SELF-SETTLED ASSET PROTECTION TRUSTS: WHAT YOU NEED TO KNOW IF THESE COME TO TEXAS*

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I. INTRODUCTION 238
II. BACKGROUND CONCEPTS 239
III. HISTORICAL DEVELOPMENT OF SSAPTS 241
IV. HOW A TYPICAL SSAPT STATUTE WORKS 242
A. Typical Requirements to Create a Valid SSAPT 243
B. Settlor's Rights Typically Permitted in a SSAPT Statute 244
C. Settlor's Powers Typically Permitted in a SSAPT Statute .. 245
D. Settlor's Powers Typically Prohibited in a SSAPT Statute. 246
V. THE TEXAS SSAPT STATUTE PROPOSED IN 2025 246
A. Requirements to Create a Texas SSAPT Under the 2025 Texas Bill 247
B. Permissible Retained Interests for the Settlor Under the 2025 Texas Bill 248
C. Permissible Settlor's Powers Under the 2025 Texas Bill ... 248
VI. INCOME TAX, GIFT TAX, AND ESTATE TAX CONSIDERATIONS 249
VII. THEORIES TO REACH ASSETS HELD IN A SSAPT 252
A. Fraudulent Transfer / Voidable Transfer 252
B. Statute of Limitations 254
1. Statute of Limitations in a Bankruptcy Proceeding 254
2. Statute of Limitations Under the Uniform Fraudulent Transfer Act 255
3. Statute of Limitations Under the Delaware SSAPT Statute 256
4. Other Statutes of Limitations 256
C. Per Se Voidable Transaction Under the UVTA 257
D. Limitations on Actions in Texas 257

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1. Uniform Fraudulent Transfer Act—Texas Business and Commerce Code 258
2. Badges of Fraud 259
3. Lookback Periods 259
4. Limitations on Actions Under the 2025 Texas Bill 260
E. Exception Creditors 261
F. Implied Agreement 262
G. Power Over the Trustee 264
1. Relevant Tax Proceedings 264
2. Relevant Bankruptcy Proceedings 266
3. Other Relevant Cases 267
H. Conflict of Laws 272
1. Choice of Law 273
J. Potential Constitutional Argument 274
VIII. SUGGESTED BEST PRACTICES 275
A. Best Practices Relating to the Question of a Fraudulent Transfer 275
B. Best Practices Relating to the Question of an Implied Agreement 277
C. Best Practices Relating to Jurisdiction and Conflict of Laws 278
IX. ISSUES WITH THE 2025 TEXAS BILL 279
X. ALTERNATIVES TO SSAPTS IN TEXAS 282
XI. CONCLUSION 283

I. INTRODUCTION

The Texas legislature has considered enacting a statute enabling the creation of self-settled asset protection trusts (SSAPT or SSAPTs) in Texas.[1] However, after various attempts over the past several years, this statute has not yet been enacted.[2] The last proposed statute before the Texas legislature was in 2025 but it was not passed into law (2025 Texas Bill).[3] Therefore, if a SSAPT statute is considered again in Texas, it will be during the 2027 legislative session.[4]

There are many well-researched writings on SSAPTs, some of which are used for this article.[5] The goal of this article is not to produce

1. TX HB4058, BILL TRACK 50 (June 2, 2025), https://www.billtrack50.com/billdetail/1856690 [https://perma.cc/6FQ9-3G5C].

2. *Id.*

3. *Id.*

4. *See id.*; *see generally* Patrick Norwood, *2025 Texas Estate and Trust Legislative Update: What You Need to Know*, SHIELDS LEGAL (Oct. 9, 2025), https://shieldslegal.com/2025texas-estate-and-trust-legislative-update/ [https://perma.cc/44CB-MJED].

5. Daniel Rubin, *Use of Asset Protection Trusts for Estate Tax Planning Purposes*, ACTEC FOUND. (Jan. 2025), https://actecfoundation.org/podcasts/asset-protection-estate-tax/ [https://perma.

another all-encompassing summary of the topic, but rather to focus on the practicalities the authors have experienced with SSAPTs since their inception in the United States—more than a quarter-century ago in 1997—and to relate these to the 2025 Texas Bill.[6] This article was written with the objective of discussing the authors' experiences with SSAPTs, both through direct encounters as well as through research on the topic, and to consider how these experiences can be used when considering whether a Texas SSAPT statute should be enacted.[7]

SSAPTs can play an important role in a person's overall financial, tax, and wealth transfer planning.[8] Too often, however, we hear only of the bad fact patterns that overshadow the benefits that can derive from the appropriate use of this tool.[9] Another objective of this article is to provide the reader with a discussion of SSAPTs that illustrates their potential usefulness, as well as the possible pitfalls and suggested best practices for administering such trusts.[10]

II. BACKGROUND CONCEPTS

It is helpful to begin by discussing the relevant concepts involved in a SSAPT.[11] In general, all asset protection trusts are either discretionary trusts or the trust instrument includes a spendthrift provision.[12] Most asset protection trusts are discretionary trusts with trust instruments that include a spendthrift provision.

A discretionary trust is a trust that allows distributions to be made solely in the discretion of the trustee.[13] In general, neither a beneficiary

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cc/5X4A-3MDK].

6. Author's original thought; *see generally* HPT GROUP, *Cook Island Trust: The Gold Standard in Asset Protection* (2026), https://www.hpt.group/blog-posts/cook-islands-trust-complete-guide [https://perma.cc/3PGX-QKEG]. Foreign SSAPTs have existed since the enactment of the International Trusts Act in the Cook Islands in 1994, if not before then in certain other foreign jurisdictions. In this article we will be discussing domestic SSAPTs only.

7. Author's original thought.

8. Rubin, *supra* note 5.

9. *Id.*

10. David A. Diamond and Daniel S. Rubin*, The Do's and Don'ts of Administering Asset Protection Trusts*, Address at the ACTEC Mid-Atlantic Regional Meeting (Oct. 20, 2024). The authors acknowledge and thank Daniel S. Rubin for allowing the authors to use these materials.

11. Prescott B. Pohl with updates by Scott M. Hancock, *Asset Protection Trusts (In Arizona): Explained*, Address at the State Bar of Arizona CLE (Mar. 7, 2017) (explaining the description of General Relevant Concepts). The authors acknowledge and thank Prescott B. Pohl for allowing the authors to use material from that presentation.

12. *Discretionary V. Non-Discretionary Trust*, CMRS, https://cmrs-law.com/cmrs/30-different-types-of-trusts/discretionary-v-non-discretionary-trust/ [https://perma.cc/9JL7-LW3R] (last visited Jan. 31, 2026).

13. *Discretionary Trust*, CORN. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/discretionary_trust [https://perma.cc/8DQH-7NUF] (last visited Mar. 2023).

nor a creditor can compel a distribution from a discretionary trust.[14] A discretionary trust does not protect assets after they are distributed to the beneficiary.[15] A support trust is a trust that provides that the trustee is to distribute to a beneficiary as much income and principal as is necessary for the beneficiary's support.[16] The support distribution standard may be an ascertainable standard, such as health, education, maintenance, and support.[17] A spendthrift provision is a provision of a trust instrument that prohibits the voluntary or involuntary assignment or alienation of the beneficiary's interest in the trust.[18] A spendthrift provision in a trust instrument does not protect assets after they are distributed to the beneficiary.[19] In a discretionary trust, it is the nature of the beneficiary's interest (rather than a provision forbidding alienation—*i.e.*, a spendthrift provision) that prevents the transfer of the beneficiary's interest to creditors of the beneficiary.[20] The trust instrument of a discretionary trust need not contain a spendthrift provision.[21] However, the trustee of a discretionary trust without a spendthrift provision may be directed to satisfy claims against a beneficiary with any distributions the trustee decides to make to that beneficiary.[22] As a result, a trust instrument of a discretionary trust that includes a spendthrift provision provides better asset protection: the trustee may make distributions in the trustee's discretion, the trustee cannot be compelled to make a distribution, and the trustee cannot be directed to satisfy the claims of a beneficiary's creditors if the trustee decides to make a distribution.[23]

SSAPTs are sometimes referred to as domestic asset protection trusts, or simply asset protection trusts.[24] However, since almost all trusts—including those created for third-party beneficiaries—will generally have spendthrift provisions, other non-self-settled trusts might

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14. *See generally* Texas Com. Bank Nat. Ass'n v. U.S., 908 F. Supp. 453 (1995) (explaining Texas statutes do not explicitly provide creditor protection for "discretionary" trusts, but Texas case law does recognize the creditor protection provided by "discretionary" trusts).

15. *Discretionary Trust*, *supra* note 13.

16. *Support Trust*, CORN. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/support_trust [https://perma.cc/A6ZE-9W8C](last visited June 2024).

17. *Id.*

18. Rubin, *supra* note 5.

19. *Id.*

20. Browne C. Lewis, THE LAW OF TRUSTS CH. 4 (eLangdell Press 2013).

21. *Id.*

22. Lee Carpenter, *Protect Your Loved Ones With a Spendthrift Trust*, OFFIT KURMAN (Oct. 17, 2025), https://www.offitkurman.com/offit-kurman-blogs/spendthrift-trust-estate-planning [https://perma.cc/X56G-PHYS].

23. *Spendthrift Trusts vs. Discretionary Trusts*, MHC (May 16, 2022), https://www.mhc-law.com/spendthrift-trusts-vs-discretionary-trusts/ [https://perma.cc/BQ8V-3NBQ].

24. Rustin Diehl, *Ins and Outs of Domestic Asset Protection Trusts (DAPTs)*, KIPLINGER (May 21, 2024), https://www.kiplinger.com/retirement/all-about-domestic-asset-protection-trusts-dapts [https://perma.cc/5G62-K7YC].

reasonably be viewed as asset protection trusts as well.[25] For this reason, we refer to SSAPTs in this article.[26]

III. HISTORICAL DEVELOPMENT OF SSAPTS

Beginning in 1997, laws began allowing a person to be both the settlor and a beneficiary of a trust (self-settled); and if done properly under the given statute, the assets in the trust should be shielded from the claims of the settlor's creditors as well as the claims of the creditors of the third-party beneficiaries of the trust.[27] This legislative change represented a substantial shift in otherwise settled law.[28] The Restatement (Third) of Trusts provides a good example of the historic view; it states that "[a] restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid."[29] Thus, SSAPT legislation contradicts the legal authority that had long been in place.[30]

In April 1997, Alaska became the first state to enact SSAPT legislation, enacting the Alaska Trust Act.[31] Very soon thereafter, in July 1997, Delaware became the second state to enact such legislation, enacting the Qualified Dispositions in Trusts Act.[32] As of today, twenty states have enacted SSAPT legislation.[33] These states are Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.[34] Although the Texas legislature introduced the 2025 Texas Bill to enact a SSAPT statute—it did not become law.[35]

In addition, Oklahoma—pursuant to the Family Wealth Preservation Trust Act of June 9, 2004—permits an individual to create a trust with a bank or trust company located in Oklahoma as trustee for the benefit of their spouse, descendants, and any one or more of the charities under

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25. Timothy Barrett, *How Does a Spendthrift Trust Differ from an Asset Protection Trust?*, KIPLINGER (Aug. 6, 2021), https://www.kiplinger.com/retirement/estate-planning/603245/how-does-a-spendthrift-trust-differ-from-an-asset-protection [https://perma.cc/YU9Q-YVWQ].

26. Author's original thought.

27. Rubin, *supra* note 5.

28. *Id.*

29. RESTATEMENT (THIRD) OF TRUSTS § 58(2) (A.L.I. 2003).

30. *See* Michael A. Passananti, *Domestic Asset Protection Trusts: The Risks and Roadblocks Which May Hinder Their Effectiveness*, (2006) 32 ACTEC L. J. 260.

31. AS 13.36.310, 34.40.110.

32. 12 DEL. C. §§ 3570–3576.

33. *Domestic Asset Protection Trust States: Top 5 Jurisdictions for Wealth Preservation*, DANIEL S. PICKENS L., https://lawyerinathensal.com/domestic-asset-protection-trust-states/ [https://perma.cc/FX5J-MEHF] (last visited Jan. 31, 2026).

