

# ASSET PROTECTION: AN ANALYSIS OF DOMESTIC AND OFFSHORE TRUST ACCOUNTS

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## INTRODUCTION

Trusts were developed by English common law with the initial purpose to minimize the impact of inheritance taxes arising from transfers at death and to facilitate transfers of wealth within the family

unit.<sup>1</sup> In essence, a trust was formed to separate legal title, which was given to someone to hold, from equitable title, which was to be retained by the trust beneficiaries.<sup>2</sup> While separation of title is apparent in many trust funds, it is not absolutely necessary for trust creation.<sup>3</sup> The primary distinction is that a legal owner has the right of possession and use, as well as the right to convey or alienate those benefits.<sup>4</sup> Although the legal owner enjoys some interests that are upheld by a court of law, the legal owner carries no beneficial interest in the property.<sup>5</sup>

Alternatively, an individual or group with equitable title benefits from the actual use or enjoyment of the property without ownership.<sup>6</sup> The individual or group who holds legal title is called the “trustee,” and the individual or group who holds equitable title is called the “beneficiary.”

As trust law evolved, parties the United States began to implement spendthrift clauses into trust agreements to prevent trust beneficiaries from alienating their beneficial interests to creditors.<sup>7</sup> These clauses are particularly important in terms of asset protection trusts.

In an increasingly litigious world, clients have been seeking strategies to help protect the financial interests they have accumulated.<sup>8</sup> This shift in thinking has occurred because clients are concerned about an increased exposure to liability as a result of new government regulations,

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1. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632-33 (1995).

2. E.J. LASHLEE, *THE PROTECTION BOOK* 31 (2012).

3. *Id.*

4. *Trust*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/607352/trust#ref269740> (last visited Sept. 21, 2014).

5. *Id.*

6. Kelly Troy, *Legal Title Versus Equitable Title*, PROEDUCATE (June 7, 2011), available at <https://www.proeducate.com/courses/Finance/EquitableTitle.pdf>.

7. J. PAUL FIDLER, *SPENDTHRIFT PROVISIONS: WOULDN'T YOU LIKE TO BE A SPENDTHRIFT TOO? 2*, available at <http://www.ssr1.com/attachments/download/105/00246305.pdf>.

8. KENNETH L. JORDAN, MORGAN STANLEY, *DOMESTIC ASSET-PROTECTION TRUSTS 2* (2012), available at <http://www.morganstanleyfa.com/public/projectfiles/3368068a-3af2-4587-a8bb-aa88cef9c68c.pdf>.

government involvement in commercial affairs, and various concerns stemming from worldwide economic shifts.<sup>9</sup>

While there are many groups of people who have no need for asset planning and protection, there are groups who are at significantly higher risks of exposure than others, such as lawyers, physicians, and accountants.<sup>10</sup> Additionally, those who have accumulated great wealth are also at high risk of exposure and are rightfully concerned about protecting their financial resources.<sup>11</sup>

Banks and other financial institutions encourage clients to protect assets domestically through savings and investment vehicles such as IRAs, life insurance plans, home ownership, and several types of annuities. Where a greater risk of liability exists, domestic asset protection trusts may be the right financial tool to employ.<sup>12</sup> In recent years, domestic asset protection trusts have increased in popularity due to new statutory provisions,<sup>13</sup> many of which include state-implemented spendthrift provisions.

By contrast, offshore asset protection trusts may still be effective if correctly employed under the appropriate circumstances. Although this view is changing, offshore asset protection trusts have historically been the more secure form of trust account.<sup>14</sup> As many financial institutions make clear to potential clients, the main purpose of the offshore asset protection trust is to protect assets against lawsuits.<sup>15</sup>

Deciding which trust is the best fit for a particular client is not a decision to be made lightly. Many factors should be considered in the analysis, such as the financial status of the client, any pending or potential litigation issues, personal characteristics of the beneficiary, and specific state law. After a full analysis and much conferral, the counselor should be able to recommend which trust account is better suited to meet

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Offshore Asset Protection Trusts*, MW PATTON,

<http://www.mwpatton.com/asset-protection-services/offshore-asset-protection-trusts> (last visited Sept. 30, 2014).

15. *See, e.g., id.*

the client's needs. As domestic asset protection trust law continues to expand within the United States, the decision whether to recommend a domestic asset protection trust or an offshore asset protection trust will become increasingly complex.<sup>16</sup>

The focus of this article is to provide an analysis of domestic and offshore trust accounts, including their similarities, differences, benefits, and disadvantages. Because clients seeking trusts come to attorneys at many different stages in their financial lives, it is important to consider the relevant factors that go into determining which trust is better suited for the particular client. This article will present a detailed background on relevant case law, statutes, and other secondary sources that discuss domestic and offshore asset protection trust accounts. Examples of domestic and offshore asset protection trusts will be explained and analyzed. Thereafter, this article will offer a determination on which trust would be better for a client in a given set of circumstances.

## PART 1: BACKGROUND OF TRUST LAW, THE ATTORNEY'S ROLE, AND WHERE WE ARE TODAY

### 1. Basic Trust Terminology

To truly comprehend trust law, one must first understand why a client would want to create a trust. Creating a trust forms a "legal entity that holds property or assets for the person who created it."<sup>17</sup> In trust law, the person who created the trust may be referred to as the grantor, donor, or settlor.<sup>18</sup> At the time of the creation of the trust, the settlor appoints a person or entity to manage the trust.<sup>19</sup> This person or entity is referred to as the trustee.<sup>20</sup> Simultaneously, the settlor selects someone to ultimately

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16. *Chalk Up Another Case in International Asset Protection Law*, TRUST LEGAL GROUP (May 31, 2013), <http://trustlegalgroup.weebly.com/3/post/2013/05/chalk-up-another-case-in-international-asset-protection-law-us-v-grant-2013-wl-1729380-sdfla-april-22-2013.html>.

17. *Understanding Trusts*, USA.GOV, <http://www.usa.gov/topics/money/personal-finance/trusts.shtml>.

