THE USE OF WILLS AND ASSET PROTECTION TRUSTS IN FRAUD AND OTHER FINANCIAL CRIMES

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ABSTRACT

According to the Internal Revenue Service, 2.9 million Form 1041 (domestic trust) tax returns were filed in 2009. It is predicted that beneficiaries will receive wealth transfers in the tens of billions passing via trusts. Accompanying this growth has been a proliferation of abusive estate planning, such as asset protection trust schemes to reduce income and tax liability; illegal techniques to depreciate personal assets, deduct personal expenses, and underreport income; and participation in money laundering. This Article highlights and analyzes wealth transfer and preservation fraud and trust schemes, scrutinizes both offshore and domestic asset protection trusts, and provides red flags of fraud to assist in the prevention and detection of wealth transfer and preservation fraud schemes.

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I. INTRODUCTION

For tax year 2009, 2.9 million Form 1041 (domestic trust) tax returns were filed, placing domestic trusts third—behind only individuals and corporations—in terms of total filings.[1] Experts predict that even after the payment of estate taxes, trust beneficiaries will receive wealth transfers of between $24 trillion and $65 trillion from 1998 through 2052.[2] As the proliferation of trusts continues to accelerate, the federal government has noted a corresponding proliferation of abusive estate planning tactics, such as (1) trust and tax schemes intended to reduce income and tax liability; (2) various abusive techniques used to depreciate personal assets, deduct personal expenses, and underreport income; and (3) "attempt[s] to protect transactions [(e.g., money laundering)] through bank secrecy laws in tax haven countries" and the abuse of domestic and offshore asset protection trusts.[3]

The use of abusive trust, estate planning and other schemes, together, constitutes wealth or asset transfer and protection planning fraud. Legitimate asset or wealth transfer and protection planning, on the other hand, includes three parts: (1) estate planning, (2) tax minimization, and (3) judgment creditor planning.[4] Legitimate asset transfer and protection planning is a complex area even for experienced estate planning professionals. As the demand for asset transfer and protection planning services continues to increase, estate planning professionals have an ethical duty, when assisting clients in developing a legitimate asset protection plan, to protect them from wealth preservation planning fraud and violation of

1. *Abusive Trust Tax Evasion Schemes - Talking Points*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-talking-points [hereinafter *IRS Talking Points*] (last updated Aug. 15, 2016).

2. John J. Havens & Paul G. Schervish, *Why the $41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Comments*, J. GIFT PLAN., no.1, 2003, at 11, 12; John Leland, *Breaking the Silence*, N.Y. TIMES (Mar. 18, 2008), http://www.nytimes.com/2008/03/18/business/businessspecial3/18family.html.

3. *IRS Talking Points*, *supra* note 1.

4. BARRY S. ENGEL, ASSET PROTECTION PLANNING GUIDE (2d ed. 2005).

federal and state laws.[5]

The purpose of this Article is to assist estate planning professionals in: (1) understanding the diverse ways in which fraud and unethical practices can enter into wealth transfer and preservation planning; (2) scrutinizing domestic and offshore asset protection trusts and trust fraud schemes (involving tax evasion and money laundering); and (3) utilizing red flags to help in the detection and prevention of fraud in asset protection planning. This Article contributes to the legal and ethics literature by integrating important asset preservation planning and fraud knowledge for estate planning professionals of all types, including lawyers, accountants, regulators, bankers, law enforcement personnel, academics, ethicists, and other interested parties.

This Article is organized as follows: Part II discusses the types of fraud affecting wills and estate planning.[6] Part III examines the steps to take to protect against undue influence, duress, and fraud.[7] Part IV analyzes domestic and offshore asset protection trusts and trust fraud schemes.[8] Part V highlights some of the red flags associated with trust fraud, money laundering, and other financial crimes.[9] Part VI concludes the Article.[10]

II. TYPES OF FRAUD AFFECTING WILLS AND ESTATE PLANNING

A. *Undue Influence*

In the United States, will contests affect up to 3 percent of all wills, which, given the high number of wills executed every year, is a significant number.[11] The most common (and often unsuccessful) ground for will contests is undue influence.[12] In most states, "undue influence is defined as an influence exerted on the testator that overpowers the testator's mind and free will, which produces a will that would not have been executed but for

5. *See id.* ¶ 1635, at 335–38 (discussing ethical considerations and summarizing cases from across the United States).

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Part V.

10. *See infra* Part VI.

11. David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 86 n.189 (2012).

12. Margaret Ryznar & Angelique Devaux, Au Revoir*, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 3–4 (2013).

that influence."[13] This is a relatively imprecise definition, which some courts regard as a necessary feature given that a more precise definition could "furnish a fingerboard pointing out the [very] path by which it m[ight] be evaded."[14] Unfortunately, allegations of undue influence have increased in recent years.[15] This is particularly true in situations where the elderly transfer their assets to beneficiaries through *inter vivos* or testamentary probate or nonprobate transfers (e.g., 401(k) plans and retirement account beneficiary designations).[16] In part, this trend is attributable to the geographic dispersion of family members, increased longevity, and older age making the elderly more susceptible to debilitating illnesses (e.g., Alzheimer's and macular degeneration).[17]

For an aggrieved person to contest a will under the doctrine of undue influence, the plaintiff must establish the following elements: (1) the influencer had a disposition or motive to exercise undue influence; (2) the influencer had the opportunity to exercise the influence; (3) the influencer did in fact exercise the undue influence; and (4) the testamentary disposition was a result of undue influence.[18] The doctrine of undue influence "assumes that the influencer can achieve control of the testator's will through means other than force."[19] This means that "the influencer uses means that fall short

13. *Id.* at 3 (citing JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 283 (9th ed. 2013)). As applied in U.S. courts, undue influence has been subject to expansion over the past few decades. Casebooks from about 100 years ago listed coercion or fraud as elements of undue influence with coercion being "actual violence, of threats expressed or implied, or of harassing importunity." JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 175, at 105–06 (1904).

14. JOSEPH TRAUB ARENSON, THE DOCTRINE OF UNDUE INFLUENCE IN ANGLO AMERICAN LAW 3 (1953) (quoting Shipman v. Furniss, 69 Ala. 555, 565 (1881)).

15. David W. Kirch, *Balancing Discretion to Give and Undue Influence Concerns*, EST. PLAN., Aug. 2011, at 28, 28 [hereinafter Kirch, *Balancing Discretion*].

16. *Id.*

17. *Id.*

18. Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 55 (2008).

19. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 263 (2010). A classic case of undue influence is exemplified in *Estate of Lakatosh*, 656 A.2d 1378, 1381 (Pa. Super. Ct. 1995). In that case, Roger Jacobs made friends with Rose Lakatosh, who lived alone and isolated from her family. *Id.* Over a two-year period, Jacobs visited Lakatosh almost every day. *Id.* He drove her to appointments and assisted with chores around the house. *Id.* A few months after they made contact, Jacobs stated that Lakatosh should provide him power of attorney to manage her affairs for her in dire circumstances. *Id.* at 1381–82. She signed the power of attorney and drafted a new will leaving Jacobs $267,000 of her estate, which

of actual physical coercion but which rise above mere affection, entreaty, or even repeated requests."[20]

"Undue influence can be hard to prove" because "it often is exerted subtly and in private."[21] "The existence of undue influence is a question of fact, and from its very nature, like all fraudulent . . . schemes, hides its features behind masks and operates in dark and secret places and in covert ways, and proof of it must usually be by circumstantial rather than by direct [evidence]."[22]

A clear approach for the analysis of circumstantial evidence in undue influence cases is as follows:

(1) Each element of the undue influence claim must be supported by satisfactorily proven circumstantial facts from which at least one inference in support of undue influence can be reasonably drawn. It need not be the only reasonable inference that could be drawn from the facts.[23]

(2) If each element has some supporting circumstantial evidence (facts plus inferences), then there is enough evidence to submit the claim to a jury where all the facts and inferences on each of the elements can be considered together as a whole.[24]

(3) If the combined evidence, taken as a whole, supports a reasonable inference of undue influence by a preponderance of the evidence, then it is sufficient to support a jury finding in favor of the claim.[25]

totaled $268,000. *Id.* at 1381–82, 1383–84. Jacob's second cousin drafted Lakatosh's will. *Id.* at 1381–82. A tape recording of the will execution evinces that Lakatosh had a weakened intellect and experienced delusions. *Id.* at 1384–85. By 1990, Lakatosh was living in squalor not paying sewer bills and taxes. *Id.* at 1382. Ultimately, the will was denied probate on the grounds that the will was the result of undue influence. *Id.* at 1385.

20. Spivack, *supra* note 19.

21. Kirch, *Balancing Discretion*, *supra* note 15, at 29.

22. Truelove v. Truelove, 266 S.W.2d 491, 497 (Tex. Civ. App. 1953) (quoting Holt v. Guerguin, 156 S.W. 581, 584 (Tex. Civ. App. 1913), *aff'd in part, rev'd in part*, 163 S.W. 10 (Tex. 1914)).

23. *See* Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963); *Truelove*, 266 S.W.2d at 497.

24. Pullen v. Russ, 209 S.W.2d 630, 634–35 (Tex. Civ. App. 1948).

25. *E.g.*, Curry v. Curry, 270 S.W.2d 208, 214–15 (Tex. 1954) (finding evidence insufficient to support jury's finding of undue influence); *Truelove*, 266 S.W.2d at 498 (finding evidence sufficient to support jury's finding of undue influence).

Procedurally, undue influence involves burden shifting. The burden of proof is first placed on the party asserting undue influence.[26] If the plaintiff raises a rebuttable presumption of undue influence, then the burden shifts to the party seeking to have the will admitted to probate.[27] Once the burden of proof shifts, the will's proponent must negate the elements of undue influence, i.e., introduce contrary evidence regarding the "grantor's lack of susceptibility"; the alleged wrongdoer's "want of opportunity to exercise [undue] influence"; "the lack of a disposition to influence unduly"; and a testamentary "result clearly unaffected by undue influence."[28]

Circumstances that may provide an evidentiary basis for finding (or refuting) undue influence include such factors as:

- A confidential relationship;[29]
- A fiduciary relationship;[30]
- Undue influence present at the time the will was executed;[31]
- A relationship between the attorney drafting the will and the influencer;[32]

26. RESTATEMENT (THIRD) OF PROP. (WILLS & OTHER DONATIVE TRANSFERS) § 8.3 cmt. b (AM. LAW INST. 2003).

27. *Id.* § 8.3 cmt. f ("A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer . . . .").

28. *In re* Estate of Todd, 585 N.W.2d 273, 277 n.5 (Iowa 1998).

29. *E.g.*, *In re* Estate of Edel, 700 N.Y.S.2d 664, 668 (Sur. Ct. 1999). The decedent left a $250,000 specific bequest to a hospital, and the attorney who drafted the will was also chairman of the hospital's board. *Id.* at 665.

30. *E.g.*, Jordan v. Growney, 416 So. 2d 24, 25 (Fla. Dist. Ct. App. 1982). Plaintiff's two uncles (who were lawyers) held a life estate in waterfront property and her children held the remainder interest. *Id.* As guardian, plaintiff sold the remainder interest to her uncles. *Id.* An appellate court ruled that an attorney–client relationship existed between plaintiff and her uncles and she failed to meet the burden of proving that the conveyance was not self-dealing by a fiduciary. *Id.*

31. *E.g.*, *In re* Estate of Carpenter, 253 So. 2d 697, 701–02 (Fla. 1971), *superseded by statute*, 1974 Fla. Laws ch. 106, § 733.107, at 239. A woman prepared a will four days before her death. *Id.* at 698. She left her entire estate to her daughter and disinherited her three sons. *Id.* The daughter was active in procuring the will and kept its execution a secret. *Id.* at 699. An appellate court ruled the circumstances raised a presumption of undue influence. *Id.* at 704–05.

