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Ohio Northern University Law Review

Student Comments

Viability of Ohio Domestic Asset Protection Trusts: A Review of the Proposed Ohio Legacy Trust Act

BRANDON BECK*

I. INTRODUCTION

This paper will explore the burgeoning movement in Ohio to adopt the domestic asset protection trust (“DAPT”). A DAPT is a means to allow settlors to protect their assets through the creation of a trust in which the settlor preserves beneficial use and enjoyment, while still retaining the ability to shield those assets from most creditors.¹ With the introduction of the Ohio Legacy Trust Act to the Ohio legislature,² Ohio, like thirteen states before it, will soon be a battleground between those who wish to allow this asset protection technique and those who oppose it.³ This paper proposes that enacting a statute that would allow for the creation of DAPTs, such as the proposed Ohio Legacy Trust Act or other similar statutory scheme, is not a viable asset protection strategy that should be adopted in Ohio.

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1. Michael A. Passananti, *Domestic Asset Protection Trusts: The Risks and Roadblocks Which May Hinder Their Effectiveness*, 32 AM. COLL. OF TR. & EST. COUNSEL J. 260, 260-61 (2006).

2. See Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association, *Report of the Estate Planning, Trust and Probate Law Section, in OHIO STATE BAR ASSOCIATION COUNCIL OF DELEGATES MEETING: NOV. 5, 2010, 28* (2010) [hereinafter Ohio Legacy Trust Act Report] (proposed to be codified at OHIO REV. CODE ANN. §§ 5815.01-5816.14).

3. See *infra* notes 53-65 and accompanying text (for a list of the states with the asset protection technique); see also Passananti, *supra* note 1, at 262-63.

The remainder of Part I will introduce and define the concept of a DAPT, while Part II will discuss the history and development of DAPTs.⁴ Part III gives a brief overview of the proposed Ohio Legacy Trust Act, including how it acts as a response to the current statutory scheme in Ohio, its origins and rationale, and an overview of its language.⁵ Part IV provides a comparison between the proposed Ohio DAPT statute and the enacted Delaware statute upon which it is based.⁶ Part V describes and responds to the arguments made by proponents of DAPTs.⁷ Part VI presents arguments against the adoption of DAPTs.⁸ Part VII proposes possible revisions that could be made to the Ohio Legacy Trust Act and explains the limitations of those revisions.⁹

The proposed Ohio Legacy Trust Act would allow for the creation of trusts commonly called domestic asset protection trusts¹⁰ or self-settled spendthrift trusts.¹¹ The DAPT “is generally, an irrevocable trust with an independent trustee who has absolute discretion to make distributions to a class of beneficiaries which includes the settlor.”¹² It is an offshoot of the foreign asset protection trust, which allows settlors to transfer their assets to offshore trusts in order to take advantage of tax savings and favorable debtor protection laws.¹³ Similar to foreign asset protection trusts, the main purpose of a DAPT is asset protection.¹⁴ The DAPT eradicates the common law rule applied by all but the thirteen states with DAPT statutes that allow creditors and other parties with a claim against the settlor to access the settlor’s assets contained in a trust if the settlor uses that trust for his own benefit.¹⁵ In order to create a DAPT, settlors in the states that allow it must transfer assets into a trust, name the settlor as a beneficiary, include a spendthrift provision stating that trust assets may not be “voluntarily or involuntarily alienated before distribution,” and appoint the settlor as trustee

4. See *infra* Parts I-II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. See *infra* Part V.

8. See *infra* Part VI.

9. See *infra* Part VII.

10. Michael J. Stegman et al., *Legacy Trusts: Will Ohio Move Forward?*, OHIO LAW., Mar./Apr. 2011, at 13.

11. Amy Lynn Wagenfeld, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows*, 32 VAND. J. TRANSNAT’L L. 831, 838 (1999).

12. David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 AM. COLL. OF TR. & EST. COUNSEL J. 293, 293 (2009).

13. Passananti, *supra* note 1, at 260.

14. Shaftel, *supra* note 12, at 293.

15. Thomas O. Wells, *Domestic Asset Protection Trusts – A Viable Estate and Wealth Preservation Alternative*, FLA. BAR J., May 2003, at 44.

or another party “over whom [the settlor] retains certain powers.”¹⁶ This creates a trust in which the interest of the settlor-beneficiary cannot be assigned or reached by creditors,¹⁷ while at the same time “allow[ing] the settlor to retain a beneficial interest in the trust.”¹⁸

II. HISTORY AND DEVELOPMENT OF ASSET PROTECTION TRUSTS

In order to understand the current trend toward the adoption of DAPTs, it is important to place it into its historical context.¹⁹ Throughout the historical growth of asset protection, certain forces have acted to shape how and why some domestic jurisdictions have adopted the DAPT as an asset protection technique.²⁰ Any DAPT legislation that may be adopted in Ohio must be able to respond to the needs of those pushing for even further development of asset protection devices more readily available to the American public.²¹

For more than 100 years, the U.S. domestic legal system has allowed for the expansion of the theories of risk that allow for recovery through legal action, which many have feared as a threat to individual wealth.²² Many have argued that the judicial system has grown to be pro-creditor and has developed in a way that puts a greater risk on wealthy individuals by exposing them to legal judgments over and above the degree of liability.²³ The truth behind this assertion is irrelevant, as the belief combines with a general distrust of government regulatory abilities and new potential liability from future state and federal legislation to foster a desire for asset protection.²⁴

In response to these types of pressures, the spendthrift trust was created in the late nineteenth century in order to allow protection of a non-settlor beneficiary’s assets.²⁵ This type of trust forbade the beneficiary from alienating his or her interest and prevented creditors from reaching trust assets.²⁶ Shortly before the twentieth century, spendthrift trusts allowed by state statute or common law had adopted this asset protection method as a

16. Wagenfeld, *supra* note 11, at 838-39.

17. *Id.* at 839.

18. Passananti, *supra* note 1, at 261.

19. See Shaftel, *supra* note 12, at 293.

20. See Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 486, 499-500 (2000).

21. See Stegman et al., *supra* note 10, at 13.

22. See Wagenfeld, *supra* note 11, at 836-37.

23. Lischer, *supra* note 20, at 499-500.

24. See *id.* at 484, 510-11.

25. Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1042 (2000).

26. Lischer, *supra* note 20, at 490.

valid way to protect the beneficiary's assets.²⁷ States also sought to limit this concept by creating a rule against self-settled spendthrift trusts, so that settlors could not use a trust to protect assets from creditors and then still use those assets for their own benefit.²⁸ This severely limited the asset protection potential of asset protection trusts in the United States.²⁹

In response to limits imposed on asset protection trusts by domestic jurisdictions, offshore protection trusts have, in recent years, become a very popular asset protection strategy for those with the financial means to utilize it.³⁰ Currently, about sixty nations across the world have asset protection trust statutes, providing a multitude of foreign jurisdictions in which U.S. citizens can take advantage of favorable trust laws.³¹ These foreign jurisdictions have developed law that allows a settlor to create a spendthrift trust for his or her own benefit while shielding those assets from creditors of the settlor.³² Generally, the law will allow a settlor to exercise broad control over the trust, retain a beneficial interest in the trust, and protect trust property from creditor claims.³³

Offshore asset protection trusts have come into vogue because the laws of most of the offshore asset protection trust jurisdictions make it extremely difficult for creditors to obtain jurisdiction over and then make a valid attachment against such a trust, despite the settlor reserving an interest in or use of the trust property.³⁴ Offshore asset protection trusts “present geographic, legal, procedural, and financial hurdles to a creditor interested in reaching its assets.”³⁵ The costs to the creditor in even filing an action can be prohibitive in many foreign jurisdictions, particularly in those that do not allow contingent fee litigation or require deposits before an action can begin.³⁶ Further, most of the foreign jurisdictions that have adopted asset protection trusts do not recognize judgments of foreign courts, meaning that the creditor must try the action in the local foreign court, even if the creditor has already obtained a judgment in a U.S. court.³⁷ Legal systems in foreign asset protection jurisdictions have developed in such a way as to be very

27. See Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 181-82 (1993).

28. See Sterk, *supra* note 25, at 1043-44.

29. See *id.*

30. See Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TR. J. 287, 297 (2002).

31. Passananti, *supra* note 1, at 260.

32. Fox & Huft, *supra* note 30, at 297.

33. Lischer, *supra* note 20, at 503.

34. Fox & Huft, *supra* note 30, at 297.

35. *Id.* at 298.

