By Daniel G. Worthington & Mark Merric

# Which Situs is Best in 2012?

An update on the race among jurisdictions to attract trust business with client-friendly laws

The combination of the generous $5 million gift, estate and generation-skipping transfer (GST) tax exemptions (adjusted for inflation) provided in the 2010 Tax Act, historically low interest rates and depressed estate values has provided an unprecedented opportunity for affluent individuals and families to engage in highly effective estate planning. The current estate-planning environment and competition among U.S. jurisdictions for trust business has created the perfect storm for clients to benefit from a choice of the most favorable trust laws. In the best trust jurisdictions, clients are able to transfer wealth for generations, even perpetually, while eliminating current and future federal or state death taxes. Trust grantors and beneficiaries in these jurisdictions also benefit from highly effective asset protection laws and exemption from income taxes.

While the choice of which situs is best for a specific client depends on that particular client's planning needs, it has never been more important for advisors to be aware of the comparative benefits of the top jurisdictional choices when advising clients. Which factors are most important to consider? In the January 2010 issue of *Trusts & Estates*, we provided a matrix for comparing the relative strengths of the then-27 jurisdictions that had repealed or modified their rule against perpetuities (RAP). We've now updated that matrix and added an additional jurisdiction to bring the total to 28 (27 states and the District of Columbia).

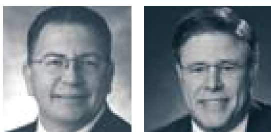
The task of determining which situs is best involves evaluating how a jurisdiction has formulated its trust laws. One unique factor is the RAP. In those jurisdictions that have repealed or modified the RAP, it's possible to exempt from gift, estate and GST taxes all trust assets for as long as the trust exists. Over the past 60 years, 27 states and the District of Columbia 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: from 150 years in some places, up to 1,000 years in others.[1]

But, while the RAP is important to differentiate one jurisdiction from another, there are other important factors, including: (1) state and local tax laws; (2) modern trust laws, which provide future flexibility; (3) asset protection laws; and (4) how trust migration reduces a beneficiary's distribution interest when compared to other beneficiaries.

In our view, the top four jurisdictions for 2012[2] (listed by the year they adopted their perpetuities legislation) remain South Dakota,[3] Delaware, Alaska and Nevada. We believe that New Hampshire is likely the fifth best jurisdiction because of its recent efforts to improve its trust laws. New Hampshire has a perpetual trust period, has eliminated its dividend tax on non-residents and has strengthened its trust reformation, virtual representation, private family trust company (PFTC) and special purpose entity laws. A recent case has also clarified the interpretation of a key provision in New Hampshire's discretionary trust law. Two other jurisdictions deserve honorable mention: Wyoming and Florida. Most of the remaining trust jurisdictions have lagged behind with respect to modern trust laws or have less impressive asset protection laws.

We've based our current rankings on similar objective criteria used in the 2010 version. We've modified

**Daniel G. Worthington**, far left, is CEO and managing member at Worthington Everidge Group LLC and Generations at Family Bank Design Center LLC in Orlando, Fla. **Mark Merric** is Director of International Tax Services for GHP Horwath P.C. and the manager of the law firm of Mark Merric, LLC, both in Denver



several factors which we hope will offer more clarity and provide you with useful tools to consider the nuances of all the jurisdictions' laws and how these laws might serve your clients' needs—or adversely impact them. So armed, you can help your clients maximize their wealth-planning strategies. (See "Situs at a Glance," p. 62.)

## Perpetual or Near-perpetual

Under the common law RAP adopted from British common law, an interest in trust must vest, if at all, within "a life in being, plus 21 years (plus a reasonable period for gestation)." Several states adopted the Uniform Statutory Rule Against Perpetuities (USRAP), which sets the duration of a trust to the greater of the RAP or 90 years.

> Alaska, Delaware and South Dakota have the strongest asset protection laws of the truly perpetual jurisdictions.

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

Today, Internal Revenue Code Section 2642 provides a GST tax exemption of $5.12 million for each individual, meaning that a married couple may exempt up to $10.24 million in assets from the GST tax. When the larger estate and GST tax exemptions and effective perpetual trusts planning strategies are combined, most large estates may legally eliminate transfer taxes altogether.

Congress temporarily extended and increased the GST tax exemption in 2010. While this extension has bought some time to decide what to do with the estate and GST taxes, Congress could let the current law expire at the end of 2012, in which case, the estate and GST tax exemptions will be $1 million per individual instead of $5.12 million. The use of the additional GST tax exemption under the 2010 Tax Act may create its own problems if the GST tax provisions in the 2001 Tax Act are permitted to sunset. Allocation of the GST tax exemption to separate shares may be prudent, given this uncertainty.[4]

Since the federal GST tax was adopted 26 years ago, 25 more jurisdictions have modified or repealed their RAP or USRAP. Of those, eight states abolished their RAP and/or USRAP: Alaska,[5] Delaware, Missouri, New Hampshire, New Jersey, Pennsylvania, Rhode Island and North Carolina.

A growing number of other state legislatures, including New York, have considered some changes to their RAP or USRAP. Seventeen jurisdictions didn't abolish it altogether; some because of longstanding policy concerns, constitutional barriers or political resistance. Rather, they have modified the RAP in some way. In those jurisdictions, it may be impossible to abrogate the rule fully. In seven, the perpetuities periods have been extended to a term of years: Colorado (1,000 years), Florida (360 years), Nevada (365 years), Utah (1,000 years), Wyoming (1,000 years), Washington (150 years) and, most recently, Tennessee (360 years). The remaining 10 jurisdictions are what are known as "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: Arizona, the District of Columbia, Illinois, Ohio, Maine, Maryland, Michigan, Nebraska, Virginia and, most recently, Hawaii.

In 2003, author Garrett Moritz, in a *Harvard Law Review* note,[6] outlined six approaches that jurisdictions had undertaken to create perpetual or long-term trusts. These approaches fall into three broader categories:

(1) the *Murphy* case perpetual trust approach,
(2) the term-of-years trust approach, and
(3) the opt-out trust approach.

## *Murphy*

In 1979, the Tax Court affirmed Wisconsin's method for 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.

Delaware, New Hampshire and South Dakota are the strongest of the truly perpetual jurisdictions.[7] Alaska also is a very strong contender, but has a 1,000 year power of appointment (POA) statute. These four states, as a group, are the leaders in competitive trust legislation. Alaska, Delaware and South Dakota have the strongest asset protection laws of the truly perpetual jurisdictions.

The remaining *Murphy* trust jurisdictions have done little to maintain their competitiveness in trust law or asset protection. Three exceptions are: New Hampshire, which is described more fully above; Idaho, which has adopted a trust protector statute; and recently, North Carolina, which now has a directed trust statute.

## Term-of-Years

The second most favorable approach for trusts is the "term-of-years approach." Nevada and Wyoming are the most progressive jurisdictions using this approach; they also keep their trust laws current and neither state has an income tax. Both have favorable asset protection laws when compared to other jurisdictions.

Jurisdictions like Florida and Tennessee follow this approach too, but fall short of perpetual trust status because they still rely on a trust term limit. Florida, however, has adopted a directed trust statute, decanting and reformation and virtual representation laws. It also has no state income tax.

