Domestic Asset Protection Trusts: Ushering in the *Klabacka* Era

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CONTENTS

INTRODUCTION

The study of people's behaviors during different economic climates is now a serious field of study—just look at newly minted Nobel Prize winner Richard H. Thaler's research in behavioral economics.[1] The U.S. economy will likely produce ample research material for Mr. Thaler in the coming years because of its 3% increase in gross domestic product and its 0.4% increase in personal income—numbers that are just a snapshot of the

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1. *Richard H. Thaler: Interview*, THE NOBEL PRIZE (Oct. 28, 2017), https://www.nobelprize.org/prizes/economic-sciences/2017/thaler/interview/ [https://perma.cc/3TQB-NK6E].

2017 third quarter.[2] With these promising numbers, Americans are able to change their relationships with money: "now that we're seeing some income growth, broad based across the economy, people are moving the needle on savings in a way we haven't seen in a while."[3] Now that the time for saving is here, the focus shifts to finding a successful method to do so. A novel approach has emerged in seventeen states: domestic asset protection trusts (DAPTs).[4]

DAPTs are self-settled spendthrift trusts that allow the settlor to retain a beneficial interest in the trust while removing it from the reach of future creditors.[5] These trusts are irrevocable with an "independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor. The primary goals of DAPTs are asset protection and, if so designed, transfer tax minimization."[6]

The history of authorizing DAPTs spans decades and has slowly crept from the west coast to the east coast. After two states seemed to support DAPTs in statutory terms, Alaska enacted the first operational statute in 1997.[7] During the two proceeding decades, nineteen states have authorized some form of revised statute or act supporting DAPTs.[8] A settlor now has the option of settling funds in one of seventeen domestic jurisdictions or choosing to put money in one of the many offshore jurisdictions available.[9]

By instinct, the choice seems easy—why not keep your money down the street instead of transferring it to the Cayman Islands?[10] A local bank does not pose the same apparent risks as transferring your money outside of the country.[11] The decision is not as simple as it should be because of

2. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM., https://www.bea.gov/ [https://perma.cc/FL2K-AEVV].

3. Anna Bahney, *Americans are Saving (a Little) More*, CNN: MONEY (June 20, 2017), http://money.cnn.com/2017/06/20/pf/emergency-fund/index.html [https://perma.cc/3XUJ-2CC4].

4. David G. Shaftel et al., *Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes*, ACTEC (Aug. 2017), http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf [https://perma.cc/M5A3-GTAN].

5. Wesley D. Cain, Note, *Judgment Proof: Can Connecticut Residents Insulate Assets from Creditors Using a Delaware Domestic Asset Protection Trust?*, 47 CONN. L. REV. 1463, 1463 (2015).

6. Shaftel et al., *supra* note 4, at 1.

7. *Id.*

8. *See id.* DAPT friendly states include: Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *Id.*

9. *See* Matthew Russo, Comment, *Asset Protection: An Analysis of Domestic and Offshore Trust Accounts*, 23 MICH. ST. INT'L L. REV. 265, 279–91 (2014).

10. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 515 (2000) (stating the palpable advantages of avoiding foreign jurisdiction due to different languages, political and legal structure, and currency).

11. *See* Paul M. Roder, Note, *American Asset Protection Trusts: Alaska and Delaware Move "Offshore" Trusts onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1257 (1999).

each state court's uncertainty surrounding the novel trusts.[12] Counsel is less likely to suggest a strategy that has not been reviewed by a court, as counsel would be unable to ensure its effectiveness for their client.

It took fifteen years for a court to contemplate the efficacy of DAPTs.[13] The Washington bankruptcy case, *In re Huber*, involved a Washington settlor who created a self-settled trust under Alaska law.[14] The case was decided on a choice of law question, with the trial court concluding that Washington law, not Alaska law, governed when deciding the validity of the Alaskan trust.[15] By applying Washington law, the court pronounced that the trust violated Washington's public policy against self-settled trusts, thereby rendering the trust void.[16]

Nonetheless, the tides in favor of DAPTs have taken a turn with the holding of *Klabacka v. Nelson*. Correspondingly, through the lens of this favorable ruling, this Note will address why DAPTs should be regarded as an effective method of protecting a settlor's money and argue for more states to follow suit. More specifically, this Note will describe why the *Klabacka* case came to the correct holding because of public policy sentiment and economic jurisdictional competition.

First, this Note illustrates that the *Klabacka* case mercifully establishes a clear test for the efficacy of DAPTs. Notably, this is the first case to reach the efficacy question and provides an attractive template for succeeding states. Second, this Note demonstrates that the *Klabacka* case was decided correctly because current public policy favors the use of DAPTs.[17] There are already similar, legitimate techniques available to protect assets that are not against public policy, so it follows that public policy favors DAPTs. For instance, homestead exemptions[18] and tenancy

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12. Generally, domestic asset protection trusts offered less shelter in comparison to offshore trusts. *See* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 309–10 (2002) (comparing common characteristics of offshore trusts and contemporary trust law and determining that a multitude of problems exist in domestic asset protection trusts as opposed to their offshore counterparts).

13. DAPTs were first introduced in 1997 via Alaska statute, yet the first court case appeared fifteen years later in Washington. Shaftel et al., *supra* note 4, at 1; Waldron v. Huber (*In re* Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013).