34. *Id.*

35. TX HB4058, *supra* note 1.

Section 501(c)(3) of the Internal Revenue Code, while retaining the right to revoke the trust, without causing the trust to thereby be available to the settlor's creditors.[36] In addition, the law provides that no court shall have the authority to compel the settlor to exercise their power to revoke the trust.[37] However, Oklahoma law does not technically provide for self-settled spendthrift trusts because the settlor himself cannot be a beneficiary of such a trust.[38]

In addition, a number of states have enacted legislation that is sometimes referred to as "quasi self-settled asset protection trust statutes."[39] These statutes provide protection from the claims of the settlor's creditors in connection with a back-end beneficial interest in the trust.[40] For example, fourteen states, including Texas, have legislation that specifically abrogates the historic rule against self-settled spendthrift trusts in connection with a back-end interest of the settlor in an inter vivos Qualified Terminated Interest Property (QTIP) trust.[41] As a result, since the assets in the QTIP trust are not deemed to be assets contributed by the settlor, if the settlor's spouse dies before the settlor, the assets cannot be reached by the settlor's creditors notwithstanding the fact that the settlor then has a beneficial interest (i.e., a back-end interest) in the trust that he or she created.[42]

IV. HOW A TYPICAL SSAPT STATUTE WORKS

The following is an overview of a typical SSAPT statute, along with references to the Delaware Qualified Dispositions in Trust Act, provided as a specific applicable example for each element of the

36. OKLA. STAT. tit. 31, § 11-12 (2024).

37. *Id.* § 16.

38. OKLA. STAT. tit. 31, § 11 (2024) (defining "preservation trust" and "qualified beneficiaries" to include only the grantor's spouse, lineal ancestors and descendants, § 501(c)(3) charities, or a trust for those beneficiaries, without including the grantor as a beneficiary).

39. T. G. Hall, *Holding All the Cards: The Role of the Oklahoma Family Wealth Preservation Trust Act in Asset Protection*, 76 OKLA. L. REV. 809, 828 (2024) (noting that state statutes commonly establishing domestic asset protection trusts have been described as creating a "settled quasi-spendthrift trust" in which the settlor retains some beneficial interest but creditor protection is afforded).

40. OKLA. STAT. tit. 31, § 12

41. ARIZ. REV. STAT. ANN. § 14-10505(e) (2013); ARK. CODE ANN. § 28-73-505(c)(1) (2023); AR. CODE §§ 28-72-702 and 28-72-712 (2023); 12 DEL. C. § 3536(c); FL. STAT. § 736.0505(3) (2022); GA. CODE ANN. § 53-12-82(b); KY. REV. STAT. ANN. § 386B.5-020(8)(a) (2014); MD. CODE ANN., Est. & Trusts § 14.5-1003(a)(2) (2015); MICH. COMP. LAWS § 700.7506(4); N.H. REV. STAT. ANN. § 564-B:5-505(2023); N.C. GEN. STAT. ANN. § 36C-5-505(c); OHIO REV. CODE § 5805.06(B)(2)(b)(2021); Oregon, OR. REV. STAT. § 130.315(4); South Carolina, S.C. CODE ANN. § 62-7-505(b)(2) (2022); TENN. CODE ANN. § 35-15-505(d) (2024); TEX. PROP. CODE ANN. § 112.035(g); Virginia, in addition to its SSAPT statute, V.A. CODE ANN. § 64.2-747(B)(3) (2012); Wisconsin, WISC. STAT. ANN. § 701.0505(e)1.a.(2024); WYO. STAT. ANN. § 4-10-506(f) (2023) (summarizing the Thirteenth ACTEC Comparison of the Domestic Asset Protection Trust Statutes).

42. MISS. CODE ANN. § 91-8-504(d).

overview.[43] This overview discusses: (i) the requirements to create a SSAPT, (ii) rights that may be retained by the settlor, (iii) powers that typically may be retained by the settlor, and (iv) powers that typically may not be retained by the settlor.[44]

A. Typical Requirements to Create a Valid SSAPT

There must be a disposition by a transferor by means of a trust instrument.[45] The trust must be irrevocable.[46] The trust must have a resident trustee referred to as a "qualified trustee."[47] Delaware law also requires that the qualified trustee maintain or arrange for the custody of at least some of the trust assets, maintain records for the trust on an exclusive or nonexclusive basis, prepare or arrange for the preparation of fiduciary income tax returns for the trust, or otherwise materially participate in the administration of the trust.[48] Note how the required duties of the qualified trustee are purely ministerial.[49] Also note that the required duties of the qualified trustee are listed in the disjunctive, meaning that any one or more of such duties will suffice.[50] Similar to the typical SSAPT statute, under the Delaware statute, "in the case of a disposition to more than [one] trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the trustees are qualified trustees."[51]

The trust must incorporate such a state's law.[52] In Delaware, the relevant statute provides that Delaware law shall govern the trust's

43. Passananti, *supra* note 30 (outlining where the common characteristics of a SSAPT is taken from); *see* Rubin, *supra* note 5.

44. Joshua S. Rubenstein and Diane B. Burks, *Self-Settled Asset Protection Trusts,* PRACTICAL LAW TRUST & ESTATES, WESTLAW, https://1.next.westlaw.com/Document/I14cd2446be1f11e698dc8b09b4f043e0/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a9398660000019d3504d32543ee39e8%3Fppcid%3D888953c32e9042a59ee7c28d7fc65463%26Nav%3DKNOWHOW%26fragmentIdentifier%3DI14cd2446be1f11e698dc8b09b4f043e0%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=53a4f0424de1524b702f3536f6e06ef9&list=KNOWHOW&rank=1&sessionScopeId=a9fceeeb46022c992e64b85efdc0df83f433eae46743c145efd8bfb9639f54d7&ppcid=888953c32e9042a59ee7c28d7fc65463&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&navId=C9FDD6ACFBA9F88441BA82A72B76A04E [https://perma.cc/AFB7-WL7C] (last visited Mar. 28, 2026) (noting that a SSAPT is a trust established to shield a settlor's own assets from creditors, and describing the creation requirements and typical settlor powers and limitations).

45. 12 DEL. C. § 3570(7).

46. *Id.* § 3570(11)(b).

47. *Id.* § 3570(11).

48. *Id.* § 3570(8)(b).

49. *Id.*

50. *Id.*

51. *Id.* § 3570(8)(f).

52. *Id.*

validity, construction, and administration.[53] The trust must have a spendthrift clause.[54] The Delaware statute provides that the trust must contain a spendthrift clause that references Section 541(c)(2) of the Bankruptcy Code.[55] Section 541(c)(2) of the Bankruptcy Code provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."[56]

B. Settlor's Rights Typically Permitted in a SSAPT Statute

The settlor may receive discretionary distributions of income, principal, or both.[57] Under the Delaware statute, the settlor may retain the ability to receive income or principal as determined by Delaware trustees, non-Delaware trustees, or advisors named in the trust instrument, pursuant to discretion, or a standard that governs the distribution of principal and does not confer upon the settlor a substantially unfettered right to the receipt or use of the principal.[58] The settlor may also retain the right to receive mandatory income distributions.[59] The Delaware statute also provides that the settlor may receive up to a 5% interest in a Grantor Retained Annuity Trust (GRAT), Grantor Retained Unitrust (GRUT), or Total Return Unitrust.[60]

Many SSAPT statutes provide that the settlor may receive discretionary reimbursement for income tax paid by the settlor as a result of the income being taxable to the settlor of a grantor trust.[61]

> The Delaware statute provides that the settlor may retain the right to receive income or principal from the trust to pay income taxes due on the income of the trust for any of the following reasons:
>
> (i) the trust instrument expressly provides for the payment of such taxes and the potential or actual receipt of income or principal would be at the trustee's discretion,
>
> (ii) pursuant to a mandatory direction in the trust instrument, or

53. *Id.* § 3570(11)(a).
54. *Id.*
55. *Id.* § 3570(11)(c).
56. 11 U.S.C. § 541(c)(2)(2021).
57. *Delaware Trust Law: Why Delaware?*, LEXOLOGY (Jan. 20, 2012), https://www.lexology.com/library/detail.aspx?g=7ced332e-597d-4b25-9586-11faed05fb1c [https://perma.cc/D3YU-KMHM] (noting that under the Delaware Qualified Dispositions in Trust Act, a settlor may retain the right to receive income, principal, or both according to the trustee's discretion).
58. 12 DEL. C. § 3570(11)(b)(6).
59. *Id.* § 3570(11)(b)(5).
60. *Id.* § 3570(11)(b)(3).
61. *Id.* § 3570(11)(b)(9).

(iii) in the discretion of the qualified trustee or an advisor.[62]

The statute also provides for post-mortem distributions for the settlor's debts, estate administration expenses, and estate taxes.[63]

C. Settlor's Powers Typically Permitted in a SSAPT Statute

Under many SSAPT statutes, the settlor may retain a veto power over distributions of income or principal.[64] Under the Delaware statute, the settlor may retain the power to veto distributions of income or principal from the trust.[65]

It is also common in SSAPT statutes to permit the settlor to have a limited testamentary (and sometimes inter vivos) power of appointment.[66] The Delaware statute provides both an inter vivos and a testamentary power of appointment.[67]

SSAPT statutes typically provide that the settlor may serve as an investment advisor.[68] This gives the settlor the power to direct the trustee on investment matters.[69] This is found in the Delaware statute.[70]

Typically, a SSAPT statute will provide the settlor with the ability to appoint and remove trustees or advisors.[71] The Delaware statute provides that the settlor may retain the power to remove and replace trustees and trust advisors.[72] The settlor may also retain the power to appoint advisors who have authority to remove and appoint qualified trustees or trust advisors, advisors who have authority to direct, consent to, or disapprove distributions from the trust, and advisors described in Section 3313 of Delaware's directed trustee statute.[73]

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62. *Id.*

63. *Id.* § 3570(11)(b)(10).

64. *See* Treas. Reg. § 25.2511-2(b) (providing that "if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case.") (explaining the power to veto distributions is utilized to render the settlor's transfer of property to the trust "incomplete" for gift tax purposes, if that is the desired result); *see also* Memorandum from Office of Chief Counsel Internal Revenue Service (Sept. 28, 2011) (opened to public inspection on Feb. 24, 2012) and I.R.S. Priv. Ltr. Rul. 120843-12 (Nov. 07, 2012).

65. 12 DEL. C. § 3570(11)(b)(1).

66. Author's original thoughts. A power of appointment is another method utilized to render the settlor's transfer of property to the trust "incomplete" for gift tax purposes, again if that is the desired result.

67. 12 DEL. C. § 3570(11)(b)(2).

68. *Id.* § 3570(8)(d).

69. *Id.*

70. *Id.* § 3570(8)(d).

71. *Id.* § 3570(8)(f).

72. *Id.* § 3570(11)(b)(7).

73. *Id.* §§ 3570(8)(c), 3313.

Many SSAPT statutes also permit several miscellaneous powers.[74] For example, the settlor may retain an interest in a charitable remainder trust; the possession and enjoyment of a qualified annuity interest within the meaning of Section 2702 of the Internal Revenue Code, and the potential or actual use of real property held under a qualified personal residence trust; or the possession and enjoyment of a qualified annuity interest within the meaning of Section 25.2702-5(c) of the Treasury Regulations.[75]

D. Settlor's Powers Typically Prohibited in a SSAPT Statute

As a general concept, a settlor cannot retain a power that would rise to the level of serving as a trustee.[76] These limitations, however, are relatively few.[77] The settlor may not serve as a trustee of the trust.[78] Although the settlor may serve as an advisor named in the trust instrument with the power to direct the trustee on investment matters, the settlor may not be named in the trust instrument as any other type of advisor.[79] For example, the settlor cannot be named as a distribution advisor with the power to direct the trustee on distributions.[80] Similarly, the settlor may not serve as a trust protector.[81] "Trust protector" does not mean a person who has the authority to remove and replace trustees; that power is expressly retained by the settlor pursuant to Section 3570 of Delaware's Estate Code.[82]

V. THE TEXAS SSAPT STATUTE PROPOSED IN 2025

The following are the provisions of the 2025 Texas Bill, proposed under the Texas Property Code, Chapter 12, Subchapter F, for comparison with Delaware's typical statutory requirements.[83]

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74. *Id.* § 3750.
75. *Id.* § 3750(11)(b)(4).
76. *Id.* § 3570(11)(b)(5).
77. *Id.* § 3570(11)(b)(8).
78. *See* RESTATEMENT (SECOND) OF TRUSTS § 57 & cmt. b–g (A.L.I. 1959) (explaining that a settlor's control over fiduciary powers may void a trust if the trustee is effectively the settlor's agent).
79. *Id.*
80. 12 DEL. C. § 3570(8)(a) & (c).
81. *See id.* § 3570(8)(a) ("A person may serve as an investment adviser described in § 3313 of this title, notwithstanding that such person is the transferor of the qualified disposition, but such a person may not serve as trustee . . . .").
82. *Id.* § 3570(8)(d).
83. *Id.* § 3751.