36. *Id.*

37. *Id.*

protective of debtors by imposing a higher standard of proof for claims of fraudulent transfer and imposing a shorter statute of limitations on creditor's claims.³⁸ These factors deter creditors from pursuing such actions against debtors who have set up foreign asset protection trusts.³⁹

Despite characteristics that may deter a creditor from asserting, winning, and collecting a judgment against foreign asset protection trusts, such trusts pose substantial risks that have spurred the desire for domestic states to adopt similar trusts that can be used by U.S. citizens at home.⁴⁰ The law of fraudulent conveyances in the United States still applies to assets stowed away in overseas trusts, meaning that such a disposition leaves those assets vulnerable to creditors.⁴¹ More and more domestic courts have become concerned about offshore protection trusts, and many have devised ingenious solutions to the problems created by their existence.⁴² Also, political and economic concerns, such as civil unrest, investment scams, and the reputation of the foreign trust company, may surround foreign jurisdictions so as to make disposition of large sums of money a risky venture.⁴³ Finally, cost is a major concern.⁴⁴ The effort required to set up and administer a foreign asset protection trust can be prohibitive.⁴⁵

Due to the limitations involved with Americans setting up an asset protection trust in a foreign land, pressure was increased for states to enact legislation creating similar trusts to those found in offshore jurisdictions.⁴⁶ The adoption of asset protection trusts in the United States similar to those found in offshore jurisdictions began in the early 1990s as a response to the unwillingness of domestic lawyers and their clients to adopt the laws of a foreign nation, when they still wanted to protect assets in a similar fashion.⁴⁷ The story is that a trust attorney from New York, who was on a fishing trip in Alaska with his Alaskan attorney friend, conceived the idea of modifying Alaskan trust law to provide a domestic version of the offshore self-settled asset protection trust in order to attract more business to the remote state.⁴⁸ Together, they drafted and lobbied for the passage of a proposed statute

38. Lischer, *supra* note 20, at 505.

39. *See id.* at 503-05.

40. *See id.* at 515-16.

41. Paul M. Roder, *American Asset Protection Trusts: Alaska and Delaware Move 'Offshore' Trusts Onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1259 (1999).

42. Wagenfeld, *supra* note 11, at 859-60.

43. Roder, *supra* note 41, at 1260.

44. *Id.* at 1260-61.

45. *See id.*

46. *See* Lischer, *supra* note 20, at 515-16.

47. *See* Fox & Huft, *supra* note 30, at 321-22.

48. Christopher Paul, Note, *Innovation or a Race to the Bottom? Trust 'Modernization' in New Hampshire*, 7 PIERCE L. REV. 353, 358 (2009).

designed to accomplish those goals.⁴⁹ Shortly thereafter, Alaska's legislature enacted the Alaska Trust Act, which became effective on April 2, 1997.⁵⁰

Soon afterward, Delaware, not wanting to let business slip away from the state, passed similar legislation in order to compete with Alaska.⁵¹ "In 1999, Nevada and Rhode Island [followed suit and] enacted similar legislation."⁵² Currently, there are thirteen states that have adopted some form of DAPT through legislative enactment: Alaska,⁵³ Delaware,⁵⁴ Hawaii,⁵⁵ Missouri,⁵⁶ Nevada,⁵⁷ New Hampshire,⁵⁸ Oklahoma,⁵⁹ Rhode Island,⁶⁰ South Dakota,⁶¹ Tennessee,⁶² Utah,⁶³ Virginia,⁶⁴ and Wyoming.⁶⁵ The Alaska and Delaware acts, and those that have since followed, now allow "the settlor of a trust to remain a trust beneficiary," but still have the benefit of protection from creditors through a spendthrift provision.⁶⁶ The impetus behind adoption of self-settled asset protection trusts by domestic jurisdictions is clear: states are competing with foreign jurisdictions that attract business from U.S. citizens and other states who have now adopted DAPTs.⁶⁷ Ohio must weigh the adoption of its own DAPT in light of the pressures and trends forged through the development of asset protection techniques over the past century.⁶⁸

49. *Id.*

50. Fox & Huft, *supra* note 30, at 322; see ALASKA STAT. §§ 13.36.105-13.36.220 (2012).

51. DEL. CODE ANN. tit. 12, §§ 3570-3576 (2012); Paul, *supra* note 48, at 358.

52. Fox & Huft, *supra* note 20, at 321, 326-27; see NEV. REV. STAT. § 166.015 (2012); R.I. GEN. LAWS § 18-9.1-1 (2012).

53. ALASKA STAT. § 34.40.110 (2012).

54. DEL. CODE ANN. tit. 12, §§ 3570-3576.

55. HAW. REV. STAT. §§ 554G-1 to -11 (2012).

56. MO. REV. STAT. §§ 456.5-.505 (2012).

57. NEV. REV. STAT. §§ 166.010 - .170 (2012).

58. N.H. REV. STAT. ANN. §§ 564-D:1-18 (2012).

59. OKLA. STAT. tit. 31, §§ 10-18 (2012).

60. R.I. GEN LAWS §§ 18-9.2-1 to 18-9.2-7 (2012).

61. S.D. CODIFIED LAWS §§ 55-16-1 to -16 (2012).

62. TENN. CODE ANN. §§ 35-16-101 to -112 (2012).

63. UTAH CODE ANN. § 25-6-14 (2012).

64. VA. CODE ANN. §§ 64.2-744, -747 (2012).

65. WYO. STAT. ANN. §§ 4-10-505 and 510 to -523 (2012).

66. Fox & Huft, *supra* note 30, at 321.

67. Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2687 (2006).

68. *Id.* at 2685-86.

III. OVERVIEW OF THE OHIO LEGACY TRUST ACT

A. Ohio's Rule Against Self-Settled Spendthrift Trusts

In order to evaluate the proposed Ohio Legacy Trust Act or any other similarly proposed statute, it is imperative to understand how Ohio, through statute, currently treats self-settled spendthrift trusts.⁶⁹ This treatment provides the context of the presently existing trust environment in the state, and represents the current law proponents of Ohio DAPTs are attempting to change.⁷⁰ The traditional American rule against self-settled trusts, recognized in Ohio and in the majority of states, prohibits settlors from creating a spendthrift trust with the settlor as a beneficiary and provisions that prevent the settlor's creditors from reaching the trust assets.⁷¹ The adoption of DAPTs in Ohio would necessarily defy the traditional rule by allowing a settlor to transfer assets to a trust and retain an equitable interest in those assets, while protecting those same assets from creditors by using a spendthrift provision applicable to the settlor's interest.⁷²

Ohio's version of the traditional rule against self-settled trusts prohibits settlors from doing just that.⁷³ Ohio Revised Code section 5805.06(A)(2) provides that, "[w]ith respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."⁷⁴ It further states that the amount reachable by a settlor or assignee cannot exceed the settlor's interest in the trust.⁷⁵ The official comment to Ohio Revised Code section 5805.06 gives the reasoning behind Ohio's rule against self-settled spendthrift trusts, affirming that it is meant to follow the "sound policy" of the traditional doctrine in not allowing a settlor-beneficiary to use the trust form in order to shield assets against his or her creditors.⁷⁶ It also explicitly rejects the DAPT approach taken in other states, such as Delaware and Alaska, which allows a settlor to have a beneficial interest in the trust that is immune from creditors.⁷⁷ Under the Ohio statute, "whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could

69. See generally OHIO REV. CODE ANN. § 5805.06 (LexisNexis 2012) (for the existing statute on self-settled spendthrift trusts).

70. See Stegman et al., *supra* note 10, at 13.

71. *Id.* at 14.

72. See Darsi Newman Sirknen, *Domestic Asset Protection Trusts: What's the Big Deal?*, 8 TRANSACTIONS TENN. J. BUS. L. 133, 133 (2006).

73. Stegman et al., *supra* note 10, at 14.

74. OHIO REV. CODE ANN. § 5805.06(A)(2).

75. See *id.*

76. *Id.* cmt. (a)(2).

