Holding All the Cards: The Role of the Oklahoma Family Wealth Preservation Trust Act in the Game of Domestic Asset Protection

I. Introduction

At the most basic level, settling a trust is akin to playing a simple card game. The settlor, the person creating the trust, holds all their assets as cards in their hand. As they decide what assets to place in the trust, the settlor reorganizes their cards. In doing so, they place some cards out of reach while retaining control of others. Like most games of strategy, players engage in a "give and take," giving up some moves to hopefully secure greater benefits later. But as trust law developed, this simple transaction took on dozens of different forms. The arrival of legislation governing domestic asset protection trusts ("DAPT") pushed the boundaries of the age-old card game of trust settling.[1]

A key part of this game is balancing the interests of trust settlors and their creditors. Trust settlors are interested in securing their assets from creditor access, while creditors are interested in reliably securing access to those assets as a means of insurance.[2]

In the context of trust law, asset protection trusts allow settlors to form a special trust that is out of creditor's reach.[3] As foreign countries began attracting American investors to use offshore asset protection practices, several domestic jurisdictions sought to pull money back onshore by implementing DAPT laws.[4] A DAPT combines the hallmarks of offshore asset protection practices by allowing individuals to create trusts in the United States that most creditors cannot access.[5]

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1. *Cf.* Ritchie W. Taylor, Comment, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?*, 13 BYU J. PUB. L. 163, 163-64 (1998) (adapting Professor Lynn M. Lopucki's poker chip analogy to illustrate the liability and stakes at play in asset protection trusts).

2. *See* John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2630-31 (2006).

3. Nicole F. Stowell et al., *The Use of Wills and Asset Protection Trusts in Fraud and Other Financial Crimes*, 65 DRAKE L. REV. 509, 543 (2017).

4. *Id.* at 542; *see also* Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 IOWA L. REV. 2155, 2172 (2018) ("I know very well that these statutory innovations come from a desire to compete with the offshore. Just as the offshores have been competing between and among themselves for some decades, now some onshore jurisdictions want to join in the same game. Bring it on . . . bring it onshore.").

5. Taylor, *supra* note 1, at 163-64; Stowell et al., *supra* note 3, at 543.

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In 2004, Oklahoma created its own DAPT law: the Oklahoma Family Wealth Preservation Trust Act ("Oklahoma Act").[6] The Oklahoma Act allows individuals to create trusts that are out of the reach of creditors if statutory regulations are met, such as requiring the trust to contain Oklahoma-based assets and having an Oklahoma-based bank as a trustee.[7] This trust provides a way to secure one's assets from future unknowns and is designed to be used among a portfolio of other estate planning techniques.[8] Significantly, the Oklahoma Act is unique because it allows settlors to reach back in and change aspects of the trust after they have secluded certain assets from creditors. Oklahoma is the only state whose asset protection statute contains this "intriguing wrinkle" of what is known as revocability, or the ability to change the trust after forming it.[9] However, this type of trust has not faced judicial scrutiny in Oklahoma, and thus ambiguity surrounding its stability and ultimate usefulness abounds.[10]

In an article pre-dating the introduction of asset protection trust laws to domestic jurisdictions, Professor Elena Marty-Nelson contended that offshore trusts frustrated American trust law by circumventing the accepted premise "that one ought not control and benefit from property and at the same time shield it from one's creditors."[11] The Oklahoma Act, however, allows just that. While public policy has developed to permit some degree of asset protection in these domestic trusts, no state goes as far as Oklahoma in creating a revocable asset protection trust. This Note seeks to place the Oklahoma Act in the context of similar laws in others states to better

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6. 31 OKLA. STAT. §§ 10-18 (2024).

7. *Id.* §§ 11(5), 12.

8. Philip R. Feist, *Oklahoma's Family Wealth Preservation Trust Act: Now More Than Ever*, 86 OKLA. BAR J. 2342, 2345 (2015) ("[E]xperienced estate planning lawyers understand that the [Oklahoma] preservation trust is only one of several available asset protection instruments, and that an effective protection plan is a symphony involving several of those instruments, not a solo played by one of them.").

9. 31 OKLA. STAT. § 13 (2024); Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2687 (2006) ("Upon joining the bandwagon in 2004, Oklahoma added its own, intriguing wrinkle: Uniquely among the states, Oklahoma allows asset protection trusts to be made revocable . . . ."); *see infra* notes 26-27 and accompanying text.

10. Stowell et al., *supra* note 3, at 545 ("DAPT law in the U.S. is very unsettled (due to a paucity of case law), and new developments could alter the legal landscape."); *see also* Cheyenne VanKirk, Note, *Domestic Asset Protection Trusts: Ushering in the* Klabacka *Era*, 42 SEATTLE U. L. REV. 1559, 1566 (2019) ("Because courts have not addressed the public policy questions, the edges of these laws are still obscured—it is plausible that courts would prefer that this inquiry took place on the legislative floor.").

11. Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 15 (1994).

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understand and predict its potential viability. In particular, this Note compares the Oklahoma Act to the Spendthrift Trust Act of Nevada ("Nevada Act") and the case law considering it. Nevada is often ranked the "best" state for DAPTs and is one of the only states with clear case law regarding the validity of this type of statute.[12] Accordingly, Nevada provides a good comparison for Oklahomans wondering how challenges to the Oklahoma Act could shake out in the coming years.

This Note argues that if the Oklahoma Act is challenged in court, its feature of revocability will likely be the largest sticking point. The revocability option allows Oklahoma settlors to hold all the valuable cards in their hand at once, abolishing the "give and take" model and tipping the scales drastically in favor of settlors. The Oklahoma Act could easily be abused, undermining the creditor-debtor system and threatening the Oklahoma economy. Consequently, if challenged, a court will likely strike the Oklahoma Act down on public policy grounds. To ensure validity and compliance with public policy, Oklahoma should consider abolishing the option of revocability or rigorously enforcing strong protectionary measures to ensure compliance with public policy objectives.

Next, Part II will situate the Oklahoma and Nevada statutes in trust law generally, as well as analyze the statutes themselves. Part III tackles the analogous statute in Nevada and the Nevada Supreme Court case, *Klabacka v. Nelson*, which upheld the Nevada Act on public policy grounds. Finally, Part IV considers the validity of the Oklahoma Act in the context of the Nevada Supreme Court's justifications and suggests next steps for Oklahomans considering this type of trust in the face of judicial ambiguity.

II. Learning the Game: Trust Law Flyover

A. Trusts and Asset Protection Generally

Asset protection has been likened to building a fence around your yard or locking the front door, practices that are commonplace and typically looked

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12. *10th Annual Domestic Asset Protection Trust State Rankings Chart*, OSHINS & ASSOCS. LLC, https://www.oshins.com/_files/ugd/b211fb_e159190aa9c04112af068c994dc2c144.pdf (last visited Jan. 22, 2024); *see* Ashlea Ebeling, *Comparing Domestic Asset Protection Trust States*, FORBES (July 6, 2016, 6:01 AM), https://www.forbes.com/sites/ashleaebeling/2016/07/06/comparing-domestic-asset-protection-trust-states/?sh=418270be59fd; Tish McDonald et al., *The State of Domestic Self-Settled Asset Protection Trusts*, INSIGHTS (Willamette Mgmt. Assocs.), Autumn 2019, at 13, 14, https://willamette.com/insights_journal/19/autumn_2019_2.pdf.

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upon favorably.[13] Generally speaking, protecting what is yours is a non-controversial property ideal dating back centuries.[14] Yet, as asset protection laws have been introduced, commentators have characterized these practices as the sanctioned "hiding" or "shielding" of money from creditors.[15] But the very language of "shielding" and "hiding" money from creditors indicates deeper policy concerns potentially inherent in asset protection.