18. *Id.*

19. *Id.*

20. *Id.*

benefit from the trust, referred to as the beneficiary.<sup>21</sup> In some situations, the settlor, trustee, and beneficiary may be the same person. In these situations it is wise for the settlor to appoint a successor trustee and beneficiary if the initial settlor dies or becomes incapacitated.<sup>22</sup>

## 2. Trust or Will?

One of the most common benefits of a trust is that it is an efficient and helpful estate planning tool because after death a trust does not go through the probate process like a written will.<sup>23</sup> Some of the other reasons clients might be interested in creating trusts are to: provide for minor children or family members who are inexperienced or unable to handle financial matters; provide for management of personal assets should one become unable to handle them; reduce estate taxes and provide liquid assets to help pay for them, and; keep estate planning terms a private matter.<sup>24</sup>

The last benefit listed is especially advantageous to clients and is one of the primary reasons many clients prefer trusts instead of wills as a method of estate planning. It is beneficial to clients because, as a general principle, the terms of a will in probate are public.<sup>25</sup> On the other hand, the terms of a trust are not public. Establishing trusts benefit clients who would like to keep their estate planning terms private upon death.<sup>26</sup>

Although trusts provide the extra benefit of privacy, they also require more effort at the time of formation.<sup>27</sup> Trusts take considerably more time to form than wills and also require more expenses during their early

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21. *Id.*

22. *Id.*

23. Mary S. Yamin-Garone, *Will vs. Living Trust: What's Best for You?*, LEGALZOOM (Dec. 2009), <http://www.legalzoom.com/planning-your-estate/estate-planning-basics/will-vs-living-trust-whats>.

24. *Id.*

25. Teo Spengler, *Is a Will a Public Record?*, LEGALZOOM, <http://info.legalzoom.com/public-record-4563.html> (last visited Sept. 9, 2014).

26. Yamin-Garone, *supra* note 23.

27. *Id.*

stages.<sup>28</sup> Some major considerations one should consider before determining whether to form a trust include whether the client has minor children, whether the client's estate will be subject to taxation, and whether the client has dependents with special needs.<sup>29</sup>

The question of whether or not a client's estate will be subject to estate taxes is an important one. If the value of the client's estate exceeds the current estate tax threshold, the client will be subject to federal tax liability.<sup>30</sup> One available option to avoid or lessen the estate tax burden would be for the client to set up a trust with tax planning provisions.<sup>31</sup>

Another consideration before determining whether to create a will or set up a trust is whether the client will actively manage the estate plan.<sup>32</sup> If not, it is often better for the client to avoid setting up a trust. This is because a trust will only be beneficial if assets are actively transferred into it.<sup>33</sup>

If the client does not plan on actively transferring assets into the trust or if there is a great amount of uncertainty in regards to future assets, it may be better for the client to create a will. Will law is ironclad and a will is not subject to active monitoring and input of assets like trusts.<sup>34</sup> Instead, a written will is valid so long as it meets certain legitimacy requirements and does not require further upkeep unless changed by the testator.<sup>35</sup>

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28. *Wills and Living Trusts: The Basics*, BalancePro, BALANCE: FINANCIAL FITNESS PROGRAM, <https://www.balancepro.net/education/publications/willslivingtrusts.html> (last visited Sept. 9, 2014).

29. Renard Law Office, *Estate Planning Considerations in Making a Will or Trust, 1-3*, available at [http://renardlaw.com/images/users/RLO\\_-EP-Considerations.pdf](http://renardlaw.com/images/users/RLO_-EP-Considerations.pdf) (last visited Sept. 9, 2014).

30. See *Estate Tax*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax> (last updated Aug. 8, 2014).

31. Yamin-Garone, *supra* note 23.

32. *Id.*

33. *Id.*

34. Charles W. Bryant, *How Wills Work*, HOWSTUFFWORKS (Nov. 30, 2007), <http://money.howstuffworks.com/personal-finance/financial-planning/will.htm>.

35. *Law Will and Testament*, SENIOR MAGAZINE ONLINE, [http://www.seniormag.com/legal/will\\_requirements.htm](http://www.seniormag.com/legal/will_requirements.htm) (last visited Sept. 12, 2014).

Many well-known estate and trust planners do not have a set time that clients should establish trusts.<sup>36</sup> However, clients should look to establish trusts when they are in a comfortable financial position and can afford to funnel assets into the trust account. Because a trust is worthless without the underlying assets, the trust settlor must be able to start the trust with some initial assets and also continue to funnel assets into the trust if he or she so wishes.

Some trust planners define continued benefits, such as the option to preserve assets for heirs and favorite charities, reduce estate taxes if the client is married, gain control of distribution of the client's assets, ensure that the client's retirement assets are distributed as planned, and keep assets within the family unit.<sup>37</sup>

These continued benefits also include the fact that the formation of a trust passes wealth more privately and more efficiently than a will.<sup>38</sup> For example, the probate process may take up to a year or more during which assets may not be easily accessible to pay for funeral arrangements and other expenses.<sup>39</sup> Additionally, the costs of the probate system can act counter to the client's position and needs. Probate can cost up to 5 percent of the estate's value, depending on the jurisdiction.<sup>40</sup>

The privacy afforded trusts is also a major benefit because clients with wills instead of trusts are subject to the terms of the will being accessible by the public. This may cause unwanted solicitation by either individuals or companies that may be looking to offer cash advances on inheritance in exchange for an extremely high interest rate.<sup>41</sup>

### 3. Current Trust Law and the Attorney's Role

In addition to understanding when and why a client may be interested in establishing an asset protection trust, the practicing attorney must

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36. *See Six Reasons You Should Consider a Trust*, FIDELITY INVS. (Apr. 4, 2014), <https://www.fidelity.com/viewpoints/personal-finance/reasons-to-consider-a-trust>.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

understand the trusts available and the basic differences and similarities between these trust funds to follow best practices and provide the most efficient and effective counsel. Some of these other trust funds include, but are not limited to: credit shelter trusts, generation-skipping trusts, qualified personal residence trusts, and irrevocable life insurance trusts.<sup>42</sup>

In addition, recent articles have raised the issue that a lawyer engaged in estate planning may have an affirmative duty to his or her clients to advise them about asset protection planning.<sup>43</sup> The attorney would give this counseling in addition to the more traditional trust, estate, and tax planning advice.<sup>44</sup>

Although trust law dates back to English common law era, asset protection is an area that is relatively young in its history and precedent.<sup>45</sup> Many scholars argue that asset protection trusts, especially offshore asset protection trusts, are effective based on the lack of precedent.<sup>46</sup> Additionally, many attorneys argue that United States asset protection and boilerplate trusts are most likely just as good as offshore trusts.<sup>47</sup> This assertion has been based on the belief that it is advantageous to keep funds “closer to home.”<sup>48</sup>

There is a continuing need to shed light on the differences between the two trust funds because each carry their own set of benefits and consequences that attorneys need to be aware of. For example, offshore trust funds, while potentially more effective, are much more likely to be audited than domestic trust funds.<sup>49</sup> This is especially true in terms of tax

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42. *What Kinds of Trusts are There?*, CNN MONEY, [http://money.cnn.com/retirement/guide/estateplanning\\_trusts.moneyomag/index2.htm?iid=EL](http://money.cnn.com/retirement/guide/estateplanning_trusts.moneyomag/index2.htm?iid=EL) (last visited Sept. 12, 2014).