77. *Id.* cmt. (a)(2).

have paid to the settlor-beneficiary,” and despite the trustee having discretion to distribute income or principal, “the effect of this [statute] is to place the settlor’s creditors in the same position as if the trust had not been created.”⁷⁸ The current statutory scheme in Ohio rejects the use of DAPTs by making the settlor’s interest subject to the claims of the settlor’s creditors.⁷⁹ Proponents of the Ohio Legacy Trust Act, in sponsoring the adoption of law that would allow DAPTs in Ohio, must cast aside the current rule against self-settled spendthrift trusts.⁸⁰

B. Origins and Rationale

Over a decade ago, representatives from KeyBank recommended to the Ohio Bankers League that the organization should think about and promote the creation of an asset protection statute in Ohio that would allow for the creation of self-settled asset protection trusts.⁸¹ It was not until May 2007 that two committees were formed in order to make this happen—one through the Ohio Bankers League and one through the Ohio Legacy Trust Subcommittee of the Ohio State Bar Association’s Council of Estate Planning, Probate, and Trust Law Section (EPTPL).⁸² The Ohio Bankers League committee worked to foster support for what would become a proposed Ohio DAPT, which included persuading commercial lenders that such an act would not have an adverse effect on lending opportunities.⁸³ The EPTPL began work in January 2009.⁸⁴ By 2010, the EPTPL had researched, drafted, reviewed, and revised a proposed statute, called the “Ohio Legacy Trust Act,” that would create a new chapter, 5816, to Title 58 of the Ohio Revised Code.⁸⁵

The proposed act creates an irrevocable trust, governed by the laws of Ohio, that allows a settlor the ability to make transfers of assets to a trust and still benefit from those assets, while limiting the ability of the settlor’s creditors to access those assets.⁸⁶ The drafters of the proposed statute give the main rationale behind the Ohio Legacy Trust Act as the development of asset protection planning in Ohio that allows “the rearranging of someone’s assets to minimize the chance of loss from future litigation claims,” while expressly denying that the statutory language promotes concealing assets,

78. *Id.* cmt. (a)(2).

79. *See* OHIO REV. CODE ANN. § 5805.06(A)(2).

80. *See id.* cmt. (a)(2).

81. Ohio Legacy Trust Act Report, *supra* note 2, at 28.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Ohio Legacy Trust Act Report, *supra* note 2, at 28-29

defrauding creditors, or evading taxes.⁸⁷ Further, the rationale proffered after the proposed statute asserts that it is necessary because “[w]e live in a litigious society and adequate insurance may not be reasonably obtained at an affordable price to protect an insured from most claims,” as some claims will exceed insurance coverage, coverage may be denied, or the insurance company may fail.⁸⁸ Other proponents of the Ohio Legacy Trust Act have claimed that it will protect Ohio citizens’ wealth, while at the same time luring trust business into the state.⁸⁹

Shortly after the current draft was finalized, however, problems arose and the Ohio Legacy Trust Act was not approved by the Ohio State Bar Association’s Council of Delegates.⁹⁰ As it currently stands, the proposed act is not sponsored by the Ohio State Bar Association; thus, the EPTPL is no longer involved with its enactment.⁹¹ Not to be dissuaded, a group of individual lawyers, many of whom were on the EPTPL and involved in the process of drafting this version of an Ohio DAPT, have taken up the Ohio Legacy Trust Act’s flag and are working independently to improve it so that a revised version can be introduced to the Ohio legislature.⁹² A slightly revised version of the Ohio Legacy Trust Act, will be introduced to the Ohio legislature sometime in the near future.⁹³ The act still retains powerful support by many influential lawyers within Ohio, and because similar acts creating DAPTs have been enacted in other states, and a multitude of other states have proposed similar acts, the question of whether to adopt a DAPT in Ohio will remain an issue the Ohio legislature will likely consider.⁹⁴

C. Statutory Language

The proposed Ohio Legacy Trust Act contains fourteen sections that will be parsed and condensed below.⁹⁵ Although the proposed act has not been approved by the Ohio Bar Association or presented to the Ohio legislature, it will likely remain the centerpiece of any future proposed DAPT.⁹⁶ It is important to understand the statutory language of the

87. *Id.* at 27.

88. *Id.*

89. See Stegman et al., *supra* note 10, at 13.

90. E-mail from D. Bowen Loeffler, Loeffler Law Firm, LLC, to author (Feb. 7, 2012) [hereinafter D. Bowen Loeffler E-mail] (on file with author).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See Ohio Legacy Trust Act Report, *supra* note 2, at 15-17 (proposed to be codified at OHIO REV. CODE ANN. §§ 5816.01-5816.14).

96. D. Bowen Loeffler E-mail, *supra* note 90.

proposed act, because it represents the key ideas that will be present in any future Ohio DAPT.⁹⁷

In order to create a trust that comes within the protection of the proposed Ohio Legacy Trust Act, the settlor of the trust must create a legacy trust through a written statement providing that the settlor makes a disposition to a “qualified trustee” that incorporates the law of Ohio to govern the trust, states that the trust is irrevocable, and contains a spendthrift provision that applies to the interest of any beneficiary of trust property.⁹⁸ With the desire of keeping trust business in Ohio, the “qualified trustee” is a person, other than the settlor, who resides in the state as a natural person or is authorized by state law or court to act as trustee, “maintains or arranges for custody in [Ohio] of some or all of the property that is the subject of the Qualified Disposition,” prepares income tax returns, or administers the trust.⁹⁹

One of the most important parts of Ohio’s proposed DAPT statute is its spendthrift provision that provides creditor protection for the settlor.¹⁰⁰ Under this act, a spendthrift provision is valid, so that one placed in an Ohio DAPT would “restrain both voluntary and involuntary transfer[s]”¹⁰¹ It may also provide for any other restraints on alienation permitted under Ohio law.¹⁰² The protection offered to the settlor against his or her creditors by virtue of a spendthrift provision is limited to some extent, however, as the act contains certain “enumerated exceptions . . . when [the] property transferred into an Ohio Legacy trust can be accessed.”¹⁰³ First, there is an exception for any past or future debt the settlor owes through an agreement or court order for child support, spousal support or alimony to a former spouse, or “a division or distribution of property . . . to a spouse or former spouse.”¹⁰⁴ Second, the act allows another exception for a debt the settlor owes to someone “as a result of death, personal injury, or property damage suffered by that person on or before the time” the assets were transferred to the legacy trust, but only if caused by the settlor or someone to whom the settlor is vicariously liable.¹⁰⁵ This provides an exception for tort claim creditors even if the settlor did not know of the existence of those claims at

97. *Id.*

98. Ohio Legacy Trust Act Report, *supra* note 2, at 16-17 (proposed to be codified at OHIO REV. CODE ANN. § 5816.02(N)).

99. *Id.* at 17 (proposed to be codified at OHIO REV. CODE ANN. § 5816.02(S)).

100. *See id.* at 17-18 (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(B)).

101. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(B)).

102. *Id.* at 18 (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(B)).

103. Ohio Legacy Trust Act Report, *supra* note 2, at 29.

104. *Id.* at 18 (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(C)(1)(a), (b)).

105. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(C)(2)).

the time assets were transferred into the Ohio DAPT.¹⁰⁶ The above exceptions are imposed in addition to any causes of action that may expose assets in the legacy trust to creditors under fraudulent transfer rules.¹⁰⁷

A further limitation prevents the settlor from retaining authority in the trust through nonverbal, implied, or implicit agreement.¹⁰⁸ The settlor may retain certain enumerated rights, including the right to current income from the trust,¹⁰⁹ receipt of up “to five percent of the value of the trust principal,”¹¹⁰ reimbursement for income taxes attributable to trust income,¹¹¹ and the right to have expenses and taxes of the settlor’s estate paid from the trust.¹¹² Also, among other rights, the settlor may “veto a distribution from the trust,”¹¹³ hold a special testamentary power of appointment,¹¹⁴ remove the current trustee and appoint a new one,¹¹⁵ and limit mandatory distribution upon the happening of a certain event.¹¹⁶ None of these powers grants the ability, either alone or in conjunction with any other person, to revoke the trust.¹¹⁷

For further creditor protection, the settlor is required to sign an affidavit attesting to his or her lack of fraudulent intent, the absence of any pending or threatened lawsuits, the lack of any imminent bankruptcy filing, that the transfer to the legacy trust will not leave the settlor insolvent, and other statements evidencing a lack of abuse.¹¹⁸ A creditor who wants to challenge a disposition that places assets into an Ohio DAPT must have been a creditor before the disposition and must either bring a claim within three years after the disposition or within one year after it could have been reasonably discovered.¹¹⁹ When a disposition has been avoided because it is fraudulent or by any other means, only the amount used to satisfy the creditor is removed from the legacy trust¹²⁰ and the trust remains valid

106. *Id.* at 30.

107. *Id.* at 29.

108. Ohio Legacy Trust Act Report, *supra* note 2, at 19 (proposed to be codified at OHIO REV. CODE ANN. § 5816.04).

109. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(D)).

110. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(F)).

111. *Id.* at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(K)).

112. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(L)).

113. Ohio Legacy Trust Act Report, *supra* note 2, at 19 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(B)).

114. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(C)).

115. *Id.* at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(I)).

116. *Id.* at 19 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(A)).

117. *Id.* at 19-20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05).

118. See Ohio Legacy Trust Act Report, *supra* note 2, at 20-21 (proposed to be codified at OHIO REV. CODE ANN. § 5816.06).

119. *Id.* at 22 (proposed to be codified at OHIO REV. CODE ANN. § 5816.07(B)(1)).