Proponents of asset protection advance justificatory reasonings like cultivating security in an increasingly litigious society,[16] growing personal savings as individuals' incomes rise,[17] and increasing privacy.[18] However, critics argue "competent people should not have the right to enjoy property while avoiding their just debts."[19] Additionally, before the modern asset protection practices diverged into what they are today, "[i]t [was] against public policy to permit a man to tie up his property in such a way that he can enjoy it but prevent his creditors from reaching it."[20] So, perhaps building a fence around certain assets and excluding certain people is more controversial than it appears on its face. This Note seeks to analyze this controversy by evaluating the statutes certain states have established to allow these practices.

A trust is just one piece of the larger practice of estate planning and asset protection. At its most basic level, a trust leans into much of its plain English definition: when you give someone money or an object "in trust" for you,

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13. Lesa Creveling, *It's Not Too Late to Build a Fence When the Cows Are Out: Family Wealth Preservation Trust*, TR. CO. OKLA., https://www.trustok.com/family-wealth-preservation-trust-2/ (last visited Jan. 3, 2024); Feist, *supra* note 8, at 2342.

14. 2 WILLIAM BLACKSTONE, COMMENTARIES *2 ("[T]he right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."); *see also* Eason, *supra* note 2, at 2622.

15. Stowell et al., *supra* note 3, at 546-47 ("[Domestic asset protection trusts] can also be employed in almost the same manner as [offshore asset protection trusts] to commit various financial crimes such as . . . hiding legitimate assets from creditors with valid claims and spouses in divorce proceedings . . . ."); *see also* Taylor, *supra* note 1, at 174-75 ("[T]he purpose of properly performed asset protection is to shield assets without the appearance of impropriety . . . .").

16. Keith Adam Halpern, *Domestic Asset Protection Trusts: What Is Your State of Asset Protection?*, 7 FLA. ST. U. BUS. REV. 139, 139 (2008); *see also* Duncan E. Osborne & Mark E. Osborne, Asset Protection Trust Planning (ALI-CLE Course Materials Apr. 17-19, 2013), Westlaw SU002 ALI-CLE 1.

17. VanKirk, *supra* note 10, at 1559-60.

18. Stowell et al., *supra* note 3, at 527.

19. Eason, *supra* note 2, at 2631.

20. Nelson v. Cal. Tr. Co., 202 P.2d 1021, 1021 (Cal. 1949).

they are holding or managing whatever you give them for your own benefit.[21] In legal terms, a trust is the bifurcation of legal and equitable title in a particular thing or "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person."[22] A trust hinges on one's intent to create this relationship.

Relevant players in this transfer of title include (1) the "settlor" who orchestrates the trust and transferring transaction, (2) the "beneficiary" who will receive the "benefit" of whatever is being given or passed down, and (3) the "trustee" who oversees the management and distribution from the settlor to the beneficiary.[23] The same person can fulfill more than one role,[24] and any role could be filled by an entity or a natural person.[25] Finally, trusts are categorized as revocable or irrevocable, which distinguishes how much control the settlor has over the assets in the trust once the trust has been formed.[26] As the names suggest, a settlor cannot easily make changes, or "revoke," an irrevocable trust, while changes can be made to a revocable trust.[27]

Because trusts are flexible and can be structured in countless ways, numerous variations and types have developed as trust law has progressed.[28] Regardless of the variation in structure, Professors Henry Hansmann and Ugo Mattei describe the hallmark of any trust as the ability for "parties to the trust to partition off a discrete set of assets for separate treatment in relationships formed with creditors."[29] Two examples of the different forms trusts have taken on over time are spendthrift trusts and DAPTs. These two types of trusts are of particular relevancy to this Note, both of which turn on this concept of creditor access.[30]

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21. RESTATEMENT (SECOND) OF TRUSTS § 2 (AM. L. INST. 1959).

22. *Id.*

23. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998).

24. *Id.*

25. RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. e (AM. L. INST. 2003) ("The term 'person' includes corporations and unincorporated associations.").

26. Matthew Erskine, *What Is a Trust?*, FORBES (Aug. 5, 2022, 12:00 PM), https://www.forbes.com/sites/matthewerskine/2022/08/05/what-is-a-trust/?sh=71278cde4648.

27. *Id.*

28. *See id.*

29. Hansmann & Mattei, *supra* note 23, at 434.

30. *Id.* at 452 ("American trust law in fact permits the settlor to . . . creat[e] a 'spendthrift trust' that bars the beneficiary's creditors from levying on the beneficiary's interest in the trust."); Hirsch, *supra* note 9, at 2685-87.

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What rights the beneficiary has to the trust also shapes the rights that third parties, like creditors, have to those same assets.[31] A traditional "spendthrift trust," for example, is a trust with an added characteristic—the settlor can build in limitations, typically to an irrevocable trust, on what, how, and when a beneficiary can access the trust.[32] Technically, the spendthrift trust links the interest in alienability for the beneficiary and the settlor: if the beneficiary cannot transfer their interest in the trust (voluntary alienation) because of the limitations instituted by the settlor, then the creditor cannot access those trust assets (involuntary alienation).[33] Thus, by building in limitations to the trust, the settlor prevents creditors from piercing the seal of the spendthrift trust.[34] The policy justification of spendthrift trusts has been to "protect clients from 'credit drunk' beneficiaries who may use the trust as a transferable interest to secure a debt, pay off loans or credit cards, or expedite the acquisition of new funds."[35] Although beneficiaries must endure arguably paternalistic restrictions, the limitations placed on the trust prevent the assets from being squandered by the beneficiary and create a strong hurdle for creditors.[36]

Historically, public policy prohibited the settlor from personally reaping the benefits of a spendthrift trust because the aim was to "provid[e] a fund for the maintenance of another."[37] However, the growth of offshore asset protection trusts led several states to change course and consequently an inversion of policy justifications followed.[38]

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31. Elizabeth Brickfield et al., *The Myths and Realities of Nevada Self-Settled Asset Protection Trusts*, NEV. LAW., Jan. 2015, at 10, 10-11 ("Generally, a creditor of a beneficiary may obtain only the same rights to the trust property as that beneficiary possesses.").

32. *Id.*; *see also* Eason, *supra* note 2, at 2627.

33. Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 518 (2000). In other words:

> To be valid under section 502 of the [Uniform Trust Code], however, the spendthrift provision must prohibit both voluntary and involuntary transfers of a beneficiary's interest. If the trust instrument provides the necessary terms, a beneficiary may not transfer a spendthrift interest, and a creditor of the beneficiary may not attach the interest or a distribution by the trustee before its receipt by the beneficiary.

Id. (footnotes omitted).

34. Brickfield et al., *supra* note 31, at 11.

35. Stowell et al., *supra* note 3, at 525.

36. *See* Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63, 87 (2012).

37. Stowell et al., *supra* note 3, at 524 (quoting Miller v. Kresser, 34 So. 3d 172, 175 (Fla. Dist. Ct. App. 2010)).

38. *See* Eason, *supra* note 2, at 2630 ("[O]ffshore trends have undermined previously widespread domestic adherence to this creditor-friendly outcome.").

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Offshore asset protection trusts are trusts formed in foreign countries that often allow settlors to be beneficiaries of spendthrift trusts and loosen other traditional requirements.[39] Raising the bar challengers must meet to prove a fraudulent transfer, exploiting civil procedure rules regarding foreign judgements, and allowing a wide variety of assets to be placed in the foreign trust are examples of permitted practices in many offshore jurisdictions.[40] Unlike in domestic jurisdictions, a settlor of such trust can enjoy both the benefits of their own trust, as well as shield money from creditors.[41] This technique of shielding money from creditors, however, is largely associated with less-than-legal activity.[42] As money rapidly travelled offshore,[43] states began to create an attractive, onshore opportunity by passing legislation authorizing what became known as DAPTs.[44]

Alaska paved the way by passing the first "useable" DAPT statute in 1997, and nineteen states have since instituted some form of a DAPT.[45] A DAPT is "generally an irrevocable trust with an independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor."[46] In other words, a DAPT is exactly what public policy condemned for so many years—allowing a settlor to be a beneficiary of a trust that is out of reach of creditors.[47] While not inherently negative, this arrival of onshore asset protection trust law marked a stark shift in American trust law.

