

Custom of the Country: Trusts and Marriage Planning in High-Wealth Families

by
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“Even now, however, [Undine] was not always happy. She had everything she wanted, but she still felt, at times, that there were other things she might want if she knew about them.”

—Edith Wharton, *The Custom of the Country* (1913)

Introduction

That marriage has always been a property arrangement in some form or another – particularly for those families and couples with property to arrange – is a truism. It is a truism because marriage has significant property implications for the intended spouses, with the result that financial planning around marriage is both a historical and continuing reality, despite changes in the social and economic norms governing marriage. Moreover, the wealth management industry has, past and present, trained its eye and its expertise on marriage planning as part of a family’s larger wealth planning, offering services and products to help mitigate the economic risk of marriage to family wealth preservation. In particular, wealth managers and lawyers have long recommended that families pay close attention to the effects of divorce because “the divorce of a family member . . . can paralyse a [wealth] structure and produce major problems and uncertainty for the family members who have a stake in the family wealth structures.”¹ Divorce, these advisors warn, presents a particularly grave danger because it redistributes fam-

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¹ TAYLOR WESSING LLP, *THE FAMILY CONSTITUTION GUIDE* 9 (2014), https://img.borsen.dk/img/cms/tuksi4/uploads/img_server_adm.files/4738_file_name_4008.pdf (“Matrimonial breakdown is a major problem for family wealth structures.”).

ily wealth in ways that the advisors characterize as not only undesirable but unjust: “[L]aws designed to protect a spouse can be abused to provide a spouse with rights to family businesses and wealth that by no stretch of the imagination should they have access to.”²

In recent decades, prenuptial agreements – contracts entered into before marriage that detail how property will be divided in the case of divorce – have caught the attention of legal commentators and planners as well as the popular press.³ Prenuptial agreements, or prenups, are likely the most well-known mechanism available to help couples prepare for and contract around the deep financial entwinement of marriage. Articles appear regularly in various media forms discussing the benefits and detriments of prenups,⁴ how different age groups use prenups,⁵

² PHILIP MARCOVICI, *THE DESTRUCTIVE POWER OF FAMILY WEALTH: A GUIDE TO SUCCESSION PLANNING, ASSET PROTECTION, TAXATION, AND WEALTH MANAGEMENT* 107, 112 (2016).

³ For a small sample of the legal commentary, see SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* (2017); Jonathan Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Consideration for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW. 413 (2008). See also Brian Bix, *Bargaining in the Shadow of Law: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998), Elizabeth Carter, *Rethinking Premarital Agreements: A Collaborative Approach* 46 N.M. L. REV. 354 (2016). In popular media, see, e.g., *10 Things You Need to Know about Prenups*, <https://www.forbes.com/sites/christinefletcher/2018/09/18/10-things-you-need-to-know-about-prenups/?sh=2d05165962ba>; *What Is a Prenuptial Agreement*, <https://www.townandcountrymag.com/society/money-and-power/a30707086/what-is-a-prenup/>.

⁴ See, for example, *Considering a Prenup? Here's Everything You Need to Know* (<https://www.thespruce.com/prenuptial-marriage-agreements-2300430>); *The Pros and Cons of Prenups* (<https://money.usnews.com/money/personal-finance/family-finance/articles/2018-08-03/the-pros-and-cons-of-prenups>).

⁵ Cheryl Winokur Munk, *Millennials Embrace Prenups—but Through a Very Different Lens Than in the Past*, WALL ST. J. (Jan. 21, 2021 1:00 PM ET), <https://www.wsj.com/articles/millennials-embrace-prenups-but-through-a-very-different-lens-than-in-the-past-11611252036>; see also *Prenups Aren't Just for the Rich or Famous — More millennials are signing them before getting married, and you probably should Too* <https://www.businessinsider.com/why-sign-a-prenup-marriage-divorce-2018-9>, and *The Rise of the Millennial Prenup* https://www.nytimes.com/2018/07/06/smarter-living/millennial-prenup-weddings-money.html?mc=aud_dev&ad-keywords=auddevgate&gclid=CJ0KCCQjwktKFBhCkARiAJeDT0i4_QkLcECUCsz5EqZmow_6nkmdIPmderWwc9mz1eC8xlgjC1G9Z0IaAhMQEALw_wcB&gclsrc=aw.ds.

and what kinds of new content are appearing in prenups.⁶ Prenups, however, have had a surprisingly short history of use, and it was not until 1983, when the National Conference of Commissioners on Uniform State Laws approved the Uniform Premarital Agreement Act (UPAA), that they gained widespread acceptance with courts and subsequently legal advisors.⁷ Before that time, courts routinely considered prenups to be per se invalid and refused to enforce them, claiming that “[t]hey undermined the institution of marriage by encouraging divorce and abrogating the state-established obligations of matrimony.”⁸ Even now, while the actual number of couples who sign prenuptial agreements is unknown, that number is relatively small⁹ and objections to prenups remain plentiful, focusing on the idea that executing a prenup is a form of “planning for failure.” As one matrimonial lawyer remarks: “[L]ike a self-fulfilling prophecy, the prenup might itself plant the seed for exactly that outcome that the parties fear the most—a divorce!”¹⁰

What gets forgotten in these discussions about prenuptial agreements and marriage planning is the trust. While prenups have most recently been the focus of attention, they have never been the sole or even the preferred mechanism for protecting

⁶ New content in prenups includes pet custody terms *see* C.E.L. & Associates, *Pet Pre-Nups, Visitation Rights, and Alimony: The Realities Of Pet Ownership and Divorce*, <https://celandassociates.com/pet-pre-nups-visitation-rights-and-alimony-the-realities-of-pet-ownership-and-divorce/> (January 30, 2020) and social media use terms Hekmat, Law & Mediation, *Millennials Are Redefining Prenups—Here’s Why It Matters*, <https://hekmatfamilylaw.com/prenups/millennials-are-redefining-prenups-heres-why-it-matters/> (February 19, 2021).

⁷ Peter T. Leeson & Joshua Pierson, *Prenup*, 45 J. LEGAL STUD. 367, 371 (2016).

⁸ *Id.* at 371. *See also* Bix, *supra* note 3, at 145.

⁹ Because prenuptial agreements are private, it is almost impossible to know how many couples have them. Recent estimates suggest that between 3-5% of marrying couples have these kinds of contracts. *Interesting Prenuptial Agreement Statistics* (May 20, 2017), <http://brandongaille.com/18-interesting-prenuptial-agreement-statistics> [perma.cc/2HZR3YMR] (“Only 3% of people who have a spouse or are planning on getting married in the near future have a prenuptial agreement.”). For a discussion of the reasons why so few people use prenuptial agreements, *see* http://140.247.200.140/programs/olin_center/papers/pdf/436.pdf.

¹⁰ Chaim Steinberger, *The Perils of Prenup*, 263 N.Y.L.J. 1 (2020), <https://www.manhattan-law.com/wp-content/uploads/2020/04/The-Perils-of-Prenups.pdf>.

family money from the perceived perils of divorce. In fact, the conventional mechanism for protecting family money in high-wealth families has, over time, been relatively constant: the family trust. Trust-based marriage settlements flourished historically both in England and the United States and family trusts are still widely used in high-wealth circles to mitigate spousal claims to family wealth. What is more, if there was any doubt of the trust's utility in this respect, a new generation of asset protection trusts – designed to compete with offshore asset protection trusts – has revitalized the use of asset protection trusts in premarital planning by offering enhanced protections.¹¹ Asset protection trusts are, accordingly, specifically marketed as an alternative to prenuptial contracts and trust companies are explicitly promoting their products as a superior form of asset management for those on the brink of marriage.

This article takes up the question of asset protection trusts being used as substitutes for prenuptial – or, in some cases, postnuptial – contracts, and presses on questions concerning how they work, how trust companies market the new generation of trusts, the judicial treatment of these trusts in court, and how to think about the purported benefits when weighed against harms to spouses, the idea of marital partnership, and equality values. The article begins in Part I with a brief history of the usage of family trusts in marital planning, both in England and the United States, and details, through an examination of recent cases, how these family trusts established by third parties continue to successfully protect family wealth at divorce. Part II examines the arrival of new asset protection trusts in American states – domestic asset protection trusts (DAPTs) – and explains how they work and what various state rules governing these trusts look like. This Part also analyzes cases dealing with these trusts that are beginning to show up on divorce court dockets. Finally, Part III takes up the question of what harms these premarital trusts produce by displacing marital norms of economic partnership and entrenching particularly gendered forms of wealth inequality. Ultimately, trusts used as mechanisms for marriage planning are a time-honored tradition in high-wealth families and have, both historically and currently, worked to further family wealth pres-

¹¹ See *infra* Part II. A.

ervation. What is important to recognize is that this legally sanctioned mode of wealth preservation comes with certain costs since it damages equality values, both within and without of marriage.

I. Trusts, Marriage Settlements, and Family Wealth Preservation

The connection between trusts and premarital planning, in England and America, is long-standing and discretionary spendthrift trusts have regularly served the needs of high-wealth families seeking to protect family fortunes from creditors, including spouses who marry into (and divorce out) of the family. These trusts accommodate the wealth preservation desires of elite families by taking ownership and control out of the hands of family-member beneficiaries and vesting it instead in a trustee, who controls not only the investment but also the distribution of the trust assets. This Part explores the historical use of premarital trusts in England and how, subsequently, the usage of these trusts was both imported and embraced by American families pursuing the same goal of family wealth preservation.

A. *A Brief History of Trusts and Marriage*

As enthusiasts of English history and novels know, elite and aristocratic families have historically exploited property forms including the entail and intricate trusts to keep family land and wealth from erosion or fractionation. In early modern England, trusts were the building blocks of complex marriage settlements and a marriage was an important moment not only for negotiating terms with an intended spouse's family but also to revise terms in the family trust in order to reflect the formation of a new family generation.¹² The trust was central to this type of estate planning because the trust accommodated the desire of families to limit access to trust principal, restrict the sale of estate assets, and make assets available for the benefit of one spouse but not the other.¹³ Exploiting these trust features, each family

¹² H.J. Habakkuk, *Marriage Settlements in the Eighteenth Century*, 32 *TRANSACTIONS ROYAL HIST. SOC'Y* 15, 20–21 (1950).