A. Requirements to Create a Texas SSAPT Under the 2025 Texas Bill

The trust instrument would be required to: (i) be in a writing signed by the settlor; (ii) be irrevocable; (iii) not require that any part of the income or principal of the trust be distributed to the settlor; and (iv) not be intended to hinder, delay, or defraud known creditors.[84]

The trust would have been required to have one trustee who met any one of the following requirements: (i) an individual who resided in and was domiciled in Texas; (ii) a trust company organized under federal law or the laws of Texas or another state, and maintained an office in Texas for the transaction of business; or (iii) a financial institution, as defined by Texas Finance Code Section 201.101 that is organized under federal law or the laws of Texas or another state, maintains an office in Texas for the transaction of business, and exercises trust powers.[85]

The trust would be required to incorporate Texas law.[86] Unless the trust instrument expressly provided otherwise, Subtitle B (Texas Trust Code: Creation, Operation, and Termination of Trusts) of Title 9 (Trusts) of the Texas Property Code would have governed the construction, operation, and enforcement of a SSAPT created in or outside Texas if any of the following applied: (i) any of the trust assets were in Texas; (ii) the trust affected personal property and the creator's declared domicile; or (iii) "at least one trustee serving under Section 112.152(a)(2) had the power to maintain records and prepare income tax returns for the trust and at least part of the trust administration is performed in this state."[87]

The trust would be required to have a spendthrift clause.[88] Specifically, the trust would be required to contain a spendthrift clause with respect to the settlor's beneficial interest in the trust.[89] Proposed Texas Property Code Section 112.157 sets forth the restraints on alienation for a SSAPT.[90]

The settlor would be required to manifest the intention to create a SSAPT.[91] A SSAPT would have been created if the trust instrument

84. H.B. 4058, 89th Leg., 2025–2026 Reg. Sess. (Tex. 2025) (the proposed TEX. PROP. CODE § 112.152(a)(1).).

85. *Id.* (explaining that Texas Property Code, Chapter 12 already has a Subchapter F entitled Non-Charitable Trust Without Ascertainable Beneficiary enacted effective June 18th, 2023. However, 2025 Texas Bill indicated that it would be Subchapter F. Presumably, if the 2025 Texas Bill had been enacted it would have been Subchapter G).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

manifested the settlor's intent.[92] No specific language would have been required to create a self-settled asset protection trust.[93]

B. Permissible Retained Interests for the Settlor Under the 2025 Texas Bill

The settlor would have been "authorized to receive income or principal from the trust, so long as the authorized distribution [was] subject to the discretion of another person."[94] Provision for a beneficiary in a SSAPT would have been "for the support, education, maintenance, and benefit of the beneficiary without reference to or limitation by the beneficiary's needs, station in life, or mode of life, or the needs of any other person, whether dependent upon the beneficiary or not."[95]

The settlor would have been "authorized to use real or personal property owned by the trust."[96] The settlor would have been allowed to receive income or principal from a GRAT or GRUT paying out a qualified annuity interest or qualified unitrust interest, respectively, as defined by the applicable Treasury Regulations.[97] The settlor could receive a unitrust amount that did not exceed fiduciary accounting trust income, the minimum required distributions from a qualified retirement plan, or the minimum required distributions from a deferred compensation plan.[98]

Unlike the Delaware statute, the 2025 Texas Bill did not authorize mandatory distributions of income to the settlor.[99] Also, the 2025 Texas Bill did not authorize discretionary reimbursement of income taxes for the income of a grantor trust.[100] Nor did the 2025 Texas Bill provide for post-mortem distribution of the settlor's debts, estate administration expenses, or estate taxes.[101]

C. Permissible Settlor's Powers Under the 2025 Texas Bill

The settlor would have had the power to prevent a distribution from the trust.[102] The settlor would have held a "special lifetime or testamentary power of appointment, so long as that power could not have

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Compare* 12 DEL. C. § 3570(8)(d), *with id.* (comparing Delaware's mandatory distribution of income statutes with Texas's lack thereof).
102. H.B. 4058, 89th Leg., 2025–2026 Reg. Sess. (Tex. 2025).

been exercised in favor of the settlor, the settlor's estate, a creditor of the settlor, or a creditor of the settlor's estate."[103] The settlor could hold any power under the trust, whether or not the settlor was a cotrustee, other than the power to make distributions to the settlor without the consent of another person, including "the power to remove and replace a trustee, direct trust investments, or execute other management powers."[104]

Unlike the Delaware statute, which does not allow the settlor to be a trustee, Proposed Texas Property Code Section 112.152(c) would have allowed the settlor to serve as a trustee.[105] Specifically, the settlor could have been a cotrustee of the trust, provided the settlor did not have the power to make distributions to the settlor without the consent of another person.[106]

The 2025 Texas Bill would have also permitted the following miscellaneous rights and powers.[107] The settlor could have been a beneficiary of a charitable remainder trust.[108] The settlor could have used real property held under a qualified personal residence trust within the meaning of the relevant Treasury Regulations or could have possessed a qualified annuity interest within the meaning of the relevant Treasury Regulations.[109]

Note that, in contrast to the Delaware statute, under the 2025 Texas Bill, the settlor could have possessed certain additional powers.[110] As noted above, it appears possible that the settlor could have been a cotrustee of the trust.[111] Also, the settlor could have served as an advisor named in the trust instrument with the power to direct the trustee and would not have been limited to serving as an investment advisor.[112]

VI. INCOME TAX, GIFT TAX, AND ESTATE TAX CONSIDERATIONS

Regarding income tax implications, in a SSAPT, the settlor retains a beneficial interest, and, as a result, the trust is a "grantor" trust under Section 677(a) of the Internal Revenue Code during the settlor's life.[113] As a grantor trust, all income attributes or the trust assets are recognized

103. *See id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Compare* 12 DEL. C. § 3570(8)(a),(c), *with id.* (comparing the limitations of Delaware's statutes with the opportunities presented in the proposed Texas Property Code).
108. H.B. 4058, 89th Leg., 2025–2026 Reg. Sess. (Tex. 2025).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Prescott B. Pohl with updates by Scott M. Hancock, *Asset Protection Trusts (In Arizona): Explained*, STATE BAR OF ARIZ. CLE 1, 28 (Mar. 7, 2017).

by the settlor, resulting in the trust being "disregarded" for federal income tax purposes.[114]

The gift tax implications of a SSAPT depend on whether the transfer of assets to a SSAPT is a completed gift or an incomplete gift for federal transfer tax purposes.[115] Historically, SSAPTs were drafted so that the settlor's transfers to a SSAPT would be incomplete (non-taxable) gifts for federal transfer tax purposes.[116] This was typically accomplished by the settlor retaining certain powers over the trust assets, including a testamentary non-general power of appointment, the right to veto distributions from the trust, or both.[117] For many years, it was thought that a testamentary non-general power of appointment was sufficient to treat a transfer to a SSAPT as an gift incomplete.[118] However, a 2012 IRS Chief Counsel advice memorandum questioned that position.[119] This resulted in some state legislatures revising their SSAPT statutes and practitioners changing the provisions of trust instruments for SSAPTs to provide the settlor with both a testamentary non-general power of appointment and the right to veto distributions.[120] In 2009, an IRS private letter ruling held that a gift to a SSAPT could be a completed gift for federal gift tax purposes (and excluded from the settlor's estate for federal estate tax purposes).[121] The IRS ruled that a settlor could make a transfer to an Alaska SSAPT that was a completed taxable gift for federal transfer tax purposes even though the trustee had the discretion to distribute income and principal of the trust to the settlor. Further, the trustee's power to distribute income and principal would not cause inclusion of the trust's assets in the settlor's estate for federal estate tax purposes provided there not otherwise an understanding or pre-existing arrangement between the settlor and the trustee.[122]

The estate tax implications also depend on whether the IRS considers the transfer to the SSAPT a complete or incomplete gift for

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114. Holman v. United States, 728 F.2d 462, 464 (10th Cir. 1984). Note that this does not address incomplete non-grantor trusts—sometimes referred to as INGs—which are also SSAPTs. In an ING, the SSAPT is a non-grantor trust for income tax purposes. They are non-grantor trusts due to having certain provisions in the trust agreement such as requiring the consent of an adverse party for distributions to the grantor or grantor's spouse. A full discussion of INGs is beyond the scope of this article.

115. *See* Treas. Regs. § 25.2511-2 (2024).

116. *See* Higgins v. Comm'r, 129 F.2d 237, 242 (1st Cir. 1942).

117. *See* Treas. Regs. § 25.2511-2(b) ("[I]f upon a transfer of property [in trust] the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case.").

118. *See Higgins*, 129 F.2d 237 at 242.

119. *See* Memorandum from Curt G. Wilson, IRS Assoc. Chief Couns., to Frances F. Regan, IRS Area Couns. (Sept. 28, 2011).

120. *See generally id.* (The [t]rust emphasizes that [d]onors do not retain any powers or rights to affect the beneficial interests . . . during the [t]rust term.").

121. *See* I.R.S. Priv. Ltr. Rul. 200944002 (Oct. 30, 2009).

122. *Id.*

federal transfer tax purposes.[123] If the IRS considers the transfer to a SSAPT an incomplete gift for federal transfer tax purposes, the trust assets will likely be includable in the settlor's estate for federal estate tax purposes.[124] If the IRS considers the transfer to a SSAPT a completed gift for federal transfer tax purposes, the trust assets should be excluded from the settlor's estate for federal estate tax purposes.[125] There are two exceptions to this last statement.[126] First, if there is an implied understanding or agreement between the settlor and the trustee, then the trust assets should be subject to federal estate tax under Section 2036 of the Internal Revenue Code.[127] Second, if the settlor retains the power to require the trustee to accumulate rather than distribute income, there should be federal estate tax inclusion under Section 2038 of the Internal Revenue Code.[128]

Regarding income tax filing requirements, assuming a SSAPT is a grantor trust for income tax purposes, the trust may either file an informational IRS Form 1041 annually to report that all income tax attributes are recognized by the grantor under Section 671 of the Internal Revenue Code or employ either of two alternative reporting methods under Section 1.671-4(b)(1) of the Treasury Regulations.[129] The alternative methods do not require an annual return but require the trustee to provide relevant information (*e.g.*, the grantor's social security number) to all relevant persons.[130] Regarding gift tax filing requirements, all gratuitous transfers to a SSAPT should be reported on a federal gift tax return.[131] If the transfer is a completed gift, the gift tax return must be filed and the gift "adequately disclosed" to start the typical three-year statute of limitations.[132] If the transfer is an incomplete gift, filing a gift tax return and adequately disclosing the transfer will *not* start the statute of limitations.[133] With that said, the filing of a gift tax return for incomplete gifts is recommended as additional evidence of the settlor's transfer of the property for asset protection purposes.[134]

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123. *See* I.R.C. § 2511.

124. *See* Higgins v. Comm'r, 129 F.2d 237, 242 (1st Cir. 1942).

125. *See generally* Estate of Sanford, 308 U.S. 39 (1939) (explaining estate and gift tax laws are to be construed consistently).

126. Treas. Reg. § 1.671-4(a), (b)(1).

127. *See* I.R.S. Priv. Ltr. Rul. 200944002 (Sept. 30, 2009); Rev. Rul. 2004-64, 2004-2 C.B. 27.

128. *See generally* United States v. O'Malley, 383 U.S. 627 (1966) (discussing tax inclusion under I.R.C. § 2038).

129. Treas. Reg. § 1.671-4(a), (b)(1).

130. *Id.*

131. *Id.*

132. *Id.* § 301.6501(c)-1(f)(5).

133. *Id.*

134. *See, e.g.*, Rothschild & Rubin, *T.M. Asset Protection Planning*, U.S. TAX & REPORTING ISSUES, 810-4th, Vol. VI(G), 1, 2 (2026).

