109] Alaska also eliminated an intent to hinder with regard to transferred assets as a potential source of liability for a fraudulent transfer and chose to keep only an "intent to defraud" as a possible source of liability.[110] This was another major step in shielding trust assets from creditors because in addition to tax benefits, the very nature of a self-settled trust is to "hinder or delay" a creditor.[111] Thus, for states that had adopted the UFTA, the problem was made apparent in *Breitenstine v. Breitenstine*.[112] Deciding in a divorce case whether transfers of assets to an offshore asset protection trust—the assets of which were comprised primarily of gifts from parents to the husband—were fraudulent, the Wyoming Supreme Court noted, "[o]ur case law indicates that an intent to hinder or delay creditors is enough to consider the conveyance fraudulent even if there was no actual fraud."[113]

Furthermore, Alaska courts are required to have proof of actual fraud, and while not recognizing the concept of constructive fraud, they will allow claimants to bring in "indicia of fraud" or "badges of fraud."[114] As the Alaska Supreme Court said in *First National Bank of Fairbanks v. Enzler*:

> The compelling ones in terms of long-recognized indicia of fraud are: (1) The consideration . . . is inadequate. . . . (2) The transfer of the property was in anticipation of a pending

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107. *See* Stephen Greer, *Alaska Adopts a New Trust Law*, TR. & EST., Aug. 1, 2003, at 4, *available at* http://www.alaskatrust.com/assets/files/articles/why_alaska_trust/new_trust_law.pdf.

108. *See id.* Greer gives the hypothetical of a doctor who is unaware of any patient complaints at the time he transfers assets into a trust. In this situation, a patient who was seen prior to the transfer can assert a claim subsequent to the transfer and would be able to assert a fraudulent transfer claim at any time, if a court held the patient was a pre-existing claimant. *See id.*

109. *See* ALASKA STAT. § 34.40.110 (2010).

110. *See id.* § 34.40.110(b)(1).

111. *See* Greer, *supra* note 107, at 4.

112. 62 P.3d 587 (Wyo. 2003).

113. *Id.* at 592 (citing *In re* Estate of Reed, 566 P.2d 587, 590 (Wyo. 1977)).

114. *See* First Nat'l Bank of Fairbanks v. Enzler, 537 P.2d 517, 521–22 (Alaska 1975).

> suit . . . . (3) The transfer or debtor was insolvent . . . . (4) There was a failure to record the instrument within a reasonable length of time . . . . (5) The conveyance was a transfer of all or substantially all the debtor's property . . . . (6) The retention of possession of the premises by the grantor from the date of the execution of the deed . . . stands unexplained . . . . (7) The transfer so completely depleted the assets of Dale Trude that his creditor, the plaintiff, has thereby been hindered and delayed in recovering any part of his judgment. . . . (8) The relationship of the parties becomes an additional badge of fraud when there also appear other circumstances which of themselves incite distrust and suspicion . . . .[115]

The Alaska Supreme Court has held that, "[b]adges of fraud must be viewed within the context of each particular case, and where their presence is satisfactorily accounted for, or where their existence is not inconsistent with a construction of the transaction as a valid one, they deserve to be accorded little weight."[116] Thus, even in cases where badges of fraud clearly exist, courts may require more before invalidating a transfer.[117] While it is not impossible for other states to amend their statutes to follow Alaska's fraud statutes, it is unlikely given that Alaska is an outlier in its construction of its fraudulent transfer statute. Thus, for the time being, Alaska may have a sustainable advantage when it comes to protection from future creditors.

Finally, in order to be more competitive with offshore asset protection trusts, Alaska explicitly authorized the use of both trust protectors and advisors.[118] While a settlor cannot appoint a close friend or relative as a trustee, unlike in the Cook Islands,[119] this provision allows the settlor to appoint a "disinterested third party" who would have the power to remove a trustee, modify the trust instrument, adjust the interest of the beneficiaries, and modify the power of appointment in the trust.[120] This provision gives the settlor additional control over the trust by allowing multiple checks to be placed on the trustee.

