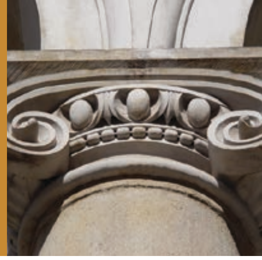


By **Daniel G. Worthington** & **Mark Merric**

Which Situs is Best in 2016?

An updated ranking matrix

In 2016, competition for trust business among U.S. jurisdictions and institutions will remain robust. What we reported as "the perfect storm" for clients two and four years ago still remains true today, but the pressure from advocates of tax reform to affect the strategies most used by high-net-worth (HNW) individuals is increasing in the public perception[1] and within the Obama administration, Congress and the Treasury. This trend leads to a deepening uncertainty about what Washington will do. Academia, the mainstream media and the Treasury seem to be increasingly antagonistic toward the wealthy. On the estate-planning front, the Obama administration has issued a number of proposals that are targeted against HNW individuals coincident to budget problems.[2] Moreover, with the $5.45 million federal gift, estate and generation-skipping transfer (GST) tax exemptions, which took effect in January 2016, far fewer individuals and families are now subject to estate tax.

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

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

In the January 2014 issue of *Trusts & Estates*, we provided a matrix for comparing the relative strengths of the then-29 jurisdictions that had repealed or modified their rule against perpetuities (RAP).[3] In 2016, the number of perpetual or near-perpetual jurisdictions is 31, with some uncertainty of what the intention was for the RAP law in North Dakota and case law in Oklahoma.[4] In addition, other laws in several jurisdictions have changed, so we've updated the ranking matrix and expanded our discussion of those factors.[5] (See "Situs at a Glance," pp. 80-83.)

Three Recent Developments

Three recent developments have added additional complexity to the question of which situs is best. However, the importance of the relative strength of a jurisdiction's trust laws will always be the determining factor in situs selection.

State constitutions and conflicts of laws. In "Unconstitutional Perpetual Trusts,"[6] Steven Horowitz and Harvard Professor Robert H. Sitkoff raise interesting questions about the constitutionality of perpetual trusts in certain jurisdictions that have proscribed them in their constitutions. They also raise important questions about conflict-of-law issues when a trust settlor's resident state may have a strong legitimate public policy against perpetual trusts. The article notes that 11 states have had constitutional bans on perpetuities. Of those 11, California and Florida are the only states to later repeal those bans, thereby leaving nine states that currently have them. The nine states are: Arizona, Arkansas, Montana, Nevada, North Carolina, Oklahoma, Tennessee, Texas and Wyoming. Of these states, Arizona, Nevada, North Carolina, Tennessee and

From left: **Daniel G. Worthington** is the manager of the Law Firm of Worthington Wealth & Legacy Law, LLC in Salt Lake City. **Mark Merric** is the manager of the Law Firm of Mark Merric, LLC in Denver

Wyoming have enacted longer term perpetuity statutes.[7]

In an article by Jonathan Blattmachr, Mitchell Gans and William Lipkin,[8] the authors make practical suggestions for practitioners to consider to mitigate against a potential constitutional challenge if they're involved with trusts in those states mentioned in the Horowitz/Sitkoff article.

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.

> The combination of generous tax exemptions, historically low interest rates and depressed asset values has provided an unprecedented opportunity for HNW individuals and families to engage in highly effective trust and asset transfer planning.

State income taxation of non-resident trusts. In another development, *Kassner Residuary Trust A v. Director* calls into question the legitimacy of resident state taxing authorities attempting to tax trusts created in non-taxing jurisdictions.[9] 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.

Proposed changes in federal tax law. Among President Obama's 2016 budget proposals is a durational limit on the GST tax exemption of 90 years. If enacted, this would create an artificial federal RAP for purposes of the GST tax exemption. This proposal is non-revenue-producing because it won't generate any tax revenue for nearly a century. Because 30 states and Washington, D.C. have already adopted RAP laws or rules that have more liberal or unlimited periods, there should be strong Congressional pushback against this proposal.[10]

Congress created the GST tax exemption to shield a specific dollar amount from the GST tax and to permit families to plan for future generations. And, multi-generational trusts are often paired with family foundations and other charitable structures to teach the importance of philanthropy and connection to community.[11]

The Trust Matrix

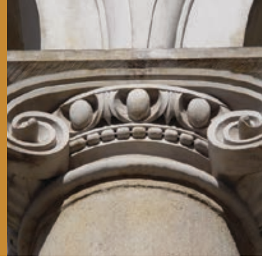
We've outlined five broad categories (including 25 subcategories) as they relate to the strength of trust laws and how to evaluate them: (1) a jurisdiction's form of any applicable RAP or the law that determines how long a trust may legally exist; (2) whether a state has inheritance, income or premium 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.

In January 2013, the American Taxpayer Relief Act of 2012 made the $5 million gift, estate and GST tax exemptions more or less "permanent." The combination of these generous tax exemptions, historically low interest rates and depressed asset values has provided an unprecedented opportunity for HNW individuals and families to engage in highly effective trust and asset transfer planning.

Top-tier Jurisdictions

In our view, the four top-tier jurisdictions for 2016 (listed by the year they adopted their RAP legislation) are South Dakota, Alaska,[12] Delaware and Nevada. Each of these jurisdictions scored high in most categories of the trust matrix. While Delaware has been in the top four jurisdictions consistently for the past 10 years, we think its asset protection laws 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 has strengthened its trust laws similar to the top tier jurisdictions. But, New Hampshire's domestic asset protection trust (DAPT) laws aren't, in our opinion, as strong as those of most of the highest ranked states.[13] 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 perpetuities period, both decanting and directed trust statutes and 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. However, Ohio's discretionary trust protection 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.

Three jurisdictions have improved their laws and asset protection reputations in the past two 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 behind 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 and 2014 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, 30 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]

Congress permanently extended and increased the GST tax exemption in 2012. In 2016, Internal Revenue Code Section 2642 provides a GST tax exemption of $5.45 million (indexed for inflation) for each spouse in 2016 (a married couple may exempt up to $10.9 million). When these larger estate and GST tax exemptions are combined with effective perpetual trusts planning strategies, most large estates may legally eliminate transfer taxes.

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, eight abolished their RAP and/or USRAP: Alaska, Delaware, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Rhode Island.