While not the preferred approach, if a term-of-years jurisdiction also has the safe harbor vesting provisions, as in *Murphy*, our opinion now is that the result for GST tax exemption purposes may be the same as with other *Murphy* jurisdictions.[8] In such cases, 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.[9]

## Opt-out

The opt-out RAP approach is the least favorable for trusts, primarily because the RAP or USRAP is maintained under state law, so the underlying perpetuities period is unchanged. While there are arguments about whether this statutory approach is effective for purposes of creating a truly exempt trust in perpetuity, the trust and asset protection laws of these jurisdictions aren't generally well developed when compared to the more competitive jurisdictions. But, there are some notable exceptions.

While Arizona has an income tax, it now also has directed trust, trust protector, decanting and reformation and virtual representation statutes. Illinois doesn't tax the income of trusts that were created by non-resident grantors, has among the lowest premium tax and has a virtual representation feature in its trust laws (that is, it provides for the administration and court supervision of trusts in which there are contingent, unborn or unascertainable beneficiaries). Ohio also doesn't tax trusts created by non-resident grantors[10] and has a directed trust statute. Virginia, the District of Columbia and Maine also have directed trust statutes.

The remaining opt-out jurisdictions lack any modern trust features that are important in our rankings. Hawaii has several peculiar limitations in its RAP law that hinder its practical application for either residents or non-residents, such as limiting the percentage of assets that may be held by such a trust and where trust assets may be sitused.

The result of these opt-out exception statutes remains unclear for the purposes of continued GST tax exemption beyond the stated underlying statute (RAP or 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 or USRAP is abrogated.[11]

## Is There a Federal RAP?

The laws of the various states define property interests under constitutional notions of federalism between the state and federal systems. When Congress established the GST tax rules in 1986, the statute looked to state law to determine the actual perpetuities period that would apply in each jurisdiction. Prior to 1986, three jurisdictions—Idaho, Wisconsin and South Dakota (in order of repeal)—had already eliminated the RAP, so perpetual trusts were already being established. Congress created

the GST tax exemption to shield from the GST tax the amount specified, originally $1 million per individual. The purpose of the exemption is to permit families to plan for future generations, promote family values and create a connection between wealth and responsibility for future generations. Multi-generational trusts are used to promote social and fiscal responsibility and often paired with family foundations and other charitable structures to teach the importance of philanthropy and connection to community.[12]

A change of situs among *Murphy* states isn't likely to create a constructive addition, because the perpetuities laws are the same.

Among President Obama's 2012 budget proposals is a durational limit on the GST tax exemption of 90 years. If enacted, this would create an artificial federal RAP. This proposal is non-revenue producing, since it won't produce any tax revenue for nearly a century. The proposal also violates the principle of federalism that Congress built into the GST tax exemption rules 26 years ago. Since 27 states and the District of Columbia have already adopted perpetuities laws that have more liberal or unlimited periods, there should be a strong Congressional push against this proposal.

## State Taxes

Income taxation and, to a lesser extent, taxation on insurance premiums are important issues for most clients. The state income taxation of a non-grantor trust accumulating income can deteriorate trust corpus over the life of the trust. This erosion is particularly true 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 five 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 and Wisconsin.

Income taxation of trusts is becoming a more complex question as a result of litigation in Connecticut and the District of Columbia, as well as proposed legislation and informational reporting requirements in New York and elsewhere.[13] A handful of states attempt to tax trusts regardless of a change in situs to another jurisdiction. This trend has become more common as states have looked for additional tax revenues in a tight economy.

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), Florida (150 basis points), Delaware (200 basis points) and Nevada (350 basis points). (See "Situs at a Glance," p. 62, for a list of premium taxes for 28 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 numerous elements to consider when you draft a trust in a perpetuities environment, including:

(1) effectiveness of flexible trust planning and administration tools, including limited POAs and the ability to decant or reform a trust if necessary;
(2) ability to change situs for income 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 the trust protector;
(5) treatment of non-resident fiduciaries doing business with the trust (often clients want to use

multiple trust advisors). This includes the use of special purpose entities to provide limited liability for such advisors;

(6) situs rules under applicable law (including possible conflict-of-laws issues) and setting clear standards for the 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 PFTCs.

**Limited POAs**—This tool is included in the drafting of perpetuities trusts to help create flexibility inter-generationally. But, note IRC Section 2041(a)(3), which prevents the abuse known as the "Delaware tax trap,"[14] which refers to the exercise of successive limited POAs over successive generations, thus allowing for a virtual perpetual trust without federal transfer taxes. Therefore, the use of limited POAs is generally reserved for beneficiaries and decedents who are ascertainable upon the creation of the trust to prevent the inadvertent violation of Section 2041(a)(3). Otherwise, this could be considered a constructive addition (that is, a material or substantial change in the beneficial interests of the beneficiaries) and potentially endanger the trust's zero GST tax-exempt inclusion ratio.

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

Alaska is the only perpetuities jurisdiction that has adopted a POA statute that exceeds what would be typically permitted under the safe harbor of Section 2041(a)(3). While Alaska is a *Murphy* jurisdiction for perpetuities purposes, at least one authority is concerned that the use of a POA provision beyond the safe harbor would create a constructive addition for GST tax purposes.[15]

**Change of situs**—The ability to change the situs of family trusts is important to affluent clients. Perhaps they want to change situs so that their trust will be in a state with more lenient income tax laws or better asset protection laws. If 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.

For example, assume a trust is created under Florida law and drafted to permit the maximum perpetuities period permitted there—360 years. That trust would have difficulty moving to any state other than, possibly, Tennessee, because Tennessee's perpetuities period is 360 years. Moreover, change of situs to a jurisdiction (other than Tennessee) would likely be deemed a constructive addition, because such a move would materially change the beneficial interest of the beneficiaries unless the Florida perpetuities period was deemed to still apply.

A change of situs among *Murphy* states isn't likely to create a constructive addition, because the perpetuities laws are the same. But 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 honor and apply Florida law.[16]

**Directed trust statute**—Such a statute permits the client to select an independent party or parties, typically designated as a co-trustee or trust advisor, to manage closely held businesses, investment assets and insurance. This relieves the directed or administrative trustee from the duty to manage the trust assets. Such use of an independent party makes it possible for clients to hold closely held interests and ongoing business interests in a trust without an administrative or directed trustee's interference. Directed trusts also provide more flexibility and control over asset allocation, concentration and selection of investments. Directed trust fees are typically lower to reflect the fact that the trustee isn't liable for the trust's investment activities.[17]

**Trust protector statute**—Such a statute recognizes the authority and limitations of a person or entity that has been appointed as trust protector. A trust protector is any disinterested third party whose appointment is provided by the trust instrument. This provides greater flexibility for future generations as conditions change. Only Alaska, Arizona, Delaware, Idaho, Nevada, New Hampshire, South Dakota and Wyoming have effective trust protector statutes.[18] Hawaii also has a directed trust statute, but it's relatively new and untested.

The power of a trust protector is as provided in the governing instrument and under 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 granted by the trust instrument.

**Reformation and decanting statutes—**Reformation and decanting statutes permit a trust to be modified within certain parameters to better meet a family's needs.

An unregulated special-purpose entity is generally used in combination with a directed trust structure.

