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Wills, Asset Protection Trusts, and Financial Crime

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I. Introduction

The Internal Revenue Service (IRS) reports that trust and estate matters to be the third highest growth area among CPA firms (IRS, 2016a). For tax year 2009, 2.9 million Form 1041 (domestic trust) returns were filed, placing domestic trusts third, behind only individuals and corporations, in terms of total filings (IRS, 2016a). Experts predict that even after the payment of estate taxes, trust beneficiaries will receive wealth transfers of between twenty-four and sixty-five trillion dollars from 1998 through 2052 (Leland, 2008; Havens and Schernish, 2003). As the proliferation of trusts continues to accelerate, the federal government has noted a corresponding growth of abusive estate planning tactics, such as: 1) trust and tax schemes intended to reduce income and tax liability; 2) various abusive techniques, used to depreciate personal assets, deduct personal expenses and underreport income; 3) attempts to protect transactions (e.g., money laundering) through bank secrecy laws in tax haven countries; and 4) the abuse of domestic and offshore asset protection trusts (IRS, 2016b).

The use of abusive trust, estate planning, and other schemes, together, constitute wealth or asset transfer and protection planning fraud. Legitimate asset or wealth transfer and protection planning, on the other hand, includes three parts: 1) estate planning; 2) tax minimization; and 3) judgment creditor planning (Engel, 2014). Legitimate asset transfer and protection planning is a complex area even for experienced estate planning professionals. The increased demand for asset transfer and protection planning services has elevated the role of forensic accountants in wealth preservation planning (and avoidance of fraud). Forensic accountants' skills can be used to verify estate and/or trust assets, analyze financial transactions, reconstruct accounts and transactions, investigate offshore entities and jurisdictions (for clients who wish to move assets offshore), provide due diligence services and identify and locate hidden and/or stolen assets in will contests, trust disputes, probate litigation, and divorce cases.

The purposes of this paper are to highlight and analyze the diverse ways in which fraud and unethical practices can enter wealth transfer and preservation planning, scrutinize domestic and offshore trusts and trust fraud schemes (some involving tax evasion and money laundering), and provide red flags of fraud to assist forensic accountants and CPAs in the detection and prevention of fraud in asset protection planning. This article contributes to the forensic accounting and ethics literature by integrating important asset preservation planning and fraud knowledge for lawyers, accountants, regulators, bankers, law enforcement personnel, academics, ethicists, and other interested parties. Also, the material in this article can be used by educators to raise the awareness of future forensic accountants and CPAs.

This article is organized as follows. Following this introduction, Section II discusses the types of fraud affecting wills and estate planning. Section III examines the steps to take to protect against undue influence, duress, and fraud. Section IV analyzes domestic and offshore asset protection trusts and trust fraud schemes. Section V highlights some of the red flags associated with trust fraud, money laundering, and other financial crimes. Section VI concludes the paper.

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II. Types of Fraud Affecting Wills and Estate Planning

Undue Influence

Will contests in the United States affect up to three percent of all wills, which, given the high number of wills executed every year, is a significant number (Horton, 2012). The most common ground for will contests is undue influence (Ryznar and Devaux, 2013). In most states, undue influence is defined as an influence exerted on the maker of a will that overpowers the testator's mind and free will, which produces a will that would not have been executed but for the influence (Dukeminier and Sitkoff, 2013). This is a relatively imprecise definition, which some courts regard as a necessary feature given that a more precise definition could "furnish a fingerboard pointing out the very path by which it may be evaded" (Horton, 2008). Unfortunately, allegations of undue influence have increased in recent years. This is particularly true in situations where the elderly transfer their assets to beneficiaries through inter vivos or testamentary probate or nonprobate transfers (e.g., 401(k) and retirement account beneficiary designations) (Kirch, 2011). In part, this trend is attributable to the geographic dispersion of family members, increased longevity, and their older age making them more susceptible to debilitating illnesses (e.g., Alzheimer's and macular degeneration) (Kirch, 2011).

For an aggrieved person to contest a will under the doctrine of undue influence, the plaintiff must establish the following elements: 1) that the influencer had a disposition or motive to exercise it; 2) that the influencer had the opportunity to exercise the influence; 3) that the influencer did exercise it; and 4) that the testamentary disposition was a result of undue influence (Scalise 2008). The doctrine of undue influence assumes that the influencer can achieve control of the testator's will through means other than force (Spivack, 2010). The influencer uses means that fall short of actual physical coercion but which rise above mere affection, entreaty, or even repeated requests (Spivack, 2010).

Undue influence can be hard to prove because it is often exerted subtly and in private (Kirch, 2011). The existence of undue influence is a question of fact, and from its very nature, like all fraud schemes, hides its features behind masks and operates in dark and secret places and covert ways, and proof of it must usually be by circumstantial rather than direct evidence (Truelove, 1953).

A probate litigator should enlist the assistance of a forensic accountant at the first sign of a contest involving undue influence. There are several reasons for doing so. First, the forensic accountant can quickly interview those witnesses who are readily known and available, such as those who provided medical and nursing services, medical office personnel, cosmetologists, bank personnel, pharmacists, and restaurant workers. Testimony of people who had regular contact or involvement with the decedent may be more persuasive. Second, a forensic accountant may be able to get a witness to agree to an interview more easily than an attorney or law enforcement personnel. This is because forensic accountants are often better trained to approach witnesses than lawyers and can be less intimidating.

Finally, forensic accountants know how to locate medical and business records, how to analyze and catalog those records, how to obtain testimony from physicians, accountants, lawyers, business associates, family members, friends, and caregivers.

Circumstances that forensic accountants can investigate that may provide an evidentiary basis for a finding of undue influence or refute one, include such factors as:

- A confidential relationship (*Estate of Edel*, 700 N.Y.S. 2d 664 [N.Y. Surr. Ct., 1999]);
- A fiduciary relationship (*Jordan v. Growney*, 416 So. 2d 24 [Fla. Dist. Ct. App., 1982]);
- Undue influence present at the will execution (*In re Estate of Carpenter*, 253 So. 2d 697 [Fla., 1971]);
- A relationship between the attorney drafting the will and the influencer (*Herman v. Kogan*, 487 So. 2d 48 [Fla. Dist. Ct. App., 1986]);
- The execution of the will being kept a secret from potential challengers (*Estate of Burton*, 45 So. 2d 873 [Fla., 1950]);

- An influencer instructing the preparation of a will, making first contact with the attorney, or meeting alone with the attorney drafting the will (*Elson v. Vargas*, 520 So. 2d 76 [Fla. Dist. Ct. App., 1988]);
- Old age of the testator (*Herman v. Kogan*, 487 So. 2d 48 [Fla. Dist. Ct. App., 1986]);
- Weak physical and/or mental condition of the testator (*Estate of Burton*, 45 So. 2d 873 [Fla., 1950]);
- A beneficiary caring for the testator during the end of his or her life (*Elson v. Vargas*, 520 So. 2d 76 [Fla. Dist. Ct. App., 1988]);
- A beneficiary treating a new will execution as an urgent matter (Kirch, 2010);
- A dramatic change in the disposition of assets upon the death of the testator (Kirch, 2010);
- An influencer securing witnesses to the will (Kirch, 2010); and
- An influencer keeping the will after execution (Kirch, 2010).