A growing number of other state legislatures, including California and New York, have considered some changes to their RAP or USRAP. 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).

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 perpetuities period. These jurisdictions include: Alabama, Arizona, Hawaii, Illinois, Maine, Maryland, Michigan, Nebraska, Ohio, Oklahoma (case law only), Virginia, North Dakota 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.

> The *Murphy* approach is considered the best perpetual trust jurisdiction law method.

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. These four states are, as a group, the leaders in competitive trust legislation.

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.

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.[18] If 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 the full term limit.

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. Ohio and Illinois 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). While there are arguments about whether this statutory approach is effective for purposes of creating a truly exempt trust in perpetuity, the trust and DAPT laws of these jurisdictions aren't generally well developed when compared to the more competitive jurisdictions. But,

there are some exceptions. While Arizona has an income tax, it now has directed trust, trust protector, decanting and reformation and virtual representation statutes.

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.[21]

State Income/Premium Taxes

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. Six states—Alaska, Florida, Nevada, South Dakota, Washington and Wyoming—are the only perpetual or nearly perpetual jurisdictions with no state income tax. 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.[22] However, Nevada recently enacted a "commerce tax," which taxes business activity in the state when revenues are in excess of $4 million annually.[23] The tax rate differs depending on the "primary" market sector in which business activity is engaged.

Income taxation of trusts is becoming a more complex question as a result of 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, there have been a series of cases that have gone the other way.[25]

Taxes on insurance premiums are another factor to consider. The least expensive premium tax jurisdictions are South Dakota (8 basis points), Alaska (10 basis points), Illinois (50 basis points), Wyoming (75 basis points) and Nebraska (100 basis points). The other highly ranked jurisdictions have higher premium taxes: New Hampshire (125 basis points), Ohio (140 basis points), Florida (175 basis points), Tennessee (175 basis points), Delaware (200 basis points), Utah (225 basis points) and Nevada (350 basis points). (See "Situs at a Glance," pp. 80-83, for a list of premium taxes for all jurisdictions.)

Modern Trust Laws

During the past decade, competitive perpetuities jurisdictions have tried to keep pace with the development of modern trust laws. There are various elements to consider when drafting a trust in a perpetuities environment, including:

1. Effectiveness of flexible trust planning and administration tools, including LPOAs and the ability to decant or reform a trust if necessary;
2. Ability to change situs for income tax and estate tax purposes without triggering a constructive addition problem;
3. Presence of 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. Changing provisions in an irrevocable trust through decanting or reformation;
6. Situs rules under applicable law (including possible conflict-of-law issues) and setting a clear standard for which situs to apply;
7. Statutory authority for trust reformation and decanting, with clear access to courts;
8. Virtual representation;
9. Effective privacy laws; and
10. Ability to facilitate and administer private family trust companies (PFTCs).

LPOA. This tool is included to create intergenerational flexibility by allowing a power holder 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 advisory committees, trust advisors with the power to invest and direct distributions and removal and replacement powers.

Directed trusts provide more flexibility and control over asset allocation, concentration and selection of investments.

Alaska is the only perpetuities jurisdiction that has 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 for the purpose of taking advantage of a perpetual state's trust laws. The *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.

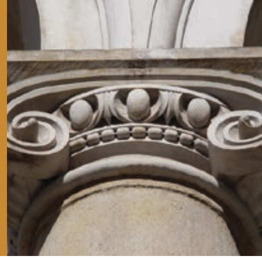
This result occurs when the trust instrument is silent as to governing law or even when the trust instrument provides that some other jurisdiction's laws shall govern.

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 permits bifurcating or even trifurcating the fiduciary responsibility among different trusted advisors and directed trustee(s). This freedom allows the client to select independent parties, typically designated as a co-trustee or trust advisor, 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 his 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 "Situs at a Glance," pp. 80-83, for a list of jurisdictions with directed trust statutes.

Trust protector statute. The strongest trust protector statutes are in Alaska, Delaware, Nevada, New Hampshire, South Dakota and Wyoming. 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.



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; and modifications of the terms of a POA. Such a statute recognizes the authority and limitations of a person or entity that's been appointed as a trust protector.

This recognition provides greater flexibility for future generations as conditions change. A trust protector 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, and only Alaska, Arizona, Delaware, Idaho, Nevada, New Hampshire, South Dakota and Wyoming have trust protector statutes.[32] Hawaii, Illinois, Michigan and Tennessee are newer states that have passed trust protector statutes. The UTC also permits trust protectors in states that have adopted its provisions.[33]

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

Irrevocable Provisions

There are certain methods to modify provisions in an irrevocable trust: trusts settling trusts; decanting; distributing property to a beneficiary in 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 trust" with U.S. estate planners, they wonder whether this is possible. Conversely, when we speak in other English common law countries, the audience typically falls asleep, because it's a common occurrence in those trust jurisdictions. When a trust provides provisions for settling a new trust, these trust provisions typically provide limitations on the 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 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 when the trustee settles 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 reformation.

Estate Inclusion Issues

With all of these methods of creating new trusts or

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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).

> The top 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 guidelines.

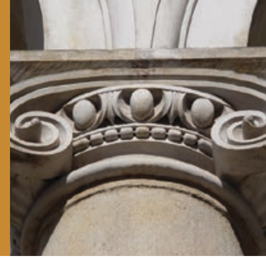
The gift argument is based on two old cases. In *Mathew Lahti*,[36] the IRS attempted to assert a second gift tax to the settlor when one trust transferred assets to a newly created trust. The petitioner's spouse was a discretionary beneficiary under the first trust and, pursuant to a divorce settlement, 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.

As 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.

The second case provides a better analysis of a gift tax issue to a beneficiary. In *Estate of Franklin Lewis Hazelton*,[37] 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]

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. However, 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 Uniform Trust Code (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.[39] 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 "Situs at a Glance."

On a side note, author Mark Merric met an estate planner who said that almost all of 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 practitioner's clients 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.[40]

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.[41]

South Dakota's decanting statute appears to provide the best example of flexibility for trust remodeling.[42] Several states have followed this model.[43]

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.[44]

Both reformation and decanting statutes provide trustees and trust beneficiaries flexibility without negative GST tax consequences if certain requirements are met. The final GST tax regulations create a safe harbor for four types of modifications, none of which affect the grandfathered status of a trust.[45] 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.[46]

Recently, the National Conference of Commissioners on Uniform laws issued a Uniform Trust Decanting Act (2015).[47] See "Situs at a Glance," pp. 80-83, for the jurisdictions that have adopted decanting statutes.[48]

Special purpose entities (SPEs). SPEs can be created to act on behalf of a family or family group to provide non-trustee fiduciary services akin to a family office. Unregulated SPEs 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 a limited liability company (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. Alaska, Arizona, Delaware, Illinois, Nevada, New Hampshire, South Dakota and Wyoming permit SPEs.