¹³ On the use of trusts in these settlements, see generally LLOYD BONFIELD, *MARRIAGE SETTLEMENTS, 1601-1740* (1883).

sought to protect – and, if possible, enhance – their family patrimony. This was especially important for the bride’s family since the wife’s property rights were subsumed into the husband’s right upon marriage through coverture rules. Accordingly, these agreements stipulated the bride’s dowry, what assets the couple could access during the marriage, and what assets would return to the spouse’s family of origin at death if there were no heirs to carry on the family line.¹⁴ Moreover, families marrying off their daughters routinely took precautions to protect the family wealth during the marriage in case the spouse turned out to be an unabashed spendthrift or otherwise likely to dissipate the wife’s fortune. Samuel Johnson blithely summarized this instinct, stating: “It is mighty foolish to let a stranger have [your estate] because he marrie[d] your daughter.”¹⁵

In the United States, colonies imported the traditional trust forms from England and retained them after gaining independence and statehood, thereby allowing high-wealth families with assets to use the trust in marriage planning, just as their aristocratic counterparts in England did. And at the end of the nineteenth century as states increasingly began to allow for absolute divorce, the asset protection features of the trust became even more useful. Two trust features in particular were key to protecting family money at divorce: spendthrift provisions and discretionary trust terms. Spendthrift provisions¹⁶ in trusts were a useful tool because they prohibited alienation of trust assets and effectively barred divorcing spouses from making a claim on

¹⁴ For discussion of early-modern marriage settlements, see AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* 79–114 (1993); EILEEN SPRING, *LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND 1300 TO 1800*, 123–48 (1993); SUSAN STAVES, *MARRIED WOMEN’S SEPARATE PROPERTY IN ENGLAND, 1660-1833*, ch. 6 (1990); Christopher Clay, *Marriage, Inheritance, and the Rise of Large Estates in England, 1660-1815*, 21 *ECON. HIST. REV.* 503, 507, 510 (1968); Habakkuk, *supra* note 12, at 22.

¹⁵ JAMES BOSWELL, *BOSWELL’S LIFE OF JOHNSON* 520 (1904).

¹⁶ A spendthrift trust, in its most basic form, is a trust containing a provision stating that the beneficiary cannot voluntarily alienate her interest in the trust. Because of this restriction, creditors cannot attach the beneficiary’s interest nor can they obtain a court order to attach a future distribution. This holds true even if the beneficiary is entitled to mandatory distributions and has funds available to satisfy creditors. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 695–96 (9th ed. 2013).

funds that had been put in trust for the other spouse. Spendthrift trusts subsequently became a useful tool that helped families shelter assets from creditors, including spouses.¹⁷ In 1896, for example, a Texas appellate court upheld the use of a spendthrift trust to keep assets held in trust for the benefit of the husband from being counted as community property.¹⁸ In *McClelland v. McClelland*, Dora McClelland sued her ex-husband seeking rental income from property that had been left to her ex-husband by his father. The court concluded that if “the income arising from the estate was not available” to the husband, then it was not available to the wife as community property upon divorce. To allow the wife an interest in the trust income, the court reasoned, would be to diminish and harm “the right of the testator.”¹⁹ The spendthrift provision did exactly what it was supposed to do and protected the husband’s family money when divorce claims threatened.

The second feature that families depended upon to protect family assets, during marriage and at divorce, was use of discretionary terms to safeguard assets and bar creditors (including a divorcing spouse). Highly discretionary distribution terms, terms that vested discretion over distributions to the trustee, accomplished (and still accomplish) this goal of wealth protection by stripping the beneficiary of guaranteed income. When income from these trusts was not guaranteed to the beneficiary and was distributable only at the trustee’s discretion, the money in trust was not available to creditors unless and until the beneficiary actually received a distribution. The validity of these trusts, like spendthrift trusts, was affirmed by American courts at the end of the nineteenth century and early into the twentieth century again on the basis of donor freedom. In the famous 1926 case of *Hamilton v. Drogo*, a New York court protected the assets put in trust for William Drogo, Duke of Manchester, by his mother, disallow-

¹⁷ *Bradley v. Palmer*, 61 N.E. 856, 881–82 (Ill. 1901) (explaining that the mother created a spendthrift trust for her son, who was an extravagant spender and an alcoholic, and stated specifically that “in no case shall any of such income be applied to the support or maintenance of my said son’s wife; and the same shall never be amenable to any order or judgment of a court which his said wife might obtain for alimony, support, or for any other cause”).

¹⁸ *McClelland v. McClelland*, 37 S.W. 350, 358 (Tex. Civ. App. 1896), *writ refused*.

¹⁹ *Id.*

ing creditor interference until a distribution was made. The court stated: “In the present case no income may ever become due to the judgment debtor. We may not interfere with the discretion which the testatrix has vested in the trustee any more than her son may do so.”²⁰ Both of these asset protection features made the trust a highly valuable tool for families engaging in wealth transfer and wealth preservation. Moreover, the features could be used together to provide a maximal level of protection, all but ensuring that spouses would not have a claim to family wealth if and when conflict arose.

B. *The Continuing Advantages of Family Trusts*

Discretionary spendthrift trusts – tested and refined by these previous generations of wealthy families – still play a large role in protecting family assets from irresponsible spending, bad investments, and the claims of a divorcing spouse.²¹ The modern rule, in fact, looks very much like the early-modern rule: courts generally do not include trust interests in the marital estate at divorce nor do they include trust interest as income when calculating spousal or child support unless the beneficiary has a present interest in the trust. Fully discretionary trusts take away that present interest and beneficiaries of a discretionary spendthrift trust are considered to possess nothing more than a speculative interest in the trust assets—a “mere expectancy”—because they do not have a guaranteed right to distributions from the trust. Following this rule, Missouri, New Jersey, Pennsylvania, Texas, and Wisconsin include trust interests in the marital estate at divorce only when the beneficiary has a present possessory interest or the right to withdraw trust assets.²² Massachusetts courts have similarly concluded that any interest in a discretionary trust is not

²⁰ *Hamilton v. Drogo*, 150 N.E. 496, 497 (N.Y. 1926).

²¹ See Jonathan W. Wolfe, *How a Trust May Impact Your Divorce Case*, FAM. ADVOC., Fall 2015, at 14-15 (noting that while some states have “a breadth of precedent” governing this issue, other states have few, if any, reported decisions).

²² *Id.* at 17. New Jersey courts have routinely held that a beneficiary spouse’s trust interest does not constitute marital property unless the beneficiary has acquired “unimpaired control and totally free use and enjoyment” of the trust assets. See *Mey v. Mey*, 398 A.2d 88, 92 (N.J. 1979); see also *Paulson v. Paulson*, 783 N.W.2d 262, 271 (N.D. 2010); *Friebel v. Friebel*, 510 N.W.2d 767, 769 (Wis. Ct. App. 1993).

includable in the marital estate: “[A] party’s beneficial interest in a discretionary trust . . . because of the peculiar nature of such a trust . . . is too remote or speculative to be so included.”²³ The Colorado Supreme Court, in agreement, concluded in *In re Marriage of Jones* that, “unlike a vested retirement plan, the beneficiary of a discretionary trust has no contractual or enforceable right to income or principal from the trust, and cannot force any action by the trustee unless the trustee performs dishonestly or does not act at all.”²⁴

One example of the successful use of a discretionary spendthrift trust in shielding assets from a spouse’s claim at divorce came to light in the 1985 case, *duPont v. Southern National Bank of Houston, Texas*.²⁵ The court noted at the beginning of the opinion: “This case illustrates once again the unfortunate verity that the family, although ideally a nurturer of love and affection, often succumbs to the corrosive influence of avarice and financial calculation.”²⁶ The case, broadly speaking, was about the efforts of Eugene duPont III, the “patriarch of the family,” to rescind an irrevocable discretionary trust that he had created in 1972 with his child and his spouse as the primary beneficiaries. The lower court noted that duPont had “established the Trust largely to prevent his then-wife, Joanne A. duPont, from obtaining his property in the event of a divorce. Having since divorced Joanne duPont and remarried, duPont III now wishes to return the Trust property to his own control.”²⁷ That is to say, the trust was created during the marriage to mitigate potential damaging effects of divorce on the duPont fortune – and the trust did just that. When duPont and his wife divorced in 1978, duPont claimed that the assets in the trust – which included several family homes as well as family heirlooms, such as “a soup tureen and plates” – could not be included as part of the marital estate. And the court agreed. Moreover, excluding the trust properties and their in-

²³ See *D.L. v. G.L.*, 811 N.E.2d 1013, 1023 (Mass. App. Ct. 2004).

²⁴ *In re Marriage of Jones*, 812 P.2d 1152, 1156–. (Colo. 1991) (concluding “[t]o the extent that it has already not done so, the trial court on remand should consider the wife’s interest in the trust as an economic circumstance” and a discretionary factor when allocating property and awarding support). *Id.* at 1158.

²⁵ *duPont v. S. Nat’l Bank of Hous.*, 771 F.2d 874 (5th Cir. 1985).

²⁶ *Id.* at 877.

²⁷ *Id.*

come, duPont's liabilities exceeded his assets, with the result that the divorce settlement for duPont's spouse was small in comparison to the scope of the family assets. The spouse, Joanne duPont, "received \$70,000 in alimony and \$10,000 in child-support per year, as compared to duPont III's average Trust income of \$1.1 million."²⁸ Ultimately, duPont failed in his quest to rescind the trust – nevertheless the trust had done its work on behalf of the duPont family money at the moment of divorce.²⁹

More recently, the 2016 Massachusetts case of *Pfannenstiehl v. Pfannenstiehl* provided an exemplary instance of how discretionary trusts work by design to preserve family wealth. In *Pfannenstiehl*, the couple married in 2000 and during the twelve-year marriage, the husband worked as an assistant bookstore manager at one of his father's subsidiary corporations, earning approximately \$170,000 annually.³⁰ In 2004, the husband's father established a discretionary spendthrift trust meant to "to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class"³¹ for the benefit of the father's "issue" as an open class.³² From the time of the trust's creation in 2004 until the divorce, only Curt and his two siblings had received any distributions and Curt's distributions over that period totaled approximately \$800,000. The court noted that these distributions, as well as gifts from Curt's family, enabled the couple to enjoy "an upper middle-class lifestyle. They owned a home valued at in excess of \$700,000, as well as other real estate, took several vacations each year, and belonged to a country club." Curt's wife, who had been in the Army Reserves, retired from that job in 2004 at the behest of her husband, to stay at home with their special needs daughter and dedicate more time to being a "homemaker and caretaker." The wife did work part time as an ultrasound technician and earned approximately \$22,672 annually.³³

²⁸ *Id.* at 878.

²⁹ *Id.* at 888. "Having made one disposition of his property to shield it from his former wife, he now seeks a different result. We agree with the district court that duPont III has not justified revoking or reforming the Trust, which by its terms is irrevocable." *Id.* at 888.

³⁰ *Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933, 935–36 (Mass. 2016).

³¹ *Id.* at 937.