43. Duncan E. Osborne & Jack E. Owen, Jr., *Planning for Asset Protection*, SM093 ALI-ABA 901, 905 (2007).

44. *Id.*

45. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1039 (2000).

46. *See, e.g., Establish a Domestic Asset Protection Trust*, MAJORS LAW FIRM, <http://www.wyomingcounsel.com/practices/wills-trusts-and-estate-planning/domestic-asset-protection-trusts-dapt/> (last visited Oct. 2, 2014).

47. *Id.*

48. *Id.*

49. *Ten Most Important Things to Know About IRS Tax Audits*, IRS TAX ATTORNEY, <http://www.irstaxattorney.com/tax-audit.html> (last visited Oct. 2, 2014).

purposes, since the offshore trust fund is a compliant-heavy type of trust and carries significant consequences for non-compliance.<sup>50</sup> On the other hand, attorneys often advise their clients to fund one of the many garden-variety domestic trust accounts because it is safer to keep money close to home.<sup>51</sup> While this motivation is well grounded, it may essentially be an attempt to over-protect a client, who then loses out on the benefits of various other types of trust funds.<sup>52</sup>

As demonstrated, determining which trust to recommend to a client is not an easy task. It is based primarily on the client's financial position, the characteristics of the beneficiary, and any potential risk factors that can be identified or that may come about in the future.<sup>53</sup> It would be wise for any estate planning and general practitioner to familiarize herself or herself with the new changes in trust law, such as the emergence of the domestic asset protection trust fund.

#### 4. Introduction to Domestic and Offshore Trust Accounts

Domestic and offshore asset protection trusts are similar in several respects. However, domestic asset protection trusts are governed by United States substantive and procedural laws that the attorney is likely more familiar with and, therefore, provide more convenience.<sup>54</sup> Also, domestic asset protection trusts avoid the complications and uncertainties associated with establishing a trust in a foreign country that may have a different language, social culture, political system, legal system, and currency.<sup>55</sup>

Many foreign jurisdictions recognize self-settled spendthrift trusts, or trusts which are designed to protect the settlor from the claims of creditors.<sup>56</sup> These trusts are becoming increasingly popular and are

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50. See Osborne & Owen, *supra* note 43.

51. *Id.*

52. *Id.*

53. *Six Reasons You Should Consider a Trust*, *supra* note 36.

54. Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147, 157 (2007).

55. *Id.*

56. *Id.* at 182-83.

especially important to consider when a client is concerned about the personal characteristics of the beneficiary that may affect the way the beneficiary spends the trust funds.

One aspect that domestic asset protection funds lack is some of the key procedural and statutory benefits that provide a strong protective foundation to offshore asset protection trusts.<sup>57</sup> Further, domestic asset protection trusts lack the benefit of being able to exercise some indirect supervision over the disposition of the trust – an advantage that is afforded to offshore asset protection trust settlors.<sup>58</sup>

Even though domestic and offshore asset protection trusts are similar in many respects, they are different in a variety of ways. One of the significant differences between the two trust funds is that domestic asset protection trusts are not “as likely to raise flags with the IRS” as are offshore asset protection funds.<sup>59</sup>

While creditors may have a less difficult time attacking a domestic asset protection trust, the fact that assets are kept overseas in a secure account is something the IRS will likely scrutinize.<sup>60</sup> This issue is especially relevant since many clients who choose to use offshore asset protection trusts are wealthy.<sup>61</sup> This is because wealthier clients are in better financial positions to begin and continue to fund the trust. Further, wealthier clients are much more likely to claim high amounts of gross income, deductions, and credits on their Form 1040 tax returns. Based on this fact alone, the IRS will already be closely scrutinizing the client’s tax return. Thus, the existence of an offshore asset protection trust will only continue to raise IRS concerns about the offshore assets and whether they are being accounted for correctly by the taxpayer.

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57. *Id.* at 157.

58. *Id.*

59. Robert Bloink & William H. Byrnes, *Domestic Asset Protection Trusts: Equal to Their Offshore Brethren?*, THINKADVISOR, (July 19, 2011) [hereinafter *Domestic Asset Protection*], <http://www.thinkadvisor.com/2011/07/19/domestic-asset-protection-trusts-equal-to-their-of?page=2>.

60. *Id.*

61. *See Asset-Protection Trust*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Asset-protection\\_trust](http://en.wikipedia.org/wiki/Asset-protection_trust) (last visited Oct. 2, 2014).

One advantage of an international trust is that the client may gain asset protection while maintaining control over their respective assets.<sup>62</sup> “Investments [in an offshore trust] are kept out of the reach of civil creditors because U.S. judges do not have jurisdiction over foreign citizens.”<sup>63</sup> By denoting a foreign citizen as a trustee or protector, domestic creditors will not be able to reach offshore asset protection trust funds.<sup>64</sup>

## PART 2: THE SPENDTHRIFT PROVISION

### 1. What is the Spendthrift Provision?

Before beginning a more in-depth analysis of domestic and offshore asset protection trusts, it will be necessary to examine spendthrift provisions a bit more thoroughly. Spendthrift provisions have been defined as:

An arrangement whereby one person sets aside property for the benefit of another in which, either because of a direction of the settlor (one who creates a trust) or because of statute, the beneficiary (one who profits from the act of another) is unable to transfer his or her right to future payments of income or capital, and his or her creditors are unable to subject the beneficiary’s interest to the payment of his or her debts.<sup>65</sup>

In general, spendthrift provisions are established when the main purpose of the trust is to provide “a fund for the maintenance of another person . . . while also protecting the trust against the beneficiary’s

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62. *International Trust and Asset Protection Trust Structures*, PREMIER OFFSHORE INVESTOR, <http://premieroffshore.com/international-trust-asset-protection-trust/> (last visited Oct. 2, 2014).

