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Which Trust Situs is Best in 2018?

An updated ranking matrix, taking into account the possibility of estate tax repeal.

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In our view, the four top-tier jurisdictions for 2018 (listed by the year they adopted their Rule Against Perpetuities (RAP) legislation) are South Dakota, Delaware, Alaska and Nevada. Each of these jurisdictions is ranked in the first tier and scored high in most categories of the trust matrix included in this article. These jurisdictions are followed closely by Tennessee, Wyoming, Ohio and New Hampshire in the second tier. The top three tiers of trust jurisdictions are described in this article, together with a matrix that explains the factors in the ranking of 32 jurisdictions.

Why is this so important?

In 2018, the trust company business in the United States represents a multi-trillion dollar industry in assets under management. Competition for trust business among U.S. jurisdictions and institutions remains robust, especially for high-net-worth (HNW) individuals. That trend should continue, but the focus of such competition will evolve with changes in the federal transfer tax and state statutory regimes.

Over nearly the past 19 years, we've witnessed federal transfer tax exemptions increase from $600,000 in 1999 for individuals, to $5.6 million in 2018 (or, it's possible that the current exemption will double to $11.2 million under the new tax law proposal).[1]

For the past six years, we've reported that this federal tax regime represented "the perfect storm" for HNW clients as a planning environment. Today, even with the possibility of estate tax repeal in 2024, the benefits of trust planning remain critical and go well beyond possible estate tax savings. The development of flexible planning tools over the past two decades and "best in class" trust laws found in the best jurisdictions permit HNW individuals and their professionals to craft elegant asset protection, governance and long-term transfer strategies that protect a national network of HNW multi-generational enterprises.[2]

While the tax proposals of the Trump administration represent an about-face from the 2016 Obama administration's direction affecting HNW planning strategies and valuation rules, those proposals represent a shift in political winds that may be as fickle as the next election cycle. Careful trust planning today locks in advantages and increases predictability in result and assists in controlling future risk, including governmental risk.

There's a marked difference between the laws of those jurisdictions that we consider "the best" for trusts and those that we deem less competitive. Planning professionals who cater to HNW clients need to understand the different trust laws and planning opportunities and how it affects those clients and their beneficiaries. This is especially true when the landscape for planning strategies for their HNW clients is under tremendous pressure to change.

In those jurisdictions that have the best trust laws, clients are still able to provide their assets with the most effective wealth transfer for generations, even perpetually, while legally eliminating current and future federal or state gift and death taxes and state income taxes. So, which factors are most important to consider?

In the January 2016 issue of *Trusts & Estates*, we provided a matrix to compare the relative strengths of the then-31 jurisdictions that had repealed or modified their RAPs.[3] In 2018, the number of perpetual or near-perpetual jurisdictions is 32, with the addition of Kentucky. Laws in several jurisdictions have changed, and the factors that we consider important to compare have been modified, so we've updated the ranking matrix and expanded our discussion of those factors. (See "Best Situs at a Glance ," pp. 92-95.)

New Developments

Seven new developments have added complexity to the question of which situs is best.

Increase in federal estate exemption. The Trump administration and congressional Republicans have proposed a doubling of the gift, estate and generation-skipping transfer (GST) tax exemption in 2018, thus increasing the exemption from $5.6 million to $11.2 million per individual. The House version of the bill proposes a six-year phase-in of an estate tax repeal. The Senate version doesn't repeal the estate tax. The House version keeps intact the step-up in basis rules and retains the larger gift and GST tax exemptions on estate tax repeal. If passed, this bill creates a tremendous (albeit perhaps short-lived) boon for HNW clients.

No revision to the Internal Revenue Code Section 2704 valuation and installment sales rules. During the Obama administration, the Treasury department was pursuing changes to valuation discounts of closely held business entities and to the estate tax benefits of installment sales rules. Those changes would have significantly reduced the effectiveness of intrafamilial asset sales and other transfer strategies to trusts, thus largely negating the benefits of those transactions.

On April 21, 2017, President Trump directed the Treasury Department in Executive Order 13789 to identify tax regulations issued on or after Jan. 1, 2016, "that (i) impose an undue financial burden on United States taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the Internal Revenue Service." In a second report in response to Executive Order 13789, the Treasury Department and the IRS announced that they'll withdraw the controversial proposed regulations about disregarded restrictions and lapsing rights under IRC Section 2704, and those proposed regulations were officially withdrawn.[4]

State constitutions and conflicts of laws. In 2016, we reported that an article entitled "Unconstitutional Perpetual Trusts"[5] by Steven Horowitz and Harvard Professor Robert H. Sitkoff raised the question of the constitutionality of perpetual trusts in certain jurisdictions that have proscribed them in their constitutions. They also raised important questions about conflict-of-law issues when a trust settlor's resident state may have a strong legitimate public policy against perpetual trusts.

We concluded then "that with respect to constitutional questions and conflict-of-law issues, practitioners should look at the quality of the perpetuities laws of the subject jurisdiction, the quality of other laws that are available to benefit the client and the jurisdictional 'nexus' requirements that have been defined on behalf of prospective clients."[6]

State income taxation of non-resident trusts. Income tax proposals have arisen in certain boutique states. For example, over the past couple of years, we've seen advisors focus on Alaska's budget issues; specifically, Governor Bill Walker has proposed the first state income tax in 35 years to combat a $3+ billion deficit. This deficit is a result of the state's heavy reliance on the oil industry as a main generator of jobs and state funds. That reliance has become quite problematic with the drop of oil prices. As such, this could potentially lead to trusts with Alaska situs to incur state income tax if the proposal goes through.[7] Similarly, Nevada has recently imposed a commerce tax on its businesses that many advisors have taken issue with. Consider the health of the economy and tax base when selecting a potential trust situs, because the state income tax laws could change based on political and economic conditions.

In another development, *Residuary Trust A (Kassner) v. Director* calls into question the legitimacy of resident state taxing authorities attempting to tax trusts created in non-taxing jurisdictions.[8] While in recent history, states have been permitted to tax trusts that were created in other jurisdictions under long-arm jurisdictional rules, the case law in some instances is trending the other way.

Changes in premium tax. Delaware lowered its premium tax from 200 basis points (bps) to 0 bps in excess of $100,000 for trust-owned life insurance policies covering the life of an individual who participates in private placement.[9] However, Delaware's low premium tax doesn't apply to policies owned by limited liability companies (LLCs). The other two lowest premium tax states, South Dakota and Alaska, provide a low premium tax, 8 bps, for both trust and LLC-owned policies. Alaska recently lowered its premium tax, so it's now the same as South Dakota.

No federal RAP. Among President Obama's 2016 budget proposals was a durational limit on the GST tax exemption of 90 years. This proposal gained no traction with Congress, which we believe is the correct result.[10]

Domestic asset protection trust (DAPT) case. In *Klabacka v. Nelson*,[11] a Nevada case, the court held that since no child or spousal support obligations were known at the time of the formation of the DAPT, the DAPT was protected. No court order or agreement for child support or alimony was present at the time of formation. Other DAPT states (for example, South Dakota) would likely provide the same exception creditor protection, given the same facts. There's nothing to suggest that a South Dakota court would come to a different result given the same facts. For example, South Dakota's requirement of notice for transfers of marital property wouldn't have been applicable in this case because it involved separate property, not marital property (and in either case, the notice requirement likely would have been met since the husband and wife created the separate DAPTs together). The Nevada court in dicta provided a possible key distinction between community property and separate property.

The Trust Matrix

We've outlined five broad categories (including 25 sub-categories) as they relate to the strength of trust laws and how to evaluate them: (1) a jurisdiction's form of any applicable RAP or the law that determines how long a trust may legally exist; (2) whether a state has inheritance, income or premium taxes; (3) what modern trust laws have been adopted, how state courts have interpreted those laws and how accommodating the financial and legal system is to trusts; (4) what asset protection laws exist and their legal interpretations; and (5) the effect of migration on the rights of beneficial interests from state to state.

Top-tier Jurisdictions

In our view, the four top-tier jurisdictions for 2018 (listed by the year they adopted their RAP legislation) are South Dakota, Alaska,[12] Nevada and Delaware. Each of these jurisdictions scored high in most categories of the trust matrix.[13] While Delaware has been in the top four jurisdictions consistently for the past 10 years, we think its asset protection laws still need to be strengthened for it to remain competitive.

We rank New Hampshire, Ohio, Tennessee and Wyoming in the second tier. New Hampshire is a perpetual trust jurisdiction that's strengthened its trust laws similar to the top tier jurisdictions. But, New Hampshire's DAPT laws aren't, in our opinion, as strong as those of most of the highest ranked states. Tennessee and Ohio have done the most to strengthen their laws in the past two years and are emerging jurisdictions, and Tennessee has a 360 term-of-years RAP period and both decanting and directed trust statutes, and it recently improved its asset protection laws. Ohio is an "opt-out" state, but is similar to Tennessee in that it's adopted a stellar DAPT statute. Tennessee is one of the states that has a constitutional prohibition against perpetuities that may be of a concern. Ohio's discretionary trust protection also remains problematic. Wyoming has been in the second tier consistently for six years. Wyoming has a 1,000-year RAP period and other features, including, recently, a decanting statute. Wyoming has both regulated and unregulated private trust company statutes.

Three jurisdictions have improved their laws and asset protection reputations in the past several years and round out the third tier of ranked jurisdictions. These jurisdictions are: Florida, Illinois and Utah. Illinois is an opt-out jurisdiction and has added new directed trust and trust protector provisions. Florida has a 360 term-of-years RAP period and no state income tax but lacks domestic DAPT features. The recent *Casselberry* case in Florida appears to create a serious issue with Florida's spendthrift and wholly discretionary trusts.[14] Utah has a 1,000 term-of-years RAP period and has adopted directed trust and self-settled trust legislation, but it has an income tax.

Most of the remaining trust jurisdictions, however, have lagged with respect to modern trust laws or have less impressive DAPT laws.

We've created our rankings using objective criteria similar to what we used in the 2010, 2012, 2014 and 2016 articles in this journal. We have, however, modified the importance of several factors. We hope these changes will help bring more clarity and provide you with a balanced view as you consider the nuances of all the jurisdictions' laws and how those laws might serve your clients' needs—or adversely impact them.

