

**Domestic Asset Protection Trusts and Trust Protectors:
The Time For Guidance and Accountability Is Here**

Introduction and Scope

In today's era of job losses, foreclosures, and bankruptcies, coupled with improved medicine and increased lifespans, clients need tools for long-term protection of their assets. Trusts are financial planning tools that allow owners of personal and real property to manage and protect their investments. Specifically, "APTs [asset protection trusts] are wealth preservation trusts coupled with spendthrift provisions to protect the settlor's assets from future creditors. A self-settled APT is a spendthrift trust created by the settlor to provide a benefit to himself as well as other beneficiaries."¹ In setting up an APT, "a settlor creates a trust over his or her assets, naming a third-party, but friendly, trustee. The trust terms empower the trustee to make discretionary distributions of trust income or principal to the settlor beneficiary. Under applicable legislation, creditors cannot reach the trust property while in trust."²

This paper addresses the use of offshore asset protection trusts (OAPTs) and the trend toward acceptance of domestic asset protection trusts (DAPTs) and asks whether such a trend should continue. The author specifically focuses on the role of Trust Protectors (TPs) in the administration of APTs and asks whether TPs should have a fiduciary or non-fiduciary duty. The author recommends that 1) TP statutes give TPs a non-fiduciary status, but that trust drafters encourage clients to make the role fiduciary and 2) litigators identify appropriate plaintiffs to test more completely the validity of a) domestic APTs with resident and non-resident settlors, and b) the fiduciary/non-fiduciary role of TPs. Until such suits are fully litigated and decisions published, it is unclear whether there are actual legal benefits to creating domestic APTs and to

what standards the third-party TP will be held. Then, pending case outcomes, the author recommends that more states codify APTs and TP roles.

Offshore and Domestic Asset Protection Trusts

Foreigners have used OAPTs for many years for various reasons, including tax benefits, avoidance of home country laws, and avoidance of government takeover of personal assets, but most recently they are used to protect assets from creditors.³ Countries encourage development of this business, including by way of friendly legislation.⁴ Under OAPT laws in some countries, “a trust will not be declared void or be affected in any way by reason of the fact that the settlor either retains the right to revoke the trust, or retains the power to dispose of trust property or remove or appoint a trustee or protector.”⁵ This is of significance because of the “longstanding position under American common law, codified in many states, that public policy would be offended if a settlor’s creditors were not permitted to reach assets in a self-settled trust.”⁶ Trust planners in the United States typically include a spendthrift clause in a trust, which a majority of courts will honor, assuming the settlor has not retained control over the trust, thereby protecting the assets from creditors.⁷ Where the settlor retains powers, however, “the assets are available to satisfy the settlor’s debts . . . whether the settlor is the sole beneficiary or not.”⁸ The UTC §505(a)(1) underscores this in that it “allows a settlor’s creditors to reach trust property where discretionary or mandatory distributions are authorized.”⁹ Clearly, settlors looked for ways to avoid such asset seizures.¹⁰

Initially Americans, like foreigners, used OAPTs for tax advantages but most of these advantages “disappeared with the enactment of the Tax Reform Act of 1976.”¹¹ Over time, as with foreigners, American clients’ interest in OAPTs shifted from tax avoidance to creditor

avoidance, i.e. settlors aimed to protect their assets from the reach of creditors by placing those assets in an OAPT, outside of U.S. court jurisdiction.¹² For creditors to “reach assets held in a trust, a court must be able to exercise its jurisdiction over the trustee or the trust assets. Where an APT is properly established in a foreign country, obtaining jurisdiction over the trustee vis-à-vis a U.S. court action will not be possible.”¹³ (Courts, may however, find loopholes in the trust that allow it to claim jurisdiction, as will be discussed below or, a creditor may seek access through a foreign court system,¹⁴ which will not be addressed here.) Given this, trust clients can gain the upper hand in a dispute with creditors:

By using offshore trusts, clients can obtain the necessary leverage to resolve disputes on more favorable terms than otherwise would be available under more traditional forms of planning. The true test of whether creditors can reach the assets of a properly established foreign trust occurs at the negotiating table. When a creditor realizes that the debtor has transferred her assets to an offshore trust, governed under laws that provide, in part, for nonrecognition of U.S. judgments, secrecy, and a set of almost insurmountable roadblocks, the proven result is a quick, cost-effective settlement in the defendant’s favor.¹⁵

Clearly, these OAPTs have advantages that Americans, in the foreseeable future, will continue to seek out. In response to this, some state legislatures recently enabled their states to compete against this OAPT business by adopting statutes allowing for creation of the domestic counterpart.¹⁶ “A domestic asset protection trust (hereinafter referred to as “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.”¹⁷ Alaska started this trend in 1997.¹⁸ “[A]laska enacted a statute expressly providing that creditors of the settlor could not reach assets that the settlor had transferred to a self-settled discretionary spendthrift trust.”¹⁹ As mentioned, the United States has had a history of public policy against such trusts; it is unclear,

now that states have statutes proactively accepting, and arguably, even encouraging, such trusts, whether residents of a non-DAPT state will be able to form a DAPT under another state and maintain the anticipated protections.²⁰ “In a state that has not enacted a DAPT statute, a settlor’s creditors can reach the maximum amount that the trustee could distribute to the settlor.”²¹ In fact, “APTs created by nonresident settlors, e.g. New Yorkers creating APTs in Delaware, appear most vulnerable in the bankruptcy arena since bankruptcy courts have jurisdiction over assets located nationally.”²² As the trend toward DAPT legislation spreads across the United States, planners are incorporating DAPTs into their clients’ estate plans; therefore, it is important to understand the various players in such a trust.