63. *Id.*

64. *Id.*

65. *Spendthrift Trust*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Spendthrift+Trust> (last visited Oct. 2, 2014).

imprudence, extravagance, and inability to manage their financial life.”<sup>66</sup> Situations where it may be wise for a settlor to implement a spendthrift provision are where the beneficiary is known to have a compulsive gambling problem, is an alcoholic, or suffers from some other disease or personal issue that will incapacitate or hinder their clear financial decision making.<sup>67</sup>

## 2. Benefits of the Spendthrift Provision

Ordinarily, a trust beneficiary can freely transfer interest in a trust. Spendthrift provisions are unique because they come into play in a situation where the trust settlor restricts alienation of a beneficial interest in the trust.<sup>68</sup> “A spendthrift provision prohibits a trust beneficiary from transferring an interest to a third party and prevents creditors of a beneficiary from reaching the beneficiary’s interest in the trust through garnishment or attachment.”<sup>69</sup> However, “the spendthrift clause does not protect against creditors once funds are distributed by the trustee to a beneficiary.”<sup>70</sup>

Spendthrift provisions have become standard in the United States. This increase in popularity has occurred, in part, due to the financial crisis. The pertinent policy behind the adoption of spendthrift provisions is to protect clients from “credit drunk” beneficiaries who may use the trust as a transferrable instrument in order to secure a debt, pay off loans, or expedite the acquisition of new funds.<sup>71</sup>

While the beneficiary may be able to do what she wishes with the actual trust proceeds, the beneficiary may not transfer the right to collect those proceeds from the trust.<sup>72</sup> States like Nevada, where gambling is

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66. *Id.*

67. *Id.*

68. Ausness, *supra* note 54, at 150.

69. *Id.*

70. *Id.*

71. Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 2 (1995).

72. *Spendthrift Trusts*, BNY MELLON WEALTH MANAGEMENT (2012), [http://www.bnymellonwealthmanagement.com/Resources/documents/PerspectivesDocs/Spendthrift\\_Trust.pdf](http://www.bnymellonwealthmanagement.com/Resources/documents/PerspectivesDocs/Spendthrift_Trust.pdf).

extremely popular, have enacted spendthrift trust provisions to increase the flexibility, usefulness, and effectiveness of the state domestic asset protection trust laws.<sup>73</sup>

The spendthrift provision's restriction on transferability is one of its strongest benefits. Trust settlors can sleep peacefully at night knowing that the judgment-flawed beneficiary cannot transfer the fund at will. If such a beneficiary could dispose of the trust at his will, his incompetence or carelessness might lead to the trust ending up in the hands of one whom it was not intended to reach.<sup>74</sup>

### 3. Creditor Rights in a Spendthrift Context

Although spendthrift provisions provide protection for the settlor because the beneficiary may not transfer the fund to whomever he or she so chooses, spendthrift provisions do not limit the creditors' rights to the property after the beneficiary receives the trust funds or property.<sup>75</sup> The creditors cannot force the trustee to pay them directly.<sup>76</sup> In essence, a spendthrift's creditors may seek to have the funds the beneficiary has already received satisfy the beneficiary's outstanding debts; however, a creditor's claims to future payments under the trust are restrained.<sup>77</sup>

While spendthrift provisions provide substantial protection from most creditors, some classes may be able to reach the trust as a matter of public policy.<sup>78</sup> The classes who may be able to breach the spendthrift protections include persons whom the beneficiary is legally bound to support, such as a spouse, child, or dependent.<sup>79</sup> Persons who render necessary personal services to the beneficiary, such as a physician, may reach the trust, as well as persons whose services preserve the beneficiary's interest in the trust.<sup>80</sup>

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73. See Nev. Rev. Stat. § 166 (2013).

74. Hirsch, *supra* note 71, at 1-2.

75. *Spendthrift Trust*, *supra* note 65.

76. See generally *id.*

77. *Id.*

78. Hirsch, *supra* note 71, at 76-82.

79. *Id.*

80. *Id.*

#### 4. Spendthrift Provision Policy Considerations

Some final details relevant to spendthrift provisions are that a trust settlor cannot create a trust with a spendthrift provision for herself.<sup>81</sup> If a client attempts to do so, the trust will be valid initially in effect, but will become invalid as a matter of law.<sup>82</sup> The policy reasons for this aspect of the law are clear: to allow a settlor to create a trust with a spendthrift provision for herself would provide unscrupulous people the opportunity to shelter their property before engaging in speculative business opportunities and to mislead creditors into believing that the settlor still owned the property because she appeared to be receiving its income.<sup>83</sup> Thus, the settlor would be creating apparent but false wealth. Creditors who relied on the settlor's property as a basis for loaning funds would essentially be deceived by the existence of the trust.

One of the most important aspects of spendthrift policy to consider is that tort claims against the beneficiary as well as claims by a respective state or the United States (such as the Internal Revenue Service) are not subject to spendthrift provisions.<sup>84</sup> This factor is especially relevant based on the fact that the beneficiary of a spendthrift trust is usually an individual who does not make decisions with the utmost caution and consideration. As a result, spendthrift beneficiaries are often the ones in the position of owing tax money to the Internal Revenue Service or subject to tort claims based on their faulty decision-making. Since these classes of people can potentially reach the spendthrift's assets, attorneys must be careful in advising settlors who want to establish an asset protection trust fund for beneficiaries who have a history of poor decision making and outlandish behavior or personality characteristics.

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81. Ausness, *supra* note 54, at 183.

82. *Id.*

83. *Id.* at 184.

84. *Id.* at 185.

## 5. The Changing Atmosphere Surrounding Spendthrift Provisions

Certain states, such as Hawaii and Virginia, have recently employed spendthrift trust provisions.<sup>85</sup> In effect, these clauses have opened the door for domestic asset protection trusts to offer more value and protection for clients. As domestic asset protection trusts become increasingly popular, so too will the need to find new, current, and effective ways to protect clients from the wide variety of consequences that may stem from the creation of a domestic asset protection trust fund.