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39. *See* Stowell et al., *supra* note 3, at 529; *see also* Nikki Nelson, *Offshore Trusts Can Offer Asset Protection*, WOLTERS KLUWER (Feb. 22, 2021), https://www.wolterskluwer.com/en/expert-insights/offshore-trusts-can-offer-asset-protection.

40. Nelson, *supra* note 39.

41. Stowell et al., *supra* note 3, at 529.

42. *Id.* at 530; *see also* Marty-Nelson, *supra* note 11, at 15.

43. Marty-Nelson, *supra* note 11, at 14 (citing a 1994 report that estimates over $1 trillion being held in offshore accounts).

44. Eason, *supra* note 2, at 2623 ("Those efforts [of offshore jurisdictions attracting trust business] ultimately became a domestic phenomenon [when] Alaska in 1997 . . . adopted comprehensive legislation validating protection from creditors through the self-settled trust device.").

45. *Thirteenth ACTEC Comparison of the Domestic Asset Protection Trust Statutes*, ACTEC: AM. COLL. OF TR. & EST. COUNSEL at i, https://web.archive.org/web/20230226221953/https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf?hssc=1 (last updated Aug. 2022) [hereinafter *Thirteenth ACTEC Comparison*] ("Prior to 1997, Missouri had statutory provisions which supported the formation of DAPTs. In 1997, Alaska was the first state to enact a useable DAPT statute.").

46. *Id.*

47. *See* Halpern, *supra* note 16, at 140-41. Additionally, note that the language in the literature begins to converge, seemingly using the terms "domestic self-settled spendthrift trust," "self-settled spendthrift trust," and "domestic asset protection trust" interchangeably.

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The major check on a DAPT is the Uniform Fraudulent Transfer Act (UFTA), or the relevant state equivalent.[48] Stemming from common law prohibitions on fraud, the UFTA seeks to regulate and prohibit the movement of assets into a trust or other wealth protecting mechanisms "for the purpose of placing the assets beyond the reach of creditors."[49] Whether a transfer to a trust is fraudulent hinges on the debtor's knowledge at the time of the transfer.[50] If the debtor knows about creditors at the time of transfer and acts with the intent to evade them, fraud quickly becomes a concern.[51] Both the common law and the UFTA measure the intentions of transferors with "badges of fraud," or a series of factors that account for the circumstances surrounding the transfer of one's assets; these include situations where a debtor is threatened with litigation or they suddenly transfer the entirety of their wealth into the trust.[52] Each asset protection trust must pass this "litmus test of an enforceable transfer" to ensure a fair balance between the creditor and debtor's interests.[53] Most states have incorporated this limit of fraudulent transfers directly into their DAPT legislation by removing the benefit of creditor protection for assets that were transferred with a fraudulent intent.[54]

As state governments sought to increase local revenue and individuals hoped to secure their assets,[55] states quickly followed Alaska in implementing their take on DAPT laws. With such a strong change in policy—allowing a settlor to enjoy the distributions of their own trust directly—these asset protection laws may attempt to mitigate persistent clashing interests but ultimately favor asset holders seeking to secure their wealth. These trust law developments set the scene for Oklahoma to begin reshaping their asset protection law in the early 2000s.

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48. Myron Kove et al., *Introduction: Domestic Asset Protection Trusts*, *in* BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 1123 (database updated June 2023), Westlaw BOGERT § 1123.

49. 37 AM. JUR. 2D *Fraudulent Conveyances and Transfers* § 4 (2023).

50. Kove et al., *supra* note 48, § 1123.

51. *Id.*

52. PETER SPERO, *Types of Fraudulent Transfers*, *in* ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS ¶ 3.04, at *8 (database updated Nov. 2023), Westlaw WGL ASSET ¶ 3.04.

53. Kove et al., *supra* note 48, § 1123.

54. *Thirteenth ACTEC Comparison*, *supra* note 45.

55. Hirsch, *supra* note 9, at 2687 ("The driving force behind these legislative initiatives is clear enough. States are vying for trust business.").

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B. Oklahoma Family Wealth Preservation Trust Act

Oklahoma waded into the waters of domestic asset protection in 2004 with the passage of House Bill 2135, or the Oklahoma Family Wealth Preservation Trust Act.[56] The Oklahoma Act permits individuals to place certain types of assets in a preservation trust that is protected from nearly all creditors.[57] The statute defines a "preservation trust" as a trust that (1) is "established by a grantor under Oklahoma law," (2) always retains an "Oklahoma-based bank" or "Oklahoma-based trust company" as a trustee, (3) has "only qualified beneficiaries," which includes lineal ancestors or descendants, the grantor's spouse, a 501(c) nonprofit organization, or another trust, and (4) has "a majority in value of its assets comprised of Oklahoma assets."[58] The definitional requirements underscore one key theme: the preservation trust must have both strong qualitative and quantitative ties to the state of Oklahoma.

Additionally, the preservation trust is "exempt from attachment or execution and every other species of forced sale . . . except a child support judgment."[59] This exemption is the crux of the statute. It allows assets that meet the statutory requirement, minus one narrow exception, to be out of reach of all types of creditors. The exception applies to times when one's own children function as "creditors"; parents cannot claim their money is shielded and refuse to pay child support.

Furthermore, the preservation trust "may be established as a revocable and amendable trust or an irrevocable trust."[60] If the trust is revocable, that revocation cannot be forced by a court in a judicial challenge.[61] In other words, the settlor cannot be forced to undo the preservation trust or unprotect their assets by a court order. Finally, the statute adopts the UFTA as a limiting measure on preservation trusts.[62]

The Oklahoma Act was revised in 2014.[63] These revisions were likely in response to concerns about the perceived narrowness of the Oklahoma Act,

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56. Susan B. Shields, *Oklahoma's New Family Wealth Preservation Trust Act*, 75 OKLA. B.J. 2583, 2583 (2004).
57. 31 OKLA. STAT. §§ 10-18 (2024).
58. *Id.* § 11.
59. *Id.* § 12.
60. *Id.* § 13.
61. *Id.* § 16.
62. *Id.* § 17.
63. David W. Wulfers, *The Oklahoma Family Wealth Preservation Trust Act*, DOERNER, SAUNDERS, DANIEL & ANDERSON, LLP (May 21, 2021), https://www.dsda.com/News-Publications/Press-Room/56211/The-Oklahoma-Family-Wealth-Preservation-Trust-Act.

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namely the limited amount of money that could be placed in the trust and the type of assets that could be included.[64] Most notably, the amendment removed the cap restricting preservation trusts to having no more than $1 million in assets and broadened the scope of what qualifies as an "Oklahoma based company."[65] Settlors are now able to include "equity of an Oklahoma-based company . . . 'without reference to assets owned by the Oklahoma-based company'" as assets in the preservation trust.[66] Now, beyond the type of assets that can be placed in the trust, there are no quantitative limits on what assets can be held in the preservation trust.[67] Despite these 2014 updates to the Oklahoma Act, the allowance of a revocable trust remains at the forefront of the debate around DAPTs.

Revocability is the flagship feature of the Oklahoma Act and is a complete anomaly among other state DAPT statutes.[68] Compared with other states where individuals must accept the settling of a DAPT as mostly final and unchangeable, settlors in Oklahoma can reach back in and change aspects of the trust after they have secluded certain assets from creditors.