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.

Increasingly, banking regulators are encouraging PFTCs to pledge larger capital requirements than just the minimum amount, especially as PFTCs mature.

Virtual representation statutes. Virtual representation statutes are important for discretionary multi-generational 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.[49] Under South Dakota's virtual representation statute,[50] 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.

Privacy laws. 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, which is unique. Delaware and Alaska's privacy laws aren't as extensive. Delaware only provides a 3-year seal period, for example. 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 all of their family trust work. Often, PFTCs are administered with the assistance of a local trust company that can provide situs based administrative services at greater cost efficiencies.

In 2013, 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 2016. Florida is now a PFTC state. However, Florida's PFTC statute isn't tested. Tennessee's relatively new PFTC statute is awkward in that it attempts to permit a PFTC and business in one entity. Ohio is the most recent state to enact PFTC legislation. Of all these jurisdictions, Nevada and South Dakota have historically contained the greatest number of PFTCs.[52]

The capital requirements for establishing a PFTC differ by jurisdiction and remain the same as they did in 2014. Currently, in capital, Nevada requires $300,000,[53] New Hampshire requires $250,000,[54] South Dakota requires $200,000 and Wyoming requires $500,000.

Increasingly, banking regulators are encouraging PFTCs to pledge larger capital requirements than just the minimum amount, especially as PFTCs mature.

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.

Independent Trust Companies

Many independent trust companies have emerged as a result of liberalization of trust laws, which means that HNW clients have many choices for trust laws and services across 31 different jurisdictions within the United States that offer multi-generational trust planning opportunities. We outline which jurisdictions we think are the best and why. We recently conducted a survey of what are largely considered the top 50 trust companies within the United States. With heightened scrutiny of banks and trust companies holding large concentrations of domestic and foreign wealth, the compliance challenges have become difficult. 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. We think that independent trust companies provide more choices to clients and more flexibility to individuals and families than traditional trust departments. We also believe that the client can achieve superior accountability and transparency for family investments in a properly managed directed family trust. The modern trust can provide individuals and families far more flexibility inter-generationally, 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 form written to confine clients behind the walls of big bank trust departments and to tie the hands of future generations.

Asset Protection—Third-Party Trusts

When clients seek asset protection for their children and descendants, they typically have two concerns (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 subsequent marriage divorce rates 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,[55] we discussed in detail the greater asset protection provided by a discretionary trust, particularly in states that had codified the *Second Restatement of Trusts (Restatement Second)*.[56] 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,[57] and therefore, no creditor may stand in the shoes of a beneficiary. Thus, the beneficiary's interest isn't a property interest[58] and is nothing more than an expectancy that creditors can't attach.[59]

In this respect, 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.[60]

The asset protection planning key to almost all of the aforementioned issues is to draft a discretionary trust in which the beneficiary doesn't have an enforceable right to a distribution.[61] English common law, the *Restatement of Trusts (Restatement First)*, the *Restatement Second,* as well as almost all case law on point, were relatively consistent, and practitioners were able to draft a discretionary distribution standard with relative certainty so that a beneficiary didn't have an enforceable right to a distribution and didn't hold a property interest. Unfortunately, with almost no case law to support its position, the *Restatement (Third) of Trusts (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.[62] Many practitioners 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 a statute, even if a state has strong *Restatement Second* case law, a court may reverse its position and inadvertently adopt

the *Restatement Third's* 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.

When drafting a discretionary trust statute, include the following four key areas:

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 should state 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, so a judge would only review the trustee's distribution decision if the trustee acted: (1) with an improper motive; (2) dishonesty; or (3) failed to use its judgment.[63]
4. The provision that no creditor may attach a discretionary interest.

Many times, drafting trustees, who don't understand the difference between a discretionary trust and a support trust, provide conflicting distribution terms.

It was our prior opinion, in order of importance, that the most critical factor to include in a statute is an affirmative statement that a discretionary interest is neither a property interest nor an enforceable right. The second most important factor to include is a provision that no creditor may attach a discretionary interest. Of third importance, the statute should include a *Restatement Second* Sections 187 and 122 judicial review standard. Finally, it must include a statutory definition of a discretionary interest. Oklahoma and South Dakota are the lead states that address all four of the above elements by statute. However, after a recent case from Massachusetts (see below), we've rethought the order of importance and find that a clear statutory definition of a common law discretionary trust is the second most important factor.

Enforceable Rights

In probably one of the poorest written majority opinions (3-2) by a court on discretionary trusts, the Massachusetts Court of Appeals in *Pfannenstiehl v. Pfannenstiehl*[64] 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 court cites several Massachusetts cases, apparently not understanding the differences among contradictory language, Massachusetts case law, the *Restatement Second* and the *Restatement Third*. While we agree that the facts of the case, the contradictory language, Massachusetts' adoption of the UTC and references within the UTC comments to the *Restatement Third* would allow a court to decide the case either as an enforceable right that creates a property interest or a common law discretionary trust that wouldn't be a property interest, it's the majority's inability to articulate why the trust should be included as marital property that's most concerning.

Whether a beneficiary has an enforceable interest, which most likely creates a property interest, depends on the distribution language. The distribution language in the trust stated:

> . . . the Trustee shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor's then living issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class.... In the exercise of such discretion, the Trustee

> may take into account funds available from other sources for such needs of each beneficiary...[65]

Many times, drafting trustees, who don't understand the difference between a discretionary trust and a support trust, provide conflicting distribution terms. The use of the word "shall" implies that the distribution pursuant to an ascertainable standard is mandatory and, therefore, creates an enforceable right. However, as pointed out by the dissent, the entire language must be read when interpreting the distribution language. The language, "in its sole discretion" is the key element under the *Restatement Second* and most case law, indicating that it's a common law discretionary trust. Further, many cases hold that the ability to make unequal distributions is an element of a discretionary trust. Finally, "comfortable support" and "welfare" aren't terms used in the tax definition of an "ascertainable standard." In fact, the term "welfare" may not be capable of judicial interpretation. If "comfortable support" and "welfare" aren't ascertainable standards or capable of interpretation under previous Massachusetts law, then we have another factor that points to a common law discretionary trust. The majority provided no analysis of the above issues. As pointed out by the dissent, there was considerable latitude for concluding the trust was a common law discretionary trust.