The main problem is that as domestic and international asset protection trusts become increasingly popular, used, and recommended, funds are effectively placed at a higher risk. While the spendthrift clause offers protection from general creditors, it does not provide complete protection against all creditors' claims.<sup>86</sup> For example, alimony creditors, support creditors, providers of necessary goods and services, and government entities may be able to reach a debtor's interest in the trust.<sup>87</sup>

### PART 3: DOMESTIC ASSET PROTECTION TRUSTS

After presenting and reviewing essential trust mechanics and terminology, it is now appropriate to explore the many nuances, benefits, and disadvantages of the domestic asset protection trust. Case studies will prove useful in understanding the current developments in domestic asset protection trust law.

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85. *Virginia Enacts Domestic Asset Protection Trust Legislation*, MCGUIREWOODS (Apr. 9, 2012), <http://www.mcguirewoods.com/Client-Resources/Alerts/2012/4/Virginia-Enacts-Domestic-Asset-Protection-Trust-Legislation.aspx>; *Hawaii Enacts Domestic Asset Protection Trust Legislation and Reinstates Separate State Estate Tax*, MCGUIREWOODS (Aug. 2, 2010) [hereinafter *Hawaii Enacts Domestic Asset Protection*], <http://www.mcguirewoods.com/Client-Resources/Alerts/2010/8/Hawaii-Enacts-Domestic-Asset-Protection-Trust-Legislation-and-Reinstates-Separate-State-Estate-Tax.aspx>.

86. Hirsch, *supra* note 71, at 76-82.

87. *Id.*

## 1. Alaska's Domestic Asset Protection Trust Law

In 1997, Alaska was the first state to implement a domestic asset protection trust law.<sup>88</sup> Alaska's statute created a "trust framework having several tax and asset-prevention advantages that, together, are more advantageous to trust settlors than the traditional trust laws of the other states."<sup>89</sup> As one of the first states to take the lead on domestic asset protection trust law, Alaska has continued its tradition of beneficial trust laws and Oshin's annual rankings currently places Alaska fifth out of the fifteen domestic asset protection trust law states in the nation.<sup>90</sup> In his determination of the rankings, Oshin considers factors such as whether or not the respective state has a state income tax, the statute of limitations for future, as well as preexisting creditors, and the trust's ease of use.<sup>91</sup> The ease of use determination is based on whether a new affidavit of solvency is required for every new transfer into the trust.<sup>92</sup>

The Alaska legislature initially decided to create beneficial domestic asset protection trust laws due to the state's interest in bringing back assets that were held overseas.<sup>93</sup> Many wealthy Alaskans were keeping assets in offshore trust accounts, which were popular at the time based on their advantage of shielding assets from creditors.<sup>94</sup> The Alaska legislature also wanted to encourage offshore asset protection trust settlors to move their trusts to the state in order to bring significant assets, banking, and trust administration business into the state.<sup>95</sup> As the amount of trusts being held in the state increased, so too would domestic

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88. *Alaska Domestic Asset Protection Trusts*, SHAFTEL LAW OFFICES, PC, [http://shaftellaw.com/ak\\_trusts.html](http://shaftellaw.com/ak_trusts.html) (last visited Sep. 30, 2014).

89. *Domestic Asset Protection*, *supra* note 59.

90. Steve Oshins, *5th Annual Domestic Asset Protection Trust State Rankings Chart*, OSHINS.COM (2014), [http://www.oshins.com/images/DAPT\\_Rankings.pdf](http://www.oshins.com/images/DAPT_Rankings.pdf).

91. *Id.*

92. *Id.*

93. Kurt A. Friesen, *Domestic Asset Protection Trusts: 15 Years after Alaska and Delaware*, ABA TR. & INVESTMENTS, Mar.-Apr. 2012, at 8.

94. *Id.*

95. Sterk, *supra* note 45, at 1051.

trust administration costs, and potentially, a new or expanded job market could emerge.

In terms of the original Alaska statute, it was required that the domestic asset protection trust had an Alaska operating nexus.<sup>96</sup> Although this operating nexus was required, the trust settlor did not need to claim Alaska as his or her domicile.<sup>97</sup> Once other states started to realize the influx of offshore assets into Alaska, as well as the creation of new jobs and increased spending on trust administration, they too began to implement domestic asset protection trust legislation.<sup>98</sup> Not long after Alaska's statute passed, Delaware, Nevada, and Rhode Island drafted their own statutes.<sup>99</sup>

## 2. Emerging Domestic Asset Protection Trust Law

Today, other states such as Colorado, Hawaii, Missouri, New Hampshire, and Utah have passed domestic asset protection trust legislation.<sup>100</sup> While legislation has passed in several states, attorneys from state-to-state must be careful and diligent in regards to differences between the degree of creditor protection and tax advantages offered by states' statutes. Regardless of the state in which the domestic asset protection trust is formed, domestic trust laws, such as the ones passed in Alaska, Delaware, Nevada, provide the IRS with easier access to the trusts and increased transparency.<sup>101</sup> Domestic trust laws also provide less protection from creditors and other interested parties.<sup>102</sup>

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96. *Domestic Asset Protection*, *supra* note 59.

97. *Id.*

98. *Id.*

99. *Id.*

100. David G. Shaftel, *Comparison of the Domestic Asset Protection Trust Statutes*, ACTEC Online, <http://www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf> (last updated Apr. 2014).

101. Bloomberg BNA Special Report, *2013 Trust Nexus Survey: Analysis of Key Factors Driving State Taxation of Trusts*, 34 BNA TAX 5-7 (Aug. 23, 2013), available at <http://www.bna.com/uploadedFiles/Content/PDFs/2013%20Trust%20Nexus%20Special%20Report%20Complete.pdf>.

102. *Domestic Asset Protection*, *supra* note 59.