115. *Id.* at 522 (quoting Evans v. Trude, 240 P.2d 940, 944 (Or. 1952)).

116. Sylvester v. Sylvester, 723 P.2d 1253, 1258 (Alaska 1986) (quoting Blumenstein v. Phillips Ins. Ctr., 490 P.2d 1213, 1223 (Alaska 1971)).

117. *See id.*

118. *See* ALASKA STAT. §§ 34.40.110(h), 13.36.370, 13.36.375 (2010).

119. *See* Danforth, *supra* note 6, at 309. The Cook Islands gives additional protections when the protector is a U.S. citizen and thus subject to U.S. laws. The settlor can give the protector only veto power and can also enact a "duress" clause. *See id.* at 309–11.

120. *See* ALASKA STAT. §§ 13.36.370, 13.36.375.

2. 2006 Amendments

Based on a series of articles regarding the possibility that a divorce court might find that some of the interests transferred to a self-settled asset protection trust belong to a divorced spouse,[121] in 2006 the Alaska Legislature adopted amendments designed to protect a trust in those cases.[122] Specifically, the legislature added subsection (m), which states:

> If a trust has a transfer restriction allowed under (a) of this section, in the event of the divorce or dissolution of the marriage of a beneficiary of the trust, the beneficiary's interest in the trust is not considered property subject to division under AS 25.24.160 or 25.24.230 or a part of a property division under AS 25.24.160 or 25.24.230. Unless otherwise agreed to in writing by the parties to the marriage, this subsection does not apply to a settlor's interest in a self-settled trust with respect to assets transferred to the trust
>
> (1) after the settlor's marriage; or
> (2) within 30 days before the settlor's marriage unless the settlor gives written notice to the other party to the marriage of the transfer.[123]

However, Alaska didn't stop there. Alaska also amended its statute to lower the statute of limitations on claims brought against a trustee from twenty-four months down to just six months.[124]

3. Internal Revenue Service Interpretation

Understanding that Alaska had set new precedent in creating the first workable asset protection trust statute, a remaining issue was whether the IRS accepted the new instrument as a completed gift.[125] This was important because if the IRS did not see transfers to a self-settled asset protection trust as a completed gift, it would hinder the use of such trusts by those seeking the dual advantages of asset protection and tax planning.[126] In a private letter ruling request, an attorney asked the IRS

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121. *See, e.g.*, Marc Chorney, *Interests in Trusts in Divorce: What the Settlor Giveth, the Divorce Court May Take Away*, 40 U. MIAMI INST. ON EST. PLAN. 14 (2006). Alaska may have been the first state to actually address the subject directly. *See* Krize v. Krize, 145 P.3d 481, 490 (Alaska 2006) (stating that where one spouse was the beneficiary of an inheritance held in a trust and where the "inheritance is virtually certain" a court should have no problem in considering the assets therein).

122. Act of June 15, 2006, 2006 Alaska Sess. Laws ch. 66.

123. *Id*. at 7 (codified at ALASKA STAT. § 34.40.110(l) (2010)).

124. *Id*. at 2 (codified at ALASKA STAT. § 13.36.100 (2010)).

125. *See* Shaftel, *supra* note 95, at 56–58.

126. *See id.*

to rule on two issues: whether the "Transfer To the Trust is A Complete Gift" and whether the "Trust Is Not Includable In Grantor's Estate."[127] The IRS responded in Letter Rule 9837007, ruling favorably that the transfer was a completed gift but conditioning the completed gift upon the "representation that there is no express or implied agreement between the Donor and the Trustee."[128] The IRS refused to rule on whether the assets would be included in the settlor's estate.[129] It is possible that the IRS did not rule because it wanted to leave open the possibility of evidence that there was an implicit agreement between the settlor and trustee.[130]

In 2009, the IRS again took up the issue,[131] this time clarifying that a transfer is incomplete for federal tax purposes if the settlor retains "sufficient dominion and control" over the property within the meaning of I.R.C. Reg. 25.2511-2(b).[132] The major difference here was that the donor specified that, upon death, the assets left in the trust would be divided into per stirpital shares and held in trust for the remaining beneficiaries.[133] The relinquishing of her right to determine the distribution of assets postmortem allowed the trust to be excluded from the grantor's estate under Internal Revenue Code Section 2036.[134]

Based on Alaska's continued work on its trust law and increase in protections for both settlors and trustees, it is possible to conclude that Alaska is set on its goal of being a global financial trust headquarters. However, to understand the obstacles still in the way, it is helpful to examine the current trust laws of other states.

