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Which Situs Is Best?

The race is on among jurisdictions hoping to attract trust business with client-friendly laws. Here's who's leading the pack right now—and why

The unsettled estate tax environment and harsh economic climate have created a new competitiveness: to be considered the "best" jurisdiction for trusts and win the most trust business. Clients certainly are benefitting. If they select the right jurisdiction for their particular set of needs, they may be able to transfer wealth for generations, even perpetually, without paying additional state and federal transfer taxes.[1]

The challenge for advisors, of course, is to help clients pick the right jurisdiction. That task usually involves evaluating how a jurisdiction has formulated its trust laws, including its rule against perpetuities (RAP)—the rule that essentially makes sure an interest in a trust vests in a certain time and doesn't go on indefinitely. Over the past 60 years, 26 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.

But while the RAPs are key in what makes a jurisdiction work well for trust purposes, there are other factors, including: state and local tax laws; modern trust laws providing future flexibility; asset protection laws; and how trust migration may reduce a beneficiary's distribution interest when compared to other beneficiaries.

In our view, the top four jurisdictions for 2010[2] (listed by the year they adopted their perpetuities legislation) are South Dakota,[3] Delaware, Alaska and Nevada. Wyoming and New Hampshire get honorable mentions. Most of the remaining trust jurisdictions have lagged behind with respect to modern trust and asset protection laws.

We've based our rankings on objective criteria that will 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. 64.)

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Perpetual or Near-perpetual

Under the common law RAP, adopted from British common law, 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 adopted the Uniform Statutory Rule Against Perpetuities (USRAP), which has the effect of setting the duration of a trust to the greater of the RAP or 90 years.

In 1986, Congress adopted the generation-skipping transfer (GST) tax regime that incorporated some assumptions and safe harbors that were 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). This established the first perpetual trust jurisdictions.

Today, Internal Revenue Code Section 2642 provides GST tax exemption of $3.5 million for each spouse, meaning that a married couple may exempt up to $7 million in assets from the GST tax. When the estate tax exemption and effective perpetual trusts and planning strategies are combined, large estates may legally eliminate transfer taxes. While the GST tax is scheduled to be eliminated for 2010, Congress will likely

extend the 2009 exemption at the first of the year. This extension would be to buy some time to decide what to do with the estate tax. Congress could let the current law sunset at the end of 2010, in which case, the estate tax and the GST tax exemption will be $1 million per person instead of $3.5 million.

Since the federal GST tax was adopted 24 years ago, 24 more jurisdictions modified or abrogated their RAP or USRAP. Of those, eight states abolished their RAP and/or USRAP: Alaska,[4] Delaware, Missouri, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and most recently, North Carolina.

A growing number of other state legislatures have considered changing their RAP. But 16 states have been reluctant to abolish it altogether; some because of long-standing policy concerns, constitutional barriers or political resistance. In those jurisdictions, it may be impossible to abrogate the rule fully. Instead, seven of those states have established extended perpetuities periods: 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 nine jurisdictions are what's 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 the perpetuities period. These jurisdictions include Arizona, the District of Columbia, Illinois, Ohio, Maine, Maryland, Michigan, Nebraska, and Virginia.

In 2003, author Garrett Moritz, in a *Harvard Law Review Note*,[5] outlined six approaches that jurisdictions had undertaken to create perpetual or long-term trusts. These approaches fall into three categories:

(1) the *Murphy* case perpetual trust approach,

(2) the term-of-years trust approach, and

(3) the opt-out trust approach.

Murphy

The approach for establishing a perpetual trust jurisdiction that is most advantageous to clients is based on a 1979 case in which the Tax Court affirmed Wisconsin's way of repealing the RAP. Known as the *Murphy* approach, it upholds the complete abrogation of the RAP and substitutes a more flexible, alternate vesting statute. The approach addresses both the RAP's timing and vesting elements for GST tax exemption purposes.

Delaware, New Hampshire and South Dakota are the strongest of these truly perpetual jurisdictions.[6] Alaska also is a very strong contender, but has a 1,000-year power of appointment statute. These four states, as a group, are the leaders in competitive trust legislation and asset protection laws.

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

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.

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.

Our opinion now is that under the current law, the result in the term-of-years jurisdictions should be no different than that in the *Murphy* jurisdictions if the safe harbor vesting requirements of *Murphy* are met.[7]

In such cases, the term-of-years period should work for the purposes of the GST tax and continue 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.[8]

Opt-out

The opt-out method is the least favorable for trusts, primarily because the RAP or USRAP is maintained as part of the 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 laws and asset protection laws of these jurisdictions are not generally well developed when compared to the more competitive jurisdictions.