120. *Id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.08(A)(1)).

despite the avoidance.¹²¹ However, the qualified trustee, under most circumstances, has first priority over any trust assets that are needed to cover the necessary costs of defending against a claim of avoidance.¹²² Moreover, a beneficiary can still retain a distribution even if that distribution affects the amount needed to pay the creditor, unless the beneficiary acted in bad faith.¹²³ The remaining sections of the proposed Ohio Legacy Trust Act deal with matters regarding trustees,¹²⁴ trust advisors,¹²⁵ administration,¹²⁶ and applicable law.¹²⁷

IV. COMPARISON WITH DELAWARE'S QUALIFIED DISPOSITIONS IN TRUST ACT

The Ohio Legacy Trust Act was “heavily influenced by [and modeled after] legislation from other states,” so the proposed act or any similar act that may be introduced into the Ohio legislature is likely to be very similar.¹²⁸ The most influential DAPT statute for those drafting the proposed statute was from Delaware and the other states, such as South Dakota, that designed subsequent statutes using Delaware as a guide.¹²⁹ The Delaware Qualified Dispositions in Trust Act¹³⁰ became effective on July 1, 1997,¹³¹ and has been amended several times since then.¹³² By studying Delaware's DAPT statute, it is possible to predict how a similar statute would operate in Ohio.¹³³

Before Alaska became the first state to implement a DAPT with the passage of the Alaska Trusts Act, Delaware had some of the most favorable trust laws in the country, and was “one of the leaders in the domestic trust industry” as a result.¹³⁴ Although Alaska beat Delaware to the punch in allowing self-settled spendthrift trusts, Delaware followed suit just three

121. *Id.* at 23 (proposed to be codified at OHIO REV. CODE ANN. § 5816.08(A)(2)).

122. *Id.* at 23-24 (proposed to be codified at OHIO REV. CODE ANN. § 5816.08(B)(1)(a)).

123. Ohio Legacy Trust Act Report, *supra* note 2, at 23-24 (proposed to be codified at OHIO REV. CODE ANN. § 5816.08(B)(2)).

124. *Id.* at 24 (proposed to be codified at OHIO REV. CODE ANN. § 5816.09).

125. *Id.* at 27 (proposed to be codified at OHIO REV. CODE ANN. §§ 5816.11, 5816.12).

126. *Id.* (proposed to be codified at OHIO REV. CODE ANN. §§ 5816.13, 5816.14).

127. *Id.* at 25-26 (proposed to be codified at OHIO REV. CODE ANN. § 5816.10).

128. Ohio Legacy Trust Act Report, *supra* note 2, at 28.

129. *Id.*

130. *See* DEL. CODE ANN. tit. 12, §§ 3570-3576.

131. Shaftel, *supra* note 12, at 294.

132. 74 Del. Laws 100 (2003); 73 Del. Laws 378 (2002); 72 Del. Laws 341 (2000); 72 Del. Laws 59 (1999); 72 Del. Laws 195 (1999); 71 Del. Laws 343 (1998); 71 Del. Laws 254 (1998); 71 Del. Laws 159 (1997).

133. *See generally* DEL. CODE ANN. tit. 12, §§ 3570-3576.

134. Wagenfeld, *supra* note 11, at 857; *see* ALASKA STAT. §§ 13.36.105-13.36.220 (where the Alaska Trusts Act is codified).

months later.¹³⁵ The purpose in passing the Delaware Qualified Dispositions in Trust Act was to maintain the state as the most favorable jurisdiction for the establishment of trusts, thereby keeping trust business in the state and enticing new business from other states.¹³⁶ This rationale is the most powerful force in the thirteen jurisdictions that have enacted similar DAPT statutes, and a similar theme surfaces in the proposed Ohio DAPT statute as well.¹³⁷ With the passage of the Delaware act, “the legislators’ purposes in enacting [it] and their intentions as to what they sought to accomplish underscores that providing effective asset protection through the enforcement of self-settled spendthrift trusts was the bottom line goal.”¹³⁸ Proponents also had the purpose of allowing settlors to transfer assets from their estates to reduce estate taxes, which required that a settlor could not retain any rights beyond discretionary distributions as a beneficiary and that the assets could not be subject to the settlor’s creditors.¹³⁹

To create a DAPT under the Delaware Qualified Dispositions in Trust Act, the settlor must make a qualified disposition, which is simply a transfer of the settlor’s assets to a qualified trustee.¹⁴⁰ Similar to the Ohio DAPT, this trustee must be someone other than the settlor, must be a resident of the state or an entity authorized to act under the laws of the state, must maintain or arrange for custody in the state of at least some of the trust property, and must maintain records in the state.¹⁴¹ The statute explicitly provides that a trustee who does not follow these directions, and who is not a resident of the state or an entity authorized to act under state law, cannot be a qualified trustee.¹⁴² Further, the trust instrument must “[e]xpressly incorporate[] the law of this State to govern the validity, construction and administration of the trust” and it must be irrevocable.¹⁴³ Together, these provisions ensure that when a Delaware DAPT is established, the trust business stays in the state.¹⁴⁴ The proposed Ohio Legacy Trust Act operates in the same manner, although using slightly different language in order to establish Ohio as an

135. Wagenfeld, *supra* note 11, at 857.

136. See Delaware Qualified Dispositions in Trust Act, 71 DEL. LAWS 159 (1997) (codified at DEL. CODE ANN. tit. 12, §§ 3570-76).

137. See *supra* notes 53-65 and accompanying text (listing the thirteen states that have enacted similar DAPT statutes); see also Wagenfeld, *supra* note 11, at 865-66 (explaining Delaware’s intentions).

138. Wagenfeld, *supra* note 11, at 865-66.

139. *Id.* at 865.

140. DEL. CODE ANN. tit. 12, § 3570(7).

141. *Id.* § 3570(8); see also Ohio Legacy Trust Act Report, *supra* note 2, at 17 (proposed to be codified at OHIO REV. CODE ANN. § 5816.02 (S)(1), (2), (V)).

142. DEL. CODE ANN. tit. 12, § 3570(8)(c).

143. *Id.* § 3570(11).

144. See *id.* § 3570(8), (11).

environment friendly to trusts and also without the established history enjoyed by Delaware.¹⁴⁵

The Delaware act provides for increased settlor protection from creditors by requiring that the interest of the beneficiaries is a spendthrift interest, including the beneficial interest held by the settlor.¹⁴⁶ Like the proposed Ohio act, this applies regardless whether the transfer is voluntary or involuntary.¹⁴⁷ The large influence on Ohio's proposed DAPT language is especially evidenced by the mirror language used to provide exceptions to the spendthrift provision, which allows limited access to trust property for certain tort creditors¹⁴⁸ and on the basis of alimony, spousal support, and distribution of property upon divorce.¹⁴⁹ Also, Delaware allows creditors to pierce the protections of a trust under state fraudulent transfer law.¹⁵⁰

Besides the above statutory exceptions, the Delaware Dispositions in Trust Act requires, as does the proposed Ohio act, that all rights retained by the settlor must be in the trust instrument and that any implicit agreement is void.¹⁵¹ Both also list a set of rights that a settlor can retain in the DAPT without invalidating it.¹⁵² Although the provisions are mostly identical, there are some minor differences between Delaware's enacted legislation and Ohio's proposed act.¹⁵³ While Delaware allows retention of the settlor's use of real property held under a qualified personal residence trust,¹⁵⁴ Ohio's proposed act would go further by allowing the settlor to also retain the use of personal or real property outside such a trust.¹⁵⁵ The proposed Ohio DAPT also allows for a provision in the trust that pours back all or part of the trust assets to the settlor's estate or trust after death.¹⁵⁶

In dealing with the avoidance of qualified dispositions into the DAPT, the drafters of Ohio's proposed statute drew heavily from Delaware law.¹⁵⁷

145. *See id.*; *see also* Ohio Legacy Trust Act Report, *supra* note 2, at 16-17 (proposed to be codified at OHIO REV. CODE ANN. § 5816.02).

146. DEL. CODE ANN. tit. 12, § 3570(11)(c); *see also supra* notes 10-18 and accompanying text (explaining spendthrift trusts).

147. DEL. CODE ANN. tit. 12, § 3570(11)(c); *see also* Ohio Legacy Trust Act Report, *supra* note 2, at 18 (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(B)).

148. DEL. CODE ANN. tit. 12, § 3573(2).

149. *Id.* § 3573(1).

150. *See id.* § 3572(a).

151. *Id.* § 3571; *see* Ohio Legacy Trust Act Report, *supra* note 2, at 19 (proposed to be codified at OHIO REV. CODE ANN. § 5816.04).

152. *See* DEL. CODE ANN. tit. 12, § 3570(11)(b).