The Oklahoma Acts's statutory language does provide that once the trust is partially or entirely revoked, the protection from creditors provided by the preservation trust no longer applies.[69] This restriction, coupled with the limitations inherent in adopting the UFTA, means that settlors cannot transfer assets in and out of a trust at the drop of a hat. Settlors cannot evade creditors one day and then enjoy the assets the next. However, revocability evokes interesting public policy concerns as it wades closely to a "having your cake and eating it too" conflict.[70] This precise concern is explored in Part IV.

Despite the Oklahoma Act being revolutionary in its construction, commentators claim it has gone rather unnoticed and underutilized.[71] This is

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64. *See id.* ("[W]hen the Act was revised by the Oklahoma legislature . . . , this type of trust became much more useful and appealed to a broader number of individuals.").

65. Feist, *supra* note 8, at 2342-43.

66. *Id.*

67. Philip Feist, *Gavel to Gavel: Family Wealth Preservation*, J. REC. (Okla. City) (May 28, 2014), https://journalrecord.com/2014/05/28/gavel-to-gavel-family-wealth-preservation-opinion/.

68. *See* Feist, *supra* note 8, at 2344.

69. 31 OKLA. STAT. § 13 (2024).

70. *See generally* Marty-Nelson, *supra* note 11.

71. Elizabeth K. Brown & Mike McDonald, *Worried About the Future? Take a Proactive Look at Asset Protection Planning, Family Wealth Preservation Trusts*, PHILLIPS MURRAH, https://phillipsmurrah.com/2015/06/worried-about-future-take-proactive-look-asset-protection-planning-family-wealth-preservation-trusts/ (last visited Jan. 4, 2024) (characterizing the

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a stark juxtaposition to what many have described as the sole purpose of these trust laws: attracting sizeable trust business to states.[72] The underutilization of the Oklahoma Act likely results in a double-edged sword for practitioners creating these trusts and individuals making use of them. Ambiguity and uncertainty has engulfed the practice of using these trusts because there have been no challenges to the validity of the Oklahoma Act.[73] Because the legal profession is built on tradition, precedent, and consistency, boundary-pushing laws and practices often create a tension between those long-standing values and the price of progress. Nevada is among the list of states that have implemented new DAPT legislation and is the only state to have litigated such legislation without a dispositive bankruptcy issue.[74] The following section analyzes Nevada's legislation and its path to judicial approval.

III. Nevada as a Benchmark

Nevada is generally viewed as a business-friendly state because it is a "low-regulation environment" and a "favorable tax environment for business and industry."[75] This holds true in the realm of asset protection and DAPT law in particular. According to a well-known ranking system of states with DAPT laws, Nevada ranks at the top of the list.[76] Nevada's favorable status is likely due to the scope of the Nevada Act, which will be explored in detail below.[77]

Additionally, Nevada is one of the few states with litigation over the legitimacy of their DAPT law and one of the only states with such litigation occurring outside the bankruptcy context.[78] Commentators have wondered if other states will follow suit after Nevada's courts blessed these asset

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Oklahoma Family Wealth Preservation Trust Act as a "unique but little known Oklahoma law").

72. Hirsch, *supra* note 9, at 2687.

73. *See* VanKirk, *supra* note 10, at 1567 ("[A]ttorneys lack certainty regarding how a court will rule on any given DAPT case. This insecurity surely stagnates the use of a potentially massively beneficial legal tool for Americans.").

74. *Id.* at 1561.

75. *Nevada Advantage*, NEV. GOVERNOR'S OFF. OF ECON. DEV., https://goed.nv.gov/why-nevada/nevada-advantage/ (last visited Jan. 4, 2024); Megan Barth, *Nevada Ranks Eighth As Best Business Climate in US*, NEV. GLOBE (Oct. 4, 2023, 12:25 PM), https://thenevadaglobe.com/articles/nevada-ranks-eighth-as-best-business-climate-in-us/.

76. *10th Annual Domestic Asset Protection Trust State Rankings Chart*, *supra* note 12.

77. *See infra* notes 89-93 and accompanying text.

78. *Thirteenth ACTEC Comparison*, *supra* note 45, at i (listing Alaska, Delaware, and Nevada as states where the DAPT statute has been challenged).

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protection trusts.[79] Given the general popularity of Nevada's statutes and the on-point case law, Nevada provides a good point of comparison for those seeking to understand the benefits and downfalls of the Oklahoma Act.

A. Spendthrift Trust Act of Nevada

The Nevada Act is a classic DAPT statute that commentators discuss when mapping the field of domestic asset protection.[80] Passed in 1999, the Nevada Act was among the first statutes to test onshore domestic asset protection in the wake of money management practices flocking offshore.[81] The statute comes directly out of the spendthrift trust line, identifying as a self-settled, or "first party," spendthrift trust.[82]

Under the statutory guidelines, a trust formed under the Nevada Act must be in writing and irrevocable.[83] Additionally, the trust cannot "require that any part of the income or principal of the trust be distributed to the settlor" directly.[84] This means the settlors cannot write in a mandatory distribution for their own enjoyment; rather, an independent trustee must approve such a distribution.[85]

Furthermore, the trust must contain sufficient ties to Nevada. To have sufficient ties, there must be a local trustee, including at least (1) a natural person residing and domiciled in Nevada, (2) a trust company maintaining an office in Nevada, or (3) a bank maintaining an office in Nevada.[86] The assets must also be sufficiently tied to Nevada, with "[a]ll or part of the land rents, issues, or profits" and "the personal property, interest of money, dividends upon stock and other produce thereof" being in Nevada.[87] Finally, there can be no intent to "hinder, delay or defraud known creditors" when creating the trust.[88]

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79. *Nevada's Unparalleled Asset Protection*, ALLIANCE TR. CO. OF NEV. (Aug. 14, 2017), https://alliancetrustcompany.com/news/nevadas-unparalleled-asset-protection/.

80. *See* Halpern, *supra* note 16, at 142 (arguing the best asset protection states are Nevada, Delaware, and Alaska).

81. Jeffrey A. Morse, *Nevada Self-Settled Spendthrift Trusts or Offshore Trusts?*, NEV. LAW., Mar. 2008, at 16, 16-17; Brickfield et al., *supra* note 31, at 11.

82. Brickfield et al., *supra* note 31, at 11.

83. NEV. REV. STAT. § 166.040(1)(b) (2024).

84. *Id.* § 166.040.

85. *Id.* § 166.040(2)(g) ("The settlor is authorized to receive income or principal from the trust, but only subject to the discretion of another person . . . .").

86. *Id.* § 166.015(2).

87. *Id.* § 166.015(1)(a), (b); *see also Thirteenth ACTEC Comparison*, *supra* note 45, at 45.

88. NEV. REV. STAT. § 166.040(1)(b).

Fitting with Nevada's reputation for being a business-friendly state, the scope of the Nevada Act is proffered as favorable to settlors utilizing the trusts.[89] In addition to the above characteristics, the Nevada Act has a two-year statute of limitations during which creditors can challenge the validity of a trust.[90] This relatively short time frame is considered strongly advantageous for Nevada trust holders.[91]

Additionally, the statute contains no exceptions for the types of creditors that can pierce the asset protection if they meet certain circumstantial qualifications.[92] Where some states protect child support, alimony claims, or tort victims, Nevada does not grant any of these creditors special protection.[93] As a result, all money in such a trust enjoys full creditor protection, providing the trust is formed correctly and is not fraudulently motivated. Nevada is the only state with this carte-blanche approach to exceptions.[94] Eighteen years after the legislature instituted the Nevada Act, the statute was challenged in the Nevada courts, which will be analyzed next.