But there are some notable exceptions:

Illinois doesn't tax the income of trusts that were created by non-resident grantors, has among the lowest premium tax, and in its trust laws, has a virtual representation feature (that is to say, 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[9] 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 ranking.

The result of these opt-out exception statutes is 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.[10]

Taxes

Income taxation and, to a lesser extent, taxation on insurance premiums are important issues for any client. The state income taxation of a non-grantor trust accumulating income can have a deteriorating effect on trust corpus over the life of a trust. This erosion is particularly true with perpetual trusts. Often, clients choose to change the situs of their trust just because of income taxes.

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: Delaware, Illinois, New Hampshire, Ohio, and Wisconsin. While New Hampshire has no income tax, it does have a tax on interest and dividends.

Income taxation of trusts is becoming a more complex question as a result of litigation in Connecticut, the District of Columbia and New York.[11] A handful of states attempt to continue to tax a trust regardless of a change of situs to another jurisdiction.

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 (150 basis points), Delaware (200 basis points), and Nevada (350 basis points). (See "Situs at a Glance," p. 64, for a list of premium taxes for all jurisdictions.)

Modern Trust Laws

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

(1) effectiveness of flexible trust planning and administration tools, including limited powers of appointment;

(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;

(4) statutory acknowledgment of the role of trust protector;

(5) treatment of other non-resident fiduciaries doing business with the trust (often clients want to use multiple trust advisors);

(6) situs rules under applicable law (including possible conflict-of-laws issues);

(7) statutory authority for trust reformation and decanting;

(8) virtual representation;

(9) effective privacy laws; and

(10) ability to facilitate and administer private family trust companies.

- **Limited powers of appointment**—This tool is included in the drafting of perpetuities trusts to help to create flexibility inter-generationally. But note IRC Section 2041(a)(3), which prevents the abuse known as the "Delaware tax trap,"[12] which refers to the exercise of successive limited powers of appointments over successive generations, thus allowing for a perpetual trust without federal transfer taxes. Therefore, the use of limited powers of appointment are generally reserved for beneficiaries and decedents who are ascertainable upon the creation of the trust to prevent the inadvertent violation of IRC Section 2041(a)(3). Otherwise, this would 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 GST tax exempt inclusion ratio.

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

Alaska is the only perpetuities jurisdiction that has adopted a power of appointment statute that exceeds what would be normally permitted under the safe harbor under IRC Section 2041(a)(3). While Alaska is a *Murphy* jurisdiction for perpetuities purposes, at least one authority is concerned that the use of a power of appointment provision beyond the safe harbor would create a constructive addition for GST tax purposes.[13]

- **Change of situs**—The ability to forum shop and change the situs of family trusts is often 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. If considering a situs change, examine the wording of the trust's perpetuities provision and the applicable law; look at a possible negative impact such a change would have on the GST tax-exempt status of the trust.

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.

Obviously, a change of situs among *Murphy* states is not 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.[14]

- **Directed trust statute**—Such a statute permits a family to have an independent party, normally designated as a co-trustee or "trust advisor," to manage both closely held and investment assets, relieving the directed or administrative trustee from the duty and liability to manage the trust assets. Such use of an independent party makes it possible for families to hold closely held interests and ongoing business interests in a trust without a directed trustee's interference. Directed trust fees are normally lower to reflect the fact that this trustee is not liable for the trust's investment activities.[15]

- **Trust protector statute**—Such a statute recognizes the authority of a trust protector, which provides greater flexibility for future generations as conditions change. Only Alaska, Delaware, Idaho, Nevada, New Hampshire, South Dakota and Wyoming seem to have effective trust protector statutes.[16] A trust protector is any disinterested third party whose appointment is provided by the trust instrument. The power of a trust protector is as provided in the governing instrument. 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; and modifications of the terms of a power of appointment 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. Historically, only judicial action could modify a trust; this process often required the consent of all the beneficiaries, or a court-approved equitable deviation.[17] 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. The 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 the beneficiaries.[18]

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.[19] South Dakota's new decanting statute, effective July 1, 2007, appears to provide the most flexibility for trust remodeling.[20]

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 courts' experience with judicial reformation and modifications.[21]

Asset protection laws are increasingly important in the choice of trust situs, particularly given the recent changes in the *Restatement (Third) of Trusts'* approach to beneficial interests.

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.[22] A decanting or modification that qualifies for one of these safe harbors will not cause a GST-exempt trust to lose its exempt status.[23]

- **Special-purpose entities**—An unregulated special-purpose entity alternative 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. These entities are typically in the form of a limited liability company (LLC) organized under the laws of the jurisdiction that permits the special-purpose entity.

