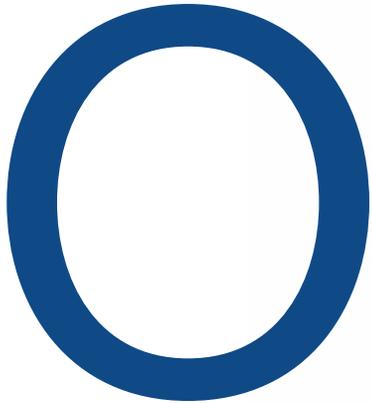




# NEVADA BECOMES AMERICA'S SAFEST STATE FOR WEALTH PROTECTION

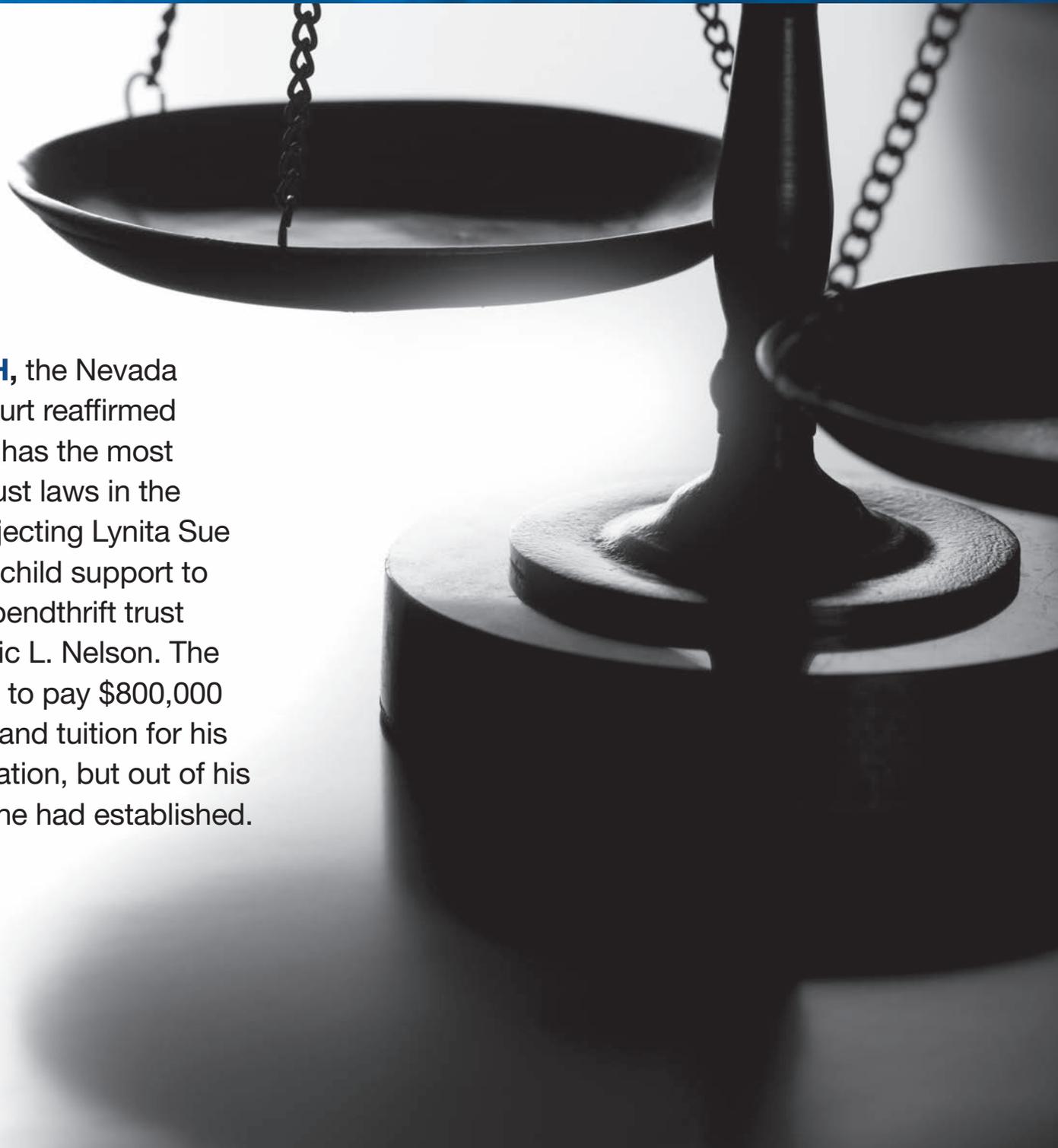
**KLABACKA VS. NELSON CONFIRMS PROTECTION  
OFFERED FROM NEVADA TRUSTS**

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**ON MAY 25TH**, the Nevada Supreme Court reaffirmed that Nevada has the most protective trust laws in the nation, by rejecting Lynita Sue

Nelson's claim for alimony and child support to be taken out of a self-settled spendthrift trust established by her husband, Eric L. Nelson. The court ruled that Nelson still had to pay \$800,000 in alimony, back child support, and tuition for his daughter's private school education, but out of his personal assets, not the trusts he had established.