B. The Nevada Act Upheld: Klabacka v. Nelson

In the early 1990s, a Nevada couple, Eric and Lynita Nelson, began separating their multi-million dollar assets after ten years of marriage.[95] The Nelsons later moved their holdings into separate self-settled spendthrift trusts created under the Nevada Act.[96] In 2009, all these acts of separation culminated in the initiation of divorce proceedings.[97] Given the "complexity of the divorce decree," the Nevada Supreme Court reviewed several aspects of the decree in 2017.[98] Most notably, the court considered the validity of the self-settled spendthrift trusts the couple formed, as well as the district court's award of child support, attorney fees, and expert fees regarding Eric's asset protection trust specifically.[99]

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89. Halpern, *supra* note 16, at 142 n.17.
90. NEV. REV. STAT. § 166.170.
91. Brickfield et al., *supra* note 31, at 11 ("Nevada's two-year statute of limitations is one of the shortest in the country, and combined with its other positive features, many practitioners believe a Nevada DAPT to be the best in the nation.").
92. *See Thirteenth ACTEC Comparison*, *supra* note 45; *see also* Ebeling, *supra* note 12.
93. *See Thirteenth ACTEC Comparison*, *supra* note 45, at 51-52; *see also* Ebeling, *supra* note 12.
94. *See Thirteenth ACTEC Comparison*, *supra* note 45.
95. Klabacka v. Nelson, 394 P.3d 940 (Nev. 2017).
96. *Id.* at 943.
97. *Id*.
98. *Id.*
99. *Id.* at 945-47.

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In addressing the validity of the asset protection trust, the court laid out the requirements of the Nevada Act, focusing on (1) the intention of the parties to form an asset protection trust, (2) the trust being in writing, (3) the trust being irrevocable, and (4) the absence of bad faith in defrauding known creditors.[100] After applying the elements of the statute to the Nelson's trust documents, the court clearly held there to be "a plain and unambiguous intent to create a spendthrift trust," finding the trusts to be valid Nevada self-settled spendthrift trusts.[101]

The court then rejected the district court's decision to require the judgement against Eric to be paid from his asset protection trust as opposed to from his own personal assets.[102] According to the Nevada Supreme Court, the district court decision was based solely on public policy concerns of *other* jurisdictions, namely jurisdictions with explicit creditor exceptions for child support judgements.[103] However, the court found that the district court's ruling ran completely contrary to the policy of Nevada and the intention of the Nevada legislature.[104] Rather, the legislature's intention underlying their asset protection statute was to "make Nevada an attractive place for wealthy individuals to invest their assets, which, in turn, provides Nevada increased estate and inheritance tax revenues."[105] Further, the court pointed out, a proposed amendment to the Nevada Act that would have added the child support exception was denied by the Nevada Legislature in 2013, indicating their intent to keep the statute free of any exceptions, even court-ordered child support.[106] Consequently, the court held payments could not be ordered from Eric's self-settled spendthrift trust, as the trust was both validly formed in accordance with the Nevada Act and the statute itself was in accordance with Nevada's economic and social policy.[107]

Decided twenty years after the first DAPT statute was passed, *Klabacka v. Nelson* arguably provided the first clarification by directly addressing the policy concerns around DAPTs.[108] The case was the first decided on pure efficacy grounds, meaning there was no choice of law or bankruptcy issue in which to extinguish the case before getting to the validity of asset protection

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100. *Id.* at 947.
101. *Id.*
102. *Id.* at 950-51.
103. *Id.* at 950.
104. *Id.* at 951.
105. *Id.*
106. *Id.*
107. *Id.*
108. VanKirk, *supra* note 10, at 1561.

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statute themselves.[109] Additionally, the Nevada Supreme Court squarely addressed some of the public policy concerns inherent in these statutes, albeit in the context of Nevada's business-friendly policies, but it remains the only court to have done so.[110] The court openly recognized and approved the legislature's conscious decision to use DAPTs to attract trust business by offering "maximum asset protection," serving a clear victory to asset holders in Nevada and potentially elsewhere.[111]

Although no act of the Nevada courts or legislature is binding on Oklahoma residents or Oklahoma courts in any way, Nevada's handling of these matters could lessen some of the ambiguity around the Oklahoma Act and point out potential differences that could cause friction. Thus, the distinctive features of *Klabacka* provide an opportunity for comparison to Oklahoma's DAPT law. *Klabacka v. Nelson* remains the only clear judicial analysis of the legal and policy ramifications of a DAPT statute.[112]

IV. Can Oklahoma Follow Suit?

The field of domestic asset protection remains enveloped in ambiguity because of its relative newness and minimal case law.[113] To address the confusion and apprehension surrounding domestic asset protection, comparisons (and differentiations) are often drawn from offshore activity, which then attaches considerable baggage in terms of perceived illegal activity, whether true or not.[114] In an effort to wade through the ambiguity, this Part compares the Oklahoma Act to the Nevada Act and hypothesizes about how these comparisons impact Oklahoman's chances of prevailing in a challenge to the Oklahoma Act. Much of the concern around DAPT legislation and practices is rooted in public policy concerns, or more specifically, questions of fairness.[115] Is it *fair* to allow settlors to place a protective shield over their assets? The fairness question can be separated from the legal question; legality does not automatically equate to fairness,

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109. *Id.*

110. *Id.*

111. *Klabacka*, 394 P.3d at 951 (quoting Michael Sjuggerud, Comment, *Defeating the Self–Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 986 (2001)).

112. VanKirk, *supra* note 10, at 1561.

113. Stowell et al., *supra* note 3, at 545.

114. *See generally* Smith, *supra* note 4.

115. Eason, *supra* note 2, at 2630-31 ("[T]he conflict generally pits respect for a settlor's right to transfer her property subject to limitations—such as 'I give this interest to X, to the exclusion of X's creditors'—against public policy concerns deemed sufficiently important to trump the settlor's wishes.").

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just as fairness does not equate to legality. The Nevada Act and litigation are useful data points in assessing both the legality and fairness of the Oklahoma Act because the Nevada court addressed both prongs.[116] While differing from state to state, many policy concerns transcend state lines. Thus, Oklahoma courts could be willing to follow suit after Nevada clearly validated their DAPT legislation despite public policy challenges.

The remainder of this Section addresses whether, in the face of a challenge to the Oklahoma Act, Oklahoma courts could or should replicate the holding of *Klabacka* under Oklahoma law. In a purely technical sense, the Nevada and Oklahoma Acts align and diverge in a few key areas. While the goal of asset protection and the emphasis on locality provide strong points of comparison between the Nevada and Oklahoma Acts, Oklahoma's restriction on the role of the settlor and the added feature of revocability pose potentially catastrophic challenges for the Oklahoma Act.

A. Strong Points

1. Advantageous Similarities

The two statutes align in their basic purpose: both create the opportunity to settle a trust that provides asset protection from some creditors.[117] Additionally, both statutes are limited by their state's fraudulent transfer law.[118] From a practical perspective, every state must refuse asset protection to fraudulent transfers to retain any semblance of a good faith requirement.[119] Without such a limitation, settlors could simply shield assets the second trouble strikes, causing the entire creditor-debtor system to crumble. Finally, each state builds in requirements demanding that assets and trustees have sufficient ties to the state itself.[120]

The Oklahoma and Nevada Acts seek to obtain the same end goal. Nevada was clear in their aim of bringing more money to their state through the law,[121] and commentators have said the same about Oklahoma's intention.[122]

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116. *Klabacka*, 394 P.3d at 947-48, 950-51.

117. 31 OKLA. STAT. § 12 (2024); NEV. REV. STAT. § 166.0120(1) (2024).

118. 31 OKLA. STAT. § 17; NEV. REV. STAT. § 166.040(1)(b).

119. *See, e.g.*, 31 OKLA. STAT. § 17 (subjecting preservation trusts to the provisions of the Uniform Fraudulent Transfer Act).