VII. THEORIES TO REACH ASSETS HELD IN A SSAPT[135]

A. Fraudulent Transfer / Voidable Transfer

The primary method of attacking a transfer to a SSAPT lies in the concepts of a "fraudulent transfer."[136] More recently, statutes have introduced the term "voidable transactions."[137]

Most states, including Delaware, have enacted a version of the 1984 Uniform Fraudulent Transfer Act (UFTA).[138] In 2014, the Uniform Law Commission approved a set of amendments to the UFTA, which also served to change the title of the Act to the Uniform Voidable Transactions Act (UVTA).[139] To date, twenty-four states have enacted a version of the 2014 amendments.[140] The Delaware statute, which shall be used as an example herein, has not yet enacted the 2014 amendments and continues to follow the UFTA.[141]

The UFTA utilizes the concept of a fraudulent transfer, meaning an attempt to avoid a debt by transferring money or assets to another person or entity.[142] If the creditor is able to prove that the creation and funding of the SSAPT is a fraudulent transfer, the creditor should be able to enforce a judgment against the SSAPT as if the transfer to the SSAPT never took place.[143] Note that under the concept of fraudulent transfer, it is largely irrelevant, except perhaps with regard to the potential application of certain badges of fraud (see below), that the trust is a SSAPT and not simply a trust created for third-party beneficiaries.[144]

With respect to present creditors, the UFTA provides that a transfer made by a debtor is fraudulent, as to a creditor whose claim arose before the transfer was made, if the debtor was insolvent at that time or became insolvent as a result of the transfer.[145]

With respect to both present and future creditors, the UFTA provides that:

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135. *See also* David G. Shaftel & David H. Bundy, *Domestic Asset Protection Trusts Created by Nonresident Settlors*, SHAFTEL L. (2005), https://shaftellaw.com/docs/article_23.pdf [https://perma.cc/BK8X-NPSY]; *see also Passananti*, *supra* note 31.

136. 11 U.S.C. § 548.

137. *See id.*

138. 12 DEL. C. § 4522.

139. *Id.*

140. Author's original thought.

141. 12 DEL. C. §§ 1301–1312.

142. Unif. Fraudulent Transfer Act § 4 (1984).

143. *Id.* § 7.

144. *Id.* § 7 cmt. 2.

145. *Id.* § 5.

> [a] transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made. . .if the debtor made the transfer or incurred the obligation:
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (i) The debtor was engaged or was about to engage in business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
> (ii) intended to incur, or believed or reasonably should have believed that [the debtor] would incur, debts beyond [the debtor's] ability to pay as they became due.[146]

Importantly, although section 4(a)(1) of the UFTA allows a fraudulent transfer with regard to both present and future creditors if it can be proven that the debtor had the actual intent to hinder, delay or defraud any creditor of the debtor—and not necessarily the creditor at issue, the Delaware statute is more constrained in its approach, requiring, in the case of a creditor whose claim arose after a qualified disposition, that it be found that the qualified disposition was made with actual intent to defraud such creditor.[147]

In determining the debtor's actual intent under section 4(a) of the UFTA, consideration may be given to whether one or more badges of fraud exist.[148] The UFTA provides a non-exclusive list of eleven possible badges of fraud, which includes whether:

> (1) the transfer was . . . to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer was disclosed or was concealed; (4) before the transfer was made . . . the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor

146. *Id.* § 4(a).
147. 12 DEL. C. § 3572(a).
148. UFTA § 4(b).

transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.[149]

B. Statute of Limitations

An action for fraudulent transfer is subject to a statute of limitations.[150] This means that the claim alleging a fraudulent transaction must be brought within a specified period.[151] The length of time depends on the law governing the trust's jurisdiction, as well as whether the settlor is a debtor in a bankruptcy proceeding.[152] A typical statute of limitations in a SSAPT statute is two or four years.[153] However, as described below, the statute of limitations in a bankruptcy proceeding is ten years when the claim is against a SSAPT.[154]

1. Statute of Limitations in a Bankruptcy Proceeding

In the Bankruptcy Code, the standard statute of limitations provides that:

> [t]he trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within [two] years before the date of the filing of the petition, if the debtor voluntarily or involuntarily
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted;
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation

149. *Id.*
150. *Id.* § 9.
151. *Id.*
152. *See id.* § 9; 6 DEL. C. § 1309.
153. 12 DEL. C. § 3572(b)(2).
154. 11 U.S.C. § 548(e)(1).

> to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.[155]

However, regarding a transfer to a SSAPT, a special elongated statute of limitations will apply under Section 548(e)(1) of the Bankruptcy Code, which provides that:

> [t]he trustee may otherwise avoid, any transfer of an interest of the debtor in property that was made on or within [ten] years before the date of the filing of the petition, if—(A) such transfer was made to a self-settled trust or similar device; (B) such transfer was by the debtor; (C) the debtor is a beneficiary of such trust or similar device; and (D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.[156]

In *In re Mortensen*, which was in the bankruptcy court, Mortensen, a resident of Alaska—without the aid of counsel—drafted a trust document in 2005 called the Mortensen Seldovia Trust (An Alaska Asset Preservation Trust), intending for the trust to qualify as an asset protection trust under Alaska law.[157] Following his creation and funding of the trust, Mortensen's financial condition deteriorated, his income became sporadic, and he ultimately filed for bankruptcy.[158] The bankruptcy court concluded that Mortensen's funding of the trust fell under Section 548(e)(1) of the Bankruptcy Code as a fraudulent transfer to a self-settled trust made within ten years prior to his bankruptcy filing.[159] Notably, at the time of the filing of the bankruptcy petition, the transfer to the Trust was outside of Alaska's own fraudulent transfer statute of limitations of four years.[160]

2. Statute of Limitations Under the Uniform Fraudulent Transfer Act

Under the UFTA, the statute of limitations period depends on the type of fraudulent transfer deemed to have occurred.[161]

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155. *Id.* § 548(a)(1).

156. *Id.* § 548(e)(1).

157. In re Mortensen, No. A09-90036-DMD, 2011 WL 5025249, at *2 (Bankr. D. Alaska May 26, 2011) (stating that Mortensen investigated the subject and prepared the trust using a preexisting template, after which the document was reviewed by counsel, who recommended only minor revisions).

158. *Id.* at *3.

159. *Id.* at *6.

160. ALASKA STAT. § 34.40.110(d)(1)(A) (2024).

161. Unif. Fraudulent Transfer Act § 9 (1984).

If the transfer was made with actual intent to hinder, delay, or defraud any creditor of the debtor, the statute of limitations is the later of "four years after the transfer was made, or one year after the transfer or obligation was or could reasonably have been discovered by the claimant."[162]

The statute of limitations is four years if the "debtor was insolvent at that time, the debtor became insolvent as a result of the transfer," "the debtor did not receive a reasonably equivalent value in exchange for the transfer and the debtor intended to incur, believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due," or the debtor was engaged or was about to engage in "a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction."[163]

3. Statute of Limitations Under the Delaware SSAPT Statute

Under the Delaware SSAPT statute, the statute of limitations period is dependent upon whether the creditor's claim arose before or after the creation of the trust.[164]

With regard to a creditor whose claim arose before creation of the trust, the claim must be brought within four years after the creation of the trust, or, if later, within one year after the creditor discovered (or should have discovered) the transfer and must prove the claim by clear and convincing evidence.[165] With regard to a creditor whose claim arose after creation of the trust, the claim must be brought within four years after the creation of the trust, and again must prove the claim by clear and convincing evidence.[166]

4. Other Statutes of Limitations

A few states, like Nevada, offer a shorter period, such as the later of two years after the transfer was made or six months after the creditor discovered or reasonably could have discovered the transfer for existing creditors, and two years for future creditors.[167]

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162. *Id.* § 9(a).
163. *Id.* § 9(b).
164. 12 DEL. C. § 3572(b).
165. *Id.* § 3572(b)(1).
166. *Id.* § 3572(b)(2).
167. NEV. REV. STAT. § 166.170 (2025).

C. Per Se Voidable Transaction Under the UVTA

As noted, in 2014, the Uniform Law Commission adopted amendments to the Uniform Fraudulent Transfer Act, renaming it the Uniform Voidable Transactions Act (UVTA).[168] This adoption also included refreshed official comments.[169] Comment 8 under Section 4 of the UVTA, when read together with Comment 2 under Section 4 of the UVTA, seems to provide that a transfer to a SSAPT is a per se voidable transaction in which the debtor resides in a state that has not itself adopted SSAPT legislation, although there has been substantial controversy over the accuracy of said comment.[170] Of course, even if a jurisdiction has enacted the 2014 amendments and has not expressly repudiated the Comments, the Comments are still not themselves law.[171] States do not necessarily enact the Comments, and the enacted act does not necessarily mention them.[172] A Comment might be viewed by a court as having a status akin to legislative history—possibly instructive but not necessarily binding.[173]

D. Limitations on Actions in Texas

In this subsection, the provisions of the Texas Uniform Fraudulent Transfer Act—Texas Business and Commerce Code, Chapter 24 are discussed, followed by a discussion of the applicable statutes of limitations or lookback periods under such statutes.[174] After reviewing those topics, this subsection will review the provisions of the 2025 Texas Bill.[175]

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168. Unif. Voidable Transactions Act § 9 (2014).

169. *See generally* UVTA § 4 cmts. 2, 8 (noting that the Act adopted refreshed official comments).

170. *See, e.g.*, UVTA § 4 cmts. 2, 8; George D. Karibjanian, Richard W. Nenno & Daniel S. Rubin, *The Uniform Voidable Transactions Act: Why Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Are Not Voidable Transfers Per Se*, 42 TAX MGMT. EST., GIFTS & TR. J. 173, 173 (2017) (explaining in Comment 8 to section 4 of the Uniform Voidable Transactions Act that whether a transfer to a self-settled spendthrift trust is voidable depends on which jurisdiction's law governs the transfer. If the debtor resides in a jurisdiction that authorizes such trusts, the transfer generally is not voidable solely on that basis. By contrast, a debtor domiciled in a jurisdiction that does not recognize self-settled spendthrift trusts may face avoidance under section 4(a)(1)).

171. George D. Karibjanian, *The Uniform Voidable Transactions Act Will Affect Your Practice*, TR. & EST., May 2016, at 17.

172. *Id.*

173. *Id.*

174. TEX. BUS. & COM. CODE ANN. §§ 24.001–.013.

175. *Id.*

1. Uniform Fraudulent Transfer Act—Texas Business and Commerce Code

The following rules apply to a present creditor.[176]

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.[177]
>
> [Furthermore, a] transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.[178]

The following rules apply to present and future creditors.[179]

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor,[180] or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.[181]

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176. *Id.* § 24.006.

177. *Id.* § 24.006(a).

178. *Id.* § 24.006(b).

179. *Id.* § 24.005(a).

180. *See id.*; *see also*, H.B. 4058, 89th Leg., 2025–2026 Reg. Sess. (Tex. 2025) (proposed TEX. PROP. CODE ANN. § 112.152(a)(1) (addressing situations lacking intent to hinder, delay, or defraud a creditor)).

181. TEX. BUS. AND COM. CODE ANN. § 24.005(a)(2)(A)–(B).

2. Badges of Fraud

Actual intent is determined based on the following badges of fraud:

> (1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[182]

3. Lookback Periods

There are several lookback periods depending on the nature of the transfer.[183] For a transfer with actual intent to hinder, delay, or defraud any creditor of the debtor, the statute of limitations is within four years of the transfer or obligation or, if later, one year after the transfer or obligation was discovered or could reasonably have been discovered.[184] For transfers or obligations incurred without the receipt of reasonably equivalent value and in which the debtor was or became insolvent, the statute of limitations is within four years of the transfer or obligation.[185] For a transfer to an insider made after a creditor's claim arose, and in which the debtor was insolvent, and the insider had reasonable cause to believe the debtor was insolvent, the action must be brought within one year after the transfer.[186] For causes of action by a spouse, child, or ward, the lookback periods for transfers or obligations incurred are generally the same, except that four-year lookback periods are shortened to two years.[187]

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182. *Id.* § 24.005(b).
183. *See id.* § 24.010.
184. *Id.* § 24.010(a)(1).
185. *Id.* § 24.010(a)(2).
186. *Id.* § 24.010(a)(3).
187. *Id.* § 24.010(b) (showing how this lookback period is unique to Texas).