32. *E.g.*, Herman v. Kogan, 487 So. 2d 48, 49 (Fla. Dist. Ct. App. 1986). The testator's will was prepared by an attorney who was the regional president of a

- The execution of the will being kept a secret from potential challengers;[33]
- An influencer instructing the preparation of a will, making first contact with the attorney, or meeting alone with the attorney drafting the will;[34]
- Old age of the testator;[35]
- Weak physical condition, weak mental condition, or both of the testator;[36]
- A beneficiary caring for the testator during the end of the testator's life;[37]
- Multiple wills executed two years prior to death;[38]
- A beneficiary treating a new will execution as an urgent matter;[39]
- A dramatic change in the disposition of assets upon the death of the testator;[40]
- An influencer securing witnesses to the will;[41] and

corporation, which was the charitable beneficiary of the will. *Id.*

33. *E.g.*, *In re* Burton's Estate, 45 So. 2d 873, 876 (Fla. 1950). A son's father drafted a will in which he left the majority of his estate to his daughter and son-in-law. *Id.* at 874. The son cited numerous facts including: transactions between the daughter, son-in-law, and the father that allowed them to retain control over decedent's stock; the will execution was kept secret from the son; and the father lived with the daughter. *Id.* at 874–75. These facts raised a question about whether undue influence could have resulted. *Id.* at 876.

34. *E.g.*, Elson v. Vargas, 520 So. 2d 76, 76–77 (Fla. Dist. Ct. App. 1988) (per curiam). A sister-in-law challenged the decedent's will because of alleged undue influence by a caretaker who cared for the decedent in her final months of life. *Id.* at 76. The caretaker had a confidential relationship with the decedent and helped procure the contested will. *Id.* An appellate court upheld the will, as numerous witnesses indicated that decedent was mentally competent, a strong woman, and not under the caretaker's sway. *Id.* at 78.

35. *E.g.*, *In re Burton's Estate*, 45 So. 2d at 876; *Herman*, 487 So. 2d at 49.

36. *E.g.*, *In re Estate of Carpenter*, 253 So. 2d at 699.

37. *E.g.*, *Elson*, 520 So. 2d at 76.

38. *See, e.g.*, Swartzendruber v. Lamb, 582 N.W.2d 171, 171 (Iowa 1998).

39. David W. Kirch, *A Donor's Rights to Disposition of Assets Versus Undue Influence Protection*, COLO. LAW., Oct. 2010, at 47, 48.

40. *Id.*

41. *Id.*

- An influencer keeping the will after execution.[42]

At the state level, there have been recent developments in undue influence law. First, courts in various states, including California, North Carolina, West Virginia, Illinois, Ohio, Wisconsin, New Mexico, and others, have recognized a tort called "tortious interference with an expected interest."[43] To prevail under this theory,

> [c]ourts require the disinherited plaintiff to prove[:] (1) the existence of her expectancy; (2) that the defendant intentionally interfered with her expectancy; (3) that the interference involved conduct tortious in itself such as fraud, duress, or undue influence; (4) that there is a reasonable certainty that the devise to the plaintiff would have been received but for the defendants' interference; and (5) damages.[44]

For example, in *Harmon v. Harmon*, the son of the deceased sued his brother and sister-in-law for allegedly inducing his 87-year-old mother by fraud and undue influence to transfer valuable property to them, thereby effectively disinheriting the plaintiff.[45] The plaintiff–son brought the lawsuit while his mother was still alive.[46] The Maine Supreme Judicial Court held that prior to the mother's death, the plaintiff could maintain an action in tort for wrongful interference with his intended legacy.[47] The court further stated that when "a person can prove that, but for the tortious interference of another, he would in all likelihood have received a gift," there is an interference with advantageous relations and the person is "entitled to recover for damages thereby done to him."[48]

A second development involves "financial abusers." "One study estimates that about [40] percent of reported elder abuse cases concern

42. *Id.*

43. Beckwith v. Dahl, 141 Cal. Rptr. 3d 142, 156–57 (Ct. App. 2012) (recognizing intentional interference with expectation of inheritance in California); Marianna R. Chaffin, Comment, *Stealing the Family Farm: Tortious Interference with Inheritance*, 14 SAN JOAQUIN AGRIC. L. REV. 73, 91 & n.135 (2004) (listing states with the tort of intentional interference with inheritance).

44. Chaffin, *supra* note 43, at 85 & n.80 (collecting cases).

45. Harmon v. Harmon, 404 A.2d 1020, 1021 (Me. 1979).

46. *Id.*

47. *Id.* at 1024–25 ("The issue is not whether the interest is vested or expectant; rather the issue is whether it is legally protected so that intentional and wrongful interference causing damage to the plaintiff gives rise to liability in tort." (citing Ross v. Wright, 190 N.E. 514, 515 (Me. 1934)).

48. *Id.* at 1024 (citations omitted).

financial exploitation."[49] A growing number of states,[50] including California, Washington, Oregon, and Arizona, have statutes that make it possible to disinherit financial abusers who inherit from their elderly victims.[51] Under these laws, "any person who participates in the willful and unlawful financial exploitation of a vulnerable adult will be" disinherited from the victim's will or property disposition.[52]

In 2014, the Florida legislature enacted section 825.103 of the Florida Statutes, entitled: "Exploitation of an elderly person or disabled adult; penalties."[53] As the name suggests, the statute was enacted to make it easier for prosecutors to pursue people who prey on the elderly.[54] In particular, the statute targets individuals who use funds, assets, or property of elderly or disabled adults with the intent to deprive the victim of the use of those funds, assets, or property, or to benefit someone other than the elderly person or adult.[55] The statute also targets trustees, guardians, and agents under a power of attorney who breach their fiduciary duties, fail to "use an elderly or disabled [person]'s income and assets for the necessities required for that person's support," or misappropriate an elderly or disabled person's money.[56] Under Florida law, an offender may also face criminal penalties.[57]

A growing number of states have statutes that make it possible to disinherit any financial abusers who inherit from their elderly victims.[58]

49. Spivack, *supra* note 19, at 298 (citing John F. Wasik, *The Fleecing of America's Elderly*, CONSUMERS DIGEST, Mar./Apr. 2000, at 77, 78).

50. Historically, financial exploitation of the elderly has been a state issue rather than a federal one. The only federal statute addressing financial exploitation of the elderly is the Elder Justice Act of 2009, Pub. L. No. 111-148, §§ 6701–6703, 124 Stat. 119, 782–804 (2010) (codified as amended in scattered sections of 42 U.S.C.). *See* KIRSTEN J. COLELLO, CONG. RESEARCH SERV., R43707, THE ELDER JUSTICE ACT: BACKGROUND AND ISSUES FOR CONGRESS 2 (2014).

51. Randy Gardner & Leslie Daff, *Beneficiaries Misbehavin': Legal Developments in Undue Influence*, J. FIN. PLAN., Apr. 2014, at 32, 32.

52. *Id.*

53. FLA. STAT. § 825.103 (West 2017).

54. *See* STAFF OF H. JUDICIARY COMM., CRIMINAL JUSTICE SUBCOMM., 23D LEG., REG. SESS., ANALYSIS OF H.B. 409: OFFENSES AGAINST VULNERABLE PERSONS 3–4 (Fla. 2014), http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0409a.CRJS.DOCX&DocumentType=Analysis&BillNumber=0409&Session=2014.

55. FLA. STAT. § 825.103(1)(a), (b).

56. *Id.* § 825.103(1)(c), (e).

57. *Id.* § 825.103(3).

58. Gardner & Daff, *supra* note 51.

These states include California, Washington, Oregon, and Arizona.[59] Under these laws, any person who participates in the willful and unlawful financial exploitation of a vulnerable adult will be disinherited from the victim's will or property disposition.[60] Clearly, a financial abuse case, on both sides, would benefit from the investigative and analytical skills of a forensic accountant.

B. *Duress*

In the testamentary context, duress has occurred when "the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made."[61] For example, duress can take the form of a wrongdoer using force or coercion to such a degree that the free will of the testator or trust settlor is suppressed.[62] Because of the duress, the testator or settlor feels there is no alternative but to revise his or her will or trust to favor the wrongdoer, or is afraid to change dispositions away from the wrongdoer in the will or trust for fear of abuse or facing the possibility that the intimidation will be repeated.[63]

Duress is often included within the definition of undue influence (and often combined with undue influence in an objection to the probate of a will) but is quite distinguishable.[64] Duress involves force, the threat of harm, or a wrongful act to the victim or a loved one.[65] While undue influence is a mental coercion, duress is often proved by a physical act.[66] Unlike undue influence, with duress, the victim is fully aware of the illegal element.[67] The following

59. *Id.*

60. *Id.*

61. RESTATEMENT (THIRD) OF PROP. (WILLS & OTHER DONATIVE TRANSFERS) § 8.3(c) (AM. LAW INST. 2003); *see also* Spivack, *supra* note 19, at 262–63.

62. Spivack, *supra* note 19, at 262–63; *see also* 25 AM. JUR. 2D *Duress and Undue Influence* § 2, Westlaw (databased updated Feb. 2017).

63. *See* 25 AM. JUR. 2D *Duress and Undue Influence*, *supra* note 62.

64. *See id.*

65. *See* Harrison v. Grobe, 790 F. Supp. 443, 454 (S.D.N.Y. 1992) ("Duress is shown where 'one is compelled to perform an act which he has a legal right to abstain from performing. The compulsion must be such as to overcome the exercise of freewill.'" (quoting Gerstein v. 532 Broad Hollow Rd. Co., 429 N.Y.S.2d 195, 199 (App. Div. 1980))).

66. *Cf.* Howell v. Landry, 386 S.E.2d 610, 616–17 (N.C. Ct. App. 1989) (discussing duress and undue influence in the context of a premarital agreement).

67. *See* 25 AM. JUR. 2D *Duress and Undue Influence*, *supra* note 62; *see also Howell*, 386 S.E.2d at 616.

elements must be proved to establish a clear case of duress: (1) the wrongdoer's wrongful act posed a threat of repeated violence to the testator or settlor; (2) the threat induced fear in the victim; (3) the testator or settlor feared the perpetrator would physically harm the victim or a loved one; and (4) such fear precluded the victim from exercising his or her free will and judgment.[68]

Circumstances that may provide an evidentiary basis for a finding of duress include:

- Elder abuse;[69]
- Sexual abuse;[70]
- Physical abuse;[71]
- Mental abuse;[72]
- Neglect of the elderly;[73] and
- Financial abuse.[74]

California, Illinois, Maryland, and Oregon have statutes barring inheritance based upon some or all of these forms of abuse.[75] Where a wrongdoer has engaged in coercive or abusive conduct, duress is the best doctrine under existing probate and trust contest laws to invalidate a bequest or gift in favor of the perpetrator.[76]

68. *In re* Estate of Rosasco, No. 4050/2006, 2011 WL 1467632, at *8 (N.Y. Sur. Ct. Apr. 5, 2011).

69. *Understanding Elder Abuse Fact Sheet 2016*, CENTERS FOR DISEASE CONTROL & PREVENTION (2015), http://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf (outlining characteristics of various forms of elder abuse).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Peter K. Kelly, *Objections of Probate: Undue Influence and Duress*, LEXISNEXIS LEGAL NEWSROOM: EST. & ELDER L. BLOG (Jan. 2, 2012 11:18 AM), https://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2012/01/02/objections-to-probate-undue-influence-and-duress.aspx?Redirected=true.