The RAP: Perpetual or Near-Perpetual

Under the common law RAP, an interest in trust must vest, if at all, within the period of a life in being, plus 21 years (plus a reasonable period for gestation). Several states have adopted the Uniform Statutory Rule Against Perpetuities (USRAP), which sets the duration of a trust to the greater of the RAP or 90 years. In those states that have repealed or modified the RAP, it's possible to exempt from gift, estate and GST taxes all trust assets for as long as the trust is permitted to exist. Over the past 62 years, 31 states and Washington, D.C. have abolished or modified their RAPs, in whole or in part, so that trusts created in those jurisdictions can last forever or, at least, for very long periods of time.

In 1986, Congress adopted the GST tax regime, which incorporated some assumptions and safe harbors patterned after either the RAP or the USRAP. But, three jurisdictions already had abolished their RAP and, instead, adopted a more flexible rule against alienation and suspension of powers (RAASP): Idaho (1957), Wisconsin (1969) and South Dakota (1983). These actions established the first perpetual trust jurisdictions.[15]

Since the federal GST tax was adopted, 29 more jurisdictions have modified or repealed their RAP or USRAP (and Oklahoma purports to have an exception under case law). Of those, nine abolished their RAP and/or USRAP: Alaska, Delaware, Kentucky, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Rhode Island.

There are 21 jurisdictions that didn't abolish it altogether—some because of longstanding policy concerns, constitutional barriers or political resistance. Rather, they've merely modified the RAP in some way. In those jurisdictions, it may be impossible to abrogate the rule fully. Seven of those states have extended the RAP periods to a term of years: Colorado (1,000 years), Florida (360 years), Nevada (365 years), Tennessee (360 years), Utah (1,000 years), Washington (150 years) and Wyoming (1,000 years). Georgia is in the process of changing their USRAP to 360 years (scheduled now for 2018).

The remaining 13 jurisdictions are opt-out jurisdictions. There, the RAP or USRAP is retained, and by statute, the interests in a trust are permitted to opt out of or be exempted from the RAP period. These jurisdictions include: Alabama, Arizona, Hawaii, Illinois, Maine, Maryland, Michigan, Nebraska, North Dakota, Ohio, Oklahoma (case law only), Virginia and Washington, D.C.

In 2003, author Garrett Moritz, in a *Harvard Law Review Note*,[16] outlined six approaches that jurisdictions have undertaken to create perpetual or long-term trusts. These approaches fall into three broad categories:

1. the *Murphy* perpetual trust,

2. the term-of-years trust, and

3. the opt-out trust.

***Murphy* Approach**

In *Murphy v. Commissioner*, the Tax Court affirmed Wisconsin's method of repealing its RAP. Known as "the *Murphy* approach," this case upholds a Wisconsin law that provided for the complete repeal of the RAP and

substitution of a more flexible, alternate vesting statute. This approach addresses both the RAP's timing and vesting elements for GST tax exemption purposes. The *Murphy* approach is considered the best perpetual trust jurisdiction law method.

Alaska, Delaware, New Hampshire and South Dakota are the strongest of these truly perpetual jurisdictions.

South Dakota is the only original *Murphy* jurisdiction of the three. Alaska is also a very strong contender, but has a 1,000-year power of appointment (POA) statute.

Delaware has similar issues if a limited POA (LPOA) is used.

The remaining *Murphy* trust jurisdictions have done little to maintain their competitiveness in trust law or asset protection. Exceptions are Idaho, which has adopted a trust protector statute and, recently, North Carolina, which now has a directed trust statute. Kentucky has adopted a decanting statute.

Term-of-Years Approach

The second most used approach is the term-of-years approach. Nevada, Tennessee and Wyoming are the most progressive jurisdictions using this approach; they also keep their trust laws current, and Nevada and Wyoming have no income tax. Tennessee taxes only the dividends and interest of residents.

Florida, however, has adopted a directed trust statute, decanting and reformation and virtual representation laws, and it has no state income tax. Florida appears to have a problem with wholly discretionary and spendthrift trust protection.[17] Tennessee has also adopted self-settled trust legislation. Utah added a directed trust statute, decanting and reformation laws and adopted self-settled trust legislation but has done little else in the asset protection arena.

As noted by trust expert Richard Nenno, the term-of-years approach isn't preferred to the *Murphy* approach. However, if a term-of-years jurisdiction has incorporated the safe harbor vesting provisions of *Murphy*, we believe that the result for GST tax exemption purposes may be the same as with other *Murphy* jurisdictions, except for the term of years specified rather in perpetuity.[18] If both the vesting and timing requirements of *Murphy* are met, the term-of-years period should work for the purposes of the GST tax and continue the GST tax exemption.

For example, while the Tennessee statute limits the RAP period to 360 years, it also provides an alternate possible vesting at 90 years.[19]

Opt-out Approach

The opt-out RAP approach remains the least favorable for trusts, primarily because the RAP or USRAP is maintained as part of state law, so the underlying RAP period is unchanged. Illinois and Ohio are the strongest opt-out jurisdictions. Ohio doesn't tax trusts created by non-resident grantors and has a directed trust statute.[20] It also added asset protection and self-settled trust legislation. Neither state taxes non-resident trusts; each has domestic trust protection, DAPT statutes and decanting provisions. Illinois has among the lowest premium tax; has adopted both directed trust and trust protector elements in its laws; and provides a virtual representation feature (that is, provides for the administration and court supervision of trusts in which there are contingent, unborn or unascertainable beneficiaries).

Arizona has an income tax, and it now has directed trust, trust protector, decanting and reformation and virtual representation statutes.[21] Maine, Virginia and Washington, D.C. also have directed trust statutes, and

Virginia has added additional creditor protection and self-settled trusts. The remaining opt-out jurisdictions lack any modern trust features that are important in our rankings.

The result of these opt-out exception statutes remains unclear for the purposes of continued GST tax exemption, beyond the stated underlying statute (RAP/USRAP) of the jurisdiction. While some opt-out states have attempted to blend the *Murphy* vesting exception into their statutes, it's unclear whether the *Murphy* vesting language is effective, unless the underlying RAP/USRAP is abrogated.

State Income

Whether a state imposes a state income tax and, to a lesser extent, taxes insurance premiums, are important issues. The state income taxation of a non-grantor trust accumulating income can have a deteriorating effect on trust corpus. This erosion is particularly evident with perpetual trusts. Often, clients choose to change the situs of their trust just to legally avoid the payment of state income taxes. Seven states—Alaska, Florida, Nevada, Pennsylvania, South Dakota, Washington and Wyoming—are the only perpetual or nearly perpetual jurisdictions with no state income tax, but, as was stated above, Alaska is considering an income tax to offset oil and gas tax revenue shortfalls. The final form of the tax and its application to non-resident trusts will be of important note.

Nevada recently enacted a "commerce tax," which taxes business activity in the state when revenues are in excess of $4 million annually. The applicable tax rate differs depending on the primary market sector in which business activity is engaged. An annual report is required from all businesses, even if they're exempt from the tax.[22] There are six additional jurisdictions that have a state income tax for residents, but exempt non-resident grantors and beneficiaries of perpetual trusts from state income tax: Delaware, Illinois, New Hampshire, Ohio, Tennessee and Wisconsin.[23]

Income taxation of trusts is becoming a more complex question resulting from states eager to extend the reach of their taxing authority. For example, there's been past litigation in Connecticut and Washington, D.C., as well as proposed legislation and informational reporting requirements in New York and elsewhere.[24] A handful of states attempt to continue to tax a trust regardless of a change of situs to another jurisdiction. This trend has become more common as states have looked for additional tax revenues in a tight economy. However, recently, a series of cases have gone the other way.[25]

Premium Taxes

Taxes on insurance premiums are another factor to consider with billions of insurance premium dollars at play. The least expensive premium tax jurisdiction is now Delaware (0 bps) after premiums of $100,000 for policies in trust. Policies owned by LLCs are still subject to Delaware's higher premium tax. South Dakota continues to be 8 bps for all insurance premiums, Alaska (8 bps), Illinois (50 bps), Wyoming (75 bps) and Nebraska (100 bps). The other highly ranked jurisdictions have higher premium taxes: New Hampshire (125 bps), Ohio (140 bps), Florida (175 bps), Tennessee (175 bps), Utah (225 bps) and Nevada (350 bps). (See "Best Situs at a Glance," pp. 92-95, for a list of premium taxes for all jurisdictions.)

The premium tax issue becomes particularly important when considering entities like LLCs in private placement life insurance programs. Properly sitused and administered LLCs avail clients to lower premium taxes and allow a client to be a look-through "qualified purchaser" for securities law purposes; otherwise, additional funding is needed to qualify.

Modern Trust Laws

During the past decade, competitive perpetuities jurisdictions have tried to keep pace with the development of modern trust laws. Flexibility is a key concern when considering the creation and administration of multigenerational trusts. Consider laws that provide:

1. Effective flexible trust planning and administration tools, including LPOAs and the ability to decant or reform a trust if necessary;

2. The ability to change situs for income tax and estate tax purposes without triggering a constructive addition for GST tax exemption purposes;

3. An effective directed trust statute so that investment and distribution direction may be separated from the duties of the administrative trustee;

4. Statutory acknowledgment of the role of trust protector;

5. Statutory ability to change provisions in an irrevocable trust through decanting or reformation;

6. Clear situs rules (including possible conflict-of-law issues) and setting unambiguous standards for which situs' laws to apply;

7. Statutory authority for trust reformation and decanting, with clear access to courts;

8. Statutory authority for virtual representation of all beneficial interests;

9. Effective privacy laws and beneficiary quiet statutes; and

10. The ability to facilitate and administer private family trust companies (PFTCs) in a Securities and Exchange Commission-exempt environment.

LPOA. This tool is included to create intergenerational flexibility by allowing a powerholder to appoint assets to various beneficiaries. But, note IRC Section 2041(a)(3), which prevents the abuse known as the "Delaware tax trap,"[26] referring to the exercise of successive LPOAs over successive generations, allowing for a virtual perpetual trust without federal transfer taxes. As such, the use of LPOAs are generally reserved for beneficiaries and decedents who are ascertainable on the creation of the trust to prevent the inadvertent violation of Section 2041(a)(3). Otherwise, this action could be considered a constructive addition (that is, a material or substantial change in the beneficial interests of the beneficiaries) and potentially endanger a trust's zero GST tax-exempt inclusion ratio.

Flexibility for future generations is often achieved through other means for discretionary trusts, such as decanting, reformation, advisory committees, trust advisors with the power to invest and direct distributions and removal and replacement powers.