This list is by no means exhaustive, but does sets forth circumstances in which the forensic accountant could provide invaluable support.

An astute forensic accountant also may discover illegal money arrangements related or tied to undue influence. For example, the forensic accountant could unravel a financial transaction paper trail when a fraud victim's credit cards are used to make purchases for a beneficiary or employed to pay off a beneficiary's credit card balances or mortgage. In addition, the forensic accountant could track transfers of money from a victim's investment accounts to a victim's bank account(s) and then withdrawn as cash. The forensic accountant should remember that information received from a beneficiary or beneficiaries may be intentionally misstated and/or manipulated.

At the state level, there have been recent developments in undue influence law. These developments enhance the need for the services of forensic accountants. First, courts in various states recognize a tort called "tortious interference with expectancy to inherit." These states include California, North Carolina, West Virginia, Illinois, Ohio, Wisconsin, New Mexico, and others. To prevail under this theory, courts require the disinherited plaintiff to prove the following: 1) the existence of his or her expectancy; 2) that the defendant intentionally interfered with plaintiff's expectancy; 3) that the interference involved conduct tortious in itself such as undue influence, fraud, or duress; 4) that there is a reasonable certainty that the gift or devise to the plaintiff would have been received but for the defendant's interference; and 5) damages (Chaffin, 2004). For example, in *Harmon v. Harmon*,[1] the son of the deceased sued his brother and sister-in-law for allegedly inducing his eighty-seven-year old mother—by fraud and undue influence—to transfer valuable property to the defendants, thereby effectively disinheriting plaintiff. The plaintiff son brought the lawsuit while his mother was still alive. The Maine Supreme Judicial Court held that prior to the mother's death, plaintiff could maintain an action in tort for wrongful interference with his intended legacy. The court further stated that when a person can prove that, but for the tortious interference of another, he would have likely received a gift, there is an "interference with advantageous relations" and such person is entitled to recover for damage thereby done to him. At a minimum, an opportunity exists in some cases for the forensic accountant or CPA to serve as an expert witness on the issue of damages and/or valuation.

A second development that can easily require the services of a forensic accountant involves "financial abusers." One study estimates that about forty percent of reported elder abuse cases concern financial exploitation (Wasik, 2000; Horton, 2008). Financial exploitation is a frequent form of elder abuse but differs in significant ways from other forms of elder abuse (Acierno et al., 2010). Victims of financial exploitation are usually disabled in some manner (other than by age) which makes them more vulnerable, and in some cases, unable to give consent (Jackson, 2015). Family members and caregivers are the most frequent perpetrators of financial exploitation (Jackson, 2015; Johnson, 2003), which is a rubric which encompasses various illegal and improper financial actions (Conrad et al., 2010). Improper actions include unethical arrangements for asset management (e.g., older person's income absorbed into family finances), improper use or transfer of assets, abuse and misuse of finances and prioritizing financial gain over proper care of an older person (Jackson, 2015).

[1] 404 A. 2d 1020 (Me., 1979).

A growing number of states have statutes that make it possible to disinherit any "financial abusers" who inherit from their elderly victims. These states include California, Washington, Oregon, and Arizona. Under these laws, any person who participates in the willful and unlawful financial exploitation of a vulnerable adult will be disinherited from the victim's will or property disposition (Gardner and Daff, 2014). Clearly, a financial abuse case, on both sides, would benefit from the investigative and analytical skills of a forensic accountant.

Duress

In the testamentary context, duress occurs when "the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made" (Spivack, 2011). For example, duress can take the form of a wrongdoer using force or coercion to such a degree that the free will of the testator or trust settlor is suppressed. Because of the duress, the testator or settlor feels there is no alternative but to revise his/her will or trust to favor the wrongdoer or is afraid to change dispositions away from the wrongdoer in the will or trust for fear of abuse or facing the possibility that the intimidation will be repeated.

Duress is often included within the definition of undue influence (and often combined with undue influence in an objection to the probate of a will), but is quite distinguishable. Duress involves force, the threat of harm, or a wrongful act against the victim or a loved one. While undue influence is a mental coercion, duress is often proved by a physical act. Unlike undue influence, with duress, the victim is fully aware of the illegal element (Pesando, 2015). The following elements must be proved to establish a clear case of duress: 1) the wrongdoer's wrongful act posed a threat of repeated violence to the testator or settlor; 2) the threat induced fear in the victim; 3) the testator or settlor feared the perpetrator would physically harm the victim or a loved one; and 4) such fear precluded the victim from exercising his/her free will and judgment (Estate of Mildred Rosaco, 2011).

Circumstances or red flags that forensic accountants can investigate that may provide an evidentiary basis for a finding of duress include:

- Elder abuse;
- Sexual abuse;
- Physical abuse;
- Mental abuse;
- Neglect of the elderly; and
- Financial abuse (or exploitation) (CDC, 2016).

These various types of abuse (forms of duress) could be proved by a forensic accountant using his or her investigative skills. Discreet interviews of the alleged victim, family members, friends, and those who had routine contact with the alleged victim (e.g., hairdressers, barbers, massage therapists) could provide insightful and valuable information. Surveillance may also occasionally prove valuable in gathering evidence of alleged abuse. In the event litigation has commenced, a forensic accountant hired by an attorney (in an abuse case) would be able to use subpoenas to obtain medical and financial records which might provide evidence of neglect and/or abuse.

The list above is by no means exhaustive but sets forth circumstances in which the forensic accountant could provide invaluable services. Such red flags would be helpful to the forensic accountant in an estate planning fraud investigation interview to determine who, what, where, when, why, and how.

California, Illinois, Maryland, and Oregon have statutes barring inheritance based upon some or all of these forms of abuse (Kelly, 2012). Where a wrongdoer has engaged in coercive or abusive conduct, duress is the best doctrine under existing probate and trust contest laws to invalidate a bequest or gift in favor of the perpetrator (Kelly, 2012). Duress as a freestanding objection to the admission of a will to probate involves going into uncharted waters, which makes it ripe for engaging forensic accounting services.