The Nelsons had divided their assets in 1993. The property division was intended to shield the wife from riskier assets in the Nelson portfolio, including casinos and liquor licenses. In 2001, shortly after the Nevada legislature enacted laws enabling them, the two placed their separate assets into two self-settled spendthrift trusts. A self-settled spendthrift trust, is a form of irrevocable trust which names the grantor as the primary beneficiary. Self-settled spendthrift trusts are typically structured so that neither the grantor nor his or her creditors can access trust assets; rather the trust delegates authority for distributions to an independent trustee. If a creditor or spouse is suing the grantor for assets in the trust, the trustee can simply not make any distributions. As a result, the assets are protected unless the law allows exceptions, as several state statutes do, for alimony and child support. *Klabacka vs. Nelson* tested whether the Nevada Courts would allow these exceptions.

In 2009, the couple began divorce proceedings, and Lynita Sue sued for alimony and child support. A district court judge ruled that Eric should pay these costs out of his trust, citing statutes from South Dakota and Wyoming, as well as case law from Florida, which allowed self-settled spendthrift trusts to be accessed for alimony and child support. The Nevada Supreme Court rejected this interpretation and overturned this decision in May.

“Asset protection plans have become more and more popular in the last 10-15 years, and Nevada has really prided itself on having some of the strongest and most thorough asset protection laws here in the nation,” explained Brian Steadman, a partner at Solomon Dwiggin & Freer, Ltd. (Solomon Dwiggin litigated the case on behalf of the trust.) “One of the issues, though, that we’ve been running into with all asset protection plans are, how are the courts going to handle these cases? What is the court going to do if, as in this situation, we have child support and alimony issues,

what are the courts going to do in the event we have a third-party creditor and the trust wasn’t run as cleanly as it should be? But all those questions have been answered with this case, at least in Nevada.”

“Nevada has been known for years as having the most protective domestic asset protection trust laws,” explained Steve Oshins of Oshins & Associates in Las Vegas, Nevada, who was named the Las Vegas Trusts and Estates Lawyer of the Year in 2012 and 2015 and the Las Vegas Tax Law Lawyer of the Year in 2016 by The Best Lawyers in America®. “Some of the practitioners in other states have suggested that Nevada’s laws are too protective and therefore won’t work. The Supreme Court just showed us that they do work and that Nevada will protect the laws as written.”

## THE NEVADA TRUST ADVANTAGE

Even before the *Klabacka vs. Nelson* decision, Nevada trusts offered a compelling array of advantages versus trusts domiciled in other states.

First, Nevada does not have a state or fiduciary income tax. Irrevocable trusts are taxed at the state level on where the trustee resides. If a client has a Nevada trustee, the trust may avoid filing a state income tax return. This helps reduce the erosion of trust assets by the tax rate. The trust will always have to file a federal income tax return. If a beneficiary of a Nevada trust receives a trust distribution, that distribution will be subject to their own state’s personal income tax filings.

Second, Nevada dynasty trusts allow a trust to continue for 365 years. The length of time a trust can last is commonly referred to as a state’s “Rule against Perpetuities.” Dynasty provisions allow a trust to avoid the estate tax arena for multiple generations.



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Oshins & Associates

And finally, Self-Settled Spendthrift Trusts (often referred to as Nevada Asset Protection Trusts) allow individuals to create an irrevocable trust in Nevada for their own benefit. Two years after the assets are transferred to the trust, they should become unavailable to creditors. This two-year waiting period is one of the shortest in the nation. Unlike many states, Nevada does not make an exception for divorcing spouses, as many states do. Nevada law also allows for division of trust duties among a family trustee, an independent trustee, and an administrative trustee. Recent legislation even allows grantors to change the terms of an irrevocable trust through a decanting statute passed in 2015.

Klabacka vs. Nelson reaffirms Nevada's pre-eminence among trust domiciles, making it the hands-down choice for estate attorneys and financial planners.

## THE OUT OF STATE QUESTION

Both Eric and Lynita Sue Nelson were Nevada residents, and their assets included both liquid assets and real estate located in Nevada. But what about individuals who live outside Nevada or hold assets out of state?

"If an individual lives in another state and they sue in that state, there's some question about whether the court will recognize self-settled spendthrift trusts," says Jay Larsen, a partner in the Nevada law firm of Gerrard Cox Larsen. Only 16 states, including Nevada, allow this type of trust and some of them make an explicit exception for alimony and child support claims.