14. *Waldron*, 493 B.R. at 807–09.

15. *Id.* at 808–09. In general, choice of law doctrine determines which laws apply to any given case. When the case has some connection to multiple jurisdictions, a court can either apply the law of the forum state or the law of the location of transaction giving rise to the litigation. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1977).

16. *Waldron*, 493 B.R. at 809. An illegal trust is one that is contrary to a statute, public policy, or morality. *Illegal Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014).

17. *See* discussion *infra* Section III.

18. A homestead exemption shelters a certain amount of a home's worth from property taxes. *See Property Tax Homestead Exemptions*, INST. ON TAXATION & ECON. POLICY (2011), https://itep.org/property-tax-homestead-exemptions/ [https://perma.cc/3WMU-2868].

by the entirety[19] currently permit individuals to legally protect their assets from creditors.[20] In essence, DAPTs have an unfair negative stigma when considering the other asset protection vehicles seemingly in-line with public policy.

Furthermore, *Klabacka's* favorable holding of these principles may summon transformation on a macro scale, including an advantageous impact on interstate federalism.[21] Particularly, this Note emphasizes that encouraging settlors to create DAPTs celebrates the fiscal advantages of interstate federalism—especially the economic significance of interstate competition.

Through the above-mentioned grounds, this Note will champion the holding in *Klabacka*, exclaiming it should be the standard for deciding the efficacy of future DAPTs. Thus, Part I briefly outlines the development of trust law, from the beginning of trusts to the emergence of domestic asset protection laws. Part II summarizes the facts, reasoning, and holding of *Klabacka v. Nelson*. Part III analyzes *Klabacka* in relation to domestic asset protection trusts generally, stressing the lack of direction in this field, the clear need for certainty, and the benefit of establishing a test. Part IV contends that courts should appreciate the benefits of these trusts not only for the settlor and beneficiary, but also for states and the country. A short conclusion will follow.

I. BACKGROUND

A. Basics of Trust Law

To understand the public policy fueling DAPTs and the *Klabacka* holding, it is important to understand trust law at large in the United States. The most basic description of a trust is an explanation detailing a three-party fiduciary affiliation relating to property; the first party transfers the legal title upon the second party for the benefit of the third party.[22] Often the second party, the trustee, manages the property with full independence,

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19. Tenancy by entirety only involves jurisdictions allowing the protection of property from the creditors of one spouse. *See Tenancy by the Entirety*, CORNELL L. SCH.: LEGAL INFO. INST. (Apr. 21, 2018, 9:47 PM), https://www.law.cornell.edu/wex/tenancy_by_the_entirety [https://perma.cc/GU68-ZQXU].

20. *See* John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2668 (2006).

21. *See generally* Alexander B. Shiffman, *The Domestic Asset Protection Trust and Its Federalism Implications*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 853 (2015).

22. *See Trust*, BUS. DICTIONARY (Apr. 21, 2018, 2:27 PM), http://www.businessdictionary.com/definition/trust.html [https://perma.cc/2RNM-KSN4].

while the third party, the beneficiary, is permitted to receive payments from the trust income or corpus.[23]

American law deals with the attempt to manipulate conduct after death, commonly referred to as "dead hand" control, differently than its English predecessor.[24] American trust law placed a higher level of deference to the testator, allowing for more control after death than its English counterpart.[25] A primary example of this control is the spendthrift trust.[26] A spendthrift is used for the purposes of shielding the trust body while granting the beneficiary trust income distributions.[27] Settlors favored the idea of giving a gift in installments (versus a lump sum to be squandered immediately) but sought to protect the gift from the beneficiary's creditors.[28] The spendthrift offers the supreme protection of wealth: protection from a frivolous beneficiary and shelter from the beneficiary's powerful creditors.[29]

In its simplest explanation, a spendthrift trust is a trust that incorporates specific clauses that bar the beneficiary from freely dissipating their interest but also prevent attachment by creditors.[30] A creditor may attach to the assets when a trust distribution has occurred but cannot take out a lien on the trust or pierce the trust veil.[31]

The general acceptance of spendthrift trusts in the United States owes a debt to two cases in the 1800s.[32] Over time, the vast majority of the state governing bodies and courts have recognized the efficacy of spendthrift

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23. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 70, 385 (9th ed. 2013).

24. Because of public policy, dead hand control is limited, specifically by the rule against perpetuities. See *Deadhand Control*, CORNELL L. SCH.: LEGAL INFO. INST. (Apr. 21, 2018, 8:10 PM), https://www.law.cornell.edu/wex/deadhand_control [https://perma.cc/SKL2-RRJW].

25. *Id. See generally* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

26. N. Camille Varner, *Is The Dead Hand Losing Its Grip in Texas?: Spendthrift Trusts and In Re Townley Bypass Unified Credit Trust*, 62 BAYLOR L. REV. 598, 599 (2010).

27. *Id.* at 694–98.

28. GERRY W. BEYER, EXAMPLES & EXPLANATIONS: WILLS, TRUSTS, AND ESTATES 376 (6th ed. 2015).

29. *Id.*

30. Lischer, *supra* note 10, at 485. One such attachment by creditors that is authorized occurs when there have been fraudulent transfers or if the creditor is part of a special class that the beneficiary is legally bound to support. Russo, *supra* note 9, at 282, 277.