76. *See id.*

C. *Fraud in the Inducement*

"Fraud in the inducement occurs when a misrepresentation causes the testator to execute or revoke a will, to refrain from executing or revoking a will, or to include particular provisions in the wrongdoer's favor."[77] The inducement usually occurs before any action is taken on the testator's part to execute or revoke a will or include certain provisions in the will.[78] The inducement usually consists of false statements of fact made in bad faith or with the intent to deceive.[79]

"The fraud [involved] must amount to coercion, compulsion, or a constraint which destroys the testator's free agency . . . ."[80] Essentially, the fraud must overcome the testator's power of resistance, oblige the testator to adopt the will of another, and in so doing, bear directly on the testamentary act.[81] Moreover, the testator must have been deceived and must have relied on the misrepresentation.[82] This is in contrast to undue influence, which unlike fraud, need not be accompanied by deception.[83] Fraud in the inducement suffices to set aside a will when it affected the testator at the moment the will was executed.[84]

D. *Fraud in the Execution*

Fraud in the execution, which is not common, occurs when the instrument executed (e.g., will or trust agreement) differs from the one the testator, or settlor, intended to execute.[85] Fraud in the execution generally involves a misrepresentation of the actual contents of the document being executed.[86] A will provision resulting from fraud in the execution is invalid, and the remainder of the will stands, unless the fraud affects the entire will or the affected provisions are inseparable from the remainder of the will.[87]

77. DUKEMINIER & SITKOFF, *supra* note 13, at 318.
78. *See, e.g.*, *id.* at 318–19 (citing McDaniel v. McDaniel, 707 S.E.2d 60, 65 (Ga. 2011)).
79. 79 AM. JUR. 2D *Wills* § 381, Westlaw (database updated Feb. 2017).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* § 380.
84. *Id.* § 382.
85. DUKEMINIER & SITKOFF, *supra* note 13, at 318.
86. *Id.*
87. *See id.*

III. STEPS TO PROTECT AGAINST UNDUE INFLUENCE, DURESS, AND FRAUD

Perpetrators of will and estate planning fraud often use one or more of the following techniques to accomplish their nefarious objectives: (1) "increasing dependency needs," (2) "restricting access to loved ones," (3) "relationship poisoning," and (4) "self-promotion."[88] If an estate planning professional has a client whose objective is to become, or to remain, a favored beneficiary, the client should be made aware that he or she may need to prove the testator or trust settlor was mentally competent at the time of execution of the instrument.[89] One method of doing so is to obtain the written opinion of one or more physicians confirming that the testator or trust settlor is competent at the time documents are executed, along with a certificate of independent review.[90] Making the client aware of these considerations is often best accomplished by having at least one meeting alone with the client to give the client the chance to express his or her wishes about the estate plan and to candidly explain to the client the legal consequences of engaging in will and estate planning fraud.[91]

88. Gardner & Daff, *supra* note 51, at 34.

89. *Id.*

90. *Id.*; *see also* Lisa M. Stern, *An Ounce of Prevention*, TR. & EST., Aug. 2008, at 41, 43–44.

91. Stern, *supra* note 90, at 43.

Table 1. Asset Questions to Establish Testamentary Capacity:[92]

(1)	Describe your assets, including real estate, bank accounts, retirement accounts and life insurance, etc.
(2)	What is the approximate value of your real estate, bank accounts, life insurance, etc.?
(3)	What type of retirement or pension assets do you have?
(4)	Is there a beneficiary designation in place for your retirement and pension assets and life insurance? If so, who is the designated beneficiary?
(5)	Are you the sole owner of your assets (other than life insurance and retirement assets) or do you share ownership with another person? If so, who is the other owner?
(6)	Are you a party to any stockholder agreements, partnership agreements, or other agreements that may influence your estate's or trust's ability to obtain, liquidate, or transfer any of your business interests or assets?
(7)	Have you made gifts to family members or friends? If so, what prompted the gifts? Were gift tax returns filed to report the gifts?
(8)	Have you made any loans to family members or other individuals? If so, are the loans documented? Do you expect repayment?
(9)	Do you anticipate any situation where you may encounter a problem locating or liquidating any of your assets?
(10)	Identify your advisors, such as accountant and financial planner, and any other professional on whom you rely for advice.
(11)	Did you consult any of your advisors (other than your estate planning attorney) about your estate plan?

On the other hand, estate planning professionals whose clients may be concerned about losing an inheritance or trust beneficiary designation should advise their clients to screen and select caregivers, and to continue an ongoing relationship with the elder.[93] The professional should also advise his or her client to periodically ask the elder about the caretaker relationship

92. *See* Lisa M. Stern & Leonard S. Baum, *Implement Strategies to Help Guard Against Will Contests*, EST. PLAN., June 2010, at 21, 33 exhibit 1.

93. Gardner & Daff, *supra* note 51, at 34.

and, when possible, monitor financial and investment accounts.[94]

The professional would be wise to advise the client to prepare and retain memoranda detailing all steps which he or she took, or was involved in, preceding and during the will or trust agreement execution.[95] If any close relatives will be disinherited or excluded as a beneficiary in a trust, then clearly stated reasons should be contained in memoranda prepared by the lawyer and assented to by the client.[96] Also, such memoranda should document a complete discussion of the client's assets and the approximate value of all assets and liabilities.[97]

IV. TRUSTS AND FRAUD

Another legal vehicle subject to abuse by fraudsters and asset hiders is a trust. The primary defining characteristic of a trust is that it provides for a separation of legal and beneficial ownership.[98] The establishment of a trust requires the trust creator (or "settlor" or "grantor") transfer ownership of an asset or assets (legal title) to a person or institutional entity (trustee).[99] "The trustee is usually, although need not be, someone other than the settlor."[100] The trustee owns and manages the asset(s) according to the provisions or terms set out in a trust agreement for the benefit of beneficiaries.[101] The latter possess beneficial ownership.[102] "A trust will typically include 'current beneficiaries,' persons to whom the trustee is authorized or required to make current distributions, and 'future beneficiaries,' persons who will or may receive trust distributions in the future."[103]

Subject to certain exceptions, a beneficiary's interest in a trust is considered freely transferable.[104] "Thus, a beneficiary entitled to [some or]

94. *Id.*
95. Stern & Baum, *supra* note 92, at 23.
96. *See id.*
97. *Id.*
98. Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 290 (2002).
99. Mathew Russo, Comment, *Asset Protection: An Analysis of Domestic and Offshore Trust Accounts*, 23 MICH. ST. INT'L L. REV. 265, 268–69 (2014).
100. Danforth, *supra* note 98.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 291.

all [of the] income of a trust . . . can transfer the income interest, either gratuitously or for consideration, to some other person," institutional entity, or creditor.[105] "The beneficiary's income interest can also be transferred involuntarily, through attachment by a judgment creditor."[106]

A settlor or grantor can avoid the transfer, alienation, or attachment of a beneficiary's trust interest by creating a spendthrift trust or including a spendthrift provision in the trust.

> A spendthrift trust is a trust "created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection." When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust and a creditor or assignee of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the interest or distribution.[107]

While almost all trusts contain some form of language purporting to make the trust a spendthrift trust, many such trusts do not withstand judicial scrutiny. One bright-line rule employed by courts in many jurisdictions is that any self-settled trust, regardless of whether it includes a so-called spendthrift provision, cannot be a spendthrift trust.[108] This is because spendthrift trusts are necessarily "created with a view of providing a fund *for the maintenance of another*," not for the settlor's own benefit.[109] In practice, courts deem a trust to be self-settled if one of the following factors exists: (1) if "the trust was created for the settlor's own support"; (2) if the settlor is a beneficiary of the trust; (3) if the settlor retains control over the trust corpus; or (4) if the settlor "retains and reserves a general power of appointment."[110] If a spendthrift trust has several beneficiaries, one of whom is the settlor, the

105. *Id.*

106. *Id.* (emphasis omitted).

107. Miller v. Kresser, 34 So. 3d 172, 175 (Fla. Dist. Ct. App. 2010) (internal citation omitted) (quoting Croom v. Ocala Plumbing & Elec. Co., 57 So. 243, 244 (Fla. 1911)).

108. *See, e.g.*, *In re* Brown, 303 F.3d 1261, 1266 (11th Cir. 2002); *see also* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 5 (1995) [hereinafter Hirsch, *Spendthrift Trusts*] (discussing the inability to create a spendthrift trust through other trusts).

109. *In re Brown*, 303 F.3d at 1266 (emphasis added).

110. Ritchie W. Taylor, Comment, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?*, 13 BYU J. PUB. L. 163, 168 (1998) (footnote omitted).

trust is self-settled only in respect to the settlor's interest in the trust.[111]

Another important test courts employ when evaluating spendthrift provisions is to examine the trust as a whole to determine whether the beneficiary has authority "to demand distributions from the trust or terminate the trust and acquire trust assets."[112] "If the trust allows the beneficiary to control all of the trust assets by terminating the trust or demanding distribution of the entire trust corpus, a court will allow the beneficiary's creditor to reach the entire trust corpus," thus undermining the purpose of the spendthrift provision.[113] This practice of focusing on the authority provided to the beneficiary makes good sense considering the policy behind permitting spendthrift trusts is to protect clients from "credit drunk" beneficiaries who may use the trust as a transferable interest to secure a debt, pay off loans or credit cards, or expedite the acquisition of new funds.[114] In all but two states, an important aspect of spendthrift policy is that tort victim creditors are precluded from satisfying judgments from support payments or assets contained in a traditional spendthrift trust.[115] Nevertheless, a spendthrift provision does not prevent creditors from accessing funds that have been distributed by the trustee to a beneficiary.[116]

In most jurisdictions, a spendthrift trust may be implemented by including a spendthrift clause or provision in the trust instrument.[117] In fact,

111. Nina T. Dow, *The Hide and Seek of Creditors & Debtors: Examining the Effectiveness of Domestic Asset Protection Trusts for the Massachusetts Settlor*, 27 QUINNIPIAC PROB. L.J. 170, 172 (2014).

112. Miller v. Kresser, 34 So. 3d 172, 175 (Fla. Dist. Ct. App. 2010) (collecting cases).

113. *Id.* (collecting cases).

114. *See* Hirsch, *Spendthrift Trusts*, *supra* note 108, at 8.

115. Taylor, *supra* note 110.

116. 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, 150 (2007). Creditors cannot force a trustee to pay them directly. *Id.* While spendthrift provisions provide formidable protection from most creditors, those who may be able to penetrate the spendthrift provision include spouses, children, dependents, persons who render personal services to the beneficiary, and persons whose services preserve the beneficiary's interest in the trust. *Id.*; *see also* Hirsch, *Spendthrift Trusts*, *supra* note 108, at 76–81.

117. *See, e.g.*, NEV. REV. STAT. ANN. § 166.050 (West 2017) ("No specific language is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the writing (construed in the light of this chapter if necessary) the creator manifests an intention to create such a trust."); TEX. PROP. CODE. ANN. § 112.035(b) (West 2017) ("A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a 'spendthrift trust' is sufficient to restrain voluntary or involuntary alienation of the

spendthrift trusts are authorized under the Uniform Trust Code.[118] Although virtually all states recognize spendthrift provisions, most (including the drafters of the Uniform Trust Code), for the reasons stated above, do not permit a settlor who is also a beneficiary to protect his or her assets or interest from creditors' claims.[119] These self-settled spendthrift trusts, which have been given the misnomer of "asset protection trusts" (because they purportedly protect the settlor from creditors), are discussed in more detail below.

Asset protection trusts are a "booming business for banks, trust companies, and estate planners, both [in the U.S.] and abroad. They [are] a multi-billion-dollar-a-year business."[120] Many offshore promoters attract U.S. citizens with promises of tax avoidance (not evasion) and asset protection through the use of trusts.[121] In this way, they are quite similar to the use of shell corporations, whose abuse has recently been highlighted with the release of the Panama Papers.[122]

interest by a beneficiary to the maximum extent permitted by this subtitle."). The origin of the spendthrift trust is frequently ascribed to *Nichols v. Eaton*, 91 U.S. 716, 725–26, 730 (1875). Although the operative language of the case enabling spendthrift trusts is dictum, state courts followed it in due time and established it as precedent. Hirsch, *Spendthrift Trusts*, *supra* note 108, at 6 n.17. One noted court case is *Broadway National Bank v. Adams*, 133 Mass. 170, 172–73 (1882). *See* Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63, 75 n.48 (2012) (noting *Broadway National Bank* as one of the first state court cases to follow *Nichols*).

118. UNIF. TRUST CODE §§ 502, 505(a)(2) (UNIF. LAW COMM'N 2000) (amended 2010), http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf.

119. *Id.* § 505(a)(2); Ausness, *supra* note 116, at 148; *see also* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a (AM. LAW INST. 2003).

120. Jeffrey A. Morse, *Nevada Self-Settled Spendthrift Trusts or Offshore Trusts?*, NEV. LAW., Mar. 2008, at 16, 16.

121. *Id.*

> [T]here is a very fine line dividing ordinary tax planning from abusive tax shelters. Tax shelters can be divided into three categories: (1) legitimate tax shelters, which are essentially tax-favored investments that are promoted by the legislature and tax laws; (2) gray area shelters, where a tax benefit may be legally recognized though the benefit is generally unintended by Congress; and (3) abusive tax shelters, which involve transactions that are designed to minimize tax payments but clearly circumvent the Internal Revenue Code.