Some insurers provide coverage to an entity established specifically for these purposes, thus protecting the trust protector 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 five jurisdictions that permit special-purpose entities are Alaska, Delaware, Nevada, South Dakota and Wyoming.

- **Virtual representative statutes**—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 is 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 six jurisdictions that have virtual representation statutes are Alaska, Illinois, Nevada, Washington, South Dakota, and Wyoming. Delaware has a limited version of virtual representation. The UTC also provides a form of virtual representation.[24]

Private Trust Companies

The most popular perpetual or near-perpetual jurisdictions that permit private family trust companies (PFTCs) are Nevada, New Hampshire, South Dakota and Wyoming. South Dakota and Wyoming contain the greatest number of PFTCs.[25]

Nevada and New Hampshire are expanding their efforts in this area, and have strengthened their laws to participate more fully. Nevada enacted legislation in 2009 that increases the capital requirement for PFTCs from $300,000 to $350,000 by Oct. 1, 2010, and to $500,000 over the next three years,[26] while raising the capital requirement for its 17 public trust companies to $1 million by 2012.

Currently, South Dakota requires $200,000 in capital, Wyoming requires $500,000 in capital, and New Hampshire requires $500,000 of capitalization to begin a PFTC.

Some view lower capital requirements as an advantage because it is less of a barrier to entry into the PFTC

arena. Others say that having larger capital requirements tends to weed out less capable PFTC candidates.

Asset Protection

Asset protection laws are increasingly important in the choice of trust situs. Four factors are key, particularly given recent changes in the *Restatement (Third) of Trusts'* approach to beneficial interests:

(1) discretionary trust protection for third party trusts;

(2) dominion and control for third-party trusts;

(3) self-settled trust legislation; and

(4) family limited partnership (FLP) and LLC charging order provisions.

There are primarily two types of asset protection under U.S. common law:

(1) discretionary trust protection; and

(2) spendthrift protection.

Discretionary trust protection is based on the fact that a beneficiary does not have an enforceable right to a distribution,[27] so no creditor may stand in the shoes of a beneficiary. In this respect, the beneficiary's interest is not a property interest[28] and is nothing more than an expectancy that no creditor can attach. [29]

Spendthrift protection began in the United States about 125 years ago. Except for certain debts (such as child support, alimony, governmental claims or a beneficiary's necessary expenses), a spendthrift clause stops creditors from attaching the assets at the trust level and forcing a distribution to satisfy the creditors' claims.

While almost all discretionary trusts contain (and should contain[30]) 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 did not have either an enforceable right to a distribution or a property interest; because 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.

There are several key areas in which a discretionary trust protects a beneficiary, while a spendthrift clause provides little-to-no asset protection. All of these issues are based on whether a beneficiary holds an enforceable right to a distribution. With divorce, there are three areas in which discretionary trust protection provides very strong protection for a beneficiary, but a spendthrift protection provides none.[31]

First, if a minor child beneficiary has an enforceable right to a distribution, an estranged spouse of a child may sue on behalf of the minor child for these distributions in the estranged spouse's capacity as a guardian of that child. The ability of the estranged spouse to force distributions from the trust has nothing to do with child support, alimony or a property settlement. Rather, if the estranged spouse's minor child has a right to a distribution, the estranged spouse may bring an action to force the distribution on that child's behalf.

The second issue is whether a beneficiary interest becomes marital property that is eligible for division in divorce. Courts in 10 states hold that remainder interests are marital property, and this classification may easily be expanded to current distribution interests.

The third enforceable marital asset not protected by a spendthrift provision occurs when a court imputes income in computing child support and alimony, even though distributions are not made from the trust.[32] The rational for imputing income for child support or maintenance is based on the ability of a beneficiary being able to force a distribution pursuant to the distribution standard in the trust. Why should a child or estranged spouse receive less child support or alimony simply because a beneficiary does not request a distribution?

As for 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 trust may be attached for a federal claim.[33]

In addition to the asset protection issues, there are estate-inclusion issues for self-settled trusts and possible estate-inclusion issues for 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[34]), to avoid estate inclusion, a settlor/beneficiary cannot hold an enforceable right to a distribution.[35] With a spousal access trust,[36] if a spouse/beneficiary holds an enforceable right to a distribution and the trust (or local law) doesn't include an *Upjohn* savings clause[37] (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.

Until 2003, all of the law—English common law, the *Restatement (First) of Trusts*, the *Restatement (Second) of Trusts*, as well as almost all case law on point—was relatively consistent and estate planners could draft a discretionary distribution standard with relative certainty so 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* reversed how a court should interpret a distribution standard, so that a distribution standard almost always will create an enforceable right in a discretionary trust. Many estate planners interpret the UTC as following the *Restatement Third's* position.[38] In response, some states (including some UTC states) are codifying the *Restatement Second* in this area. But use caution: Absent a statute codifying the *Restatement Second*, and even if a state has strong *Restatement Second* case law, a court may adopt the *Restatement Third's* new view of discretionary trusts.