31. Kellsie J. Nienhuser, Comment, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 WYO. L. REV. 551, 555 (2015).

32. *See generally* Nichols v. Eaton, 91 U.S. 716 (1875); Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882).

provisions.[33] The policies supporting the validity of spendthrift provisions are that the settlor has the right to dispose of property as they please; the public will not be burdened by insolvent beneficiaries; and creditors have the duty to investigate the settlor's finances and should know well enough to not use the trust when calculating credit lines.[34] In this day and age, spendthrift provisions are accepted in all fifty states.[35] As time wears on, the edges of these laws are slowly carved out through deliberation on specific issues.[36] I consider one of the most provocative of these issues arises from a self-settled spendthrift trust.

B. Self-Settled Spendthrift Trusts' History

As explained above, most jurisdictions accept the idea of a spendthrift provision. However, spendthrift trusts created by the settlor and for the settlor's benefit are not as widely accepted.[37] Some jurisdictions find that if a fraction of beneficial interest is held for the settlor of the trust, the instrument is considered void.[38] The policy consideration for this rule is a concern that property owners could shelter their money for their own needs without being required to pay back or mislead creditors.[39] Courts recognized well-intending property owners hoping to provide for a beneficiary with creditor protection, while at the same time acknowledged the likelihood of property owners wishing to "protect themselves against their own profligacy, at the expense of their creditors."[40] Creditors rely on the debtor's apparent income and could be misled into believing the debtor is financially stable based on the trust, only to find out the settlor has no other assets outside of the shelter of the trust.[41] In contrast, the argument has been made that a

33. *See, e.g.*, OHIO REV. CODE ANN. § 5801.04(B) (West 2016); N.J. STAT. ANN. § 3B:9–11 (West 2016); NEV. REV. STAT. §§ 166.010–180 (2016); ME. REV. STAT. ANN. TIT. 18–B § 105(2)(E) (2016); ALASKA STAT. § 34.40.110 (2015).

34. BEYER, *supra* note 28, at 377.

35. *See* HALENE S. SHAPO, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 222, at 420 (3rd ed. 2007) (compiling numerous spendthrift provisions in all fifty states, along with their exceptions).

36. *See* DUKEMINIER & SITKOFF, *supra* note 23, at 697 ("The policy debate in contemporary times has shifted to the question of whether to make exceptions for certain classes of creditors, such as spouses and children or tort victims."). These exceptions are the main focus of the holdings in *Klabacka v. Nelson* and *Toni 1 Tr., by Tangwall v. Wacker*, to be discussed later.

37. Cain, *supra* note 5, at 1470.

38. *Id.*

39. *See* Erwin N. Griswold, *Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor*, 44 HARV. L. REV. 203, 203–04 n.1 (1930).

40. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1044 (2000).

41. *See* GEORGE T. BOGERT, TRUSTS 155–56 (6th ed. 1987).

> creditor that was going to lend money to somebody, usually took a look at what they owned. When they looked at somebody who may have a self-settled or had spendthrift trust, they know as a creditor they would not be able to touch those assets so they did not lend, based on those assets.[42]

However, self-paternalism was considered to be more beneficial than the costs of allowing self-settled spendthrift trusts.[43] The only option for settlors seeking asset protection to the highest extent was to gamble by creating a spendthrift trust with the beneficiary as someone other than the settlor.[44] That is, until the 1980s rolled around and numerous offshore jurisdictions began attracting trust business with an inventive technique: the self-settled asset protection trust.[45] These foreign jurisdictions enacted legislation that determined that judgments rendered by overseas courts were non-enforceable against the suite of trust parties: settlors, beneficiaries, and self-settled trusts.[46] Some estimates indicate that more than one trillion dollars sit in offshore jurisdictions under asset protection trusts.[47]

C. Emergence of Domestic Asset Protection Trusts

In 1997, Alaska was the first state to introduce a self-settled asset protection statute.[48] This law condoned the formation of irrevocable trusts that made distributions to a class of beneficiaries allowing allocations to the settlor.[49] Delaware followed suit later that same year, stating that it "intended to maintain [its] role as the most favored domestic jurisdiction

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42. *See Hearing on A.B. 469 Before the S. Comm. on Judiciary*, 1999 Leg., 70th Sess. 7 (1999) (statement of David Goldwater, Assem. Dist. 10, Southern Nev.), https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1999/AB469,1999.pdf [https://perma.cc/56TF-KN9X].

43. *See, e.g.*, Ariz. Bank v. Morris, 436 P.2d 499 (Ariz. Ct. App. 1969) (declaring that fairness counterpoised the possible benefits for the settlor); Pitrat v. Garlikov, 947 F.2d 419, 424 (9th Cir. 1991) ("The image of a wise and benevolent person seeking to provide for a foolish and impulsive loved one supersedes the values which generally require that creditors be able to have access to debtors' assets and allows for spendthrift trusts. However, this image of benevolent paternalism is absent when the settlor of the trust is also the beneficiary.") (citations omitted).

44. *See Abusive Trust Tax Evasion Schemes—Glossary of Trust Terms*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-glossary-of-trust-terms [https://perma.cc/K9S8-WJG2] (defining "strawman" as the person whose trust receives another grantor's assets to be passed through the original trust to a second or more trusts for the purpose of disguising the true identity or ownership of the assets).

45. *See* Sterk, *supra* note 40, at 1047–48.