DAPT/OAPT: Parties to the Trust

Several parties are involved in executing a trust, including a settlor, trustee, trust protector, and beneficiary:

The hallmark of the modern trust device is the fiduciary relationship between the trustee and the trust beneficiary that results from the separation of the legal and equitable interests in the property. Legal title to the property . . . is held by the trustee subject to enforceable rights in the trust beneficiary.²³

The settlor is the party funding the trust. As indicated above, in an APT the settlor can be the beneficiary of the trust without rendering the trust invalid. Of course, the trust also may be established for other beneficiaries. The beneficiaries are the parties who will receive the benefit of the trust. Finally, it has become more popular for the settlor to also select a trust protector (TP).²⁴ “The trust protector’s role is to modify the terms of the trust when necessary or appropriate to carry out the grantor’s [settlor’s] intent.”²⁵ This person (or corporate body) is typically “an independent actor, nonsubordinate to the settlor, the trustee, or any beneficiary,

who possesses specific but potentially broad powers over the ongoing administration and terms of a trust.”²⁶

Trust Protector Role

The use of TPs has greatly increased, due in significant part to states now allowing DAPTs.²⁷ Additionally, some state statutes now specifically address TPs, with South Dakota being the first in 1997.²⁸ The settlor must choose her TP wisely so as not to run afoul of the trust rules and negate the settlor’s original asset protection goals. To accomplish this, it is important to select a TP “familiar with the intentions of the settlor and with the beneficiaries.”²⁹ Of utmost importance, however, is to select a TP who is an independent party, so as to avoid adverse tax consequences (as explained below).³⁰

Usually in an APT the settlor gives up his control over the trust as a way “to prevent his creditors from exercising such control through a court order.”³¹ With the use of a TP, the settlor, presumably, gives up control of the trust but, in reality, the settlor selects a TP he believes understands and will carry out his intentions. “That is, although the settlor would have no apparent control over the trust, he could have indirect (if not direct) control over the protector, who in turn could control the trust.”³² A significant advantage in using a TP is that the trust can continue on with the settlor’s original intentions even after the settlor is deceased and even when circumstances or laws change (that might require trust amendments in order to maintain the original trust purpose). “As the living embodiment of the dead settlor, the protector has the potential to mitigate the foresight problems associated with dead hand control.”³³

One researcher proposes that the use of TPs can reduce “agency costs.” These costs “arise because it is often difficult for a principal [settlor] to observe whether the agent [trustee] is

acting on the principal's behalf."³⁴ The settlor, and other beneficiaries, count on the "trustee's duties of care, loyalty, impartiality, and the duty to provide information to the beneficiaries . . ." and, when those break down, can seek justice through the legal system.³⁵ The problem, however, is that legal proceedings regarding fiduciary duty expend resources, most likely trust resources, the same property the beneficiaries are trying to preserve, and the entire system presumes beneficiaries know how to protect their interests, perhaps an unfounded presumption.³⁶ A TP can lessen these agency costs by exercising his duty of care and loyalty and by monitoring trustee behavior; namely using TP powers to carry out the settlor's intent. As an independent party, not a beneficiary and not the settlor himself, the TP can exercise greater objectivity in his duties, more closely align with settlor interest, and reduce agency costs (where interests diverge).

The TP typically can have negative and positive powers.³⁷ An example of a negative power is the ability of a TP to veto some proposed act.³⁸ "[T]he trustee is responsible for initiating the decision, subject to the third party's [TP's] approval."³⁹ Positive powers may include: "power to remove and replace trustees or add beneficiaries, or amend the trust, or even terminate the trust."⁴⁰ One author classified the powers as "(i) the power to act, (ii) the power to direct action, or (iii) the power to consent."⁴¹ According to the Uniform Trust Code (UTC), "A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made."⁴² The UTC addresses the TP's powers in § 808, Powers to Direct:

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would

constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.⁴³

Subsection (c) further states that, by way of the trust, this party can have the “power to direct the modification or termination of the trust.”⁴⁴ The UTC § 808 Comments indicate that subsection (b) (and (d)) “ratify the use of trust protectors and advisors” and that (c) “ratifies the recent trend to grant third persons such broader powers.”⁴⁵

Those states that recognize the TP by statute have various guidelines regarding a broad range of TP powers.⁴⁶ For example, the TP can monitor the actions and decisions of trustees, with the power to add, remove, or appoint trustees, ensuring trustee decisions align with settlor intent.⁴⁷ Additionally, the settlor can allow the TP to select the successor TP, with the idea that the successor will ensure the settlor’s intentions continue to be carried out.⁴⁸ Regarding beneficiary distributions:

The trust protector may direct, consent to or veto distributions to a beneficiary without being bound by an ascertainable standard. Vesting such power in the trust protector may forestall application of §§2041 and 2042, which would otherwise cause the trust principal to be included in the estate of the trustee or beneficiary. However, if the settlor is living, the power to direct distributions could potentially evoke grantor trust status and, unless grantor trust status is desired, should instead be vested in an independent trustee, as expressly permitted under Section 674(c) or limited by an ascertainable standard, as expressly permitted under Section 674(d).⁴⁹

A TP can change the situs of the trust⁵⁰ which may be useful if governing laws have changed and no longer enable the trust purpose to be met. These examples of potential TP powers illustrate the significance of the TP role and the importance of carefully choosing an appropriate TP. Just as with the trustee, the TP must have absolute discretion and avoid steps

that make it appear that the settlor and the trustee or TP have some kind of agreement about manner of trust distributions.⁵¹

Duress Clause

It is common for an APT to include a (anti) duress clause which, ultimately, protects the trust. “Commonly utilized in foreign trusts, the typical duress clause will direct the trustee to ignore any such advice, order, or instruction where such is given under duress by the person granted such powers under the instrument.”⁵² This clause is important for example where, as in the case of a TP, a third party non-trustee has the power to direct the trustees to act; the trustee can ignore the direction if it is given under duress.⁵³ Likewise, since a TP, for example, may have the power to veto a trustee decision, it is important that the duress clause also apply to the TP.⁵⁴

An Example: Alaska DAPT And Trust Protector Statutes

For qualification under Alaska’s domestic asset protection trust statute, a trust must be irrevocable, indicate that Alaska state law governs it, and include a spendthrift clause.⁵⁵ “The Alaska DAPT statute was initially conceived to try to repatriate some of the billions of dollars that had been transferred offshore in order to seek asset protection.”⁵⁶ This seems a valid objective, and may be even more important as an economic stimulus in the United States today than in 1997 when Alaska first codified the DAPT. Alaska’s TP statute refers specifically to a “trust protector” as a “disinterested third party.”⁵⁷ The TP has those powers provided in the trust which may include, for example:

(b)(1) remove and appoint a trustee;

(2) modify or amend the trust instrument to achieve favorable tax status or to respond to changes in 26 U.S.C. (Internal Revenue Code) or state law, or the rulings and regulations under those laws;

(3) increase or decrease the interests of any beneficiary to the trust and

(4) modify the terms of a power of appointment granted by the trust⁵⁸

Alaska's Legislature specifically deemed that the TP "is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector taken when performing the function of a trust protector under the trust instrument."⁵⁹ Alaska was an early adopter of DAPTs and the specified TP role; other states have followed.⁶⁰ The problem, or perhaps some see it as an opportunity, is that attorneys and their clients do not have sufficient information to know exactly how these trusts and the position of TP will be treated by the Service and the courts. In Ltr. Rul. 9837007, the Service addressed the question of the gift tax treatment of a DAPT when (Alaska) state law reversed the long-standing policy of allowing creditors to reach assets in a self-settled trust; "the settlor has parted with dominion and control over the trust assets, so the gift is complete."⁶¹ The Service ruled that the gift to the trust was a completed gift for federal tax purposes, on the premise that the trustee truly had independent, absolute discretion as to how to distribute income and principal to the beneficiaries (which included the settlor) and that there was no agreement between the settlor and the trustee as to how to make distributions.⁶² (The Service did not rule on whether it would be includable in the settlor's gross estate at death for federal tax purposes.⁶³)

Recently, the Service published a private letter ruling regarding estate tax treatment of an Alaskan DAPT, focusing on "whether, under Section 2036(a)(1), the settlor has retained enjoyment of, or the right to income from, trust assets."⁶⁴ Specifically, the taxpayer sought a

ruling on the proposal that “No portion of the trust’s assets would be included in the settlor’s gross estate.”⁶⁵ The trust term at issue is that, “[T]he trustee was given authority, in the trustee’s sole and absolute discretion, to distribute income and principal to one or more members of the class consisting of the settlor, the settlor’s spouse, and the settlor’s descendants.”⁶⁶ Here, the trustee was not allowed to pay the settlor any reimbursement for taxes paid.⁶⁷ (A trust company served as the Independent Trustee and an independent attorney as the TP.⁶⁸) “Ltr. Rul. 200944002 represents the first instance in which the IRS has approved the use of domestic asset protection trust (DAPT) to minimize estate tax.”⁶⁹

Minimal Government Guidance

There has been a dearth of governmental guidance in regards to DAPTs and TPs. “There is no specific code section that directly addresses Congress’s tax treatment Congress has yet to directly engage in a discussion regarding the specific tax treatment of transfers from these specific types of trusts.”⁷⁰ The Service private letter rulings (PLRs) mentioned above provide some guidance though not complete. “Since PLRs are not binding, except for the individual seeking the PLR, we cannot rely on a ruling provided in a PLR, even if the individual disclosed all pertinent information for purposes of the PLR.”⁷¹ The questions seem to outnumber the answers; this means attorneys must make educated guesses about such issues as 1) which state’s trust laws apply when a creditor sues a settlor who is a resident of a non-DAPT statute state when he forms a trust using a DAPT state’s laws⁷² or 2) can the individual who never resided in a DAPT statute state even form a DAPT using another state’s DAPT laws and benefit from the intended asset protection?⁷³

Likewise, the judicial response to the use of DAPTs and TPs seems virtually nonexistent.⁷⁴ Given that most states lack DAPT statutes, the issue posed above regarding

formation of DAPTs by non-residents becomes an important one where courts have to determine if there is creditor access or not; clearly, different jurisdictional approaches can be outcome determinative in creditor actions.⁷⁵ The one case that has provided some insight, albeit in an OAPT situation, is *Federal Trade Commission v. Affordable Media, LLC*. (otherwise known in the literature as the “Anderson” case).⁷⁶

Orders to Repatriate Trust Assets

The defendants, Mr. & Mrs. Anderson, appealed a finding that they were in contempt of court when they refused to fulfill a court order to repatriate funds (which they raised from a significant telemarketing Ponzi scheme) from their offshore trust in the Cook Islands.⁷⁷ In the argument of relevance here:

[T]he Andersons claimed that they were unable to repatriate the assets in the Cook Islands trust because they had willingly relinquished all control over the millions of dollars of commissions in order to place this money overseas in the benevolent hands of unaccountable overseers, just on the off chance that a law suit might result from their business activities.⁷⁸

While the court’s sarcasm is obvious, it merits untangling just what the Andersons attempted to accomplish and how, as trust attorneys leverage the lessons of this case. The 9th Circuit affirmed the finding of civil contempt of court.⁷⁹

In April 1998, the Federal Trade Commission (FTC) charged the Andersons with violating the FTC Act for their role in selling fraudulent investments through a telemarketing Ponzi scheme.⁸⁰ During the proceedings, the district court issued a temporary restraining order and a preliminary injunction requiring the Andersons to “repatriate any assets held for their benefit outside of the U. S.”⁸¹ A few years earlier the couple had created an irrevocable trust based out of the Cook Islands.⁸² First, as co-trustees, the Andersons instructed the corporate co-

trustee to repatriate the assets; the corporate co-trustee determined that the court order constituted an event of duress under the trust's duress clause and thereby removed the Andersons as co-trustees and refused to follow the repatriation instruction.⁸³ The district court then "rejected their assertion that compliance with the repatriation provisions of the trust was impossible,"⁸⁴ found a high likelihood that the Andersons would dissipate the assets,⁸⁵ and had the Andersons taken into custody.⁸⁶

Of relevance here, the 9th Circuit found that, "It is readily apparent that the Andersons' inability to comply with the district court's repatriation order is the intended result of their own conduct – their inability to comply and the foreign trustee's refusal to comply appears to be the precise goal of the Andersons' trust."⁸⁷ Essentially, the trust's duress clause allowed the TP to decide if a decree by any court in the world in any way restricting a trustee's disposal of trust property would equate to an event of duress, thereby allowing for termination of the Andersons as trustees so that the foreign trustee would be in control (i.e. outside the reach of U.S. jurisdiction).⁸⁸ Although the Andersons proffered an impossibility defense, the district court found that they did not meet the burden of proving compliance to be impossible and, instead, found them to be in control of the trust still; the circuit court found no clear error in this decision.⁸⁹