³² *Id.* at 936

³³ *Id.* She earned another \$7,428 in rental income. *Id.*

During the divorce proceedings, the issue arose whether the present value of the husband's interest in the trust – which was then valued at approximately \$25 million – could be considered part of the marital estate.³⁴ The trial court judge valued the husband's interest to be approximately \$2 million and included it in the marital estate, a decision that the appellate court affirmed.³⁵ The trial court judge “found that the distributions to Curt ceased when he filed the complaint for divorce because the trustees deemed it too risky to distribute funds to Curt at a time when he might be required to share the funds with Diane, a nonbeneficiary.”³⁶ And in affirming the decision, the appellate court specifically reiterated this point, noting that the husband's monthly distributions from the trust, made relatively regularly since 2007, stopped “precisely on the eve of the husband's divorce filing.”³⁷ The appellate court then remarked: “[T]he spendthrift provision is being invoked as a subterfuge to mask the husband's income stream and thwart the division of the marital estate in the divorce.”³⁸ What had happened, the appellate court concluded, was that “as the divorce began, ‘the proverbial family wagons circled the family money.’”³⁹

Once the case reached the Massachusetts Supreme Court, however, the tide turned. That court disagreed with the lower court rulings and returned to the conventional analytic framework for assessing the availability of a trust interest. Keeping in line with conventional doctrine, the court concluded that the husband's trust interest was “so speculative as to constitute nothing more than [an] expectanc[y],” and consequently was not includable in the marital estate.⁴⁰ The court observed:

Interests in discretionary trusts generally are . . . too remote for inclusion in a marital estate, because the interest is not “present [and] enforceable”; the beneficiary must rely on the trustee's exercise of

³⁴ *Id.* at 937–38.

³⁵ *Id.*

³⁶ *Id.* at 937.

³⁷ *Pfannenstiehl v. Pfannenstiehl*, 37 N.E.3d 15, 17 (Mass. App. Ct. 2015), *review granted*, 47 N.E.3d 684 (Mass. 2015), and *vacated and remanded*, 55 N.E.3d 933, 934 (Mass. 2016).

³⁸ *Id.*

³⁹ *Id.* at 21.

⁴⁰ *Pfannenstiehl*, 55 N.E.3d at 935 (quoting *Adams v. Adams*, 945 N.E.2d 844, 859 (Mass. 2011)).

discretion, does not have a present right to use the trust principal, and cannot compel distributions.⁴¹

The wife lost and the trust assets remained safe—protected by the “family wagons.” The very best result for the wife, within this framework of analysis, was to have the husband’s assets considered as one among many factors at the distribution phase and in the determination of spousal support.⁴²

Many trust lawyers hailed the outcome, relieved that the court did not undo the trust’s asset protection features.⁴³ The husband’s lawyer expressed his satisfaction with the ruling, invoking the traditional justification of donor intent: “[The husband’s father] did not intend . . . for an ex-spouse to get part of his estate, and that’s what the court is upholding.”⁴⁴ Another commentator wrote: “This is a relief to those who draft trusts for the purpose of ‘asset protection.’”⁴⁵ Other commentators, how-

⁴¹ *Id.* at 940.

⁴² The other right that an ex-spouse has to trust assets is as an exception creditor in states that have adopted the Uniform Trust Code (UTC). This right does not help divorcing spouses reach trust assets during a divorce but allows ex-spouses to potentially reach trust assets to satisfy obligations already written into a divorce judgment. In these states, an ex-spouse with a divorce judgment can try to pierce a trust and make the income available for spousal or child support payments if they are in arrears. With discretionary trusts, the UTC states that a court may order a distribution to satisfy a court order for either spousal or child support, but only to “[t]he extent a trustee has not complied with a standard of distribution or has abused a discretion.” UNIF. TRUST CODE § 504(c) (UNIF. LAW COMM’N 2000). This is a high bar to reach for and, moreover, a court cannot direct a trustee to distribute more than the trustee should have distributed absent the abuse of discretion.

⁴³ See, e.g., Robert J. O’Regan, Pfannenstiehl: *Out of a Mistake Comes Clarity*, WEALTHMANAGEMENT.COM (Aug. 9, 2016), <https://www.wealthmanagement.com/estate-planning/pfannenstiehl-out-mistake-comes-clarity> [perma.cc/QDY8-D7L4].

⁴⁴ Michael Levenson, *SJC Rules Heir Can Refuse to Pay \$1.4M to Ex-wife*, BOSTON GLOBE (Aug. 05, 2016), <https://www.bostonglobe.com/metro/2016/08/05/high-court-rules-scion-wealthy-family-doesn-have-pay-wife/cLDKzM7oTGbkvvVNM5O3dK/story.html> [perma.cc/FJ7K-VDGF].

⁴⁵ Matthew Solomon, *Words Matter: Pfannenstiehl Overruled by Supreme Judicial Court*, ISRAEL, VAN KOOY & DAYS, LLC, <http://www.yourfamilymatterslawblog.com/words-matter-pfannenstiehl-overruled-by-supreme-judicial-court/> [perma.cc/DYQ7-PH7P] (last visited July 15, 2017). Practitioners have relied on the asset protection features of the trust and continue to recommend them as safeguards against the negative results of a divorce.

ever, have been less enthusiastic about the outcome, mentioning that “[t]he equities of this case appear to favor Diane.”⁴⁶ Whatever analytic tension might surround the outcome, however, what the Massachusetts court made abundantly clear in *Pfannenstiehl* is that third-party discretionary spendthrift trusts continue to be an unmistakably effective mechanism for keeping assets from a divorcing spouse, even when created during the marriage.⁴⁷

II. Self-Made Money and “Selfie”⁴⁸ Premarital Trusts

In the twenty-first century, family trusts that protect the beneficiary-spouses still retain their utility and their power to help families preserve their wealth. In the last several decades,

Third party trusts are . . . effective in protecting the income and principal of the trust from the beneficiary’s divorcing spouse. In its simplest terms, for example, the parents or grandparents create a trust for the benefit of their child/grandchild who is about to marry . . . [and] if one of the goals of the trust is to avoid a beneficiary’s spouse from claiming any income or principal from the trust, one might consider giving the trustee . . . absolute discretion in distributing the income and assets of the trust. With this “absolute discretion” provision the funds can protected from being used for marital purposes or included as an asset or stream of income if a beneficiary’s marriage ends in divorce.

Cindy S. Vova, *Prenuptial Agreements and Trusts — “Keeping It All in the Family”*, LAWYERS.COM (July 24, 2020), <https://blogs.lawyers.com/attorney/premarital-agreements/prenuptial-agreements-and-trusts-keeping-it-all-in-the-family-63920/>.

⁴⁶ Harry S. Margolis, *Does Pfannenstiehl Case Undermine Asset Protection in Massachusetts?*, MARGOLIS & BLOOM, LLP, (Sept. 22, 2015), [http://www.margolis.com/our-blog/does-recent-divorce-undermine-centuries-of-spendthrift-trust-law\[perma.cc/6HYP-LWRD\]](http://www.margolis.com/our-blog/does-recent-divorce-undermine-centuries-of-spendthrift-trust-law[perma.cc/6HYP-LWRD]). In addition, questions about the independence of the trustee, the decanting of the trust, and the ability of the court to encompass separate property into the marital estate using Massachusetts’s hotchpot approach have continued to cast doubt on the result.

⁴⁷ See also *Loomis v. Loomis*, 158 S.W.3d 787 (Mo. Ct. App. 2005); *Avent v. Avent*, 849 N.E.2d 98 (Ohio Ct. App. 2006); *Robinson v. Robinson* 621 S.E.2d 147 (Va. Ct. App. 2005).

⁴⁸ Ashlea Ebeling, *Onshore Asset Protection with the Selfie Trust*, FORBES (July 6, 2016, 7:48AM) <https://www.forbes.com/sites/ashleaebeling/2016/07/06/onshore-asset-protection-with-the-selfie-trust/?sh=55d45d361be5>

however, a new breed of asset protection trusts has proliferated and increased the use of trusts in marital planning by making asset protection trusts available to an expanded class of users – individuals who want to create trusts with their own money while retaining a modicum of control over the assets. This Part explores the phenomenon of this new generation of asset protection trusts becoming available across the United States, the strategies of trust companies and practitioners for marketing these trusts as an alternative to prenups, and how these new “prenup trusts” are faring in court.

A. *The New Generation of Asset Protection Trusts*

In the last several decades, prodigious changes to trust law in a number of states have created new opportunities for wealth preservation, providing asset protection far beyond what already exists while also reshaping conventional trust rules. The largest change in trust law over the past decades has been the introduction and adoption of Domestic Asset Protection Trusts (DAPTs). What is new about these asset protection trusts is that they allow the settlor to be a beneficiary and even a trustee of an irrevocable trust and still obtain the asset protection features long associated with discretionary spendthrift trusts. This development is in contravention of the traditional rules for asset protection which hold that, for a beneficiary’s interest to be protected, the trust must be created by a third party:

To hold otherwise would be to give unexampled opportunity to unscrupulous persons to shelter their property before engaging in speculative business enterprises, to mislead creditors into thinking that the settlor still owned the property since he appeared to be receiving its income, and thereby work a gross fraud on creditors who might place reliance on the former prosperity and financial stability of the debtor.⁴⁹

The Uniform Trust Code reiterated this rule, stating that individuals cannot shield assets from creditors, including spouses, by placing them in a trust for their own benefit,⁵⁰ and “even if the trust is discretionary, spendthrift, or both, the settlor’s creditors

⁴⁹ GEORGE T. BOGERT, TRUSTS § 40, at 155–56 (6th ed. 1987); *see also* Henry J. Lischer, *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479 (2000).

⁵⁰ UNIF. TRUST CODE § 505 (UNIF. LAW COMM’N 2000).

can reach the maximum amount that the trustee could under any circumstances pay to the settlor or apply for the settlor's benefit."⁵¹ Accordingly, family wealth planning has historically been anchored by the use of these third-party trusts, as discussed in Part II, and these family trusts have done exactly what they were designed to do: protect assets based on the theory of donor intent.

This longstanding rule first came under attack in the 1980s when the Cook Islands amended that jurisdiction's governing law to allow for self-settled asset protection trusts in an attempt, which would prove immensely successful, to attract foreign capital.⁵² Other offshore jurisdictions soon followed suit in allowing these "Foreign Asset Protection Trusts" (FAPTs),⁵³ "and the great Offshore Boom of the 1990s came like a tidal wave."⁵⁴ Eager to compete for a part of this lucrative trust business, American states fought back. Alaska became the first state to enact legislation allowing Domestic Asset Protection Trusts in 1997. Several months after Alaska took this step, Delaware did the same, hoping "to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts."⁵⁵ Since

⁵¹ DUKEMINIER & SITKOFF, *supra* note 16, at 703. The reporter for the Restatement on Trusts wrote, "it is well settled that where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditor can reach his interest." Ritchie W. Taylor, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?*, 13 *BYU J. PUB. L.* 163, 167 (2013) (quoting RESTATEMENT (SECOND) OF TRUSTS § 156 reporter's notes (AM. LAW INST. 1957)).

⁵² Stewart Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 *CORNELL L. REV.* 1035, 1048 (2000). "To that end, the statute include[d] numerous measures that made the Cook Islands a favorite trust situs for settlors seeking to avoid creditor claims." *Id.*

⁵³ See FOREIGN ASSET PROTECTION TRUSTS, <https://www.lodmell.com/asset-protection/foreign-trusts> [perma.cc/5CVM-L9HZ] (last visited July 23, 2017).