A statute codifying the *Restatement Second* is the only way to preserve the asset protection of a common law discretionary trust. Drafters seeking to codify the *Restatement Second* should include four elements in their statutes:

(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 (in other words, state that the beneficiary who holds a discretionary interest does not hold a property interest or an enforceable right to a distribution);

(3) the *Restatement Second's* elevated judicial review standard for a discretionary interest in which a judge would review the trustee's distribution decision only if the trustee acted (a) with an improper motive; (b) dishonestly; or (c) failed to use its judgment;[39] and

(4) a clause that provides no creditor may attach a discretionary interest.

Unfortunately, only South Dakota has codified all four elements of a common law discretionary trust. Many other states, such as Nevada and Michigan[40] have codified some elements. Delaware's solution is to prohibit a Delaware court from using Sections 50 and 60 of the *Restatement Third*, but rather use the judicial review standard of the *Restatement Second* Section 187.

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.

Delaware, Michigan, Nevada and South Dakota are the lead jurisdictions addressing the discretionary trust issue.

Dominion and Control

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 a beneficiary has dominion and control over a trust. And if a court so finds, any creditor may reach the beneficiary's interest, regardless of spendthrift or discretionary trust protection.

Dominion or control may be found when a beneficiary holds an unconditional removal/replacement power, appoints a friend or close relative as a trustee, holds a general or special power of appointment, or is a manager, president or general partner of an entity owned primarily by the trust. Nevada and South Dakota have legislation rejecting that these factors, either alone or in combination, constitute a finding of a beneficiary's dominion and control. Delaware has likewise adopted legislation that seeks to prevent dominion and control arguments.

Self-Settled Trusts

Self-settled trusts are trusts that settlors form for their own benefit. That is to say, the settlor is both the settlor and a permissible beneficiary. Eleven states[41] have self-settled trust legislation. (See "Situs at a Glance," p. 64.)

Alaska, Delaware, Nevada and South Dakota have the best self-settled trust legislation.[42]

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. With a charging order, the creditor does not receive any voting rights. Sixteen states, in their FLP and/or LLC statutes, provide that charging order protection is the sole remedy for creditors.

Not all remedy statutes are created equal.[43] Seven states have additional asset protection features that make it more difficult for a creditor to indirectly reach partnership assets or have access to books and records. (See "Situs at a Glance," p. 64.) The seven leading states on charging order protection are Alaska, Delaware, Florida, New Jersey, Texas, Virginia and South Dakota.[44]

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

Migration

The migration of a trust from one jurisdiction to another can reduce a beneficiary's distribution interest when compared to other beneficiaries. Most trust instruments are silent on whether the trustee should look to a beneficiary's resources before making a distribution. Under the *Restatement First*, the *Restatement Second* and most common law, if a trust instrument is silent, a trustee does not have an obligation to look to a beneficiary's resources when determining the amount of a distribution. Rather, the assumption is that the settlor wanted to treat his beneficiaries equally, regardless of a beneficiary's personal wealth.

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 the comments in the UTC, it appears that the UTC adopts the *Restatement Third's* position. For example, the comment to UTC Section 814(a) references Section 50 of the *Restatement Third*, and the reference to special needs trusts in the UTC 2005 amended comment likewise adopts the *Restatement Third's* position. States that want to avoid the application of the *Restatement Third's* approach should codify the *Restatement Second*. Only South Dakota and Nevada have codified the *Restatement Second*.

Still, there is a way to be proactive and avoid the *Restatement Third's* application to newly created trusts: Explicitly state in a trust instrument whether a trustee should look at a beneficiary's resources before making a distribution.[45] You also can seek a change in jurisdiction to one that has codified the more favorable *Restatement Second's* view. Conversely, if an instrument is silent on the issue, trust beneficiaries that have accumulated their own wealth generally would be opposed to moving their trust to a jurisdiction that has adopted the *Restatement Third's* view. Note that if you suggest changing jurisdictions, you must disclose your recommendation to all beneficiaries or risk a beneficiary suing you.[46]

And Now the Hard Part!

We've provided a framework to examine the key elements that should go into deciding which jurisdiction is the best for your client's trust. Although we've determined that Alaska, Delaware, Nevada and South Dakota are the top four jurisdictions for trusts, followed closely by New Hampshire and Wyoming, we must stress that the best jurisdiction always depends on a particular client's specific needs.