The court found the Andersons to be "protectors" of the trust, retaining some control, although doing so makes them subject to U.S. personal jurisdiction where they can be "forced to exercise their control to repatriate the assets."⁹⁰ Where the TP powers are not just negative powers to veto trustee decisions and the TP is not subject to a duress clause, then the TP can be required to repatriate; here, the Andersons had affirmative powers to appoint trustees and, also in their role as TPs, fell under the anti-duress clause.⁹¹ In fact, the record showed that the

Andersons tried to resign as TPs, which the court saw as a demonstration that the Andersons “knew that, as the protectors of the trust, they remained in control of the trust and could force the foreign trustee to repatriate the assets” as the trust clearly states that the TPs “have the power to determine whether or not an event of duress has occurred.”⁹² As a result of the Anderson decision, attorneys advise clients to never name themselves as trustees or TPs.

In a subsequent case, *In re Lawrence*, a bankruptcy trustee also sought to compel the debtor to turn over funds from an OAPT in Mauritius; through a series of amendments to the trust (e.g. application of anti-duress clause to the TP, termination of settlor’s life interest if bankruptcy occurs, and a subsequent statement that debtor was excluded beneficiary), most of them after a multi-million dollar judgment against the debtor, the debtor/settlor sought to insulate himself from repatriation.⁹³ Here, as with *Anderson*, the district court found “that Lawrence had control over the Trust, through his retained powers to remove and appoint Trustees and to add and exclude beneficiaries, and it rejected Lawrence’s impossibility defense” and held him in contempt.⁹⁴ Relying heavily on *Anderson* and taking a totality of the circumstances approach, the 11th Circuit affirmed the lower court, found the duress amendment “void as to current and future creditors under Florida law where the settlor creates a Trust for his own benefit and inserts a spendthrift clause,” and found that Lawrence “retained de facto control over the Trust through his ability to appoint Trustees who could in their absolute discretion reinstate the appellant as a beneficiary and assign the entire proceeds to him.”⁹⁵ The court found Lawrence’s claim that he did all he could by trying to appoint the bankruptcy trustee as the new OAPT trustee, despite the current trustee presumably invoking the anti-duress clause, to be without merit.⁹⁶

These two often-cited cases provide a cautionary tale about how to advise trust clients, specifically to avoid naming settlors as trustees or TPs in OAPTs or DAPTs; however, this is not

entirely applicable or reliable case law because they only dealt with OAPTs. The opinions are insufficient to show attorneys and clients how the courts will handle DAPTs facing similar challenges or the validity of the DAPT statutes on which they are founded.

Who To Name To The Trust Protector Role

Based on what little legal doctrine is available, it is recommended that the “Protector should be [a] person (corporate or individual) who is not settlor, trustee or beneficiary, who resides outside relevant jurisdictions, and who has few economic ties to those jurisdictions.”⁹⁷

Although trust investment advisors have been used for quite some time, the use of “protectors” with broader powers increased significantly concomitant with the use of OAPTs and DAPTs.⁹⁸

Particularly in the case of OAPTs:

The settlor probably does not want to create the trust in the first place, and certainly not with a trustee he does not know much about who resides in another country about which he may know even less. Worse, from the settlor’s point of view, that trustee needs discretionary powers in order to be able to deal with future events.⁹⁹

Adding this party to the mix with trustee, settlor, and beneficiary complicates the relationships among the parties. The TP’s negative powers (of veto) impact the trustee’s ability; this typically adds time and steps to the trust administration, however this very process is in protection of the trust assets and the settlor’s intent. If the consent requirements are extensive though, “it will likely be difficult to find a responsible person willing to act as trustee.”¹⁰⁰

With the recent growth in DAPTs, clients need to identify appropriate TPs, which can be corporate organizations or individuals the settlor knows personally; the need for TPs has fueled increased opportunities for professionals. In *CPAs as Trust Protectors*, Allmon suggests that certified public accountants are well-positioned to serve their clients in this “manageable, meaningful new niche.”¹⁰¹ He purports that CPAs “Have the client’s confidence . . . Have . . .

the education, training, and experience . . . Understand the clients . . . [and] Have a tax background”¹⁰² It makes sense, given the potential pitfalls of trustee and TP roles, the complexity of financial instruments, and the professional expertise and objective approach of CPAs, that CPAs would be especially qualified to step into this expanding arena. Allmon does caution, however, that, as the role is still virtually untested from a legal perspective, that CPAs would necessarily be taking on some risk and should consult their malpractice carriers and consider any required time involvement in their planning.¹⁰³

Trust Protector as Fiduciary?

Currently, professionals are debating whether or not the TP is or should be a fiduciary.¹⁰⁴

The UTC takes a position on this issue in § 808:

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.¹⁰⁵

Then, under the UTC approach, a TP with negative powers would not, presumptively, be a fiduciary. This raises the question though as to how beneficial the TP would be ultimately (e.g. having only negative powers means that the TP could not change the trust situs to a more legally beneficial location).¹⁰⁶ Even in states that follow the UTC, the settlor “could provide that the holder of the power is not to be held to the standards of a fiduciary.”¹⁰⁷ State statutes addressing the TP role vary, as some declare the TP to be a fiduciary while others a non-fiduciary.¹⁰⁸ Of import in this distinction is that a fiduciary owes a duty to act in the best interest of the beneficiaries and can be held liable for not exercising its powers under the trust.¹⁰⁹ Additionally, settlors need to be concerned about tax implications of TPs being fiduciaries. For example, if a

TP has a fiduciary power to “distribute property to a different trust or to amend a trust . . . ,” the IRS could treat this as a “retained power to designate the persons who will enjoy the trust property under [IRC] Section 2036(a)(2) or a retained power to alter the enjoyment of the property under [IRC] Section 2038(a)(1), or both.”¹¹⁰ To avoid the risk that the “IRS could argue that the facts and circumstances show that the fiduciary was under the grantor’s [settlor’s] control or that there was a pre-arranged understanding” the TP should not be a relative or a subordinate of the settlor.¹¹¹