4. Limitations on Actions Under the 2025 Texas Bill

Under the proposed 2025 Texas Bill, the ability and time for a creditor to make a claim against a settlor would have been even more limited than under the Texas Uniform Fraudulent Transfer Act.[188] For instance, a current creditor of the settlor would not have been able to bring an action against the settlor after the later of: "the second anniversary of the date on which the transfer was made [to the SSAPT], or the 180th day after the date on which the creditor [had discovered] or reasonably should have discovered the transfer" to the SSAPT.[189] For the second prong of this test, discovery would have been deemed to have occurred at the time a public record was made, including: (i) recording of a conveyance for real property in the deed records; (ii) recording of a bill of sale for personal property in the county of the transferor's principal residence or in the county of the trustee's principal residence or place of business; or (iii) filing of a financing statement.[190]

> In addition,
> [a] person [who would have become] a settlor's creditor after a transfer [was] made to a[n] [SSAPT] [would not have been able to] bring an action with respect to the transfer unless the action [was] commenced on or before the second anniversary of the date on which the transfer was made.[191]

> Moreover:
> [A] settlor's creditor [would not have been able to] bring an action with respect to transfer of property to a[n] [SSAPT] unless the creditor [could have proven] by clear and convincing evidence that the transfer of property was a fraudulent transfer under Chapter 24 [of the Texas] Business & Commerce Code, or that the transfer violate[d] a legal obligation owed to the creditor under a contract or a valid court order that [was] legally enforceable by the creditor.
>
> [I]f community property . . . [would have been transferred] by only one spouse to a[n] [SSAPT], a claim related to the fraudulent transfer of community assets by the non-joining spouse [would not have been limited by the 2025 Texas Bill].[192]

The conveyance of property held by a SSAPT out of the SSAPT to obtain a loan and then reconveyed back to the SSAPT would have been

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188. *See* H.B. 4058, 89th Leg., 2025–2026 Reg. Sess. (Tex. 2025) (Proposed TEX. PROP. CODE ANN. § 112.160).
189. *Id.* § 112.160(a)(1); *id.* § 112.160(a)(2).
190. *Id.* § 112.160(c).
191. *Id.* § 112.160(b).
192. *Id*. § 112.160(d)–(e).

disregarded, and the property would have been transferred to the SSAPT as of the original transfer date.[193]

The typical burden of proof for a non-beneficiary or non-settlor seeking to bring a claim against an advisor or trustee of a SSAPT would have been clear and convincing evidence that such advisor or trustee knowingly and in bad faith violated the law and that the claimant suffered damages as a result.[194]

Property decanted from a SSAPT would have been considered to have been transferred as of the date of the original funding of the SSAPT.[195]

E. Exception Creditors

To the extent the enforcement of a spendthrift provision relies upon a public policy determination that it is appropriate to enforce the will of the settlor with regard to voluntary and involuntary alienation of the beneficiary's interest in the trust (whether or not the beneficiary is also the settlor of the trust), the law will enforce the claims of certain creditors whose claims are deemed particularly worthy of enforcement, notwithstanding the settlor's wish that the trust fund should be inalienable; such creditors are often called exception creditors.[196]

The Uniform Trust Code provides for the following exception creditors**:**

> (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance; (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and (3) a claim of [a] State or the United States to the extent a statute of [the] State or federal law so provides.[197]

In Delaware, there are two classes of exception creditors.[198] The first class is for tort claims.[199] Such a tort claimant is:

> [A]ny person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor, which

193. *Id.* § 112.160(f).
194. *Id.* § 112.160(g) and (h).
195. *Id.* § 112.161.
196. *See* UTC § 503(b).
197. *Id.*
198. *See* 12 DEL. C. § 3573(a)(2).
199. *See id.*

> death, personal injury or property damage is at any time determined to have been caused in whole or in part by the tortious act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable but only to the extent of such claim against such transferor or other person for whom such transferor is or was vicariously liable.[200]

The second class is for certain interpersonal claims.[201] Such an interpersonal claimant is:

> any person to whom the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of such transferor's spouse, former spouse or children, or for a division or distribution of property incident to a judicial proceeding with respect to a separation or divorce in favor of such transferor's spouse or former spouse, but only to the extent of such debt.[202]

For this purpose, Delaware law provides that "'spouse' and 'former spouse' means only persons to whom the transferor was married at, or before, the time the qualified disposition is made."[203]

F. Implied Agreement

The facts might support an argument that the settlor has, through an implied agreement or otherwise, retained the use or enjoyment of the SSAPTs assets, has retained control over those assets, or both.[204] The concept is similar to the one that arises under tax law with regard to Section 2036(a) of the Internal Revenue Code, which provides for inclusion in a person's gross estate of:

> [T]he value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death . . . (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person,

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200. *See id.*; *see Shaftel & Bundy*, *supra* note 135 (providing a survey of the different treatment of tort claims among the state statutes in those states that provide for SSAPTs).

201. *See* 12 DEL. C. § 3573(a)(1).

202. *See id.* (providing a survey of the different treatment of marital claims among the state statutes in those states that provide for SSAPTs); *see Shaftel & Bundy*, *supra* note 137.

203. 12 DEL. C. § 3570(9).

204. *See* Kulp v. Timmons, 944 A.2d 1023, 1031–32 (Del. Ch. 2002).

> to designate the persons who shall possess or enjoy the property or the income therefrom.[205]

For this reason, it is useful to review various tax-related cases, Treasury Regulations, and Revenue Rulings.[206] Section 20.2036-1(c) of the Treasury Regulations provides, in pertinent part, that "[a]n interest or right is treated as having been retained or reserved if at the time of the transfer there was an understanding, express, or implied, that the interest or right would later be conferred."[207] A prime example would be if there were an implied understanding between the settlor and the trustee that the settlor could obtain distributions whenever the settlor so desired.[208] A variation on this argument would be that the trust is not truly a separate entity, but merely an alter ego of the settlor.[209]

Some states that have enacted self-settled spendthrift trust laws have attempted to address the potential issue of an implied agreement through statutory enactment.[210] Section 34.40.110(i) of the Alaska Statutes provides:

> A settlor whose beneficial interest in a trust is subject to a transfer restriction that is allowed under (a) of this section may not benefit from, direct a distribution of, or use trust property except as may be stated in the trust instrument. An agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant or permit the retention of greater rights or authority than is stated in the trust instrument is void.[211]

In Delaware, Section 3571 of the Trust Code provides, in pertinent part, that "[t]he transferor shall have only such powers and rights as are conferred by the trust instrument . . . and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void."[212] Proposed Texas Property Code Section 112.157 would have been similar to the preceding Delaware statute.[213]

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205. I.R.C. § 2036(a).
206. *See id.*
207. Treas. Reg. § 20.2036-1(c).
208. Author's original thought.
209. *Id.*
210. *See* ALASKA STAT. ANN. § 34.40.110(i) (2025).
211. *Id.* § 34.40.110(i).
212. 12 DEL. C. § 3571.
213. *See* discussion *supra* Part V.

G. Power Over the Trustee

The facts might support an argument that the settlor has, through a retained power over the trustee, retained the use or enjoyment of the SSAPT's assets, or that the settlor has retained control over those assets, or both.[214] In discussing this topic, we consider relevant tax, bankruptcy, and other case law.[215]

1. Relevant Tax Proceedings

The concept is similar to that arising under the tax law regarding Sections 2036 and 2038 of the Internal Revenue Code.[216] Thus, as with the prior topic, it is instructive to review various tax-related cases, Treasury Regulations, and Revenue Rulings.[217]

The Internal Revenue Service ruled in Revenue Ruling 79-353 that when a trustee had discretionary power—not subject to an ascertainable standard—to distribute income and principal to or among a class of beneficiaries, the value of the undistributed principal and income was included in the decedent grantor's gross estate under Sections 2036 and 2038 of the Internal Revenue Code, in which the decedent kept the power to remove the corporate trustee and replace it with another corporate trustee.[218] Specifically, the Internal Revenue Service in Revenue Ruling 79-353 ruled that "reservation by the settlor of the power to remove the trustee at will and appoint another trustee is equivalent to reservation of the trustee's powers."[219]

In this regard, note the Treasury Regulations that exist under each of Sections 2036 and 2038 of the Internal Revenue Code (but note that these Treasury Regulations apply only where the decedent can remove or discharge a trustee and appoint himself as trustee).[220] For example, Section 20.2036-1(b)(3) of the Treasury Regulations provides, in pertinent part, that "if the decedent reserved the unrestricted power to remove or discharge a trustee at any time and appoint himself as trustee, the decedent is considered as having the powers of the trustee."[221]

Similarly, Section 20.2038-1(a)(3) of the Treasury Regulations provides, in pertinent part, that "if the decedent had the unrestricted

214. *See* discussion *infra* Sections VII.G.1, VII.G.2, VII.G.3.
215. *See* discussion *infra* Sections VII.G.1, VII.G.2, VII.G.3.
216. *See* discussion *supra* Part VI.
217. *See* discussion *supra* Part VI.
218. Rev. Rul. 79-353, 1979-2 C.B. 325.
219. Rev. Rul. 79-353, 1979-2 C.B. 326.
220. *See id.*
221. Treas. Reg. § 20.2036-1(b)(3) (2026).

power to remove or discharge a trustee at any time and appoint himself trustee, the decedent is considered as having the powers of the trustee."[222]

In *Estate of Wall v. Commissioner*,

> [t]he single issue for decision [was] whether property held by three irrevocable inter vivos trusts created by the decedent, Helen S. Wall . . . [was] includable in her gross estate under section 2036(a)(2) or section 2038(a)(1) because in creating the trusts Mrs. Wall reserved the right to remove the sole trustee, a corporation, and appoint a successor corporate trustee.[223]

The Internal Revenue Service maintained the position that the trust assets were includable in the decedent's gross estate in reliance upon Revenue Ruling 79-353, and the cases cited therein, and argued that the decedent could have controlled the corporate trustee because she had the power to replace the corporate trustee.[224] According to the Tax Court,

> [t]he underlying assumption of Rev. Rul. 79-353 . . . and [the Commissioner of Internal Revenue's] argument is that even a corporate trustee will be compelled to follow the bidding of a settlor who has the power to remove the trustee; otherwise the settlor will be able to find another corporate trustee which will act as the settlor wishes. In other words, says [the Commissioner of Internal Revenue], under these circumstances the settlor has the de facto power to exercise the powers vested in the trustee. . .
>
> In the case before us [the Commissioner of Internal Revenue] simply speculates that Mrs. Wall, by merely threatening [the existing corporate trustee] to replace it, could indirectly have exercised powers of the trustee.[225]

The Tax Court held, however, that

> [u]nder established principles of the law governing trusts, a trustee would violate its fiduciary duty if it acquiesced in the wishes of the settlor by taking action that the trustee would not otherwise take regarding the beneficial enjoyment of any interest in the trust, or agreed with the settlor, prior to appointment, as to how fiduciary powers should be exercised over the distribution of income and principal. The trustee has a duty to administer the trust in the sole

222. *Id.* § 20.2038-1(a)(3) (2026).
223. Estate of Wall v. Comm'r, 101 T.C. 300, 301 (1993).
224. *Id.*
225. *Id.* at 311.

> interest of the beneficiary, to act impartially if there are multiple beneficiaries, and to exercise powers exclusively for the benefit of the beneficiaries. . .In irrevocable trusts such as those under scrutiny, the trustee is accountable only to the beneficiaries, not to the settlor, and any right of action for breach of fiduciary duty lies in the beneficiaries, not in the settlor.[226]

In *Estate of Vak v. Commissioner*, a gift tax case, the grantor created an irrevocable trust and retained the power to remove any trustee at any time, with or without cause, and to appoint a successor trustee, provided that any successor trustee was independent (*i.e.*, not related or subordinate to the grantor within the meaning of Section 672(c) of the Internal Revenue Code).[227] The Internal Revenue Service argued that the grantor's power to change the trustees was sufficient to give him complete control over the trust, thus rendering the entirety of the gift incomplete until he gave up that power.[228] The Eighth Circuit Court of Appeals disagreed and found that "while [the grantor] had unlimited power to remove the trustees, he could only replace them with independent trustees," and that "[t]he IRS overstates its position when it contends that 'Mr. Vak had the power to replace the trustees with individuals who would do his bidding.'"[229]

In Revenue Ruling 95-58, the Internal Revenue Service acquiesced on the issue of the independent and fiduciary duty of a trustee, even one subject to removal and replacement by the grantor without cause.[230] More specifically, the Revenue Ruling provides that an individual is not treated as possessing the trustee's powers when the individual can remove and replace a trustee and appoint an individual or corporate trustee that is not related or subordinate to the individual (within the meaning of Section 672(c) of the Internal Revenue Code).[231]

2. Relevant Bankruptcy Proceedings

It is also illustrative to examine bankruptcy cases when considering asset protection issues related to retained powers to remove or replace trustees.[232] As a preliminary matter, note that, in the bankruptcy context,

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226. *Id.* at 312–13 (citations omitted); *see*, *e.g.*, Bogert, *Law of Trusts and Trustees*, sec. 543, at 217 (2d ed.1993) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons.").

227. Estate of Vak v. Comm'r, 973 F.2d 1409, 1410 (8th Cir. 1992).

228. *Id.* at 1414.