46. *See* DUKEMINIER & SITKOFF, *supra* note 23, at 704–05.

47. Ritchie W. Taylor, *Domestic Asset Protection Trusts: "The Estate Planning Tool of the Decade" or a Charlatan?*, 13 BYU J. PUB. L. 163, 164 (1998).

48. Shaftel et al., *supra* note 4, at 1.

49. *See* Alaska Stat. § 34.40.110 (1997).

of the establishment of trusts."[50] In recent years, fifteen states have followed Alaska and Delaware, allowing for self-settled asset protection trusts.[51] Each state legislature has approached the issue differently, especially regarding exceptions for potentially fraudulent actions, burden of proof, and asset protection.[52]

While these statutes have now been in existence for over twenty years, there are few cases litigating the nuances of the trusts they create.[53] An explanation for such a dearth of litigation is that there have not been any creditors or plaintiffs needing to challenge the efficacy of a self-settled asset protection trust—though this is quite unlikely. More likely, a settlor ends up paying the money owed or settles outside of court to avoid costly litigation. 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. Inquiries on legislative floors across the country would in turn address the primary issues facing these trusts.

D. The Surety and Surplus Issue

There are two main issues facing domestic asset protection trusts today: (1) enforceability and (2) the fact that only a minority of states have enacted them. As demonstrated through the various cases mentioned above, many courts are unwilling to find a DAPT enforceable. Courts have demonstrated a stringent adherence to presumed public policy and a preference to apply local laws (even in the face of explicit contrary language). One Utah court even held that the trust instrument was revocable, and thus could be attached by creditors.[54]

The uncertainty posed by DAPTs is presented twofold: first, for attorneys who are unsure whether to advise clients to potentially use DAPTs and second, for settlors who are again gambling with assets reminiscent of the initial days of moving accounts offshore. Attorneys who wish to venture into DAPT use should study the current cases on record, always being diligent to note if there are new developments in the laws.[55] An attorney must be aware of how the courts are interpreting a particular state's DAPT law, whether it is the participating state establishing

50. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 713 (10th ed. 2017) (citing Synopsis of Qualified Dispositions in Trust Act, H.B. 356, 139th Gen. Assemb., 71 Del. Laws 452 (1997)).

51. Shaftel et al., *supra* note 4, at 1.

52. *See generally id.*

53. Shaftel et al., *supra* note 4, at 1.

54. *See, e.g.*, Dahl v. Dahl, 345 P.3d 566, 579–81 (Utah 2015) (holding that the instrument was a revocable trust, instead of a domestic asset protection trust, based on language in the document).

55. *See* Shaftel et al., *supra* note 4, at 1.

precedent or supportive theory for advancing a current law. As always, the final advice for attorneys is to avoid implementation errors, ensuring that the case is decided on its merits and not scriveners' error. Yet, all this advice does not remedy the actual problem: attorneys 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.

The surety question surrounding DAPTs was recently clarified to an extent with the holding in the Alaska Supreme Court case *Toni 1 Trust, by Tangwall v. Wacker*.[56] The court held it could not limit the scope of another court's jurisdiction over fraudulent transfer action against a DAPT.[57] Specifically, the court held that "the Full Faith and Credit Clause does not compel states to follow another state's statute claiming exclusive jurisdiction over suits based on a cause of action '*even though* [the other state] created the right of action.'"[58]

The trust in question was established in Alaska, a DAPT-friendly state, but held Montana property, where DAPTs are not accepted.[59] With this holding there is hardly a theory about how a DAPT would protect assets against the creditors of the settlor in non-DAPT states. The court's holding more clearly defines a contour of DAPT interpretation and handling. On one hand, this case adds needed precedent to a scarce area of law. On the other hand, the holding may not show an enthusiastic acceptance of DAPTs that the *Klabacka* holding had signaled.[60] Perhaps establishing comprehensive DAPT law will be like walking in sand: two steps forward and one step back.

Additionally, few American jurisdictions have approved DAPTs.[61] Only the minority of states allowing DAPTs means that clients may not be receiving the best possible asset protection. Clients assume their attorney is striving to provide the best strategy—and yet perhaps one of the best

56. *See generally* Toni 1 Tr., by Tangwall v. Wacker, 413 P.3d 1199 (Alaska 2018).

57. *Id.* at 1203.

58. *Id.* at 1204 (citing Tenn. Coal, Iron & R. Co. v. George, 233 U.S. 354, 360 (1914) (emphasis added)).

59. *Id.* at 1201.

60. Professional sentiment about this case is that it may not *truly* add to the contours of DAPT law. The transfers to the trusts occurred after the claims against the defendants had already arisen, therefore the fraud exemption clearly renders the trust void. Furthermore, because the defendant was subject to personal jurisdiction in a non-DAPT state, the assets are subject to administration by that state. These are simple fraud-on-creditor and personal jurisdiction issues, not a DAPT efficacy issue. *See generally* Jay Adkisson, *Alaska Supreme Court Hammers Last Nail in DAPT Coffin for Use in Non-DAPT States in Toni 1 Trust*, FORBES (Mar. 5, 2018, 10:08 PM), https://www.forbes.com/sites/jayadkisson/2018/03/05/alaska-supreme-court-hammers-last-nail-in-dapt-coffin-for-use-in-non-dapt-states-in-toni-1-trust/#17c9157e62a7 [https://perma.cc/8LYQ-V8MZ].