While similar in many respects, different states' domestic asset protection trust statutes contain unique provisions. Hawaii, which adopted a domestic asset protection trust statute in 2010, allows only cash, marketable securities, life insurance contracts, and non-private annuities be placed in a Hawaiian trust.<sup>103</sup> Hawaii also distinctly provides that a transfer is only valid to the extent that the amount of the property transferred is equal to or less than 25 percent of the transferor's net worth.<sup>104</sup> In order to satisfy this state requirement, the settlor must provide an affidavit stipulating that the 25 percent of net worth requirement has been met as well as that the transfer is not one to defraud creditors.<sup>105</sup>

One of the issues with domestic asset protection trusts is the state's maximization and overall efficiency in handling the funds and implementing new laws. It has been established that a number of jurisdictions, both domestic and foreign, compete for trust business.<sup>106</sup> Some professionals have questioned whether bad, inefficient, or unfair trust law will drive out good trust law.<sup>107</sup> This phenomenon would occur because there are many competing interests at play. The various jurisdictions all want to keep their hand in the trust administration pot in order to increase trust expenses in their state, as well as increase the market and employment statistics for trust related business.<sup>108</sup>

Once one defines the state's self-interest and what the particular state has at stake, it becomes easier to determine whether the trust laws promulgated are an attempt to further those interests by any means necessary or are implemented in order to provide the most effective and efficient trust services for state citizens.

While the benefits a domestic jurisdiction receives from implementing new trust legislation may be rather diminutive, jurisdictions continue to encourage giant waves of trust settlors to move their funds.<sup>109</sup> As Stewert

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103. *Hawaii Enacts Domestic Asset Protection*, *supra* note 85.

104. *Id.*

105. *Id.*

106. *See* Sterk, *supra* note 45.

107. *Id.* at 1056-58.

108. *Id.*

109. *Id.*

Sterk mentions in his article, the competition for trust business is unique in the fact that generating profits for the state itself does not seem to be a primary motivation for trust-friendly jurisdictions.<sup>110</sup> The trust law dichotomy is unique in the sense that trust-friendly jurisdictions seem to be satisfied merely by bringing in new business to the jurisdiction's bankers, lawyers, and other professionals that will benefit from the trust-friendly laws.<sup>111</sup> While the state or foreign jurisdiction may benefit indirectly in this sense, there is no direct benefit or flow of income heading straight into these jurisdictions' coffers.<sup>112</sup>

Sterk goes on to consider the fact that as more states and foreign jurisdictions pass trust-friendly legislation, the trust process will become more efficient and effective for clients.<sup>113</sup> Competition, therefore, could certainly benefit many parties in the trust industry. As more and more states continue to pass domestic asset protection trust legislation, the respective states will need to become more creative and presumably more client-friendly in their rules and procedures.<sup>114</sup>

### 3. Competing Interests with the Spendthrift Provision

As previously discussed, most spendthrift trusts are invalid as a matter of law if the settlor is also the beneficiary of the trust. However, Nevada, Delaware, and Alaska asset protection trusts offer a slight twist on this general rule, which proves beneficial to clients in a variety of financial circumstances.<sup>115</sup>

In these respective jurisdictions, if the settlor is also the beneficiary, the trust can potentially provide asset protection if the following are also true about the trust: (1) the trust is irrevocable, (2) the trust has an independent trustee who is not a relative, controlled employee, or agent

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110. *Id.* at 1060.

111. *Id.*

112. *Id.*

113. *Id.* at 1061-63.

114. *Id.*

115. *Asset Protection Trusts*, ASSET PROTECTION PLANNERS,

<http://www.assetprotectionplanners.com/articles/asset-protection-trusts> (last visited Oct. 3, 2014).

of the settlor, (3) the trust does not require distributions of income or principal because the payouts are instead subject to the trustee's judgment, and (4) the trust has a spendthrift clause.<sup>116</sup>

These state provisions offer extra protection and benefits for domestic asset protection trust settlors because, in certain situations and if all the requirements are met, they may be able to declare themselves as the beneficiary of the trust.<sup>117</sup>

#### PART 4: OFFSHORE ASSET PROTECTION TRUST LAW

Next, the basic fundamentals of offshore asset protection trust funds will be examined, as well as their various benefits and disadvantages.

##### 1. Asset Protection Overseas and the Role of the Protector

One advantage of an international trust is that the client may gain asset protection while maintaining control over his or her respective assets.<sup>118</sup> These dual benefits have attracted many clients, and that is why states have initiated domestic asset protection trust programs in the United States. Investments in an offshore trust are kept out of the reach of civil creditors because U.S. judges do not have jurisdiction over foreign citizens. By denoting a foreign citizen as a trustee or protector, domestic creditors will not be able to reach offshore asset protection trust funds.<sup>119</sup>

On the other hand, issues with offshore asset protection trusts have risen based on the fact that it is unjust for a settlor to essentially "have his cake and eat it too."<sup>120</sup> Critics of this particular aspect of offshore asset trust law have mentioned that it is not right for settlors to be able to name themselves as beneficiaries so long as the trustee is an

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116. *Id.*

117. *Id.*

118. *International Trust and Asset Protection Trust Structures*, *supra* note 62.

119. *Id.*

120. Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating it Too*, 47 RUTGERS L. REV. 11, 80 (1994).

“independent” party.<sup>121</sup> Many people have attempted to circumvent the independent trustee requirement by retaining a trustee that appears to be independent on the surface, but who the settlor essentially controls upon further examination of the facts and circumstances.<sup>122</sup>

In these situations, the settlor would name a particular group of people as trustees and could even name an entity or a corporation.<sup>123</sup> Further, the settlor can also maintain control over the trust by putting in place a protector of the trust who, among other things, may replace the trustee.<sup>124</sup> Major problems have come about because many of the named protectors seem to be sham corporations. Particularly, several corporations have been established for the sole purpose of serving as the protector of a certain asset protection trust fund.<sup>125</sup> Whether or not these corporation protectors are essentially sham corporations is a hot and emerging topic being currently debated. However, many of these trusts have been deemed valid, even those involving this type of corporate-protector structure and relationship.<sup>126</sup>

The right to a protector is one of the strongest incentives for clients to choose to place assets in an offshore asset protection fund, and certain financial institutions have laid out guidelines and resources for trust protectors. For example, Cannon Financial has provided certain regulations and tools for trust protectors that may be followed to ensure compliance with law and best practices.<sup>127</sup> Cannon Financial also displays some of the powers the trust protector may have, such as the

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121. *Id.* at 15.

122. Ausness, *supra* note 54, at 171-73.

123. Jay Adkisson, *Trust Protectors – What They Are And Why Probably Every Trust Should Have One*, FORBES (Aug. 25, 2012, 1:03 PM), <http://www.forbes.com/sites/jayadkisson/2012/08/25/trust-protectors-what-they-are-and-why-probably-every-trust-should-have-one/>.