229. *Id.*

230. Rev. Rul. 95-58, 1995-2 C.B. 191.

231. *Id.*

232. *See* discussion *infra* Section VII.G.2.

Section 541(b)(1) of the Bankruptcy Code provides that "[p]roperty of the estate does not include any power that the debtor may exercise solely for the benefit of an entity other than the debtor."[233] By implication, then, a power that the debtor may exercise, in whole or in part, in favor of the debtor might render the property subject to the power, including in the bankruptcy estate.[234]

In at least one case, *In re Cattafi*, it was held that a broad power to remove the trustee was sufficient control in the grantor to compel inclusion of the trust's assets in the bankruptcy estate.[235] However, in a second case, *In re Parris*h, it was held that the grantor's power to remove the trustee was not a power that conferred a benefit upon the beneficiary.[236] In *In re Herzig,* the debtor was the beneficiary of a New York sitused spendthrift trust established for his benefit pursuant to the terms of his mother's will.[237] The will named the debtor's brother as trustee but gave the debtor the power to require his brother's resignation as trustee, in which case the debtor's wife would become the successor trustee if she was living with the debtor at such time.[238] Although the *Herzig* court noted that neither the debtor's brother nor the debtor's wife could "be considered an alter ego of the [d]ebtor nor under his control," because the "[d]ebtor could . . . take up residence elsewhere, require [his brother] to resign, refuse to agree to the appointment of a successor to [his brother], and [thereby] obtain the Trust assets"; the spendthrift nature of the Trust was destroyed and the trust was found to be available to the debtor's creditors.[239] Finally, in *In re Baldwin*, the debtor beneficiary's right to remove and replace the trustee of his spendthrift trust was held to constitute a level of dominion and control over the trust assets such that the spendthrift clause was held invalid because the right to remove and replace the trustee with a "corporate trustee" was not limited to bank and trust companies.[240]

3. Other Relevant Cases

In *Federal Trade Commission v. Affordable Media, LLC, et al.*, a case involving an offshore SSAPT, the settlors were the protectors of their trust and were therefore found to be in control of it.[241] Specifically, the Ninth Circuit Court of Appeals stated that "[a] protector has

233. 11 U.S.C. § 541(b)(1).
234. *See id.*
235. *In re* Cattafi, 237 B.R. 853, 856 (Bankr. M.D. Fla.1999).
236. *In re* Parrish, 11 B.R. 65, 65 (Bankr. N.D. Tex. 1981).
237. *In re* Herzig, 167 B.R. 707, 708 (Bankr. Mass. 1994).
238. *Id.* at 709.
239. *Id.* at 709–10.
240. *In re* Baldwin, 142 B.R. 210, 215 (Bankr. S.D. Ohio 1992).
241. FTC v. Affordable Media, LLC*,* 179 F.3d 1228, 1243 (9th Cir. 1999).

significant powers to control an offshore trust."[242] Further, "'[t]his person . . . has the power to replace trustees and veto certain actions by the trustees.'"[243] "The [debtors'] trust gives them affirmative powers to appoint new trustees . . . therefore, they can force the foreign trustee to repatriate the trust assets to the United States."[244]

Conversely, in *United States v. Raymond Grant and Arline Grant,* the district court held that the protector-beneficiary of a foreign trust could not be held in civil contempt for failing to repatriate the trust's assets pursuant to a court order in a case where she was able to establish that, notwithstanding her authority as protector of the trust, she was unable to effect the repatriation of the trust's assets into the United States due to a clause in the trust agreement whereby the foreign sitused trustee was directed to ignore her directions as protector if given under duress.[245]

In *In re Huber,* the Bankruptcy Trustee successfully obtained summary judgment invalidating a settlor's transfers to a self-settled asset protection trust made shortly before he filed for bankruptcy.[246] The settlor, Donald Huber, had been involved in real estate development and management in the Puget Sound, Washington area for over 40 years.[247] As noted by the court, with the deteriorating real estate market in 2007–2008, the settlor was, or had to be, aware of the gathering storm clouds.[248] Donald Huber retained a Washington attorney to set up an asset-protection trust, the Donald Huber Family Trust, which was established on September 23, 2008.[249] This was an Alaska SSAPT created under an Alaska statute.[250] Correspondence after drafting the trust document acknowledges that one of the debtor's principal goals for creating the trust was to "protect a portion of [the Debtor's] assets from [his] creditors."[251] In a number of emails between the Debtor and the attorney, the Debtor expressed urgency in setting up the trust."[252] The settlor funded the trust with $10,000 in cash and various interests in twenty-five entities related to real estate.[253] None of the real estate interests were in Alaska.[254] The only trust asset located in Alaska was $10,000, invested in

242. *Id.* at 1242.

243. *Id.* (quoting Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts*, 23 EST. PLAN. 65, 70 (1996)).

244. *Id.* at 1242.

245. United States v. Grant, No. 00-08986-CIV, 2008 WL 2894826, at *1, *2 (S.D. Fla. May 27, 2008).

246. *In re* Huber, 493 B.R. 798, 804 (Bankr. W.D. WA 2013).

247. *Id.*

248. *Id.* at 803.

249. *Id.* at 805.

250. *See* ALASKA STAT. § 34.40.110 (2018).

251. *In re Huber*, 493 B.R. at 807.

252. *Id.* at 805.

253. *Id.*

254. *Id.* at 808.

a certificate of deposit.[255] In addition, after the debtor created and funded the trust, there was a series of distributions made to the settlor and the family members of the settlor.[256] The settlor filed for Chapter 11 bankruptcy protection on February 10, 2011.[257] The bankruptcy court considered various issues, including choice of law and fraudulent conveyance.[258] The choice-of-law question was whether the court should apply the Alaska asset-protection statute or Washington law.[259] The court ruled that Washington law applied.[260] "Washington has a strong public policy against self-settled asset protection trusts.[261] Specifically, pursuant to RCW Section 19.36.020, transfers made to self-settled trusts are void as against existing or future creditors."[262] The Court's conflict of laws analysis was based in part on the fact that:

> At the time the trust was created, the settlor resided in Washington; all of the property placed into the trust, except a $10,000 certificate of deposit, was transferred to the trust from Washington; the creditors of the settlor were located in Washington; the Trust beneficiaries were Washington residents; and the attorney who prepared the Trust documents and transferred the assets into the Trust was located in Washington.[263] Accordingly, while Alaska had only a minimal relation to the Trust, Washington had a substantial relation to the Trust when the Trust was created.[264]

Regarding fraudulent conveyance, in determining that the settlor transferred his assets to the Trust with actual intent to hinder, delay or defraud a creditor, the court looked at the badges of fraud connected with the transfers that proved by circumstantial evidence that Huber's transfers were fraudulent as a matter of law under both Section 548(e)(1) of the Bankruptcy Code and the Uniform Fraudulent Transfer Act.[265]

The Court stated that:

> Considering each of the badges of fraud, the evidence submitted by the Trustee first establishes that at the time the Debtor transferred his assets into the Trust, there was threatened litigation against the Debtor.

255. *Id.*
256. *Id.* at 813.
257. *Id.* at 806.
258. *Id.* at 807–08.
259. *Id.* at 807.
260. *Id.* at 808.
261. *Id.* at 809.
262. *Id.* (citing Carroll v. Carroll, 18 Wash. 2d 171, 175 (Wash. 1943)).
263. *Id.* at 808–09.
264. *Id.* at 809.
265. *Id.* at 811 (citing *In re* Roca, 404 B.R. 531, 543 (Bankr. D. Ariz. 2009)).

> Specifically, it appears that foreclosure of several properties for which the Debtor had guaranteed the bank loans was becoming increasingly certain.[266]

In *TrustCo Bank v. Mathews,* the Delaware Court of Chancery issued a memorandum opinion granting the defendant's motion for partial summary judgment, ruling that the plaintiffs were time-barred in their claim that transfers to a Delaware trust created under the Qualified Dispositions in Trust Act were fraudulent.[267] The facts of this case involved a plaintiff (TrustCo) with a principal place of business in New York and a defendant settlor who lived in Florida and created a SSAPT under the Delaware Qualified Dispositions in Trust Act.[268] In reaching its conclusion, the court applied a conflict-of-laws analysis involving Delaware, New York, and Florida law to determine which state had the most significant contacts.[269] Ultimately, the court held that Florida and Delaware had the most significant contacts.[270] The plaintiffs' claims were time-barred under both Florida's and Delaware's fraudulent conveyance laws.[271] The relevant statutes in Delaware and Florida provided a four-year period to bring a cause of action for fraudulent conveyance, while the relevant statute in New York provided a six-year period.[272] The cause of action was not brought within the time period allowed under the Florida and Delaware statutes, but would have been allowed under the time period of the New York statute.[273] Because the court's conflict of laws analysis concluded that the facts of the case had more substantial contacts with Delaware and Florida, and the plaintiff's cause of action was time-barred under the shorter statute of limitations of Delaware and Florida, the court did not rule on whether the transfer to the trust in question was a fraudulent conveyance.[274]

The Delaware Court of Chancery, in *In the Matter of the CES 2007 Trust*, granted summary judgment against a creditor who brought a claim against a Delaware SSAPT to enforce a judgment against the trust's settlor, even though the settlor retained various powers over the Limited Liability Companies (LLCs) held in the trust.[275] The petitioner in this case loaned funds to a company owned by the respondent.[276] The respondent

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266. *Id.* at 812.
267. TrustCo Bank v. Mathews, No. 8374-VCP, 2015 WL 295373 at *1 (Del. Ch. Jan. 22, 2015).
268. *Id.* at *2.
269. *Id.* at *9.
270. *Id.* at *8.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at *9.
275. *In re* CES 2007 Tr., No. 2023-0925-SEM, 2025 WL 1354268 at *5 (Del. Ch. May 2, 2025).
276. *Id.* at *2.

was unable to repay the loan, and in 2018, the petitioner sued the respondent for repayment and additional relief.[277] In 2019, a Michigan court awarded the petitioner a $14 million judgment.[278] The respondent maintained he did not have the assets to pay the judgment.[279] In an effort to satisfy the judgment, the petitioner sought to invalidate the respondent's CES 2007 Trust (the Trust), of which the respondent was the settlor and a beneficiary, under the assertion that the Trust was a sham used only to avoid paying the Michigan judgment.[280] The Trust was a Delaware SSAPT created in 2007, years before the parties' dispute.[281] The Trust's assets were 90% interests in three Delaware LLCs held principally for the benefit of the Respondent's family.[282] The petitioner claimed that even if the Trust was a SSAPT, its spendthrift provision should be invalidated as a matter of common law.[283] The magistrate generally agreed that such an invalidation can be carried out, but she did not agree that it should be in this instance.[284] The court cited *Kulp v. Timmons*, which held that invalidation is only appropriate when a spendthrift provision is created purely for the grantor's benefit or when the beneficiary and the grantor have the same interest.[285] After finding that neither of those situations existed in the case, the magistrate granted the respondent's motion to dismiss.[286]

The Utah district court in *Dahl v. Dahl* upheld the Nevada choice of law provision in a trust created under the Nevada Spendthrift Trust statute, and held that this SSAPT created and funded by the husband after marriage, but before divorce proceedings began, was not part of marital property in the divorce proceedings between the husband and wife.[287] However, on January 30, 2015, the Utah Supreme Court issued an opinion which held that because Utah has a strong public policy in the interest of equitable division of marital assets, the choice-of-law provision in the Nevada trust, citing Nevada law as the governing law, did not apply.[288] The Utah Supreme Court applied Utah law and found that the trust was to be considered in the division of the marital property in the Utah divorce proceeding.[289]

277. *Id.* at *2–3.
278. *Id.* at *3.
279. *Id.*
280. *Id.* at *4.
281. *Id.*
282. *Id.* at *6–7.
283. *Id.* at 2–4.
284. *Id.* at 2–4.
285. Kulp v. Timmons, 944 A.2d 1023, 1031 (Del. Ch. 2002).
286. *CES*, 2025 WL 1354268 at *2–6.
287. Dahl v. Dahl, 2015 UT 79, 459 P.3d 276, 327.
288. Dahl v. Dahl, 2015 UT 23, 345 P.3d 566, 578–79, 583–84, opinion amended and superseded, 2015 UT 79, 459 P.3d 276.
289. *Id.* at 580–84.