Maria Tihin, Note, *The Trouble with Tax Havens: The Need for New Legislation in Combating the Use of Offshore Trusts in Abusive Tax Shelters*, 41 COLUM. J.L. & SOC. PROBS. 417, 421 (2008).

122. A massive leak of documents from the Panamanian law firm, Mossack Fonseca,

The popularity of asset protection trusts is based, in large part, on the fact that trusts provide beneficiaries with more privacy and autonomy than traditional business entities or estate planning strategies. Trusts have no registration requirements or central registries where trustee, settlor, and beneficiary names must be listed.[123] For example, in some states, a land trust that owns real property enjoys a degree of secrecy and anonymity that is ordinarily absent from the real property marketplace because of tax rolls, property appraisers' records, and corporate filings databases.[124] A search of the public records will often reveal just the trustee's name and possibly a copy of the trust agreement.[125] However, in other states, such an agreement will not work since the names of beneficial owners must be revealed.[126] Nevertheless, even where beneficiaries' identities must be disclosed, the beneficiary can be a limited partnership or another trust, thus adding layers

has blown the door open on the "vast, murky world of shell companies, providing an extraordinary look at how the wealthy and powerful conceal their money." Kevin G. Hall & Marisa Taylor, *Massive Leak Exposes How the Wealthy and Powerful Hide Their Money*, MCCLATCHYDC (Apr. 3, 2016), http://www.mcclatchydc.com/news/nation-world/national/article69994502.html ("Those exposed in the leak include the prime ministers of Iceland and Pakistan, an alleged bagman for Syrian President Bashar Assad, a close pal of Mexican President Enrique Peña Nieto and companies linked to the family of Chinese President Xi Jinping. Add to those the monarchs of Saudi Arabia and Morocco, enough Middle Eastern royalty to fill a palace, honchos in . . . FIFA that controls international soccer and 29 billionaires featured in Forbes Magazine's list of the world's 500 richest people. . . . The documents within the leak . . . expose how secretive offshore companies at times subvert U.S. foreign policy and mock U.S. regulators. When drug traffickers, money launderers or other crooks control companies, they undermine national security, and the trail of dark money flowing through them strips national treasuries . . . of tax revenues. Plenty of criminals are [listed] in the documents, from drug traffickers to . . . fraudsters."). Offshore asset protection trusts can be similarly abused and operated as shell companies.

123. *See Six Reasons You Should Consider a Trust*, FIDELITY INV. (Jan. 30, 2017), https://www.fidelity.com/viewpoints/personal-finance/reasons-to-consider-a-trust.

124. *See* Jeffrey Simser, *Money Laundering and Asset Cloaking Techniques*, 11 J. MONEY LAUNDERING CONTROL 15, 17 (2008).

125. *Id.*

126. *E.g.*, HAW. REV. STAT. ANN. § 558-8(a) (West 2017) ("Any [land] trust created hereunder shall be invalid unless the recorded conveyance document transferring title to the trustee discloses the name and pro rata interest of each beneficiary of such trust."). *But see, e.g.*, *Abusive Trust Tax Evasion Schemes - Special Types of Trusts*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-special-types-of-trusts (last updated Aug. 15, 2016) (discussing Illinois Land Trusts and noting "the ability to trace property transactions becomes limited").

of opacity to the trust's ownership structure.[127] Moreover, "[i]f the land trust['s] trustee is a lawyer, the attorney-client privilege erects an additional barrier" to transparency.[128]

Despite the enhanced privacy of trusts, they require more work at the time of formation than wills.[129] Trusts take more time to administer than wills and involve greater expenses in their early stages.[130] Individuals should establish trusts when they are in a suitable financial position and can afford to place assets into the trust.[131] The formation of a trust passes wealth more privately and less expensively than a will.[132] In contrast to the passing of wealth through a trust, the probate process may take over a year during which assets may not be accessible and can cost up to 5 percent of the estate's value.[133] Trusts have another important benefit: their favorable tax treatment. Whether from foreign or domestic sources, all income received by a trust "is taxable to the trust, to the beneficiary, or to the grantor of the trust."[134] A trust is "allowed to deduct distributions to beneficiaries . . . , with a few modifications," to reduce taxable income.[135] Consequently, trusts can significantly reduce or eliminate income by making distributions to other trusts or entities as beneficiaries.[136] Unsurprisingly, much of the wealth that is or will be transferred to (or inherited by) future generations of Americans will involve the use of trusts.[137] Various trusts are available, but two

127. *See* Simser, *supra* note 124, at 18–19; *see also* Carl J. Pacini et al., *Domestic Asset Tracing: Identifying, Locating and Freezing Stolen and Hidden Assets*, 1 J. FORENSIC ACCT. RES. A42, A56 n.26 (2016).

128. Pacini et al., *supra* note 127; Simser, *supra* note 124.

129. *Wills and Living Trust: The Basics*, BALANCE FIN. FITNESS PROGRAM, https://www.balancepro.net/education/publications/willslivingtrusts.html (last visited Feb. 20, 2017).

130. *Id.*

131. *See Six Reasons You Should Consider a Trust*, *supra* note 123 (discussing the benefits of a trust, especially for those that have substantial assets).

132. *Id.*

133. *Id.*; *see also* DUKEMINIER & SITKOFF, *supra* note 13, at 466 (discussing the costs and public nature of the probate process, which is avoided by using trusts).

134. *Abusive Trust Tax Evasion Schemes - Facts (Section II)*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Abusive-Trust-Tax-Evasion-Schemes-Facts-Section-II (last updated Aug. 15, 2016).

135. *Id.*

136. *Id.*

137. *Abusive Trust Tax Evasion Schemes - Facts (Section I)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-facts-section-i (last updated Aug. 15, 2016).

significant distinctions, not free of controversy, are domestic and offshore trusts.[138] The discussion herein focuses on asset protection trusts since they are commonly subject to abuse.[139] This Article divides the analysis into offshore and domestic asset protection trusts.[140]

A. *Offshore Asset Protection Trusts*

An offshore asset protection trust (OAPT) is a type of spendthrift trust that is established in a nation or jurisdiction outside the United States.[141] Unlike most U.S. jurisdictions, numerous offshore jurisdictions "recognize 'self-settled' spendthrift trusts, that is, trusts . . . designed to protect the settlor" from domestic creditors' claims.[142] "[E]stimates indicate that between $1 and $5 trillion in assets are located in [OAPTs]."[143] Various jurisdictions that permit OAPTs are Anguilla, the Bahamas, Barbados, Belize, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, the Isle of Man, Saint Kitts and Nevis, and the Turks and Caicos Islands.[144]

Numerous legitimate reasons exist to set up an OAPT, including:

1. economic diversification;

2. presentation of a low profile to disguise great wealth;

138. *Id.*

139. *See* ORG. FOR ECON. CO-OPERATION & DEV., BEHIND THE CORPORATE VEIL: USING CORPORATE ENTITIES FOR ILLICIT PURPOSES 26 (2001) ("[T]rusts may be used to perpetrate fraud. For example, settlors attempting to evade taxes may transfer assets into a trust and then falsely claim that they have relinquished control over the assets. To create this facade, a settlor will follow all of the formalities required to create a valid trust, such as setting up an irrevocable trust, appointing a third party trustee, and not naming himself as a beneficiary in the trust deed. However, despite adhering to the formal requirements of the law, settlors can still exercise control through the use of a letter of wishes and a protector. A letter of wishes . . . sets out the settlor's wishes regarding how he desires the trustee to carry out his duties, who the trustee should accept instructions from, and who the beneficiaries should be (which may include the settlor himself). . . . [The protector] may replace the trustee for any reason and at any time.").

140. *See infra* Parts IV.A, IV.B.

141. Ausness, *supra* note 116, at 149.

142. *Id.*

143. Trent Maxwell, Comment, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 BYU L. REV. 477, 482.

144. Ausness, *supra* note 116, at 152; Maxwell, *supra* note 143.

> 3. tax planning, including general estate planning;
>
> 4. avoidance of forced-heirship laws;
>
> 5. planned expatriation;
>
> 6. marital planning (in lieu of or in conjunction with a pre-nuptial or ante-nuptial agreement concerning assets and the potential dispositions of assets if a divorce were to occur in the future);
>
> 7. asset protection from potential future creditors; [and]
>
> 8. privacy and confidentiality . . . .[145]

A downside, however, of OAPTs is that they tend to be perceived as being associated (whether deservedly or not) with unlawful, fraudulent, or unethical activities.[146] Thus, estate planning professionals must be careful to evaluate the motivations of prospective clients seeking to establish OAPTs, and where a representation is undertaken, should obtain written confirmation (as opposed to a mere disclaimer of liability) from their clients regarding the legitimacy of their affairs.[147]

Various factors make it more difficult for U.S. creditors to access funds held in OAPTs. First, foreign jurisdictions are often not required to recognize or give any force or effect to a U.S. state or federal court judgment.[148] Although a domestic creditor may sue a trust's settlor in an offshore jurisdiction, the process is time-consuming, burdensome, and expensive.[149] In most offshore jurisdictions, contingent fees are not

145. Robert M. Pullis et al., *Foreign (Offshore) Asset-Protection Trusts: Considerations for the Entrepreneurial Executive*, 18 ENTREPRENEURIAL EXECUTIVE 29, 30 (2013).

146. *See* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 15 (1994) (noting OAPTs may be used to defeat principles of U.S. trust law).

147. *See id.* at 33, 41–42.

148. Thomas M. Brinker Jr. et al., *Demystifying Offshore Trusts: Capitalizing on a Valuable Asset Protection Tool*, J. INT'L TAX'N, Aug. 2004, at 30, 60.

149. Morse, *supra* note 120, at 19–20 (discussing the increased reporting requirements associated with OAPTs and creditors' ability to seek to enforce judgments abroad); Christopher M. Reimer, *International Trust Domestication: Migrating an Offshore Trust to a U.S. Jurisdiction*, 25 QUINNIPIAC PROB. L.J. 170, 179 (2012) (discussing creditors' reluctance to sue abroad because of unfamiliar and sometimes hostile laws).

permitted and local attorneys require that their fees be paid in advance.[150] Also, these offshore jurisdictions often require a higher standard of proof ("beyond a reasonable doubt") than in U.S. civil cases ("preponderance of the evidence").[151] Moreover, the statute of limitations in many offshore jurisdictions starts to run at the time of asset transfer and usually expires within a year or two.[152] By the time an attorney or forensic accountant locates the offshore assets or trust, the statute of limitations will often have expired.[153] Also, fraudulent transfer or conveyance laws in many jurisdictions frequently mandate that a creditor demonstrate that a grantor or settlor intended to "hinder, delay, or defraud [the] creditor."[154]

In general, fraudulent transfer law has evolved to prohibit two forms of transactions: "actually fraudulent transfers" and "constructively fraudulent transfers." An actually fraudulent transfer is a transfer intended to hinder, delay, or defraud creditors.[155] "The hallmark of a constructively fraudulent conveyance," on the other hand, "is the transfer of property, or the incurrence of an obligation, for less than reasonably equivalent value, at a time when the transferor was insolvent, or became insolvent as a result of the transfer or the incurrence of the obligation."[156] Any transfer deemed fraudulent by a court, whether "actually" or "constructively" fraudulent, may be set aside, thus permitting the creditor to satisfy debts from the assets conveyed.[157] Alternatively, the creditor may obtain a judgment against the transferee in the amount of the transfer.[158]

150. Susanna C. Brennan, Comment, *Changes in Climate: The Movement of Asset Protection Trusts from International to Domestic Shores and Its Effect on Creditors' Rights*, 79 OR. L. REV. 755, 768 (2000).

151. Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP. PROB. & TR. J. 561, 568–69 (2004); Marty-Nelson, *supra* note 146, at 60–61.