Alaska and Tennessee are the only perpetuities jurisdictions that have adopted a POA statute that exceeds what would be typically permitted under the safe harbor under Section 2041(a)(3). While Alaska is a *Murphy* jurisdiction for RAP purposes, at least one authority[27] is concerned that the use of a POA provision beyond the safe harbor would create a constructive addition for GST tax purposes.

Change of situs. The ability to change the situs of trusts is often important to HNW clients who seek to shop for the most favorable laws. When considering a situs change, examine the wording of the trust's provisions,

including perpetuities language and the applicable law. Look at a possible negative impact such a change would have on the GST tax-exempt status of the trust and its effect on beneficiary rights.

Another related issue is which law may apply to a trust that's changed its situs to take advantage of a perpetual state's trust laws. The Delaware Supreme Court *Peierls* decisions[28] make clear that Delaware law will govern the administration of any trust that allows for the appointment of a successor trustee without geographic limitation once a Delaware trustee is appointed and the trust is administered in Delaware, unless the choice-of-law provision expressly provides that another jurisdiction's laws shall always govern the administration (even if the place of administration or situs changes). According to *Peierls*, the ability to appoint a trustee in Delaware reflects the settlor's implied intent that Delaware law will govern the administration of the trust.

This result occurs when the trust instrument is silent as to governing law or even when the trust instrument provides that some other jurisdiction's laws shall govern. A change of situs among *Murphy* states isn't likely to create a constructive addition because the perpetuities laws are the same. But, a change in situs may affect which state's law applies. It should be noted that, for example, a Florida trust with specific language requiring the Florida perpetuities period to apply could be administered in another state that would continue to honor and apply Florida law.[29]

Directed trust statute. A directed trust statute generally provides that an administrative or directed trustee be appointed and then permits bifurcating or even trifurcating the fiduciary responsibility among different trust advisors. This freedom allows the client to select independent parties, typically designated as co-trustees or trust advisors, to manage both closely held and investment assets, distributions or other fiduciary duties. This selection relieves the directed or administrative trustee from the duty and liability to manage the trust assets. Directed trusts also provide more flexibility and control over asset allocation, concentration and selection of investments. It also allows the client to continue to employ trusted advisors in the professional roles to which the client is accustomed.[30]

A national survey we recently conducted reveals that directed trust fees are typically lower to reflect the fact that the administrative trustee isn't liable for the trust's investment activities because other fiduciaries have those duties.[31] (See "Best Situs at a Glance ," pp. 92-95, for a list of jurisdictions with directed trust statutes.)

Trust protector statute. Such a statute recognizes the authority and limitations of a person or entity that's been appointed as a trust protector. A trust protector is any disinterested third party whose appointment is provided by the trust instrument and whose powers are provided in the governing instrument and in state law. This recognition provides greater flexibility for future generations as conditions change. The strongest trust protector statutes are in Alaska, Delaware, Nevada, New Hampshire, South Dakota and Wyoming.[32]

Such powers may include: modification or amendment of the trust instrument to achieve a favorable tax status or to address changes in the IRC, state law or applicable rules and regulations; the increase or decrease of the interest of any trust beneficiaries, including the power to add beneficiaries in some circumstances; removal and replacement of a trustee; and modifications of the terms of a POA.

A trust protector and trust enforcer is a "must" for a non-charitable purpose trust (NCPT) (that is, a trust that lacks beneficiaries and instead exists for advancing a non-charitable purpose of some kind). Delaware and South Dakota have special provisions for perpetual purpose trusts. Hawaii, Idaho, Illinois, Michigan and Tennessee are newer states that have passed trust protector statutes. The Uniform Trust Code (UTC) also permits trust protectors in a more limited way in states that have adopted its provisions.[33]

NCPTs. NCPTs generally require a trust protector and trust enforcer because the trusts aren't required to have beneficiaries. Their sole purpose is to care for the underlying property that's the corpus of the trusts.

Commonly, NCPTs are permitted for the care of pets and cemetery plots. Delaware and South Dakota allow very broad NCPTs. For example, some of the common purposes for establishing an NCPT are: 1) pet care (including offspring); 2) support of religious gravesite ceremonies; 3) maintenance of: gravesites; honorary trusts; family property (for example, antiques, cars, jewelry and memorabilia); art collections; family homes (residence and vacation); buildings, property or land; and PFTCs;[34] 4) protection of: business interests; royalties; and digital assets; and 5) to provide for a philanthropic purpose not qualifying for a charitable deduction.

Changing Irrevocable Trusts

Changing irrevocable trusts is done on a case-by-case approach because of sensitivity to gift, estate and GST tax issues that may be triggered. There are certain ways to modify irrevocable trusts: trusts settling trusts; decanting; distributing property to a beneficiary in trust; trust protector amendment powers; and reformation. The first three methods involve the creation of a new trust. The latter two methods involve amendment of the current trust. Historically, only judicial action could reform a trust; this process often required the consent of all the beneficiaries or a court-approved equitable deviation.[35]

When we discuss the concept of a trust "settling" a new trust, we mean that the trust provisions of the original trust provide limitations and terms of settling a new trust. A decanting statute may be used as an alternative when a trust doesn't have specific trust provisions allowing the trustee or protector to settle a new trust. South Dakota has the most flexible decanting statute.

Many trust provisions allow a trustee to make a distribution to a beneficiary in trust, rather than outright. Generally, this is the least favored option, because the trust language doesn't specify whether the trust must have been in existence before the distribution or whether the trustee may merely settle a new trust. If it's interpreted that the distribution language gives the trustee the power to settle a new trust, then the question presented is whether there are any limits on provisions in the new trust.

The fourth method is to grant a protector or trustee the power to amend the trust, and the fifth method is through the trust reformation process.

Estate Inclusion Issues

With these methods of creating new trusts or modifying a current trust, there's the question of whether such creation or modification creates an estate tax, gift tax or GST tax issue. Specifically, does changing the dispositive provisions in a trust create a tax issue to the settlor or a beneficiary?

As to the settlor, the estate inclusion issue is whether the settlor, with the consent of anyone, is involved in modifying the old trust or creating a new trust that changes the dispositive provisions. If he is, then there's an estate tax inclusion issue under IRC Section 2036(a)(2). You can remove this estate tax inclusion issue if the settlor's power is limited by an ascertainable standard. While it's a remote argument, if the settlor is attributed the powers of the trustee or protector under an implied (generally oral) promise, and the trustee or protector has the ability to create a new trust or modify a current trust, then there's an estate tax inclusion issue under Section 2036(a)(1).[36]

As it relates to a beneficiary, if an independent trustee exercises the power to create or modify the dispositive provisions, generally there shouldn't be an estate inclusion issue, unless the implied promise argument is used to attribute the trustee or protector powers to the beneficiary. By definition, an independent person isn't a beneficiary of the trust, and estate and gift tax inclusion issues apply to the settlor or a person who holds a POA.[37]

While most estate planners aren't concerned with an attribution issue when using an independent trustee or protector to modify the dispositive provisions of a trust, the IRS hasn't issued definitive guidance and is currently studying the issue. Therefore, some conservative planners advocate that when they use one of the trust creation or modification techniques, the dispositive provisions should remain the same.

Change of situs, standards and Covey provisions. State law may actually change the dispositive provisions when a trust changes its governing law. Or, the trustee or protector adding or removing any standard may change the dispositive provisions.

For example, Ohio's UTC takes the most restrictive definition of a discretionary trust. Under common law, a beneficiary of a discretionary trust didn't have an enforceable right to a distribution or a property interest, and the trustee's discretion could only be challenged for: (1) improper motive; (2) dishonesty; and (3) failure to act.[38] The Ohio UTC restricts a discretionary trust to one that has no standards or guidelines. Conversely, the top trust jurisdictions generally define a discretionary trust as one that gives the trustee any discretion in making a distribution, regardless of whether there's a standard or guideline. For example, in Alaska, South Dakota, Tennessee and Wyoming, the following language would be classified as a common law discretionary trust: "The trustee may make distributions to the beneficiaries on Section 2.01 for health, education, maintenance, and support."

Therefore, when a trust that has any standards or guidelines moves from Ohio to Alaska, South Dakota, Wyoming or Tennessee, the beneficiary's interests are reduced from having an enforceable right to a distribution, which most likely is a property interest, to no enforceable right to a distribution and no property interest. That is, the beneficial interests have been changed. For conservative practitioners who don't want any change in beneficial interests, the state statute must provide for keeping an enforceable right. Only South Dakota and Tennessee provide such a provision, which is contained in its discretionary support trust. This provision was recommended by Richard Covey, when he reviewed the South Dakota discretionary support statute. Hence, we use the term "Covey Provision" in one of the columns in our matrix.

On a side note, author Mark Merric met an estate planner who said that almost all his clients wanted the beneficiaries to have an enforceable right to a distribution. From an asset protection perspective, we would generally disagree with this position, particularly for sophisticated or HNW clients. However, the flexibility of the South Dakota discretionary support statute allows for creation of an enforceable right, regardless of the distribution language, should a client desire to do so.

UTC Section 411(a) provides two options: modification with, or without, court approval. Older versions of the UTC didn't require court approval for a modification with the consent of the settlor and all the beneficiaries.[39] Choosing the most appropriate decanting statute depends on the nature of the trustee's discretionary authority and whether the beneficiaries of the new trust include contingent beneficiaries of the original trust.[40]

South Dakota's decanting statute appears to provide the best example of flexibility for trust remodeling.[41] Several states have followed this model.[42]

Trustees or beneficiaries might wish to modify an irrevocable trust to:

1. Improve a trust's governance structure;

2. Change the law applicable to the trust when the terms of the trust don't facilitate a change to its governing law;

3. Change dispositive provisions;

4. Change the administrative terms of the trust to ensure that the trust provides the proper tools to its fiduciaries for the best management of the trust; or

5. Modernize an outdated trust agreement.

Another situs consideration: Advisors should check the respective state courts' experience with judicial reformation and modification of trusts and the procedures, costs and time involved.

Both reformation and decanting statutes provide trustees and trust beneficiaries flexibility without negative GST tax consequences if certain requirements are met. The GST tax regulations create a safe harbor for four types of modifications, none of which affect the grandfathered status of a trust.[43] A decanting or modification that qualifies for one of these safe harbors won't cause a GST tax-exempt trust to lose its exempt status.[44] Recently, the National Conference of Commissioners on Uniform laws issued a Uniform Trust Decanting Act (2015).[45] (See "Best Situs at a Glance ," pp. 92-95, for the jurisdictions that have adopted decanting statutes.)