III. THE DOMESTIC ASSET PROTECTION TRUST LANDSCAPE

A. After the Alaska Trust Act

Almost immediately following the passage of the Alaska Act, Delaware passed a domestic asset protection vehicle of its own. The Qualified Dispositions in Trust Act[135] was passed in an effort to give

127. I.R.S. Priv. Ltr. Rul. 9837007 (Sept. 11, 1998).
128. *Id.*
129. *See id.*
130. *See* Shaftel, *supra* note 95, at 57.
131. *See* I.R.S. Priv. Ltr. Rul. 200944002 (Oct. 30, 2009).
132. ROTHSCHILD, *supra* note 96, at 8–9.
133. *Id.* at 8.
134. *See id.* at 9. Section 2036 provides the general rule that "[t]he value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer." 26 U.S.C. § 2036 (2012).
135. DEL. CODE ANN. tit. 12, § 3576 (2011).

Delaware a share of the $640 billion trust industry.[136] In addition to following Alaska's lead by eliminating the rule against perpetuities and allowing dynasty trusts,[137] a Delaware trust would be privy to the same tax and estate benefits that an Alaska trust would be subject to. Delaware was also able to provide benefits that Alaska was unable to. First, Delaware is already home to the largest share of U.S. corporations and as such has built up the infrastructure to handle large assets. This is unlike Alaska, which was given unfavorable treatment in a 1986 survey examining Alaska's chances of becoming an international financial center.[138] Delaware also has close proximity to New York and Charlotte, which are major U.S. banking hubs. Finally, the fact that Delaware is located on the mainland may provide potential settlors easier access should they choose to travel to the location of their trust.

Beyond these differences, Delaware also chose to create a possible advantage by allowing "tacking"[139] of time for assets that were previously in a different trust and subsequently transferred into a Delaware asset protection trust.[140] This allows settlors who already have their assets in a trust in another jurisdiction that bars creditors' claims to freely move[141] their assets to Delaware without the risk of opening up the trust assets to claims where the statute of limitations had already run. Delaware also empowered the trust advisors much more than Alaska. For example, in a Delaware asset protection trust, a settlor can hold the position of an "investment advisor," which would allow the settlor to "direct, consent to or disapprove a fiduciary's actual or proposed investment decisions."[142] A final Delaware benefit above all other domestic asset protection trusts is the ability for the settlor to receive up to five percent of the trust's assets as specified in the trust instrument.[143] While this disbursement will likely qualify as income for tax purposes and the distribution would likely be attachable by a

136. *See* Brigid McMenamin, *Flimsy Shelters*, FORBES (Sept. 8, 1997), http://www.forbes.com/forbes/1997/0908/6005094a.html.

137. *See* DEL. CODE ANN. tit. 25, § 503 (2011).

138. *See House Minutes*, *supra* note 49 (statement of Rep. Joe Ryan).

139. Tacking is defined as "[t]he joining of consecutive periods of possession by different persons to treat the periods as one continuous period." BLACK'S LAW DICTIONARY 1590 (9th ed. 2009).

140. *See* DEL. CODE ANN. tit. 12, § 3572(b)(2) (2011).

141. Delaware does have four required elements for a trust to tack: the trust must be irrevocable, distributions must be made at the trustee's discretion, the trustee must be qualified, and the instrument must contain a Delaware choice of law clause. *See* DEL. CODE ANN. tit. 12, § 3570(11) (2011).

142. DEL. CODE ANN. tit. 12, § 3313(a) (2011).

143. *Id.* § 3570(11)(b)(5).

claimant, the ability for the settlor to retain some extra amount of control can go a long ways when a trust seeker is weighing his or her options.