Some believe it is best for the TP to be a non-fiduciary as the TP then “does not have a fiduciary responsibility to any particular beneficiary. This should provide the protector an absolute unfettered power to act or not act.”¹¹² Perhaps, though, “unfettered power” is not in everyone’s best interest; today’s financial headlines display examples of what parties can do with such a carte blanche power to act without clear accountability. It is informative though to clarify what it means to be a non-fiduciary. As such, the TP’s powers are personal rather than fiduciary which makes for a very different relationship with the trustee.¹¹³

An individual holding a personal power cannot be forced to exercise it and in fact need not even consider whether to exercise it. And if he does exercise such a power, he may do so on a whim, or even for a spiteful or malicious reason, so long as he does not commit a fraud on the power.¹¹⁴

This means the trustee simply assesses whether the trust terms have been met when the TP acts (or doesn’t act) but does not have to assess the TP’s “motives for or reasonableness of its exercise”¹¹⁵ This seems a bit troubling because of its apparent disregard for potential problems; however, regardless of the TP’s duty, “the trustee must nevertheless recognize and honor his fiduciary obligations and question the protector when called for.”¹¹⁶

Given that the state DAPT statutes vary, it is appropriate that the settlor expressly state in the trust instrument that the TP is a fiduciary. Where fiduciary status is not expressly stated, some interpretation and inferences may be required:

Generally, if the appointed protector is a beneficiary or a person who would likely be an object of the settlor's bounty and there is no language or facts to dictate otherwise, then to the extent the exercise of a particular power could benefit the protector, there is likely to be a presumption that it is a personal power. If the protector is someone in an advisory capacity to the settlor or someone the settlor would be unlikely, under normal circumstances, to name as a beneficiary, the power will most likely be a fiduciary one.¹¹⁷

The "burden is on the drafter" to state how the TP's powers are held; additionally, the trust "should not impose any duty on the TP to take any action . . ." if the duty is non-fiduciary.¹¹⁸ Beyond the express or implied statement of fiduciary or non-fiduciary status, an "exculpation clause" can also address TP liability. Opinions differ here as well; some in the field believe a clause should always be included that "provides where the trust protector has not acted recklessly, such trust protector will not be liable to any person for his or her actions (or failures to act)."¹¹⁹ This again, though, appears to invite irresponsible behavior by a TP without accountability, as long as it does not reach the level of recklessness.

Some DAPT states choose to define the TP role as non-fiduciary, e.g. "The Alaska statute provides explicitly that, subject to contrary provisions in the trust instrument, 'a trust protector is not liable or accountable as a trustee or fiduciary'"¹²⁰ Perhaps, though, this begs the question of what, then, is the purpose of the TP? Ultimately, the settlor wants his financial assets protected for the beneficiaries, thus the reason for the trust to begin with; so, it seems that the settlor would want all of the TP's actions or non-actions to, inherently, provide the most

complete protections. To enable a TP to perform on a whim, without regard to effects on the instrument or the beneficiaries, or without accountability seems risky: “If the protector was in fact appointed to ‘protect,’ then he has to be regarded as a fiduciary as to the powers falling into that category and he cannot be released from his obligations merely by language stating the contrary.”¹²¹ Particularly where the trust describes the TP as an “office” rather than a certain individual, and the office is empowered with powers of appointment and is compensated for their duties, it is difficult to argue that the powers are simply personal.¹²²

It may be more difficult to secure a TP if the trust (or statute) holds the TP to a fiduciary duty and, therefore, greater exposure to liability; however, “The typical settlor concerned about agency costs should want to impose fiduciary duties on trust protectors, and should not want to exculpate them from liability.”¹²³ This is not to say that the TP would not also have personal powers which do not bear a fiduciary duty, but it seems prudent to first select a TP who would not benefit personally from the trust and then to apply fiduciary duty to the TP’s negative and positive powers that do impact viability of the trust. As discussed above, the settlor and, potentially, the beneficiaries experience advantages in reduced agency costs and preservation of assets through the use of a TP, but there are still risks that a TP will act in its self-interest.

One significant way to lessen this possibility is to apply a fiduciary duty to the position of TP, such that accountability is transparent and remedies are more available to beneficiaries. Likewise, by its existence, the fiduciary duty over both trustees and TPs may incent both parties to collaborate and resolve issues, on behalf of beneficiaries, outside of legal proceedings. For example, “Holding the trustee liable for failing to seek judicial or beneficiary consent before acceding to the protector’s questionable directions provides the trustee with an incentive to monitor the protector’s actions.”¹²⁴ In this way, the fiduciary duty serves as a part of the system

of checks and balance over the trust (bearing in mind that “If the trust beneficiaries were optimal monitors of the actions of trust protectors, there would be little reason to hold the trustee liable for following the protector’s directions, even when those directions breached the protector’s fiduciary duty.”¹²⁵) Of course, if the TP has powers of appointment and removal of trustees, there is a danger that the trustee would then act more like the agent of the TP (to curry favor with the TP) rather than the agent of the settlor or the beneficiaries.¹²⁶

State Statutes

In the last thirteen years, at least twelve states have created statutes that address DAPTs and some states have directly addressed TPs by statute.¹²⁷ “Most states, however, have made no statutory provision for protectors and have not yet developed case law defining the relationships among protectors, trustees, settlors, and beneficiaries. Moreover, even in states that have labeled protectors as fiduciaries, the scope of fiduciary duties owed by the protector remain substantially uncertain.”¹²⁸ While this can create a significant economic advantage for those states allowing DAPTs, it creates jurisdiction and choice of law questions that have yet to be fully addressed. For example, as the DAPT purpose is typically to protect assets from creditors, issues related to access to assets clearly arise in bankruptcy proceedings. Bankruptcy law is federal so plaintiffs and courts have a national reach in bankruptcy proceedings; however, these DAPT laws are by state.¹²⁹

It is likewise unclear if non-residents can rely on the protection of DAPT statutes of other states.¹³⁰ As long as DAPTs are allowed to exist and the trend continues to reach additional states, the public policy argument against asset protection trusts will continue to disintegrate. In an era of rampant home foreclosures and bankruptcy filings, the spread of consumer-friendly

legislation, such as DAPT statutes, surely puts creditors on notice that they should develop more flexible negotiating positions when trying to attach debtors' assets.