153. *See infra* notes 154-63 and accompanying text (for an explanation of the minor differences between the Delaware and the proposed Ohio act).

154. DEL. CODE ANN. tit. 12, § 3570(11)(b)(8).

155. Ohio Legacy Trust Act Report, *supra* note 2, at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(J)).

156. *Id.* at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(M)).

157. *Id.* at 28; *see* DEL. CODE ANN. tit. 12, § 3570 (11)(b)(8) (for qualified language).

While Delaware's statute, unlike Ohio's, expressly provides that the challenged disposition must be made with "actual intent to defraud" a creditor whose claim arose after the qualified disposition,¹⁵⁸ both provide that the transfer is avoided only to the extent necessary to satisfy the creditor.¹⁵⁹ The proposed Ohio DAPT, however, imposes a shorter time period for creditors to bring claims that challenge the disposition.¹⁶⁰ Delaware permits such claims to be brought up to four years after the disposition into trust is made or one year after it could have reasonably been discovered.¹⁶¹ Ohio narrows the period to three years after the disposition.¹⁶² Also deviating from the Delaware Qualified Dispositions in Trust Act, Ohio's proposed act would require the settlor to sign a qualified affidavit as further proof that the settlor was not making unlawful, abusive, or illegitimate dispositions.¹⁶³

In order to compete with states like Delaware, Ohio would necessarily have to enact legislation that offers similar asset protection.¹⁶⁴ Thus, the proposed statute, although it may undergo some revisions, will not be substantially changed, lest it lose its underlying purpose of drawing trust business into Ohio.¹⁶⁵ In order to draw that trust business from states like Delaware, which have traditionally favored business, the Ohio Legacy Trust Act must deviate slightly.¹⁶⁶

V. ARGUMENTS FOR THE ADOPTION OF DAPTS

Many arguments have been proffered advocating for the adoption of DAPTs in American jurisdictions.¹⁶⁷ As thirteen states have already enacted legislation allowing settlors to create such trusts in favor of

158. DEL. CODE ANN. tit. 12, § 3572(a).

159. *Id.* § 3572(a), (c); Ohio Legacy Trust Act Report, *supra* note 2, at 23 (proposed to be codified at OHIO REV. CODE ANN. § 5816.08 (A)(1)).

160. Ohio Legacy Trust Act Report, *supra* note 2, at 22 (proposed to be codified at OHIO REV. CODE ANN. § 5816.07(B)(1) ("the Creditor is a Creditor of the Transferor before the relevant Qualified Disposition, and the action under division (A) is brought within the later of: (a) three years after the Qualified Disposition; or (b) one year after the Qualified Disposition is or reasonably could have been discovered by the Creditor")).

161. DEL. CODE ANN. tit. 12, § 3572(b)(2).

162. Ohio Legacy Trust Act Report, *supra* note 2, at 22 (proposed to be codified at OHIO REV. CODE ANN. § 5816.07(B)(1)).

163. *Id.* at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.06).

164. *See* DEL. CODE ANN. tit. 12, §§ 3570-3576.

165. *See generally* Ohio Legacy Trust Act Report, *supra* note 2, at 28.

166. *See* DEL. CODE ANN. tit. 12, §§ 3570-3576. *See, e.g.*, Ohio Legacy Trust Act Report, *supra* note 2, at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(M) (allowing for a provision in a trust that pours back trust assets to the settlor's estate or trust following death)).

167. Symposium, Richard W. Nenko, *Planning with Domestic Asset-Protection Trusts 7-9* (2005), available at http://apps.americanbar.org/rppt/meetings_cle/2005/spring/pt/AssetProtectionPlanning/NENNO_hand.pdf.

themselves, while at the same time retaining rights over that trust property, arguments for their adoption have gained traction in many states.¹⁶⁸ In debating whether to enact the proposed Ohio Legacy Trust Act, and thereby permit the creation of DAPTs in Ohio, the arguments below represent the most common and the most persuasive.¹⁶⁹ While many of these arguments offer solid ground on which proponents may stand, they should be given little weight in light of the valid counterarguments that can be made against them.¹⁷⁰

A. Protection from Meritless Claims

One of the main arguments for adoption is that DAPTs can shield the settlor's assets from the ever-expanding scope of liability and risks of litigation arising from a broken legal system that allows and rewards meritless claims.¹⁷¹ It has been argued that American plaintiffs are increasingly unwilling to accept responsibility for their own actions, seeking to place blame on others through the legal system.¹⁷² Many view the U.S. legal system as wholly plaintiff-oriented, where courts are willing to give out judgments that do not coincide with the harm caused to the plaintiff or the wrong committed by the defendant.¹⁷³ As it currently stands, "the United States system of determining legal liability [is] badly flawed because it permits opportunistic plaintiffs (and their imaginative counsels) excessive opportunity to assert legal liability against others."¹⁷⁴ Instead of dispensing cases in an unbiased manner using neutral laws and principles, the legal system is biased against the defendant.¹⁷⁵ In order to avoid this result, DAPTs are designed to protect defendants from meritless claims by placing assets beyond the reach of all but certain limited classes of plaintiffs.¹⁷⁶

This reasoning is unsound because using the DAPT as a response to an allegedly flawed legal system favoring plaintiffs and big money judgments is overbroad.¹⁷⁷ Courts can flush out meritless claims brought by overeager plaintiffs through dismissal, on summary judgment, or by imposing

168. See generally Shaftel, *supra* note 12, at 293 (article notes twelve states at that time; now, there are thirteen as noted throughout the discussion, *supra* notes 53-65 and accompanying text).

169. See *infra* Part IV(a)-(f).

170. See *infra* Part V(a)-(E).

171. Lischer, *supra* note 20, at 527.

172. Sirknen, *supra* note 72, at 144.

173. *Id.*

174. Lischer, *supra* note 20, at 526.

175. *Id.*

176. *Id.* at 537.

177. See *id.* at 527-29.

sanctions on frivolous claims.¹⁷⁸ Even though, in rare circumstances, these three procedures can be ineffective, using DAPTs as a remedy goes too far in not only protecting settlors from meritless claims, but also protecting their assets from perfectly meritorious ones as well.¹⁷⁹ If protection against overzealous claims in a faulty legal system were a valid argument, allowing settlors to shield assets in a DAPT would not disadvantage plaintiffs with legitimate and compelling claims from seeking a full recovery.¹⁸⁰ If proponents perceive the problem to be a biased legal system, they should seek to reform the system itself instead of allowing defendants to create their own “individualized liability system.”¹⁸¹ Other, more direct, methods of reforming the legal system are available that do not prevent those with valid claims from recovering from defendants who have committed a wrong for which the law provides a remedy.¹⁸²

B. Allows Settlers to Enjoy the Same Benefits as Traditional Spendthrift Beneficiaries

Another argument is that the creation of DAPTs allows settlors to take advantage of the same benefits given to other beneficiaries of spendthrift trusts.¹⁸³ Many claim that the current rule against self-settled asset protection trusts creates a distinct disadvantage to those who have accumulated wealth by their own means because only those who have inherited wealth from others through a spendthrift trust have built-in creditor protection.¹⁸⁴ Those who have created their own wealth cannot, because of the rule against self-settled spendthrift trusts, protect their assets from creditors in the same manner.¹⁸⁵ Proponents have argued that accumulated assets should have the same protections available no matter how they have been attained.¹⁸⁶ If this is not the case, those who have affirmatively acted to accumulate wealth through individual success are punished.¹⁸⁷ Allowing DAPTs permits settlors to have the same protections they could provide for others.¹⁸⁸

178. Sirknen, *supra* note 72, at 144.

179. Lischer, *supra* note 20, at 529.

180. *See id.*

181. *Id.*

182. *See id.* at 528.

183. Sirknen, *supra* note 72, at 145.

184. Nenko, *supra* note 167, at 8.

185. *Id.*

186. Sirknen, *supra* note 72, at 145-46.

187. *Id.* at 145.

188. *Id.* at 146.