Klabacka v. Nelson was a divorce case in the Nevada district court, in which both husband and wife were Nevada residents.[290] The husband and wife had each set up their own SSAPT before the divorce proceedings began in 2009.[291] In the divorce proceedings, the Nevada district court ordered the husband's SSAPT to satisfy his personal obligations, specifically the husband's child and spousal support claims, which were in arrears.[292] Upon appeal, the Nevada Supreme Court reversed this holding, concluding that the district court's order directing support payments to be made from the SSAPT was contrary to Nevada law.[293]

H. Conflict of Laws

Jurisdiction may be a basis for arguing a conflict of laws when bringing an action against a SSAPT.[294] It is likely that the creditor will bring a cause of action to enforce a judgment against the debtor in a court in the state in which the creditor is domiciled, if that state has not yet enacted SSAPT legislation, or in federal court pursuant to diversity jurisdiction.[295] Such a court might be more receptive to applying local law to the SSAPT in lieu of the law designated by the SSAPT as governing.[296]

Section 202(a) of the Uniform Trust Code provides that "[b]y accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust."[297] The presence of a trustee located out of state, therefore, might muddy the question of the trust's principal place of administration.[298] In addition, Section 202(c) of the Uniform Trust Code provides that "[t]his section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust."[299]

Jurisdiction over a trust should be based upon jurisdiction over one or more of the trustees of the trust.[300]

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290. Klabacka v. Nelson, 133 Nev. 164, 164 (2017).
291. *Id.* at 165–67.
292. *Id.* at 168.
293. *Id.* at 176–78.
294. Author's original thought.
295. *Id.*
296. *Id.*
297. UTC 2000 § 202(a).
298. Author's original thought.
299. UTC § 202(c); *see* 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 556–73 (4th ed. 1989) (providing a more comprehensive discussion of jurisdictional issues concerning trusts).
300. *See infra* discussion Part VII.I.

1. Choice of Law

The general rule is that the settlor's designation of controlling law will govern the administration of a trust, including the efficacy of a trust's spendthrift provision.[301]

> If the settlor creates a trust to be administered in a state other than that of his domicile, the law of the state of the place of administration, rather than that of his domicile, ordinarily is applicable. Thus, a settlor domiciled in one state may create an inter vivos trust by conveying property to a trust company of another state as trustee and delivering the property to it to be administered in that state. In that case the law of that state will be applicable as to the rights of creditors to reach the beneficiary's interest. This permits a person who is domiciled in a state in which restraints on alienation are not permitted, to create an inter vivos trust in another state where they are permitted and thereby take advantage of the law of the latter state.[302]

Similarly, the Restatement (Second) of Conflict of Laws Section 273 states:

> Whether the interest of a beneficiary of [an inter vivos] trust of movables is assignable by him and can be reached by his creditor is determined. . .by the local law of the state, if any, in which the settlor has manifested an intention that the trust is to be administered and otherwise by the local law of the state to which the administration of the trust is most substantially related.[303]

However, some courts have cited to the Restatement (Second) of Conflict of Laws Section 270, which provides, in pertinent part:

> An inter vivos trust of interests in movables is valid if valid . . . under the local law of the state designated by the settlor to govern the validity of the trust, provided . . . that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in [section] 6 and have then summarily determined that the application of the law of the state that permits SSAPTs violated a strong public policy of the forum state.[304]

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301. Thomas Gallanis, *Trusts and the Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 TUL. L. REV., 805, 824 (2023).

302. 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 626 (4th ed. 1989).

303. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 273 (A.L.I. 1971).

304. *Id.* § 270.

The fact that a forum state might not permit SSAPTs to be created under its own law does not necessarily mean that it would violate a strong public policy of the forum state to recognize a SSAPT if it was validly created under the law of a foreign jurisdiction.[305]

> It would seem that the policy of a state, whether it be to restrain alienation in order to protect the beneficiary, or to permit alienation in order to protect creditors and assignees, is not so strong as to preclude the application of the law to the contrary prevailing in another state.[306]

J. Potential Constitutional Argument

A potential constitutional argument is sometimes made based on the Full Faith and Credit Clause of the U.S. Constitution.[307] This Clause provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[308] Moreover, "Congress may . . . prescribe the [m]anner in which such [a]cts, [r]ecords and [p]roceedings shall be proved, and the [e]ffect thereof."[309]

As a general matter, the Full Faith and Credit Clause requires every state to enforce judgments that have been properly rendered in a sister state.[310] Therefore, if a creditor obtains a judgment against a debtor who has created and funded a SSAPT in a state which does not, itself, recognize the ability of an individual to create a SSAPT under that state's laws, and the creditor then seeks to enforce the judgment in the state where the SSAPT was created, there is an argument that the Full Faith and Credit Clause will require the court of the SSAPT state to enforce that judgment.[311]

However, in *In the Matter of the Cleopatra Cameron Gift Trust*, we see an important limitation upon the application of the Full Faith and Credit Clause.[312] Here, Cleopatra's father, Arthur, had established certain trusts for Cleopatra that prohibited payments to her creditors and granted the trustee sole discretion to make (or withhold) distributions.[313] Cleopatra got married in 2005 and lived in California with her husband and their two young children until her husband commenced a divorce

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305. 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 556–73 (4th ed. 1989).
306. 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 413 (4th ed. 1989).
307. U.S. CONST. art. IV, § 1.
308. *Id.*
309. *Id.*
310. Johnson v. Johnson, 37 S.W.3d 523, 526 (Tex. App.—El Paso 2001, no pet.).
311. Author's original thought.
312. Matter of Cleopatra Cameron Gift Tr., Dated May 26, 1998, 931 N.W.2d 244, 250 (S.D. 2019).
313. *Id.* at 246.

action in 2009.[314] In connection with that action, the California family court determined that Cleopatra owed both child and spousal support obligations and joined the trust pursuant to a provision of California trust law that preempts a spendthrift provision and allows for compulsory trust distributions to non-beneficiaries of an otherwise spendthrift trust in which doing so would facilitate child and spousal support payments.[315] Cleopatra then invoked her authority under the trust instrument to move the situs to South Dakota.[316] The trust continued to pay child support for a period of time despite its new situs, but eventually a new trustee and a new trust protector were appointed; the new trustee protector reviewed the trust's spendthrift provision and determined that the trustee could not continue the child support payments believing them contrary to both the trust's spendthrift provision and to South Dakota law regarding the rights of creditors to reach the assets of spendthrift trusts.[317] The South Dakota Supreme Court upheld the circuit court determination that "[the California] family court's order requiring the trustee to make direct child support payments to [the husband] in contravention of the Trust's spendthrift provision was not entitled to full faith and credit."[318] The South Dakota Supreme Court further stated that "[p]roviding full faith and credit to a foreign state's judgment 'does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.'"[319]

VIII. SUGGESTED BEST PRACTICES

A. Best Practices Relating to the Question of a Fraudulent Transfer

The settlor should transfer property to the SSAPT as early as possible to limit the risk that the transfer will be deemed fraudulent or, if it is deemed fraudulent, that it falls outside the statute of limitations.[320]

The settlor should limit their funding of the SSAPT since excessive funding of the SSAPT would likely implicate a number of badges of fraud, including UFTA Section 4(b)(5) "[t]he transfer was of substantially all the debtor's assets."[321]

A transfer of substantially all of the debtor's assets also implicates the question of the debtor's retained control over the assets, as suggested by the cases of *In re Stephan Jay Lawrence* and *Federal Trade*

314. *Id.*
315. *Id.*
316. *Id.* at 248.
317. *Id.*
318. *Id.* at 249.
319. *Id.* at 250 (quoting Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 235 (1998)).
320. *See generally* UFTA § 4(a)–(b).
321. *Id.* at § 4(b)(5).

Commission v. Affordable Media, LLC, which then implicates a further badge of fraud under UFTA Section 4(b)(2) which speaks to the debtor's "retained possession or control of the property transferred after the transfer."[322]

The settlor should consider structuring the trust to avoid inclusion in the settlor's estate, which will provide a motivation in the appropriate circumstances for the creation of the trust (i.e., estate tax savings), in lieu of a pure asset protection motivation (which might be subject to a subtle recharacterization as an intent to hinder, delay or avoid current or anticipated future creditors).[323]

The settlor should avoid filing in bankruptcy court if the SSAPT was funded more than ten years prior to the fraudulent transfer statute of limitations period under applicable local law, but within the statute of limitations period under Section 548(e) of the Bankruptcy Code.[324]

Even when the law does not require in the SSAPT jurisdiction, the settlor should execute an "Affidavit of Solvency," which is a written statement under oath, whereby the settlor swears that subsequent to an intended transfer into the SSAPT, the settlor will continue to be able to meet the settlor's known liabilities, claims, and potential claims.[325] The importance of an Affidavit of Solvency is evidenced by the case of *Goldberg v. Rosen*.[326] In *Goldberg*, approximately one year prior to the entry of a substantial adverse judgment, and eighteen months prior to the debtor's bankruptcy filing, the debtor hired the attorney to create and fund an Off-shore Asset Protection Trust.[327] Following the debtor's subsequent bankruptcy filing, the bankruptcy trustee brought an adversary proceeding against the attorney seeking to recover the attorney's fees and costs as fraudulent transfers under Section 548 of the Bankruptcy Code by alleging that the debtor was insolvent at the time of the transfers.[328] At trial, however, the bankruptcy trustee presented only the debtor's testimony regarding the debtor's insolvency.[329] To impeach the debtor's testimony, the attorney was able to present the debtor's Affidavit of Solvency—executed when they retained the attorney's services and in which they swore that they were solvent and could pay their anticipated debts, including lawsuit judgments, as they might come due.[330] On that basis, it was found that the record supported a finding that the debtor was,

322. *Id.* at § 4(b)(2).
323. *In re* Lawrence, 227 B.R. 907, 913 (Bankr. S.D. Fla. 1998).
324. FTC v. Affordable Media, LLC, 179 F.3d 1228,1241 (9th Cir. 1999).
325. *See* UFTA § 4(b)(2).
326. *In re* Niroomand*,* 493 Fed. Appx. 11 (11th Cir. Fla. 2012).
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.* at 13.

in fact, solvent at the time of the transfer, and the claim against the attorney was dismissed.[331]

B. Best Practices Relating to the Question of an Implied Agreement

It should be made clear to the potential settlor that they are giving up legal ownership of the property that they are placing in the SSAPT**,** as this is the fundamental premise of these statutes.[332] Some statutes—such as Delaware's Qualified Dispositions in Trust Act—do allow the payment of a unitrust amount, net income, or some other amount determined by a standard.[333] However, a best practice is to avoid exercising these rights.[334]

Instruct your client to think about their interest as a discretionary beneficiary in the SSAPT in the same manner as the owner of an individual retirement account might think about the owner's interest therein prior to the required beginning date for taking required minimum distributions.[335] In other words, the asset is available to the individual; however, a best practice is to avoid taking distributions unless absolutely necessary.[336] The adverse consequences inherent in taking a distribution from one's individual retirement account prior to the required beginning date include a ten percent penalty if taken before the permissible age, as well as inclusion of the distribution in the individual's gross income, and a lost opportunity to continue to defer the income taxation on the distributed amount.[337]

The settlor should limit the settlor's funding of the SSAPT since an excessive funding of the SSAPT might suggest an implied agreement with the trustee, even if distributions are not made, because it makes it more likely that distributions will someday be required.[338] For example, in the bankruptcy proceeding of *In Re Stephan Jay Lawrence*, involving a foreign SSAPT, the bankruptcy court stated that:

> The Debtor testified that when the trust was settled, the assets transferred to the trust represented in excess of ninety percent (90%) of his liquid assets . . . . This Court finds it impossible to believe that the Debtor surrendered ninety percent (90%) of his assets to a stranger on

331. *Id.*
332. TEX. PROP. CODE ANN. § 111.004(4).
333. *See* 12 DEL. C. § 3572-3574.
334. Author's original thought.
335. TEX. PROP. CODE ANN. § 113.029(a).
336. *See id.*
337. *See id.*
338. *Id.* at § 112.152(b).