152. Marty-Nelson, *supra* note 146, at 61.

153. Eric Henzy, *Offshore and "Other" Shore Asset Protection Trusts*, 32 VAND. J. TRANSNAT'L L. 739, 741 (1999).

154. Brennan, *supra* note 150, at 758–60.

155. *See id.* at 757.

156. Estate of Jackson v. Schron, No. 8:16-cv-22-T17, 2016 WL 4718145, at *6 (M.D. Fla. Sept. 8, 2016), *appeal filed*, No. 16-16462 (11th Cir. Oct. 11, 2016).

157. *Cf.* Brennan, *supra* note 150, at 758 (explaining that the Uniform Fraudulent Conveyance Act (UFCA) voids actually or constructively fraudulent conveyances, and that creditors can reach a debtor's hidden assets).

158. *See* Amy Lynn Waganfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT'L L. 831, 848–49 (1999). The majority of states have enacted into law some

With respect to actually fraudulent transfers, the Uniform Fraudulent Transfer Act (UFTA) lists numerous red flags of fraud that may be utilized to demonstrate the settlor's actual intent.[159] At least one court utilized a red flags-of-fraud approach to prevent a settlor of an OAPT from purloining assets from his spouse in a divorce case. In *Breitenstine v. Breitenstine*, the husband and wife were married in 1979 and later had two children.[160] The husband's parents owned stock in Breitenstine Landfill, Inc. and conveyed 21 percent of the outstanding stock to him.[161] In 1989, Breitenstine Landfill, Inc. sold for $30 million, and during the first half of the 1990s, the husband received a total of about $8 million in gifts from his parents.[162] In 1995, the husband created a Bahamas OAPT named the Breitenstine Family Trust.[163] In 1996, the wife filed for divorce.[164] During divorce proceedings, the husband continued to make transfers of property to the trust.[165] The trial court awarded the wife one half of the marital estate and found, "The [family] Trust was created for the sole purpose of defrauding the defendant[–husband]'s creditors and potential creditors, including the plaintiff, Nancy L. Breitenstine."[166]

On appeal, the Supreme Court of Wyoming stated that the important factor is the husband's intent when transferring assets to the Bahamas OAPT.[167] This intent can be inferred through various red flags of fraud, including:

version of the Uniform Fraudulent Transfer Act (UFTA), but two states still follow a version of the UFCA. CHARLES J. TABB & RALPH BRUBAKER, BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE 484 (4th ed. 2015) ("As of 2014, only two states (New York and Maryland) still have the UFCA on the books."); *see also* Richard W. Nenno, *Planning with Domestic Asset-Protection Trusts: Part I*, 40 REAL. PROP. PROB. & TR. J. 263, 276 (2005). The UFTA protects not only those who are creditors at the time of asset transfer but also extends protection to future creditors. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035, 1045 (1999–2000).

159. UNIF. FRAUDULENT TRANSFER ACT § 4(b) (UNIF. LAW COMM'N 1984) (amended 2014), http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014_AUVTA_Final%20Act_2016mar8.pdf.

160. Breitenstine v. Breitenstine, 62 P.3d 587, 589 (Wyo. 2003).

161. *Id.*

162. *Id.* at 589–90.

163. *Id.* at 590.

164. *Id.*

165. *Id.*

166. *Id.* at 592.

167. *Id.*

> lack or inadequacy of consideration, close familial relationship or friendship among the parties, retention of possession or benefit of the property transferred, the financial condition of the transferor both before and after the transfer, the chronology of events surrounding the transfer, the transfer takes place during the pendency or threat of litigations, and hurried or secret transactions.[168]

The Supreme Court of Wyoming upheld the trial court's finding that the husband's transfers of property to the OAPT amounted to fraudulent conveyances.[169]

One method or technique sometimes employed to circumvent the "fraudulent conveyance" issue is to place an international limited liability company (ILLC) (often based in Nevis) inside the OAPT so that the trust owns 100 percent of the ILLC.[170] Since the trustee can serve as managing member of the ILLC, fraudulent transfer is not an issue.[171]

OAPTs also possess a number of features that permit the settlor to exercise some control over the trust assets.[172] Protective features of an OAPT include a trust protector clause, an anti-duress clause, a flee or flight clause, and a non-binding letter of intent or wishes.[173] A trust protector is one appointed by the grantor to act as an advisor and who is responsible for making sure the trustee implements the grantor's wishes.[174] Often the trust protector is given the power to remove the trustee, change the situs of the trust, or change the beneficiaries.[175] An anti-duress clause prohibits the trustee from complying with any order imposed upon the settlor or trustee.[176] The trust agreement identifies the events that trigger the clause and, as a result, terminate the settlor's powers over the trust.[177] A flee or flight clause authorizes the trustee to transfer the trust to another jurisdiction upon the

168. *Id.* at 593 (collecting cases).

169. *Id.* at 594.

170. *Asset Protection Trust*, OFFSHORE CO., http://www.offshorecompany.com/trusts/asset-protection-trust (last visited Feb. 20, 2017).

171. *Id.*

172. Ausness, *supra* note 116, at 155; *see also* James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 146–50 (1997).

173. Ausness, *supra* note 116, at 155.

174. *Id.*

175. *Id.*

176. Lorenzetti, *supra* note 172, at 146.

177. Brennan, *supra* note 150, at 767.

occurrence of certain events,[178] such as an inquiry from a foreign government or Interpol. A letter of intent or wishes is written by the settlor and states his or her wishes as to the disposition of trust assets.[179]

At the time this Article was written, the formation of an OAPT is quite expensive with initial start-up costs ranging from $1,000 to $8,500 and annual maintenance fees ranging from $250 to $5,500.[180] Also, a stigma is often associated with offshore accounts and trusts.[181] In the last few years, the U.S. government has enacted laws that have raised the reporting requirements for offshore vehicles (e.g., offshore trusts) and have stiffened civil and criminal penalties for noncompliance.[182] As an example, George Briguet, a naturalized U.S. citizen, filed false income tax returns for tax years 2001 through 2010, in which he failed to report his foreign financial accounts, failed to report any income earned thereon, and failed to pay taxes on the foreign income.[183] Briguet faces a statutory maximum sentence of three years in prison and has agreed to pay the IRS restitution in the amount of $169,935.[184]

Another political disadvantage of OAPTs is the enactment of the Foreign Account Tax Compliance Act (FATCA).[185] It raises the possibility

178. Taylor, *supra* note 110, at 174.

179. Ausness, *supra* note 116, at 156.

180. *Protect and Secure What's Yours*, HARBOR FIN. SERVICES, http://www.hfsoffshore.com/Order01.aspx?kw=offshoreassetprotectiontrust&mm_campaign (last visited Feb. 20, 2017); *see also* Maxwell, *supra* note 143, at 485 ("OAPTs are very expensive, with initial start-up costs around $18,500 and maintenance costs running to several thousand dollars each year.").

181. In 2012, some opponents of Republican presidential nominee, Mitt Romney, accused him of hiding activity in offshore accounts. Maxwell, *supra* note 143, at 485 & n.52.

182. Reimer, *supra* note 149, at 183.

183. *New York Man Residing in the Hamptons Pleads Guilty to Obstructing Internal Revenue Service for Concealing Swiss Bank Accounts*, U.S. DOJ (Feb. 18, 2015), https://www.justice.gov/opa/pr/new-york-man-residing-hamptons-pleads-guilty-obstructing-internal-revenue-service-concealing.

184. *Id.*

185. Hiring Incentives to Restore Employment Act (Foreign Account Tax Compliance Act (FATCA)), Pub. L. No. 111-147, § 501(a), 124 Stat. 71, 97–105 (2010) (codified at I.R.C. §§ 1471–1474 (2012)). FATCA is a U.S. law designed to prevent tax evasion by U.S. citizens using offshore banking facilities. The law requires certain U.S. taxpayers holding foreign financial accounts with an aggregate value greater than $50,000 to report certain information about those assets on Form 8938 that must be attached to the taxpayer's annual return. *Summary of Key FATCA Provisions*, IRS,

that an OAPT may be deemed a "foreign financial institution," with the result that remittances to the OAPT of "fixed or determinable, annual or periodic income from a U.S. source may be subjected to federal withholding tax."[186] FATCA materially raises the amount of reporting that may be required by those who are beneficiaries of foreign trusts and expands the scope of those who might be considered to have a reportable interest without providing clear guidelines.[187] "FATCA requires any U.S. person considered an owner of a foreign trust under grantor trust rules to comply with new reporting requirements."[188] Substantial penalties may be imposed for failure to meet reporting requirements.[189]

Offshore promoters advertise or communicate to prospective clients that they will possess absolute asset protection and secrecy regardless of U.S. laws and regulations.[190] In the landlocked European nation of Lichtenstein, prospective clients are informed that asset transfers to OAPTs by non-Lichtenstein citizens are not subject to foreign judgments and laws.[191] Settlors of OAPTs, however, may be and have been ordered by a U.S. court to consent to the government's acquisition of legal and financial records in foreign jurisdictions.

In *United States v. Spearbeck*, the IRS was involved in an investigation of the tax liabilities of Mari Lyn Spearbeck during which the IRS learned that her husband, Tim Spearbeck, was involved in an offshore tax avoidance scheme.[192] The Spearbecks received well over $500,000, which was deposited

https://www.irs.gov/businesses/corporations/summary-of-key-fatca-provisions (last updated Nov. 7, 2016). FATCA also requires "foreign financial institutions" to report directly to the IRS certain information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. *Id.* Foreign financial institutions had to enter into special agreements with the IRS by June 30, 2013. *Id.* If a foreign financial institution did not enter into an IRS agreement all relevant U.S.-sourced payments, such as dividends and interest paid by U.S. corporations, are subject to a 30 percent withholding tax. *Id.*

186. Reimer, *supra* note 149, at 174 (citing I.R.C. § 1471(d)(5)). A strong argument exists that trusts—particularly those that include a spendthrift clause, such as OAPTs—should not be treated as foreign financial institutions because they are not entities engaged in business through associates who have transferable interests.

187. *Id.*

188. *Id.*; *see also* I.R.C §§ 6048(b), 6677(a)–(b).

189. I.R.C. § 6677(a)–(b).

190. Morse, *supra* note 120, at 18.

191. *Id.*

192. United States v. Spearbeck, No. 96-538Z, 1996 WL 529343, at *1 (W.D. Wash. Jun. 11, 1996).

into accounts in the Bahamas.[193] A federal district court enforced an IRS summons by ordering the Spearbecks to sign waivers and releases to obtain financial records in foreign jurisdictions.[194] Although the foreign jurisdictions prohibited financial institutions from releasing information sought by the IRS, the defendants were forced to waive such protections or face contempt and imprisonment.[195]

In general, offshore trust settlors in the United States subject themselves to the risk of being held in contempt by a U.S. state or federal court for failure to repatriate offshore assets.[196] Offshore trust settlors, however, have not been cited for contempt in every case for failure to repatriate assets from OAPTs.[197] Criminals and terrorists have also seized upon OAPTs as a method to further their nefarious aims.[198]

OAPTs can be utilized in four ways by those bent on committing financial crimes: (1) hiding legitimate assets for the purpose of evading taxes;[199] (2) integrating illicitly obtained funds into an economy as "clean assets" (money laundering);[200] (3) moving legitimately obtained funds to be used for heinous purposes (e.g., terrorism) into an economy as clean assets

193. *Id.*

194. *See id.* at *3.

195. *See id.*

196. In an appellate court case, the Ninth Circuit Court of Appeals opined:

> [W]e are not certain that the Andersons' inability to comply in this case would be a defense to a finding of contempt. It is readily apparent that the Andersons' inability to comply with the district court's repatriation order is the intended result of their own conduct—their inability to comply and the foreign trustee's refusal to comply appears to be the precise goal of the Andersons' trust.

FTC v. Affordable Media, LLC, 179 F.3d 1228, 1241 (9th Cir. 1999); *see also In re* Lawrence, 238 B.R. 498, 500–01 (Bankr. S.D. Fla. 1999).