And so, now that you have all this information, you're ready to begin the always interesting and challenging analysis to determine precisely which jurisdiction that might be. TE

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); *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 the trust jurisdictions addresses two related questions: (1) Does the jurisdiction permit truly perpetual trusts or something less? (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 also* 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. 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; but it also adopted a 1,000-year power of appointment 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.
5. *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.
6. 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 was not 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*.
7. Note that Daniel G. Worthington has taken a contrary view in previous articles in *Trusts & Estates* regarding the term-of-years approach. After much consideration, his position now is that, under current law, 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 is 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 4 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."
8. *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."
9. 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.
10. *See, for example*, Arizona's ARS Section 14-2901(A)(3): "[T]he common-law Rule does not apply to a nonvested 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

Situs at a Glance

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

Four jurisdictions are clearly the most trust friendly but of course, every client's needs are different

BEST (by year RAP modified)

	Rule Against Perpetuities (RAP)					Taxation		Modern Trust Laws					
Situs	Year RAP Modified	Common Law Rule RAP	USRAP	*Murphy* Case Applies	Effective GST Limit	State Income Tax	State Premium Tax	Limited Power of Appointment	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reform & Decanting Statutes*	Special Purpose Entities
SD	1983	Abolished	No	Yes	Perpetual	No	8 bp	IRC Section 2041(a)(3)	Perpetual	Yes	Yes	Yes/Yes	Yes
DE	1995	Abolished	No	Yes	Perpetual	Yes, tax on residents	200 bp	IRC Section 2041(a)(3)	Perpetual	Yes	Yes	Yes/Yes	Yes
AK	2000[1]	Abolished	No	Yes but POA	Perpetual unless POA	No	10 bp	1,000 yrs IRC Section 2041(a)(3)	Perpetual unless POA	Yes	Yes	Yes/Yes	Yes
NV	2005	No	365 yrs	No	If vesting, 365 yrs	No	350 bp	IRC Section 2041(a)(3)	No	Yes	Yes	Yes/Yes	Yes

HONORABLE MENTION (by year RAP modified)

	Rule Against Perpetuities (RAP)					Taxation		Modern Trust Laws					
Situs	Year RAP Modified	Common Law Rule RAP	USRAP	*Murphy* Case Applies	Effective GST Limit	State Income Tax	State Premium Tax	Limited Power of Appointment	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reform & Decanting Statutes*	Special Purpose Entities
WY	2003	Yes	1,000 yrs	No	If vesting, 1,000 yrs	No	75 bp	IRC Section 2041(a)(3)	Limited UT, CO	Yes	Yes	Yes/Yes	Yes
NH	2006	Abolished	No	Yes	Perpetual	Dividends, interest	150 bp	IRC Section 2041(a)(3)	Perpetual	Yes	Yes	Yes/Yes	Uncertain

REST (in alphabetical order)

	Rule Against Perpetuities (RAP)					Taxation		Modern Trust Laws					
Situs	Year RAP Modified	Common Law Rule RAP	USRAP	*Murphy* Case Applies	Effective GST Limit	State Income Tax	State Premium Tax	Limited Power of Appointment	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reform & Decanting Statutes*	Special Purpose Entities
AZ	1998	Opt out	No	No	Uncertain	Yes	200 bp	IRC Section 2041(a)(3)	No	No	No	No	No
CO	2001	No	1,000 yrs	No	If vesting, 365 yrs	Yes	200 bp	IRC Section 2041(a)(3)	Limited UT/CO	Yes	No	No	No
DC	2002	Opt out	Yes	No	Uncertain	Yes	170 bp	IRC Section 2041(a)(3)	No	Yes	No	No	No
FL	2001	No	360 yrs	No	If vesting, 360 yrs	No	175 bp	IRC Section 2041(a)(3)	Limited TN	Yes	No	No	No
ID	1957	Abolished	No	Yes	Perpetual	Yes	170 bp	IRC Section 2041(a)(3)	Perpetual	No	Yes	No/Ltd.	No
IL	1998	Opt out	No	No	Uncertain	Yes, tax on 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

*Note that the UTC does have a form of reformation and decanting; however, only those jurisdictions that have a specific statute on their books are recognized in the chart.