This argument holds little weight, however, because of the control retained by the DAPT settlor.¹⁸⁹ When a person creates a spendthrift trust for other beneficiaries, that settlor has no other interest in the assets that make up the trust.¹⁹⁰ The spendthrift provision serves to sever or suspend their interest so that creditors may not reach the assets.¹⁹¹ A settlor of a DAPT, however, may still retain substantial rights over the trust itself and the assets that make up the trust.¹⁹² Because all DAPT statutes, including the proposed Ohio Legacy Trust Act, permit the settlor to retain certain rights and interests in the trust property, while protecting that property from creditors, the rationale behind allowing the same protections given to spendthrift beneficiaries disappears.¹⁹³ Not only would settlors retain control over and benefit from trust assets but creditors would be barred from seeking a recovery from those assets.¹⁹⁴

C. Other Asset Protection Strategies Already Exist

The fact that a variety of asset protection arrangements already exist in all American jurisdictions weighs in favor of extending the law to include DAPTs.¹⁹⁵ Federal and state laws currently recognize, as valid asset protection strategies, certain strategies and practices that are similar to self-settled spendthrift trusts in that they protect certain assets from creditors.¹⁹⁶ For example, many can obtain immunity from creditors through “retirement plans, family limited partnerships and limited-liability companies, homesteads, life insurance policies, annuity contracts, and transfers to or in trust for ‘cooperative’ friends or family members.”¹⁹⁷ In a family limited partnership, a creditor can reach a person’s interest; however, the creditor cannot generally force liquidation of the partnership.¹⁹⁸ Homestead exemptions also provide protection for the debtor’s residence from most creditors.¹⁹⁹ Additionally, the Employee Retirement Income Security Act (ERISA) requires that all retirement savings, pensions, and health plans that qualify contain a spendthrift provision that prevents distribution of plan

189. Lischer, *supra* note 20, at 529.

190. *Id.* at 524-25.

191. *Id.*

192. See DEL. CODE ANN. tit. 12 § 3570(11)(b); Ohio Legacy Trust Act Report, *supra* note 2, at 19-20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05).

193. See Ohio Legacy Trust Act Report, *supra* note 2, at 20 (proposed to be codified at OHIO REV. CODE ANN. § 5816.05(M)); Lischer, *supra* note 20, at 548.

194. Lischer, *supra* note 20, at 517.

195. See *id.* at 484.

196. Paul, *supra* note 48, at 371.

197. Nenko, *supra* note 167, at 8.

198. Sirknen, *supra* note 72, at 146.

199. *Id.*

benefits.²⁰⁰ The argument is that those who do not have access to these methods should be able to use DAPTs in order to protect their assets in a similar fashion.²⁰¹

The existing asset protection strategies, however, are all aimed at protecting specific property that public policy permits under those circumstances.²⁰² The protection of assets like family businesses, homes, and retirement accounts from creditors are justified because that limited protection is only extended to certain classes of assets that have been deemed to require special protection.²⁰³ Using DAPTs to protect a broad and unlimited array of assets, however, does not raise the same public policy considerations.²⁰⁴ DAPTs would do more than protect specified classes of assets worth protecting by shielding all assets contained within from the reach of creditors.²⁰⁵

D. Keeps Trust Assets within the State

Proponents of DAPTs have also argued that if they are not allowed within a state, those settlors who would have established the trust within the state will instead place their assets in offshore asset protection trusts or in the DAPTs of other states.²⁰⁶ Allowing for the creation of DAPTs in Ohio would provide an economic boon to many financial industries within the state because the Ohio Legacy Trust Act requires that a trustee be from the state of Ohio and certain trust assets remain in Ohio.²⁰⁷ It has been estimated that thousands of asset protection trusts have been set up in offshore jurisdictions since 1997.²⁰⁸ Some sources have stated that up to six trillion dollars was held on offshore trusts.²⁰⁹ It is argued that the adoption of the Ohio Legacy Trust Act “would help deter migration of trust funds and trust business out of Ohio, and [could] help attract new business and funds into Ohio.”²¹⁰ If not enacted, trust business will continue to flee the state for more favorable jurisdictions.²¹¹ Having a DAPT statute signals to businesses that Ohio is a favorable state in which to invest.²¹²

200. *Id.* at 147.

201. *See* Lischer, *supra* note 20, at 544.

202. *See id.* at 494.

203. *See id.* at 543-44.

204. *See id.* at 498-99.

205. *Id.* at 501.

206. Nenko, *supra* note 167, at 9.

207. Passananti, *supra* note 1, at 263.

208. Stegman et al., *supra* note 10, at 13.

209. *See id.*

210. *Id.*

211. *Id.*

212. *Id.*

This argument seems appealing at first glance, as an increase in business and wealth invested in the state is hard to ignore.²¹³ The pressure to adopt a DAPT statute, however, creates a “race to the bottom,” where states compete for more business by adopting similar, yet more radical versions in order to attract business from the last state to offer more favorable conditions.²¹⁴ Some commentators have stated:

The conventional wisdom asserts that interstate economic competition of this sort is bad because it leads to nonuniform laws, complexity, and the least restrictive legal regime (*i.e.*, the race to the bottom).

The desire to provide an economic stimulus to the financial services sector of its economy likely plays a significant role in a state’s decision to adopt an APT statute. As a matter of broader policy, however, this factor should not weigh in favor of recognizing the APT.²¹⁵

The desire to attract more business to a state should not be achieved at the expense of providing less creditor protection for those creditors in the state.²¹⁶ While keeping Ohio assets in the state and attracting those from out of state is a worthwhile goal, it needs to be kept in check by considerations of what policy is in the best overall interest of the state and its citizens.²¹⁷

E. Avoids the Harshness of the Traditional Rule Against Self-Settled Spendthrift Trusts

The United States is one of the only countries that has a general rule against self-settled asset protection trusts, as much of the world’s jurisdictions allow settlors to shield assets from the settlor’s creditors.²¹⁸ The adherence of most U.S. states to this rule gives creditors more rights than the settlor has over the property,²¹⁹ because “permitting creditors to reach the trustor’s interest in a [trust], regardless of the circumstances, might give them greater access to trust funds than [settlors] whose receipt of funds might be subject to legal and practical limitations.”²²⁰ Furthermore,

213. See Lischer, *supra* note 20, at 514.

214. *Id.* at 530-31.

215. *Id.* at 531-32.

216. *Id.* at 543.

217. See *id.* at 493-95.

218. Nenko, *supra* note 167, at 7.

219. Sirknen, *supra* note 72, at 152.

220. Nenko, *supra* note 167, at 8.

when a trust has beneficiaries other than the settlor, the interest those beneficiaries have in the trust assets is ignored and their interests may be subverted in favor of a creditor who attaches the trust.²²¹ Giving creditors automatic access to the assets of trusts ignores the rights of trust beneficiaries, other than the settlor, who also have a beneficial interest in the trust.²²²

What proponents of DAPTs offering this argument fail to consider is that the settlor's creditors, after winning a judgment, have just as much of a right to the trust assets as beneficiaries.²²³ A non-settlor beneficiary of a trust has done no affirmative act that entitles them to receive distributions from the trust.²²⁴ When the trust assets run out, or upon conditions stated in the trust, their beneficial interest ceases.²²⁵ Creditors of the settlor have a right in the trust assets, obtained through the proper process, stemming from a contractual obligation or injury award given to compensate for loss.²²⁶ The interests of valid creditors are just as important, if not more important, as those of trust beneficiaries.

F. Allows Freedom of Contract

Finally, proponents have argued that “legally preventing DAPTs interferes with one's right of contract and free alienation of property.”²²⁷ Enacting a DAPT statute would increase the autonomy of debtors and creditors, leading to a more efficient and productive market within the state.²²⁸ Because a DAPT is not a hidden arrangement, creditors can negotiate and structure the terms of the credit agreement however they want, as long as the creditor recognizes that the assets in a DAPT are not available to satisfy a judgment against the debtor.²²⁹ This argument fails to recognize that not all debtor arrangements are negotiated with the creditor.²³⁰ DAPTs often involve consumer debt, in which individualized negotiations do not take place.²³¹ In these situations, the creditor often is not informed of the entire credit worthiness of the debtor.²³² Moreover, this

221. Paul, *supra* note 48, at 371.

222. Nenko, *supra* note 167, at 8.

223. See *supra* notes 218-22 and accompanying text.

224. See Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 295-96 (2002).

225. See OHIO REV. CODE ANN. § 5804.10 (LexisNexis 2012).

226. Lischer, *supra* note 20, at 536.

227. Paul, *supra* note 48, at 371.

228. Lischer, *supra* note 20, at 532.

229. *Id.*

230. See *id.*

231. *Id.*

232. *Id.*

argument does not consider situations involving involuntary creditors, those who do not rely on the financial standing of the debtor such as tort claimants and government claims for unpaid taxes.²³³ An involuntary creditor does not have the ability to negotiate terms with the debtor or make an assessment of the creditor's assets, or lack thereof.²³⁴ For the involuntary creditor, this can create inefficiency in the market by prohibiting an otherwise valid claim.²³⁵ For instance, a person injured by the settlor after assets have been transferred to the DAPT would not be able to access all of the wealth available to the settlor, despite having a meritorious claim.²³⁶ In these cases, the creditor is left with nothing, while the settlor still retains the benefits of assets in the DAPT.