197. In *United States v. Grant*, a federal district court entered judgment against Raymond and Arline Grant to pay over $36 million in income taxes, penalties, and interest. No. 00-08986-CIV, 2008 WL 2894826, at *1 (S.D. Ga. May 27, 2008). After judgment, the federal government ordered the couple to repatriate funds held in OAPTs in the Isle of Jersey and Bermuda. *Id.* at *1–2. Despite repeated significant efforts, the overseas trustees refused to repatriate the funds. *Id.* The federal district court did not hold the Grants in contempt. *Id.* at *2.

198. Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477, 491 (2014).

199. Harvey M. Silets & Michael C. Drew, *Offshore Asset Protection Trusts: Tax Planning or Tax Fraud?*, 5 J. MONEY LAUNDERING CONTROL 9, 9–10 (2001).

200. *Id.* at 12.

(reverse money laundering);[201] and (4) hiding legitimate assets from creditors with bona fide claims and spouses in divorce proceedings.[202] Control or beneficial ownership of both legitimate and illegitimate assets can be returned to the owner through multiple trusts.[203] The linchpins to illegitimate uses or abuses of OAPTs are layering and misdirection.[204]

The cleverest schemes insulate the identity of the wrongdoer through many layers of trusts and other legal entities (e.g., limited liability companies (LLCs), limited liability partnerships (LLPs), and international business companies (IBCs)). They also incorporate misdirection by creating the appearance that the wrongdoer has no control of OAPTs and their sole administrator is an offshore jurisdiction.[205]

One example of how a tax evader layered OAPTs is *United States v. Scott*.[206] An organization named International Business Associates (IBA) devised a scheme involving transfers to and among four successive trusts.[207] "Trust I was a . . . 'domestic' trust established as a shell with an apparently fictitious contribution of $100 by some entity other than the purchaser" (who bought the trust scheme from IBA).[208] The nominal grantor of Trust I was World Venture, Cache Properties, or some other IBA trust.[209] The nominal beneficiary was the owner of the 100 "capital units," apparently the nominal grantor.[210] "Trust I was required to distribute all taxable income each year to the capital unit owner . . . ."[211] "Trust II, which would almost immediately

201. Although tax evasion and money laundering are separate and distinct offenses, there is a distinct similarity between the methods used for money laundering and tax evasion. Bryan S. Arce, Note, *Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded U.S Taxes*, 34 BROOK. J. INT'L. L. 465, 471 (2009). Both require deception (or an act of fraud) and concealment, and when assets from illegal activity are shielded from tax officials, a direct overlap occurs between the two. *Id.* "Once money evades taxes, it [must] be laundered before it can be used again." *Id.* "[A]lmost all laundered money has evaded taxes and is therefore unlawful, irrespective of its legal or illegal origin." *Id.*

202. Silets & Drew, *supra* note 199, at 13.

203. *Id.* at 14.

204. *Id.* at 9.

205. *Id.*

206. United States v. Scott, 37 F.3d 1564 (10th Cir. 1994).

207. *Id.* at 1570.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

own all Trust I's capital units," was a Belizean trust, naming as a trustee a resident of Belize.[212] Trust II required the distribution of all income and was required to file a U.S. tax return.[213] Trust II was a conduit trust that passed its income to Trust III, an alleged foreign trust that could distribute and accumulate income.[214] Trust IV was a passive foreign trust until the purchaser of the trust scheme needed funds.[215]

Purchasers of the IBA trust structure had three means to gain access to funds.[216] First, Trust III could give them direct gifts up to $10,000 per year.[217] Also, purchasers received debit cards that could draw directly from overseas trust bank accounts or exploit a "tax free" loan scheme.[218] Trust III would loan Trust IV the requisite sum and Trust IV would provide Trust III a demand note made out to "bearer."[219] Trust III would gift the demand note to the purchaser as an intangible gift from a foreign entity.[220] The purchaser could collect on the note from Trust IV.[221] Like most OAPT tax evasion schemes, power rested with the purchaser while the latter remained unnamed in all documentation.

Purchasers were told by IBA that they could transfer buildings (e.g., homes), equipment, and even businesses to Trust I; set the assets up on a schedule of full market value; and then depreciate the assets for tax purposes.[222] According to the Tenth Circuit Court of Appeals, the true settlor of these trusts is the purchaser with the fraud in the transfer arrangements apparent.[223] "[T]he true grantor of these trusts in substance is the purchaser, who is also the trustee, and also the beneficiary."[224] The appellate court noted that "income tax consequences . . . depend upon the substance of the situation, not the form."[225] The scheme promoters (owners

212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 1571.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 1571–72.
223. *Id.* at 1572.
224. *Id.*
225. *Id.* (citations omitted).

of IBA) were convicted of conspiracy to defraud the United States (under 18 U.S.C. § 371) and sentenced to prison terms.[226]

Many such illegal OAPT tax evasion schemes are pushed by a network of promoters and sub-promoters who prepare trust documents, tax returns, and permit taxpayers to utilize offshore bank accounts.[227] Such promoters charge from $5,000 to $70,000 for these arrangements.[228] The following case illustrates the activities of one such promoter.

In *United States v. Kukhahn*, Sharon Kukhahn "promote[d] tax-fraud schemes using the business names IMF Decoder, Paralegal Research Advocates, and Advocates for Justice, Liberty, and Freedom."[229] Using promotional materials, seminars, and various websites, the defendant sold a multi-phase program that falsely advised customers: that they were not required to pay federal income taxes unless they were living in a U.S. territory; that U.S. residents can only be taxed via a federal excise tax if they are involved in an excise taxable enterprise; and that the IRS misidentified U.S. citizens so they could be charged excise taxes.[230] For a fee ranging from $1,750 to $3,195, Kukhahn helped clients purportedly obtain internal IRS documents under the Freedom of Information Act, claimed to "decode" them, and then mailed rebuttal packages that would ostensibly remove clients from the tax system.[231] The federal government identified 315 customers from 43 different states who participated in Kukhahn's scheme, collectively owing the IRS $4.9 million for failure to file income tax returns.[232] Kukhahn was sentenced to seven years in prison for four counts of tax evasion, one count of defrauding the IRS, and one count of corrupt interference with the administration of the internal revenue laws.[233]

OAPTs can also be abused illegally for the purpose of money laundering.[234] Money launderers are able to avail themselves of the layering

226. *Id.* at 1569, 1574; *see* 18 U.S.C. § 371 (2012).

227. Morse, *supra* note 120.

228. *See* Debra Baker, *Island Castaway*, ABA J., Oct. 1998, at 54, 59 (discussing attorneys establishing fees of at least $18,500 plus continuing fees); *supra* note 180 and accompanying text.

229. United States v. Kukhahn, No. C08-5212BHS, 2008 WL 3928028, at *1 (W.D. Wash. Aug. 21, 2008), *aff'd*, 488 F. App'x 232 (9th Cir. 2012).

230. *Id.* at *1–2.

231. *Id.* at *2.

232. *Id.* at *4.

233. *Kukhahn*, 488 F. App'x at 232, 233.

234. Money laundering occurs in three steps: placement, layering, and integration.

and misdirection features of OAPTs.[235] A case illustrative of these features is *United States v. Brennan*.[236] In this case, the Second Circuit Court of Appeals upheld Robert Brennan's conviction for bankruptcy fraud, based in part on money laundering using OAPTs.[237] The defendant owned and operated First Jersey Securities, Inc. (FSJ), a brokerage trading in penny stocks.[238] Brennan and FSJ were found guilty of securities fraud and ordered to pay or disgorge $75 million to 500,000 customers.[239] Subsequently, FSJ and Brennan filed for bankruptcy.[240] Before the securities fraud litigation, defendant Brennan created two OAPTs.[241] Defendant agreed to a bankruptcy court order freezing the OAPTs' assets.[242] Near the end of his trial for securities fraud, Brennan created a third OAPT known as the Cardinal Trust.[243] It was funded by $4 million in bearer bonds.[244] Brennan did not disclose Cardinal's assets in the bankruptcy action.[245]

Cardinal Trust's assets grew to $22 million by mid-1997.[246] Brennan used $12 million in assets from the three OAPTs to buy and refurbish the Palm Beach Princess—a gambling boat.[247] The three OAPTs "held a $12 million mortgage on the boat."[248] The Cardinal Trust's situs was moved twice (via a flee or flight clause) to avoid detection.[249] Brennan was convicted of money laundering and other offenses and sentenced to over nine years in

History of Anti-Money Laundering Laws, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/history-anti-money-laundering-laws (last visited Feb. 21, 2017).

Although many cases tend to evince that OAPTs are used in the placement and layering stages, it appears that they present opportunities for laundering in the third or integration phase as well. Silets & Drew, *supra* note 199, at 12 (citing United States v. Arditti, 955 F.2d 331, 333–36 (5th Cir. 1992)).

235. Silets & Drew, *supra* note 199, at 12.
236. United States v. Brennan, 395 F.3d 59 (2d Cir. 2005).
237. *Id.* at 61–62.
238. *Id.* at 62.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* (citing United States v. Brennan, 326 F.3d 176, 180–81 (3d Cir. 2003)).
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 63.
249. *Id.*

prison.[250]

A distinction must be made, however, between illegally obtained funds (e.g., from drug dealing and human trafficking) that are laundered, and legally obtained funds that are laundered for illegal purposes (e.g., terrorist acts). The latter are even harder to detect than the former.[251] For example, terrorist financing that employs money laundering techniques often originates with legitimate organizations (e.g., charities and non-profits) and travels partially through customary channels.[252] "It is often difficult . . . to [ascertain] whether funds [or assets] are destined for a terrorist organization . . . ."[253]

Some terrorists take advantage of the "principle of *zakat*, or charity—one of the five pillars of Islam."[254]

> "The Qur'an sets out five lawful recipients of *zakat*. Of particular interest are those described as *sabil Allah*, which refers to persons engaging in deeds for the common good of a particular Muslim society. Terrorist groups have construed *sabil Allah* to encompass violence against non-Muslim Western targets."[255] The U.N. Security Council has implicated Islamic trusts in a variety of terrorist acts, including the 2008 bombings in India and arms dealing in Afghanistan.[256]

These various situations and cases illustrate that the goal is to transfer assets through enough layers of OAPTs (and other entities) that a banker, lawyer, forensic accountant, or bankruptcy trustee may not suspect or find the criminal or non-criminal sources of assets.[257] Individuals and entities can

250. *Id.* at 61. A federal district court denied Brennan's motion for habeas corpus relief and, therefore, upheld the nine-year prison sentence. Brennan v. United States, No. 04-4719 (GEB), 2007 WL 1381752, at *6 (D.N.J. May 9, 2007), *aff'd*, 322 F. App'x 246 (3d. Cir. 2009).

251. *See* Baradaran et al., *supra* note 198, at 488–91.

252. Daryl Shetterly, Comment, *Starving the Terrorists of Funding: How the United States Treasury Is Fighting the War on Terror*, 18 REGENT U. L. REV. 327, 329 (2005–2006).

253. *Id.*

254. Baradaran et al., *supra* note 198, at 490.

255. Ilias Bantekas, Current Developments, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 322 (2003).

256. Baradaran et al., *supra* note 198; *see also Nature of the Threat of Terrorist Abuse and Exploitation of Non-Profit Organizations (NPOs)*, U.S. EMBASSY, KABUL, AFG. 1 (Feb. 10, 2009), http://kabul.usembassy.gov/media/doc0.pdf.

257. Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money*

control their assets without being named as a beneficiary or trustee.[258] The privacy and anonymity of OAPTs make them a superb means of laundering assets and subject these trusts to illegal and unethical abuse.

Illegal OAPT schemes usually cannot be accomplished by one person.[259] Such schemes involve a ring of people, often including professionals such as lawyers, accountants, and bankers (collectively known as "gatekeepers").[260] Such schemes often generate a substantial amount of paper and electronic records.[261] The more people involved and the larger the quantity of records, the higher the probability the perpetrators will get caught.[262]

B. *Domestic Asset Protection Trusts*

The success of offshore jurisdictions in attracting trust business has led to 16 states passing some version of domestic asset protection trust (DAPT) legislation.[263] Each of the 16 states has a somewhat different DAPT statute and requirements to establish a valid DAPT.[264]

Laundering and Related Litigation Traps for the Unwary in International Trust Matters, 32 VAND. J. TRANSNAT'L L. 1023, 1027 (1999).