⁵⁴ Jay Adkisson, *A Short History of Asset Protection Trust Law*, *FORBES*, (Jan. 26, 2015), <https://www.forbes.com/sites/jayadkisson/2015/01/26/a-short-history-of-asset-protection-trust-law/#605ecd2f3fb4> [https://perma.cc/LD83-ND5Z].

⁵⁵ DUKEMINIER & SITKOFF, *supra* note 16, at 705. Alaska and Delaware have not been shy in expressing their respective desire to become the leading trust jurisdictions—not only domestically but also as an alternative to the offshore jurisdictions which have garnered so much world-wide business in the last several years. John K. Eason, *Home from the Islands: Domestic Asset Protection*

Alaska and Delaware paved the way for DAPTs, seventeen other states have passed legislation authorizing these trusts.⁵⁶

Playing to the presumed desire of clients to build and preserve their family legacies, trust companies continually invent new names for their trust products, offering Dynasty Trusts,⁵⁷ Legacy Trusts,⁵⁸ and Millennium Trusts.⁵⁹ One trust company offers a “Bloodline Trust”⁶⁰ and one even boldly markets a “Have Your Cake and Eat It Too” Trust (HYCET Trust®).⁶¹ What these trusts all offer is new possibilities and opportunities for individuals without generational family money to establish their own financial “legacies” and protect their own fortunes from spousal claims at divorce. That is to say, DAPTs allow newly rich trust settlors to hide their own money away in trust, while still

Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations, 52 FLA. L. REV. 41, 53 (2000).

⁵⁶ Connecticut, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wyoming, and West Virginia have also enacted legislation validating DAPTs. Following the 1986 creation of the GST exemption, states have similarly raced to change or abolish the rule against perpetuities and compete for dynasty trust business. Roughly \$100 billion in trust assets has migrated into states that have provided for dynasty trusts.

⁵⁷ *The Dynasty Trust*, WILMINGTON TR. CORP., <https://www.wilmingtontrust.com/wtcom/index.jsp?fileid=3000303> [perma.cc/Z383-7CEV] (last visited July 16, 2017) (explaining that “a dynasty trust is an irrevocable trust designed so that it may stay in effect for multiple generations, creating a powerful estate planning tool for high-net-worth families”).

⁵⁸ Christopher Cline, *Why Use Legacy Trusts*, ABBOT DOWNING, <https://www.abbotdowning.com/asset/ggckc8/LegacyTrusts.pdf> [perma.cc/MCZ3 - NCWL] (last visited July 16, 2017) (explaining that legacy trust is a term for any trust that lasts perpetually).

⁵⁹ *Trusts to Consider*, PEAK TR. CO., <https://www.peaktrust.com/trustee/trusts-to-consider/> [perma.cc/3TPQ-JA84] (last visited July 16, 2017) (explaining that “perpetual trust[s] (Millennium Trust) provide for a long-term trust that saves estate and gift taxes while increasing the family wealth, using Alaska jurisdiction”).

⁶⁰ *The Benefits of Bloodline Trusts Special Report*, BEGLEY L. GROUP, <http://www.begleylawyer.com/2012/02/the-benefits-of-bloodline-trusts-special-report/> [perma.cc/UC2R-H9AY] (last visited July 16, 2017) (explaining that a bloodline trust is designed to keep money in the family protecting the inheritance of your children and their descendants).

⁶¹ *Have Your Cake and Eat It Too: The HYCET Trust*, JEFFERY M. VERDON L. GROUP, LLP, [hereinafter *HYCET*] <http://jmvlaw.com/hycet-trust/> [perma.cc/ABH4-AD4D] (last visited July 16, 2017).

potentially benefitting from the assets, and receive the asset protection of a conventional trust.

B. *Marketing Romance and Providing Asset Protection*

While the marketing of DAPTs takes many forms and targets a number of users – from doctors potentially subject to large malpractice claims to entrepreneurs and financial speculators in high-risk industries – trust companies quickly discovered the connection between trusts and divorce. And because of the enhanced protections that DAPTs offer against creditors in general, trust companies, wealth managers, and financial planners began heavily marketing DAPTs as a new and improved alternative to prenuptial agreements. The new narrative – put forth by both the trust companies as well as wealth managers – is this: prenups are fine, but premarital trusts are even better. No wealth manager, of course, will advise against a prenuptial agreement, if a prenup is the only form of protection that a couple is considering. Nevertheless, most wealth managers will tell clients that prenuptial agreements are not sufficient, especially when significant assets are at stake. One lawyer remarks: “Prenuptial agreements are good, but there are numerous personal and legal issues that deter couples from actually executing a prenuptial agreement.”⁶² Another lawyer is more specific about what can go wrong with a prenup:

Spouses attempt many strategies to circumvent a prenuptial agreement with success. A spouse can attempt to prove they had been tricked, coerced or were the victim of bad intent when they agreed. A spouse can also try to prove that the document was never signed, that their attorney was ineffective or the prenuptial agreement is outrageous (maybe it wasn't when signed, but it is now). Spouses also attempt to prove that the agreement was signed without adequate knowledge of the other spouse's assets. Any of these can nullify a prenuptial agreement and at the very least pull the other spouse into a

⁶² Richard Shapiro et al., *Domestic Asset Protection Trusts v. Prenuptial Agreements*, BLUSTEIN, SHAPIRO, RICH & BARONE, LLP (Oct. 14, 2016), <https://www.mid-hudsonlaw.com/blog/domestic-asset-protection-trusts-v-prenuptial-agreements/> [perma.cc/B89F-UK3J].

prolonged divorce proceeding, and possibly push you into a settlement.⁶³

Wealth managers also warn that many jurisdictions “take a robust approach to family wealth structures,”⁶⁴ meaning that the courts are willing to break up family wealth at divorce, and wealth managers routinely stress the significant discretion that family court judges have, emphasizing the uneven and unpredictable results that follow if a prenup is challenged in court.⁶⁵

One option that advisors sometimes recommend is to do both – execute a prenup and use a DAPT, the “belt and suspenders”⁶⁶ approach. Trust companies and lawyers generally ad-

⁶³ *Irrevocable Trust vs. a Prenuptial Agreement*, ESTATE STREET PARTNERS LLC, <https://irrevocable-trust.ultratrust.com/irrevocable-trust-vs-prenuptial-agreement.html> (last visited Mar. 16, 2021).

⁶⁴ TAYLOR WESSING LLP, *supra* note 1, at 33.

⁶⁵ Wealth managers also warn that even placing family assets in a discretionary asset-protection trust might not suffice to protect them at divorce. High-profile divorces such as the 2014 Poon case in which the wife of Otto Poon received a payout of over HK\$700 million after trust assets were determined to be marital property have reinforced this message. Jennifer Hughes, *Hong Kong Divorce Case Rattles Family Trust Industry*, FIN. TIMES, July 17, 2014, <https://www.ft.com/content/f953e8e4-0d92-11e4-815f-00144feabdc>; *see also* Abby Schultz, *Prenuptial Agreements Gain Traction in Asia*, BARRON'S (Dec. 18, 2015), <https://www.barrons.com/articles/prenuptial-agreements-gain-traction-in-asia-1450409202>.

⁶⁶ *See* Rachel Emma Silverman, *Beyond the Prenup: Families Increasingly Turn to Trust to Protect Assets, Inheritances from Ex Spouses*, WALL ST. J. (Sept. 22, 2005), <https://www.wsj.com/articles/SB112735445722148247> (explaining that “[p]rotecting wealth from the financial ravages of divorce has long been a key concern of families”).

Because of the possibility of a court rewriting the intent of the parties based on equitable principles, a better way to ensure protection of separate property prior to a marriage includes the use of irrevocable trusts, including a DAPT, which can be used by either party to provide enhanced asset protection for separate assets. I would argue that while a prenuptial agreement and DAPT are similar tools, a DAPT is superior and more powerful tool. Why? Prenuptial agreements are contracts and like any contract, can be misconstrued or equitably rewritten by a judge. Of course, you can have both as well, as a sort of belt and suspender approach, to provide a prenuptial contract for your understanding with your spouse and a DAPT to protect the assets that the spouse agrees not to pursue.

Randall A. Denha, *For Better or for Worse—Prenuptial Agreement or Domestic Asset Protection Trust*, DENHA & ASSOCS. PLLC BLOG, <http://denhalaw.com/>

wise, however, that the DAPT alone is sufficient and that the DAPT-only approach even has additional benefits. Specifically, trust companies and wealth managers highlight that – unlike prenuptial agreements – DAPTs can be created by one fiancé unilaterally. Accordingly, DAPTs are characterized as a good alternative to pre-marital contracts because they help fiancés avoid “awkward” conversations about money during wedding planning. One lawyer explains the problem with prenuptial agreements: “The bottom line is that while many couples are delighted to share their lives together when entering into a marriage, they may feel uncomfortable sharing information about their net worth.”⁶⁷ A Delaware trust company, responsive to this concern, states that DAPTs act as a substitute for prenuptial agreements but with the added advantage that they help individuals avoid negotiations.⁶⁸ An article in the American Bar Association newsletter describes the utility of the DAPT by similarly underscoring the “low-stress” angle these trusts provide and remarking that this approach is well-suited to any individuals who are contemplating asset protection upon marriage but “would like to do so quietly and without any hassle.”⁶⁹ One website offering asset protection advice even offers this advice:

for-better-or-for-worse-prenuptial-agreement-or-domestic-asset-protection-trust/ (last visited Mar. 16, 2021).

Consequently, when a prenuptial agreement is impractical, undesirable, or potentially unenforceable, a DAPT is an effective alternative, provided that it is created and funded prior to the wedding (with the additional benefit of protecting the DAPT’s assets from an elective share claim by a surviving spouse). There is no requirement to disclose the creation of the trust, to ask the future spouse to sign it, or to disclose financial assets. Alternatively, a DAPT used in combination with a prenuptial agreement can also be an effective strategy.

Twenty Questions About Using Delaware Trusts, THE FREE LIBRARY, Sept. 1, 2013, <https://www.thefreelibrary.com/Twenty+questions+about+using+Delaware+trusts-a0344842326>

⁶⁷ Shapiro et al., *supra* note 62.

⁶⁸ Northern Trust, *Delaware Trusts: Safeguarding Personal Assets* (2019), <https://www.northerntrust.com/documents/white-papers/wealth-management/research/delaware-trusts-safeguarding-personal-wealth.pdf?bc=25683840> [perma.cc/5SJ5-XE3H].