124. *Id.*

125. *See, e.g.*, The Andersen Firm, *Trust Protectors*, <http://theandersenfirm.com/media-center/wp-content/uploads/2012/11/Trust%20Protectors.pdf> (last updated Oct. 23, 2012).

126. *See* Adkisson, *supra* note 123.

127. *Regulation and Compliance—Guidelines for Trust Protectors*, CANNON FIN. INST. 1 (2010), <http://www.cannonfinancial.com/resources/newsletter/CI-Regulation0610.pdf>.

right to, “[r]emove or replace the Trustee,” “[c]hange the Trust’s situs,” or “[r]esolve deadlocks between co-trustees or disagreements between the Trustee and/or Beneficiaries.”<sup>128</sup>

## 2. Offshore Asset Protection Trust Tax Considerations

In addition to issues with the protector, there are substantial tax considerations parties must take into account when forming a foreign asset protection trust. Often times, foreign asset protection trusts are viewed as tools for the wealthy to shield assets from the United States government, particularly the Internal Revenue Service.<sup>129</sup> Recently, the United States government has started to impose stricter penalties on individuals who engage in “abusive trust arrangements.”<sup>130</sup> These arrangements have been characterized as trust schemes that attempt to reduce or eliminate federal income taxes through prohibited means.<sup>131</sup>

Concurrent to the abusive trust scheme language, the IRS enacted the National Compliance Strategy, Fiduciary, and Special Projects Task Force.<sup>132</sup> The underlying purpose of the Task Force is to scrutinize domestic and foreign asset protection trusts for abusive schemes.<sup>133</sup> The development of the Task Force was the IRS’s way of finally implementing a dynamic task force to enforce the government’s tough stance on abusive trust schemes. The Task Force comprised a “joint effort” between the Assistant Commissioner of Examination, the Assistant Commissioner of Criminal Investigation, and the Office of the Chief Counsel.<sup>134</sup>

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128. *Id.*

129. See, e.g., *Wealth Transfer & Gifting*, WELLS FARGO ADVISORS, <https://www.wellsfargoadvisors.com/financial-services/estate-planning/gifting-wealth-transfer.htm> (last visited Oct. 8, 2014).

130. *The U.S. Taxpayer and the Foreign Trust*, ASSET LAWYER, <http://www.assetlawyer.com/hot-topics/offshore-asset-protection/the-u-s-taxpayer-and-the-foreign-trust> (last visited Oct. 8, 2014).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

The Assistant Commissioner of Examination gives the task force the ability to audit and search for abusive trust schemes by United States taxpayers, while the Assistant Commissioner of Criminal Investigation and the Office of the Chief Counsel give the task force the ability to enforce and penalize abusive trust scheme parties.<sup>135</sup> Simultaneously, the United States government has been attempting to forge treaties with foreign countries, which would provide for increased free flow of foreign asset protection trust information.<sup>136</sup> These treaties provide the IRS opportunities to scrutinize American taxpayers' foreign asset protection trusts and make sure the taxpayer is held accountable for the proper amount of taxes.<sup>137</sup>

### 3. Trust Law in Belize

At this point, a case study of a foreign jurisdiction's asset protection trust laws will prove useful and enlightening to the analysis and consideration of the similarities and differences between domestic and international asset protection trust funds.

The case study will focus on the country of Belize, a Central American nation of approximately 340,000 people.<sup>138</sup> Belize is one of the most popular international destinations to establish an asset protection trust because it is extremely simple and advantageous to the parties involved.

The Belize Trust Acts of 2000 established the jurisdiction's trust law policy and procedure.<sup>139</sup> One of the biggest benefits and selling points of Belizean asset protection trusts is the high level of protection granted to

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135. *See id.*

136. Andreas Keiser, *Switzerland to back OECD tax treaty*, SWISSINFO (Feb. 21, 2014, 5:00PM), [http://www.swissinfo.ch/eng/politics/Switzerland\\_to\\_back\\_OECD\\_tax\\_treaty\\_.html?cid=38014420](http://www.swissinfo.ch/eng/politics/Switzerland_to_back_OECD_tax_treaty_.html?cid=38014420).

137. *Id.*

138. Central Intelligence Agency, *The World Factbook-Belize*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/bh.html> (last visited Oct. 8, 2014).

139. *See e.g.*, Trusts Act of 2000, ch. 202 (Belize), available at <http://www.incorporatebelize.com/downloads/Belize-Trusts-Act.pdf>.

the trust parties. Such high levels of protection are achieved since courts in Belize cannot vary or set aside a Belizean trust, nor recognize the validity of any claim against the trust property, pursuant to the law of another jurisdiction.<sup>140</sup> Furthermore, the Belize Trust Acts insulate the assets of the trust pursuant to the laws of foreign jurisdictions, such as Bankruptcy Acts and provisions of the Reciprocal Enforcement of Judgments Act.<sup>141</sup>

This is the pinnacle aspect of Belizean asset protection trust funds because it protects the trust from foreign claims and bankruptcies. The provisions of the Belize Trust Act safeguards the assets held in a Belize asset protection trust fund – even if a judgment on the assets exists in another jurisdiction, the claimant cannot reach the assets in Belize.<sup>142</sup> Another advantage of the Belizean asset protection trust fund is how simple and frugal it is to establish the fund.<sup>143</sup> There are many online services that will incorporate a trust fund in Belize. The most common rate for these trust establishment services is \$1,500, relatively cheap when considering the extensive amounts of protections afforded to the trust parties.<sup>144</sup>

While many researchers and professionals view the trust laws of Belize as some of the most flexible and benevolent in the world, there are certain downsides that may serve as deterrents to establishing a trust fund in Belize. For one, the IRS will closely scrutinize American citizens who are known to be a party to an offshore asset protection trust in Belize.<sup>145</sup> The IRS will look over with a fine-toothed comb the tax returns and tax liabilities of those individuals who are parties to asset protection trust funds in Belize.<sup>146</sup>

Now that basic trust terminology has been explored, as well as the similarities and differences between domestic and offshore asset

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140. *Id.* at 13.

141. *Id.* at 14.

142. *Id.* at 13.