Fraud in the Inducement

Fraud in the inducement occurs when a misrepresentation causes the testator to execute or revoke a will, to refrain from executing or revoking a will, or to include certain provisions in the wrongdoer's favor (Dukeminier and Sitkoff, 2013). The inducement usually occurs before any action is taken on the testator's part to execute or revoke a will or include certain provisions in the will. The inducement usually consists of false statements of fact, made in bad faith or with the intent to deceive.

The fraud involved must amount to coercion, compulsion, or a constraint which destroys the testator's free agency. The fraud must essentially overcome the testator's power of resistance, oblige the testator to adopt the will of another, and in so doing, bear directly on the testamentary act (Blum et al., 2015a). Moreover, the maker of the will must have been deceived and have relied on the misrepresentation (Blum et al., 2015a). This situation contrasts with undue influence, which unlike fraud, need not be accompanied by deception (Blum et al., 2015b). Fraud in the inducement suffices to set aside a will when it affected the maker of the will as of the moment the will was executed (Blum et al., 2015c).

Fraud in the Execution

Fraud in the execution, which is not common, occurs when the instrument executed (e.g., will or trust agreement) differs from the one the testator (or settlor) intended to execute. Fraud in the execution generally involves a misrepresentation of the actual contents of the document being executed (Dukeminier and Sitkoff, 2013). A will provision resulting from fraud in the execution is invalid, and the remainder of the will stands, unless the fraud affects the entire will or the affected provisions are inseparable from the remainder of the will (Dukeminier and Sitkoff, 2013).

If fraud in the inducement or fraud in the execution is alleged to have occurred, a forensic accountant's skills could be employed to investigate and analyze the "paper trail" culminating in the fraud, such as e-mails, bank and investment account statements, ledgers, spreadsheets, correspondence, telephone records, electronic databases, receipts and invoices, and prior estate planning documents. A forensic accountant may also be instrumental in scrutinizing the conduct of those orchestrating the fraud. A forensic accountant could determine the fraudster's motives through interviews and/or interrogation. These inquiries may lead the forensic accountant to other witnesses, suspects, and new records. The forensic accountant could also be proactive in preventing fraud by being available to family members who question potential gifts and/or bequests to caregivers and/or non-family members.

III. Steps to Protect Against Undue Influence, Duress, and Fraud

Perpetrators of will and estate planning fraud often use one or more of the following techniques to accomplish their nefarious objectives: 1) increasing dependency needs; 2) restricting access to loved ones; 3) relationship poisoning; and 4) self-promotion (Gardner and Duff, 2014). Forensic accountants can assist in preventing perpetrators from achieving their objectives. Forensic accountants can screen the background of potential caregivers using public and proprietary databases such as brbpublications.com, casebreakers.com, clear.thomsonreuters.com/clear home, confi-chek.com, criminalcheck.com, intellius.com, knowx.com, lexis-nexis.com, mugshots.com, pacer.gov, publicdata.com, twazzup.com, and ussearch.com. In addition, forensic accountants can interview prior clients (or the client's family) of the caregiver and talk with the caregiver's references.

If the forensic accountant and asset protection lawyer have a client whose objective is to become a favored beneficiary, the client should be made aware that they may need to prove that the testator or trust settlor was mentally competent at the time of execution of the instrument. One method of doing so is to obtain the written opinion of one or more physicians confirming that the testator or trust settlor is competent at the time documents are executed, along with a certificate of independent review (Stern, 2008). This is often best accomplished by having at least one meeting alone with the client, to give the client the chance to express his or her wishes about the estate plan, and to candidly explain to the client the consequences of engaging in will and estate planning fraud (Stern, 2008).

On the other hand, a forensic accountant whose clients may be concerned about losing an inheritance or trust beneficiary designation should advise their clients to screen and select caregivers, and continue an ongoing relationship with the elder (Gardner and Duff, 2014). The forensic accountant/lawyer should also advise their client to periodically ask the elder about the caretaker relationship and when possible, monitor financial and investment accounts.

The lawyer/forensic accountant would be wise to advise the client to prepare and retain memoranda detailing all steps which he or she took, or was involved in, preceding and during will or trust agreement execution. If any close relatives will be disinherited or excluded as a beneficiary in a trust, the reasons for doing so should be memorialized by the lawyer/forensic accountant and assented to by the client. Also, such documentation should contain a complete discussion of the client's assets and the approximate value of all assets and liabilities (Stern and Baum, 2010). Moreover, a forensic accountant with business valuation expertise is an ideal candidate to help value assets and/or liabilities that do not have an established market value such as traded common stocks or bonds.

Table I: Questions for the Forensic Accountant to Ask a Testator or Trust Settlor

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

Source: Stern and Baum (2010).

IV. Trusts and Fraud

Another legal vehicle subject to abuse by fraudsters and asset hiders is a trust. The primary defining characteristic of a trust is that it provides for separation of legal ownership from beneficial ownership. The establishment of a trust requires the trust creator (or settlor or grantor) to transfer ownership of an asset or assets (legal title) to a person or institutional entity (trustee). The trustee is usually, although need not be, someone other than the settlor (Danforth, 2002). The trustee owns and manages the asset(s) according to the provisions or terms set out in a trust agreement for the benefit of beneficiaries (Danforth, 2002). The latter possess beneficial ownership. A trust will typically include "current beneficiaries," persons to whom the trustee is authorized or required to make current distributions, and "future beneficiaries," persons who will or may receive trust distributions in the future (Danforth, 2002).

Subject to certain exceptions, a beneficiary's interest in a trust is freely transferable. Thus, a beneficiary entitled to some or all the income of a trust can transfer their income interest, gratuitously or for consideration, to some other individual or institutional entity, or a creditor (Danforth, 2002). The beneficiary's income interest also can be transferred involuntarily, through attachment by a judgment creditor (Danforth, 2002).

A settlor or grantor can avoid the transfer, alienation, or attachment of a beneficiary's trust interest by creating a spendthrift trust (or including a spendthrift provision in the trust). A spendthrift trust is one created with a view of providing a fund for the maintenance of another, and at the same time securing it against his improvidence or incapacity for self-protection.[2] When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust and a creditor of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the interest or distribution.

Because of this restriction, creditors are unable to access the beneficiary's interest for the payment of his or her debts. The policy behind the adoption and use of a spendthrift clause is to protect clients from "credit drunk" beneficiaries who may use the trust as a transferable instrument to secure a debt, pay off loans or credit cards, or expedite the acquisition of new funds (Hirsch, 1995). Virtually all U.S. jurisdictions recognize spendthrift clauses, but most do not permit a settlor or grantor who is also a beneficiary to protect his or her assets or interest from creditors' claims (Ausness, 2007). A self-settled spendthrift trust is also known as an asset protection trust (because it purportedly protects the settlor from creditors).