120. *Id.* § 11(5)(b); NEV. REV. STAT. § 166.015(2).

121. *Klabacka*, 394 P.3d at 951.

122. Hirsch, *supra* note 9, at 2687 n.12 ("Two other jurisdictions [Oklahoma and Utah] have divulged their ambitions by requiring, quite remarkably, that an asset protection trust name at least one local corporate fiduciary, not just a local resident, as trustee in order for the trust to take effect under state law.").

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By requiring the assets and trustees to be Oklahoma- or Nevada-based, the states enjoy the increased revenue locally. If challenged in court, Oklahoma trust holders seeking to uphold a preservation trust could rely on these similarities and analogize to *Klabacka*. The strong language in *Klabacka* defending the choice of the legislature provides a potentially persuasive argument.[123] Where the lower courts in *other* jurisdictions were swayed by fairness arguments,[124] namely jurisdictions that permitted piercing asset protection shields for child support judgements, the Nevada Supreme Court firmly sided with the Nevada legislature's decision to maintain a strong and vast asset protection shield.[125] Given the contentious national debate about the fairness of onshore asset protection laws, the Nevada court's willingness to forgo the policy concerns and uphold the Nevada Act could pave the way for other states to follow suit.

2. Advantageous Differences

The Oklahoma Act differs from the Nevada Act in two respects that could benefit Oklahoma litigants: the scope of the Oklahoma Act and the requisite ties to the state. First, as evidenced by the holding in *Klabacka*, the scope of Nevada Act sweeps broader in the protection it gives, as there are no exceptions for creditors to pierce the protection veil.[126] Oklahoma, however, does have an exception for child support judgements.[127] In utilizing Nevada as a point of comparison to uphold an Oklahoma preservation trust, this exception strengthens Oklahoman's arguments. Given the controversy over some of the protective carve outs, Nevada's willingness to uphold a carte-blanche statute could make it easier for an Oklahoma court to approve of the Oklahoma Act's policy carve outs. As the entire aim of preservation trusts is to protect money from creditors, *what type* of creditors exempted from such protection is a central concern.[128] *Klabacka* contains strong language about

123. *See Klabacka*, 394 P.3d at 950-51.

124. *Id.* at 950 ("The statutes and caselaw relied upon by the district court annunciate public policy concerns for allowing spendthrift trusts to be reached for child and spousal support.").

125. *Id.* ("Despite the public policy rationale used in the other jurisdictions, Nevada statutes explicitly protect spendthrift trust assets from the personal obligations of beneficiaries.").

126. *Id.* at 951; *see also Thirteenth ACTEC Comparison*, *supra* note 45, at 51-52.

127. 31 OKLA. STAT. § 12 (2024).

128. Eason, *supra* note 2, at 2631 ("[T]he debate has in more recent years focused upon the more specific question of which (if any) creditors have claims that are so compelling that public policy demands the elevation of those claims above respect for the donor's rights to condition her transfer.").

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upholding the policy of preservation trusts and shows a willingness to protect assets from *all* creditors. This decision, however, does not reflect a consensus in the asset protection realm, as states continue to provide different levels of protection to different categories of creditors.[129]

Concerning asset protection generally, some practitioners consider it to be a rightful shielding of one's assets,[130] while others delineate these statues as a "stiff-your-creditors ploy [that] is legal but controversial."[131] Enumerated exceptions in state statutes are likely an attempt to lessen that concern. These exceptions carve out areas where public policy outweighs debtor protections and allows certain groups of creditors to access a debtor's assets. Even with the Nevada Legislature's explicit language about not protecting *any* creditors, and the Nevada Supreme Court's deference to that decision, the subsequent commentary around the absence of an exception for child support claims highlights the persistent policy concerns.[132]

The term "creditors" evokes the image of banking professionals signing loan agreements or business owners entering supply contracts. Perhaps the image even extends to the involuntary realm, capturing tort victims or medical malpractice plaintiffs. But when the conversation shifts to paying child support, the thought of a child being a "creditor" and a parent seeking to wall off their money from their own children in a formal, wealth management system presents clear problems.[133] This is an example of why many criticize DAPT laws as wrongfully shielding money or "stiffing" those with rightful claims. Regardless of this debate, Oklahoma's exception for those seeking child support should strengthen its validity argument. The approval of the Nevada statute on policy grounds even amidst these controversial disputes could make it easier for Oklahoma courts to rationalize approving the Oklahoma Act with the child support carve out. In other words, an Oklahoma court does not have to approve nearly as broad of a protective shield given the existing limits in the Oklahoma Act.

The second difference between the Nevada and Oklahoma statutes is the requisite ties to the state, both in terms of assets and the trustee managing

129. *See Thirteenth ACTEC Comparison*, *supra* note 45.

130. Feist, *supra* note 8, at 2342.

131. Ebeling, *supra* note 12.

132. Allison Tait, *Debt Governance, Wealth Management, and the Uneven Burdens of Child Support*, 117 NW. U. L. REV. 305, 323 (2022).

133. *Id.* ("Most of the [trust] companies do not mention child support explicitly, an implicit recognition of the strength of the public policy argument and public sentiment against the nonpayment of child support. Nevertheless, they do point out the 'zero exception creditor' rule regularly and include it prominently in their trust services information.").

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those assets. In Nevada, "all or part" of the assets must be in Nevada.[134] There must also be at least one trustee whom the statute considers local to Nevada; either a Nevada resident, trust company, or bank.[135] By contrast, Oklahoma has much stricter locality requirements. A preservation trust under the Oklahoma Act must have "a *majority* in value of its assets comprised of Oklahoma assets."[136] The statute qualifies things like interests in Oklahoma bank companies, bonds issued by the Oklahoma government, or Oklahoma based bank accounts as permissible assets.[137] The Oklahoma Act also mandates a corporate or professional fiduciary always manage the trust.[138] Thus, the threshold requirement for what type of assets can gain protection in a preservation trust is much higher in Oklahoma.

Some consider these stringent requirements a brazen declaration of Oklahoma being "in it" for the money.[139] However, as the court in *Klabacka* made remarkably clear, that purpose is not immediate grounds for invalidation because that is the prerogative of the local legislatures.[140] Others claim the high bar for qualifying Oklahoma assets and requiring a professional Oklahoma trustee will be of particular benefit to the Oklahoma Act when challenged because associating such a level of professionalism with this otherwise ambiguous practice should deliver "a presumption of proper administration."[141] The sophisticated management could also help fend off claims of the preservation trust contravening the UFTA, which is a simple way for the trust's validity to be undermined.[142] Yet ensuring validity of the trust in this way could cause practical problems. If an individual seeking to settle an asset protection trust sees these Oklahoma requirements as too extensive or burdensome, they may choose the path of least resistance

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134. NEV. REV. STAT. § 166.015(1) (2024).

135. *Id.* § 166.015(2).

136. 31 OKLA. STAT. § 11(5)(d) (2024) (emphasis added).

137. *Id.* § 11(2).

138. *Id.* § 11(5)(b).

139. *See* Hirsch, *supra* note 9, at 2687; *see also* Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1176 n.144 (2011). Such influence is described by Ascher as follows:

> Currently, there are, more or less, twelve "asset-protection trust" states. . . . Is it fair to point out that, by and large, these are among our least populous states? Or that none is a major money center? Might it be that the legislatures in these states are more susceptible to influence by a determined few? Or especially interested in attracting or retaining trust business?

Id.