⁶⁹ Kalimah Z. White, *Domestic Asset Protection Trusts: An Alternative to Prenuptial Agreements* 2 (Feb. 2006), <http://www.americanbar.org/newsletter/>

So, asset protection plans do not even have to be disclosed to the future spouse; or if you want to be really tricky, you can show the future spouse that she is a beneficiary. You can say, honey, I've made you rich. You are now the beneficiary of my asset protection plan. This thing has some money in it and you're going to be fine. Well, a week later you can change the beneficiary designation at any time. You don't have to tell her. You're not obligated to tell her. You don't even need her consent to do the trust.⁷⁰

Based on this idea of avoiding awkward conversations and the ability of the intended spouse to act unilaterally, trust companies and wealth planners subsequently market DAPTs as the “romantic” option, while prenups are characterized as “unromantic” and tied to communication challenges.⁷¹ Wealth managers make the comparison very directly: “Due to the unromantic pitfalls of negotiating a family property settlement the week of the wedding, some proactive individuals are avoiding the prenup altogether.”⁷² Another lawyer observes: “Many wealthy individuals choose to forgo a prenup altogether, for fear that it will dim the ardor of romance—and for them a premarital trust is a good alternative.”⁷³

publications/law_trends_news_practice_area_e_newsletter_home/domestic_trust.html [perma.cc/W9B7-4657].

⁷⁰ *Why Trusts Are a Better Alternative to Prenup*, ASSETPROTECTION-TRAINING.COM, <https://www.assetprotectiontraining.com/asset-protection-trusts-prenuptial-agreements/> (last visited Mar. 16, 2021).

⁷¹ As one lawyer remarks: “As a practical matter, asking a future spouse to enter into a prenuptial agreement often causes discomfort to blossoming love relationships.” Shapiro, *supra* note 62.

⁷² *Divorce Asset Protection*, ASSET PROTECTION PLANNERS, [http://asset-protectionplanners.com/articles/divorce/\[perma.cc/GR2R-DVWF\]](http://asset-protectionplanners.com/articles/divorce/[perma.cc/GR2R-DVWF]) (last visited July 16, 2017).

One benefit of utilizing a trust rather than a prenuptial agreement is that the creation of a trust does not require the signature of the other party to the marriage. One party can make the unilateral decision to put his or her assets in a trust prior to the marriage. Also, the settlor does not need to inform the other party of the existence of the trust. This can eliminate the potential of offending or insulting the other party, which could have potentially put a strain on the relationship.

Using Trusts as an Alternative to Prenuptial Agreements, MILVIDSKIY LAW GROUP P.C., <https://www.milvidlaw.com/estate-planning/using-trusts-as-an-alternative-to-prenuptial-agreements/>.

⁷³ Rachel Winokur Munk, *Beyond the Prenup*, WALL ST. J. (Sept. 22, 2005 12:01 AM ET), <https://www.wsj.com/articles/SB112735445722148247>.

11th Annual Domestic Asset Protection Trust State Rankings Chart											
Rank	State	Statute (50% weight)	Uniform Voidable Transactions Act (12.5% weight)	Statute of Limitations (Future Creditor) (2.5% weight)	Statute of Limitations (Preexisting Creditor) (2.5% weight)	Spouse/ Child Support Exception Creditors (Spouse 3%, Alimony 1%, Child Support 1% weight)	Preexisting Torts Exception Creditors/Other Exception Creditors (5% weight)	Ease of Use – New Affidavit of Solvency required for every new transfer? (7.5% weight)	Fraudulent Transfer Standard (10% weight)	Decanting State Ranking (5% weight)	Total Score
1	NV	§§166.010 to 166.170	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	No	No	No Affidavit Required	Clear and convincing	Ranked #2	99
2	SD	§§55-18-1 to 18	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; (only if indebted at time of transfer)	No	No Affidavit Required	Clear and convincing	Ranked #1	98
3	OH	Ch. 5816	No	1.5 Yrs.	1.5 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required (with exceptions)	Clear and convincing	Ranked #6	85
4	MO	§496.5-505	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Alimony; Child Support	State/U.S. to extent state/federal law provides	No Affidavit Required	Clear and convincing	Ranked #7	84.5
5	CT	Public Act No. 19-137	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support (only if indebted at time of transfer)	Preexisting Torts	No Affidavit Required	Clear and convincing	None	84
6(1e)	DE	Tit. 12, §§370-375B	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #3	83.5
6(1e)	TN	§§35-16-101 to 112	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	Affidavit Required	Clear and convincing	Ranked #4	83.5
8	AK	§34.40.110; §13.38.310	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No	Affidavit Required	Clear and convincing	Ranked #8 (1e)	82.5
9	RI	§18-9.2	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts	No Affidavit Required	Clear and convincing	Ranked #14	82
10	IN	§30-4-8	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Child Support	Properly listed on app. to obtain credit – but only as to that lender	Affidavit Required	Clear and convincing	Ranked #10 (1e)	80.5
11	NH	§564-B:5-505A	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	No	No Affidavit Required	Limited clear and convincing standard	Ranked #5	79
12	WY	§§4-10-502, 504, 508(c), 210-523	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Properly listed on app. to obtain credit – but only as to that lender	Affidavit Required	Clear and convincing	Ranked #13	78
13	MI	§§700.1041 to 700.10502	Yes	2 Yrs.	2 Yrs. or 1 Yr. Discovery	Divorcing Spouse	No	Affidavit Required (with exceptions)	Clear and convincing	Ranked #25 (1e)	75
14	MS	§§91-9-701 to 91-9-723	No	2 Yrs.	2 Yrs. or 0.5 Yr. Discovery	Divorcing Spouse; Alimony; Child Support	Preexisting Torts, State Criminal Restitution/ Up to \$15MM if no \$1MM Umbrella Policy	Affidavit Required	Clear and convincing	None	72.5
15	HI	§554G	No	2 Yrs.	2 Yrs. Pers. Injury; 8 Yrs. Contract	Divorcing Spouse; Alimony; Child Support	Preexisting Torts/ Certain Lenders/ Hawaii Tax	No Affidavit Required	Limited clear and convincing standard	None	72
16	UT	§25-B-502	Yes	None	2 Yrs. or 1 Yr. Discovery (see 120-day mailing/ publication edition)	No	No	Affidavit Required	Missing clear and convincing standard	None	60
NR	OK	Tit. 31, §§10 to 18	No	4 Yrs.	4 Yrs. or 1 Yr. Discovery	Child Support	Must be majority Oklahoma assets	No Affidavit Required	Clear and convincing	None	NR
NR	VA	§64.2-745.1, §64.2-745.2	No	None	5 Yrs.	Child Support	Creditor who has provided services to protect trust/ U.S. job, etc.	No Affidavit Required	Clear and convincing	Ranked #16 (1e)	NR
NR	WV	§44D-5-503A, §44D-5-503B	No	None	4 Yrs.	No	No	Affidavit Required	Missing clear and convincing standard	None	NR

*11th Annual Domestic Asset Protection Trust State Rankings Chart created in April 2020. Original State Rankings Chart created in April 2010. Copyright © 2010-2020 by Steve Oshins (soshins@oshins.com) / www.oshins.com / (702) 341-6000, ext. 2. All rights reserved.
 **The Decanting State Ranking column is based on the 7th Annual Trust Decanting State Rankings Chart (Jan. 2020) at <http://www.oshins.com/state-rankings-charts>.

Perhaps the most significant benefit of DAPTs, however, is the amount of asset protection that these trusts provide at divorce – a benefit that is discussed in depth by practitioners and certainly alluded to by the trust companies. Delaware trust companies advertise “extra breaks, including stronger protection from creditors and exclusion of assets in divorce proceedings.”⁷⁴

⁷⁴ *Dynasty Trusts Let U.S. Wealthy Duck Estate, Gift Taxes Forever*, BLOOMBERG NEWS (July 28, 2011), <http://www.fa-mag.com/news/dynasty-trusts-let-us-wealthy-duck-estate-gift-taxes-forever—7913.html> [perma.cc/VQR4-R5Q4]. In states that have not adopted the UTC, local rules do not generally dictate any exceptions for spouse creditors.

Another lawyer suggests DAPTs because “utilizing Domestic Asset Protection Trusts in the pre-marital planning process greatly reduces the chances of a successful attack resulting in the equitable distribution of property brought to the marriage.”⁷⁵ Marketing for Nevada trust companies is straight-to-the-point: “Nevada is one of two states that have no exception creditors. This includes divorcing spouses.”⁷⁶ That asset protection at divorce is a highly desirable feature and one that is sought after by clients, as the Annual Domestic Asset Protection Trust State Rankings Chart makes clear (see image).⁷⁷ This rankings chart demonstrates that states clearly compete in offering trust settlors varied opportunities to shield assets from marital property and spousal support claims. Nevada, for example “has apparently chosen to be even more competitive by providing for no statutory creditor exceptions [including spouses] to the self-settled spendthrift trust features of its legislation.”⁷⁸ Oklahoma law, likewise, bars spouses from access to trust assets at divorce, as does Wyoming.⁷⁹ Wyoming DAPT law, moreover, shields trust assets from spousal and child support claims when the settlor is thirty days or more in default.⁸⁰ Other states give more weight to spousal claims, but doing so lowers their ranking and may make their jurisdiction less attractive to clients for trust formation purposes.

⁷⁵ *Use of Asset Protection Trusts in the Pre-Marital Planning Process*, MCKONLY & ASBURY, <http://www.macpas.com/use-of-asset-protection-trusts-in-the-pre-marital-planning-process/> [perma.cc/S2JX-SWHB?type=image] (last visited July 16, 2017).

⁷⁶ *The 4 Things You Need to Know About a Nevada Asset Protection Trust*, PREMIER TRUST, <https://premiertrust.com/2016/12/30/the-4-things-you-need-to-know-about-a-nevada-asset-protection-trust/> [perma.cc/M68T-C9QZ] (last visited July 17, 2017).

⁷⁷ STATE RANKINGS CHARTS, <https://www.oshins.com/state-rankings-charts> [perma.cc/4HC3-CQP7] (last visited July 16, 2017); Ashlea Ebeling, *Comparing Domestic Asset Protection Trust States*, FORBES (July 6, 2016), <http://www.forbes.com/sites/ashleaebeling/2016/07/06/comparing-domestic-asset-protection-trust-states/#7caed6a765fe> [perma.cc/4VXK-E7HY].

⁷⁸ See Edward D. Brown & Hudson Mead, *Divorce and the Self-Settled Trust: Insights into How-and Where-Clients Might Protect Their Trust Assets from Financial Risk of a Future Divorce*, 2 FEATURE: EST. PLAN. & TAX'N (Feb. 2014), <http://www.barryengel.com/pdf/divorce-self-settled-trust.pdf> [perma.cc/7BLV-6YHD].

⁷⁹ STATE RANKINGS CHARTS, *supra* note 77.

⁸⁰ *Id.*

This is not to say that there are no limits whatsoever on the use of DAPTs as premarital trusts in the states that have adopted them. Some states require a certain amount of time before the marriage before granting asset protection. For example, assets in an Alaskan or Hawaiian DAPT are not protected at divorce unless the DAPT was created more than thirty days before the marriage or written notice was provided to the to-be spouse.⁸¹ These constraints are not, however, burdensome, and neither are they a large part of the marketing message circulated by the trust industry and practitioners. These constraints are also, certainly, of a different order from the requirements that accompany the drafting and execution of a prenuptial agreement.