61. *See* Shaftel et al., *supra* note 4, at 1.

strategies is an elusive one because the courts and legislatures are unwilling to budge on their stance. Most importantly, however, a lack of favorable jurisdictions means that there is intensely concentrated interstate competition among these jurisdictions.[62] A lack of DAPT jurisdictions means that seventeen states hold a monopoly on trust assets, simply because they are willing to shield the trusts in a novel way.[63]

If courts and legislatures could resolve the enforceability questions and promote DAPTs as a new trust option, the United States could see an astonishing rise in trust formation and in turn, marketplace competition. The benefits of these two solutions would affect the individual settlor and the state.[64]

II. THE *KLABACKA V. NELSON* DECISION

A. Case Brief

The *Klabacka* opinion may be the first case to marshal in the benefits of DAPTs because it not only established the novel concept of trust efficacy, but it also addressed the public policy questions head-on.[65] The case involved a married couple, Eric and Lynita, each represented by separate counsel, who signed separate property agreements that converted all their assets from community property into separate property in 1993.[66] In 2001, the couple placed their respective property into self-settled spendthrift trusts, which were governed by Nevada law.[67] The couple's divorce proceedings began in 2009.[68] The district court "equalized the two [self-settled spendthrift trusts] so as to pay Eric's personal obligations and

62. *See* Daphne A. Kenyon, *Theories of Interjurisdictional Competition*, NEW ENGLAND ECON. REV., Mar.–Apr. 1997, at 14.

63. Six of the ten most popular states for trusts include those with DAPT statutes. *The Ten Most Popular States for Trusts*, WEALTHMANAGEMENT.COM (Dec. 18, 2018), https://www.wealthmanagement.com/estate-planning/ten-most-popular-states-trusts [https://perma.cc/JA94-D8KX].

64. *See infra* Part III.

65. RESTATEMENT (THIRD) OF TRUSTS § 59 (AM. LAW INST. 2003) ("Spendthrift Trusts: Exceptions for Particular Types of Claims. The interest of a beneficiary in a valid spendthrift trust can be reached in satisfaction of an enforceable claim against the beneficiary for (a) support of a child, spouse, or former spouse; or (b) services or supplies provided for necessities or for the protection of the beneficiary's interest in the trust."); Greg Crawford, Klabacka vs. Nelson *Sets Precedent for Asset Protection in Nevada*, ALLIANCE TR. CO. OF NEV. (Aug. 14, 2017), https://alliancetrustcompany.com/news/nevadas-unparalleled-asset-protection/ [https://perma.cc/28YE-Z3BS]; Howard M. Zaritsky, *Court Sustains Domestic Asset Protection Trust Against Claims for Spousal and Child Support*, 29 PROB. PRAC. REP., No. 7, 2017, at 1, 4.

66. Klabacka v. Nelson, 394 P.3d 940, 943 (Nev. 2017).

67. *Id.*

68. Crawford, *supra* note 65.

also awarded Lynita a lump sum alimony award against Eric's *Trust*—not Eric in his personal capacity."[69]

Each of the trusts had a spendthrift clause, prohibited attachment by any future creditor, and listed Nevada residents as initial distribution trustees.[70] Further, each grantor held the right to veto any distribution; was the investment trustee of his or her trust; held all rights as a trustee, other than the power to make or direct distributions; and required that the distribution trustee provide ten days' notice of any impending distribution.[71] "The respective settlors, however, in the capacity of also being an 'investment trustee,' retained the power to hold and manage the investments of the respective trust."[72]

The court held that the trusts were valid DAPTs because the terms of the writing manifested an intention that the assets be protected from the claims of the beneficiaries' creditors, which is all that is required under Nevada law.[73] The law in question lists out an unambiguous test as to whether a DAPT is valid, entailing that it must (1) be in writing, (2) be irrevocable, (3) not require that any part of the trust's income or principal be distributed to the settlor, and (4) not be "intended to hinder, delay or defraud known creditors."[74]

The court relied heavily upon the legislative history of Nevada's DAPT statute.[75] The court confirmed that Nevada does not have exception creditors, including spouses and dependent children in a domestic dispute, and expressly rejected the position given in section 59 of the Restatement (Third) of Trusts.[76] The court reiterated:

> The legislative history explicitly mentions child support as an example of a debt that would not be free from attachment *if known at the time the trust was created*. However, the trust assets would be protected from attachment as to debts unknown at the time the trust was created—presumably, this protection extended to child-and

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69. Thomas Greene, *Supreme Court Case Reinforces Nevada as #1 DAPT Jurisdiction*, LIBERTY ST. ADVISORY GRP. (May 11, 2017), https://www.libertystreetadvisorygroup.com/supreme-court-case-reinforces-nevada-1-dapt-juridiction/ [https://perma.cc/VEN4-2HBR].

70. Zaritsky, *supra* note 65, at 4.

71. *Id.*

72. Edward D. Brown, *Domestic Asset Protection Trust Not Obligated to Pay Spouse's Alimony and Child Support*, DAVIS SCHILKEN L. BLOG (June 6, 2017), http://dslawcolorado.com/domestic-asset-protection-trust-not-obligated-pay-spouses-alimony-child-support/ [https://perma.cc/7AVG-TK2P].