Nevada was also quick to follow suit. In 1999, the Nevada Legislature passed the Spendthrift Trust Act.[144] Following Alaska and Delaware generally, Nevada made it known that its purpose was to enforce self-settled asset protection trusts, except in the case of fraudulent transfers.[145] In an attempt to set itself apart from Delaware and Alaska, Nevada expressly requires that trustees of asset protection trusts ignore federal and state bankruptcy courts seeking to pierce a trust's shield.[146] Additionally, Nevada chose not to walk the tightrope with regards to child support and spousal creditors that Alaska and Delaware did.[147] Quite the opposite, the Nevada statute affirmatively denies access to anyone, "whether dependent upon the beneficiary or not."[148]

Additional benefits of a Nevada self-settled asset protection trust are that Nevada chose to limit its statute of limitations, and to this day, it

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144. NEV. REV. STAT. ANN. § 166.010 (2010).

145. *See id.* § 166.040(1)(b).

146. *See id.* § 166.120(2). The statute provides the following provision:

> Payments by the trustee to the beneficiary, whether such payments are mandatory or discretionary, must be made only to or for the benefit of the beneficiary and not by way of acceleration or anticipation, nor to any assignee of the beneficiary, nor to or upon any order, written or oral, given by the beneficiary, whether such assignment or order be the voluntary contractual act of the beneficiary or be made pursuant to or by virtue of any legal process in judgment, execution, attachment, garnishment, *bankruptcy* or otherwise, or whether it be in connection with any contract, tort or duty.

Id. (emphasis added). Nevada is not alone seeking to shield trusts from federal and state bankruptcy courts. *See* DAVID G. SHAFTEL, COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES 13 (2010), *available at* http://shaftellaw.com/docs/comparison_domestic_apt_statutes.pdf (stating that Colorado and Missouri also do not provide that the spendthrift clause is a transfer restriction as described in the Bankruptcy Code). In May 2011, an Alaska bankruptcy court avoided a transfer of real property of a settlor of an Alaska self-settled asset protection trust. *In re Mortensen*, A09-90036-DMD, 2011 WL 5025249 (Bankr. D. Alaska May 26, 2011), *reconsideration denied,* A09-90036-DMD, 2011 WL 5025252 (Bankr. D. Alaska July 8, 2011). As noted, while Alaska does not follow Nevada, Colorado, or Missouri in addressing the Bankruptcy Code, the Alaska Bankruptcy Court was ruling on federal law. There is no reason to question this view of the federal bankruptcy statute as it pertains to self-settled asset protection trusts in other states.

147. *See* NEV. REV. STAT. ANN. § 166.090(1) (2010). The section explicitly excludes any person *except* the beneficiary. *Id.*

148. *See id.* ("Provision for the beneficiary will be for the support, education, maintenance and benefit of the beneficiary alone, and *without reference to or limitation by the beneficiary's needs, station in life, or mode of life, or the needs of any other person, whether dependent upon the beneficiary or not.*" (emphasis added)).

has the shortest statute of limitations against pre-existing creditors' claims: just two years.[149] Nevada also chose to follow Delaware in the area of settlor discretion and allows settlors to prevent the trustee from making a distribution without affecting the trust's irrevocability.[150]

As of 2010, a total of thirteen states offered some variation of Alaska's asset protection trust, while two states are currently working on enacting similar legislation and have "placed their toe in the water."[151]

B. Challenges to Domestic Asset Protection Trusts

While domestic self-settled asset protection trusts have now been in existence almost fifteen years, there has been little in the way of meaningful case law challenging their major provisions.[152] There are many possible stumbling blocks that have yet to be cleared.

First, there is the Full Faith and Credit Clause of the Constitution.[153] It is very possible that a judgment in a state without an asset protection trust statute may be enforced against a trust in Alaska or some other state.[154] While legislatures have attempted to make provisions through requirements that the trustee and trust be domiciled in the state, a court may be willing to find some type of *in rem* jurisdiction.