In this new landscape of DAPTs, then, prenups are characterized as difficult to execute, subject to challenge, the source of difficult conversations, and “unromantic.” DAPTs, on the other hand, are described as the better option because they allow for unilateral action and flexible timing while avoiding awkward exchanges about wealth and property.

⁸¹ Amy J. Amundsen, *Domestic Asset Protection Trusts in Divorce Litigation*, 29 J. AM. ACAD. MATRIM. LAW. 1, 11-12 (2016), https://cdn.ymaws.com/aaml.org/resource/collection/385FDCDA-028C-494C-8530-7641053BD254/MAT106_9.pdf A greater number of states (Delaware, Mississippi, New Hampshire, Ohio, Rhode Island, South Dakota, and Tennessee) require notice if the DAPT is created during the marriage. *Id.* at 12. In South Dakota, marital property transferred into the DAPT is protected at divorce, but only if the spouse received notice in the form provided by the statute or provided written consent after having received substantially similar notice. *Id.* The statute directs that any letter of notice containing the following language, in capital letters and at the top of the letter:

“YOUR SPOUSE IS CREATING A PERMANENT TRUST INTO WHICH PROPERTY IS BEING TRANSFERRED. YOUR RIGHTS TO THIS PROPERTY MAY BE AFFECTED DURING YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF CHILD SUPPORT OR ALIMONY OR A DIVISION OR DISTRIBUTION OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR SPOUSE.”

Id. The notice must also describe the property being transferred. *Id.* at 13. The spouse may request a copy of the trust document and is advised to seek independent legal counsel. Failure to object after notice is construed as consent. S.D. CODIFIED LAWS § 5516-15(3)(a); *Codified Laws*, S.D. LEGISLATURE, https://sdlegislature.gov/Statutes/Codified_Laws/2073006.

C. *New Asset Protection Trusts in the Courtroom*

Despite all the work and planning that wealth managers put into safeguarding assets, there is a critical question that remains: how do DAPTs fare in the courtroom? The answer so far is ambiguous, as DAPT divorce cases have produced mixed results, often turning at this preliminary stage on conflict of law questions.⁸² *Dahl v. Dahl* illustrates the types of DAPT divorce issues that are currently showing up in court. Charles and Kim Dahl were married and lived in Utah for almost eighteen years before the husband filed for divorce in 2006, beginning proceedings that the district court called a “train wreck.”⁸³ Charles was a cardiologist and Kim had worked as an interior designer and school counselor for a short time before the marriage. During the marriage, she was primarily a stay-at-home parent and the primary caretaker of two children.⁸⁴ One of the main issues in this “contentious” divorce were the assets that Charles had placed in a trust that he created in Nevada in 2002, the Dahl Family Irrevocable Trust, naming himself as beneficiary and his brother C. Robert Dahl and the Nevada State Bank as co-trustees. Charles initially funded the trust with 97% of the shares in Marlette Enterprises, a Utah real estate investment company (LLC) that he owned and that was valued at approximately \$1 million. The following year, the couple jointly transferred the deed to their primary residence to the trust. Despite the fact that the couple lived in Utah, Nevada was listed as place of domicile in the trust’s choice of law provision.

When divorce proceedings began, Kim sought a share of assets in trust on the grounds that they were marital property. The Utah district court concluded that Kim had no interest in trust assets both because of the choice-of-law provision and because

⁸² Courts have found against granting jurisdiction to the state of trust settlement in other creditor contexts—notably in *In re Huber*, 493 B.R. 798, 807–09 (Bankr. W.D. Wash. 2013), a case about a real estate developer trying to shield his assets through the use of a DAPT. At least one commentator has argued that these types of trusts should be protected as a matter of supporting trustor intent. See Brendan Duffy, *In States We “Trust”: Self-Settled Trusts, Public Policy, and Interstate Federalism*, 111 Nw. U. L. REV. 205 (2016).

⁸³ *Dahl v. Dahl*, 345 P.3d 566, 575 (Utah 2015).

⁸⁴ *Id.* at 575.

the trust was irrevocable,⁸⁵ but the Utah Supreme Court disagreed on appeal. Charles admitted that at least some part of the trust assets were marital property and, consequently, the court stated: “Thus, to the extent that the Trust corpus contains marital property, Utah has a strong interest in ensuring that such property is equitably divided in the parties’ divorce action.”⁸⁶ Ultimately, the court concluded that Kim’s interest in the marital home was undeniably marital property and there was an open question as to what, if any, percentage of the real estate company was marital property.⁸⁷ The larger message that the court sent in its conclusion was that the trust’s choice-of-law provision was invalid and Nevada’s highly protectionist trust law did not save Charles from claims to marital assets in the trust.

The twist in the case—and the resolution—depended, however, on what was likely a mistake in trust drafting. The main reason that the court concluded some portion of the trust assets were reachable by Kim at divorce was because the court determined that the trust was revocable—not irrevocable as Charles claimed. The trust agreement stated: “The Trust hereby established is irrevocable. Settlor reserves *any power whatsoever* to alter or amend *any* of the terms or provisions hereof.”⁸⁸ As commentators have pointed out: “[T]his provision may contain a typographical error—if one substitutes ‘no’ for ‘any,’ the phrase not only reads as more natural but makes sense as a provision in an irrevocable trust.”⁸⁹ Had the trust been correctly drafted as an irrevocable trust, it is highly possible that the outcome for Kim would have been quite different and that the DAPT would have done its intended work.

IMO Daniel Kloiber Dynasty Trust, another DAPT divorce case turning on the inclusion of trust assets, likewise involved a family business and claims by the wife to a portion of the assets

⁸⁵ *Id.* at 577.

⁸⁶ *Id.* at 579.

⁸⁷ *Id.* In addition, Ms. Dahl claims to have conveyed to the Trust her interest in Marlette Enterprises and other marital property with a value of at least \$2 million. *Id.*

⁸⁸ *Id.* at 580.

⁸⁹ See *Utah Supreme Court Decides Conflict-of-Laws Issue in Revoking Dahl*, FORBES (Feb. 16, 2015) <https://www.forbes.com/sites/jayadkisson/2015/02/16/utah-supreme-court-decides-conflict-of-laws-issue-in-revoking-dahl/?sh=E1f986f652eb>.

in trust.⁹⁰ The trust in *Kloiber* was a dynasty trust, a particular form of a DAPT,⁹¹ that Glenn Kloiber created in 2002 with PNC bank for the benefit of his son, Daniel Kloiber. Although Glenn was the initial trust creator, Daniel was not only the primary beneficiary, with a right to withdraw up to 5% of the net fair market value of the trust estate annually,⁹² Daniel was also quickly given special powers of appointment⁹³ and was named as a “special trustee,” with sole authority to direct the trustee regarding investment decisions, distributions, and trustee selection.⁹⁴ Moreover, the assets in the trust were primarily Daniel’s. Glenn initially funded the trust with approximately \$15,000. The real wealth, however, was placed in trust by Daniel less than a year later, when Daniel sold 99.45% of his shares in Exstream Software (a company that he had founded and still co-owned) to the trust for “an unsecured promissory note with a face amount of \$6 million.”⁹⁵ By 2008, the trust had sold all of this stock for approximately \$310 million.⁹⁶ The trust, therefore, offered maximum asset protection and tax benefits while still giving Daniel signifi-

⁹⁰ For more on the divorce, see Jay Adkisson, *Delaware Anti-Suit Injunction Nixed as to Dynasty Trust in Kloiber*, FORBES (Aug. 18, 2014), <http://www.forbes.com/sites/jayadkisson/2014/08/18/delaware-anti-suit-injunction-nixed-as-to-dynasty-trust-in-kloiber/6/#6bb14c77328b> [perma.cc/94WX-WC5J].

⁹¹ Dynasty trusts are created in jurisdictions that offer enhanced asset protection and exemption from the rule against perpetuities, thereby allowing for “dynastic” wealth to accrue without termination. *Id.*

⁹² “In addition, the Trustee ‘shall pay to or apply for [Dan’s] benefit’ such amounts as ‘shall be necessary or advisable from time to time for [Dan’s] health, education, support and maintenance.’ *Id.* § 1.1.3. The Trustee also may use funds from the trust estate to provide and maintain a personal residence for Dan. *Id.* § 1.1.7.” *In re Kloiber*, 98 A.3d 924, 929 (Del. Ch. 2014).

⁹³ That permitted him to appoint the principal of the trust estate to the “wife of the Grantor’s son,” to his blood relations, or to a charitable organization. *Id.*

⁹⁴ The Special Trustee possessed powers including the following: “Sole authority to direct the Trustee with respect to investment of the trust estate, *id.* § 9.1; Sole authority to direct the Trustee with respect to Special Holdings, *id.* § 9.2; Sole authority to direct the Trustee with respect to discretionary distributions, *id.* § 9.3; and Sole authority to remove and replace the Trustee, *id.* § 9.4.” *Id.* at 931–32.

⁹⁵ *Id.* at 932.

⁹⁶ *Id.*

cant control over the trust wealth, which derived primarily from the sale of his company.⁹⁷

When Daniel filed for divorce in 2010, his wife, Beth, argued that the trust assets were marital property. The Kentucky court, presiding over the divorce because of the couple's domicile in Kentucky, froze all the couple's asset including the assets in trust,⁹⁸ after which Daniel resigned as special trustee—transferring the power to his son. As a result of the freeze, the Delaware trust company (PNC) sought a declaration that Delaware's Court of Chancery had exclusive jurisdiction over all matters pertaining to the trust, excluding all other courts including the Kentucky Family Court.⁹⁹ Unpersuaded, the Delaware court concluded that the Delaware Court of Chancery possessed exclusive jurisdiction with respect to other Delaware courts.¹⁰⁰ Moreover, the court remarked: "This case differs from a situation where parties have agreed voluntarily by contract to an exclusive forum. Beth did not execute the Trust Agreement, nor is there any indication that she chose explicitly or implicitly to become bound by its terms."¹⁰¹ In other words, the use of the trust as a mechanism for apportioning property rights was not, the court concluded, the same as a prenuptial contract that had been reviewed and consented to by both parties. Ultimately, the parties settled and some (undisclosed) portion of the dynasty DAPT assets were severed from the original trust and placed in a new trust for Beth. The question of what portion of the trust assets were marital, if any, was circumvented by private settlement and left unanswered. The takeaways for wealth managers were that exclusive jurisdiction was not necessarily exclusive and that safeguarding

⁹⁷ Jocelyn Margolin Borowsky & Richard W. Nenko, *Myths and Facts About Kloiber*, MARTINDALE.COM (Apr. 12, 2017), https://www.martindale.com/family-law/article_Duane-Morris-LLP_2242706.htm [perma.cc/8DD3-MLJV].