73. Zaritsky, *supra* note 65, at 5.

74. *Id.*

75. Klabacka v. Nelson, 394 P.3d 940, 951 (Nev. 2017).

76. Shaftel et al., *supra* note 4, at 22.

spousal-support obligations unknown at the time the trust was created.[77]

Understanding that the Nevada state law seeks to protect the assets of a valid spendthrift trust against any court order, the court ensured the efficacy of the DAPTs.[78]

The *Klabacka* holding is unique for three reasons. First, the case had favorable facts that forced the court to decide the efficacy issue; there were no choice of law questions and the fraudulent transfer question was easily defeated.[79] Second, after the Nevada court took the bait, it established an unambiguous test for valid DAPTs, providing case law in favor of these trusts—supplying attorneys with ammunition for their arguments in future litigation. Finally, Nevada's legislation is distinctive in its DAPT friendliness.[80] The *Klabacka* decision sprang from Nevada's unique friendliness towards DAPTs.

B. Legislative History Authority

A review of Nevada's legislative history on DAPTs shows the blunt considerations when passing the statute on spendthrift trusts. Three main considerations were discussed when deciding how pro-DAPT the state would be: the benefit to Nevada, the protection for the settlor, and the likelihood of child support issues arising in the future.[81] First, the discussions explicitly state that the reasoning for such a settlor-friendly law is to "increase estate tax revenue and attract assets to Nevada by providing benefits to very wealthy persons."[82] Nevada Assemblyman David Goldwater stated that when "the trust was domicile in Nevada and the person was a resident of Nevada, Nevada got the benefit of all their inheritance tax."[83] It is clear that Nevada stands to profit on multiple revenue levels by allowing such trusts to be established within its

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77. *Klabacka*, 394 P.3d at 951 (internal citation omitted).

78. Zaritsky, *supra* note 65, at 6.

79. *Klabacka*, 394 P.3d at 947.

80. *Id.* at 951.

81. *See generally Hearing on Assemb. B. 469 Before the Assemb. Comm. on Judiciary*, 1999 Leg., 70th Sess. (Nev. 1999) [hereinafter *Hearing* 469], https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1999/AB469,1999.pdf [https://perma.cc/Q2CW-K3DG]; *Hearing on Assemb. B. 378 Before the S. Comm. on Judiciary*, 2013 Leg., 77th Sess. 6 (Nev. 2013) [hereinafter *Hearing* 378], https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/1035.pdf [https://perma.cc/4VLS-RXHM].

82. *Hearing* 469, *supra* note 81, at 2.

83. *Id.* at 6.

borders.[84] In other words, "DAPT friendly laws are just one example of . . . attraction-incentivized policy making."[85]

Second, Mr. Goldwater stated that spendthrift trusts "offered protection to wealthy people just as the committee was often fighting for the rights of the poor . . . . Wealthy people deserved rights as well."[86] He continued on by saying that the "problem of becoming extremely wealthy was it becomes impossible to insure against that liability."[87] These frank statements demonstrate the concerns that specific attorneys who need to employ these asset protection tools have: preserving their clients' wealth in as many ways as possible.

Finally, a later committee fully examined the absence of creditor rights for child support against these trusts.[88] A committee member said the group needed to "determine if we want to allow an individual to support himself or herself with a large sum of money held in a spendthrift trust and not pay child or spousal support, thereby requiring the taxpayers to support the children or spouse through the welfare system."[89] This is by far the strongest argument against such a settlor-friendly statute: the fear of disadvantaging special creditors such as children. The public policy rationale is that "a beneficiary of a trust should not be able to evade support obligations by hiding behind a spendthrift clause. The needs of the beneficiary's ex-spouse and children are deemed to outweigh the rights of the settlor to control the use of trust property."[90]

In response, Senator Justin C. Jones said that his experience was that "self-settled spendthrift trusts are sophisticated and require counsel to set up. I am not sure the children or spouse of someone who has one of these trusts would end up on welfare. An individual should be allowed to set up an estate plan as he or she sees fit."[91] The Senator made an appealing argument for individual choice and was further bolstered by another committee member asserting that when "a trust is properly set up and does not have a fraudulent conveyance, one-half to two-thirds of an individual's assets are outside of the trust. A trust is not set up so the individual is

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84. Similar state-centric thinking can be found in Delaware's corporate legal structure, which shows the State's desire to compete economically with the rest of the country. Some have questioned whether stringent holdings against DAPTs indicate similar imminent fraud challenges to Delaware's differing corporate charter laws that so many businesses take advantage of. *See* Alexander B. Shiffman, *The Domestic Asset Protection Trust and Its Federalism Implications*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 853, 877 (2015).

85. *Id.* at 875.

86. *Hearing* 469, *supra* note 81, at 6.

87. *Id.*

88. *Hearing* 378, *supra* note 81, at 3, 18.

89. *Id.* at 6.

90. BEYER, *supra* note 34, at 379.

91. *Hearing* 378, *supra* note 81, at 6.

essentially indigent because all of his or her assets have been placed in trust."[92] The rebuttal to the public policy opposition is therefore extinguished under the reasoning that the creditors will still have access to the majority of the settlor's assets and should not be able to pierce the trust veil unless fraud is proven.