> 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.

Conversely, if the majority simply wanted to change Massachusetts law and find that the trust was an enforceable right, here's all that was needed: Massachusetts adopted the UTC in 2012. The comments to the UTC refer to the *Restatement Third* for interpretation. The *Restatement Third* takes the relatively unsupported position that any standard or guideline in a trust creates an enforceable right. Adding further support to the property interest argument, the court could have pointed out that Massachusetts UTC Section 501 allows all discretionary interests to be attached by an exception creditor. Query: If a beneficiary's interest under the UTC isn't a property interest created by the UTC, then how can an exception creditor attach a beneficiary interest? Further, the majority could have brought up the issue that the judicial review standard under UTC Section 814(a) had changed common law, so a court could now be able to review a trustee's discretion for good faith, rather than the dual review standard under common law. Therefore, in addition to the contradictory language, which the majority didn't discuss, there was plenty of ammunition under the UTC and/or *Restatement Third* to support the majority's opinion.

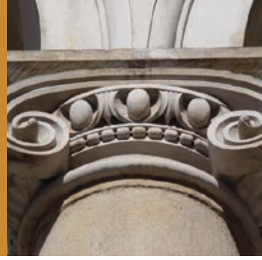
The majority had another method to reach its conclusion. It could have decided that the trust was the husband beneficiary's alter ego. This conclusion is analogous to a corporate pierce the veil argument, which sometimes, in trust terms, is referred to as a "dominion and control argument."

The court did make innuendos that the beneficiaries and/or settlor controlled the co-trustees. One trustee was the settlor's brother, and the other trustee was the beneficiary's father, an attorney who'd done considerable amount of work for the settlor. Then, the majority made a very good analysis that distributions, some that were traditionally quite large, ceased just prior to filing the divorce. The court concluded,

> It is clear that this cutoff of the distributions from the 2004 trust only to the husband and just on the eve of divorce was a deliberate manipulation to erase a major component of the husband's annual income and to silence his interest in the trust—for a convenient time while the divorce was ongoing.[66]

However, the majority never concluded that these facts by themselves resulted in the trust being the alter ego of the husband beneficiary. Nor did the court cite any cases supporting the alter ego or dominion and control type of argument.

This ruling now raises the question: Should



discretionary trusts with any standards flee Massachusetts and move to a jurisdiction with much better trust law? Hopefully, the case will be appealed, and the Supreme Court of Massachusetts will provide a better legal analysis and reasoned opinion on whether the trust should be an enforceable right or a common law discretionary trust. If the ultimate law of Massachusetts is that an ascertainable standard similar to the language in *Pfannenstiehl* creates an enforceable right, then the trustees should seriously consider looking for more favorable trust law in another jurisdiction.

When searching for more favorable trust law, practitioners can learn key lessons from *Pfannenstiehl*. First, to think that a domestic relations trial judge is going to spend the 150 to 200 hours to learn the difference among a discretionary trust, a support trust, a spendthrift trust, the *Restatement Second*, how the *Restatement Third* rewrote the definition of a discretionary trust and whether the UTC adopts the *Restatement Third* 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 critical in determining the asset protection provided by a trust. Also, many planners will disagree on whether the activities of the trustees and the relationship of the trustees to the beneficiaries in this case rose to the level to support an alter ego argument method of piercing the trust. For this reason, a dominion and control statute also becomes very important. Estate planners don't want a judge to treat related trustees and advisors of the client serving as a trustee negatively solely due to their relationship to the settlor or a beneficiary.

Dominion and Control Arguments

Creditors might use dominion and control arguments or alter ego arguments to pierce a third-party trust. We previously discussed the importance of a statute that protected the trust assets from such claims. We noted that South Dakota has the "best" protection against these types of claims, followed by Indiana, Nevada, Oklahoma and Tennessee, which have "good" protection in this category, as listed on the chart. 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 approach may prove to be novel. 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

Fifteen jurisdictions 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, we've limited the matrix to a "Best," "Yes," "Limited" or "No" approach.[67] We find that Alaska, Delaware, Nevada, Ohio and South Dakota have the best self-settled trust legislation.

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-law principles. This result 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.

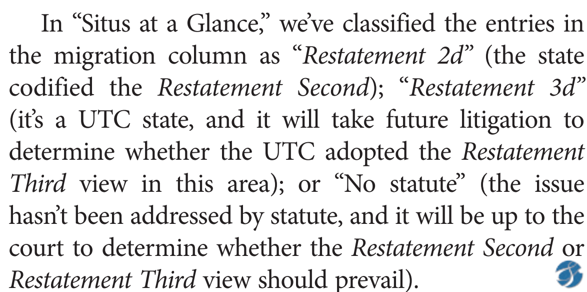
When evaluating state charging order statutes, we used the following categories. "Best" jurisdictions have a statute that prevents: (1) the judicial foreclosure sale of the partner's or member's interest; and (2) provides either a provision denying any legal or equitable remedies against the partnership or a provision preventing a court from issuing a broad charging order interfering with the activities of the partnership. We use "SR" in the matrix to indicate the statute states where a charging order is the sole remedy, and there's no other language in the statute (or comments in the case of a UTC) stating that a court may issue additional orders to effect the charging order or a court may order the judicial foreclosure sale of the partner's or member's interest. The eight lead states on charging order protection are: Alaska, Delaware, Florida, New Jersey, Ohio, South Dakota, Texas and Virginia.

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

was silent, then the trustee didn't have an obligation to look to a beneficiary's resources in determining whether to make 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's not certain, it's highly probable that the UTC also adopts this position.

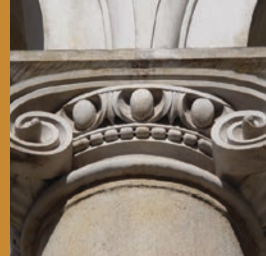
For example, assume that a mother created a trust for the benefit of her three children, the trust instrument was silent as to whether the trustee should look to the beneficiaries' resources and state law followed the general common law that didn't require the trustee to do so when a trust instrument 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 a beneficiary ever consent to such a change if it would have the effect of decreasing his beneficial interest? In this respect, a state statute that codifies the *Restatement Second* view (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.