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

Restatement (2d)—jurisdiction has codified *Restatement (Second) of Trusts*
Restatement (3d)—jurisdiction has codified *Restatement (Third) of Trusts*
Restatement (3d)?—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 has not 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

Modern Trust Laws			Asset Protection (AP) — Third Party Trusts						AP	Migration
			Statutory *Restatement (2d)* Discretionary Trust Protection							
Enhanced Virtual Rep.	Privacy Laws	Popular PFTC State	Definition of Discretionary	Not Enforceable Right	*Restatement (2d)* Judicial Review	Creditor Can't Attach	Protects Dominion/ Control	Self-Settled Trust Legislation	Sole Remedy Charge Order Protection	Look to Beneficiaries' Resources
Yes	Seal	Yes, regulated	Yes	Yes	Yes	Yes	Yes	Best	FLP - Best LLC - Best	*Restatement (2d)*
Limited	Seal-3 yrs	No	No	No	Probably[2]	Yes	Yes	Best	FLP - Best LLC - Best	No statute
Yes	Limited filings	No	No	No	No	Yes	No	Best	FLP - Best LLC - Best	No statute
Yes	Public	Yes, unregulated	Ambiguous[7]	No	Yes	Yes	Yes	Best	FLP - SR LLC - SR	*Restatement (2d)*

Modern Trust Laws			Asset Protection (AP) — Third Party Trusts						AP	Migration
			Statutory *Restatement (2d)* Discretionary Trust Protection							
Enhanced Virtual Rep.	Privacy Laws	Popular PFTC State	Definition of Discretionary	Not Enforceable Right	*Restatement (2d)* Judicial Review	Creditor Can't Attach	Protects Dominion/ Control	Self-Settled Trust Legislation	Sole Remedy Charge Order Protection	Look to Beneficiaries' Resources
Yes	Public	Yes, unregulated	Yes	No	Uncertain[6]	Yes	No	Yes	LLC - SR FLP - Best	No statute
No	Public	Yes	No	Uncertain[8]	No	No	No	Yes	LLC - SR	*Restatement (3d)?*

Modern Trust Laws			Asset Protection (AP) — Third Party Trusts						AP	Migration
			Statutory *Restatement (2d)* Discretionary Trust Protection							
Enhanced Virtual Rep.	Privacy Laws	Popular PFTC State	Definition of Discretionary	Not Enforceable Right	*Restatement (2d)* Judicial Review	Creditor Can't Attach	Protects Dominion/ Control	Self-Settled Trust Legislation	Sole Remedy Charge Order Protection	Look to Beneficiaries' Resources
No	Public	No	No	No	No	Conflicting provisions	No	No	LLC - SR	*Restatement (3d)?*
No	Public	No	Case law	Case law	Case law	Case law	No	No	FLP - ? LLC - JF	No statute
No	Public	No	No	No	No	No	No	No	LLC - ?	*Restatement (3d)?*
No	Public	No	No	No	No	Yes	No	No	FLP - Best LLC - ?	*Restatement (3d)?*
No	Public	No	No case law	No case law	No case law	No case law	No	No	LLC - JF	No statute
Yes	Public	No	Case law	Case law	Case law	Case law	No	No	FLP - JF LLC - JF	No statute
No	Public	No	Case law	No case law	Probably case law	Case law	No	No	FLP - JF LLC - ?	No statute
No	Public	No	Probably not	No	No	No[3]	No	No	FLP - JF LLC -?	*Restatement (3d)?*

More jurisdictions, p. 66

Situs at a Glance (continued)

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REST (in alphabetical order)

		Rule Against Perpetuities (RAP)				Taxation		Modern Trust Laws					
Situs	Year RAP Modified	Common Law Rule RAP	USRAP	*Murphy* Case Applies	Effective GST Limit	State Income Tax	State Premium Tax	Limited Power of Appointment	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reform & Decanting Statutes*	Special Purpose Entities
MI	2008	Opt out	No	No	Uncertain	Yes	125 bp	IRC Section 2041(a)(3)	No	No	No	No	No
MO	2001	Abolished	No	Yes	Perpetual	Yes	200 bp	IRC Section 2041(a)(3)	Perpetual	No	No	No	No
NC	2007	Abolished	No	Yes	Perpetual	Yes	190 bp	IRC Section 2041(a)(3)	Perpetual	Yes	No	Yes/Yes	No
NE	2002	Opt out	Yes	No	Uncertain	Yes	100 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	Yes, tax on residents	140 bp	IRC Section 2041(a)(3)	No	Yes	No	No	No
PA	2007	Abolished	No	No	Uncertain	No	200 bp	IRC Section 2041(a)(3)	No	No	No	No	No
RI	1999	Abolished	No	No	Uncertain	Yes	200 bp	IRC Section 2041(a)(3)	No	No	No	Yes/Yes	No
TN	2007	Opt out	360 yrs	No	If vesting, 360 yrs	Yes	175 bp	IRC Section 2041(a)(3)	Limited FL	Yes	No	Yes/Yes	No
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	Yes/Yes	No
VA	2000	Opt out	Yes	No	Uncertain	Yes	225 bp	IRC Section 2041(a)(3)	No	Yes	No	No	No
WA	2002	Yes	150 yrs	No	Uncertain	No	200 bp	IRC Section 2041(a)(3)	No	Yes	No	No	No
WI	1969	Abolished	No	Yes	Perpetual	Yes, tax on residents	350 bp	IRC Section 2041(a)(3)	Perpetual	No	No	No	No

*Note that the UTC does have a form of reformation and decanting; however, only those jurisdictions that have a specific statute on their books are recognized in the chart.