143. *See generally Belize Trust*, INTERNATIONAL CORPORATE SERVICES, [http://www.offshorebelize.com/belize\\_trust.html](http://www.offshorebelize.com/belize_trust.html) (last visited Sept. 22, 2014).

144. *See generally Belize International Trusts*, FIDELITY OVERSEAS LTD, <http://www.incorporatebelize.com/belize-offshore-trust.php> (last visited Sept. 22, 2014).

145. *The U.S. Taxpayer and the Foreign Trust*, *supra* note 130.

146. *Id.*

protection funds, it is appropriate to discuss which trust provides more benefits for a given client.

#### PART 5: WHICH TRUST PROVIDES GREATER BENEFITS?

##### 1. Analysis of the Advantages and Disadvantages of Domestic and Offshore Trusts

After examining the details of both domestic and offshore asset protection funds, it is readily apparent that both have several benefits as well as disadvantages. Domestic asset protection trusts are becoming increasingly popular, and thus advantageous to the client. As the popularity of domestic trust funds continues to grow, jurisdictions within the United States will research and develop more cost effective and efficient ways to provide the best services possible for the client.<sup>147</sup> Therefore, domestic asset protection trusts will likely become an increasingly attractive option due to the high levels of competition pushing up the level of quality.<sup>148</sup>

While the decreased cost and increased overall effectiveness of domestic asset protection trusts is certainly on the rise, clients must still take into account the disadvantages of this form of trust. For one, new developments surrounding domestic asset protection trusts increase the amount of uncertainty in regards to legislation that will be passed in the near future.<sup>149</sup>

Domestic asset protection trust law is yet to be settled in the United States, and there are always new developments that have the ability to change the legal landscape.<sup>150</sup> In certain respects, the predictions about new trust law driving out established trust law is valid and relevant – new trust law may be of a higher quality than the older law and prove beneficial to clients.<sup>151</sup>

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147. Sterk, *supra* note 45, at 1038.

148. *Id.*

149. *Id.* at 1064.

150. See Ausness, *supra* note 54, at 156-57.

151. Sterk, *supra* note 45, at 1039.

On the other hand, new trust law may be the product of lobbying interests and may only benefit a particular sector of society while leaving others out to dry. This problem must not be taken lightly and is at the crux of the important decision a client must make between domestic and foreign asset protection trust funds.<sup>152</sup>

Another disadvantage of domestic asset protection trust funds, in contrast to their foreign counterparts, pertains to IRS tax treatment and scrutiny. The disadvantage here is that domestic asset protection trusts are subject to taxation in the United States, whereas many trust funds kept overseas are not liable to IRS taxation.<sup>153</sup> While this is a downside to domestic asset protection trusts, there is an incidental advantage. Because there is more transparency and a free flow of information about these trusts in the United States, the IRS will not scrutinize domestic trust parties as closely as they do foreign trust parties.<sup>154</sup> This incidental benefit may provide significant advantages for clients looking to reduce the likelihood of an IRS audit.

Despite the plethora of advantages and varieties of domestic asset protection trusts, offshore asset protection trusts seem like a better option at this time. Although the client will be opening herself up to increased IRS scrutiny simply based on the fact they are holding assets offshore, the offshore asset protection trust provides benefits that can be neither overlooked nor undervalued. The offshore asset protection trust, such as the one established in Belize, allows clients to hold their assets offshore and enjoy the benefits that come along with that. For instance, the taxpayer's assets will be held in trust notwithstanding foreign judicial proceedings to tap the trust.

The protections of offshore asset protection trusts are flexible and expansive; however, the funds place the client in a vulnerable situation. The IRS, through its National Compliance Strategy, Fiduciary, and Special Projects Task Force has made tracking and examining offshore asset protection trust funds a priority.<sup>155</sup> The IRS has taken a stance on these trusts, and it is clear the parties to an offshore trust are vulnerable

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152. Osborne & Owen, *supra* note 43, at 902.

153. Bloomberg BNA Special Report, *supra* note 101.

154. *The U.S. Taxpayer and the Foreign Trust*, *supra* note 130.

155. *Id.*

to high levels of scrutiny and potential consequences if the trust is determined to be an abuse of law.<sup>156</sup>

## 2. The Better Option Right Now

Currently, offshore asset protection trust funds seem to be the safer and better option for the client hoping to establish a trust fund. These trusts are afforded such high levels of protection from foreign judgments and creditor claims.<sup>157</sup> While there is a significant risk of increased IRS scrutiny, the high level of protection places offshore trusts ahead of domestic asset protection trusts in terms of service, effectiveness, and cost efficiency for the client.

## CONCLUSION

With the increased popularity and development in domestic and offshore trust law, practitioners must be certain to inform themselves of the benefits and disadvantages of both, as well as the positive and negative consequences each form of trust may have upon the client.<sup>158</sup>

In addition to knowing the nuances and consequences of certain types of trusts, practitioners must be aware of trust law in general. As discussed, asset protection trust law is evolving and developing in the United States and practitioners must be aware of these changes and developments in order to best service their clients.<sup>159</sup>

The number of states who are implementing domestic asset protection trust laws in the United States is expanding, and with that, competition will also increase between the states.<sup>160</sup> There has been, and will continue to be a race, a “race to the bottom” between states to determine which among them has the means and ability to pass the most advantageous trust laws for the client.<sup>161</sup>

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156. *Id.*

157. *See, e.g.*, Trusts Act of 2000, *supra* note 139.

158. Osborne & Owen, *supra* note 43.

159. *Id.* at 911.

160. Sterk, *supra* note 45, at 1039.

161. *Id.* at 1038.

While the various states will compete with each other, foreign jurisdictions will continue to attract clients who want increased protection and secrecy over their assets. As the states focus on one another in the race for domestic asset protection supremacy,<sup>162</sup> these foreign jurisdictions will only strengthen their trust laws and potentially make their countries more beneficial for trust parties.

It will be intriguing to watch how domestic and offshore asset protection trust funds continue to compare and contrast in the future. The development of new trust law in the United States will increase the amount of serious players in the trust market and has the potential to increase the quality of trust law for consumers.

The domestic versus offshore asset protection trust dichotomy will be an interesting one to follow in the years to come. The trust forms are similar and different in a wide variety of ways, each carrying their own benefits and disadvantages that will ultimately help or hinder the client.

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162. See generally Sterk, *supra* note 45.