⁹⁸ *Kloiber*, 98 A.3d at 933. A subsequent order additionally prohibited Daniel from "taking action to facilitate, request or procure any change in any of the liquid, cash or cash equivalent investments within the [dynasty trust], or within the entities within the [dynasty trust]." *Id.* at 934.

⁹⁹ *Id.* at 938 (citing 12 DEL. CODE § 3572(a)).

¹⁰⁰ *Id.* at 939 (concluding not only that Delaware did not have exclusive jurisdiction, but also that Delaware did not have primary jurisdiction).

¹⁰¹ *Id.* at 940 (citing *Garretson v. Garretson*, 306 A.2d 737, 740 (Del. 1973)).

assets from distribution by a divorce court was a trickier proposition than originally imagined.¹⁰²

Other cases, such as the high-profile *Bosarge* case, similarly have settled before courts can rule on the efficacy of DAPTs in keeping assets out of reach of divorcing spouses. The *Bosarge* divorce has been covered extensively in the popular press because of the enormous wealth involved and the intricate complex of trusts that Ed Bosarge created to shield assets from all creditors, including the wife he was divorcing. Ed and Marie Bosarge married in 1989, before Ed Bosarge made billions through the company he co-founded, Quantlab, a high-frequency trading company. Their marriage lasted over thirty years – during which time Ed developed and profited from Quantlab – until 2017 when Ed served Marie with divorce papers just as she was “putting the finishing touches on their newest pad, a \$45 million Georgian mansion in billionaire haven Belgrave Square.”¹⁰³ when her husband served her with the divorce papers. Marie was surprised, one article recounts, because “she assumed Ed would see it as too expensive to divorce her since the couple didn’t have a prenuptial property agreement and Texas is a community property state—meaning everything earned during their marriage, including those Quantlab profits, would be jointly owned.”¹⁰⁴

What Marie failed to realize or consider was the fact that their communal assets had been almost entirely poured into South Dakota DAPTs. Accordingly, when Ed filed for divorce, he claimed that

the couple’s community property assets total just \$25 million since an array of trusts own not only his Quantlab stock, but also their homes in Houston, Aspen, London and Maine and the 72-acre island in the Bahamas where they docked their three (trust-owned) yachts, includ-

¹⁰² Steven J. Oshins, *Beware of Rights of Beneficiary’s Divorcing Spouse in Delaware*, *INFORMA* (Nov. 1, 2016), <http://www.wealthmanagement.com/estate-planning/beware-rights-beneficiary-s-divorcing-spouse-delaware> [perma.cc/AAW9-HFUV].

¹⁰³ Christopher Helman, *How to Hide a Billion Dollars: Three Techniques the Ultrarich Use to Dodge Ex-Spouses, the Taxman and Disgruntled Business Partners*, *FORBES*, Sept. 4, 2020, <https://www.forbes.com/sites/christopherhelman/2020/09/04/how-to-hide-a-billion-dollars-three-techniques-the-ultra-rich-use-to-dodge-ex-spouses-the-taxman-and-disgruntled-business-partners/?sh=5d2cbd7f5994>.

¹⁰⁴ *Id.*

ing the eponymous 180-foot Marie, complete with a baby grand piano.¹⁰⁵

Ed's lawyers claimed that neither Ed nor Marie were the owners of any of those properties, properties that had served as marital homes and that the couple had used and enjoyed over the years. The South Dakota trust company was the true owner. Bosarge even had a million-dollar necklace he had given Marie repossessed, stating in his depositions: "That wasn't a gift; that was specifically bought by the trust. It was a specific investment."¹⁰⁶

South Dakota rules for DAPTs worked in Ed's favor, both during the marriage and at divorce. Marie claimed that she never received trust accountings in her capacity as a trust beneficiary; moreover, she was not notified when she was removed as a beneficiary from the trust. Moreover, during the divorce, "a South Dakota court turned down [Marie's] attempt to get discovery of key trust documents."¹⁰⁷ South Dakota trust privacy rules enabled all these various forms of secrecy and fostered, in this case, a complete lack of transparency that made Marie's quest to prove that a large portion of the trust assets were community property even more daunting. One trust lawyer stated in an article about the divorce: "South Dakota is almost bulletproof,"¹⁰⁸ and another article about the case observed that "[s]everal divorce attorneys and others familiar with trust law said they know of no precedent in which an aggrieved spouse has successfully accessed the assets in a South Dakota trust in a court-ordered divorce settlement."¹⁰⁹ Marie Bosarge likely walked away from her divorce a rich woman; nevertheless on account of her husband's use of DAPTs, she also likely received significantly less than she would have had he owned the assets outright.

Only one case has worked its way through the courts in which DAPTs have worked as marital agreements in a way that replicates the more contractual and consensual characteristics of

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Candace Taylor, *A High-Stakes Divorce Illustrates How the Rich Play Real-Estate Tug of War*, WALL ST. J., Apr. 9, 2020, <https://www.wsj.com/articles/a-high-stakes-divorce-illustrates-how-the-rich-play-real-estate-tug-of-war-11586458598>.

¹⁰⁸ Helman, *supra* note 103.

¹⁰⁹ Taylor, *supra* note 107.

a standard pre- or post-nuptial agreement. The 2017 case from Nevada, *Klabacka v. Nelson*, involved spouses, Eric and Lynita Nelson, who married in 1983 and ten years into the marriage signed a separate property agreement (SPA) that transmuted their community assets into separate property. After almost another decade, in 2001, the spouses each funded their own DAPT with separate property.¹¹⁰ Both spouses named the same independent trustee and both spouses retained the right to veto any distribution made from the discretionary spendthrift trusts. From the inception of the trust until Eric filed for divorce in 2009, the spouses made a number of gifts from one trust to the other.

Upon filing for divorce in 2009, however, Eric claimed “the SPA and trust agreements were signed in an effort to protect the parties’ assets from creditors and that much of the property contained within the trusts was community property.”¹¹¹ The district court found that “the testimony of the parties clearly established that the intent of creating the spendthrift trusts was to provide maximum protection from creditors and was not intended to be a property settlement in the event that the parties divorced.”¹¹² Moreover, the district court noted that they could have invalidated either or both of the trusts “under theories of constructive trust or unjust enrichment.”¹¹³ Consequently, the district court ordered an equalization of \$8.7 million in total trust assets and ordered both lump-sum spousal support and child support arrearages to be paid from Eric’s trust.

On appeal, the Nevada Supreme Court wholly disagreed. At the outset of its analysis, the Nevada Supreme Court swiftly concluded that the SPA was valid because “[b]oth parties were apprised of the legal consequences of the agreement by their attorney. Additionally, Lynita had her own outside counsel review the agreement prior to signing and provide additional legal advice regarding the consequences of the SPA.”¹¹⁴ Moreover, the trusts were also valid because they had been executed according to all relevant formalities and the intention of each spouse had

¹¹⁰ *Klabacka v. Nelson*, 394 P.3d 940, 943 (Nev. 2017).

¹¹¹ *Id.* at 944.

¹¹² *Id.*.

¹¹³ *Id.* at 944.

¹¹⁴ *Id.* at 947.

been clear.¹¹⁵ Because both trusts were valid and because there was no evidence that either trust contained community property, the court concluded that the district court had erred in ordering an equalization payment between trusts, stating that such a payment would contravene the discretionary nature of the trust and “would require the trustee to make a distribution outside the scope of the trust agreement and, perhaps more importantly, would run afoul of [the Nevada code] which prohibits payments made pursuant to or by virtue of any legal process.”¹¹⁶ For similar reasons, the court concluded that the district court erred in ordering spousal support and child support arrears to come out of Eric’s trust and reiterated that “Nevada’s statutory framework explicitly protects spendthrift trust assets from the personal obligations of beneficiaries.”¹¹⁷

Ultimately, then, the trusts worked as intended and by design, allowing Eric and Lynita to each protect their assets, even at divorce; the difference here is that the trusts were created with intention, with transparency between spouses, and with attentiveness to the nature of the property being put into trust. In this way, these trusts looked like a postnuptial agreement as opposed to the “secret” or “stealth” premarital trusts recommended by trust companies and wealth managers.

III. What Harms Arise from Premarital Trusts?

The questions that ultimately arise from this phenomenon of family trusts and DAPTs being used as a replacement for pre- and postnuptial agreements is whether they are creating harms within marriage and, if so, who is bearing the burden of these harms. The answer to the first question – whether the use of these trusts creates harms to spouses – is likely affirmative, as the cases show. Traditional asset protection trusts still work to keep family wealth from a divorcing spouse at divorce while DAPTs,

¹¹⁵ *Id.* at 949. “Here, both Eric’s Trust and Lynita’s Trust are valid Nevada SSSTs with plain, unambiguous language indicating a clear intent to create a spendthrift trust.” The court did however conclude that “the district court erred by not tracing the assets contained within the trusts . . . if community property exists within the trusts, the district court shall make an equal distribution of that community property.” *Id.*

¹¹⁶ *Id.* at 950.

¹¹⁷ *Id.* at 952.

marketed and sold as substitutes for marital agreements and contracts, are being used to decrease transparency in marital wealth planning, strip spouses of marital wealth that would otherwise be subject to distribution at divorce, and safeguard one spouse's money from the other's support claims. DAPTs, then, by design contravene principles of marital and economic partnership without providing any true assurance that this manner of regulating marital wealth has been ratified by both spouses.

The question of who bears the harms, however, may be more complicated. As the *Klabacka* case demonstrates, there are cases in which concern may be minimal, if both spouses are parties to the planning and enter into a trust-based marital arrangement with full counsel and consent. Cases in which both parties use trusts to protect their own wealth, earned or obtained before marriage, certainly generate less cause for concern. This kind of planning tends to arise particularly in second and third marriages, when spouses enter into marriage with their own wealth and are looking not only to protect their assets but also provide for children from previous marriages.¹¹⁸ In these scenarios, concerns about transparency and communication might arise but concerns about wealth and power asymmetries as well as trusts being used to strip one spouse of marital wealth accumulated over the life of a long-term marriage may be less acute. The cases that are beginning to trickle into divorce courts around the country evidence however that the harms of these trusts are being born by women in long-term, high-wealth marriages defined by a great degree of specialized household labor and significant wealth asymmetry.