Special purpose entities/trust protector companies (SPEs/TPCs). Unregulated SPEs/TPCs are, generally, business entities used in combination with a directed trust structure to limit the liability of fiduciaries and more directly tie the trust to the chosen jurisdiction. These may include trust protectors, trust advisors and investment and distribution committees, as well as other individuals and professional entities that serve in advisory and investment roles on behalf of a directed trust or the family. These entities are typically in the form of an LLC organized under the laws of the jurisdiction that permits them. The purpose of such entities is generally limited by statute to a single client or family group. SPEs/TPCs can be created to act on behalf of a family or family group to provide non-trustee fiduciary services akin to a family office. Only New Hampshire and South Dakota have a specific SPE statute. Alaska, Arizona, Delaware, Illinois, Nevada, New Hampshire, South Dakota and Wyoming permit SPEs/TPCs.[46]

Family offices organized as SPEs can fall within the SEC safe harbor rules.[47] The advantage is that some insurers provide directors and officers and errors and omissions coverage to an entity established specifically for these purposes, thus protecting the trust protector and committee members. In contrast to PFTCs, SPEs also provide legal continuity beyond any single individual's death, disability or resignation. The entity's bylaws generally allow for additional members to be added or removed so that the entity can continue along with the trust. These entities need to be properly structured so that they also avoid estate tax inclusion issues.

Virtual representation statutes. Virtual representation statutes are important for discretionary multigenerational trusts. These statutes are designed to facilitate the administration and court supervision of those trusts in which there are contingent, unborn or unascertainable beneficiaries. Typically, if there's no person "in being" or ascertained to have the same or similar interests, it's necessary to appoint a guardian ad litem to accept service of process and to protect such interests.

Several jurisdictions that have specific virtual representation statutes include: Alaska, Arizona, Florida, Illinois, Nevada, South Dakota and Washington. Delaware has a limited version of virtual representation. The UTC also provides a form of virtual representation.[48] Under South Dakota's virtual representation statute,[49] service of process when notifying beneficiaries is generally limited to persons in being and parties to the proceeding. The court shall appoint a guardian ad litem to represent or protect the persons who may eventually become entitled to an interest, if it doesn't appear that there's a person in being or ascertained as having the same interest. Further, under South Dakota law, it may not be necessary to serve the potential appointees of a POA or the takers in default of the exercise of a general POA. Alaska has a comparable statute, while Delaware and Nevada's virtual representation statutes are more limited. (See "Best Situs at a Glance ," pp. 92-95.)

Privacy laws and quiet statutes. Of the top-tier jurisdictions, South Dakota has the best trust privacy laws. For example, its "quiet statute" not only allows a trust to be quiet during the grantor's life, but also applies after the grantor's death or disability and isn't limited to a period of time, which is unique. Alaska, Delaware and Nevada's privacy laws aren't as extensive.[50] For example, Delaware and Nevada's quiet statutes restrict to a period of time and don't expressly allow for the trust protector to modify notice to beneficiaries. Delaware only provides a 3-year seal period for court matters. In addition, South Dakota has an automatic total seal statute for all court matters involving trusts (for example, litigation or court reformation). In South Dakota, the privacy seal also extends to any possible future litigation or court reformation, which is a significant advantage.[51]

PFTCs. Many HNW families want to establish PFTCs to handle administration of all their family trusts. Often, PFTCs are administered with the assistance of a local trust company that can provide situs-based administrative services at greater cost efficiencies.

In 2016, the most popular perpetual or near-perpetual jurisdictions that permitted PFTCs were: Nevada, New Hampshire, South Dakota and Wyoming. These are still the most popular jurisdictions in 2018. Tennessee's PFTC statute attempts to permit a PFTC and business in one entity. Missouri is the most recent state to enact PFTC legislation.[52] Of all these jurisdictions, Nevada and South Dakota have historically contained the greatest number of PFTCs.[53]

The capital requirements for establishing a PFTC differ by jurisdiction and remain the same as they did in 2016. Currently, in capital, Nevada requires $300,000, New Hampshire requires $250,000,[54] South Dakota requires $200,000[55] and Wyoming requires $500,000 for regulated PFTCs. Increasingly, banking regulators are encouraging PFTCs to pledge larger capital requirements than just the minimum amount, especially as PFTCs mature.[56]

Of the key PFTC states, Florida, Ohio, South Dakota, Tennessee and Wyoming are accredited by the Conference of State Bank Supervisors. New Hampshire and Nevada aren't accredited; only four of the 50 states aren't accredited. This accreditation may be a key point if a family is seeking to qualify from SEC exemption via a regulated PFTC.[57]

Independent Trust Companies

These give HNW families more choices. As reported in 2016, many independent trust companies have emerged because of modernization of trust laws, which means that HNW clients have many choices for trust laws and services across 32 different jurisdictions within the United States that offer multigenerational trust planning opportunities.

We conducted a recent survey of what are largely considered the top 50 trust companies within the United States. The trust executives we interviewed were universally concerned with providing high quality service to their clients, while providing compliance that protects the integrity of both the service providers and clients. In our opinion, independent trust companies provide more choices to clients and more flexibility to individuals and families than traditional trust departments because they don't have the inherent conflicts of interest created by the banking and investment side of the business. We also believe that clients can achieve superior accountability and transparency for family investments in a properly managed directed family trust when they choose their own independent advisors.

The modern trust can provide individuals and families far more flexibility intergenerationally, so it's no longer true that the trust needs to be governed by the "dead hand," as some in academia have accused. Rather, modern trusts are living and adaptable documents capable of being managed in a dynamic way. Gone are the

days of the slanted standard trust forms written to confine clients behind the walls of big bank trust departments and to tie the hands of future generations. This flexibility requires more involvement and training of members of the next generation so that they have the maturity and sophistication to participate in the inevitable course corrections that are required to take place over time.

The modern trust can be designed and administered purposefully and in concert with multigenerational goals. Often, HNW individuals combine trust planning with their family foundation and charitable goals to create a connection between wealth and responsibility in successive generations.

Asset Protection—Third-Party Trusts

In our 2016 article,[58] we mentioned that if the Massachusetts Supreme Court upheld the appellate decision in *Pfannenstiehl v. Pfannenstiehl,*[59] many Massachusetts trustees should consider moving trusts to jurisdictions that had more favorable asset protection. Fortunately, the Massachusetts Supreme Court reversed the decision. Our concern was based on the Massachusetts appellate court finding that a discretionary trust interest was marital property eligible for division in a divorce. The Massachusetts Court of Appeals in *Pfannenstiehl v. Pfannenstiehl* [60] had held, "For these reasons, we conclude that the ascertainable standard embedded in the 2004 trust, the enforceability of that standard for distributions to the husband, and the vested nature of the husband's interest in the 2004 trust warranted the judge in including the 2004 trust in the marital estate." The appellate court cited several Massachusetts cases apparently not understanding the difference among conflicted language, Massachusetts case law, the *Restatement (Second) of Trusts (Restatement Second)* and the *Restatement (Third) of Trusts (Restatement Third).* As we noted in our 2016 article, the Massachusetts appellate court could have decided the case either way based on the facts and uncertainty within Massachusetts law; however, its inability to articulate the reasons for its decision was particularly concerning. Unfortunately, this is what happens when a trust statute doesn't define "discretionary interest" and explain the legal results from being classified as a discretionary interest.

When clients seek asset protection for their children and descendants, there are typically two issues they're concerned about: (1) protecting a child's inheritance from claims of an estranged spouse; and/or (2) dealing with claims from third parties. With first marriage divorce rates around 50 percent and divorce rates for subsequent marriages much higher, protecting a child's inheritance from an estranged spouse is typically a much greater concern when compared to third-party creditors.

In our 2012 article,[61] we discussed in detail the greater asset protection provided by a discretionary trust, particularly when states had codified the *Restatement Second.*[62] This is because discretionary trust protection originated under English common law and has nothing to do with spendthrift protection. Rather, it's based on the fact that a beneficiary doesn't have an enforceable right to a distribution,[63] and therefore, no creditor may stand in the shoes of a beneficiary. In this respect, the beneficiary's interest isn't a property interest[64] and is nothing more than an expectancy that can't be attached by any creditor.[65]

A discretionary trust under the *Restatement Second* protects against the most likely creditor, an estranged spouse, in the following three ways:

1. Because a beneficiary's interest in a trust doesn't rise to the level of property, it doesn't become marital property, and therefore isn't subject to division in a divorce.

2. An estranged guardian spouse can't stand in the shoes of a minor child beneficiary and force a distribution on behalf of a minor child.

3. Maintenance or child support is determined by historic distributions to a beneficiary, not an imputed amount that's based on what the trust could have distributed to a beneficiary.[66]

The asset protection planning key to almost all of the aforementioned issues is to draft a discretionary trust when the beneficiary doesn't have an enforceable right to a distribution.[67] Under English common law, the *Restatement of Trusts (Restatement First)*, the *Restatement Second*, as well as almost all case law on point, all of this law was relatively consistent, and estate planners could draft a discretionary distribution standard with relative certainty so that a beneficiary had neither an enforceable right to a distribution nor a property interest. Unfortunately, with almost no case law to support its position, the *Restatement Third* reverses how a court should interpret a distribution standard so that it will almost always create an enforceable right in a discretionary trust.[68] Many estate planners believe that the national version of the UTC follows the *Restatement Third's* position regarding this issue. In response to this problem created by the *Restatement Third*, states (including some UTC states) are beginning to respond with statutes codifying the *Restatement Second* in this area. Absent such statute, even if a state has strong *Restatement Second* case law, a court may reverse its position and inadvertently adopt the *Restatement Third's* new view of discretionary trusts. In this respect, a statute codifying the *Restatement Second* is the only sure method to preserve the asset protection of a common law discretionary trust.

In our 2016 article, we changed the order of importance of the following four key areas that need to be included:

1. The definition of a discretionary trust so planners will know the correct distribution language that should be used.

2. The legal ramifications of a discretionary interest. That is, the statute states that the beneficiary who holds a discretionary interest doesn't hold a property interest or an enforceable right to a distribution.

3. The *Restatement Second*'s elevated judicial review standard for a discretionary interest when a judge would only review the trustee's distribution decision if the trustee acted: (1) with an improper motive; (2) dishonestly; or (3) without using its judgment.[69]

4. No creditor may attach a discretionary interest.

The appellate court in *Pfannenstiehl* struggled with two major questions. What's a discretionary trust, and what are the legal ramifications if it is a discretionary trust? To avoid this confusion, most of the lead trust states have defined a discretionary trust and then stated that a discretionary interest doesn't hold a property interest or an enforceable right to a distribution.