Finally, the committee was informed that many states are no longer observing special classes of creditors to pierce the trust veil:

> The trend in the various states is to remove the exception creditors. Utah removed these exception creditors and does not allow either to access the trust. Wyoming does not allow a divorcing spouse to access a trust. It has a special type of trustee that can be drafted into the document to allow for not accessing child support out of the trust. Virginia and Oklahoma only allow child support as an exception. Colorado does not allow either exception. South Dakota recently enacted legislation to not allow either exception unless it was already a debt before the transfer to the trust. Enactment in this area has been progressive, and other states are trying to match Nevada.[93]

It is clear that Nevada's legislature deliberated on the benefits and possible detriments establishing themselves as a DAPT friendly jurisdiction. Ultimately, it instituted a unique statute heavily favoring the trusts, concluding that the opportunity for fraud and misuse would be minimal.[94] The state's legislature recognized the advantages that DAPTs offered: those which this Note argues could be emulated in other jurisdictions across the country.

III. THE MACRO ANALYSIS OF *KLABACKA*

There are generally two positive consequences to allowing DAPTs and using the *Klabacka* holding as a template for states to mimic: public policy and economic theory of interstate federalism. Each will be discussed below, followed by an analysis of how these concepts resolve the existing surety and scarcity issues facing DAPTs.

A. Public Policy

Time and again our country has demonstrated a progressive approach to public policy; being flexible enough to change with the eras.[95] Trust law is no exception. Prior to 1997, not a single state explicitly allowed

92. *Id.* at 16.

93. *Id.* at 17.

94. *Id.* at 16.

95. Consider holdings in cases such as *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down all state laws banning interracial marriage), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (legalizing gay marriage).

domestic asset protection trusts.[96] Fast forward to now and seventeen states allow these instruments, with additions as recent as March 2017.[97] This Note contends that more states should, and will, recognize the various public policy benefits by allowing DAPTs.

The first convincing policy argument for DAPTs is that the concept is already widely accepted under a myriad of asset protection options that provide almost duplicate benefits as DAPTs; for instance, there are creditor-proof retirement accounts for employees.[98] Scholars commonly assert the rebuttal against these asset protection opportunities due to their unwillingness to "allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle."[99] But there are already enacted vehicles which even scholars affirm are unsettling, such as tenancy by the entirety, family limited partnerships, limited liability companies, homestead exemptions, life insurance policies, annuity contracts, and transfers to close individuals.[100]

A supreme benefit of DAPTs is they would offer security to business owners from legal liability.[101] Considering that in 2010 the average outside litigation expense for a single company to litigate was $115 million,[102] reduced liability is a significant incentive. Additionally, in the same year, small businesses had to pay out eighty-one percent of the costs for litigation, but only saw twenty-two percent of the settlement revenue.[103] Domestic asset protection trusts could combat draining small businesses of capital through frivolous tortious claims, currently causing them to pay $35.6 billion of these costs out of their own coffers.[104] Happily, the checks on businesses abusing these asset protection vehicles are already in place, such as fraudulent conveyance statutes.[105] In theory, if small business

96. Shaftel et al., *supra* note 4, at 1.

97. *Id.* Michigan enacted a DAPT statute in 2017, West Virginia in 2016, and Mississippi in 2014. *Id.*

98. *See* Tenneco Inc. v. First Va. Bank of Tidewater, 698 F.2d 688, 689–90 (4th Cir. 1983).

99. *See* Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1259 (2000).

100. Michael A. Passananti, *Domestic Asset Protection Trusts: The Risks and Roadblocks Which May Hinder Their Effectiveness*, 32 AM. C. TR. & EST. COUNS. J. 260, 262 (2006).

101. Brendan Duffy, *In States We "Trust": Self-Settled Trusts, Public Policy, and Interstate Federalism*, 111 NW. U. L. REV. 205, 232 (2016).

102. CIVIL JUSTICE REFORM GROUP ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf [https://perma.cc/JRQ7-T86G].

103. U.S. CHAMBER INST. FOR LEGAL REFORM, TORT LIABILITY COSTS FOR SMALL BUSINESS 9 (2010), http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf [https://perma.cc/AM4A-XKPM].

104. *Id.* By shielding a portion of a business's assets from tort liability the trust ensures a fortified reserve is always available for the sustained operation of business.

105. *See, e.g.*, 11 U.S.C. § 548 (2005).

owners are able to shield their assets from legal liability, they will be able to drip these assets into the local economy, benefiting the community at large.[106]

The next public policy argument in favor of DAPTs is the benefit the United States would see economically. As stated previously, it is estimated there are billions, if not trillions of dollars in wealth going to offshore accounts.[107] If this money was kept in the United States, the country's economy would benefit through attorney fees, financial advisors employed, possible tax revenue, etc.[108] Finally, there is the potential extinction of costly litigation with foreign jurisdictions, saving money for all parties involved.[109] And of course, the courts could limit the fraudulent activity if the accounts are within jurisdictional reach and better clarify the edges of this nuanced area of law.

B. Competition Among States

Another benefit of normalizing DAPTs in the United States is the recognition of the constitutional foundation of these accounts and the economic advantage of interstate federalism. Setting the boundaries of a court's sovereignty, the Full Faith and Credit Clause of the Constitution allows the application of one state's law over another.[110] This clause of the Constitution states that full faith and credit "shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[111] Simply put, every state has its own laws, but no state's laws are more important or better than another's.