Next, an argument can be made that asset protection trust statutes violate the Contracts Clause.[155] A state's laws violate the clause if they "substantially impair the obligations of parties to existing contracts or make them unreasonably difficult to enforce."[156] So long as a state's asset protection law precludes pre-existing creditors from the creditors' shield, states may not have substantial problems here since the clause has been interpreted to refer to existing contracts and not future ones.[157]

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149. *Id.* § 166.170(1)(a).
150. *Id.* § 166.040(2).
151. SHAFTEL, *supra* note 146, at 2–3.
152. *See* Sirknen, *supra* note 40, at 158 ("[T]he author has been unable to find any case in which a creditor has brought a challenge to a domestic [asset protection trust].").
153. U.S. CONST. art. IV, § 1.
154. *See* Sirknen, *supra* note 40, at 152.
155. U.S. CONST. art. I, § 10, cl. 1.
156. Duncan E. Osborne et al., *Asset Protection: Trust Planning*, SJ036 ALI-ABA 1419, 1446 (ALI-ABA C.L.E. Annual Advanced Course of Study Nov. 17–21, 2003).
157. *Id.*

Finally, in cases of corporate trustees, the minimum contacts test[158] may allow a claimant to bring suit in a non-asset protection trust state and argue that such trusts are against the forum state's public policy.[159]

CONCLUSION

It has been almost fifteen years since Alaska made its ground-breaking move into the realm of domestic self-settled asset protection trusts. Since that time twelve additional states have followed it down that path. The big question is how is Alaska doing on its journey to be the trust capital of the United States? The answer is much easier asked than answered. This is, in large part, because two of the benefits of transferring assets to a trust are anonymity and confidentiality.[160] The best indicator to date was a survey of Alaska trustees and attorneys done in 2002,[161] five years after the Alaska Legislature enacted the law authorizing self-settled asset protection trusts. As of 2002, Alaska trustees had formed approximately 870 trusts for nonresidents of Alaska; approximately 310 were self-settled asset protection trusts.[162] The creation of these trusts employed approximately 110 Alaska attorneys.[163] In addition, approximately 125 self-settled asset protection trusts had been created for Alaska residents while another 200 to 300 perpetual trusts, which were made available through Alaska's repeal of the rule against perpetuities, were formed.[164] Since the passage of the original Act, advocates of offshore asset protection trusts have argued that domestic trusts are still unable to compete with offshore trusts in

158. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that an out-of-state defendant must have minimum contacts with a state in order for the exercise of personal jurisdiction by that state to be proper).

159. *See* Sirknen, *supra* note 40, at 142–43. The public policy argument becomes more difficult as more and more states adopt similar asset protection trust statutes.

160. Telephone Interview with David G. Shaftel, Attorney, Shaftel Law Offices, PC (Dec. 3, 2010). Mr. Shaftel stated that it was very difficult to gather information regarding the number of trusts opened and even more so regarding the amount of assets held in trust. This is particularly difficult because a tangential benefit of having assets in trust is that they do not show up as personal assets and therefore are often hidden from creditors. This is especially true of assets that are held in offshore trusts. *Id.*

161. *See* Shaftel, *supra* note 95.

162. *See id.* at 507. Shaftel notes that all the statistics are anecdotal and were gathered through personal surveys of institutions and individuals who were likely to act as trustees for nonresident trusts. *See id.* at 507 n.3.

163. *Id.* at 507.

164. *See id.*

the area of maximum creditor protection, and thus the primary focus of Alaska's asset protection trusts has shifted to tax reduction.[165]

It appears, at least based on what little evidence is available, that Alaska is still far from reaching its goal of becoming a financial hub for asset protection. This goal may simply be unattainable due to the increase in competition from its sister states, all of which have closer access points for their residents to setup asset protection trusts than Alaska. Additionally, Alaska is unable to compete with offshore jurisdictions which are not bound by U.S. federal law. Although becoming a hub for the global trust market may be an unachievable goal, Alaska seems to have attracted increased assets to the state, seems to have increased notoriety in the trust and estates community generally, and seems to have created additional work for its professional workers. So long as Alaska continues to maintain its progressive stance on asset protection trusts, it should continue to benefit from increased awareness among scholars, attorneys, and trust seekers.

165. *See id.*