Historically, only judicial action could modify a trust. This process often required the consent of all the beneficiaries or a court-approved equitable deviation.[19] In addition, a trustee might, under common law, have the power to make distributions of trust property to another trust, even one created by that trustee. Uniform Trust Code (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 beneficiaries.[20]

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.[21] South Dakota's decanting statute, effective July 1, 2007, provides the best example of flexibility for trust remodeling.[22]

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

(1) improve the 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 court's experience with judicial reformation and modifications and the procedures, costs and time involved.[23]

Both reformation and decanting statutes provide trustees and trust beneficiaries flexibility without negative GST tax consequences if certain requirements are met. The final GST regulations create a safe harbor for four types of modifications, none of which affect the grandfathered status of a trust.[24] A decanting or modification that qualifies for one of these safe harbors won't cause a GST tax-exempt trust to lose its tax-exempt status.[25]

**Special-purpose entities—**An unregulated special-purpose entity is generally used in combination with a directed trust structure. Special-purpose entities are intended to limit the liability of trust protectors, trust advisors, investment and distribution committees as well as other individuals and professional entities that serve in advisory and investment roles on behalf of a directed trustee. Additionally, they provide greater ties to the trust situs state by including non-resident fiduciaries as part of an entity in that state. These entities are typically limited liability companies (LLCs) organized under the laws of a jurisdiction that permits the special-purpose entity. The scope and purpose of such entities is generally limited to a single client or family group.

Some insurers provide coverage to an entity established specifically for these purposes, thus protecting the trust protector, directors, officers and committee members. Special-purpose entities 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.

The six jurisdictions that permit special-purpose entities are: Alaska, Delaware, New Hampshire, Nevada, South Dakota and Wyoming.

**Virtual representation statutes—**These statutes are designed to facilitate the administration and court supervision of 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.

The nine jurisdictions that have virtual representation statutes are: Alaska, Arizona, Florida, Illinois, Nevada, New Hampshire, South Dakota, Washington and Wyoming. Delaware has a limited version of virtual representation. The UTC also provides a form of virtual representation.[26]

## PFTCs

Many affluent families want to establish a PFTC to handle all of their family trust work. In 2012, the most popular perpetual or near-perpetual jurisdictions that permit PFTCs are: Nevada, New Hampshire, South Dakota and Wyoming. South Dakota and Nevada contain the greatest number of PFTCs.[27]

Currently, Nevada requires $300,000 in capital,[28] New Hampshire requires $250,000 in capital, South Dakota requires $200,000 in capital and Wyoming requires $500,000 in capital to begin a PFTC. Increasingly, banking regulators in various states are encouraging PFTCs to pledge more capital than just the minimum amount, especially as PFTCs mature.

PFTCs are exempt from Securities and Exchange Commission registration and are popular with many families as a result of the newly released definition of "family office." PFTCs also allow families to establish common trust funds and business trusts, both SEC registration-exempt. PFTCs provide a family office with liability protection as a trustee (versus serving personally), as well as governance and privacy.

## Asset Protection

When clients seek asset protection for their children and descendants, they're typically concerned with protecting a descendant's inheritance from: (1) claims of an estranged spouse; and/or (2) 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 than the threat of third-party creditors.

In this respect, there are primarily two types of asset protection under U.S. common law: (1) discretionary trust protection, and (2) spendthrift protection. 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,[29] so no creditor may stand in the shoes of a beneficiary. In this respect, the beneficiary's interest isn't a property interest[30] and is nothing more than an expectancy that creditors can't attach.[31]

While almost all discretionary trusts contain a spendthrift clause, when one reads a discretionary trust case, the analysis never gets to spendthrift protection.

Conversely, spendthrift protection began in the United States approximately 125 years ago. English courts have never accepted it. Under U.S. law, except for certain debts (such as child support, alimony, governmental claims or necessary expenses of a beneficiary), a spendthrift clause stops creditors from attaching the assets at the trust level and forcing a distribution.

While almost all discretionary trusts contain (and should contain[32]) a spendthrift clause, when one reads a discretionary trust case, the analysis never gets to spendthrift protection. Rather, the analysis is as follows: The beneficiary didn't have either an enforceable right to a distribution or a property interest, and since the beneficiary held nothing, no creditor (not even an exception creditor) could stand in the beneficiary's shoes. Therefore, no creditor could reach the

beneficiary's interest by forcing a distribution or attaching the beneficiary's interest.

It's the beneficiary's lack of an enforceable right to force a distribution that provides the key concept to protect against the following types of marital claims:

(1) Will the beneficiary's trust interest be considered marital property subject to division in a divorce?
(2) Will an estranged spouse be able to force a distribution through a minor child beneficiary? and
(3) Will a court impute undistributed income in computing a beneficiary's child support or alimony?

The first issue is currently a concern in the 10 states[33] where remainder interests have been deemed to be marital property. Whether a current distribution interest will be considered a property interest under most state laws generally depends on whether the beneficiary has an enforceable right to a distribution.[34] This complex analysis is beyond the scope of this article. However, one may simply draft out of the "any property interest" issue by using a discretionary dynasty trust—provided local law has a *Restatement (Second) of Trusts (Restatement Second)* interpretation.

The second issue is a bit more subtle, but is present in every state whenever a minor child beneficiary holds an enforceable right to a distribution. In this situation, an estranged spouse can stand in the child's shoes and sue for a distribution on the minor's behalf. Assume a client creates a trust in which distributions may be made to his child, John, and his child's descendants. John has two minor children, Frank and Betty, and his estranged wife, Carol, has some form of custody of the two minors. Can Carol sue the trustee pursuant to the distribution standard on behalf of her children, Frank and Betty? Of course she can, if the distribution standard gives the children any enforceable right to a distribution. It should be noted that Carol isn't suing for child support or maintenance, and she isn't suing for a property distribution. Rather, she's suing solely due to her children having an enforceable right to a distribution. (See "Forcing a Distribution," this page.)

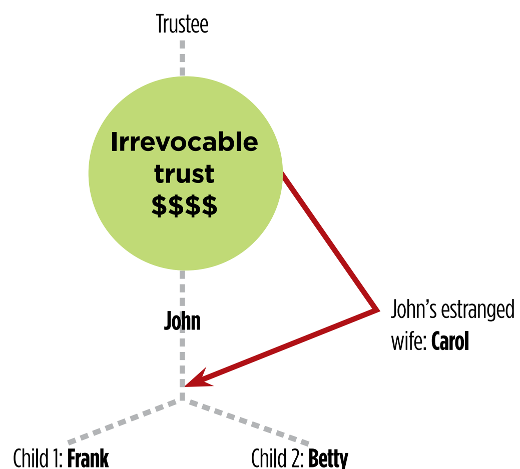
The good news is that almost all domestic relations attorneys have yet to figure this out. The bad news is that more and more of them are learning about trust law. The better news is that by drafting a discretionary trust that doesn't give a minor beneficiary the ability to force a distribution, Carol has no more rights than the child beneficiary. Therefore, even standing in the child's shoes, she can't force a distribution.

While this part of the article deals with third-party trusts, we frequently see a related drafting concern in domestic asset protection trusts (DAPTs) (that is, self-settled trusts). For example, assume that a settlor, Marie, names herself and her children as beneficiaries and funds a DAPT with separate property. The distribution standard states the "Trustee shall make distributions for health, education, maintenance and support" or some other standard that creates an enforceable right under local law. Later, Marie divorces and her estranged husband Bill sues on behalf of the minor children for a distribution. Again, if a minor child can force a distribution, so can Bill standing in the minor child's shoes.

The third issue is the concern that a court will impute undistributed income in the computation of child support. This is the result in the case of *Dwight v. Dwight*.[35] This is also a new issue that the domestic relations attorneys have only recently raised.

**Forcing a Distribution**

*Carol can sue the trustee on behalf of Frank and Betty*




— Mark Merric

Unfortunately, the deductive logic is relatively straightforward. If a beneficiary has an enforceable right to a distribution, just because a beneficiary doesn't ask for a distribution doesn't appear to be a reason to exclude it from child support or maintenance. Further, a court may analogize to a special needs trust. If a beneficiary has an enforceable right to a distribution in one of these trusts, the beneficiary has an available resource and is disqualified from governmental benefits.