In "Situs at a Glance," we've classified the entries in the migration column as "*Restatement 2d*" (the state codified the *Restatement Second*); "*Restatement 3d*" (it's a UTC state, and it will take future litigation to determine whether the UTC adopted the *Restatement Third* view in this area); or "No statute" (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. Grayson M. P. McCouch, "Who Killed the Rule Against Perpetuities?" 40 *Pepp. L. Rev.*, at pp. 1291-1306; Angela M. Vallario, "Death by a Thousand Cuts: The Rule against Perpetuities," 25 *Journal of Legislation*, at pp. 141-162.
2. The 2016 Obama Administration's budget calls for the estate and generation-skipping transfer (GST) tax exemptions to decrease from $5.43 million to $3.5 million, the lifetime gift tax exemption to decrease from $5.43 million to $1 million and the top estate, gift and GST tax rate to increase from 40 percent to 45 percent. While portability of the estate and gift tax exemptions between married couples would remain in effect, the exemptions wouldn't be indexed for inflation. If President Obama's budget is enacted as proposed, these changes would go into effect on Jan. 1, 2016. The 2016 budget calls for limiting the time period that multi-generational, dynasty trusts would remain estate and GST tax-free to 90 years. This limitation would apply to trusts created after the date of enactment and to the portion of a pre-existing trust attributable to additions to the trust made after that date (subject to rules substantially similar to the grandfather rules currently in effect for additions to trusts created prior to the effective date of the GST tax).
3. *See* Howard Zaritsky, "Rule Against Perpetuities, A Survey of State (and D.C.) Law," ACTEC, 2012, *http://nbgradio.net/www.actec__org--public--Documents--Studies*; 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. *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.
4. *Zaritsky, ibid.*; 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 Iowa, a 2012 bill presented to the Legislature would allow a creator of a trust to suspend, explicitly in the trust document, the RAP from applying to a particular trust, if the trustee has the power to sell all trust assets or if one



or more people, including the trustee, have the power to terminate the trust. *See* Iowa House Study Bill 556 (2012).

5. 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. *See* 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), *http://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.*
6. Steven Horowitz and Robert H. Sitkoff, 67 *Vand. L. Rev.* 1769 (2014).
7. *See supra*, note 5.
8. In *Estate Planning Newsletter* #2263, Jonathan Blattmachr, Mitchell Gans and William Lipkin provided their views of the Horowitz/Sitkoff article (*supra* note 6) 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.
9. *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).
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).
11. Daniel G. Worthington and Daniel D. Mielnicki, "In Defense of Multigenerational Trusts," *Trusts & Estates* (January 2011), at p. 60.
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 GST tax exemption of a trust. *See* Richard Nenno, "Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust," 2006 *Heckerling Tax Institute.*
13. Steven J. Oshins publishes an annual ranking of dynasty trust jurisdictions as well. The criteria for that 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) Delaware; (7) Ohio; (8) New Hampshire; (9) Illinois; and (10) Florida; "3rd Annual Dynasty Trust State Ranking Chart" (2015), *www.oshins.com/dynastytruststaterank.html.*
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 result in the term-of-years states should be no different from the result in *Murphy* states (with the exception that the term of years is set) if: (1) there's a real possibility of a vesting or alienation of the trust interests; and (2) 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

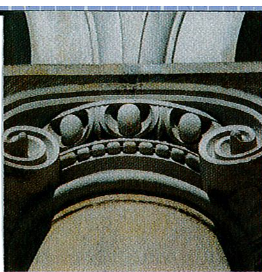
these conditions are met, the term-of-years period should work for purposes of the GST tax and continued GST tax exemption for the full term limit. For a contrary view, *see* Nenno, *supra* note 12 at 3-1; 3-51.

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 ME RSA 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. *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.
23. On June 10, 2015, Governor Brian Sandoval of Nevada signed Senate Bill 483 (SB 483), thus enacting a new "commerce tax" (effective July 1, 2015) applicable to each "business entity" engaged in business in Nevada with Nevada-sitused 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."
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, e.g.,*. the line of cases represented by *Residuary Trust A (Kassner) v. Director, supra* note 9 and *supra* note 5.
26. The so-called "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; 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* "Situs at a Glance," at pp. 80-83.
32. *See, for example,* SDCL 55-1B-6 (South Dakota). This is the first trust protector statute adopted by a U.S. jurisdiction. 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. The first trust protector statute was enacted in South Dakota in 1997. Idaho, Alaska, Wyoming, New Hampshire, Tennessee, Delaware, Arizona, Michigan, Nevada and Vermont followed. 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). 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; *www.naela.org/Public/Library/Resource_Database/Topics/5_Estate_Planning/5a_Trusts_Wills/Designing_Trust_Protectors_and_Their_Powers.aspx.*
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* (October 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).
37. *Estate of Franklin Lewis Hazelton,* 29 TC 637 (1957).
38. *Ibid.*
39. Mark Merric, "How to Draft Distribution Standards For Discretionary Dynasty Trusts," *Estate Planning Magazine* (March 2009). Endnote 33 of the article cites both *Restatement Second,* Section 187 comment j and Section 122, as well as citing cases in 14 states and in two countries other than the United States.
40. Wareh, *supra* note 35, at p. 14. The UTC was amended at the request of the American College of Trust and Estate Counsel (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).
41. 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 Uniform Trust Code 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).
42. 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).
43. In "2nd Annual Trust Decanting State Rankings Chart," Steven J. Oshins ranks 22 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; (8) Arizona; (9) Virginia; and (10) Illinois. *See http://www.oshins.com/images/Decanting_Rankings.pdf.*
44. 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 new basic decanting statute.
45. Wareh, *supra* note 35, at note 25; 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.
46. 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.
47. Uniform Trust Decanting Act, *www.uniformlaws.org/shared/docs/trustdecanting/2015AM_TrustDecanting_VBS.pdf.*
48. *See* "2nd Annual Trust Decanting State Rankings Chart," *supra* note 43.
49. 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.*
50. SDCL Section 55-3-32.
51. *See www.macpas.com/privacy-and-trust-planning-the-south-dakota-advantage.*
52. 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, "The Private Trust Company, Single Family PTC Formations in Key States," *Fall Forum* (October 2009).
53. *See* Nevada Senate Bill 310, Section 26, 3(a), which amends NRS Section 669A.160.
54. New Hampshire recently reduced their capital requirement to $250,000. RSA 383-A and RSA 383-C.
55. Worthington and Merric, "Which Situs is Best in 2012?" *supra* note 5 at p. 51.
56. *Restatement (Second) of Trusts,* Section 155(1) and comment (1)b.
57. *Ibid.*
58. Mark Merric, "How to Draft Distribution Standards For Discretionary Dynasty Trusts," *Estate Planning Magazine* (March 2009). Endnote 41 lists cases from 16 states noting that a discretionary distribution interest isn't a property interest.
59. Under common law, the strong majority rule was a discretionary interest couldn't be attached. 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.
60. *Tannen v. Tannen,* 31 A.3d 621 (N.J. 2011) affirming the Appellate Court, 3.A3d 1229