For example, the most detailed definition of a discretionary trust was first adopted by South Dakota and later incorporated into both Nevada trust law[70] and the Tennessee UTC.[71] It was also partially adopted by Indiana.[72] The South Dakota Trust Code begins by classifying distribution interests into three major categories pursuant to Section 55-1-38:

A distribution interest can be classified in three ways:

(1) As a mandatory interest, which is a distribution interest, in which the timing of any distribution must occur within one year from the date the right to the distribution arises, and the trustee has no discretion in determining whether a distribution shall be made or the amount of such distribution;

(2) As a support interest, which is not a mandatory interest but still contains mandatory language such as 'shall make distributions' and is coupled with a standard capable of judicial interpretation; or

(3) As a discretionary interest, which is any interest where a trustee has any discretion to make or withhold a distribution.

A discretionary interest may be evidenced by permissive language such as 'may make distributions' or it may be evidenced by mandatory distribution language that is negated by the discretionary language of the trust, such as 'the trustee shall make distributions in the trustee's sole and absolute discretion.' An interest that includes mandatory distribution language such as 'shall' but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest and not as a support or a mandatory interest. A discretionary interest is any interest that is not a mandatory or a support interest.

Both the South Dakota Statute and Tennessee Trust Code give the following examples of trust language classification in Section 55-1-40:

Although not the exclusive means to create a distribution interest, absent clear and convincing evidence to the contrary, the following language by itself results in the following classification of distribution interest:

(1) Mandatory interest:

(a) 'All income shall be distributed to (named beneficiary)'; or

(b) 'One hundred thousand dollars a year shall be distributed to (named beneficiary)';

(2) Support interest:

(a) 'The trustee shall make distributions for health, education, maintenance, and support';

(3) Discretionary interest:

(a) 'The trustee, may, in the trustee's sole and absolute discretion make distributions for health, education, maintenance, and support';

(b) 'The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance, and support';

(c) 'The trustee may make distributions for health, education, maintenance, and support';

(d) 'The trustee shall make distributions for health, education, maintenance, and support. The trustees may exclude any of the beneficiaries or may make unequal distributions among them';

(e) 'The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare.'

When the proposal was first made to include drafting language as examples of types of classifications in the trust statute, some drafters were concerned that the corporate trustees may have a negative reaction. Actually, the reverse occurred. The corporate trustees were very happy to be able to read the statute, rather than to try to sift through case law and decipher numerous court cases.

Some less detailed approaches, which most likely will have the same effect, are those adopted by Alaska, Oklahoma and Wyoming.[73] These statutes define a discretionary trust very broadly. For example, the Wyoming Statute Section 4-10-103(xxix) defines a discretionary interest as:

. . . a distribution which the trustee is not directed to make, but is permitted to make in the trustee's discretion. For example, the language in a trust instrument providing for a discretionary distribution may contain the words 'may' or 'in the trustee's discretion'. The language providing for a discretionary distribution may include a standard of distribution or other guidance as long as the language or other guidance does not require the trustee to make a distribution in accordance with the standard or guidance.

At the opposite end of the spectrum, and probably the least desirable definition for a discretionary trust, is the Ohio UTC. It creates something it refers to as a "wholly discretionary trust," which is a trust without any standards or guidelines. Richard Covey criticized Ohio's approach due to its very limited definition.[74]

While the Ohio UTC has at least defined a discretionary trust, it doesn't have the other elements that should be included in a discretionary-support trust statute. In particular, the statute didn't state that a discretionary interest is neither an enforceable right nor a property interest. This resulted in Ohio's Supreme Court case of *Pack v. Osborn*,[75] holding, "A significant aspect of a pure discretionary trust is that its assets are not recognized as an available resource in the Medicaid-eligibility review because a pure discretionary trust lacks a mechanism through which a beneficiary may compel a distribution." That is, the beneficiary has no enforceable right to force a distribution. Wouldn't it have been much easier to have stated this in the statute, rather than having to appeal a case to the Ohio Supreme court so that they could correct the Ohio appellate court's interpretation?

This second key element of a discretionary interest statute stating both: (1) the beneficiary doesn't have an enforceable right to a distribution, and (2) the discretionary interest isn't a property interest, has been codified by Alaska, Indiana, Oklahoma and South Dakota. Conversely, the Nevada statute[76] states only that the beneficiary doesn't have an enforceable right to a distribution, and the Wyoming statute[77] states only that the discretionary interest isn't a property interest. As between stating one of the two elements, it's better to state that the beneficiary doesn't have an enforceable right, as the lack of the enforceable right generally prevents the creation of a property interest under federal and state law.[78] Conversely, the statement that a discretionary interest isn't a property interest is a conclusion based on having no enforceable right to a distribution. The reason this has been added to the statute is so courts don't have to attempt a detailed analysis of the sticks of rights necessary to create a property interest under their state laws.[79]

When searching for more favorable trust law, there are some very key lessons that may be learned from *Pfannenstiehl*. First, to think that a domestic relations trial judge is going to spend 150 to 200-plus hours to learn the difference among a discretionary trust, a support trust, a spendthrift trust, the *Restatement Second* and how the *Restatement Third* rewrote the definition of a discretionary trust, and whether the UTC adapts the *Restatement Third's* position, is simply ludicrous. The same is true for many appellate courts. Therefore, the importance of having a discretionary-support statute that clearly defines the language that creates a common law discretionary trust is a critical issue in determining the asset protection provided by a trust. The second significance of *Pfannenstiehl* is the legal finding that the beneficiary of a discretionary trust holds neither an enforceable right for a distribution or a property interest. Third is the dual judicial standard of review, and the determination that a creditor can't attach a discretionary interest. Also, many planners will disagree on whether the activities of the trustees and the relationship of the trustees to the beneficiaries in *Pfannenstiehl* rose to the level to support an alter ego argument method of piercing the trust. For this reason, a "dominion and control" statute becomes important. Estate planners don't want a judge to treat related trustees and advisors of the client serving as a trustee negatively, solely by their relationship to the settlor or a beneficiary.

Dominion and Control Arguments

Other methods that a creditor might use to pierce a third-party trust are dominion and control arguments, as well as alter ego arguments. Therefore, we previously discussed the importance of a statute that protects trust assets from such claims. We noted that South Dakota has the "best" protection against these types of claims, followed by Indiana, Nevada and Oklahoma, which have "good" protection in this category as listed on our matrix. Delaware took a different approach. Its statute provides that a creditor has no more rights than provided by the trust document itself. On one hand, for so long as the drafting attorney is aware of the type of creditor language that needs to be added to a Delaware trust, this may prove to be a novel approach. On the other hand, whether this approach will prevent a Delaware court from using the equitable dominion and control remedy is uncertain.

Self-Settled Trust Legislation

Seventeen states have self-settled trust legislation. Space doesn't permit a detailed discussion of the pros and cons of each of these statutes, except for the limited discussion below. In this respect, the table has been limited to a "Best," "Yes," "Limited" or "No" approach. In our 2017 article, we opined that Nevada, Ohio and South Dakota had the best self-settled trust legislation.[80]

Charging Order Protection

Many times, either a family limited partnership (FLP) or LLC is owned partially or wholly by a trust(s). This strengthens the likelihood that an out-of-state judge will apply the governing law of the trust under conflict-of-laws principles. This is because an LLC or FLP interest is personal property, and, in addition to the factors of the governing law of the trust and the place of administration, some of the trust property is now held in the same state.

When evaluating state charging order statutes, the following categories were used in our matrix. Best jurisdictions (denoted by "Best" in our matrix) have a statute that: (1) prevents the judicial foreclosure sale of the partner's or member's interest; (2) includes a provision denying any legal or equitable remedies against the partnership; and (3) includes a provision preventing a court from issuing a broad charging order interfering with the activities of the partnership. "SR" is used in the matrix to indicate the statute states when a charging order is the sole remedy, and there's no other language in the statute (or comments in the case of a uniform act) stating that a court may issue additional orders to affect the charging order or a court may order the judicial foreclosure sale of the partner's or member's interest. "JF" denotes that either the statute or case law allows the judicial foreclosure sale of the partner's or member's interest. For LLCs, the six lead states on charging order protection are: Alabama, Alaska, Nevada, North Dakota, Ohio and South Dakota. For FLPs, the four lead states are Alabama, Alaska, Nevada and South Dakota.

Migration

Most trust instruments are silent on whether the trustee should look to a beneficiary's resources before making a distribution. Under the *Restatement First, Restatement Second* and most common law, if a trust instrument is silent, then the trustee doesn't have an obligation to look to a beneficiary's resources in determining whether or the amount of a distribution. Rather, the assumption is that the settlor wanted to treat his beneficiaries equally, regardless how well a beneficiary did in his personal life. Unfortunately, the *Restatement Third* reverses common law and prior *Restatements* in this area, by requiring a trustee to look to a beneficiary's resources when the trust instrument is silent. While it isn't certain, it's highly probable that the UTC also adopts this position.

Assume for example that Mom created a trust for the benefit of her three children, the trust instrument was silent as to whether the trustee should look to the beneficiaries' resources and state law followed the general common law that didn't require the trustee to do so when a trust instrument was silent. Now, the beneficiaries wish to move to one of the lead trust jurisdictions to take advantage of their much more favorable trust laws. Would such beneficiaries ever consent to such a change if it would have the effect of decreasing their beneficial interests? In this respect, a state statute that codifies the *Restatement Second* view, in which a trustee isn't required to look to a beneficiary's resources in determining the amount of the distribution, becomes very important as to whether a beneficiary should be in favor of a change in the governing law and place of administration of the trust.

For purposes of the matrix, we've classified the migration column with the titles "*Restatement 2d*" (meaning the state codified the *Restatement Second*) or "*Restatement 3d*" (meaning it's a UTC state, and it will take future litigation to determine whether the UTC adopted the *Restatement Third* view in this area). If the column states "No statute," then the issue hasn't been addressed by statute, and it will be up to the court to determine whether the *Restatement Second* or *Restatement Third* view should prevail.

Endnotes

1. The estate tax, which is paid only when property and other assets worth over $5.6 million are passed on to heirs, doubles to $11.2 million in 2018 (around $22.4 million for couples), resulting in a lot fewer people paying the tax. Under the House Bill, the estate tax goes away entirely in 2024. High-net-worth individuals also would get to keep charitable deductions, and they no longer would have to pay the alternative minimum tax, a safeguard against excessive tax dodging that's been in place since 1969. Some wealthy business owners would be able to take advantage of the lower pass-through rate as well. Overall, the Tax Policy Center found that half the benefits of the bill go to the top 1 percent by 2027. *See* *www.washingtonpost.com/news/wonk/wp/2017/11/16/the-house-is-voting-on-its-tax-bill-thursday-heres-what-is-in-it/*.