In addition to marital property claims, estranged spouses suing on behalf of minor child beneficiaries and the imputation of income for child support or alimony, there are other areas in which planners want to make sure a beneficiary can't force a distribution. Regarding claims by the federal government, if a beneficiary has an enforceable right to a distribution, he has a property interest under federal law and a federal supercreditor may attach the trust.[36] In addition to the asset protection issues, there are estate inclusion issues for self-settled trusts and spousal access trusts if certain beneficiaries hold an enforceable right to a distribution. For a self-settled estate-planning trust (like the Alaska Rainy Day Trust[37]) to avoid estate inclusion, the settlor/beneficiary can't hold an enforceable right to a distribution.[38] With a spousal access trust, if a spouse/beneficiary holds an enforceable right to a distribution and the trust (or local law) doesn't include an *Upjohn* savings clause[39] (that is, the trustee may not make a distribution to a beneficiary that would relieve the trustee's support obligation) or a provision to look to the beneficiary's resources, including the settlor's obligation of support, there again is a possible estate inclusion issue.[40]

The asset protection planning key to almost all of the above issues is to draft a discretionary trust in which the beneficiary doesn't have an enforceable right to a distribution.[41] Under English common law, the *Restatement (First) of Trusts (Restatement First)*, the *Restatement Second,* as well as almost all case law on point, estate planners could draft a discretionary distribution standard with relative certainty that a beneficiary didn't have either an enforceable right to a distribution or 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. Many estate planners believe that the national version of the UTC follows the *Restatement Third's* position regarding this issue. In response to this problem, states (including some UTC states) are beginning to respond with statutes codifying the *Restatement Second* in this area. Absent a statute codifying the *Restatement Second*, and even if a state has strong *Restatement Second* case law, a court may reverse its position and inadvertently adopt the *Restatement Third's* newer view of discretionary trusts. In this respect, a statute codifying the *Restatement Second* is the only sure method to preserve the asset protection of a common law discretionary trust.

In order of importance, the most critical elements needed in a discretionary trust statute are:

(1) the affirmative statement that a discretionary interest is neither a property interest nor an enforceable right;
(2) that no creditor may attach a discretionary interest;
(3) the judicial review standard in *Restatement Second* Sections 187 and 128; and
(4) the definition of a discretionary interest.

We find that South Dakota, Oklahoma and Michigan are the leading states with respect to the four statutory asset protection factors described above. (Note that Oklahoma isn't included in our chart because it still has a RAP.) Conversely, Delaware's proposed solution is to prohibit a Delaware court from using Article 50 and 60 of the *Restatement Third*, but rather use the judicial review standard of the *Restatement Second* Section 187.

## Dominion and Control

A new area in which trial attorneys are attempting to pierce both discretionary and spendthrift protection is "dominion and control." For example, with little, if any, legal support, the *Restatement Third* takes the position that any creditor may attach a sole trustee/beneficiary's interest. But there are factors that may lead a court to hold that a beneficiary has dominion and control over a trust. For example, the beneficiary holds an unconditional removal/replacement power, appoints a friend or close relative as a trustee, holds a general or special POA or is a manager, president or general partner of an entity owned primarily by the trust. South Dakota has gone the furthest in this area by providing that these elements,

either alone or in combination, don't warrant a finding of dominion and control by a court.[42] Nevada and Oklahoma also adopted substantially similar legislation. 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, as long as the drafting attorney is aware of the type of creditor language that needs to be added to a Delaware trust, this may prove to be a novel approach. On the other hand, whether this approach will prevent a Delaware court from using the equitable dominion and control remedy is uncertain. In the dominion and control area, South Dakota, Oklahoma and Nevada have the best laws.

For a client who's not a resident of a DAPT state, how effective the structure will be depends on conflict-of-laws principles.

## Alter Ego

Closely related to the concept of dominion and control is the doctrine of holding the trust as the alter ego of a settlor or a beneficiary. Following the approach of a DAPT statute, South Dakota law states:

> Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a South Dakota trust or for avoidance of a transfer to a South Dakota trust unless the settlor's transfer of property was made with the intent to defraud that specific creditor.[43]

South Dakota has applied the same restriction on attacking claims that several DAPT states have applied. In essence, its statute says that the only remedy a creditor has against a South Dakota trust is a claim for fraudulent conveyance. In addition, South Dakota, Oklahoma, Indiana and Nevada all have provisions stating that a court may not deem a settlor of an irrevocable trust to be the alter ego of the trustee even if the settlor has shown evidence of the dominion and control factors that are listed in their respective statutes. (Note that Indiana isn't included in our chart because it still has a RAP.) The settlor also can't be deemed the alter ego of the trustee based on:

(1) isolated occurrences in which the settlor has signed checks, made disbursements or executed other documents related to the trust as a trustee, when in fact, the settlor wasn't a trustee;
(2) the fact that the settlor has made requests for distributions on behalf of beneficiaries; or
(3) the fact that the settlor has made requests to the trustee to hold, purchase or sell any trust property.[44]

In this respect, South Dakota has the best protection against an alter ego claim, followed by Oklahoma, Indiana and Nevada.

**Self-settled trusts:** Self-settled trusts are trusts that settlors form for their own benefit. That is, the settlor is also a permissible beneficiary. Twelve states have self-settled trust legislation.[45] (Eleven of those states are listed in our chart, p. 62; Oklahoma isn't included in our chart because it still has a RAP.) We find Alaska, Delaware, Nevada and South Dakota to have the best self-settled trust legislation.

## Exception Creditors

When ranking the strength of DAPT jurisdictions, some practitioners favor one jurisdiction over another based on whether such jurisdiction has an exception creditor for items such as child support or maintenance. We disagree with placing much weight on factors such as these when evaluating the strength of a DAPT.[46]

From a practical standpoint, we've never come across a situation in which a client was proposing to create a DAPT with the objective of shirking a child support obligation. Clients who have the means to create a DAPT simply don't wish to be incarcerated when the trustee of a DAPT could make a distribution in payment of a child support obligation.

Second, for a client who's not a resident of a DAPT state, how effective the structure will be depends on conflict-of-laws principles. If a trust is properly designed, a court generally will seek to follow the governing law of the trust, place of administration and location of the assets as the key factors in determining conflict-of-laws principles.[47] However, there's a line of cases in which courts appear to blatantly ignore conflict-of-laws principles or greatly twist their application to reach what the court feels is an equitable result. This is when a debtor is involved in obvious fraudulent conveyance activity[48] or shirking a child support or maintenance obligation.[49] We would strongly suggest that if a domestic relations court in an out-of-state jurisdiction finds that a beneficiary was delinquent on his child support or his maintenance, the court would simply apply the law of the beneficiary's residence to the trust and then find that child support or alimony was an exception creditor. The result would merely be another "bad facts make bad law" case.

## Property Settlements

Some commentators imply that a DAPT statute provision that specifically prevents an estranged spouse from reaching the trust assets under that state's marital laws will be respected by an out-of-state domestic relations court. For example, AS 34.40.110(l) states:

> If a trust has a transfer restriction allowed under (a) of this section, in the event of divorce or dissolution of the marriage of a beneficiary of the trust, the beneficiary's interest in the trust is not considered property subject to division under AS 25.24.160 or 25.24.230 or a part of property division under AS 25.24.160 or 25.24.230.