Given that the trend toward DAPTs is here and appears to be spreading, it may be prudent for additional states to pass DAPT (and TP) statutes. Some, however, believe that these statutes "do not represent good policy" for the same reasons such trusts traditionally had not been allowed in the United States (as mentioned above, self-settled spendthrift trusts were previously forbidden in all states as against public policy since they frustrated legitimate creditors, including tort victims, from reaching assets settlors controlled).¹³¹ From a benefit perspective, these statutes can stimulate the economy; moving this benefit from offshore locations to the United States means that the economic benefits (e.g. trust administration fees, investment fees, work for professionals and support staff involved in trust creation and execution) can accrue in the United States instead.

In the legislative debate leading up to the passage of the Alaskan DAPT statute, "An attorney specializing in estate tax and planning testified that the Act would attract business to Alaska that would primarily benefit attorneys, bankers, certified public accountants, and money managers. However, the attorney also noted that money from this business would permeate the Alaskan economy."¹³² Although critics have a valid point in arguing that settlors should not be encouraged by enabling legislation to avoid child support or tort victim payments, surely legislative bodies can create restrictions that address this particular issue. In fact, the Delaware law deals with this by creating a "class of preferred creditors" where, with certain restrictions, the spendthrift clause does not apply – "settlor's spouse and children, and any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor . . ." where such harm was caused by the settlor.¹³³

Clearly, this can raise the issue, as discussed above, that if these creditors can reach the assets, then perhaps this means the settlor has retained control over the trust such that it must be included in the settlor's estate.¹³⁴ There simply is not enough case law yet to know how these questions would be answered. Perhaps it will take more than a special clause in these DAPT statutes and, instead, actually require change in the I.R.C. before clients, attorneys, and CPAs would have sufficient clarity to move forward with confidence in setting up DAPTs and before TPs would have greater confidence in their role and potential liability.

Conclusion and Recommendations

Several states have recognized the advantages other countries have provided estate planning clients through the use of OAPTs. To seize this asset protection business, these states have codified the creation of DAPTs. Other states should follow this lead and also codify the use of DAPTs. Given today's struggling economy, bringing this economic benefit into the United States seems to be a prudent investment. Creditors will, of course, have to adjust their approach to ensure they can also protect their investments as much as possible; in reality, however, more clients are using OAPTs, so creditors need to make these adjustments anyhow. Instead of foreign entities, however, U.S. businesses and individuals (as TPs, trustees, attorneys on behalf of settlors) could be the party across the table (and thus the ones benefitting financially from these transactions), in those states that allow DAPTs. Although this is a less than ideal circumstance for creditors, the lesser of two evils it seems, would be to oppose a DAPT rather than an OAPT. It appears that the long-standing public policy against allowing settlors to protect their assets in a self-settled trust away from the reach of creditors is turning.

Creating statutory explanations of DAPTs and TPs would also help to clarify expectations about the possible advantages and the realistic limitations of DAPTs as a planning tool and TPs as a support role. Such statutes would facilitate estate planning, for example, making it clear whether or not a state deems a TP to be a fiduciary or non-fiduciary. States should indicate a default of non-fiduciary status as this seems the safest way to avoid inadvertent negative tax ramifications (which could completely frustrate the entire trust purpose), but attorneys should encourage a fiduciary status with proper planning. Not applying an exculpatory clause and, instead, holding the TP accountable for negative and positive powers would provide the greatest protection against improper oversight of the trust; by the same token, the planner must be very careful to test the TP role against the relevant tax code and state DAPT and TP statutes to ensure the greatest overall advantage for the client. The trust instrument should state explicitly the TP's fiduciary and/or non-fiduciary status for each type of power. This will encourage conscious decision-making about the ramifications of the status, will lessen the need for litigation and court interpretation, and will clarify role expectations for the TP.

It is anticipated that the use of TPs will continue to rise as the use of DAPTs rises; attorneys should encourage their clients to use TPs, either individuals or corporations depending on the circumstances, to provide an extra layer of protection over the client's assets and to aid in continuing the client's intent after he is deceased. Most importantly, attorneys should work closely with their clients to explain current DAPT and TP statutes and determine the best approach for the individual client. "The general point is that one size won't fit all, which is one of the reasons why it will be so difficult for courts to figure out just what the fiduciary rules should be with respect to trust protectors."¹³⁵

Finally, and perhaps, even before states create new statutes (or amend current ones), litigators should identify appropriate plaintiffs to test more completely the validity of a) domestic APTs with resident and non-resident settlors, and b) the fiduciary/non-fiduciary role of TPs. Given the lack of case law, it is simply unclear how well the DAPTs and the TP role will hold up to the pressures of inter-state challenges by creditors, beneficiaries, bankruptcy trustees, and courts. The advantages of clients using these tools could be enormous, but the downside of finding out too late that a DAPT will not hold up to scrutiny and, therefore, not provide the protection sought and expected could be just as devastating. Likewise, the role of TP could be hugely advantageous, assuming the planner takes into account the current tax law and slim case law holdings; however, the few published cases are based on OAPTs and the few TP statutes are still so new that proactively testing the waters in court could provide a significant service to many future clients.

¹ Phyllis C. Smith, *The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trusts: Can You Really Have Your Cake and Eat It Too?*, 44 New Eng. L. Rev. 25, 26 (2009).

² Roger W. Anderson & Ira Mark Bloom. FUNDAMENTALS OF TRUSTS AND ESTATES, 433 (3d ed. 2007).

³ Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts*, 23 Est. Planning 65, 65 (Feb. 1996).

⁴ *Id.* (Cook Islands-Int'l Trusts Amendment Act 1989).

⁵ *Id.* at 68 (citing Cook Islands Int'l Act, 1984, as amended 1989 and 1991, § 13C).

⁶ Roger W. Anderson & Ira Mark Bloom, *supra* note 2, at 434 (citing Restatement (Second) of Trusts § 156 (1957)).

⁷ Gideon Rothschild, *supra* note 3, at 68.

⁸ *Id.* “This doctrine is referred to as the self-settled trust rule.” (citing Restatement (Second) of Trusts, § 156 (1957)).