Asset protection trusts are a booming business for banks, trust companies, and estate planners, both in the U.S. and abroad. They are a multi-billion-dollar-a-year business. Many offshore promoters attract U.S. citizens with promises of tax avoidance and asset protection using trusts (Morse, 2008). In this way, they are quite like the use of shell companies, whose abuse has recently been highlighted with the release of the Panama Papers.[3]

The popularity of asset protection trusts is based, in large part, on the fact that trusts provide beneficiaries with more autonomy than traditional business entities or estate planning strategies. Trusts have no registration requirements or central registries where trustee, settlor, and beneficiary names must be listed (Fidelity, 2016). For example, in some states, a land trust that owns real property enjoys a degree of secrecy and anonymity that, due to tax rolls, property appraisers' records, and corporate filings databases, is ordinarily absent from the real property marketplace (Simser, 2008). A search of the public records will often reveal just the trustee's name and possibly a copy of the trust agreement (Simser, 2008). In other states, such an agreement is not anonymous since the names of beneficial owners must be revealed (IRS, 2016c). Nevertheless, even where beneficiaries' identities must be disclosed, the beneficiary can be a limited partnership or another trust, adding layers of opacity to the trust's ownership structure (IRS, 2016c). Moreover, if the land trust trustee is a lawyer, attorney-client privilege erects an additional barrier that favors privacy (Simser, 2008).

Various types of trusts are available. One of the most important (and controversial) distinguishing factors among trusts is whether the trust is a domestic or offshore trust. Asset protection trusts, in particular, are quite subject to abuse (OECD, 2001).

Offshore Asset Protection Trusts

An offshore asset protection trust (OAPT) is a type of spendthrift trust that is established in a nation or authority outside America. Unlike most U.S. states, numerous offshore jurisdictions recognize self-settled spendthrift trusts, that is, trusts designed to protect the settlor from domestic creditors' claims (Ausness, 2007). Estimates indicate that between one and six trillion dollars in assets are in OAPTs (Maxwell, 2014). Various jurisdictions

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[2] Miller v. Kresser, 34 So. 3d 172 (Fla. Dist. Ct. App., 2010).

[3] A massive leak of documents from the Panamanian law firm, Mossack Fonseca, has exposed the vast, murky world of shell companies, providing an extraordinary look at how the wealthy and powerful conceal their money. Those exposed in the leak include the prime ministers of Iceland and Pakistan, an associate of Syrian President Bashar Assad, an associate of Mexican President Enrique Pena Nieto and companies linked to the family of Chinese President Xi Jinping. Add to those the monarchs of Saudi Arabia and Morocco, executives of FIFA that controls international soccer, and 29 billionaires featured in Forbes Magazine's list of the world's 500 wealthiest people. The documents within the leak expose how secretive offshore companies, at times, subvert U.S. foreign policy and mock U.S. regulators. When drug traffickers, money launderers, or other crooks control companies, they undermine national security, and the trail of dark money flowing through them strips national treasuries of tax revenues. Offshore asset protection trusts can be similarly abused and operated as are shell companies (Hall and Taylor, 2016).

which permit OAPTs are Anguilla, the Bahamas, Barbados, Belize, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, the Isle of Man, Saint Kitts and Nevis, and the Turks and Caicos Islands (Maxwell, 2014).

Numerous legitimate reasons exist to establish an OAPT: 1) economic diversification; 2) presentation of a low profile to disguise significant wealth; 3) tax and estate planning; 4) avoidance of forced heirship provisions; 5) planned expatriation; 6) marital planning (in lieu of or in conjunction with a pre-marital or ante-nuptial agreement concerning assets and the disposition of assets if a divorce were to occur); 7) asset protection from future potential creditors; and 8) privacy and confidentiality (Pullis et al., 2013). A disadvantage of OAPTs is that they tend to be perceived as being associated with unlawful, fraudulent, and/or unethical activities. Accountants and lawyers should evaluate the motivations of clients seeking to establish OAPTs and should obtain written confirmation from those clients concerning the legitimacy of their affairs (Pullis et al., 2013).

Various factors make it more difficult for U.S. creditors to access funds held in OAPTs. First, foreign jurisdictions are often not required to recognize or give any force or effect to a U.S. state or federal court judgment (Brinker, 2004). Although a domestic creditor may sue a trust's settlor in an offshore authority, the process is time-consuming, burdensome, and expensive (Morse, 2008). In most offshore jurisdictions, contingent fees are not permitted and local attorneys require that their fees be paid in advance (Brennan, 2000). Offshore jurisdictions often require a higher standard of proof (beyond a reasonable doubt) than in U.S. civil cases (preponderance of the evidence) (Lischer, 2004). Moreover, the statute of limitations in many offshore jurisdictions starts to run at the time of asset transfer and usually expires within a year or two (Ausness, 2007). By the time an attorney or forensic accountant locates the offshore assets or trust, the statute of limitations may have expired. Further, fraudulent transfer or conveyance laws in many jurisdictions frequently mandate that a creditor demonstrate that the grantor or settlor intended to "delay, hinder, or defraud them" (Brennan, 2000).

Fraudulent transfer law has evolved two prohibited forms of transactions: "actually fraudulent transfers" and "constructively fraudulent transfers." "Fraudulent transfers" are transfers intended to hinder, delay, or defraud creditors. "Constructively fraudulent conveyances" involve the "transfer of property, or the incurrence of an obligation, for less than reasonably equivalent value, at a time when the transferor was insolvent, or became insolvent because of the transfer or the incurrence of the obligation."[4] Any transfer deemed fraudulent by a court may be set aside, thus permitting the creditor to satisfy debts from the assets conveyed. Alternatively, the creditor may obtain a judgment against the transferee in the amount of the transfer (Wagenfeld, 1999).

Most states have enacted into law some version of the Uniform Fraudulent Transfer Act (UFTA), but two states, New York and Maryland, still follow a version of the Uniform Fraudulent Conveyance Act (UFCA) (Nenno, 2005; Tabb and Brubaker, 2015). The UFTA protects not only those who are creditors at the time of asset transfer but also extends protection to future creditors or creditors yet-to-be (Sterk, 2000).

The UFTA lists numerous red flags of fraud that may be utilized to demonstrate the settlor's actual intent (UFTA §4(b)(2014)). At least one court utilized a red flags-of-fraud approach to prevent a husband-settlor of an OAPT from purloining assets from his spouse in a divorce case. In *Breitenstine v. Breitenstine,*[5] husband and wife were married in 1979 and later had two children. Husband's parents owned stock in Breitenstine Landfill, Inc., and conveyed twenty-one percent of the outstanding stock to the husband. In 1989, Breitenstine Landfill, Inc. sold for thirty million dollars and, during the first half of the 1990s, the husband received a total of about eight million dollars from that sale. In 1995, the husband created a Bahamas OAPT named the Breitenstine Family Trust. In 1996, the wife filed for divorce. During divorce proceedings, the husband continued to make transfers of property to the trust. The trial court awarded the wife one half of the marital estate and found that the family trust was established to defraud the husband's creditors and potential creditors including his wife.