We find that this is an excellent provision for Alaska residents or other DAPT state residents that have a similar statutory provision.[50] However, this type of provision will provide little protection for an out-of-state beneficiary in a divorce. First, if any non-DAPT state found the beneficiary's interest to be marital property under its own laws, it wouldn't follow conflict-of-laws principles and simply apply its own law to the trust. Second, we question whether an Alaska court would even attempt to apply its marital laws to an out-of-state beneficiary. Division of property under the Alaska statutes referenced above apply only to Alaska domestic relations issues.

The best method to avoid creating a marital property interest is to draft a discretionary dynasty trust as discussed in the beginning of this article. Please note, while this technique is very effective in the third-party trust scenario, the effectiveness with a DAPT remains to be seen.

## Charging Order Protection

A charging order is a court order issued to a judgment creditor that forces an entity in which a debtor is a partner to make distributions to the creditor (rather than the debtor) until a debt is satisfied. Often a family limited partnership (FLP) or LLC is owned partially or wholly by a trust(s). This strengthens the likelihood that an out-of-state judge will apply the governing law of the trust under conflict-of-laws principles. That's 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 determined the best jurisdictions were those with a statute that: (1) prevents 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 our chart to indicate that the statute states that a charging order is the sole remedy, and there's no other language in the statute (or comments in the case of a uniform act) stating that a court may issue additional orders to effect the charging order or that a court may order the judicial foreclosure sale of the partner's or member's interest. "JF" means that either the statute or case law allows the judicial foreclosure sale of the partner's or member's interest. (See "Situs at a Glance," p. 62.) The nine lead states on charging order protection are: Alaska, Delaware, Florida, New Jersey, Nevada, Texas, Virginia, Wyoming and South Dakota. (Texas isn't included in our chart because it still has a RAP.)

## Migration

The migration of a trust from one jurisdiction to another can reduce a beneficiary's distribution interest when compared to other beneficiaries. Most

## Situs at a Glance*

*Know what you're getting your client into*

**LEGEND:** **USRAP**—Uniform Statutory Rule Against Perpetuities
**GST**—generation-skipping transfer
**POA**—power of appointment
**bp**—bonus points
**PFTC**—private family trust company

Top jurisdictions are **bolded in blue**. Florida and Wyoming (honorable mentions) are also **bolded in blue**.

### 28 Perpetual and Close-to-Perpetual Trust Jurisdictions

| | | Rule Against Perpetuities (RAP) | | | | Taxation | | Modern Trust Laws | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Situs | Year RAP Modified | Common Law Rule RAP | USRAP | *Murphy* Case Applies | Effective GST Tax Limit | State Income Tax | State Premium Tax | Limited POA | Change of Situs | Directed Trust Statute | Trust Protector Statute | Reformation/ Decanting Statutes | Special-Purpose Entities |
| ID | 1957 | Abolished | No | Yes | Perpetual | Yes | 170 bp | IRC Section 2041(a)(3) | Perpetual | No | Yes | No/limited | No |
| WI | 1969 | Abolished | No | Yes | Perpetual | Tax residents | 350 bp | IRC Section 2041(a)(3) | Perpetual | No | No | No | No |
| **SD** | **1983** | **Abolished** | **No** | **Yes** | **Perpetual** | **No tax** | **8 bp** | **IRC Section 2041(a)(3)** | **Perpetual** | **Yes** | **Yes** | **Yes/yes** | **Yes** |
| **DE** | **1995** | **Abolished** | **No** | **Yes** | **Perpetual** | **Tax residents** | **200 bp** | **IRC Section 2041(a)(3)** | **Perpetual** | **Yes** | **Yes** | **Yes/yes** | **Yes** |
| AZ | 1998 | Opt out | No | No | Uncertain | Yes | 200 bp | IRC Section 2041(a)(3) | No | Yes | Yes | Yes/yes | No |
| IL | 1998 | Opt out | No | No | Uncertain | Tax residents | 50 bp | IRC Section 2041(a)(3) | No | No | No | No | No |
| MD | 1998 | Opt out | Yes | No | Uncertain | Yes | 200 bp | IRC Section 2041(a)(3) | No | No | No | No | No |
| ME | 1999 | Opt out | No | No | Uncertain | Yes | 200 bp | IRC Section 2041(a)(3) | No | Yes | No | No | No |
| NJ | 1999 | Abolished | No | Yes | Perpetual | Yes | 210 bp | IRC Section 2041(a)(3) | Limited by statute | No | No | No | No |
| OH | 1999 | Opt out | No | No | Uncertain | Tax residents | 140 bp | IRC Section 2041(a)(3) | No | Yes | No | No | No |
| RI | 1999 | Abolished | No | No | Uncertain | Yes | 200 bp | IRC Section 2041(a)(3) | No | No | No | Yes/yes | No |
| **AK** | **2000**** | **Abolished** | **No** | **Yes but POA** | **Perpetual unless POA** | **No tax** | **10 bp** | **1,000 yrs IRC Section 2041(a)(3)** | **Perpetual unless POA** | **Yes** | **Yes** | **Yes/yes** | **Yes** |
| VA | 2000 | Opt out | Yes | No | Uncertain | Yes | 225 bp | IRC Section 2041(a)(3) | No | Yes | No | No | No |
| CO | 2001 | No | 1,000 yrs | No | If vesting 365 yrs | Yes | 200 bp | IRC Section 2041(a)(3) | Limited 1,000 yrs | Yes | No | No | No |
| **FL** | **2001** | **No** | **360 yrs** | **No** | **If vesting 360 yrs** | **No tax** | **150 bp** | **IRC Section 2041(a)(3)** | **Limited TN** | **Yes** | **No** | **Yes/yes** | **No** |
| MO | 2001 | Abolished | No | Yes | Perpetual | Yes | 200 bp | IRC Section 2041(a)(3) | Perpetual | No | No | No | No |
| DC | 2002 | Opt out | Yes | No | Uncertain | Yes | 170 bp | IRC Section 2041(a)(3) | No | Yes | No | No | No |
| NE | 2002 | Opt out | Yes | No | Uncertain | Yes | 100 bp | IRC Section 2041(a)(3) | No | Yes | No | No | No |
| WA | 2002 | Yes | 150 yrs | No | Uncertain | No tax | 200 bp | IRC Section 2041(a)(3) | No | Yes | No | No | No |

*Arranged by year that the RAP or USRAP was modified or repealed. **Alaska first modified its laws in 1997, but didn't adopt the *Murphy* approach until 2000.

