

In the face of industry uncertainty, proactively protect assets and family wealth

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Worried about the future? Take a proactive look at asset protection planning, family wealth preservation trusts

By [Elizabeth K. Brown](#) and Mike McDonald



Liz Brown is a director at Phillips Murrah, P.C., where she has practiced for most of her legal career.

Liz is primarily a tax and transactional lawyer with a special emphasis in the energy industry.

For those of us who lived in Oklahoma during the 1980s, it may feel a little like deja vu all over again.

While the Oklahoma economy is more diversified than it was in the 1980s, our State's overall well-being is still tied heavily to the health of the oil and gas industry.

As a whole, our industry is much stronger and more financially sound than it was in the 1980s. But, if oil prices remain where they are now, or drop lower, difficult times may be ahead for all Oklahomans, but especially for energy producers and service companies.

Those of us who are concerned about the potential impact of this recent downturn and want to take steps to minimize any resulting financial hardship should take a serious look at asset protection planning.

Asset protection planning typically incorporates a wide range of techniques accepted under Oklahoma and bankruptcy law to shield assets from the claims of creditors.

The key to a solid asset protection plan is to establish the plan before a financial crisis is on the horizon, since transfers made with the intent to hinder, delay or defraud creditors or when the transferor is insolvent can be attacked and possibly invalidated. One of the asset protection planning tools available under Oklahoma law is the Family Wealth

Preservation Trust, created under the Oklahoma Family Wealth Preservation Trust Act passed in 2004. This unique but little known Oklahoma law permits a person to transfer Oklahoma assets to a revocable "Preservation Trust" and protect those assets from claims of that person's creditors.

To qualify as a Preservation Trust, the trust must meet the following requirements:

- The Trust must be established by an individual (the "Grantor");
- The Trust must have as a trustee or co-trustee an Oklahoma bank or trust company – one that is chartered under Oklahoma law or is a nationally chartered bank or trust company that has a place of business at a physical location in Oklahoma;
- The beneficiaries may only be certain "qualified beneficiaries" – the grantor's spouse, the lineal ancestors and descendants of the Grantor or of the Grantor's spouse, qualified charities and trusts for the sole benefit of qualified beneficiaries (note that the Grantor is not eligible to be a beneficiary);
- A majority in value of the assets of the Preservation Trust must consist of "Oklahoma assets" – stocks, bonds, and ownership interests in Oklahoma-based companies, bonds issued by the state of Oklahoma or an Oklahoma governmental agency, accounts maintained with an Oklahoma-based bank, and real estate and mineral interests located in Oklahoma; and
- The Trust Agreement must provide that the income produced by its assets is subject to Oklahoma income tax.

Until last year, there was a \$1 million cap on contributions to a Preservation Trust. Effective Nov. 1, 2014, however, the Oklahoma legislature lifted the cap so that the Act now exempts all trust assets held in a Preservation Trust from attachment or execution to satisfy a judgment against the

Grantor. This recent amendment eliminating the cap makes the Preservation Trust a much more attractive asset protection planning tool since now all assets in a Preservation Trust, regardless of value, are protected from claims of the Grantor's creditors.

The most unique feature of the Preservation Trust is that the trust agreement can provide that the Preservation Trust can be revoked or amended by the Grantor at any time. This power of revocation or amendment allows the Grantor to retain ultimate control over the assets transferred to the Preservation Trust. Until the Act was passed, Oklahoma law did not allow a Grantor of a trust to set up a revocable trust and protect the assets in trust from the claims of the Grantor's creditors. As a result, creditors could easily reach assets held in a revocable trust to satisfy their claims against the Grantor. Now, however, as long as the assets are held in the Preservation Trust, those assets are not subject to the claims of the Grantor's creditors even though the Grantor has the power to revoke the Preservation Trust at any time.

Many energy companies that are owned and operated by Oklahoma producers are "Oklahoma-based companies" and thus suitable assets for transfer to a Preservation Trust. An Oklahoma-based company is a corporation, limited liability company, limited partnership, limited liability partnership or other legal entity formed or qualified to do business in Oklahoma that has its principal place of business in Oklahoma. The most problematic part of the Act seems to be the requirement that an Oklahoma bank or trust company serve as trustee or co-trustee of the Preservation Trust, since the fees of the corporate trustee increase the associated costs.

A typical asset protection plan for an Oklahoma oil and gas producer could, for example, involve the Grantor setting up a Preservation Trust and transferring equity interests in the Grantor's Oklahoma-based business to the Preservation Trust. Alternatively, the Grantor could set up a new limited

liability company ("Newco") funded with Oklahoma marketable securities or deposit accounts, then transfer a part or all of the membership interests in Newco to the Preservation Trust. By doing so, the Newco membership interest owned by the Preservation Trust would be protected from the claims of the Grantor's creditors.

If the Preservation Trust is set up in accordance with the Act (and subject to the provisions of the Uniform Fraudulent Transfer Act under which creditors, in certain instances, can attack asset transfers), any assets that are held in the Preservation Trust, including the stock or other equity interests in the Oklahoma based business, will not be subject to the claims of the Grantor's creditors so long as a majority in value of the assets are Oklahoma assets. Even if the Preservation Trust owns some assets that are not Oklahoma assets, those assets also would still be protected as long as the majority in value of the assets in the Preservation Trust are Oklahoma assets.

In our industry, we have certainly weathered economic storms before and no doubt we will weather this one as well. While we are all hopeful that oil prices will recover in the short term, none of us have a crystal ball. Therefore, it is smart to consider taking some defensive moves now, including developing an asset protection plan possibly with a Preservation Trust. If you set up a Preservation Trust and the worst-case scenario develops, the assets in the Preservation Trust will be protected from the claims of your creditors. On the other hand, if and when the skies clear and commodity prices rebound, you can simply revoke the Preservation Trust and go back to business as usual.

Ask yourself...what do you have to lose?

About the authors:

Elizabeth K. Brown is a shareholder in the law firm of

Phillips Murrah, P.C. She is also CEO of The Gloria Corporation, an independent oil producer based out of Ada, and a member of the Board of Directors of the Oklahoma Independent Petroleum Association and the National Stripper Well Association.

Mike McDonald, owner of Triad Energy in Oklahoma City, has served as chairman of the OIPA and president of the Domestic Energy Producers Alliance. He holds a juris doctor from the University of Mississippi and a master of laws degree from New York University.