On appeal, the Supreme Court of Wyoming upheld the trial court and held that the significant factor is the husband's intent when transferring assets to the Bahamas OAPT. His intent could be inferred from various red

[4] *Estate of Jackson, et al., v. Schron*, Case No. 8:16-cv-22-T17 (M.D. Fla. Sept. 8, 2016).
[5] 62 P. 3d 587 (Wyo., 2003).

flags of fraud including lack or inadequacy of consideration, close familial relationships or friendships among the parties, retention of possession or benefit of property transferred, the financial condition of the transferor both before and after the transfer, the chronology of events surrounding the transfer, the transfer occurring during the pendency or threat of litigation, and hurried or secret transactions. The husband's transfers amounted to fraudulent conveyances.

One technique sometimes used to attempt to circumvent the fraudulent conveyance issue is to place an international limited liability company (ILLC-often based in Nevis) inside the OAPT so that the latter owns 100 percent of the trust. Since the trustee can serve as managing member of the ILLC, fraudulent transfer is not an issue (Offshore Company, 2016). Finally, OAPTs contain a number of features that permit the settlor to exercise some control over the trust property.[6]

In the last few years, the U.S. federal government has enacted laws raising the reporting requirements for offshore vehicles (e.g., offshore trusts) as well as stiffening civil and criminal penalties for non-compliance (Reimer, 2012). As an example, George Briguet, a naturalized U.S. citizen, filed false income tax returns for tax years 2001 through 2010 in which he failed to report his foreign financial accounts, failed to report any income earned thereon, and failed to pay taxes on the foreign income. Briguet faces a statutory maximum sentence of three years in prison and has agreed to pay the IRS restitution in the amount of $169,935 (DOJ, 2015). Briguet's case should serve as a warning that the federal government is becoming more aggressive in prosecuting OAPT abuses.

Another potential disadvantage of OAPTs is the recent enactment of the Foreign Account Tax Compliance Act (FATCA).[7] This law makes it possible to treat an OAPT as a "foreign financial institution," with the result being that remittances to the OAPT of fixed or determinable, annual or periodic income from a U.S. source may be subjected to federal withholding tax (Reimer, 2012).[8] FATCA materially raises the amount of reporting that may be required by those who are beneficiaries of foreign trusts and expands the scope of those who might be considered to have a reportable interest without providing clear guidelines (Reimer, 2012). FATCA requires any U.S. person considered an owner of a foreign trust under grantor/settlor trust rules to comply with new reporting requirements.[9] Substantial penalties may be imposed for failure to meet reporting requirements.

Offshore promoters advertise or communicate to prospective clients that they will possess absolute asset protection and secrecy regardless of U.S. laws and regulations. In the landlocked European nation of Lichtenstein, prospective clients are informed that asset transfers to OAPTs by non-Lichtenstein citizens are not subject to foreign judgments and laws (Morse, 2008). Settlors of OAPTs, however, may be and have been ordered by a U.S. court to consent to the government's acquisition of legal and financial records in foreign

[6] Protective features of an OAPT include a trust protector clause, an anti-duress clause, a flight or flee clause, and a non-binding letter of intent. A trust protector is one appointed by the settlor to act as an advisor and who is charged with making sure the trustee carries out the settlor's wishes. The protector may be empowered to remove the trustee, change the beneficiaries, or change the situs of the trust (Roder, 1999; Frolik, 2015). An anti-duress clause prohibits the trustee from complying with any order imposed upon the settlor or trustee. The trust agreement identifies those events which trigger the clause, it also terminates any powers retained by the settlor over the trust. A flight clause authorizes the trustee to transfer the trust to another authority upon the occurrence of certain events. A letter of intent is written by the settlor and expresses his or her wishes as to the disposition of trust assets (Danforth, 2002).

[7] IRC §1471(d)(5)(2016). FATCA is a U.S. law designed to prevent tax evasion by U.S. citizens using offshore banking facilities. The law requires certain U.S. taxpayers holding foreign financial accounts with an aggregate value greater than $50,000 to report certain information about those assets on Form 8938 that must be attached to the taxpayer's annual return. FATCA also requires "foreign financial institutions" to report directly to the IRS certain information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

[8] A strong argument exists that trusts, particularly those that include a spendthrift clause, such as OAPTs, should not be treated as foreign financial institutions because they are not entities engaged in business through associates who have transferable interests.

[9] IRC §§ 6048(b), 6677(a)(2016).

jurisdictions.[10] Settlors of offshore trusts subject themselves to the risk of being held in contempt by a U.S. state or federal court for failure to repatriate offshore assets (Reimer, 2012).[11] Criminals and terrorists have also seized upon OAPTs as a method to further their nefarious aims.

OAPTs can be utilized in four ways by those bent on committing financial crimes: 1) hiding legitimate assets for the purpose of evading taxes; 2) integrating illicitly obtained funds into an economy as "clean assets" (money laundering); 3) moving legitimately obtained funds to be used for heinous purposes (e.g., terrorism) into an economy as "clean" assets (reverse money laundering);[12] and 4) hiding legitimate assets from creditors with bona fide claims and spouses in divorce proceedings. Control or beneficial ownership of both legitimate and illegitimate assets can be returned to the beneficial owner through multiple trusts (Silets and Drew, 2001). The linchpins to illegitimate uses or abuses of OAPTs are layering and misdirection (Silets and Drew, 2001).

The cleverest schemes insulate the identity of the wrongdoer through many layers of trusts and other legal entities (e.g., limited liability companies [LLCs], limited liability partnerships [LLPs], international business companies [IBCs]). They also incorporate misdirection by creating the appearance that the wrongdoer has no control of OAPTs and their sole administrator is in an offshore jurisdiction (Silets and Drew, 2001).

One example of how a tax evader layered OAPTs is *U.S. v. Scott*.[13] In that case, four layers or tiers of legal structures were arranged to evade income taxation. Trust I was a domestic trust established as a shell with a nominal fictitious contribution by some entity besides the purchaser (who bought the trust from International Business Associates [IBA]). The beneficiary of Trust I was another trust, Trust II, created in Belize. The latter had only foreign trustees and beneficiaries. Trust I distributed all its taxable income each year to Trust II. The beneficiary of Trust II was a third trust, Trust III, which could distribute or accumulate income. IBA claimed that Trust III was outside U.S. jurisdiction and not amenable to its tax laws. Trust IV was also a foreign OAPT like Trust III and arguably outside U.S. jurisdiction. Trust IV remained dormant (passive) until the purchaser needed funds.