> the other side of the world without maintaining some control over the assets.[339]

Similarly, in *Federal Trade Commission v. Affordable Media, LLC*, the Ninth Circuit Court of Appeals stated that, "[w]hile it is possible that a rational person would send millions of dollars overseas and retain absolutely no control over the assets, we share the district court's skepticism."[340]

There is a strong argument that the sole trustee of the SSAPT should be an independent corporate fiduciary, even if the settlor has an individual resident within the SSAPT jurisdiction to act as the local trustee, and no distribution advisor should be named.[341]

The settlor should retain sufficient assets in the settlor's individual name to support the settlor's lifestyle for a period no less than the settlor's actuarial life expectancy after accounting for the settlor's other sources of income.[342] A financial planning professional should be engaged to assist in this assessment.[343] The point here is that if distributions are ever made, they would seemingly be more likely to be found discretionary, since the need for such distributions was necessarily unanticipated at the time the trust was created.[344]

Make no (or at least minimal) distributions to the settlor from the trust.[345] The settlor should think of the SSAPT as a contingency rainy-day fund, used as a last resort.[346] If one or more distributions are necessary, consider a partial decanting of the original trust to a new trust with a new institutional trustee in an amount designed to support the anticipated distributions, with any excess trust assets retained in the original trust.[347] In this situation, the finding of an implied agreement regarding the original trust would seem unlikely, if not impossible.[348]

C. Best Practices Relating to Jurisdiction and Conflict of Laws

There should not be a fiduciary (co-trustee, investment advisor, distribution advisor, trust protector, or other fiduciary named in the trust instrument) in the same state as the settlor (or, indeed, ideally outside of

339. *In re* Lawrence, 227 B.R. 907, 913 (Bankr. S.D. Fla. 1998).
340. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1241 (9th Cir. 1999).
341. TEX. PROP. CODE ANN. § 112.035.
342. *See id.*
343. *See id.*
344. *See id.*
345. *See id.* § 112.035.
346. *See* TEX. CONST. art. III, § 49-G.
347. *See id.* at § 112.072.
348. *See id.*

a SSAPT jurisdiction).[349] Having a fiduciary in the same state as the settlor (or even outside of a SSAPT jurisdiction) increases the possibility of a plaintiff obtaining jurisdiction in that state.[350] This, in turn, could possibly lead to the court in that state refusing to apply the state law of the SSAPT.[351]

The settlor should not fund the SSAPT with, and the future investment of the SSAPT should not include, assets that are located in a jurisdiction that does not permit the creation of a SSAPT under local law.[352] Specifically, the issue is one of in rem jurisdiction, whereby a creditor's ability to access such property would be governed by the law of the situs of the property, rather than the law set forth by the settlor within the trust instrument as being the governing law of the SSAPT.[353] For this reason, a SSAPT should be funded with intangible property, rather than real or personal property, unless the real or personal property has a situs within one of the jurisdictions that permit the creation of SSAPTs under local law.[354]

IX. ISSUES WITH THE 2025 TEXAS BILL

The Texas Real Estate & Probate Institute (T-REP) analyzed the 2025 Texas Bill and took issue with several aspects of the 2025 Texas Bill that T-REP found to be deficient pursuant to a letter dated January 27, 2025, addressed to Adam Burklund of Burklund Consulting, LLC (T-REP Letter).[355] Specifically, T-REP noted that the 2025 Texas Bill: (i) provided insufficient child support protections; (ii) inadequately addressed community property issues; (iii) decreased statutory fraudulent transfer claim deadlines; (iv) made it too difficult to bring a fraudulent transfer claim because the burden of proof involved proving that the trustee knowingly and in bad faith acted in violation of Texas law and that the creditor suffered damages by the trustee's action; (v) did not provide tort liability protection; (vi) did not require a solvency affidavit by the settlor; and (vii) provided insufficient lender protections.[356]

In response, Mr. Burklund, on behalf of the Texas Bankers Association, Wealth Management and Trust Division (WMT), responded

349. *See* TEX. PROP. CODE ANN. § 114.001.
350. *See id.*
351. *See id.*
352. *See id.* § 142.005.
353. *See id.*
354. *See id.*
355. Letter from Texas Real Estate & Probate Institute, to Adam Burklund of Burklund Consulting (Jan. 27, 2025) (on file with author).
356. *Id.*

to the T-REP Letter with a letter dated March 10, 2025 (WMT Letter).[357] In the WMT Letter, Mr. Burklund addressed each point presented in the T-REP Letter but noted that the "chief objections to the [2025 Texas Bill] seem to focus on collection of child and spousal support."[358]

The authors believe that most of the issues identified by T-REP in the T-REP letter have arguments both for and against potential modifications to future Texas SSAPT legislation.[359] But, the authors do agree with Mr. Burklund's assessment that one of the main issues to be resolved in future Texas SSAPT legislation should be the collection of child and spousal support.[360] In addition, if Texas were to adopt a SSAPT statute, it would be the only community property state, other than Nevada, to have adopted a SSAPT statute and because the 2025 Texas Bill substantially tracked the Nevada SSAPT statute, the authors in particular feel that addressing community property in future Texas SSAPT legislation is extremely important.[361] As a result, the authors would like to provide their opinions on potential ways to addressing the collection of child and spousal support and community property.[362]

First, T-REP noted that the 2025 Texas Bill provided insufficient child support protections.[363] Proposed Section 112.157(j) did provide some protection but only if the settlor was in arrears for child support obligations at the time of funding the SSAPT.[364] T-REP's proposal was to revise the 2025 Texas Bill to "authorize a party to pursue SSAPT assets to satisfy child support claims, regardless of when the child support obligation arises or the past-due payment status of the settlor at the time of transferring assets to a SSAPT."[365] In response, the WMT Letter indicated that "Texas already has an exception allowing a court to order payment of child support from an irrevocable spendthrift trust to the extent of income generated by that trust."[366]

The authors do not see any downside for future Texas SSAPT legislation to be drafted to make explicit that SSAPTs are subject to the same enforcement or collection with respect to child support obligations as any other spendthrift trust, or other trust, under Texas law.[367] Simple revisions to Proposed Section 112.157(j) should be able to accomplish

357. Letters from Adam Burklund of Burklund Consulting, LLC on behalf of Texas Bankers Association, Wealth Management and Trust Division, to Texas Real Estate & Probate Institute (Mar. 10, 2025) (on file with author).

358. *Id.*

359. *See id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *See* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355, at 2–3.

364. *Id.*

365. *Id.* at 3–4.

366. *See id.* (citing TEX. FAM. CODE ANN. § 154.005).

367. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357.

such modifications.[368] To do so, future Proposed Section 112.157(j) could be drafted as follows:

> "(j) an asset transferred to a self-settled protection trust under this subchapter is subject to Title V, Family Code, for the enforcement or collection of a court-order child support obligation of the beneficiary, to the same extent of any other spendthrift trust or other trust."[369]

Second, T-REP noted that the 2025 Texas Bill was deficient in relation to the interplay between the 2025 Texas Bill and the community property protections of the non-settlor spouse.[370] The 2025 Texas Bill did include Proposed Section 112.160(e) that confirmed a spouse's ability to bring a fraud on the community claim against the other spouse was not to be changed because of the 2025 Texas Bill.[371] However, the position of T-REP was that a fraud on the community claim was often not sufficient in providing appropriate remedies to the non-settlor spouse for potential abuses by the settlor spouse related to the community property of the spouses.[372] T-REP also noted several related community property issues such as the character of income generated by a SSAPT, the ability of creditors of a non-beneficiary spouse to reach assets of a SSAPT, and whether the assets of a SSAPT would be subject to a surviving-spouse's statutory rights under the Texas Estates Code.[373] The WMT Letter indicated in response that similar to "currently existing planning techniques . . . community property should be partitioned before being contributed[.]"[374]

The authors believe that a potential resolution of the various spousal rights and community-property-related concerns that T-REP highlighted would be to only allow for the creation of a single-settlor, separate property SSAPT as implied by the WMT Letter's response.[375] This requirement could be added to the creation requirements under Proposed Section 112.152(1).[376] In this scenario, spouses would need to enter into a standard Community Property Partition and Exchange Agreement pursuant to Texas Family Code Section 4.102, which would create

368. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357.
369. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357.
370. *See* Letter from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355, at 3–4.
371. *Id.*
372. *Id.*
373. *Id.*
374. *See* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355 at 2.
375. *See* Letters from Adam Burklund to Tex. Real Est. & Prob. Inst., *supra* note 357; *see* Letter from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355.
376. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357; *see* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355.

separate property shares of equal value subject to such an agreement.[377] Each spouse would then be in the same initial position from a property rights standpoint prior to the funding by one or both spouses of a single-settlor, separate property Texas SSAPT.[378] This approach obviously would not allow for both spouses to create a joint-settlor Texas SSAPT that is funded with community property, which for non-completed gift SSAPTs would result in a loss to a complete step up in basis for SSAPT assets at the first spouse's death.[379] However, such a trade-off seems reasonable in light of the ability to obtain creditor protection under a SSAPT.[380] In essence, the suggested approach, would mirror to a great extent the funding approach taken by spouses when doing wealth transfer planning through Spousal Lifetime Access Trusts, as alluded to above.[381]

X. ALTERNATIVES TO SSAPTS IN TEXAS

Texas Property Code Section 112.035—Spendthrift Trusts and Creditors' Claims, addresses spendthrift trusts and creditors' claims against beneficial interests and settlors in Texas.[382] A settlor may provide in the terms of the trust that the interest of a beneficiary—in the income, in the principal, or in both—may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.[383] A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a spendthrift trust is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by the relevant statutory subtitle.[384]

However, spendthrift provisions do not apply to a settlor-beneficiary.[385] If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial

377. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357; *see* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355.

378. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357; *see* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355.

379. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357; *see* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355.

380. *See* Letters from Adam Burklund, to Tex. Real Est. & Prob. Inst., *supra* note 357; *see* Letters from Tex. Real Est. & Prob. Inst., to Adam Burklund, *supra* note 355.

381. *Program Operations Manual System* (POMS), SOC. SEC. (June 27, 2017), https://secure.ssa.gov/apps10/poms.nsf/lnx/1601825146 [https://perma.cc/6H95-WPVX] (noting that additional consideration may be needed with respect to how such requirements might affect SSAPTs settled in jurisdictions other than Texas that are later administered in Texas under the Texas SSAPT).

382. TEX. PROP. CODE. ANN. § 112.035.

383. *Id.* § 112.035(a).

384. *Id.* § 112.035(b).

385. *Id.* § 112.035(d).

interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate.[386]

But, a settlor is not considered a beneficiary in the following six circumstances: (1) Income Tax Reimbursement Provision; a trustee who is not the settlor is authorized under the trust instrument to pay or reimburse the settlor for, or pay directly to the taxing authorities, any tax on trust income or principal that is payable by the settlor under the law imposing the tax.[387] (2) Exercise of Power of Appointment; the settlor's interest in the trust was created by the exercise of a power of appointment by a third party.[388] (3) Marital Trust–QTIP or General Power of Appointment Trust; in the case of an irrevocable inter vivos marital trust, if the settlor is a beneficiary of the trust after the death of the settlor's spouse; and the trust is treated as either a qualified terminable interest property under Section 2523(f) of the Internal Revenue Code; or a general power of appointment trust under Section 2523(e) of the Internal Revenue Code.[389] (4) Beneficiary After Death of Spouse; in the case of an irrevocable inter vivos trust for the settlor's spouse, if the settlor is a beneficiary of the trust after the death of the settlor's spouse.[390] (5) Reciprocal Trusts for Spouses; in the case of an irrevocable trust for the benefit of a person, if the settlor is the person's spouse, regardless of whether or when the person was the settlor of an irrevocable trust for the benefit of that spouse.[391] (6) General Power of Appointment Trusts; in the case of an irrevocable trust for the benefit of a person, to the extent that the property of the trust was subject to a general power of appointment in another person.[392]

Notwithstanding the fact that the 2025 Texas Bill did not become law and SSAPTs may not be available in Texas soon, the previous six types of trust planning provide the potential for substantial spendthrift protection in Texas to a settlor who is also a beneficiary or remainder beneficiary of such a trust.[393]

XI. CONCLUSION

At more than twenty-five years of age, SSAPTs are no longer in the innocence of youth, and they may be coming to Texas in the future.[394]

386. *Id.* § 112.035(d).
387. *Id.* § 112.035(d)(1).
388. *Id.* § 112.035(d)(2).
389. *Id.* § 112.035(g)(1).
390. *Id.* § 112.035(g)(2).
391. *Id.* § 112.035(g)(3)(A).
392. *Id.* § 112.035(g)(3)(B).
393. *See supra* Sections III, V.
394. *See supra* Sections III, V.

Any proposed Texas SSAPT statute benefits from drawing on years of experience from various jurisdictions.[395]

We have now seen reported case law in various states.[396] At the same time, there will likely be further developments and case law as more states enact SSAPT legislation.[397] On balance, SSAPTs can play an important role in a person's overall financial, tax, and wealth transfer planning.[398] However, as in all things, it is important to follow best practices and sound and thoughtful planning.[399]

395. *See supra* Sections III, V.
396. *See supra* Sections II–IV.
397. *See supra* Sections II–IV.
398. *See supra* Sections II–IV.
399. *See supra* Section VIII.