Endnotes

1. 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; but it also adopted a 1,000-year power of appointment statute that may effectively limit the generation-skipping transfer (GST) tax exemption of a trust.
2. 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 is not nearly as certain as a statute that specifically restricts judicial review to (1) improper motive; (2) dishonesty; and (3) failure to use judgment.
3. Maine's statute, 18-B 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 was not completely preserved, regardless of Maine's comment under Section 504 indicating an intent to preserve the discretionary/support distinction.
4. Richard Covey, in *Practical Drafting* (April 2007) at p. 8,918, criticized Ohio's Uniform Trust Code (UTC) due to its very limited definition of a discretionary trust. For an Ohio "wholly discretionary trust" (that is not a special needs trust), the trust cannot 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 UTC, Wyoming UTC, or under South Dakota's discretionary-support statute.
5. For a wholly discretionary trust, the Ohio UTC removes the judicial standard of reasonableness, similar to Section 187 of the *Restatement Second*. However, the Ohio UTC does not use the much more precise language that a judge will review a trustee's discretion only for (1) an improper motive; (2) dishonesty; or (3) failure to use judgment. In this respect, Michigan again provides a better model, as do South Dakota and Nevada.
6. 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 Section 814(a) of the UTC.

interest." *Compare* Illinois' IL ST Ch.765, Section 305/4, which provides that the rule does not 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 unlimited power to sell assets); *with* Maine's 33 ME RSA Section 101-A, which says the rule does not apply to trusts created after Sept. 18, 1999, if 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 rule against perpetuities (RAP). *See also* Maryland's MD Est. & Trust Section 11-102(5): The rule does not apply if 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 is required for an interest created under the instrument to vest to be valid under the RAP; Missouri's V.A.M.S. Section 456.025(1): The RAP will not 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-statecomparisonofspendthrifttrustlaws.pdf*>.

11. *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).
12. 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 (USRAP). 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).
13. *See* Nenno, *supra* note 4. *See generally* Dukeminier and Krier, *supra* note 4 at p. 1316.
14. Some states require a trust be administered in the state for the laws of the state to apply. This requirement is important because one cannot 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.
15. *See, for example,* 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.
16. *See, for example,* SDCL 55-1B-6 (South Dakota). This is the first trust protector statute adopted by a U.S. jurisdiction.
17. *See* Rashad Wareh, "Trust Remodeling," *Trusts & Estates* (October 2007) at p. 18. *Restatement (Third) of Trusts,* 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.
18. Wareh, *ibid* at note 17, 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 was that if court approval was not 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 17, p. 3.
19. Wareh, *supra* note 17 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 17 at p. 1 (Arizona and Florida as additional states that have adopted decanting statutes).
20. *Blattmachr, supra* note 17 at p. 19 ("South Dakota's new decanting statute, effective July 1, 2007, provides the most flexibility for trust remodeling.")
21. In addition, some states may 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 upon the court required process and delays.
22. Wareh, *supra* note 17 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 does not shift a beneficial interest to a lower generation or postpone vesting.
23. ACTEC's concern was that if court approval was not 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. It's reported that South Dakota is modifying its law to require court approval for that reason. Telephone discussion between Daniel G. Worthington and Al King, CEO, South Dakota Trust Company, Oct. 26, 2009, discussing Wareh's concern (*see* note 17).
24. The UTC, which has virtual trust provisions, has been adopted by 22 states.
25. While Texas is not a perpetual jurisdiction, it ranks second 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): Alaska-0; Delaware-3; Illinois-2; Nevada-12; New Hampshire-3; New York-3; South Dakota-19; Texas-12; and Wyoming-3. Nevada authorizes unlicensed "family trust companies" for which no data is available. Wyoming

authorizes unregulated corporate fiduciaries, for which no data is available (information is through September 2009).