When questioning DAPTs through the lens of interstate federalism, it must be asked: what should states be doing according to the Constitution, and also, is what they are doing benefitting the country? When looking at the Constitution, it is clear that each state is a sovereign (Full Faith and Credit Clause); that every citizen is treated equally, no matter the state they are from or currently in (Privileges and Immunities Clause); and that the states cannot erect trade obstructions (Commerce Clause).[112] The Constitution promotes a competitive, capitalistic model between states.[113] And competition is one of the most basic motivations stimulating behavior, and even helps to explain fundamental theories such as

106. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 103, at 6.

107. Taylor, *supra* note 47.

108. Duffy, *supra* note 101, at 233.

109. *Id.*

110. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 312–13 (1981).

111. U.S. CONST. art. IV, § 1.

112. *Id.*; U.S. CONST. art. IV, § 2; U.S. CONST. art. I, § 8, cl. 3.

113. Christopher DeMuth, *Competition and the Constitution*, AM. ENTER. INST. (Sept. 21, 2011), http://www.aei.org/publication/competition-and-the-constitution/ (last visited June 15, 2019).

evolution.[114] In an almost poetic way, DAPT legislation is an excellent model of evolution, demonstrating that survival is based on the struggle over limited resources.

Enacting statutes and obtaining certain holdings in the courts proves Charles Tiebout's research from the 1950s.[115] Tiebout's research was the catalyst that produced two theories: (1) interstate competition compels local representatives to grasp the true effects of their policies, and (2) interstate competition results in a supreme distribution of goods, services, and laws throughout the locality.[116] An intriguing and analogous example is the competitive results that occurred in state legislatures for legalizing marijuana and gay marriage.[117] This shows the economic benefits—no matter if the idea is seen by some as controversial—of endorsing interstate competition between states.[118]

The last question to ask is whether enacting DAPT statutes will even benefit citizens. It is difficult to say precisely how much an individual and state will profit from such action, but a similar circumstance has been used to illustrate the changes in profits when a state changes its estate or property laws.[119] The increase in profits due to changes in these laws are predictive of what trust law reformation could do because each of these laws are highly intertwined and are typically used simultaneously to achieve an overall legal plan for a client. The same clients that drove up profits in the other fields of law would be those doing the same for trust law.

Professors Schanzenbach and Sitkoff looked at the economic changes in several states after ending the rule against perpetuities.[120] The findings of the study showed there was a trust asset increase of as much as twenty percent—more than six billion dollars.[121] Another way to look at

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114. Shiffman, *supra* note 84, at 874.

115. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (contending local competition would produce more effective public expenditures).

116. Duffy, *supra* note 101, at 235.

117. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 SOUTHERN CAL. L. REV. 745, 831–33 (1995) (exploring the "first mover" advantages states had to legalize same-sex marriage). *See generally* Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U. CAL. DAVIS L. REV. 595 (2016) (discussing the legal friction and battles pitting states against other states—as opposed to a state against the federal government—over legalized marijuana).

118. It is noted that with "the trust being an instrument that is freely transferrable from one jurisdiction to another with little difficulty, the likelihood of the entanglement of opposing laws becomes drastically greater." Shiffman, *supra* note 84, at 876.

119. *See generally* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. 356 (2005).

120. *Id.*

121. *Id.* at 410.

it: average individual accounts grew by at minimum $200,000.[122] It is unsurprising that professional groups, such as attorneys and accountants, saw an increase in trust business—a demonstrated example of the benefits that drip down throughout the state's economy.[123] In reflecting on their findings, the professors mused that "jurisdictional competition in trust law appears ready to focus next on [D]APTs."[124]

DAPTs and federalism could have a symbiotic relationship—each helping to stimulate the other. The federalist action of "racing to the top" would improve DAPT law and efficacy, while the establishment of DAPTs would promote strong competition among states, economically and statutorily.[125] The questions have been asked and answered: acceptance of DAPTs would benefit the individual citizen, stimulate the distinct state's economy, and uphold the traditions embedded in the United States' Constitution.

CONCLUSION

It seems fitting that this Note would open and close with economic studies speaking to the topic at hand. The start of the discussion was the anticipation of individuals seeking a protection option for newfound wealth. The conclusion shows that the novel shelter approach of domestic asset protection trusts can benefit the individual, the local community, the state, and the country. First, however, internal struggles must be resolved for DAPTs to truly shine. Advisors need to be sure of their advice, knowing that they have the courts and law on their side when recommending these asset protection vehicles. The *Klabacka* case provides the ideal policy template for attorneys to, at minimum, bolster their arguments in favor of a valid DAPT. Furthermore, legislatures now have the *Klabacka* bright-line test to duplicate in their own legislation.

By debunking the timeworn ideas that public policy disfavors DAPTs and adding confidence to promote them, it is the hope of this Note that a path of clarification and surety should follow after *Klabacka*. As noted, DAPTs are supported by the Constitution, federalism, and economic studies. The time for domestic asset protection trusts as a common planning tool is now. All that states and courts have to do is usher in the *Klabacka* era.

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122. *Id.* at 409.

123. *Id.* at 363.

124. *Id.* at 414.

125. *See generally* Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J. L. & PUB. POL'Y 89 (2012) (noting that "robust interjurisdictional competition facilities the enactment of better public policy at the state level").