258. Lorenzetti, *supra* note 172, at 149–50.

259. Silets & Drew, *supra* note 199, at 12.

260. *See, e.g.*, United States v. Scott, 37 F.3d 1564, 1569 (10th Cir. 1994).

261. *See* Silets & Drew, *supra* note 199, at 12.

262. *See id.*

263. The 16 states (along with their respective statute numbers) that have enacted a domestic asset protection law are: Alaska (ALASKA STAT. ANN. §§ 13.36.310, 34.40.110 (West 2017)), Delaware (DEL. CODE ANN. tit. 12, §§ 3570–3576 (West 2017)), Hawaii (HAW. REV. STAT. ANN. ch. 554G (West 2017)), Mississippi (MISS. CODE ANN. §§ 91-9-701 to 91-9-723 (West 2017)), Missouri (MO. ANN. STAT. § 456.5-505 (West 2017)), Nevada (NEV. REV. STAT. ANN. §§ 166.010–166.170 (West 2017)), New Hampshire (N.H. REV. STAT. ANN. ch. 564-D (West 2017)), Ohio (OHIO REV. CODE ANN. ch. 5816 (West 2017)), Oklahoma (OKLA. STAT. ANN. tit. 31, §§ 10–18 (West 2017)), Rhode Island (18 R.I. GEN. LAWS ANN. ch. 9.2 (West 2017)), South Dakota (S.D. CODIFIED LAWS ch. 55-16 (2017)), Tennessee (TENN. CODE ANN. §§ 35-16-101 to 35-16-112 (West 2017)), Utah (UTAH CODE ANN. § 25-6-14 (West 2017)), Virginia (VA. CODE ANN. §§ 64.2-745.1, 64.2-745.2 (West 2017)), West Virginia (W. VA. CODE ANN. §§ 44D-5-503a to 44D-5-503c (West 2017)), and Wyoming (WYO. STAT. ANN. §§ 4-10-501 to 4-10-523 (West 2017)). *See* ACTEC, COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES 1–35 (David G. Shaftel ed., 2014), http://shaftellaw.com/docs/article-35.pdf.

264. For example, a Nevada DAPT requires that: (1) the grantor or settlor create a written irrevocable trust, NEV. REV. STAT. ANN. § 166.040; (2) at least one trustee must be a Nevada resident and domiciliary, or trust company or bank with a Nevada physical office, *id.* § 166.015(2); (3) the Nevada trustee must maintain records and prepare income

Conceptually and structurally, DAPTs are similar to OAPTs. A DAPT permits a grantor to create a self-settled spendthrift trust that provides a degree of asset protection against the settlor's creditors.[265] In 15 states, DAPTs are irrevocable trusts.[266] Oklahoma, however, allows asset protection trusts to be made revocable, in whole or in part, and precludes creditors from using the court system to force grantors to exercise any retained right of revocation.[267] "By exercising a reserved right of revocation, [completely] personal to themselves, settlors can recover [assets] at will, but creditors cannot touch it."[268]

The effectiveness of DAPTs as an asset protection device remains, at best, uncertain. It is unclear whether a DAPT would be effective in protecting assets from creditors when the settlor–beneficiary of the trust is domiciled in a state that forbids self-settled trusts.[269] It is primarily settlors who are residents of a state that forbids DAPTs as a matter of public policy and who create a DAPT outside their home state in one of the 16 states that

tax returns for the trust, *id.* § 166.015; (4) some of the administration of the trust must take place in Nevada, *id.*; (5) the trust can only allow discretionary distributions to the grantor or settlor, *id.* § 166.040; and (6) funding the trust cannot be for the purposes of hindering, delaying, or defrauding known creditors, *id.*

265. Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2685 (2006) [hereinafter Hirsch, *Fear Not*].

266. *See supra* notes 263–64 and accompanying text.

267. Hirsch, *Fear Not*, *supra* note 265, at 2687.

268. *Id.*; *see* OKLA. STAT. ANN. tit. 31, §§ 12, 13, 16.

269. 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, 1466 (2015). We note, however, that the Nevada DAPT may be an exception to this lack of certainty. Robert Pagliarini, *How to Use a Nevada Asset Protection Trust to Safegaurd Your Assets*, FORBES (May 21, 2014), http://www.forbes.com/sites/robertpagliarini/2014/05/21/how-to-use-a-nevada-asset-protection-trust-to-protect-your-assets/#76e397384696. Nevada DAPTs are irrevocable so the settlor or grantor cannot change or modify them. *Id.* Chapter 166 of the Nevada Revised Statutes Annotated (NRSA) clearly indicates that after a two-year seasoning period (statute of limitations) the DAPT cannot be pierced or busted. NEV. REV. STAT. ANN. § 166.170; Pagliarini, *supra*. A person (e.g., pre-existing creditor such as a fraud victim) may not bring a lawsuit to challenge asset transfers to the DAPT after the later of two years from the date of transfer or six months after the person discovers or reasonably should have discovered the transfer. NEV. REV. STAT. ANN. §166.170(1); Pagliarini, *supra*. "[A] creditor is deemed to have discovered a transfer at the time a public record is made of the transfer . . . ." Pagliarini, *supra*; *accord* NEV. REV. STAT. ANN. § 166.170(2). Nevada also has no exception creditors in its DAPT statute (e.g., child support). NEV. REV. STAT. ANN. § 166.170. In nearly 15 years (up to 2014), there is not a reported case of a DAPT being pierced after the seasoning period. Pagliarini, *supra*.

permit DAPTs who should be concerned about whether their home state may enforce a judgment against their DAPT.[270]

One legal hurdle for DAPTs is the Full Faith and Credit Clause of the U.S. Constitution (Article IV, Section One).[271] Uncertainty may arise when a creditor files a lawsuit against a debtor in a non-DAPT state and seeks enforcement of the judgment against the debtor's assets held in the DAPT, as the non-DAPT state's laws do not explicitly protect the assets held in the DAPT.[272] However, as the number of states that permit DAPTs increases, the likelihood declines that a court in a non-DAPT state will rule that a DAPT violates public policy.[273]

A second potential legal stumbling block is the contention that DAPTs violate the Contracts Clause (Article I, Section Ten, Clause One) of the U.S. Constitution.[274] A state's laws transgress the clause if they retroactively impair contract rights.[275] Creditors may argue that permitting settlors to

270. Cain, *supra* note 269.

271. This clause provides that "Full Faith and Credit shall be given in each State to the . . . judicial proceedings of every other State." U.S. CONST. art. IV, § 1. Full faith and credit does not mean that State A's court is required to enforce State B's judgment to the judgment's full extent or to enforce the judgment in the same manner that State B's court would enforce it. Cain, *supra* note 269, at 1487. In *Baker v. General Motors Corp*., the U.S. Supreme Court held, "Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998).

272. *See* Cain, *supra* note 269.

273. Danforth, *supra* note 98, at 325.

274. Timothy Lee, Note, *Alaska on the Asset Protection Trust Map: Not Far Enough for a Regulatory Advantage, but Too Far for Convenience?*, 29 ALASKA L. REV. 149, 171 (2012).

275. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 57 (3d ed. 2008).

> The contract clause is not an absolute prohibition on the impairment of contract obligations. . . . [T]he severity of the impairment determines the strictness of the inquiry into the nature and purpose of state legislation. In other words, the greater the impairment, the less deference to the legislative judgment. . . . *Allied* [*Structural Steel Co. v. Spannaus*] implicitly limited the permissible ends of legislation by requiring that the challenged legislation "deal with a broad, generalized economic or social problem. . . ." The requirement that the legislation deal with a broad societal interest therefore limits a state's police power to interfere with contractual relations.

Janet Irene Levine, *The Contract Clause: A Constitutional Basis for Invalidating State Legislation*, 12 LOY. L.A. L. REV. 927, 944, 947–48 (1979) (citing Allied Structural Steel

protect their assets behind the shield of a DAPT impairs their contractual rights to reach the assets.[276] However, there is a counterargument that "the contractual rights of existing creditors have not been impaired; rather, merely the remedies available to [such] creditors to enforce [their] rights have been affected."[277]

Another matter of concern for DAPTs arises during bankruptcy proceedings. Federal legislators have responded to the growing number of states enabling DAPTs by legislating a specific provision in the federal bankruptcy code targeting such trusts.[278] Enacted in 2005, § 548(e)(1)(a) of the Bankruptcy Code contains a 10-year statute of limitations for any fraudulent transfer made to a self-settled trust or similar device in a bankruptcy situation.[279] This section requires actual intent to hinder, delay, or defraud a creditor to be operative.[280]

Moreover, DAPT law in the U.S. is very unsettled (due to a paucity of case law), and new developments could alter the legal landscape.[281] The first federal bankruptcy court decision to consider the validity of a DAPT occurred in *Waldron v. Huber* (*In Re Huber*).[282] In this case, Donald Huber (the debtor) was "involved in real estate development and management in the Puget Sound area for over 40 years."[283] "[H]e founded United Western Development, Inc. (UWD) with its principal place of business . . . in Tacoma, Washington."[284] In 2007, many of Huber's real estate projects started to unwind because of lack of capital and the deterioration of the real estate markets.[285] In September 2008, Huber retained attorney Harold Snow and established an Alaska DAPT called the Donald Huber Family Trust.[286] Huber transferred $10,000 and his ownership or membership interest in over

Co. v. Spannaus, 438 U.S. 234, 241–42 (1978)).

276. Maxwell, *supra* note 143, at 494–95.

277. *Id.* at 477.

278. Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 VAND. L. REV. 1741, 1747 (2014).

279. *Id.* at 1756–57 (citing 11 U.S.C. § 548(e)(1)(A) (2012)).

280. 11 U.S.C. § 548(e)(1)(D).

281. Alexander B. Shiffman, Note, *The Domestic Asset Protection Trust and Its Federalism Implications*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 853, 868 (2015).

282. *See* Waldron v. Huber (*In re* Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013).

283. *Id.* at 802.

284. *Id.*

285. *Id.* at 803–04.

286. *Id.* at 805.

25 entities into DGH, LLC, an Alaska limited liability company that was also established in September 2008.[287] "UWD's shares were transferred directly into the Trust . . . ."[288] Other assets, such as Huber's residence, "were conveyed to an Alaska corporation . . . and then into DGH, LLC."[289] DGH, LLC was owned 99 percent by the trust.[290] Huber was the settlor, while his son, Alaska USA Trust Company, and one other person were the trustees.[291] Trust beneficiaries were Huber, his children, stepchildren, and grandchildren.[292] The only asset in Alaska was a $10,000 certificate of deposit.[293] The total amount paid out of the trust from February 10, 2011, (the date on which Huber filed for chapter 11 bankruptcy) through July 30, 2012, was $406,837.[294]

The Alaska DAPT instrument stated that the trust was governed by the Alaska DAPT statute; however, the Western District of Washington Bankruptcy Court ruled that Washington state law prevailed.[295] Washington does not recognize self-settled spendthrift trusts.[296] The court ruled that Huber's transfers of assets into the trust were fraudulent and void, thus exposing its assets to his creditors.[297] Until more court decisions are handed down, it is wise for individuals and lawyers to create DAPTs with a sense of skepticism as to their actual efficacy when challenged.[298]

In any event, DAPTs can also be employed in almost the same manner as OAPTs to commit various financial crimes such as: (1) hiding legitimate assets from creditors with valid claims and spouses in divorce proceedings;

287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 806.
295. *Id.* at 809.
296. *Id.*
297. *Id.* at 814.
298. The issues with regard to DAPTs heretofore have arisen in the context of bankruptcy cases, which call into question a variety of collateral issues. As in *In re Huber*, an Alaska federal bankruptcy court struck down an Alaska DAPT in *Battley v. Mortensen (In re Mortensen)*, Nos. A09-00565-DMD, A09-90036-DMD, 2011 WL 5025249, at *8 (D. Alaska May 26, 2011). In both *In re Huber* and *In re Mortensen*, the facts indicate both debtors created DAPTs to defraud current or future creditors. Shiffman, *supra* note 281.