2. Daniel G. Worthington and Mark Merric, "Which Situs is Best in 2016?" *Trusts & Estates* (January 2016), at p. 61; Daniel G. Worthington and Mark Merric, "Which Trust Situs is Best in 2014?" *Trusts & Estates* (January 2014), at p. 53; Daniel G. Worthington and Mark Merric, "Which Situs is Best in 2012?" *Trusts & Estates* (January 2012), at p. 51; Daniel G. Worthington and Mark Merric, "Which Situs is Best?" *Trusts & Estates* (January 2010), at p. 54; Daniel G. Worthington, "Latest Perpetual Trust States—Latest Rankings," *Trusts & Estates* (January 2007), at p. 59; Mark Merric, "How to Draft Distribution Standards for Discretionary Dynasty Trusts," *Estate Planning* (March 2009). *Compare* Steven J. Oshins, "4th Annual Dynasty Trust State Rankings Chart" (updated 2014), *www.oshins.com/images/Dynasty_ Trust_Rankings.pdf* with "6th Annual Domestic Asset Protection Trust State Rankings Chart" (updated January and February 2015), *www.oshins.com/ images/DAPT_Rankings.pdf*.

3. *Ibid. See also* Howard Zaritsky, "The Rule Against Perpetuities: A Survey of State (and D.C.) Law," American College of Trust and Estate Counsel (ACTEC) (2012), *www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf*; Jesse Dukeminier and James E. Krier, "The Rise of the Perpetual Trust," 50 *UCLA L. Rev.* 1303, 1316. *See* Idaho Code Section 55-111 (Michie 2000); Wisconsin Statute Section 700.16(5) (1999); South Dakota Codified Laws Section 43-5-8 (Michie 1997). See also Delaware Code Ann. Tit. 25 Section 503(a) (Supp. 2000); 765 Illinois Comp. Stat. Ann. 305/4 (West 2001); Alaska Stat. Section 34.27.100 et al.; New Jersey Stat. Ann. Section 46:2F-9 (West Supp. 2002); Ohio Rev. Code Ann. Section 2131.08(B) (West Supp. 2003); Maryland Code Ann. Estates & Trusts Section 11-102(C) (2001); Florida Stat. Ann. Section 689.225 (West 2003); Arizona Rev. Stat. Ann. Section 14-2901(A)(1) (West Supp. 2002); Missouri Ann. Stat. Section 456.025 (West Supp. 2003); Nebraska Rev. Stat. Sections 76-2001 (1996 and Supp. 2002); Colorado Rev. Stat. Sections 15-11-1102.5 (2006); Maine Rev. Stat. Ann. Tit. 33, Sections 101 (West 1964); Rhode Island Gen. Laws

Section 34-11-38 (Supp. 2003); Virginia Code Ann. Section 55-13-3(C) (Michie Supp. 2002); District of Columbia Code Sections 19-904(a)(10), 19-901 (2002); Washington Rev. Code Ann. Section 11.98.130 (West 2002); Wyo. Stat. Ann. Section 34-1-139 (2003); New Hampshire Rev. Stat. Ann. Section 547:3-k and 564:24 (West, Westlaw through 2003 Sess.); Utah Code Ann. Sections 75-2-1201 (Lexis Supp. 2002); Nevada Rev. Stat. Section 111.1031 (Nev. Rev. Stat. Ann. 2 Sections 111.103-1039 (Michie Supp. 2004)); Tennessee Code Ann. Section 66-1-202(f) (2007); North Carolina Gen. Stat. Section 41-15 (2007); 20 PSA Section 6107.1 (2007); MCLA Section 554.71 (2008); Haw. Rev. Stat. Section 525-4(6) (2010); Ala. Code Section 35-4A-5(9) and N.D. Cent. Code Sections 47-02-27.1 to 47-02-27.4; KRS Chapter 381.224 (2010); Annotated; *See generally* Richard A. Oshins and Steven J. Oshins, "Protecting and Preserving Wealth into the Next Millennium [Part Two]," *Trusts & Estates* (October 1998), at p. 68; Daniel G. Worthington, "The Problems and Promises of Perpetual Trusts," Trusts & Estates (December 2004), at p. 15; N.D. Cent. Code Sections 47-02-27.1 to 47-02-27.5: The Rule Against Perpetuities (RAP) doesn't apply to a "fiduciary's power relating to the administration or management of assets" or to a "discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;" Oklahoma: The RAP doesn't apply to a trust if the trustee is granted the full power to sell or transfer the trust assets. *See Pipkin v. Pipkin*, 370 P.2d 826 (Okla. 1962). In our view, the methodology for ranking trust jurisdictions addresses two related questions: (1) Does the jurisdiction permit truly perpetual trusts or something less? and (2) Does the jurisdiction have other trust laws and practices that give it an edge? We believe that experience with existing perpetual trust laws, administrative issues, ease of interaction with the courts and other trust law issues are all important considerations.

4. Executive Order 13789 (2017); *see www.actec.org/resources/capital-letter-no-42/* .

5. Steven Horowitz and Robert H. Sitkoff, "Unconstitutional Perpetual Trusts," 67 *Vand. L. Rev.* 1769 (2014).

6. In *Estate Planning Newsletter* #2263, Jonathan Blattmachr, Mitchell Gans and William Lipkin provided their views of the Horowitz/Sitcoff article, ibid, and claimed that its position may be correct. "It is ... appropriate to determine what the effect would be if the statute under which the trust is created is invalid under the state constitution. That in turn raises other issues, such as: (1) whether the effect of declaring the state statute allowing long-term trusts unconstitutional might be a 'reversion' to the common law rule, and (2) whether the trust is entirely invalid...." Although the Horowitz/Sitcoff article doesn't directly suggest potential remedies, at least two may be available: (1) a reformation under which a court may reduce the term to one that doesn't violate the application rule on trust duration; or (2) a court can adopt the "wait and see" rule to see if the duration, in fact, violates the rule. If the trustee has the power to terminate the trust by, for example, paying the assets to someone before the allowable duration passes and does so, that might salvage the trust. The article also suggests the use of "Maximum Duration for Trusts" language to save the perpetuities period if necessary. *Compare* Steven J. Oshins, "The Rebuttal to Unconstitutional Perpetual Trusts," Steve Leimberg's *Estate Planning Email Newsletter*—Archive Message #2265, in which the author describes why the questions Horowitz/Sitkoff raised in their article shouldn't be applied to Nevada trusts because of Nevada legislative history and case law. *Compare Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 131 Nev. Advance Opinion 13 (2015); Steve Leimberg's *Estate Planning Email Newsletter*—Archive Message #2297.

7. "Gov. Walker pitches 1.5 percent income tax with a limit," *www.alaskapublic.org/2017/09/22/gov-walker-pitches-1-5-percent-income-tax-with-a-limit/* .

8. *See Residuary Trust A (Kassner) v. Director*, Docket No. 0A-3636-12T1 (App. Div. Unpublished May 28, 2015); *Kassner Residuary Trust A v. Director*, 27 NJ Tax 68 Tax 2013) and *McNeil v. Commonwealth, PA Comm. Court*, No. 651 FR 2010, 173 FR 2011 (May 24, 2013). *See Pennoyer v. Taxation Division Director*, 5 N.J. Tax 386 (1983); *Potter v. Taxation Division Director*, 5 N.J. Tax 399 (1983).

9. *See* Chart, *www.debankers.com/Assets/Tuesday%20Sessions/Session%204A%20-%20You%20Can%20Go%20Your%20Own%20Way/You%20Can%20Go%20Your%20Own%20Way%20-%2010-25-16.pdf*.

10. General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals, *www.treasury.gov/resource-center/tax-policy/Documents/General- Explanations-FY2016.pdf*; Mitchell A. Drossman, "Reviewing Obama's 2016 Tax Proposals: So many proposals in the Administration's fiscal 2016 budget, but do any of them stand a chance of passing?" *Trust Acumen*, Issue 29, U.S. Trust (2015); *see also* *www.bna.com/states-sidestepping-congress-n73014445289/*.

11. *Klabacka v. Nelson*, 133 Nev. Adv. Op. 24 (May 25, 2017).

12. While Alaska adopted an opt-out type perpetuities statute in 1997 for certain trusts, it later adopted a Murphy-type statute (in 2000) to resolve the RAP problem. It also adopted a 1,000-year power of appointment (POA) statute that may effectively limit the generation-skipping transfer (GST) tax exemption of a trust. *See* Richard Nenno, "Relieving Your Situs Headache: Choosing and Re-choosing the Jurisdiction for a Trust," 2006 Heckerling Tax Institute.

13. *Compare* Steven J. Oshins, 6th Annual Dynasty Trust State Rankings Chart (October 2017), *http://ultimateestateplanner.com/free-resources/6th-annual-dynasty-trust-state-rankings-chart/*; The criteria for Oshins' ranking is based on seven factors. He places the jurisdictions in the following order: (1) South Dakota; (2) Nevada; (3) Tennessee; (4) Alaska; (5) Wyoming; (6) Rhode Island; (7) Ohio; (8) Delaware and Illinois (tie); (10) Missouri and New Hampshire (tie); and (12) Florida.

14. In *Berlinger v. Casselberry*, Case No. 2D12-6470, 6 (Fla.2d DCA Nov. 27, 2013), the Florida Second District Court of Appeal upheld a writ of garnishment issued by a trial court against the trustee of a discretionary trust over any present and future distributions made to or for the benefit of a trust beneficiary. The holding is unique as it's the first case to interpret the Florida Trust Code spendthrift/discretionary trust provisions (since the Florida Trust Code became effective on July 1, 2007) and the first case to hold that the well-known Bacardi v. White decision (463 So.2d 218 (1985)) is still applicable to Florida trusts (both those protected by spendthrift clauses and those that are wholly discretionary).

15. These jurisdictions often are referred to as the "original *Murphy* jurisdictions" after the case that validated this approach. *See Estate of Murphy v. Commissioner*, 71 T.C. 671 (1979), in which the Tax Court held that the Delaware tax trap wasn't violated in Wisconsin. The Internal Revenue Service acquiesced in *Murphy*.