**UTC**—Uniform Trust Code
**FLP**—family limited partnership
**LLC**—limited liability company
**JF**—judicial foreclosure
**SR**—sole remedy

***Second***—jurisdiction has codified *Restatement (Second) of Trusts*
***Third ?***—jurisdiction is a UTC jurisdiction and it will take future litigation to determine whether the UTC adopted the *Restatement (Third) of Trusts*

**No statute**—the issue hasn't been addressed by statute and it will be up to the courts to determine whether the *Restatement Second's* or *Restatement Third's* view prevails
**?**— the jurisdiction is undecided whether charging order is the sole remedy for creditors

| | | | Asset Protection (AP)—Third-Party Trusts | | | | | | | | Migration |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Discretionary Trust Protection | | | | | | | | |
| Enhanced Virtual Representation | Privacy Laws | Popular PFTC State | Not Enforceable Right | Creditor Can't Attach | *Second* 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 | Public | No | No case law | No case law | No case law | No case law | No | No | No | FLP - JF LLC - JF | No statute |
| No | Public | No | No case law | No case law | No case law | No case law | No | No | No | FLP - ? LLC - ? | No statute |
| **Yes** | **Seal** | **Yes, regulated** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | **Best** | **Best** | **FLP - Best LLC - Best** | ***Second*** |
| **Limited** | **Seal 3 yrs** | **No** | **No** | **Yes** | **Probably**[1] | **No** | **Yes** | **No** | **Best** | **FLP - Best LLC - Best** | **No statute** |
| Yes | Public | No | No | Conflicting provisions[2] | No | No | No | No | No | FLP - SR LLC - SR | *Third?* |
| Yes | Public | No | Case law | Case law | Case law | Case law | No | No | No | FLP -JF LLC - JF | No statute |
| No | Public | No | No case law | Case law | Probably case law[3] | Case law | No | No | No | FLP - JF LLC - JF | No statute |
| No | Public | No | No | No[4] | No | Probably[5] | No | No | No | FLP -JF LLC - JF | *Third?* |
| No | Public | No | No | No | No | No | No | No | No | FLP - SR LLC - Best | No statute |
| No | Public | No | No | Yes | Probably[6] | Very restrictive[7] | No | No | No | FLP - JF LLC - ? | *Third?* |
| No | Public | No | No | Case law | Case law | Case law | No | No | Yes | FLP - ? LLC - ? | No statute |
| **Yes** | **Limited filings** | **No** | **No** | **Yes** | **No** | **No** | **No** | **No** | **Best** | **FLP - Best LLC - Best** | **No statute** |
| No | Public | No | No | No | No | No | No | No | No | FLP - Best LLC - Best | *Third?* |
| No | Public | No | Case law | Case law | Case law | Case law | No | No | No | FLP - ? LLC - JF | No statute |
| **Yes** | **Public** | **No** | **No** | **Yes** | **No** | **No** | **No** | **No** | **No** | **FLP - Best LLC - Best** | ***Third?*** |
| No | Public | No | Yes | Yes | No | No | No | No | Yes | FLP - ? LLC - ? | *Third?* |
| No | Public | No | No | No | No | No | No | No | No | FLP - ? LLC - JF | *Third?* |
| No | Public | No | No | No | No | No | No | No | No | FLP - JF LLC - ? | *Third?* |
| Yes | Public | No | No | No | No | Little case law | No | No | No | FLP - JF LLC - ? | No statute |

***More jurisdictions, p. 64***

## **Situs** at a Glance* (continued)

*Know what you're getting your client into*

**LEGEND:** **USRAP—**Uniform Statutory Rule Against Perpetuities
**GST—**generation-skipping transfer
**POA—**power of appointment
**bp—**bonus points
**PFTC—**private family trust company

Top jurisdictions are **bolded in blue**. Florida and Wyoming (honorable mentions) are also **bolded in blue**.

### 28 Perpetual and Close-to-Perpetual Trust Jurisdictions

| | | Rule Against Perpetuities (RAP) | | | | Taxation | | Modern Trust Laws | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Situs | Year RAP Modified | Common Law Rule RAP | USRAP | *Murphy* Case Applies | Effective GST Tax Limit | State Income Tax | State Premium Tax | Limited POA | Change of Situs | Directed Trust Statute | Trust Protector Statute | Reformation/ Decanting Statutes | Special-Purpose Entities |
| **WY** | **2003** | **Yes** | **1,000 yrs** | **No** | **If vesting 1,000 yrs** | **No tax** | **75 bp** | **IRC Section 2041(a)(3)** | **Limited UT, CO** | **Yes** | **Yes** | **Yes/yes** | **Yes** |
| UT | 2004 | No | 1,000 yrs | No | If vesting 1,000 yrs | Yes | 225 bp | IRC Section 2041(a)(3) | Limited WY, CO | No | No | No | No |
| **NV** | **2005** | **No** | **365 yrs** | **No** | **If vesting 365 yrs** | **No tax** | **350 bp** | **IRC Section 2041(a)(3)** | **No** | **Yes** | **Yes** | **Yes/yes** | **Yes** |
| **NH** | **2006** | **Abolished** | **No** | **Yes** | **Perpetual** | **Dividends, interest** | **125 bp** | **IRC Section 2041(a)(3)** | **Perpetual** | **Yes** | **Yes** | **Yes/yes** | **Yes** |
| TN | 2007 | Opt out | 360 yrs | No | If vesting 360 yrs | Yes | 175 bp | IRC Section 2041(a)(3) | Limited FL | Yes | No | No | No |
| NC | 2007 | Abolished | No | Yes | Perpetual | Yes | 190 bp | IRC Section 2041(a)(3) | Perpetual | Yes | No | No | No |
| PA | 2007 | Abolished | No | No | Uncertain | No tax | 200 bp | IRC Section 2041(a)(3) | No | No | No | No | No |
| MI | 2008 | Opt out | No | No | Uncertain | Yes | 125 bp | IRC Section 2041(a)(3) | No | No | No | No | No |
| HI | 2010 | Opt out | No | No | Uncertain | Yes | 275 bp | IRC Section 2041(a)(3) | No | Yes | Yes | Yes/yes | No |

*Arranged by year that the RAP or USRAP was modified or repealed.

## 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.
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 notwith-standing 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 Uniform Trust Code (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. 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. For an Ohio "wholly discretionary trust" (that isn't a special needs trust), the 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.

**UTC—**Uniform Trust Code
**FLP—**family limited partnership
**LLC—**limited liability company
**JF—**judicial foreclosure
**SR—**sole remedy

***Second*—**jurisdiction has codified *Restatement (Second) of Trusts*
***Third ?*—**jurisdiction is a UTC jurisdiction and it will take future litigation to determine whether the UTC adopted the *Restatement (Third) of Trusts*

**No statute—**the issue hasn't been addressed by statute and it will be up to the courts to determine whether the *Restatement Second's* or *Restatement Third's* view prevails
**?—** the jurisdiction is undecided whether charging order is the sole remedy for creditors

| | | | Asset Protection (AP)—Third-Party Trusts | | | | | | | | Migration |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Discretionary Trust Protection | | | | | | | | |
| Enhanced Virtual Representation | Privacy Laws | Popular PFTC State | Not Enforceable Right | Creditor Can't Attach | *Second* 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** | **Public** | **Yes, unregulated** | **No** | **Yes** | **Uncertain**[8] | **Yes** | **No** | **No** | **Yes** | **FLP - ? LLC - Best** | **No statute** |
| No | Public | No | No | No | No | No | No | No | Yes | FLP - ? LLC - JF | *Third?* |
| **Yes** | **Public** | **Yes, unregulated** | **No** | **Yes** | **Yes** | **Ambiguous**[9] | **Yes** | **Good** | **Best** | **FLP - Best LLC - Best** | ***Second*** |
| **Yes** | **Public** | **Yes** | **Yes**[10] | **No** | **No** | **Case law**[11] | **No** | **No** | **Yes** | **FLP - JF LLC - ?** | ***Third?*** |
| No | Public | No | No | No | No | No | No | No | Yes | FLP - ? LLC - SR | *Third?* |
| No | Public | No | No | Uncertain[12] | No | Yes | No | No | No | FLP - ? LLC - SR | *Third?* |
| No | Public | No | No | No | No | No | No | No | No | FLP - JF LLC - ? | *Third?* |
| No | Public | No | Yes | Yes | Probably[13] | Yes | No | No | No | FLP - JF LLC - ? | *Third?* |
| No | Public | No | No | No | No | No | No | No | Yes | FLP - JF LLC - JF | No statute |

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) of Trusts* 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 preposition may have some effect in 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, supra* note 10.
12. North Carolina General Stautes (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.
13. While Section 7815 of the Michigan UTC states the *Restatement Second* Section 122 elements of improper motive, dishonesty and failure to use judgment as a basis of an abuse of discretion, it doesn't limit a judge to only these three circumstances.