To begin with, at least in the current context of gender and marriage, the harms of these trusts are more likely to fall on women at divorce because trusts are more likely to be created by men – that is to say, those individuals with wealth to protect, access to sophisticated estate planning advice, and the financial capacity to forgo full rights to the assets by placing them in an

¹¹⁸ See, for example, HIS, HERS, OR OURS? – ESTATE PLANNING FOR BLENDED FAMILIES, <https://www.sterlingandtucker.com/ealert/estate-planning-blended-families/> and ESTATE PLANNING FOR BLENDED FAMILIES, <https://modernwealthlaw.com/estate-planning-basics-101/estate-planning-blended-families/>.

irrevocable trust.¹¹⁹ As the cases reviewed in the previous parts of this article confirm, it is much more common to see men taking steps to protecting their wealth before or during marriage than women. Women in general possess less wealth than men, at all points on the wealth spectrum. Single women are, in fact, the lowest wealth-holders and within that group the level of wealth varies according to race and ethnicity.¹²⁰ Whereas the median wealth for single white women is \$41,500, the median wealth for single black and Hispanic women is \$100 and \$120 respectively.¹²¹ Married women, overall, possess more wealth than single women and this is attributable to the fact that their wealth is generally measured by couple: “Married households are significantly wealthier than non-married households Never-married women’s median net worth is just \$2,500 compared to the

¹¹⁹ Because we do not have data on who creates trusts, we are reliant on legal disputes to bring the trust claims to light and reveal what kinds of trusts are being created with what kinds of governing terms. Certainly, women also create trusts and, as women gain more wealth, perhaps marketing will be more directed at women. Nevertheless, the trust companies in their current marketing are targeting men, which maps on to the cases that are coming into court.

¹²⁰ See Asset Funders, https://assetfunders.org/wp-content/uploads/Women_Wealth_Insights_Grantmakers_brief_15.pdf, *Gender Economic Inequality*, <https://inequality.org/facts/gender-inequality/>, and *America Doesn’t Just Have a Gender Pay Gap, It Has a Gender Wealth Gap*, WASH POST, Apr. 2, 2019, <https://www.washingtonpost.com/outlook/2019/04/02/america-doesnt-just-have-gender-pay-gap-it-has-gender-wealth-gap/>

¹²¹ Mariko Chang, *Lifting as We Climb*, INSIGHT CTR. COMMUNITY ECON. DEV. (2010), https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting_As_We_Climb_InsightCED_2010.pdf. This statistic points to another likelihood, which is that even among men, men of color are less likely than white men to create trusts because of the differences in wealth and the racial wealth gap. From the outset, white families are more likely to inherit than their black counterparts and among those families receiving inheritances, black families receive less: “Blacks received 8 cents of inheritance for every dollar inherited by whites.” Cedric Herring & Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 RACE & SOC. PROBS. 4, 8 (2016) (quoting T. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 69 (2004)). Even in the upper echelons of wealth: “The 99th percentile black family is worth a mere \$1,574,000 while the 99th percentile white family is worth over 12 million dollars.” William Darity Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap*, INSIGHT CTR. COMMUNITY ECON. DEV. 2 (2018), https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/FINAL%20COMPLETE%20REPORT_.pdf.

\$148,700 median net worth of married individuals.”¹²² Even at the very top levels of wealth, women experience the gender wealth gap and on the 2021 Forbes billionaire list, out of 2,755 billionaires, only 328 (12%) were women, and the majority of those women inherited at least a portion of their wealth, usually from a father.¹²³

Pressing on the question of who holds the wealth within marriage, recent studies conclude that in most cases marital wealth derives primarily from the husband, at least in different-sex marriages.¹²⁴ This is especially true in high-wealth families, the same ones who tend to use trusts in their financial planning. In these high-wealth, “1%” families,

married households rarely qualify for one percent status based on women’s income alone. In 2016, women’s income was sufficient for one percent status in only 1 in 20 elite households . . . [and] women’s income is not necessary for the vast majority of married households to meet the one percent threshold.¹²⁵

This is not only because women tend to own less wealth than men but also because, despite some changes in the conventional pattern, women tend to marry men with higher incomes than their own.¹²⁶ What these studies as a whole suggest, then, is “a persistent male dominance of income resources in elite families.”¹²⁷ Based on these gendered patterns of wealth-holding within marriage, Lily Kahng suggests that women are the ones in a marriage who are “less likely to benefit from spousal transfer provisions such as the marital deduction, gift splitting, or QTIP trusts, simply because they have less wealth to transfer.”¹²⁸ By

¹²² Karuna Jaggar, *The Race and Gender Wealth Gap*, 15 RACE & REGIONALISM (2008).

¹²³ *Billionaires: The Richest People in the World*, FORBES (last visited Aug. 17, 2021) <https://www.forbes.com/billionaires/>.

¹²⁴ There is less data on patterns of wealth-holding in same-sex marriages and what inequalities exist there.

¹²⁵ Jill E. Yavorsky et al., *Women in the One Percent: Gender Dynamics in Top Income Positions*, AM. SOC. REV. (2019), <https://journals.sagepub.com/doi/full/10.1177/0003122418820702>.

¹²⁶ *Better-Educated Women Still Prefer Higher-Earning Husbands*, INST. FAM. STUD. (Nov. 7, 2016), <https://ifstudies.org/blog/better-educated-women-still-prefer-higher-earning-husbands>.

¹²⁷ Yavorsky et al., *supra* note 125.

¹²⁸ Lily Kahng, *The Not-so-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 351 (2016).

the same logic, women are also less likely to establish DAPTs and use premarital trusts as a part of their wealth management and financial planning. As Kahng also suggests, women may tend to use these kinds of asset protection trusts less than men even when they do hold wealth because “trusts are used predominantly by wealthy husbands and appear to reflect a ‘deeply patriarchal outlook.’”¹²⁹

The financial harm these women experience at divorce is compounded because women in high-wealth marriages are also more likely to specialize household labor and work at home rather than in the paid labor market, thereby exacerbating their lack of individual wealth. Drawing again on recent studies: “When a man is the primary breadwinner, 70 percent of women in elite households don’t participate in the labor force When a woman’s income is enough to put the household in the top 1 percent, men stay home about 22 percent of the time.”¹³⁰ Another report found “that 46 percent of the mothers whose husbands earned at least \$250,000 a year don’t work for pay.”¹³¹ Accordingly, the women in high-wealth marriages – whose marital wealth is more likely to be structured by marital trusts – are also more likely to have marriages that follow extremely conventional and gendered scripts for marital roles. Their marriages are “gender-full.”¹³² These women are more likely to focus their full time and attention on running the household and caretaking, and therefore rely heavily on a court to equalize marital wealth at divorce, compensating them for indirect contributions to the marital wealth. In these marriages, women, many of them with

¹²⁹ *Id.* at 353.

¹³⁰ Andrew Van Dam, *Among 1-Percent Earners, Where Area All the Women?*, WASH. POST, Feb. 18, 2019, <https://www.washingtonpost.com/us-policy/2019/02/13/glass-ceiling-is-even-higher-penthouse-women-percenters-are-rare/>.

¹³¹ Robert VerBruggen & Wendy Wang, *The Real Housewives of America: Dad’s Income and Mom’s Work*, INST. FAM. STUD. (Jan. 23, 2019), <https://if-studies.org/blog/the-real-housewives-of-america-dads-income-and-moms-work>. Also, just over a third of mothers married to men earning less than \$25,000 a year are not in the workforce. *Id.*

¹³² Abbie E. Goldberg, “Doing” and “Undoing” Gender: The Meaning and Division of Housework in Same-Sex Couples, 5 J. FAM. THEORY & REV. 85, 88 (2013).

advanced, professional degrees and work experience,¹³³ have depended on modern legal understandings of marital partnership as a safeguard to allow them to opt out of paid labor. The migration of marital wealth into asset protection trusts, however, has the capacity to undermine any implied bargains made between spouses about the division of household labor.

Ultimately, then, because of sizeable gender and racial wealth gaps – which predict that white couples are more likely to hold wealth and that within that set of predominantly white couples the man is more likely to be the wealthy spouse – the particular harm wrought by DAPTs in marriage planning falls primarily on white women.¹³⁴ These women are privileged within marriage and even at divorce they retain and benefit from more than a modicum of privilege in both economic and social terms. Consequently, it may seem as if the problems that plague these women, revealed in part by the use of asset protection trusts, are remote from larger social concerns, involving as they do only a small and circumscribed group of privileged actors. Looking at the effects through a broad frame, however, it is possible to suggest that these concerns have more generalizable implications that can amplify the effects. One troubling dimension of the use of these trusts is what this trend might reveal about social understandings or acceptance of marital partnership and shifts away from transparency – a value that prenuptial agreements instantiate and work to actualize. Another reason we might care about the use of these trusts is the relationship between premarital trusts and wealth inequality. The use of asset protection trusts in marital planning provides a critical look into the legal mechanisms that intensify gender and racial wealth gaps over time.

¹³³ See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

¹³⁴ Women in same-sex marriages are less likely, as Kahng points out, to be in high-wealth marriages based on their own incomes (although there are certainly exceptions, see *United States v. Windsor*, 570 U.S. 744 (2013). Add cite And there is little data about men in same-sex marriages, although speculatively they are less likely to specialize in household labor and be egalitarian within marriage, particularly if there are no children in the home. With an increasing number of children in these marriages and households, however, high-wealth same-sex marriages may begin to look more like different-sex marriages than they do presently – that is to say they may become more gender-full. For more on this, see Allison Tait, *Divorce Equality*, 90 WASH. L. REV. 1245 (2015).

Trust settlors – mostly, at least for now, white men in different-sex marriages – are using trusts to solidify their wealth at the expense of other parties. These trust settlors already benefit from privilege in creating wealth and the trust laws around asset protection trusts let these individuals consolidate and entrench their wealth. Moreover, this entrenchment comes at the potential expense of their spouses and, ultimately, perhaps even at the expense the larger social collective that supports these ex-spouses and their children when a husband's asset are locked away in trust, unavailable for distribution. Accordingly, the role of premarital asset protection trusts in regulating household economies produces inequality within the household, and it may also produce inequality in the larger context. For all these reasons, it may be beneficial to inquire more deeply into what level of tolerance trust law maintains with respect to premarital trusts.

Conclusion

The use of trusts in marriage planning is a traditional practice in high-wealth families, both historically and presently. Trusts have been the preferred mechanism because they offer asset protection that safeguards the family fortune from multiple kinds of creditors, including divorcing spouses. Moreover, unlike prenuptial contracts – the premarital trust's recently arrived competitor – the trust does not necessarily require any form of asset disclosure, independent review by the other spouse, or even notice to the other spouse. This is especially true of the new generation of asset protection trusts that are being specifically marketed as alternatives to the prenuptial agreement. These trusts expand the population that can establish premarital trusts by allowing individuals to place their own assets in trust and receive protection rather than depending on a third party to create such a trust. While conventional trusts still consistently and successfully protect family wealth, as caselaw demonstrates, cases involving DAPTs are just beginning to work their way onto divorce court dockets. As the use of these trusts increases and more states consider adopting them, however, it may be useful to press on the question of effects and interrogate more fully the gendered harms and equality harms that result from the use of these trusts – and asset protection trusts more generally – in marriage planning. Upon further inquiry, tolerance for these trusts

may decrease as their role in disrupting economic partnership, diminishing marital transparency, and entrenching gendered forms of wealth inequality becomes increasingly well-defined.