"There is a whole body of law called 'choice of law' and 'conflicts of law', and each state has its own history and precedent in that regard," explains James Duggan, founding principal of the Chicago-based business, tax, estate, and wealth planning firm Duggan Bertsch, when asked why it is so difficult to predict how other states



might treat a Nevada self-settled spendthrift trust. "Each state has its own principles that it follows when it comes to choice of law or conflicts of law between jurisdictions. And the approach they take can differ, based on the type of law being addressed in the case. They may be deferential in one case. They may follow another state's lead."

Indeed, in the original ruling, in Nevada District Court, the judge applied statutes from South Dakota, Wyoming, and Florida case law in determining that the trust's assets could be accessed. The Supreme Court's reversal, says Duggan, is one of the things that makes Klabacka vs. Nelson so interesting.



“States like South Dakota and Wyoming obviously don’t allow asset protection trusts to avoid paying child support or alimony. And in Nevada they actually contemplated that in the legislative history and they specifically excluded it,” he explains. “So when I compare all the different jurisdictions and the pros and cons of each statute, some of them have a lot of carve outs, for spousal support, for child support, for bodily harm tort claims. Nevada was clear that it doesn’t have any inclusion of spousal support.”

He concluded, “The court did the right thing. They said, listen, our legislature determined what the public policy was in our state and they specifically included it. It’s a clear statute.”

Providing protection to Nevada residents who set up self-settled spendthrift trusts is now settled in Nevada. The question is murkier for people who live elsewhere, though it may help if the assets in the trust are held in Nevada. Say, for instance, that a court outside Nevada disregarded the protection against alimony and child support and allowed trust assets to be tapped. “If the assets are liquid assets that are also held in Nevada where the trust is domiciled, then anyone suing in another state would have to bring that judgment here,” says Larsen. “Then the question would be whether the court would actually enforce it or not, and you get into issues with the choice of law and one state recognizing another state’s judgments.”

“What the decision means is that we’re 100% certain that [self-settled spendthrift trusts] work as advertised for Nevada residents,” says Oshins. “We still don’t know with 100% certainty that it will be the result if the grantor or settlor of a trust is a resident of a different state.”

Steadman says that roughly 30% of the asset protection trusts that his firm administers are for out-of-state clients. Californians are particularly interested in Nevada’s favorable statute since their state does not allow self-settled spendthrift trusts. For these clients, Steadman says, caution is still in order. “I give them every warning under the sun. I make sure we disclaim to them ‘I don’t know how California courts are going to look at this.’” The main case law, before *Klabacka vs. Nelson*, was the 2011 decision in *Re: Huber*, where a Washington court essentially threw out an Alaska-domiciled asset protection trust.

It may take a long time for a case involving an out-of-state grantor or settlor to resolve the matter, too. Oshins explains that the vast majority of claims against self-settled spendthrift trusts are settled out of court so that no judgment is ever reached. “What actually happens is that almost every one of these ends up settling, so we don’t see a case from the asset protector’s viewpoint,” he says. “A quick and cheap settlement in our clients’ favor is a victory. So there must be tons of victories that we don’t see because they never turn into a case.”

## FLAWED ADMINISTRATION

One important element of *Klabacka vs. Nelson* is that the judge decided that even trusts that aren’t perfectly administered still provide protection. In the initial ruling, Jeffrey P. Luszeck, also a partner at Solomon Dwiggin, explains that the District Court judge noted some irregularities, though he and his legal team disputed them. “He didn’t believe the formalities were followed and if the Supreme Court somehow remanded the case back to him, he was merely going to invalidate the trust,” says Luszeck. “I think that’s why the Supreme Court made it clear in its ruling that even if an asset protection trust doesn’t follow the formalities, the proper remedy isn’t to invalidate the trust. The proper remedy is to allow a suit to be brought against the trustee.”



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# BUILD YOUR BUSINESS WITH NEVADA TRUSTS

For wealth planners and financial advisors, *Klabacka vs. Nelson* provides an opportunity to reach out to your clients and reinforce the benefits of Nevada-domiciled asset protection trusts. Here are five steps that will help you get started:

## STEP ONE:

### TALK TO YOUR CLIENTS ABOUT NEVADA TRUSTS

Nevada's trust laws are among the most investor-friendly in the nation, protecting your clients against claims from all creditors — not just ex-wives and child support — after only a two-year waiting period. *Klabacka vs. Nelson* reaffirms that the Nevada courts will enforce the state's trust statutes, giving clients an added level of confidence that their assets are shielded.

## STEP TWO:

### START EARLY

Protecting assets from divorce should start long before the dishware starts flying, and preferably even before your clients have gotten married. Setting up an asset protection trust a few months — or even a couple of years — before a divorce may leave your client vulnerable to adverse judgments if the courts determine that the spouse is a "known creditor," with claims that predate the establishment of the trust.