⁹ Roger W. Anderson & Ira Mark Bloom *supra* note 2, at 434 (citing Uniform Trust Code 505(a)(1)).

¹⁰ Howard D. Rosen, *The How's and Why's of Offshore Trusts in Asset Protection Planning*, 21 Tax Mgmt. Est. Gifts & Tr. J. 115, ¶ 13 (1996). “A suitable APT jurisdiction will have in place legislation that specifically repudiates these defects in U.S. trust protection laws.”

¹¹ Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L. Rev. 1035, 1048 (2000). (IRS to treat Americans' foreign trust assets as settlor's assets for income tax determination).

¹² *Id.*

¹³ Howard D. Rosen, *supra* note 10, at ¶ 5.

¹⁴ *Id.* at ¶ 6.

¹⁵ Gideon Rothschild, *supra* note 3, at 65-66.

¹⁶ Roger W. Anderson & Mark Ira Bloom *supra* note 2, at 434.

¹⁷ David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes: Updated Through November 2008*, 34 Am. C. of Trust & Est. Couns. J. 293, 293 (Spring 2009).

¹⁸ *Id.*; Alaska Stat. § 34.40.110.

¹⁹ David G. Shaftel, *IRS Letter Ruling Approves Estate Tax Planning Using Domestic Asset Protection Trusts*, 112 J. Tax'n 213, ¶ 11 (2010).

²⁰ David G. Shaftel, *supra* note 17, at 293.

²¹ David G. Shaftel, *supra* note 19, at ¶ 13 (Essentially, this “prevents the settlor's transfer to the trust from being a completed gift for gift tax purposes” because the settlor has not totally given up control, thereby invoking application of IRC Sections 2036 and 2038.)

²² Roger W. Anderson & Ira Mark Bloom, *supra* note 2 at 434.

²³ *Id.* at 380-381.

²⁴ Alexander A. Bove, Jr., *The Trust Protector, Friend, Foe or Fiduciary?*, Address at the Am. C. of Trust & Est. Couns. Annual Meeting, 28-1, 28-1 (Mar. 4, 2009).

²⁵ Charles D. Fox IV, *The Thirtieth Annual Law Review Symposium Frontiers of Estate Planning: Changing Laws for Changing Times: Symposium Article: How “Revocable” Is “Irrevocable?” Obtaining Flexibility in Irrevocable Trusts*, 33 Ohio N.U.L. Rev. 943, 949 (2007).

²⁶ Jonathan C. Lurie and William R. Burford, *Drafting Flexible Irrevocable Trusts*, 33 Am. C. of Trust & Est. Couns. J. 86, ¶ 29 (Summer 2007).

²⁷ Charles D. Fox IV, *supra* note 25, at 950.

²⁸ *Id.* at 951. (e.g. Alaska, Idaho, South Dakota); Alexander A. Bove, Jr., *The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?*, 30 Est. Plan. 390, 390 (August 2003).

²⁹ Charles D. Fox IV, *supra* note 25, at 956.

³⁰ *Id.*

³¹ Alexander A. Bove, Jr., *supra* note 24, at 28-3.

³² *Id.*

³³ Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 Cardozo L. Rev. 2761, 2763 (2006).

³⁴ *Id.* at 2770 (citing Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 643-646 (2004)).

³⁵ *Id.* at 2771.

³⁶ *Id.* at 2772-2773.

³⁷ Alexander A. Bove, Jr., *The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?*, 30 Est. Plan. 390, 390 (August 2003).

³⁸ *Id.*

³⁹ UTC § 808 Comments (2005).

⁴⁰ Alexander A. Bove, Jr., *supra* note 37, at 390.

⁴¹ Elizabeth Carrott Minnigh, *Utilizing Trust Protectors in Domestic Estate Planning*, 48 Tax Mgm't Memorandum 3, ¶ 13 (January 8, 2007).

⁴² UTC §808 Comments.

⁴³ UTC § 808.

⁴⁴ *Id.*

⁴⁵ UTC § 808 Comments.

⁴⁶ Elizabeth Carrott Minnigh, *supra* note 41, at ¶ 14 (e.g. Alaska Stat. § 13.36.370, Idaho Code § 15-7-501(6), South Dakota: S.D. Codified Law § 55-1B-6).

⁴⁷ *Id.* (citing Alaska Stat. Section 13.36.370(b)(1) and S.D. Codified Law Section 55-1B-6(4)).

⁴⁸ *Id.* at ¶ 16 (citing S.D. Codified Law Section 55-1B-6(8) and Wyo. Stat. Section 4-10-710(a)(iii)).

⁴⁹ *Id.* at ¶ 18 (citing I.R.C. Generally, I.R.C. § 2041 includes property over which decedent has general power of appointment in the value of the decedent's gross estate, (except where there is ascertainable standard relating to health, education, support, maintenance). Generally, I.R.C. § 2042 includes value of life insurance proceeds in the decedent's estate to "amount receivable by executor" and that amount receivable by beneficiaries to extent decedent maintained "incidents of ownership.")

⁵⁰ *Id.* at ¶ 24.

⁵¹ David G. Shaftel, *supra* note 19, at ¶ 42-43.

⁵² Howard D. Rosen, *supra* note 10, at ¶ 22.

⁵³ *Id.*

⁵⁴ *Id.* at ¶ 21.

⁵⁵ David G. Shaftel, *supra* note 17, at 294 (citing Alaska Stat. § 34.40.110).

⁵⁶ David G. Shaftel, *supra* note 19, at ¶ 12.

⁵⁷ Alaska Stat. § 13.36.370(a) (2010).