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

Purchasers were told by IBA that they could transfer buildings (e.g., a home), equipment, and even businesses to Trust I, set the assets up on a schedule at full market value, and then depreciate the assets for tax purposes. According to the appellate court, the true settlor of these trusts is the purchaser, who is also the trustee and the beneficiary. The purchaser was subject to income taxes on all income of the various trusts. The scheme

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[10] In *U.S. v. Spearbeck*, 1996 U.S. Dist. LEXIS 8957 (W.D. Wash. June 11, 1996), a federal district court ordered Mari Lyn and Tim Spearbeck to sign waivers and releases to obtain financial records in foreign jurisdiction(s). Although the foreign jurisdiction(s) prohibited financial institutions from releasing information sought by the IRS, the defendants were forced to waive such protections.

[11] FTC v. Affordable Media, 179 F. 3d 1228, 1241 (9th Cir., 1999). See also In re Lawrence, 238 B.R. 498, 500-01 (Bankr. S.D. Fla., 1999).

[12] Although tax evasion and money laundering are separate and distinct offenses, there is a distinct similarity between the methods used for money laundering and tax evasion. Both require deception (or an act of fraud) and concealment, and when assets from illegal activity are shielded from tax officials, a direct overlap occurs between the two. Once money evades taxes, it must be laundered before it can be used again. Almost all laundered money has evaded taxes and is unlawful, irrespective of its legal or illegal origin (Arce, 2009).

[13] 37 F. 3d 1564 (10th Cir., 1994).

promoters (owners of IBA) were convicted of conspiracy to defraud the U.S. and sentenced to three- to five-year prison terms.

Many such illegal OAPT tax evasion schemes are pushed by a network of promoters and sub-promoters who prepare trust documents, tax returns, and permit taxpayers to utilize offshore bank accounts. Such promoters charge from five to seventy thousand dollars for these arrangements.

In *U.S. v. Kukhahn,*[14] Sharon Kukhahn operated businesses known as IMF Decoder, Paralegal Research Advocates, and Advocates for Justice, Liberty, and Freedom. For a fee, the defendant helped clients purportedly obtain internal IRS documents, claimed to decode them and then mailed rebuttal packages that would ostensibly remove clients from the tax system. Kukhahn also sold more than 400 abusive trust schemes resulting in more than seven million dollars in unpaid taxes. She was sentenced to seven years in prison for four counts of tax evasion, one count to defraud the IRS, and one count of corrupt interference with the administration of internal revenue laws.

OAPTs also can be abused illegally for money laundering.[15] Money launderers are able to avail themselves of the layering and misdirection features of OAPTs. A case illustrative of these features is *U.S. v. Brennan.*[16] In this case, the Second Circuit upheld Robert Brennan's conviction for bankruptcy fraud, based in part on money laundering using OAPTs. The defendant owned and operated First Jersey Securities, Inc. (FJS), a broker trading in penny stocks. Brennan and FJS were found guilty of securities fraud and ordered to pay or disgorge seventy-five million dollars to about 500,000 customers. Subsequently, FJS and Brennan filed for bankruptcy. Before the securities fraud litigation, defendant Brennan created two OAPTs. Defendant agreed to a bankruptcy court order freezing the OAPTs' assets. Near the end of his trial for securities fraud,[17] Brennan created a third OAPT known as the Cardinal Trust. It was funded by four million dollars in bearer bonds. Brennan did not disclose Cardinal's assets in the bankruptcy action.

Cardinal Trust assets grew to twenty-two million dollars by mid-1997. Brennan used twelve million dollars in assets from the three OAPTs to buy and refurbish the Palm Beach Princess, a gambling boat. The three OAPTs held a twelve million dollar mortgage on the boat. The Cardinal Trust's situs was moved twice (via a flight or flee clause) to avoid detection. Brennan was convicted of money laundering and other offenses and sentenced to over nine years in prison.[18]

A distinction must be made, however, between illegally obtained funds (e.g., drug dealing, human trafficking) that are laundered, on the one hand, and legally obtained funds that are laundered for illegal future purposes (reverse money laundering, e.g., terrorist acts) (Cassella, 2003). The latter are even harder to detect than the former (Baradaran et al., 2014). For example, terrorist financing that employs money-laundering techniques often originates with legitimate organizations (e.g., charities and non-profits) and travels partially through customary channels. It is often difficult to ascertain whether funds or assets are destined for a terrorist organization (Shetterly, 2006).

These various situations and cases illustrate that the goal is to transfer assets through enough layers of OAPTs and other entities that a banker, lawyer, forensic accountant, or bankruptcy trustee may not suspect or find the criminal or non-criminal sources of assets. Individuals or entities can control their assets without being named as a beneficiary or trustee. The privacy and anonymity of OAPTs make them a superb means of laundering assets and subject these trusts to illegal and unethical abuse.

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[14] 2008 U.S. Dist. LEXIS 68797 (W.D. Wash. August 21, 2008); 2012 U.S. App. LEXIS 21973 (9th Cir., 2012).
[15] Money laundering occurs in three steps-placement, layering, and integration. Although many cases tend to evince that OAPTs are used in the placement and/or layering stages, it appears that they present opportunities for laundering in the third or integration phase as well.
[16] 395 F. 3d 59 (2nd Cir., 2005).
[17] 326 F. 3d 176 (3rd Cir., 2003).
[18] On remand to a federal district court, the nine-year prison sentence was upheld. *Brennan v. U.S.,* 2007 U.S. Dist. LEXIS 33979 (May 9, 2007 D.N.J.).

Finally, for forensic accountants investigating illegal OAPT schemes it is important to bear in mind that these schemes usually cannot be accomplished by one person. Rather, these schemes often necessitate a network of participants, which often includes professionals, such as lawyers, accountants, and bankers (gatekeepers). These schemes also often generate a substantial amount of paper and/or electronic records. Thus, the more people involved and the larger the quantity of records, the higher the probability the perpetrators will get caught (Silets and Drew, 2001).

Domestic Asset Protection Trusts

The success of offshore jurisdictions in attracting trust business has led to sixteen states passing some version of domestic asset protection trust (hereinafter DAPT) legislation.[19] Each of the sixteen states has a somewhat different DAPT statute and requirements to establish a valid domestic asset protection trust.[20] Conceptually and structurally, DAPTs are like OAPTs. A DAPT permits a grantor to create a self-settled spendthrift trust that provides a degree of asset protection against the settlor's creditors.