140. Klabacka v. Nelson, 394 P.3d 940, 950-51 (Nev. 2017).

141. Feist, *supra* note 8, at 2343.

142. *Id.*

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and pick a state, or perhaps an offshore jurisdiction, with fewer requirements for the sake of convenience. This would defeat the entire aim of these trust laws: to generate local revenue by stopping money from flowing offshore.[143]

B. Sticking Points

1. Structural Differences

The Oklahoma and Nevada Acts differ structurally. Put simply, the players in the creation and use of the trust are forced to occupy different roles in each state. In Nevada, the settlor can also be a beneficiary provided they meet statutory distancing requirements.[144] In essence, if decisions are made at an arm's length through the use of a third person, then the settlor can directly receive funds from the trust and use the trust's property.[145] However, in Oklahoma, the settlor cannot be a direct beneficiary; the beneficiaries can only be direct descendants of the settlor, the settlor's spouse, a 501(c) organization, or another trust.[146]

There is a lack of clarity surrounding the categorization of this type of trust given this structural difference. The Oklahoma Act is still consistently considered under the DAPT umbrella, given that it does indeed shield assets from creditors.[147] However, while some commentators consider it a "self-settled quasi-spendthrift trust,"[148] others emphatically reject the spendthrift label and consider it an "exemption trust."[149] The Oklahoma Act itself uses the label "preservation trust," further confusing the correct title.[150]

Depending on the wishes and goals of the settlor, the settlor's inability to directly profit as a beneficiary could have massive implications on the use of Oklahoma Act. If the settlor merely plans to utilize the preservation trust as an intergenerational wealth transfer vehicle, then the exclusion of the settlor may be irrelevant to them personally, as the settlor's spouse and lineal descendants are the appropriate beneficiaries. However, if the settlor wants the benefit of the trust assets during their own lifetime, then the structure of the Oklahoma Act poses a direct barrier.

As the settlor is excluded from the list of acceptable beneficiaries in Oklahoma, one may ask what benefits the Oklahoma Act offers a settlor.

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143. Eason, *supra* note 2, at 2623.
144. NEV. REV. STAT. § 166.040(2)(g) (2024).
145. *Id.* § 166.040(2)(g), (h).
146. 31 OKLA. STAT. § 11(6) (2024).
147. *Thirteenth ACTEC Comparison*, *supra* note 45, at 61-73.
148. Hirsch, *supra* note 9, at 2699.
149. Feist, *supra* note 8, at 2342.
150. 31 OKLA. STAT. § 11(5).

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Why would anyone choose to create a preservation trust in the state of Oklahoma when other states or countries offer increased benefits for settlors and the same protection from creditors? The answer lies in the most revolutionary aspect of the Oklahoma Act and likely the largest sticking point for the Act in trying to survive a validity challenge: revocability.

2. Oklahoma's Revocability Clause

In Nevada, the asset protection trust must be irrevocable.[151] The irrevocability of the trust is in line with every other state that has an asset protection trust law—except Oklahoma.[152] Irrevocability has been characterized as "[o]ne of the larger hurdles with clients" because "[t]here is no 'turning back'" once the trust is settled.[153] That requirement or "finality can leave a client felling like she has 'lost control' over all that she owns."[154]

Appearing to magically solve this issue, the Oklahoma Act allows for the preservation trust to be revocable.[155] This is intertwined with the settlor's limited role, given the technical restriction on their ability to be a beneficiary.[156] Whether the Oklahoma legislature's decision to allow revocable trusts is a fundamental difference or a mere matter of semantics will likely have large ramifications on the validity of the Oklahoma Act and is explored in detail below.

Practically, a revocable trust is a manipulable trust. After the trust documents are settled, the settlor can still reach back and make changes to the trust.[157] Because the law is always concerned with what property individuals hold at what time, a revocable trust has specific tax, bankruptcy, and estate planning ramifications.

When someone settles an irrevocable trust, meaning they cannot easily make changes once it has been created, that property is no longer their own and they relinquish the legal rights attached to it.[158] Put simply, if the player

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151. NEV. REV. STAT. § 160.040(1)(b) (2024).

152. *Thirteenth ACTEC Comparison*, *supra* note 45.

153. Halpern, *supra* note 16, at 146.

154. *Id.*

155. 31 OKLA. STAT. § 13.

156. *Id.* § 11(6); *see also* Shields, *supra* note 56, at 2584.

157. Myron Kove et al., *Introduction: Revocable Trusts*, *in* BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, *supra* note 48, § 1061, Westlaw BOGERT § 1061.

158. *See* Halpern, *supra* note 16, at 153 ("Any special power of appointment retrained [by the settlor], however, makes asset transfers to the trust . . . includable in the settlor's gross estate under [the federal tax code]."); RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (AM. L. INST. 2011) ("[A] power to revoke or amend a trust or a

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holds all of their assets (property, money, or businesses) as cards in their hand, settling an irrevocable trust means taking those select cards out of both their hand and the deck entirely. By contrast, settling a revocable trust is like segmenting the cards just off to the side where the player still has access and control despite the temporary separation. This often plays out as a "give and take" that justifies asset protection trusts. Settlors give up the ability to voluntarily alienate their property, or revoke the trust, in exchange for protection from involuntary alienation, or creditor access.[159] How this "give and take" is measured is reflected in federal gift tax regulations.

The IRS has implemented a specific tax that applies to the transfer of property in the form of a gift.[160] The settling of a trust is one way this transfer can take place.[161] If the transfer meets the myriad of federal regulations and requirements, the tax remains the responsibility of the individual giving the gift as opposed to whoever is receiving the gift.[162]

Whether or not the transfer is deemed a "complete transfer" determines whether the gift tax is triggered.[163] Completeness is measured by the "dominion and control" the gift giver, or the settlor in the trust context, retains when orchestrating the transaction.[164] If the giver relinquishes complete control of the gift, the gift is "complete" and qualifies for a gift tax on the transfer.[165] By contrast, an incomplete gift does not trigger the gift tax, and "[a] gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself."[166] Thus, how much control the gift giver or trust settlor retains over the assets, or the cards in their hand, dictates the implementation of the transfer tax. If the cards are not truly out of the player's hands, then a transfer tax will not apply, as the

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power to withdraw principal from a trust is recognized as a power of appointment over the principal of the trust . . . .").

159. Hirsch, *supra* note 9, at 2699 ("By insisting that restraints on voluntary alienation accompany restraints on involuntary alienation, even when they do the settlor no good, we ensure that the vehicle is not cost-free.").

160. 26 C.F.R. § 25.2511-1(a) (2024).

161. *Id.* ("The gift tax applies to a transfer by way of gift *whether the transfer is in trust or otherwise*, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.") (emphasis added).

162. *Id.* § 25.2511-2(a) ("[T]he [gift] tax is a primary and personal liability of the donor.").

163. Lischer, *supra* note 33, at 564.

164. 26 C.F.R. § 25.2511-2(b) ("As to any property . . . of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete."); *see also* Lischer, *supra* note 33, at 564.

165. 26 C.F.R. § 25.2511-2(c).

166. *Id.*

assets are still in the player's own estate and will be subject to different property or income taxes.

A similar measure of control and dominion used in determining federal gift taxes is present in the composition of DAPTs generally. An average transfer of property is a complete transfer, one where assets are transferred from person A to person B with person A retaining no control or interest in the property.[167] Everyday examples of such a transfer would be selling a home or giving a birthday gift. When a complete transfer occurs, it is "respected for purposes of creditor claims" because "the transferor no longer owns the property, and, accordingly, the property is no longer subject to the claims of the transferor's creditors."[168] In other words, because the cards no longer belong to person A, public policy validates (1) taxing the gift giver in a complete transfer because the property is no longer theirs, and (2) protecting the transferred assets from person A's creditors because they can no longer go after what person A does not own.