Continued on p. 84



Situs at a Glance*

Know what you're getting your client into

LEGEND:

RAP—Rule Against Perpetuities
POA—power of appointment
bps—basis points
UTC—Uniform Trust Code Section 808(b) (directed trustee liable if direction is manifestly contrary to terms of trust or trustee knows direction is a serious breach of fiduciary duty of directing person)

31 Perpetual and Close-to-Perpetual Trust Jurisdictions

		Rule Against Perpetuities				Taxation		Modern Trust Laws					
Year RAP Modified	Situs	RAP	State Constitution Prohibits	*Murphy* Case Applies	Effective GST Tax Limit	State Income Tax	State Premium Tax	Limited POA (IRC §)	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reform & Decanting Statute	Covey Provision
1957	ID	Abolished	N/A	Yes	Perpetual	Yes	41-402 bps	2043(a)(3)	Perpetual	Yes	Yes	No/Ltd.	No
1969	WI	Abolished	N/A	Yes	Perpetual	Residents	350 bps	2043(a)(3)	Perpetual	No	No	Yes	No
1983	**SD**	**Abolished**	**N/A**	**Yes**	**Perpetual**	**No**	**8 bps**	**2043(a)(3)**	**Perpetual**	**Yes**	**Yes**	**Yes**	**Yes**
1998	**DE**	**Abolished***	**N/A**	**Yes**	**Perpetual**	**Residents**	**200 bps**	**2043(a)(3)**	**Perpetual**	**Yes**	**Yes**	**Yes**	**No**
1998	AZ	Opt out	Yes	No	Uncertain	Yes	200 bps	2043(a)(3)	No	Yes	Yes	Yes	No
1998	**IL**	**Opt out**	**N/A**	**No**	**Uncertain**	**Residents**	**50 bps**	**2043(a)(3)**	**No**	**Yes**	**Yes**	**Yes**	**No**
1998	MD	Opt out	N/A	No	Uncertain	Yes	200 bps	2043(a)(3)	No	UTC	No	No	No
1999	ME	Opt out	N/A	No	Uncertain	Yes	200 bps	2043(a)(3)	No	UTC	UTC	No	No
1999	NJ	Abolished	N/A	Yes	Perpetual	Yes	200 bps	2043(a)(3)	Limited statute	No	No	No	No
1999	**OH**	**Opt out**	**N/A**	**No**	**Uncertain**	**Residents**	**140 bps**	**2043(a)(3)**	**No**	**Yes**	**UTC**	**Yes**	**No**
1999	RI	Abolished	N/A	No	Uncertain	Yes	200 bps	2043(a)(3)	No	No	No	Yes	No
2000**	**AK**	**Abolished**	**N/A**	**Yes/POA**	**Perpetual/POA**	**No**	**10 bps**	**1000 years**	**Perpetual/POA**	**Yes**	**Yes**	**Yes**	**No**
2000	VA	Opt out	N/A	No	Uncertain	Yes	225 bps	2043(a)(3)	No	UTC	UTC	Yes	No
2001	CO	1000 years	N/A	No	1000 years	Yes	200 bps	2043(a)(3)	1000 years	Yes	No	No	No
2001	**FL**	**360 years**	**Remedied**	**No**	**360 years**	**No**	**175 bps**	**2043(a)(3)**	**TN, AL**	**Yes**	**UTC**	**Yes**	**No**
2001	MO	Abolished	N/A	Yes	Perpetual	Yes	200 bps	2043(a)(3)	Perpetual	No	UTC	Yes	No
2002	DC	Opt out	N/A	No	Uncertain	Yes	170 bps	2043(a)(3)	No	UTC	UTC	No	No
2002	NE	Opt out	N/A	No	Uncertain	Yes	100 bps	2043(a)(3)	No	UTC	UTC	No	No
2002	WA	150 years	N/A	No	150 years	No	200 bps	2043(a)(3)	No	Yes	Maybe	No	No
2003	**WY**	**1000 years**	**Yes**	**No**	**1000 years**	**No**	**75 bps**	**2043(a)(3)**	**WY, CO**	**Yes**	**Yes**	**Yes**	**No**
2004	**UT**	**1000 years**	**N/A**	**No**	**1000 years**	**Yes**	**225 bps**	**2043(a)(3)**	**WY, CO**	**Yes**	**UTC**	**Yes**	**No**

*Arranged by year that the RAP or USRAP was modified or repealed. Top four jurisdictions are **bolded in blue**. The seven second and third tier jurisdictions are **bolded in tan**.