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

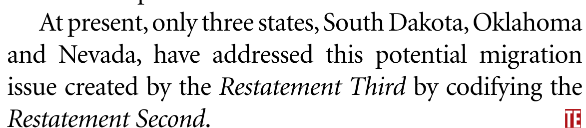
trust instruments are silent on whether the trustee should look to a beneficiary's resources before making a distribution. Under the *Restatement First, Restatement Second* and most common law, if a trust instrument is silent, a trustee doesn't have an obligation to look to a beneficiary's resources in determining the amount of a distribution. Rather, the assumption is that the settlor intended to treat his beneficiaries equally, regardless of a beneficiary's personal wealth.

Unfortunately, the *Restatement Third* takes the opposite approach, requiring a trustee to look to a beneficiary's resources if the trust instrument is silent. Based on comments in the UTC, it appears that the UTC adopts the *Restatement Third's* 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 leading trust jurisdictions to take advantage of their much more favorable laws. Would such a beneficiary ever consent to this change if it would decrease his beneficial interest? In this respect, a state statute that codifies the *Restatement Second's* view that a trustee isn't required to look to a beneficiary's resources in determining the amount of the distribution becomes very important to whether a beneficiary should be in favor of a migration.

For purposes of the chart, we've classified the migration column with the titles, "*Second*" meaning the state codified the *Restatement Second* or "*Third?*" meaning it's a UTC state and it will take future litigation to determine whether the UTC adopts the *Restatement Third* view. If we said "No statute," then the statute hasn't addressed the issue and it will be up to the court to determine whether the *Restatement Second* or *Restatement Third* view should prevail.

At present, only three states, South Dakota, Oklahoma and Nevada, have addressed this potential migration issue created by the *Restatement Third* by codifying the *Restatement Second*.



## Endnotes

1. Jesse Dukeminier and James E. Krier, "The Rise of the Perpetual Trust," 50 *UCLA Law Review* 1303, at p. 1316. *See* Idaho Code Section 55-11 (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. (A)(1) Section 14-2901 (West Supp. 2002); Missouri Ann. Stat. Section 456.236 (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 19-109 (10) (2002); Washington Rev. Code Ann. Section 11.98.130 (West 2002); Wyoming H.B. 77 (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 (*See* 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); *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.
2. In our view, the methodology for ranking trust jurisdictions must address two related questions: (1) Does the jurisdiction permit truly perpetual trusts or something less? and (2) Does a jurisdiction have other trust laws and practices that give it an edge? We believe that the length of time and experience with perpetual trust laws on the books, 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 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).
3. In the interest of full disclosure, author Daniel G. Worthington served as associate dean of the University of South Dakota School of Law (1992 to 1994) and now serves on the audit committee and board of directors for the South Dakota Trust Company located in Sioux Falls, S.D.
4. *See* Daniel G. Worthington and Daniel D. Mielnicki, "Planning with Multigenerational Trusts," *Trusts & Estates* (May 2011) at p. 34. *See also* Carlyn S. McCaffrey and Pam H. Schneider, "The Generation-skipping Transfer Tax: Time Traveling with the GST Tax in 2011 and Beyond," *Trusts & Estates* (February 2011) at p. 30.
5. 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

rule against perpetuities (RAP) problem. It also adopted a 1,000-year power of appointment (POA) statute that may effectively limit the generation-skipping transfer (GST) tax exemption of a trust. *See* Richard Nenno, "Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust," *2006 Heckerling Tax Institute*.

6. *See* Garrett Moritz, "Dynasty Trusts and the Rule Against Perpetuities," 116 *Harvard Law Review* 8 (June 8, 2003). In this law review note, Moritz outlines six categories or approaches that the (then-15) jurisdictions had undertaken to create perpetual trusts. *See* the discussion in Daniel G. Worthington, "Problems and Promises of Perpetuities Planning," *Trusts & Estates* (October 2005) at p. 10.
7. These jurisdictions often are referred to as the original *Murphy* jurisdictions after the *Murphy* case 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. Wisconsin had a perpetuities statute stated in terms of a rule against the suspension of the power of alienation (rather than a rule based upon remoteness in vesting). The Internal Revenue Service acquiesced in *Murphy*.
8. The result in the term-of-years states should be no different than 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 5 at 3-1; 3-51:

   > In any event, it's difficult to distinguish in any practical sense among Delaware with its indefinite period, Wisconsin with its 30-year period easily negated by a power of sale, and states such as Alaska (1,000-year period) or Florida (360-year period) with their definite periods of such inordinate length that they might as well be indefinite. Note that the 360-year or 1,000-year periods adopted by Florida and Alaska, respectively, greatly exceed the IRS' safe harbor periods (either the common law or the USRAP period) in the constructive addition regulations for the exercise of limited powers of appointment over grandfathered dynasty trusts. Treasury Regulations Section 26.2601-1(b)(1)(v)(B)(2) applies to any exercise of a power and not just to a power creating a second power. The regulation suggests, however, that if an ending period is essential to avoid the application of IRC Section 2041(a)(3), the IRS will require such ending period to be no longer than the traditional period or 90 years. No tax policy would be served by a different tax result under state laws with allegedly 'phony' periods and states with an indefinite period. In informal discussions, IRS representatives confirmed this view.

9. 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.

10. 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.
11. *See, for example*, Arizona's ARS Section 14-2901(A)(3): "[T]he common-law Rule does not apply to a non-vested interest under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest." *Compare* Illinois' IL ST Ch.765, Section 305/4, which provides that the rule doesn't apply to "qualified perpetual trusts" (any trust created on or after Jan. 1, 1998, expressly states that the rule doesn't apply and the trustee has the

**SPOT LIGHT**

**We're Going to Need A Bigger Boat**

"Dutch Fishing Smacks and Trading Vessels Off the Coast in a Heavy Swell" (17 in. by 24½ in.) by Charles Martin Powell, sold at Christie's Maritime Art Sale on Nov. 24, 2011 for $5,813. Powell was a self-taught artist who worked in his early life as a merchant seaman. His adoption of the Dutch painting style and accurate depiction of Dutch trading vessels in his work, suggest that he spent considerable time in Holland.

unlimited power to sell assets) *with* Maine's 33 ME RSA Section 101-A, which says the rule doesn't apply to trusts created after Sept. 18, 1999, if the trust expressly states that the rule doesn't apply and the trustee has the power to sell, mortgage or lease property for any period of time beyond the period required for an interest created under the governing instrument to vest to be valid under the RAP. *See also* Maryland's MD Est. & Trust Section 11-102(5): The rule doesn't apply if the trust expressly states that the rule doesn't apply and the trustee has the power to sell, mortgage or lease property for any period of time beyond the period that's required for an interest created under the instrument to vest to be valid under the RAP; and Missouri's V.A.M.S. Section 456.025(1): The RAP won't apply to a trust created after Aug. 28, 2001, if a trustee has the power pursuant to the terms of the trust or applicable law to sell the trust property during the period of time the trust continues beyond the period of the RAP that would apply to the trust but for this subsection. *See also* 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-statecomparisonofspendth"ifttrustlaws.pdf*.