26. *See* Nevada Senate Bill 310, Section 26, 3(a), which amends NRS Section 669.100.
27. *Restatement (Second) of Trusts,* Section 155(1) and comment (1)b.
28. Merric, *supra* note 2, endnote 41, lists cases from 16 states noting that a discretionary distribution interest is not a property interest.
29. *Ibid,* endnote 42, lists cases from 18 states, noting discretionary interests could not 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. But five UTC states have modified the national version of the UTC to retain common law in this area.
30. 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.
31. A detailed discussion of these three marital asset protection issues are provided in Merric, *supra* note 2. This article is one of a trilogy on the asset protection behind discretionary dynasty trusts. *See <www.International-Counselor.com>. See also* Mark Merric, "How to Draft Discretionary Dynasty Trusts–Part III," *Estate Planning,* April 2009 at p. 13.
32. *Dwight v. Dwight,* 756 N.E.2d 17 (Mass. Ct. App. 2001). This case appears to address a new issue that the domestic relations attorneys may raise during a divorce. Unfortunately, the deductive logic is relatively straightforward. If a beneficiary has an enforceable right to a distribution, just because a beneficiary does not ask for a distribution doesn't appear to be a reason to exclude the distribution from child support or alimony. Also, a court may make an analogy to a special needs trust. In the event that a beneficiary has an enforceable right to a distribution with one of these trusts, the beneficiary has an available resource and is disqualified from governmental benefits.
33. Mark Merric, "Starting Place of Asset Protection: Drafting Discretionary Dynasty Trusts," Thirty-Fifth Annual Notre Dame Tax and Estate Planning Institute materials, Oct. 1, 2009, at p. 50.
34. The term "rainy day trust" is trademarked by Alaska Trust Company.
35. Mark Merric, "Self-Settled Estate Planning Trusts," *Steve Leimberg's Estate Planning Email Newsletter,* No. 1391 (Jan. 6, 2009).
36. 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).
37. An *Upjohn* savings clause is a provision that provides that the trustee will not make a distribution that is a support obligation of the settlor. It is distinguished from a trustee support obligation savings clause, which provides that the trustee will not make a distribution that is a support obligation of the trustee.
38. The issue whether the UTC adopts the *Restatement Third's* position on discretionary trusts is hotly debated. We suggest you review the number of UTC jurisdictions that have adopted or continue to adopt legislation to deal with these issues.
39. *Restatement Second,* Section 187, comment j; Section 128. While this is the judicial standard of review adopted by all courts, it is by far the most common discretionary trust judicial review standard with courts from 14 states and two other countries using it. *See* Merric, *supra* note 2.
40. Efforts by estate planners Douglas Stein and David Kerr in Michigan have resulted in Michigan being the best UTC statute addressing most of the discretionary trust issues created by the *Restatement Third.* Also, efforts by estate planners Julia Gold, Matthew Grayx, Brent Keele and Mark Solomon have resulted in Nevada adopting a discretionary-support trust classification statute similar to South Dakota's statute, as well as substantially improving Nevada's domestic asset protection trust statute. *See* David Shaftel, "Comparison of Domestic Asset Protection Trust Statutes," *Estate Planning,* 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).
41. *See* Alaska (Alaska Stat. Section 34.40.110), Colorado (Colo. Rev. Stat. Section 38-10-111), Delaware (Del. Code Ann. tit. 12, Section 3570—3576), Missouri (Mo. Rev. Stat. Section 456.5-505), Nevada (Nev. Rev. Stat. Section 166.010—166.170), Oklahoma (Okla. Stat. tit. 31, Section 10—18), Rhode Island (R.I. Gen. Laws Section 18-19.2-1—18-19.2-7), South Dakota (S.D. Codified Laws Section 55-16-1—55-16-17), Tennessee (Tenn. Code Ann. Sections 35-15-505 and 66-1-2002 relative to the "Tennessee Investment Services Act of 2007"), Utah (Utah Code Ann. Section 25-6-14), and Wyoming (Wyom. UTC Section. 4-10-510 *et. seq.*).
42. *See* Mark Merric and William Comer, "Forum Shopping For Favorable FLP and LLC Legislation–Parts I–IV," *Steve Leimberg's Asset Protection Newsletter,* Nos. 112 (August 2007), 114 (August 2007), 117 (September 2007), 127 (April 2008).
43. *Ibid.*
44. *Ibid.*
45. It also may be possible to correct this problem by using a state's decanting statute and stating under the provisions of the new trust statute that the trustee should not look to a beneficiary's resources.
46. Whether a beneficiary has standing to bring an action against the estate-planning attorney naturally depends on whether the estate-planning attorney represented the beneficiary. Conversely, Professor Martin Begleiter of Drake Law School in Des Moines, Iowa, notes that there is a growing trend in which an estate-planning attorney who represents the settlor also has obligations to the beneficiaries. *See* Martin Begleiter, "First Let's Sue All the Lawyers–What Will We Get: Damages for Estate Planning Malpractice," 51 *Hastings Law Review* 325 (2000).