16. *See* Garrett Moritz, "Dynasty Trusts and the Rule Against Perpetuities," 116 *Harv. L. Rev.* 8 (June 8, 2003). *See also* Daniel G. Worthington, "Problems and Promises of Perpetuities Planning," *Trusts & Estates* (October 2005), at p. 10.

17. *Berlinger, supra* note 14.

18. The GST tax result in the term-of-years states may be different from the result in Murphy unless: there's a real possibility of a vesting or alienation of the trust interests; and that method of vesting is described in the statute (for example, vesting or alienation occurs with the trustee's ability to sell or distribute assets). If these conditions are met, the term-of-years period should work for purposes of the GST tax and continued GST tax exemption for the term of the trust. For a contrary view, *see* Nenno, *supra* note 12, at 3-1; 3-51.

19. *See* TCA Section 66-1-202(f). The common law rule is generally applicable, but: "[a]s to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust may require that

all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years. Provided, however, this section (f) shall only apply to trusts that grant a power of appointment at death to at least one member of each generation of beneficiaries who are beneficiaries of the trust more than ninety (90) years after the creation of the interest. The permissible appointees of each such power of appointment must at least include all descendants of the beneficiary, yet may include other persons."

20. Residency is determined by the domicile of the person who transferred the net assets to the trust. *See* OHIO R.C. 5747.01(A)(6), (I) and (S), 5747.02 and 5747.05 at Section 5.

21. *See* Arizona's ARS Section 14-2901(A)(3) and *compare with* Illinois' IL ST Ch. 765, Section 305/4 and Maine's 33 MERSA Section 101-A. *See also* Maryland's MD Est. & Trust Section 11-102(5); Missouri's V.A.M.S. Section 456.025(1); and Elizabeth M. Schurig and Amy P. Jetel, "Summary of State Rule Against Perpetuities Laws," *www.abanet.org/rppt/meetings_cle/2007/Jointfall/Joint07/JointEstateandGiftax/50-statecomparison ofspendthrifttrustlaws.pdf*.

22. On June 10, 2015, Governor Brian Sandoval of Nevada signed SB 483, thus enacting a new "commerce tax" (effective July 1, 2015) applicable to each "business entity" engaged in business in Nevada with Nevada situs gross revenue exceeding $4 million in a taxable year. If a business
entity's Nevada gross revenue exceeds $4 million, the excess is subject to tax at various rates that depend on the industry in which the business entity is "primarily engaged."

23. *See* Steven J. Oshins, "1st Annual Non-Grantor Trust Statute Income Tax Chart" (July 2015), www.oshins.com/images/State_Income Tax_Chart.pdf for reference statutes, rates and conditions.

24. *See* Paul Comeau and Jack Trachtenberg, "Corporate Fiduciaries, Advisors and Other 'Co-Trustees'—Perhaps Your Trust Isn't Exempt from New York Income Tax," 38 *NYSBA Trusts & Estate Law Section Newsletter* 1 (Spring 2005).

25. *See* line of cases represented by *Kassner*, *supra* note 8.

26. The Delaware tax trap is one example of how the federal and state laws may interact to create unexpected results. It may be a concern for a trust created in a state where a trust might last beyond the common law RAP or the Uniform Statutory Rule Against Perpetuities. Prior Delaware law provided the opportunity for a perpetual trust without federal transfer taxes through the exercise of successively limited POAs over generations. Internal Revenue Code Section 2514(d) was enacted to prevent this result from happening. The current section dealing with this issue is IRC Section 2041(a)(3).

27. *See* Nenno, *supra* note 12.

28. *See In the Matter of Peierls Family Inter Vivos Trusts*, No. 16812 (Del. Oct. 4, 2013); *In the Matter of Ethel F. Peierls Charitable Lead Trust*, No. 16811 (Del. Oct. 4, 2013); and *In the Matter of Peierls Family Testamentary Trusts*, No. 16810 (Del. Oct. 4, 2013). "Todd Flubacher & the Delaware Supreme Court's Opinions in Peierls," Steve Leimberg's *Estate Planning Email Newsletter*—Archive Message #2152. *See also* Nenno, *supra* note 12; and Dukeminier and Krier, *supra* note 3, at p. 1316.

29. Some states require a trust be administered in the state for the laws of the state to apply. This requirement is important because one can't merely say in a trust instrument that the laws of State X will apply, if State X has rules that govern the situs of trusts. *See Peierls*, *ibid*.

30. *See* Richard W. Nenno, "State Directed Trust Statutes with Related Uniform Trust Code Statutes," Wilmington Trust Company (Oct. 1, 2013).

31. Daniel G. Worthington conducted a survey of 50 trust companies that offer directed trust services, and the result was similar throughout the United States. *See, e.g.*, SDCL 55-1B et seq. Similar directed trust statutes were patterned after the South Dakota law in other jurisdictions, including Nevada, New Hampshire, Utah, Wyoming, and most recently, Alaska's newest statute. *See* "Best Situs at a Glance ," at pp. 92-95.

32. *See, for example*, SDCL 55-1B-6 (South Dakota), the first modern trust protector statute adopted in 1997. Also, South Dakota has the most expansive quiet trust statute, allowing the protector to keep the trust quiet after a grantor's death or disability, if desired. In addition, trust protectors are required for purpose trusts. Only Delaware and South Dakota have the special dynasty provisions for purpose trusts.

33. South Dakota is followed by Idaho, Alaska, Wyoming, New Hampshire, Tennessee, Delaware, Arizona, Michigan, Nevada and Vermont in adopting a modern trust protector statute. Connecticut's statute dealing with the creation of a trust to provide for the care of animals contains the concept of a trust protector, but otherwise there isn't a specific trust protector statute. Alaska Stat. Section 13.36.370; Ariz. Rev. Stat. Ann. Section 14.10818; 12 Del.C. Section 3570(8)c; Idaho Code Ann. Section 15-7-501; Nev. Rev. Stat. Section 163.5553; N.H. Rev. Stat. Ann. Section 564-B:12-1201(a); S.D. Codified Laws Section 55-1B-6; Vt. Stat. Ann. Section1101(a); and Wyo. Stat. Section 4-10- 710(a). Uniform Trust Code (UTC) trust protectors permitted: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia and Wyoming. Six of these states and the District of Columbia also have a specific trust protector statute: Arizona, Michigan, New Hampshire, Tennessee, Vermont and Wyoming. *See* Andrew T. Huber, "Trust Protectors: The Role Continues to Evolve," *Prob. & Prop.* (January/February 2017), *www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v31/01/2017_aba_rpte_pp_v31_* , *https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v31/01/2017_aba_rpte_* .

34. Al W. King, III, "Trusts Without Beneficiaries—What's the Purpose?" *Trusts & Estates* (February 2015), at p. 7.

35. See Rashad Wareh, "Trust Remodeling," *Trusts & Estates* (August 2007), at p. 18. *Restatement (Third) of Trusts (Restatement Third)*, Section 66, provides: "The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust." This section presents an interpretation of the doctrine of equitable deviation. *See also* Jonathan G. Blattmachr, Diana S.C. Zeydel and Michael L. Graham, "The Act of Decanting: Amending Trusts Without Going to Court," *InterActive Legal* (2009), at pp. 1-5.

36. *Matthew Lahti*, 6 TC 7 (1946). The gift argument is based on two old cases. In *Mathew Lahti*, the Internal Revenue Service attempted to assert a second gift tax to the settlor when one trust transferred assets to a newly created trust. The petitioner's spouse was a discretionary beneficiary under the first trust and, pursuant to a divorce settlement, also received an income interest of up to $1,000 a year withdrawal right. This 1946 case had little analysis, other than to note that the distribution standard was sufficient to allow the 1934 trust to create the 1942 trust and that parties were adverse because of the divorce. It didn't address any estate inclusion issue as to the settlor being involved in the modification of the trust.

37. The second case provides a better analysis of a gift tax issue to a beneficiary. In *Estate of Franklin Lewis Hazelton*, 29 T.C. 637 (1957), Frank was the primary discretionary beneficiary of a trust created by his father in

1935. His sister was a contingent beneficiary. Any future wife or child would also be a discretionary beneficiary but only up to one-third of the income. In 1942, Frank married, and it appears that the couple had no children. In 1951, Frank eventually convinced the trustees to transfer part of the trust property to a new trust for the benefit of himself, as the primary discretionary beneficiary, and his spouse, with the same terms as the first trust, except no restriction that distributions to the spouse were limited to one-third of the income. The Tax Court held there was no gift tax issue because the trust was the donor, not Frank. The Tax Court secondarily noted that, "the transfer resulted in no decrease in the decedent's interest . . . over what he had before [under the first trust]. . . So long as the only interest he had, namely, a primary life interest, was not decreased by the transaction he cannot be said to have parted with anything."

38. Mark Merric, "How to Draft Distribution Standards for Discretionary Dynasty Trusts," *Estate Planning* (March 2009). Endnote 33 of the article cites both *Restatement (Second) of Trusts (Restatement Second)*, Section 187 comment j and Section 122, as well as cites cases in 14 states and in two countries other than the United States.

39. Wareh, *supra* note 35, at p. 14. The UTC was amended at the request of ACTEC to include an option requiring court approval. ACTEC's concern was that if court approval wasn't required, IRC Section 411(a) might expose irrevocable trusts in those states that previously required court approval to estate tax. *See* Blattmachr, *supra* note 35, at p. 3. *See* Diana S.C. Zeydel, *LISI Estate Planning Newsletter* #2139 (Sept. 10, 2013), *www.LeimbergServices.com* , citing *Morse v. Kraft*, 466 Mass. 92 (2013); *Phipps v. Palm Beach Trust Company*, 142 Fla. 782 (1940); *Wiedenmayer v. Johnson*, 106 N.J. Super. 161 (App. Div.), *aff'd sub. nom., Wiedenmayer v. Villaneuva*, 55 N.J. 81 (1969); *Restatement Third*; Treasury Regulations Section 26.2601-l(b)(4)(i)(A)(l)(i).

40. Wareh, *supra* note 35, at note 3. First New York (1991), then Alaska (1998), Delaware (2003), Tennessee (2004), South Dakota (2007) and North Carolina (2009) enacted decanting statutes. See New York Estates Powers & Trusts Law 10-6.6(b); Alaska Statutes Section 13.36.157; Delaware Code Annotated 12 Section 3528; Tennessee UTC Section 816(b)(27); South Dakota 2007 Session Laws HB 1288; North Carolina General Statutes, Section 36C-8-816.1. *See also* Blattmachr, *supra* note 35, at p. 1 (Arizona and Florida as additional states that have adopted decanting statutes).