12. *See* Daniel G. Worthington and Daniel D. Mielnicki, "In Defense of Multigenerational Trusts," *Trusts & Estates* (January 2011) at p. 60.
13. *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).
14. 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 in which 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 powers of appointments over successive generations. Internal Revenue Code Section 2514(d) was enacted in 1951 to prevent this result from happening. The current section dealing with this issue is IRC Section 2041(a)(3).
15. *See* Nenno, *supra* note 5. *See generally* Dukeminier and Krier, *supra* note 5 at p. 1316.
16. 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.
17. *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 and Wyoming.
18. *See, e.g.*, SDCL 55-1B-6 (South Dakota). This is the first trust protector statute adopted by a U.S. jurisdiction.
19. *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 a current 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 pps. 1-5.
20. Wareh, *ibid* at note 19, p. 14. The Uniform Trust Code (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, which adopted Arizona estate-planning attorney Les Raatz's position, 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 also* Blattmachr, *ibid* at note 19, p. 3.
21. Wareh, *supra* note 19 at note 3. First New York (1991), then Alaska (1998), Delaware (2003), Tennessee (2004) and most recently, 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 19 at p. 1 (Arizona and Florida as additional states that have adopted decanting statutes).
22. Blattmachr, *supra* note 19 at p. 19 ("South Dakota's decanting statute, effective July 1, 2007, provides the most flexibility for trust remodeling.")
23. In addition, some states may have newer statutes that may never have been fully tested in the courts. Some of the more established jurisdictions have more streamlined procedures. Legal fees and other considerations may differ based upon the court required process and delays.
24. Wareh, *supra* note 19 at note 25; Treasury Regulations 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.
25. ACTEC's concern was that if court approval wasn't required by state law, then 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. Worthington and Al W. King III, CEO, South Dakota Trust Company, Oct. 26, 2009, discussing Wareh's concern (see note 19).
26. The UTC, which has virtual trust provisions, has been adopted by 23 states and the District of Columbia.
27. While Texas isn't a perpetual jurisdiction, it ranks third with Nevada, behind only South Dakota as the state that has the largest number of private family trust companies. *See* John P.C. Duncan, "The Private Trust Company, Single Family PTC Formations in Key States," *Fall Forum* (October 2009).
28. *See* Nevada Senate Bill 310, Section 26, 3(a), which amends

NRS Section 669.100.

29. *Restatement (Second) of Trusts* Section 155(1) and comment (1)b.
30. Merric, *supra* note 2 endnote 41 lists cases from 16 states noting that a discretionary distribution interest isn't a property interest.
31. *Ibid,* endnote 42 lists cases from 18 states noting discretionary interests couldn't be attached at common law. Please note that the *Restatement Third* and the UTC reverse common law in this area allowing a creditor to attach a discretionary interest. However, five UTC states have modified the national version of the UTC to retain common law in this area.
32. Absent a spendthrift provision, UTC Section 501 allows any creditor to attach present and future distributions of any trust, including a discretionary trust. The *Restatement Third* also takes this position. This is a change from the majority rule.
33. *See* Mark Merric, "How to Draft Discretionary Dynasty Trusts—Part III," *Estate Planning Magazine* (April 2009) at pp. 13-15.
34. Mark Merric, *Southern California Tax and Estate Planning Forum 2012*, Discretionary Trust Outline.
35. *Dwight v. Dwight,* 756 N.E.2d 17 (Mass. Ct. of App. 2001).
36. Mark Merric, Michael J. Bland and Mark Monasky, M.D. "Beware of Federal Super Creditors," *Trusts & Estates* (July 2010) at p. 14; Mark Merric, "Starting Place of Asset Protection: Drafting Discretionary Dynasty Trusts," *Thirty-Fifth Annual Notre Dame Tax and Estate Planning Institute*, Oct. 1 2, 2009, at pp. 50-51.
37. The term "rainy day trust" is trademarked by Alaska Trust Company.
38. Mark Merric, "Self-Settled Estate Planning Trusts," *Steve Leimberg's Estate Planning Email Newsletter*, No. 1391 (Jan. 6, 2009).
39. An *Upjohn* savings clause is a provision that provides that the trustee won't make a distribution that is a support obligation of the settlor. It's distinguished from a trustee support obligation savings clause, which provides that the trustee won't make a distribution that's a support obligation of the trustee.
40. Mark Merric and Rod Goodwin, "Spousal Access Trusts Parts I-III," *Steve Leimberg's Estate Planning Email Newsletter* Nos. 1334 (August 2008), 1352 (October 2008) and 1379 (December 2008).
41. One of the other issues discussed, *ibid*, was a remainder interest being considered a future marital property interest under some states laws. The solution to this issue was to draft dynasty trusts.
42. S.D. Codified Laws Sections 55-1-32 and 55-1-33.
43. S.D. Codified Laws Section 55-1-44.
44. S.D. Codified Laws Section 55-1-33. Note the key use of the word "or" when restricting creditor remedies to a fraudulent conveyance applies both to transfers to the trust as well as property held by the trust. This is a key difference between the South Dakota statute and the Nevada statute that only applies to transfers to the trust. NRS Section 166.170 (3).
45. *See* David Shaftel, "Comparison of Domestic Asset Protection Trust Statutes," *Estate Planning Magazine* (March 2008); Mark Merric, Joe E. Sullivan and Robert D. Gillen, "Wyoming Enters the DAPT Legislation Arena," *Steve Leimberg's Asset Protection Planning Email Newsletter* No. 109 (July 19, 2007) and "Searching For Favorable DAPT Legislation: Tennessee Enters the Arena", *Steve Leimberg's Asset Protection Planning Email Newsletter* No. 105 (June 1, 2007).
46. The strength of an asset protection statute shouldn't be confused with the different views expressed on whether an exception creditor such as child support or alimony creates an estate inclusion issue. Some authors, such as Richard Nenno, advocate that the Internal Revenue Service will treat child support and alimony as acts of independent significance. Other planners, such as Jonathan Blattmachr, question whether this will be the case.
47. *Commerce Bank v. Bolander and Whittet*, 239 P.3d 83 (Kan. Ct. App. 2007).
48. *In Re Portnoy*, 201 BR 685 (Bankr. SDNY 1996); *In Re Brooks*, 217 BR 98 (Bankr. D. Conn. 1998); *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002); *Dexia Credit Local v. Rogan*, 624 F. Supp. 970 (N.D. Ill. 2009).
49. *Morris v. Morris,* 932 So.2d 1007 (Fla. 2006); *Morris v. Wroble,* 2006 WL 3326752 (11th Cir. 2006).
50. In South Dakota's discretionary support statute, there's a similar statement in which S.D. Codified Laws Section 55-1-30 states, "Neither a distribution interest nor a remainder interest are relevant in the equitable distribution of marital property." The same is true in Oklahoma's discretionary trust statute. Okla. St. Title 60 Section 175.58, item 5.

**SPOT LIGHT**

**A Different Kind of Bail Out**

"The Rescue" (23¾ in. by 39½ in.) by John Henry Mohrmann, sold for $1,162 on Nov. 24, 2011 at Christie's Maritime Art Sale. Mohrmann became a seaman at the age of 13. He lived as a sailor for 18 years until a stop in Buenos Aires, where he fell in love with a young lady from a wealthy family. Her father rejected him due to his poverty, but Mohrmann won the man over by painting a portrait of him. Impressed by the gift and Mohrmann's talent, the girl's father finally accepted him and they were allowed to marry.