- ⁵⁸ *Id.* at (b).
⁵⁹ *Id.* at (d).
⁶⁰ David G. Shaftel, *supra* note 17, at 293.
⁶¹ David G. Shaftel, *supra* note 19, at ¶ 15.
⁶² *Id.* at ¶ 16.
⁶³ *Id.* at ¶ 17.
⁶⁴ *Id.* at ¶ 18.
⁶⁵ *Id.* at ¶ 27 (regarding Ltr. Rul. 2009440002; also proposal/issue: “A completed taxable gift occurred when the settlor made a contribution to the trust” to which the Service responded as in Ltr. Rul. 9837007).
⁶⁶ *Id.* at ¶ 24.
⁶⁷ *Id.* at ¶ 33.
⁶⁸ *Id.* at ¶ 24 (trust company also nominated as Investment Trustee and Administrative Trustee while attorney was also nominated as “trust Selector, who had the power to remove the settlor as the beneficiary of the trust.”)
⁶⁹ *Id.* at ¶ 1.
⁷⁰ Phyllis C. Smith, *supra* note 1, at 31.
⁷¹ *Id.* at 32.
⁷² David G. Shaftel, *supra* note 19, at ¶ 60.
⁷³ *Id.* at ¶ 69.
⁷⁴ Stewart E. Sterk, *supra* note 33, at 2769.
⁷⁵ Phyllis C. Smith, *supra* note 1, at 32.
⁷⁶ *Federal Trade Commission [FTC] v. Affordable Media, LLC, et al.*, 179 F.3d 1228, 1228 (9th Cir. 1999).
⁷⁷ *Id.* at 1231.
⁷⁸ *Id.*
⁷⁹ *Id.*
⁸⁰ *Id.* at 1232
⁸¹ *Id.*
⁸² *Id.*
⁸³ *Id.*
⁸⁴ *Id.* at 1233.
⁸⁵ *Id.* at 1236
⁸⁶ *Id.* at 1233.
⁸⁷ *Id.* at 1239.
⁸⁸ *Id.* at 1240 n. 9.
⁸⁹ *Id.* at 1240-1241.
⁹⁰ *Id.* at 1242.
⁹¹ *Id.*
⁹² *Id.* at 1243 and n. 13.
⁹³ *In re Lawrence*, 279 F.3d 1294, 1294 (11th Cir. 2002).
⁹⁴ *Id.* at 1297.
⁹⁵ *Id.* at 1299.
⁹⁶ *Id.* at 1299-1300.

⁹⁷ Matthew Bender & Co, Inc., Chapter 9 Asset Protection Trusts for U.S. and Foreign Persons, 1-9 International Estate Planning § 9.12, *The Protector*, ¶ 1. (2008).

⁹⁸ *Id.* at ¶ 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶ 9 ([3] Powers of Protector).

¹⁰¹ Michael B. Allmon, *CPAs as Trust Protectors*, *J of Acct.*, Mar. 1, 2007, at 42, ¶ 1 (suggesting that TP is a more suitable position for CPAs than the position of trustee).

¹⁰² *Id.* at ¶ 16-19.

¹⁰³ *Id.* at ¶ 21.

¹⁰⁴ Charles D. Fox IV, *supra* note 25, at 955.

¹⁰⁵ UTC § 808(d).

¹⁰⁶ Stewart E. Sterk, *supra* note 33, at 2765.

¹⁰⁷ UTC § 808 Comment (2005).

¹⁰⁸ Charles D. Fox IV, *supra* note 25, at 955-956.

¹⁰⁹ *Id.* at 956.

¹¹⁰ *Id.* at 957-958.; David G. Shaftel, *supra* note 19, at ¶ 14: Retention of “economic access” to the trust means the funding of the trust is not a “completed gift for gift tax purposes” as the settlor has not given up “dominion” over the asset. “Such indirect retention of economic access would result in the inclusion of the trust assets in the settlor’s estate under Sections 2036 and 2038. Section 2036 would probably apply because the settlor has retained the enjoyment of, and income from, the property by the settlor’s ability to incur debt that the settlor’s creditors may satisfy from trust assets. Section 2038 would apply because the ability to relegate creditors to the trust assets allows the settlor to revoke the transfer of assets to the trust.” (citing Rev. Rul 77-378, 1977-2 CB 347).

¹¹¹ Charles D. Fox IV, *supra* note 25, at 958.

¹¹² Jonathan C. Lurie & William R. Burford, *supra* note 26, at 31.

¹¹³ Alexander A. Bove, Jr., *supra* note 37, at 391.

¹¹⁴ *Id.* (citing THOMAS ON POWERS (1st ed. Sweet & Maxwell 1998) and *Pitman v. Pitman*, 50 N.E.2d 69 (Mass. 1993)).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 392

¹¹⁷ *Id.*

¹¹⁸ Elizabeth Carrott Minnigh, *supra* note 41, at ¶ 8.

¹¹⁹ *Id.* at ¶ 34.

¹²⁰ Stewart E. Sterk, *supra* note 33, at 2679 (citing Alaska Stat. 13.36.370(d)).

¹²¹ Alexander A. Bove, Jr., *supra* note 37, at 393.

¹²² *Id.*

¹²³ Stewart E. Sterk, *supra* note 33, at 2803.

¹²⁴ *Id.* at 2802.

¹²⁵ *Id.*

¹²⁶ Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 *Cardozo L. Rev.* 2807, 2810 (2006).

¹²⁷ David G. Shaftel, *supra* note 17, at 293.

¹²⁸ Stewart E. Sterk, *supra* note 33, at 2770.

¹²⁹ Roger W. Anderson & Ira Mark Bloom, *supra* note 2, at 434.

¹³⁰ Amy Lynn Wagenfeld, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows*, 32 Vand. J. of Transnat'l L. 831, 868 (May 1999).

¹³¹ *Id.* at 835.

¹³² *Id.* at 859 (citing Trusts and Property Transfers: Hearing on HB 101 Before the House Labor and Commerce Standing Comm. 20th Legis., 1st Sess. (Tape 97-9, Side B, Nos. 433-671) (Alaska 1997) available at <http://www.legis.state.ak.us> (visited Jan. 29, 1999); Trusts and Property Transfers in Trust: Hearing on HB 101 Before Senate Judiciary Comm., 20th Legis., 1st Sess. (Tape 97-17, Side A, No. 001) (Alaska 1997) available at <http://www.legis.state.ak.us> (visited Jan. 29, 1999).) [Author's Note: As of May 29, 2010, these cites are most easily located by going first to the homepage, then Archives-20th Legislature, then Session Laws 1997, then Bill: HB 101.]

¹³³ *Id.* at 857.

¹³⁴ *Id.* at 862.

¹³⁵ Gregory S. Alexander, *supra* note 126, at 2811.