PFTC—private family trust company
GST—generation-skipping transfer
LLC—limited liability company
FLP—family limited partnership

Restatement 2d— *Restatement (Second) of Trusts*
Restatement 3d— *Restatement (Third) of Trusts*
JF—judicial foreclosure
SR—sole remedy
No statute—the issue hasn't been addressed by statute, and it will be up to the courts to determine whether the *Restatement 2d's* or *Restatement 3d's* view prevails

?—jurisdiction is undecided whether charging order is the sole remedy for creditors
Murphy— *Estate of Murphy v. Commissioner*, 71 T.C. 671 (1979)
Covey—Richard Covey, *Practical Drafting*, U.S. Trust, Bank of America Private Wealth Management (2007)

	Modern Trust Laws			**Asset Protection**								**Migration**
				Discretionary Trust Protection								
Special Purpose Entities	Enhanced Virtual Rep.	Privacy Laws	Popular PFTC State	Not Enforceable Right	Creditor Can't Attach	*Restatement 2d* Judicial Review	Definition of Discretionary	Protects Dominion/ Control	Protects Alter Ego	Self-Settled Trust Legislation	Sole Remedy Charging Order Protection	Look to Beneficiaries' Resources
No	Yes	Public	No	No case law	No case law	No case law	No case law	No	No	No	FLP-JF LLC-JF	No statute
No	Yes	Public	No	No case law	No case law	No case law	Case Law	No	No	No	FLP-? LLC-?	No statute
Yes	Yes	Yes, seal	Yes, regulated	Yes	Yes	Yes	Yes	Yes	Yes, best	Yes, best	FLP-Best LLC-Best	*Restatement 2d*
Yes	Limited	3-year seal	No	No	Yes	Probably[1]	No	Yes	No	Yes, best	FLP-Best LLC-Best	No statute
Yes	UTC	Public	No	Conflicting-No	Provisions[2]	No	No	No	No	No	FLP-SR LLC-SR	*Restatement 3d*
Yes	UTC	Public	No	Case law	Case law	Case law	Case law	No	No	No	FLP-JF LLC-JF	No statute
No	Limited	Public	No	Yes	Yes	Case law[3]	Yes	No	No	No	FLP-JF LLC-JF	No statute
No	UTC	Public	No	No	No[4]	No	Probably[5]	No	No	No	FLP-JF LLC-SR	*Restatement 3d*
No	Case law	Public	No	Case law	No	No	Probably	No	No	No	FLP-? LLC-SR	No statute
No	UTC	Public	Yes	Yes	Yes	Probably[6]	Restrictive[7]	No	No	Yes, best	FLP-SR LLC-Best	*Restatement 3d*
No	Yes	Public	No	No	Case law	Case law	Case law	No	No	Yes	FLP-? LLC-?	No statute
Yes	Yes	Limited filings	No	No	Case law	Case law	Case law	No	No	Yes, best	FLP-Best LLC-Best	No statute
No	UTC	Public	No	No	Yes	No	No	No	No	Yes	FLP-Best LLC-Best	*Restatement 3d*
No	Yes (formal)	Public	No	Case law	Case law	Case law	Case law	No	No	No	FLP-? LLC-JF	No statute
No	UTC	Public	Yes	No	No	No	No	No	No	No	FLP-Best LLC-SR	*Restatement 3d*
No	UTC	Public	No	Yes	Yes	No	No	No	No	No	FLP-? LLC-?	*Restatement 3d*
No	UTC	Public	No	No	No	No	No	No	No	No	FLP-JF LLC-JF	*Restatement 3d*
No	UTC	Public	No	No	No	No	No	No	No	No	FLP-JF LLC-JF	*Restatement 3d*
No	YES	Public	No	No	No	No	Little to no	No	No	No	FLP-JF LLC-?	No statute
Yes	Yes	Yes, public	Yes, unregulated	No	Yes	Uncertain[8]	Yes	No	No	Yes	FLP-? LLC-SR	No statute
No	UTC	Public	No	No	No	No	No	No	No	Yes	FLP-? LLC-JF	*Restatement 3d*

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2005	**NV**	**365 years**	**Yes**	**No**	**365 years**	**No**	**350 bps**	**2043(a)(3)**	**No**	**Yes**	**Yes**	**Yes**	**No**
2006	**NH**	**Abolished**	**N/A**	**Yes**	**Perpetual**	**Interest**	**125 bps**	**2043(a)(3)**	**Perpetual**	**Yes**	**Yes**	**Yes**	**No**
2007	**TN**	**360 years**	**Yes**	**No**	**360 years**	**Interest**	**175 bps**	**2043(a)(3)**	**TN, AL**	**Yes**	**Yes**	**Yes**	**Yes**
2007	NC	Abolished	Yes	Yes	Perpetual	Yes	190 bps	2043(a)(3)	Perpetual	Yes	UTC	Yes	No
2007	PA	Abolished	N/A	No	Uncertain	No	200 bps	2043(a)(3)	Uncertain	UTC	UTC	No	No
2008	MI	Opt out	N/A	No	Uncertain	Yes	125 bps	2043(a)(3)	No	UTC	Yes	Yes	No
2010	HI	Opt out	N/A	No	Uncertain	Yes	275 bps	2043(a)(3)	No	Not yet	Yes	No	No
2012	AL	Opt out	N/A	No	Uncertain	Yes	230bps	2043(a)(3)	FL, TN	UTC	UTC	Yes/No	No
***	ND	Opt out	N/A	No	Uncertain	Yes	200 bps	2043(a)(3)	No	UTC	UTC	No	No
****	OK	Case law	Yes	No	Uncertain	Yes	225 bps	2043(a)(3)	No	Yes	No	No	No

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Endnotes

1. Title 12 Delaware Code Section 3315(a) states, "Where discretion is conferred upon the fiduciary with respect to the exercise of a power, its exercise by the fiduciary shall be considered to be proper unless the court determines that the discretion has been abused within the meaning of § 187 of the *Restatement (Second) of Trusts* not §§ 50 and 60 of the *Restatement (Third) of Trusts*." While a step in the right direction, Delaware's statute isn't nearly as certain as a statute that specifically lists that judicial review is limited to: (1) improper motive; (2) dishonesty; and (3) failure to use judgment.
2. Arizona Revised Statutes (A.R.S.) Section 14-10501 states that a creditor can't attach a discretionary interest. However, A.R.S. Section 14-10504 allows a child support exception creditor to attach. Query: If a child support exception creditor can attach, does this create a property interest? If so, any federal claim may attach the trust under federal law.
3. *First National Bank of Maryland v. Department of Mental Hygiene, et al.*, 399 A.2d 891 (Md. App. Ct. 1979) uses the Bogert judicial review standard for a discretionary trust: (1) improper motive; (2) dishonesty; and (3) acting arbitrarily. Bogert's standard is a little more expansive than the *Restatement (Second) of Trusts (Restatement Second)* Section 128 comment d, which uses "failure to use judgment," rather than "acting arbitrarily." Naturally, since Austin W. Scott, Jr. was the reporter for the *Restatement (Second)*, *Scott on Trusts* uses the more restrictive standard. *See also Offutt v. Offutt*, 102 A.2d 554 (App. Ct. 1954) using only improper motive and dishonesty. Standard Uniform Trust Code (UTC) Section 814(a) is removed.
4. 18-B Maine Revised Statutes Annotated (M.R.S.A.) Section 501 provides that unless a trust has a spendthrift clause, any creditor may attach. The common law discretionary trust protection against attachment wasn't preserved, regardless of Maine's comment under Section 504 indicating an intent to preserve the discretionary/support distinction.
5. 18-B M.R.S.A. Section 814 provides some guidance to a court on what a discretionary distribution may be by stating, "A trustee's power to make distributions is discretionary notwithstanding terms of the trust providing that the trustee 'shall' make distributions exercising a discretionary power, with or without standards."
6. For a wholly discretionary trust, the Ohio UTC removes the judicial standard of reasonableness, similar to *Restatement (Second)* Section 187. However, it doesn't use the much more precise language that a judge will only review a trustee's discretion for an improper motive, dishonesty or failure to use judgment.
7. Richard Covey, in *Practical Drafting* (April 2007), at p. 8,918 criticized the Ohio's UTC due to its very limited definition of a discretionary trust. An Ohio "wholly discretionary trust" (that isn't a special needs trust), can't have any standards or guidelines. We agree with Covey's concerns and suggest the much better definitions of a discretionary trust found in the *Restatement (Second)*, common law and more precisely, in the Michigan and New Hampshire UTC or under South Dakota's or Nevada's discretionary support statutes.