VI. ARGUMENTS AGAINST THE ADOPTION OF DAPTS

There are many reasons why passage of a proposed DAPT statute in Ohio would not be in the best interests of the state or its citizens. In order to gauge the viability of the Ohio Legacy Trust Act, the above arguments for enactment must be weighed against the following opposing arguments.²³⁷ For all the reasons below, enacting such a statute in Ohio would violate public policy by favoring the settlors of DAPTs over their creditors.²³⁸

A. *Impairs the Settlor's Moral Duty*

Permitting a settlor to place assets into a DAPT, while still retaining control and beneficial enjoyment without the risk of subjecting assets to most creditor claims, impairs the settlor's moral duty to pay debts.²³⁹ Using the DAPT as a shield, "settlors will continue to control and enjoy their trust property while 'thumbing their noses at their creditors.'"²⁴⁰ Without the risk that his or her assets will be subject to creditor claims, a settlor no longer has an incentive to act in morally acceptable ways.²⁴¹ Even though a duty to others still exists, the enforcement of that duty does not have any teeth if the settlor can place assets in a trust that is inaccessible to the settlor's voluntary or involuntary creditors.²⁴² Thus, a DAPT allows the settlor to take risks

233. Lischer, *supra* note 24, at 532.

234. *See id.*

235. *Id.*

236. *See id.*

237. *See supra* Parts I-IV.

238. *See infra* Part V(a)-(e).

239. Passananti, *supra* note 1, at 263.

240. *Id.* (quoting ROBERT S. KEEBLER ET AL., IRREVOCABLE TRUSTS: ANALYSIS WITH FORMS ¶ 14.09 (2012), available at 2004 WL 2652603).

241. *See id.*

242. *See id.*

that he or she otherwise might not have taken or engage in hazardous activities without endangering the assets placed in a DAPT.²⁴³

Admittedly, estate planning and the use of trusts have asset protection as a goal.²⁴⁴ It can be argued that the utilization of DAPTs is merely the next logical step in allowing estate planners to better protect their client's wealth.²⁴⁵ Even with this goal in mind, however, enactment of a DAPT statute would go too far by allowing the settlor to avoid liability on lawful debts.²⁴⁶ DAPT statutes substantially contribute to the avoidance of personal responsibility for one's debts.²⁴⁷ Giving settlors the means by which to shelter their assets from potential creditors undercuts the traditional liability system by preventing the enforcement of settlors' obligations.²⁴⁸ Although a voluntary or involuntary creditor can obtain a judgment that affirms the settlor's legal responsibility, the settlor can place assets beyond the reach of those creditors without giving up control or beneficial enjoyment.²⁴⁹ This allows the settlor to externalize the costs of behavior that lead to those legal obligations, thereby encouraging the settlor to engage in more dangerous activities or risky behavior.²⁵⁰

B. Contradicts Limits of Exempt Property Statutes

Exempt property statutes under both state and federal law dictate that specific categories of property are exempt from creditor claims.²⁵¹ For example, bankruptcy statutes permit the debtor to exclude certain property from the bankruptcy estate, meaning that creditors cannot use the exempted property to satisfy debts.²⁵² Another common example is the unlimited creditor protection provided in a qualified retirement account.²⁵³ Most exemption statutes either apply to a limited class of property or to a limited dollar amount.²⁵⁴ These statutes are the result of reasoned legislative judgment that public policy should protect certain classes or amounts of assets from the reach of creditors.²⁵⁵

243. *Id.*
 244. Lischer, *supra* note 20, at 534-35.
 245. *Id.*
 246. *Id.* at 535-36.
 247. *See id.* at 536.
 248. Nenko, *supra* note 167, at 6.
 249. Lischer, *supra* note 20, at 536.
 250. Hirsch, *supra* note 67, at 2693.
 251. Lischer, *supra* note 20, at 543.
 252. Sirknen, *supra* note 72, at 142.
 253. Lischer, *supra* note 20, at 543.
 254. *Id.*
 255. Sirknen, *supra* note 72, at 142.

DAPT statutes are antithetical to such statutes because they are not directed at limited asset classes or amounts; instead, they allow an infinite and undistinguished amount of property to be placed in trust beyond the reach of creditors with valid claims.²⁵⁶ DAPT statutes go beyond the narrow public policy underlying exempt property statutes by allowing “individual debtors . . . to unilaterally rewrite the exemptions” from creditor claims as they wish.²⁵⁷ The determination of whether a debtor’s property should be exempt from valid creditor claims should be left in the hands of a legislature that bases the exemptions on specific public policy reasons.²⁵⁸ It should not be left to a debtor who can use a DAPT statute to exempt property of any nature and in any amount while maintaining control and beneficial use of the trust property.²⁵⁹

C. Available Only to the Wealthy

Due to the high costs of setting up and maintaining a DAPT, enactment of a DAPT statute would only serve to benefit those with substantial assets.²⁶⁰ These types of trusts, due to their complexity, could cost up to \$100,000 to create and maintain.²⁶¹ With this amount of money needed in order to take advantage of the considerable benefits offered by a DAPT, only those with significant wealth stand to gain.²⁶² This asset protection technique would not be available to those in the lower- to middle-classes.²⁶³ Many have argued that “[s]uch unequal availability violates the normative standard of uniform application of the laws to similarly situated persons,”²⁶⁴ which “violate[s] the concept of equal protection of the laws.”²⁶⁵ Those without considerable assets would garner no benefit, as a DAPT statute would only allow those who have already accumulated large amounts of wealth to avoid liability for valid and enforceable legal claims against property from which they benefit.²⁶⁶ Furthermore, application of laws imposing legal liability would apply only against those who did not have the assets to fund and maintain a DAPT, minimizing the duty to pay

256. See Lischer, *supra* note 20, at 544; Sirknen, *supra* note 72, at 142-43.

257. Lischer, *supra* note 20, at 544.

258. See *id.*

259. See *id.*

260. Passananti, *supra* note 1, at 263.

261. *Id.*

262. See *id.*

263. *Id.*

264. *Id.* (quoting Lischer, *supra* note 20, at 546).

265. Sirknen, *supra* note 72, at 143.

266. See *id.*

one's legal debts to those of only substantial means.²⁶⁷ While it can be argued that there are other asset protection strategies with which only the wealthy can take advantage, this is not a persuasive basis for proponents of DAPTs to rest.²⁶⁸ Enacting a DAPT statute would further the redistribution of wealth by allowing those who already have assets to protect them from those having legal claims against the owner and user of those assets, and by negating the realization of legal remedies against those with substantial assets.²⁶⁹

D. Purpose is to Hinder Courts and Creditors

If the Ohio Legacy Trust Act or an act similarly allowing settlors to create DAPTs were passed, the settlor could then take advantage of a transaction that “fundamentally conflicts with an orderly judicial process for resolution of claims of liability because the [D]APT was designed to thwart courts and creditors.”²⁷⁰ Although a statute would give the DAPT status as a legal asset protection technique, courts should then be cautious in its application because of the underlying purpose of shielding assets in these trusts.²⁷¹ Recognizing the effectiveness of DAPTs contrasts with the principle that a person should pay their debts.²⁷²

Opponents of DAPT statutes have argued that “there is something disturbing about a country that would allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle.”²⁷³ If settlors can maintain control over and beneficial enjoyment of trust assets and at the same time keep those assets protected from most valid claims against the settlor, “[c]reditors will be deterred from using the court system”²⁷⁴ There is no incentive for creditors to use the proper legal channels when it is clear that, even though a judgment can be obtained, recovery from assets contained in a DAPT is impossible.²⁷⁵ Where the settlor has effectively protected their assets, the creditor is left with less than the law entitles, while the settlor continues to use and enjoy his DAPT property.²⁷⁶ Proponents of DAPT statutes may argue that adopting a DAPT statute provides creditors with a better alternative than if the settlor creates a

267. See Lischer, *supra* note 20, at 544.

268. See Sirknen, *supra* note 72, at 143.

269. See Lischer, *supra* note 20, at 544-45.

270. *Id.* at 538.