## STEP THREE:

### DETERMINE THE RIGHT AMOUNT TO SHIELD

When your client puts assets into a self-settled spendthrift trust, he or she will not be able to access them readily, so it is important to leave enough outside the trust to maintain the client's lifestyle. In addition, courts often look unfavorably on asset protection trusts that shield an entire estate. But, on the other hand, if trust assets are shielded, your client will be asked to pay any alimony or child support out of personal assets. If he or she does not have the assets, they may not have to pay.

## STEP FOUR:

### LOCATE ASSETS IN NEVADA IF POSSIBLE

An out-of-state judgment against a Nevada-domiciled trust with Nevada assets has to be brought to Nevada courts to be affirmed and executed, so even if your client lives in another state, holding assets in Nevada institutions may provide some level of protection.

## STEP FIVE:

### NAIL DOWN THE DETAILS

The *Klabacka Vs. Nelson* decision overlooked a number of irregularities in administering the Nelson trusts, including the husband, Eric Nelson, acting as investment trustee for both trusts and some apparent breaches of fiduciary duty. Though these issues did not derail the Nelson Trust, it is better to structure a trust that is air tight. Work with an experienced partner to make sure that your clients' trusts are properly established and administered.

# NEVADA BECOMES AMERICA'S SAFEST STATE FOR WEALTH PROTECTION

## TIMING MATTERS

One factor that may have come into play in the Nevada Court's decision on the Klabacka vs. Nelson case is the relatively long period — eight years — between the original division of assets and establishment of the two trusts and the Nelson's eventual divorce. "If this were on a shorter time line, like a year, I think the court has a completely different outcome with respect to the alimony and child support," says Duggan, explaining that courts will often disregard trusts created a year or two ahead of divorce, treating the spouse and kids as "known creditors" who cannot be intentionally defrauded. (Nevada's statute imposes a two-year waiting period before assets are protected). "Eight years here was a real factor. I think the court is going to look at that and say, eight years ago when they set this up, they had no idea they were going to get divorced," he says. "So in this case, the kids and the spouse, I'm sorry to say, they're not going to be known creditors and there's no right to collect."

Trusts are protected but personal assets are not. Eric Nelson will still have to pay alimony and child support after Klabacka vs. Nelson, just not out of his self-settled spendthrift trust. Only if he had not had enough money outside the trust would he have been able to declare bankruptcy and avoid paying the judgment. Most trust grantors do have significant assets outside their self-settled spendthrift trusts. They

typically put only a portion of their assets into these vehicles, because in doing so, they have limited access and control over the money. In addition, sheltering too much money in a spendthrift trust can be a red flag for judges. All of which means that, from a strict dollars and cents perspective, the decision may not save Nevada trust grantors much, if any, money.

"Attorneys who are being prudent will leave sufficient wealth outside of a trust so that the settlor of the trust is not insolvent," Oshins comments. "If they're insolvent when they set this up, then the trust doesn't work. So in other words, almost every one of these marital support and child support claims is paid despite this spectacular statute that Nevada has. We're probably never going to see an actual case where someone puts assets into one of these trusts and actually makes use of that advantage."

## NEVADA IS #1 FOR DIVORCE PROTECTION

Klabacka vs. Nelson reaffirms Nevada's standing as the most protective state in the union in terms of trust law. "If anything, this decision should be pushing some of the planners to use Nevada law who were using other state laws. In my opinion, they all should have been using Nevada in the first place, but now they've actually seen a case where Nevada upheld its law," says Oshins. "That should push them from which ever state they were using for these trusts to now start using Nevada for every one of these trusts."

## YOUR PARTNER IN PLANNING IS PREMIER TRUST

Demand for asset protection trusts is growing fast, and the recent Klabacka vs. Nelson decision reaffirms Nevada's status as the most favorable jurisdiction in America for establishing these vehicles. As you work to make asset protection trusts an integral part of your business, you will need a partner experienced in all aspects of the Nevada trust landscape. Premier Trust is ready to help you navigate the changes and deliver solutions that work in your clients' best interests. We are a Nevada chartered trust company with offices in Las Vegas and Reno providing independent trust administration services to our clients across the United States who want to benefit from the Nevada Advantage; Nevada's favorable trust, corporate, asset protection and tax laws. Whether you or your clients are looking for high-end estate planning, basic trust services or want to invest in non-traditional assets within an IRA, Premier Trust offers the cost-effective, creative, flexible administrative solutions for estate plans of any size and situation with a full line of personalized trust, IRA, and estate settlement services.

**For more information contact us at:**  
Premier Trust 4465 S. Jones Blvd,  
Las Vegas, NV, 89103  
Tel: (702) 577-1777 Fax: (702) 507-0755