The effectiveness of DAPTs as an asset protection device remains, at best, uncertain. It is unclear whether a DAPT would be effective in protecting assets from creditors when the settlor-beneficiary of the trust is domiciled in a state that forbids self-settled trusts (Cain, 2015).[21] It is primarily settlors who are residents of a state that forbids DAPTs as a matter of public policy and who create a DAPT in one of the sixteen states that permit them who should be concerned about whether their home state may enforce a judgment against their DAPT (Cain, 2015).

One legal hurdle for DAPTs is the Full Faith and Credit clause of the U.S. Constitution (Art. IV, §1).[22] Uncertainty may arise when a creditor files a lawsuit against a debtor in a non-DAPT state and seeks enforcement of the judgment against the debtor's assets held by the DAPT and they would not be protected under the non-DAPT state's laws. As the number of states that permit DAPTs increases, however, the likelihood declines that a court in a non-DAPT state will rule that a DAPT violates public policy (Danforth, 2002).

A potential second legal obstacle is the contention that DAPTs violate the Contracts Clause of the U.S. Constitution (Art. I, §10, cl. 1). A state's laws transgress the clause if they "substantially impair the obligations of parties to existing contracts or make them unreasonably difficult to enforce" (Lee, 2012). Creditors may argue that permitting settlors to protect their assets behind the shield of a DAPT impairs their contractual rights to reach the assets. The Contracts Clause has been construed to refer to existing not future contracts (Maxwell, 2014). Also, the contractual rights of existing creditors have not been impaired but merely the remedies available to such creditors to enforce their rights have been affected (Maxwell, 2014).

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[19] The sixteen states which have enacted a domestic asset protection law are Alaska, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

[20] For example, a Nevada DAPT requires that the: 1) grantor or settlor create a written irrevocable trust; 2) at least one trustee must be a Nevada resident and domiciliary, or trust company or bank with a Nevada physical office; 3) the Nevada trustee must maintain records and prepare income tax returns for the trust; 4) some of the administration of the trust must take place in Nevada; 5) the trust can only allow discretionary distributions to the grantor/settlor; and 6) funding the trust cannot be for purposes of hindering, delaying, or defrauding known creditors (Nev. Rev. Stat. Ann. §166.015).

[21] We note, however, that the Nevada DAPT may be an exception to this lack of certainty. Nevada DAPTs are irrevocable so the settlor or grantor cannot change or modify them. Nevada also has no exception creditors in its DAPT statute (e.g., child support). In nearly fifteen years (up to 2014), there is not a reported case of a DAPT being pierced after the statute-of-limitations period (Pagliarini, 2014).

[22] This clause provides that "Full Faith and Credit shall be given in each state to the…judicial proceedings of every other state." Full faith and credit does not mean that State A's court is required to enforce State B's judgment to the judgment's full extent or to enforce the judgment in the same manner that State B's court would enforce it (Cain, 2015). In *Baker v. General Motors Corporation*, 522 U.S. 222 (1998), the U.S. Supreme Court held that "full faith and credit does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments."

Another matter of concern for DAPTs arises during bankruptcy proceedings. Federal legislators have responded to the growing number of states enabling DAPTs by enacting a specific provision in the federal bankruptcy code that targets such trusts. Enacted in 2005, section 548(e) of the Bankruptcy Code contains a ten-year statute of limitations-measured from the date of the bankruptcy filing-for any fraudulent transfer made to a self-settled trust or similar device. This section of the law requires actual intent to hinder, delay, or defraud a creditor to be operative (11 U.S.C. §548(e)(1)(D) (2016)).

Moreover, DAPT law in the U.S. is very unsettled (a paucity of case law) and new developments can alter the legal landscape (Shiffman, 2015). The first federal bankruptcy court decision to consider the validity of a DAPT occurred in the case *In re Huber*.[23] The bankruptcy court in the Western District of Washington struck down the debtor's DAPT exposing it to his creditors. Until more decisions are handed down, it is wise for individuals to create DAPTs with a sense of skepticism as to their actual efficacy when challenged (Shiffman, 2015).

In any event, DAPTs can also be employed in almost the same manner as OAPTs to commit various financial crimes including: 1) hiding legitimate assets from creditors with valid claims and spouses in divorce proceedings; 2) concealing legitimate assets and income from tax authorities to evade taxation; 3) integrating illegally acquired funds into an economy as clean assets (money laundering); and 4) moving legally acquired (reverse money laundering) and illegally obtained funds to be used for terrorism. Heretofore, legal authorities and the courts have paid less attention to DAPTs than OAPTs (Russo, 2014).

Forensic accountants should know that layering and misdirection can be utilized in DAPTs almost as much as they can be in OAPTs, especially if a family limited partnership (FLP) or an LLC (onshore or offshore) is used in conjunction with the DAPT. The whole idea is not to ignore DAPTs even though the appearance is created that the fraudster has no control or ownership of the DAPT assets and/or income and discretion and control belongs to the trustee. In reality, beneficial ownership and control resides with the fraudster/settlor.

V. Red Flags Associated with Asset Protection Trust Schemes

Forensic accountants, CPAs, lawyers, and courts should be aware of elements of asset protection trusts and financial transactions that could be a red flag of tax evasion, money laundering, and other fraudulent schemes. Courts and forensic accountants tend to rely on inferences and presumptions drawn from surrounding circumstances. It is not necessary to prove fraudulent intent (or intent to deceive) by direct evidence-circumstantial evidence is more than adequate. Circumstantial evidence of intent in asset protection trust cases often takes the form of red flags of fraud. Red flags of fraud are defined as "a fact tending to throw suspicion upon the questioned transaction, excites distrust as to bona fides, raises an inference that a conveyance is fraudulent and by its presence usually requires a showing of good faith."[24]

For asset protection trusts, offshore or onshore, various categorized red flags of fraud are shown in Table II. No single factor constitutes a showing of fraud or fraudulent intent per se but the facts must be taken together to determine if red flags of fraud aggregately indicate fraud. Red flags of fraud are not conclusive evidence, but may be strong or weak depending upon their nature and number occurring in the same case.[25] The forensic accountant needs to develop an awareness of the signs of fraudulent trust schemes and possess a willingness to investigate further to help detect and deter these activities.

[23] 493 B.R. 798 (2013). In this case, Mr. Huber, a Washington state resident, established an Alaska DAPT and transferred his interest in twenty-five entities and some cash to the trust. All assets in the DAPT, except the cash, were in Washington state. After DAPT creation, Huber received over $400,000 in payments from the trust for his personal expenses. Huber subsequently filed for Ch. 11 bankruptcy and his creditors pursued trust assets for payment.
[24] *Matter of Estate of Reed*, 566 P. 2d 587 (Wyo., 1977).
[25] *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich., 1988).