41. Blattmachr, *supra* note 35, at p. 19 (South Dakota's decanting statute, effective July 1, 2007, provides the most flexibility for trust remodeling). *Compare* Jonathan G. Blattmachr, Bethann B. Chapman, Mitchell M. Gans and David D. Shaftel, "New Alaska Law Will Enhance Nationwide Estate Planning—Part 1," *Estate Planning*, Vol. 40/No. 9, at p. 3 (September 2013).

42. In "4th Annual Trust Decanting State Rankings Chart (2016)," Steven J. Oshins ranks 25 jurisdictions based on decanting statutes and various factors. The top 10 listed are: (1) South Dakota; (2) Nevada; (3) Tennessee; (4) New Hampshire; (5) Delaware; (6) Ohio; (7) Alaska and Illinois (tie); (9) Indiana; and (10) Missouri and Wyoming (tie).

43. In addition, some states have newer statutes that may have never been fully tested in the courts. Some of the more established jurisdictions have more streamlined procedures. Legal fees and other considerations may differ based on the court required process and delays. *See* Wyo. Stat. Ann. Section 4-10-816(a)(xxviii) for an example of a basic decanting statute.

44. Treas. Regs. Section 26.2601-1(b)(4). One safe harbor applies to the exercise by a trustee of a discretionary power to distribute trust principal from a grandfathered trust to a new trust, but only if the discretionary power is pursuant either to the terms of the trust instrument or to the state law in effect at the time the trust became irrevocable. Another safe harbor applies to a modification of a grandfathered trust that doesn't shift a

beneficial interest to a lower generation or postpone vesting. ACTEC's concern was that if state law didn't require court approval, IRC Section 411(a) might expose irrevocable trusts in those states that previously required court approval to estate tax under an IRC Section 2038 theory. South Dakota has modified its law to require court approval. Telephone discussion between Daniel G. Worthington and Al W. King III, CEO, South Dakota Trust Company, Oct. 26, 2009, discussing Rashad Wareh's concern.

45. Uniform Trust Decanting Act (2015), National Conference of Commissioners on Uniform State Laws, *www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act.pdf* . The UTC, which has virtual trust provisions, has been adopted by 22 states. For a full treatment of virtual representation statutes see "Virtual Representation Statutes Chart Revised," ACTEC website (April 14, 2015). *See www.sidley.com/~/media/uploads/virtual-representation-statutes-chart.pdf* .

46. Only two states have specific special purpose entities (SPE) statutes—New Hampshire and South Dakota. Delaware and Wyoming call the entities they permit—"trust protector companies," but these entities aren't recognized by statute. Alaska and Nevada recognize SPEs indirectly.

47. The Securities and Exchange Commission-adopted rule to define "family offices" that will be excluded from the definition of an "investment adviser" under the Investment Advisers Act of 1940 (Advisers Act). *See www.sec.gov/rules/final/2011/ia-3220.pdf* .

48. Virtual Representation Statutes Chart (2016), *www.sidley.com/-/media/uploads/virtual-representation-statutes-chart.pdf* .

49. SDCL Section 55-3-32. South Dakota's Virtual Representation statute was reworked and is effective July 2017.

Sample Trust Provision Notice: "I hereby direct that the Trustee is not required to provide the notice set forth in SDCL § 55-2-13 to qualified beneficiaries."

50. Alaska (AK Stat. Section 13.36.080(b)) allows for beneficiary waiver of notice but limits the settlor to exempt the trustee from the notice requirements during the life of the settlor or until the settlor's incapacity, whichever is shorter; Delaware (Del. Code Ann. Tit. 12 Section 3303) does allow for the waiver of beneficiary notice but restricts it to a period of time and doesn't expressly allow for the trust advisor or trust protector to modify notice to beneficiaries; Nevada (Nev. Rev. Stat. Section 163.004) enacted legislation effective 2015, but restricts it to a period of time and doesn't expressly allow for the trust advisor or trust protector to modify notice to beneficiaries; North Dakota (Cent. Code 59-14-03) enacted new legislation in 2017 that makes an exception for cases in which the qualified beneficiary is unknown, because a person holds a power to change such qualified beneficiary; New Hampshire (RSA 564-B:1-105; RSA 564-B:8-813(d)) is silent on timing, but has no specific provision regarding whether advisors can withhold after death/disability that South Dakota provides. *See* Al W. King III, "Tips From the Pros: Should You Keep a Trust Quiet (Silent) From Beneficiaries?" *Trusts & Estates* (April 2015), at p. 12.

51. *See www.macpas.com/privacy-and-trust-planning-the-south-dakota-advantage* . Privacy and Trust Planning: The South Dakota Advantage, Quiet Trust—"Most wealthy families want the option of deciding whether to reveal to a child or grandchild that they have a beneficial interest in a trust. However, most states require trustees to inform a beneficiary of his or her beneficial interest in a trust at the age of eighteen (18). ... Referred to as a Quiet Trust, settlors of trusts in the above-mentioned states have control over what information is revealed to a beneficiary and when it is revealed, if at all. South Dakota ...the most comprehensive and flexible quiet trust statute in the nation, granting the settlor, trust protector, and the

investment/distribution advisor the power to expand, restrict, eliminate, or modify the rights of the beneficiaries to discover information about a trust."

52. *See* Greg Omer, Larry Katzenstein and Jason Thein, "Private Trust Companies Authorized under new Missouri Law" (2017), *www.thompsoncoburn.com/insights/blogs/bank-check/post/2017-07-28/private-family-trust-companies-authorized-under-new-missouri-law* .

53. South Dakota and New Hampshire have regulated private family trust companies (PFTCs), while Nevada and Wyoming focus on unregulated PFTCs for families, even though they have regulated statutes. While Texas isn't a perpetual jurisdiction, it ranks third with Nevada as the state that has the largest number of PFTCs. See John P.C. Duncan, "Risks and Opportunities for Private Trust Companies and Family Offices from State and Federal (Non-Tax) Legislative Developments and Proposals, Fiduciary Income Tax Committee," ABA Section on Taxation 2010 ABA Mid-Year Meeting (Jan. 21-23, 2010), *https://www.americanbar.org/groups/taxation/events_cle/taxiq_meeting_materials_archives/midyr10.html* .

54. New Hampshire recently reduced its capital requirement to $250,000. RSA 383-A and RSA 383-C.

55. South Dakota regulators do prefer that applicants meet larger capital requirements.

56. Some commentators view lower capital requirements as an advantage because they're less of a barrier to entry into the PFTC arena. Others say that having larger capital requirements tends to weed out less serious and capable PFTC candidates.

57. However, compare Todd Ganos, "Putting 'Family' In Private Family Trust Companies—A Follow-Up Discussion on Regulation," *Forbes.com* (Nov. 10, 2015), *www.forbes.com/sites/toddganos/2015/11/10/putting-family-in-private-family-trust-companies-a-follow-up-discussion-on-regulation/#7155dd8d28cd* .

58. Worthington and Merric, "Which Situs is Best in 2016?" *supra* note 2.

59. *Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933 (Mass. 2016), *reversing* 12137 N.E.3d 15 (Mass. App. 2015).

60. *Pfannenstiehl v. Pfannenstiehl*, 12137 N.E.3d 15 (Mass. App. 2015).

61. Worthington and Merric, "Which Situs is Best in 2012?" *supra* note 2.

62. *Restatement Second* Section 155(1) and comment (1)(b).

63. *Ibid.*

64. Mark Merric, "How to Draft Distribution Standards for Discretionary Dynasty Trusts," *Estate Planning* (March 2009). Endnote 41 lists cases from 16 states noting that a discretionary distribution interest isn't a property interest.

65. Under common law, the strong majority rule was a discretionary interest couldn't be attached at common law. Please note that the Restatement Third and the UTC reverse common law in this area allowing a creditor to attach a discretionary interest. However, five UTC states have modified the national version of the UTC to retain common law in this area.

66. *Tannen v. Tannen*, 31 A.3d 621 (N.J. 2011) *affirming* the appellate court 3 A.3d 1229 (2010) decision for substantially the same reasons. The appellate court case discusses in detail the proposed change to discretionary trust law by the *Restatement Third*, concludes that it would create an enforceable right in all discretionary trusts for imputing maintenance and declines to adopt the new position.

67. One of the other issues discussed above was a remainder interest being considered a future marital property interest under some states laws. The solution to this issue was to draft dynasty trusts.

68. *Supra* note 6.

69. *Restatement Second* Section 187, comment j and Section 122. While this is the judicial standard of review adopted by all courts, it's by far the most common discretionary trust judicial review standard with courts from 14 states and two other countries using it. *See* Merric, *supra* note 64.

70. Originally, Nev. N.R.S. 163.4185 was almost identical to South Dakota St. Section 55-1-138. However, it was modified in 2017 to state that a support interest needed to be a required distribution with an ascertainable standard as defined under the IRC.

71. TN Code Section 35-15-103(10)(c).

72. Ind. Code Section 30-4-2.1-14 and Section 30-4-2.1-14.5.

73. Okla. St. Section 175.825, par. 5.

74. Richard Covey, *Practical Drafting* (April 2007), at p. 8,918.

75. *Pack v. Osborn*, 881 N.E.2d 237 (Ohio 2008). Please note that this case has been distinguished by *Cook v. Ohio Department of Job & Family Services*, 2015 WL 7738415; *Gsellman v. Ohio Department of Job & Family Services*, 2012 WL 1207419; and *Kormanick v. Cooper*, 961 N.E.2d 1187 (Ohio App. 10 Dist. 2011).

76. Nev. Rev. St. Section 163.419 par. 1.

77. Wyo. Stat. Section 4-10-504(g).

78. Mark Merric, Michael J. Bland and Mark Monasky, "Beware of Federal Super Creditors," *Trusts & Estates* (July 2010), at p. 14.

79. *Ibid.*

80. Mark Merric and Daniel G. Worthington, "Best DAPT Jurisdictions Based on Three Types of Statutes," *Trusts & Estates* (January 2017), at pp. 64, 76; David G. Shaftel, "Comparison of Domestic Asset Protection Trust Statutes," *Estate Planning* (March 2008); Mark Merric, John E. Sullivan III and Robert D. Gillen, "Wyoming Enters the DAPT Legislation Arena," Steve Leimberg's *Asset Protection Planning Email Newsletter* #109 and "Searching For Favorable DAPT Legislation: Tennessee Enters the Arena," #105.

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