(2) concealing legitimate assets and income from tax authorities to evade taxation; (3) integrating illegally acquired funds into an economy as clean assets (money laundering); and (4) moving legally and illegally obtained funds to be used for terrorism. Heretofore, legal authorities—especially the IRS—and the courts have paid less attention to DAPTs than OAPTs.[299]

The benefit of less attention may provide an advantage for those looking to reduce the likelihood of an IRS audit. "The IRS, through its National Compliance Strategy, Fiduciary, and Special Projects Task Force has made tracking and examining [OAPTs] a priority. The IRS has taken a stance on these [devices], and it is clear [that] parties to an [OAPT] are vulnerable . . . ."[300]

Layering and misdirection can be utilized in DAPTs almost as much as they can in OAPTs, especially if a family limited partnership (FLP) or an LLC (onshore or offshore) is used in conjunction with the DAPT. The whole idea is that the appearance is created that the fraudster has no control or ownership of the DAPT assets or income and that discretion and control belongs to the trustee. In reality, beneficial ownership and control resides with the fraudster–settlor.

V. RED FLAGS ASSOCIATED WITH ASSET PROTECTION TRUSTS

Forensic accountants, certified public accountants, lawyers, bankers, investigators, and courts should be alert for signs which could indicate that asset protection trusts and their associated transactions could be involved in tax evasion, money laundering, and other fraudulent schemes. Investigators, forensic accountants, lawyers, and courts tend to rely on inferences and presumptions drawn from surrounding circumstances. It is not necessary to prove intent to deceive by direct evidence, circumstantial evidence being adequate.[301] Circumstantial evidence of intent in asset protection trust cases may take the form of red flags or badges of fraud.[302] A badge of fraud or warning sign is defined as "a fact tending to throw suspicion upon the questioned transaction, [which] excites distrust as to bona fides, raises an inference that a conveyance is fraudulent and by its presence usually requires a showing of good faith."[303]

299. Russo, *supra* note 99, at 274.
300. *Id.* at 290 (footnote omitted).
301. *See In re Huber*, 493 B.R. at 814.
302. *Id.* at 814–15.
303. *In re* Estate of Reed, 566 P.2d 587, 589 (Wyo. 1977) (collecting cases).

One warning sign for asset protection trusts is the transfer of all or nearly all of one's assets into an OAPT or DAPT.[304] Clients who transfer most of their assets into asset protection trusts face two vulnerabilities: (1) a potential charge of fraudulent transfer and (2) an argument that the settlor still has control.[305] Those who divest themselves of almost all or all of their assets and surrender control by placing them in a trust often have an illegal purpose in mind.[306]

For both offshore and onshore trusts, warning signs or red flags of fraud include, but are not necessarily limited to, the following:

- Lack of consideration for a transaction, especially in the face of a threat or pendency of litigation;[307]
- A close connection between the transferor, settlor, or transferee and the trustee or beneficiary;[308]
- "[R]etention of the possession, control, or benefit of the property by the transferor" or settlor;[309]
- Transferor's or settlor's intention to incur debts beyond his or her ability to pay as they mature;[310]
- Financial distress of the settlor or transferor;[311]
- A transaction or conveyance carried on in secret and not in the usual mode of doing business;[312]
- A hurried transaction not in the normal course of business;[313]
- A transfer or conveyance that occurs after the notice of

304. Silets & Drew, *supra* note 199, at 14.

305. *Id.*

306. *Id.*

307. *In re Estate of Reed*, 566 P.2d at 590.

308. Breitenstine v. Breitenstine, 62 P.3d 587, 593 (Wyo. 2003).

309. Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1457 (W.D. Mich. 1988) (citations omitted).

310. Coleman-Nichols v. Tixon Corp., 513 N.W.2d 441, 449 (Mich. Ct. App. 1994).

311. *Kelley*, 725 F. Supp. at 1457.

312. Diss v. Agri Bus. Int'l, Inc., 670 N.E.2d 97, 100 (Ind. Ct. App. 1996) (quoting Johnson v. Estate of Rayburn, 587 N.E.2d 182, 186 (Ind. Ct. App. 1992), *superseded by statute*, Uniform Fraudulent Transfer Act, 1994 Ind. Acts. 144, *as recognized in* Gipperich v. State, 658 N.E.2d 946, 950 (Ind. Ct. App. 1995)).

313. United States v. Leggett, 292 F.2d 423, 427 (6th Cir. 1961).

pending legal action (e.g., divorce filing);[314]

- "[A] solvent person's deliberate effort to stave off creditors by putting property beyond their reach even when the purpose . . . is not to cheat [the creditor] of ultimate payment but only to wrest from them time to restore the [transferor's or settlor's] affairs";[315]
- The reservation of benefit to the settlor or transferor;[316]
- The use of more than two vertical layers of trusts, LLCs, LLPs, or international business companies (IBCs), offshore or onshore;[317]
- Any transaction conducted in a manner different from customary methods;[318]
- A trust funded with bearer shares (whoever has possession of the shares has ownership);[319]
- International asset or fund transfers that are conducted, especially through bank or tax secrecy havens;[320]
- The existence of a concern regarding the jurisdiction of residence of the settlors, beneficiaries, or both; the country where the trust is established; or the country of source of trust assets;
- The use of foreign banks, offshore debit or credit cards, and other similar financial instruments for no legitimate business purpose; and
- The use of different jurisdictions in an arrangement involving layered entities; or settlors, trustees, and beneficiaries; or

314. Consumers United Ins. Co. v. Smith, 644 A.2d 1328, 1358 (D.C. 1994).

315. Klein v. Rossi, 251 F. Supp. 1, 2 (E.D.N.Y. 1966) (citations omitted).

316. Berger v. Hi-Gear Tire & Auto Supply, Inc., 263 A.2d 507, 510 (Md. 1970).

317. Silets & Drew, *supra* note 199, at 14.

318. Diss v. Agri Bus. Int'l, Inc., 670 N.E.2d 97, 100 (Ind. Ct. App. 1996) (quoting Johnson v. Estate of Rayburn, 587 N.E.2d 182, 186 (Ind. Ct. App. 1992), *superseded by statute*, Uniform Fraudulent Transfer Act, 1994 Ind. Acts. 144, *as recognized in* Gipperich v. State, 658 N.E.2d 946, 950 (Ind. Ct. App. 1995)).

319. Arce, *supra* note 201, at 473–74, 474 n.69.

320. *See* Tihin, *supra* note 121.

both.[321]

No single factor constitutes a showing of fraud—or fraudulent intent per se; the facts must be taken together to determine if the badges or red flags of fraud aggregately indicate fraud. "Badges of fraud are not conclusive [evidence], but [may be] strong or weak according to their nature and the number occurring in the same case . . . ."[322] The forensic accountant, lawyer, investigator, or other professional needs to develop an awareness of the signs of fraudulent trust schemes and possess a willingness to investigate further to help detect and deter these activities.

Both DAPTs and OAPTs are sometimes used for money laundering purposes. The red flags of money laundering are sometimes similar but also different from those of fraudulent trust schemes. A list of red flags of money laundering is provided in Table 2.

Table 2. Red Flags of Money Laundering[323]

Red flags have been assigned to the category that best represents the underlying threat.

Currency Movement or Exchange

- Concealed movement of currency from one jurisdiction to another jurisdiction to avoid cash reporting
- Significant or frequent cash deposits made over a short period of time
- Significant or frequent currency exchanges made over a short period of time
- Transfers to countries that are not destination countries or usual remittance corridors
- Numerous deposits to one account followed by numerous payments made to various people

321. *IRS Talking Points*, *supra* note 1.

322. Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1456 (W.D. Mich. 1998) (citation omitted).

323. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL app. F (2015), https://www.ffiec.gov/BSA_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf; Ahmed Taimour, *Money Laundering Schemes in Real Estate*, CORP. COMPLIANCE INSIGHTS (Feb. 17, 2016), www.corporatecomplianceinsights.com/money-laundering-schemes-in-real-estate/.

- Transfers to offshore jurisdictions with no business rationale
- Parking assets offshore in one jurisdiction and then exercising control over them through another
- Receipt of a large wire transfer that is immediately withdrawn by a check or debit card

Cash Purchases or Receipts

- Significant or frequent cash purchases of valuable commodities
- Regular buying and selling of valuable commodities that does not make economic sense
- Purchase or sale of real estate above or below market value irrespective of economic disadvantage
- Low-value property purchased with improvements paid for in cash before reselling
- Rapid repayment of loans or mortgages with cash or funds from an unlikely source
- Frequent or unusually large cash receipts or payments by a customer whose business is normally conducted primarily with checks or other non-cash instruments
- Merchants—sales of big ticket items for cash, later returned for refund by check
- Lawyers—accepting trust fund deposits in cash, particularly as deposits for purchases of large assets with mortgages funded by offshore banks or with mortgages guaranteed by deposits in offshore banks
- Large cash payments on credit cards domiciled offshore
- Art and antique dealers—sales of readily resalable antiquities and art for cash
- Real estate brokers—large cash deposits on conditional property purchases that are not completed, with deposit refunded by check
- The deposit or withdrawal of cash in amounts that consistently fall just below a reporting threshold

Concealment

- Transactions involving locations with poor anti-money laundering laws or high exposure to corruption

- The client has travel expenses to a country with which he or she has no business or family ties or is not a vacation destination

Irregular Financial Actions

- Large number of accounts held by a customer with the same financial institution
- Accounts operated by someone other than the account holder
- Large number of companies registered at the same address
- Accounts or facilities opened or operated by company formation agents
- Lack of information regarding overseas fiduciaries such as trustees or directors
- Excessive use of stored value cards
- The customer fails to provide phone or fax numbers or the numbers provided are maintained by third-party office services
- The customer presents a photocopy of his or her passport when opening a new account
- Frequent inconsistencies in account's activities
- Financial transactions involving non-profit or charitable entities that have no logical economic purpose or there is no link between the entity's stated activity and the other parties in the transaction
- The client exhibits unusual concern for secrecy, especially with regard to his or her business, trust, assets, or dealings with firms
- The client engages in transactions involving foreign currency exchanges that are followed within a short time by wire transfers to locations of concern
- The client purchases expensive items such as vehicles, real estate, boats, aircraft, collectibles, and precious gems and metals in the name of family members or third parties without any apparent logical justification

Scamming

- Customers regularly targeting young or inexperienced employees
- Customers using family members or third parties, including the use of children's accounts

- The client has difficulty describing his or her business and lacks general knowledge of his or her industry

Wrongful or Suspicious Securing or Access of Funds

- Credit cards, checks, or promissory notes used to access funds held in a financial institution, often in a bank or tax secrecy haven
- Complex ownership structures

This list is not intended to be all-inclusive or exhaustive. A forensic accountant should develop an awareness of the signs of potential money laundering and combine that knowledge with that involving fraudulent trust schemes.

VI. CONCLUSION

Many types of fraudulent activities associated with wills, trusts, and wealth transfer and preservation exist. This analysis highlights the various types of fraud affecting wills and estate planning, the use of abusive asset protection trusts, and the corresponding red flags of asset protection trust fraud and money laundering.

Undue influence, duress, fraud in the inducement, and fraud in the execution are ways vulnerable individuals are subject to exploitation.[324] Various real cases are analyzed involving these various forms of will and estate planning fraud.[325] Red flags or badges of will and estate planning fraud are noted in this Article to assist in the search for and accumulation of evidence of fraud, in order to build a case.[326] This Article also highlights steps to protect against undue influence, duress, and fraud.[327]

OAPTs and DAPTs are legitimate devices for transferring wealth from generation to generation, business purposes, investment reasons, and liability protection.[328] Both types of asset protection trusts are particularly subject to abuse by money launderers, tax evaders, other fraudsters, and terrorists.[329] This Article has provided a detailed analysis of both types of

324. *See supra* Part II.
325. *See supra* Part II.
326. *See supra* Part V.
327. *See supra* Part III.
328. *See supra* Part IV.
329. *See supra* Part IV.

trusts and discussed actual trust fraud cases.[330]

Red flags or badges of fraud for asset protection trust schemes and money launderers have also been highlighted.[331] However, it is important to note that rarely does a single red flag indicate the presence of an abusive trust scheme, tax evasion, or money laundering.

330. *See supra* Part IV.
331. *See supra* Part IV.