Table II: Red Flags of Fraud for Onshore and Offshore Asset Protection Trusts

Potential red flags of fraud being committed using onshore and/or offshore asset protection trusts:

Financial Pressure

- Financial distress of the transferor or settlor (*Matter of Estate of Reed*, 566 P. 2d 587 [Wyo., 1977])
- Transferor's or settlor's intention to incur debts beyond his or her ability to pay as they mature (*Coleman-Nichols v. Tixon Corp.*, 513 N.W. 2d 441 [Mich. Ct. App., 1994])

Funding Irregularities

- A trust is funded with bearer shares (whoever has possession has ownership) (http://www.offshoreincorporate.com/faq/what-is-the-difference-between-registered-shares-and-bearer-shares)
- Trusts are funded with easily transportable assets such as gemstones, precious metals, coins, artwork, rare stamps, or collectibles (http://www.ffiec.gov)
- Lack of consideration for a transaction (*Matter of Estate of Reed*, 566 P. 2d 587 [Wyo., 1977])
- The use of foreign bank accounts, offshore debit/credit cards and other similar instruments for no legitimate business purpose (Wright, 2002)

Jurisdiction

- Jurisdiction of residence of the settlor(s) and/or beneficiary(ies), or the country where established, source of funds, is one of concern (http://www.ffiec.gov)
- Stacking of different jurisdictions in the use of onshore and/or offshore trusts (Silets and Drew, 2001)

Questionable Transfers and/or Conveyances

- A close connection between the transferor or settlor and transferee, trustee, and/or beneficiary (*Breitenstine v. Breitenstine*, 62 P. 3d 587 [Wyo., 2006])
- A transfer or conveyance occurs after notice of pending legal action (e.g., divorce filing) (*Consumers United Ins. Co. v. Smith*, 644 A. 2d 1328 [D.C. Ct. App., 1994])
- A transaction or conveyance carried on in secret not in the usual mode of doing business (*Diss v. Agri Business International, Inc.*, 670 N.E. 2d 97 [Ind. Ct. App., 1996])
- The reservation of benefit to the settlor or transferor (*Berger v. Hi-Gear Tire and Auto Supply, Inc.*, 263 A. 2d 507 [Ct. App. Md., 1970])
- International asset or fund transfers are conducted through bank or tax secrecy havens (Zaki, 2010; http://www.lematin.ch/actu/-debat/myret-zaki-suisse-fait-235019)

Questionable Practices

- Retention of the possession, control, or benefit of the property by the transferor or settlor (*Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 [W.D. Mich., 1988])
- A hurried transaction(s) not in the normal course of business (*U.S. v. Leggett*, 292 F. 2d 423 [6th Cir., 1961], *cert. den.*, 368 U.S. 914 [1961])
- The chronology of events surrounding the transfer or conveyance (*Matter of Estate of Reed*, 566 P. 2d 587 [Wyo., 1977])
- A solvent person's deliberate effort to stave off a creditor by putting property beyond his reach even when the purpose is not to cheat the creditor of ultimate payment but only to wrest time to restore the transferor's or settlor's affairs (*Klein v. Rossi*, 251 F. Supp. 1 [E.D.N.Y., 1966])
- Any transaction conducted in a manner different from customary methods (*Diss v. Agri Business International, Inc.*, 670 N.E. 2d 97 [Ind.Ct. App., 1996])

- The use of more than two vertical layers of trusts, LLCs, LLPs, international business companies (IBCs), offshore or onshore (e.g., Robert Maxwell-UK media mogul) (OECD, 2001; Silets and Drew, 2001).

Both onshore and offshore asset protection trusts are sometimes used for money laundering purposes. The red flags of money laundering are sometimes similar but also different from those of fraudulent trust schemes. A categorized list of red flags of money laundering is provided in Table III. Some of the more common red flags of money laundering used by forensic investigators, law enforcement officers, and financial institutions include concealed movement of currency from one jurisdiction to another, significant and/or frequent cash deposits over a short period of time, transactions involving locations with poor anti-money laundering laws, credit cards or negotiable instruments used to access funds in a bank secrecy haven, transfers to countries that are not destination countries or usual remittance corridors, transfers to offshore jurisdictions with no business rationale, lack of information regarding overseas fiduciaries, customers using family members' or third parties' names for account ownership, and placing assets offshore in one jurisdiction, controlling them from another jurisdiction, the client exhibits unusual concern for secrecy, or the client has difficulty describing his or her business (FFIEC, 2016; FinCEN, 2010; Simser, 2008; Silets and Drew, 2001).

Table III: Red Flags of Money Laundering

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

Currency Movement or Exchange

- Concealed movement of currency from one jurisdiction to another jurisdiction to avoid cash reporting
- Significant and/or frequent cash deposits made over a short period of time
- Significant and/or frequent currency exchanges made over a short period of time
- Transfers to countries that are not destination countries or usual remittance corridors
- Numerous deposits to one account followed by numerous payments made to various people
- Transfers to offshore jurisdictions with no business rationale
- Parking assets offshore in one jurisdiction and then exercising control over them through another
- Receipt of a large wire transfer that is immediately withdrawn by a check or debit card

Cash Purchases or Receipts

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

Concealment

- Transactions involving locations with poor anti-money laundering laws or high exposure to corruption
- The client has travel expenses to a country with which he or she has no business or family ties or is not a vacation destination

Irregular Financial Actions

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

Scamming

- Customers regularly targeting young and/or inexperienced employees
- Customers using family members or third parties, including the use of children's accounts
- The client has difficulty describing his or her business and lacks general knowledge of his or her industry

Wrongful or Suspicious Securing and/or Access of Funds

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

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

Sources: FFIEC (2016); FinCEN (2010).

VI. Conclusion

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

Undue influence, duress, fraud in the inducement, and fraud in the execution are ways vulnerable individuals are subject to exploitation. Several court cases are cited involving these various forms of will and estate planning fraud. Red flags of will and estate planning fraud are noted to assist the forensic accountant to search for and accumulate evidence of fraud (to build a case). This article also lists steps to protect against undue influence, duress, and fraud.

Offshore and domestic asset protection trusts are legitimate devices for transferring wealth from generation to generation, business purposes, investment reasons, and for liability protection. However, both types of asset protection trusts are particularly subject to abuse by money launderers, tax evaders, other fraudsters, and terrorists. A detailed analysis of both types of trusts along with trust fraud cases are presented to assist the forensic accountant in the detection and prevention of trust fraud.

Red flags of fraud for asset protection trust schemes and money launderers are also highlighted. Rarely does a single red flag indicate the presence of an abusive trust scheme, tax evasion, and/or money laundering. The forensic accountant is better able to serve his or her client by becoming familiar with the various red flags to know when and where to further investigate.

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