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LLC—limited liability company
FLP—family limited partnership

Restatement 2d— *Restatement (Second) of Trusts*
Restatement 3d— *Restatement (Third) of Trusts*
JF—judicial foreclosure
SR—sole remedy
No statute—the issue hasn't been addressed by statute, and it will be up to the courts to determine whether the *Restatement 2d's* or *Restatement 3d's* view prevails

?—jurisdiction is undecided whether charging order is the sole remedy for creditors
Murphy— *Estate of Murphy v. Commissioner*, 71 T.C. 671 (1979)
Covey—Richard Covey, *Practical Drafting*, U.S. Trust, Bank of America Private Wealth Management (2007)

	Modern Trust Laws			Asset Protection								Migration
				Discretionary Trust Protection								
Special Purpose Entities	Enhanced Virtual Rep.	Privacy Laws	Popular PFTC State	Not Enforceable Right	Creditor Can't Attach	*Restatement 2d* Judicial Review	Definition of Discretionary	Protects Dominion/ Control	Protects Alter Ego	Self-Settled Trust Legislation	Sole Remedy Charging Order Protection	Look to Beneficiaries' Resources
Yes	Yes	Yes, public	Yes, regulated	No	Yes	Yes	Ambigious[9]	Yes	Yes, good	Yes, best	FLP-Best LLC-Best	*Restatement 2d*
Yes	UTC	Public	Yes	Yes[10]	No	No	Case law[11]	No	No	Yes	FLP-JF LLC-SR	*Restatement 3d*
No	UTC	Public	Yes	Yes	Uncertain	Yes	Yes	Yes	Yes	Yes, best	FLP-? LLC-SR	*Restatement 2d*
No	UTC	Public	No	No	Uncertain[12]	No	No	No	No	Yes	FLP-? LLC-SR	*Restatement 3d*
No	Yes	Public	No	No	No	No	No	No	No	No	FLP-JF LLC-?	*Restatement 3d*
No	UTC	Public	No	Yes	Yes	Probably[13]	Yes	No	No	No	FLP-? LLC-?	*Restatement 3d*
No	Yes	Public	No	No	No	No	No	No	No	Yes	FLP-JF LLC-JF	No statute
No	UTC	Public	No	No	No	No	No	No	No	No	FLP-SR LLC-SR	*Restatement 3d*
No	UTC	Public	No	No	No	No	No	No	No	No	FLP-JF LLC-JF	*Restatement 3d*
No	No	Public	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	FLP-SR LLC-SR	*Restatement 2d*

*** Although North Dakota's statute became effective in 1991, the exception in it is very narrow, and few practitioners are aware of its existence. However, the fiduciary exception does provide a sufficient legal basis for North Dakota to be considered an exception-only state. **** *Pipkin v. Pipkin*, 962 OK 58 (Supreme Ct. Okla. 1962)

8. Realizing the problems with a single judicial review standard of "good faith," Douglas McLaughlin, the primary drafter of the Wyoming UTC, was instrumental in deleting UTC Section 814(a). Unfortunately, it's still uncertain whether a Wyoming judge will apply a *Restatement (Second)* or *Restatement (Third)* judicial review standard.
9. Nevada Revised Statute Section 163.017(b) classifies a distribution interest as a support interest, "if it contains a standard for distribution for the support of a person which may be interpreted by the trustee or a court as necessary." Leaving it up to a court to decide when distribution language will create an enforceable right to a distribution gives little guidance on how to draft a support trust or a discretionary trust.
10. A recent New Hampshire Supreme Court case, *In re Goodlander*, 20 A.3d 199 (N.H. 2011), favorably interpreted Section 814(a) of the New Hampshire UTC so that a discretionary current distribution interest wasn't found to be either an enforceable right or a property interest in the marital property context. We're still somewhat uncertain whether the good faith standard proposition may have some effect on the imputation of income in a child support alimony type of case when no distributions have been made. *See Ventura County Department of Child Support Services v. Brown*, 117 Cal. App. 4th 144 (Cal. App. 2004), in which a California judge held that a child support exception creditor had more rights than the beneficiary. Most commentators disagree with the court's holding, but it's an example of how a court can easily twist a judicial review standard such as "good or bad faith," since the term is ambiguous. *See* Daniel G. Worthington and Mark Merric, "Which Situs is Best?" *Trusts & Estates* (January 2010, chart endnotes).
11. *In re Goodlander, ibid.*
12. North Carolina General Statutes (N.C.G.S.) Section 36C-5-501 provides that a creditor can't attach a discretionary trust. However, for child support, N.C.G.S. Section 36C-5-504(d) allows a child support creditor to attach and force a distribution from a discretionary interest. Does a discretionary beneficiary of a North Carolina trust now have an enforceable right and/or property interest since a creditor can attach a discretionary interest? Further, under federal law, if a beneficiary has a property interest, then federal super creditors will now also be able to attach North Carolina trusts.