271. See *id.* at 538-39.

272. See Nenno, *supra* note 167, at 5-6.

273. *Id.*

274. Passananti, *supra* note 1, at 263.

275. *Id.*

276. See *id.*

foreign asset protection trust.²⁷⁷ Both foreign and domestic trusts, however, have the same purpose of allowing “the settlor to avoid lawful liabilities and at the same time retain significant rights or powers with respect to the trust assets.”²⁷⁸ At its center, the DAPT is contrary to the orderly resolution of claims in America’s current legal system.²⁷⁹

E. Misleads Creditors and Changes Credit Risk

Allowing debtors to form DAPTs will mislead creditors and fundamentally alter how credit risk is determined.²⁸⁰ As one opponent of DAPT statutes stated:

Our economy is able to grow because lending allows business to develop while the underlying debts are legally guaranteed. However, by allowing a DAPT settlor to ignore his/her creditors may discourage the extension of credit by financial institutions. Lenders will be forced to do extensive due diligence and loan transaction costs will likely rise. Our economy will be adversely affected if financial institutions cannot operate efficiently due to the fear that DAPT settlors may never repay substantial debts.²⁸¹

Currently, those who commit torts or undertake other obligations are in the best position to bear the costs that result from those acts.²⁸² Allowing debtors to form DAPTs would alter this arrangement by misleading creditors as to the true nature of the settlor’s wealth and by changing the way credit risk is established.²⁸³

VII. DAPT STATUTE REVISIONS AND THEIR LIMITATIONS

In balancing the arguments for and against the adoption of DAPTs, it is clear that they weigh against passage of the proposed Ohio Legacy Trust Act. Because such an act would not be in the best interests of Ohio or its citizens and because it would be against public policy to favor the settlors of DAPTs over their creditors, it should not be made available as a viable asset protection technique.²⁸⁴ In responding to public policy criticisms against DAPTs, there are many possible statutory revisions that could be made to

277. See Lischer, *supra* note 20, at 542.

278. *Id.*

279. *Id.*

280. See *id.* at 546.

281. Passananti, *supra* note 1, at 263.

282. Hirsch, *supra* note 67, at 2694.

283. See Lischer, *supra* note 20, at 546.

284. See *supra* Part IV-V.

the Ohio Legacy Trust Act, and any other similar proposed act, that have the potential to address the issues raised by those opposed to the passage of these statutes.²⁸⁵ While recognizing that possible statutory revisions could provide a middle ground between those who argue for and against DAPTs as an available asset protection technique in Ohio, it is imperative to keep in mind the underlying rationale behind the proposed statute that may pose limitations on the practicability of any statutory revision.²⁸⁶

There are three possible statutory revisions that could be made to the Ohio Legacy Trust Act to address the negative aspects that such a trust would impose on creditors because of the settlor's ability to retain beneficial enjoyment of assets that most creditors could not reach after being placed into a DAPT.²⁸⁷ The first recommendation is to add a provision to the DAPT statute that requires the trust to distribute income, principal, or both, thus allowing those distributions to become available to the settlor's creditor. Because of the spendthrift provision in every DAPT, voluntary and involuntary transfers out of the trust are restrained and cannot be reached.²⁸⁸ Requiring, in the statute itself, that a certain amount of income, principal, or both be distributed to the settlor-beneficiary converts that amount from inaccessible trust property to accessible personal property of the settlor, thus allowing creditors to reach those limited assets. Such a statutory provision, for example, could provide that the beneficiary must receive four percent of the total value of the trust in distributions every year. Creditors could then only reach the specified amount that the settlor then controls after distribution. Other examples would be to require distribution of all income, a certain percentage of income, a specified fixed dollar amount, or any other method by which the settlor must receive a certain amount of trust assets. This requirement would help alleviate the problem of a settlor being able to enjoy trust property while keeping it shielded from the reach of those with valid claims against him.²⁸⁹

The second recommendation is to provide for more expansive creditor exceptions to the DAPT spendthrift provision. The Ohio Legacy Trust Act, like the DAPT legislation that some states that have already adopted, provides statutory exceptions allowing specified classes of creditors to access trust property.²⁹⁰ These include child support, spousal support,

285. See *supra* Part V for a discussion of public policy.

286. See Ohio Legacy Trust Act Report, *supra* note 2, at 28-29.

287. See *supra* Part V for the negative aspects.

288. OHIO REV. CODE ANN. § 5812.02(B) (LexisNexis 2012)

289. See Passananti, *supra* note 1, at 263.

290. See Ohio Legacy Trust Act Report, *supra* note 2, at 18 (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(C)).

alimony, property division upon divorce, and certain tort claimants whose claims arose before the assets were transferred into trust.²⁹¹ While Ohio is liberal in providing these exceptions, as many states have more limited or even no exceptions for existing creditors, these exceptions should be expanded to better protect creditors.²⁹² One such class of creditors absent from all enacted DAPT statutes are those who have been injured through the tortious act of the settlor after assets have been placed into the trust.²⁹³ Without this exception, the settlor could commit intentional torts or negligence after placing substantial assets into a DAPT without fear of pecuniary reprisal.²⁹⁴ Although a judgment may be obtained against him, those injured by his acts will be unable to access all the property over which he retains a beneficiary enjoyment.²⁹⁵ Including tort creditors whose claim arose after the settlor placed assets into the DAPT, as well as any other equally situated creditors that the legislature considers in need of protection, would ensure that unfairness does not arise when the settlor transfers assets to a DAPT.²⁹⁶

The third and final recommendation that could alleviate the negative effects of DAPT legislation is to limit the amount or type of assets that can be placed into a DAPT. Such a limitation would prevent the settlor from placing a substantial amount of his wealth into a DAPT in order to avoid potential future creditor claims.²⁹⁷ In limiting the amount or type of property subject to transfer into a trust under the Ohio Legacy Trust Act, limits could be placed by statutory language allowing only a specific dollar amount, a percentage of the settlor's net worth, or certain classes of assets to be placed into the trust. Further, a transfer tax on the value of property provides another option to dissuade placement of assets into a DAPT. As an example, a provision could be added to a DAPT statute prohibiting a settlor from placing more than twenty percent of his net worth into a trust. This limitation, or other similar limitations that restrict DAPT trust assets to one million dollars per settlor, would essentially prevent settlors from shielding all their assets from creditors.

The above statutory revisions, while all serving to mitigate the negative aspects that result from allowing a settlor-beneficiary to transfer assets over

291. *See id.* (proposed to be codified at OHIO REV. CODE ANN. § 5816.03(C)).

292. *Id.* at 29. For example, Alaska only allows “the holder of a child support claim that is more than . . . 30 days old at the time of a transfer into trust.” *Id.* at 30. Nevada does not even go this far, providing for no exception creditors and only relying on fraudulent transfer claims. *Id.*

293. *See Hirsch, supra* note 67, at 2692-93.

294. *See id.*

295. *See id.*

296. *See id.*

297. *See Passananti, supra* note 1, at 263.

which he retains beneficiary enjoyment to a trust, while shielding those assets from creditors at the same time, have limitations that preclude their beneficial effects.²⁹⁸ All the revisions above, because they serve to address the concerns held by those opposed to DAPTs, are in direct conflict with the intended rationale behind enacting the Ohio Legacy Trust Act or any similar DAPT statute.²⁹⁹ The goal behind the proposed act in Ohio is to provide a vehicle for increased asset protection.³⁰⁰ The stated purpose upon which the Ohio Legacy Trust Act is based is to protect settlors of Ohio DAPTs from claims that arise due to our litigious society.³⁰¹ The recommendations made above, while addressing the stated concerns about DAPT statutes, are in direct conflict with the underlying rationale of the act's proponents.³⁰² Moreover, including the above limitations in a DAPT statute would cause the Ohio act to be less advantageous than those that have already been passed in the thirteen states that currently have such legislation.³⁰³ There is already a trend toward increasing the protections afforded settlors in DAPT states by limiting creditor exclusions.³⁰⁴ The inclusion of more creditor protections in an Ohio DAPT would make Ohio less competitive in an already competitive arena by limiting the benefits afforded to a settlor in establishing such a trust. Because these recommendations would place further restrictions on the proposed Ohio DAPT, they would prevent the intended beneficial effects from being realized. Therefore, the only viable option regarding enactment is to reject the Ohio Legacy Trust Act or any other similar proposed statutory scheme in Ohio as a legitimate asset protection technique.

VIII. CONCLUSION

While the Ohio Legacy Trust Act would sanction the creation of DAPTs in Ohio, thereafter providing benefits to those settlors who could create such trusts, it would go against established Ohio law, be contrary to public policy, and be detrimental to Ohio citizens as a whole. The proposed Ohio act, or any similar proposed statutory scheme allowing a settlor to both protect assets from creditors and retain beneficial use and enjoyment over those same assets, favors the settlors of DAPTs over those who have valid claims against the settlor. Although any proposed Ohio DAPT statute could

298. See Lischer, *supra* note 20, at 542.

299. See Ohio Legacy Trust Act Report, *supra* note 2, at 27.

300. See *id.*

301. See *id.*

302. See *id.*; see also *supra* Part VI.

303. See *supra* notes 53-65 and accompanying text for a list of the thirteen states.

304. See Lischer, *supra* note 24, at 515-15, app. at 592.

be revised in order to better protect the settlor's creditors, any such revision would diminish the rationale and beneficial aspects behind creating this specific asset protection technique. Enacting a statute that would allow for the creation of DAPTs in Ohio is not a viable asset protection strategy and should not be adopted in this state.