The power and control framework for applying gift taxes conceptually aligns with an irrevocable trust.[169] When a settlor settles an irrevocable trust under the Nevada Act, a "give and take" is instituted. The settlor gives up their ability to change things by fully relinquishing control of the assets while still enjoying profits as a beneficiary, and they are consequently granted protection as it pertains to those assets. In technical terms, involuntary alienation tracks voluntary alienation, meaning if settlors cannot voluntarily change the trust, then a creditor cannot involuntarily access the trust.[170] Such a "coupling" of voluntary and involuntary alienation "ensure[s] that the vehicle is not cost-free,"[171] or that an individual cannot hold all the valuable cards at one time.

The Oklahoma Act runs entirely contrary to this reasoning. Much like how offshore asset protection trusts are criticized for allowing the settlor to "have his cake and eat it too,"[172] the Oklahoma Act allows massive advantages at practically no cost.

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167. Lischer, *supra* note 33, at 524-25.

168. *Id.* at 525.

169. *See Abusive Trust Tax Evasion Schemes – Questions and Answers*, IRS: INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers (last updated Oct. 11, 2023).

170. Hirsch, *supra* note 9, at 2698-700.

171. *Id.; see also* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 360-61 (2002) (defending asset protection trusts on the grounds that settlors relinquish control of their assets in exchange for creditor protection).

172. Marty-Nelson, *supra* note 11, at 15 ("[Offshore asset protection trusts], in practice, often defeat deep-seated precepts of U.S. trust law. . . . [A]lthough not all OAPTs raise

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By permitting *revocable* preservation trusts, Oklahoma settlors hold all the valuable cards at once: they can place qualifying assets in the preservation trust, enjoy the protective shield from creditors, and retain the ability to revoke and enjoy the assets at any time. Proponents of the Oklahoma Act claim that such revocability is not a property interest if the settlor is not a de facto beneficiary:

> A revocable preservation trust does not violate any common law principle of trusts, inasmuch as a grantor cannot be a beneficiary of her own preservation trust; so the protections of the act do not come to the grantor as a beneficiary, or otherwise. A revocation power is not an interest *in* trust property, but, rather, it is a power *over* property, and repossession of trust property by the grantor upon exercise of the revocation power also does not constitute a beneficial interest in trust property.[173]

The distinction of a *property* interest versus a *power* interest, however, appears to be a mere matter of semantics when measured by the bundle of sticks theory.

For decades, property has been conceptualized as a "bundle of sticks" with each stick representing a right or entitlement.[174] Possession, use, and management of the property are among the rights commonly associated with the bundle.[175] When an Oklahoma settlor transfers assets into a preservation trust they are temporarily pausing access to these rights. Settlors, however, can easily reignite any of these rights by revoking the assets of the trust.

To return to the deck of cards analogy, the power to revoke means the cards are briefly set to the side but remain under the control, and ultimately for the enjoyment, of the settlor. Even if the rights do not simultaneously coexist, meaning the settlor does not retain a definitional ownership interest while they hold the revocation power,[176] Oklahoma settlors are still able to enjoy creditor protection, benefits of the property, and the ability to reclaim the assets under the Oklahoma Act.

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concerns, many appear to be designed to defeat, or certainly have the effect of bypassing, U.S. trust law.").

173. Feist, *supra* note 8, at 2344 (emphasis added).

174. Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 878 (2013).

175. *Id.* at 879 n.40.

176. Kove et al., *supra* note 157, § 1061 ("An essential feature of *powers over* trust property is that the donee of a limited or special power has no *ownership interest in* trust property.").

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Courts could be persuaded of a difference between a property interest and a power over property, and subsequently uphold the revocability option, given the analogous concept in partnership law. In Oklahoma, even though a general partnership is composed of the partners, property that is held by the partnership itself does not belong to the partners, but to the entity.[177] Partners merely have a right to use the property.[178] In other words, partners have a *power* over the property instead of an *ownership interest* in the property. Because partners hold a single stick in the bundle (the power to use the property), they do not have a full ownership interest and their personal creditors cannot come after that property.[179] Like the Oklahoma preservation trust, general partnerships are revocable in the sense that partners can leave the partnership and demand a buyout at any time.[180]

Partners, however, are vastly limited by fiduciary duties that require accountability and create equity concerns that courts have historically found sympathetic.[181] Under trust law, trustees also owe fiduciary duties, but settlors are able to dictate the life of the trust or retain a high level of control in a way that is absent in the partnership.[182] Additionally, individual partners are exposed to joint and several liability for the wrongdoings of their partners[183] and creditors of the partnership can come after the entity's assets that the partners have the right to use,[184] both of which are disadvantages absent in a preservation trust.

So, while the partnership provides some parallels in rationalizing the functionality of a power interest instead of a property interest, the partnership

177. 54 OKLA. STAT. § 1-203 (2024) ("Property acquired by a partnership is property of the partnership and not of the partners individually.").

178. *Id.* § 1-401(g) ("A partner may use or possess partnership property only on behalf of the partnership.").

179. *Id.* § 1-501 ("A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.").

180. *Id.* § 1-601(1) (stating a partner can dissociate with express will); *see also id.* § 1-801(1) (stating a partnership can be dissolved with express notice from a partner).

181. Judge Cardozo's infamous language in *Meinhard v. Salmon* encapsulates the deeply rooted influence and significance carried by fiduciary duties in a partnership: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." 164 N.E. 545, 546 (N.Y. 1928).

182. Taylor, *supra* note 1, at 178 ("While the trustee has a fiduciary duty to the trust and its assets, he also has a moral obligation to manage the trust according to the objectives for which the grantor established the trust.").

183. 54 OKLA. STAT. § 1-306(a) (2024) ("[A]ll partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.").

184. *See generally id.* § 1-307.

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still maintains a structure that requires a "give and take" that preservation trusts erode drastically. At its best, the Oklahoma Act offers rights duplicative of that available through other business entity laws in a more obscure and restrictive framework. At its worst, the Oklahoma Act contravenes public policy in a way that unfairly tips the scales in favor of settlors and disadvantages creditors.

The upper hand provided by the Oklahoma Act is illustrated by commentators using the revocation right and the position as a de facto beneficiary interchangeably. The settlor's inability to serve as a beneficiary, they argue, "should not be of great concern to a [settlor] wishing to form a revocable preservation trust since . . . the [settlor] could reacquire the assets of the preservation trust upon revocation."[185] In other words, the fact that a settlor cannot be a beneficiary does not serve as a drawback in the traditional "give and take" because the ability to revoke the trust assets is still remarkably advantageous. An Oklahoma settlor enjoys the enormous advantage of revocability in addition to the same creditor protection as all other DAPT settlors. Where settlors in other states must experience a feeling of "finality" or "no turning back" when settling an asset protection trust,[186] Oklahoma settlors are able to circumvent this predicament altogether. Although distinctiveness does not automatically equate to legal invalidity, such a stark departure from the DAPT body of law could be viewed as a potential loophole and create heartburn for courts.

V. Conclusion

Oklahoma's allowance of revocation in a DAPT likely tips the scales too far in the direction of asset holders. Where the Nevada Act mandates settlors relinquish control of their assets to gain creditor protection, the Oklahoma Act erodes the "give and take" rationale. Asset holders can hold all the cards in their hands at once, keeping profitable or advantageous ties to their property all while gaining the benefit of creditor protection. It remains true that one cannot do this on a whim to evade creditors, as such an action would blatantly violate the UFTA. But as a matter of policy, the Oklahoma Act goes too far in siding with asset holders in the asset holder versus creditor debate. Such a disproportionate approach can be abused by strategic trust settlors, undermine the creditor and debtor lending system, and ultimately hurt the Oklahoma economy. If the Oklahoma Act faces judicial scrutiny,

185. Shields, *supra* note 56, at 2584.
186. Halpern, *supra* note 16, at 146.

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revocability will likely serve as a barrier to its success and should thus be considered by those utilizing an Oklahoma preservation trust.

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