

## TRUSTS & ESTATES



WEALTH PLANNING > ESTATE PLANNING

### Which Trust Situs is Best in 2020?

*Navigating the future of multigenerational planning.*

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In our view, the four top-tier trust jurisdictions for 2020 (listed chronologically by the year they adopted their Rule Against Perpetuities (RAP) legislation) are South Dakota, Delaware, Alaska and Nevada. Each of these jurisdictions is ranked in the first tier and scored high in most categories of the trust matrix included in this article. The second-tier jurisdictions (listed chronologically by the year they adopted their RAP legislation) are Ohio, Wyoming, New Hampshire and Tennessee. The third-tier jurisdictions (listed chronologically by the year they adopted their RAP legislation) are Illinois, Florida and Utah. The top three tiers of trust jurisdictions are described in this article, together with “Best Situs at a Glance,” p. 90, our updated matrix that highlights all the jurisdictions with a RAP permitting long term or perpetual trusts. The latest state to modify or abrogate its RAP is Connecticut, which has extended its RAP to 800 years. Georgia extended its RAP to 360 years in 2018.

### Trust Business

Trust business remains highly competitive. In 2020, the trust company business in the United States continues to represent a multi-trillion-dollar industry in assets under administration. Competition for trust business among U.S. jurisdictions and institutions remains robust, especially for high-net-worth (HNW) individuals. That trend should continue, but the focus of such competition will evolve with changes in the federal transfer tax and state statutory regimes.

Over nearly the past 20 years, we've witnessed federal transfer tax exemptions increase from \$600,000 in 1999 for individuals, to \$11.58 million in 2020.<sup>1</sup>

For the past eight years, we've reported that this federal tax regime represented "the perfect storm" for HNW clients as a planning environment. This situation may be changing in the coming years with the political climate pushing to reduce the exemptions, so now's the time to take advantage of the planning opportunities afforded by existing law.

While the transfer tax regime of the Trump administration represented an about-face from the 2016 Obama administration's direction affecting HNW planning strategies and valuation rules, the present tax regime is susceptible to a shift in political winds, as fickle as the next election cycle. Careful trust planning today locks in advantages and increases predictability in result and assists in controlling future risk, including governmental risk.<sup>2</sup>

Estate tax repeal in 2024 is unlikely, given the political climate. The Democratic majority in the House and several of the major Democratic candidates have proposed reducing estate tax exemptions and increasing tax rates. Impeachment proceedings against President Trump are underway as of the date of this writing, and the political situation is in turmoil. The time for planning professionals to urge their clients to take a defensive planning position is now—before the transfer tax laws are changed.

The development of flexible planning tools over the past two decades, and "best-in-class" trust laws found in the best jurisdictions, permit HNW individuals and their professionals to craft elegant asset protection, governance and long-term transfer strategies that protect a national network of HNW multigenerational enterprises.

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

Trust situs shopping is common among HNW families, especially if they live in a jurisdiction that has less favorable laws. Clients in these states can set up trusts in favorable jurisdictions to provide their assets with the most effective wealth transfer for generations, even perpetually, while legally eliminating current and future federal or state gift and death taxes and state income taxes. So, which factors are most important to consider?

In the January 2018 issue of *Trusts & Estates*, we provided a matrix to compare the relative strengths of the then-32 jurisdictions that had repealed or modified their RAPs. In 2020, the number of perpetual or near-perpetual jurisdictions increased to 34, with the addition of Connecticut, which has an 800-year term RAP, and Georgia, which has a 360-year term RAP.<sup>3</sup>

In addition, the laws in several jurisdictions have changed, and the factors that we consider important to compare have been modified, so we've updated the ranking matrix and expanded our discussion of those factors. (See "Best Situs at a Glance," p. 90.) Also, new case law has emerged both at the U.S. Supreme Court and state court levels.

## New Developments

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

**Political uncertainty and risk to affluent America.** The estate tax policies proposed by Democratic presidential candidates like Senator Bernie Sanders (D-VT) and Sen. Elizabeth Warren (D-MA) aggressively target not only the wealthy but also well-to-do Americans.<sup>4</sup> These policies would bring back some of President Obama's *Blue Book* proposals, including a 50-year limit to the generation-skipping transfer (GST) tax exemption, changing the valuation rules under Internal Revenue Code Section 2704, limiting grantor retained annuity trust (GRAT) terms and restricting *Crummey* powers.<sup>5</sup>

**State income taxation of non-resident trusts.** The Supreme Court, on June 21, 2019, issued a unanimous decision in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, holding that N.C. Gen. Stat. Ann. Section 105-160.2, the law authorizing North Carolina to tax any trust income that "is for the benefit of" a state resident, violated the 14th Amendment's due process clause. North Carolina attempted to tax trust income, which hadn't been distributed to North Carolina beneficiaries, solely on the basis that those beneficiaries lived in North Carolina. The Court held that the presence of an in-state beneficiary alone doesn't empower a state to tax trust income. Specifically, North Carolina didn't have the constitutionally required nexus because: (1) the beneficiaries didn't receive trust income; and (2) the beneficiaries had no right to control, possession or enjoyment of the trust assets and couldn't rely on receiving any amount of trust income in the future.<sup>6</sup>

**The Supreme Court denied certiorari in *Commissioner v. William Fielding*.** A case that may have broader import than *Kaestner* is *Fielding*, because the state had appealed a 2018 Minnesota Supreme Court decision that found Minnesota's statute regarding a tax on trust income to be unconstitutional on the grounds that "there were insufficient connections with the state to tax the trust" even though the settlor was a Minnesota resident. On June 28, 2019, the Supreme Court denied review. *Fielding* involved Minnesota's taxation of income generated by four trusts. While the trustee, William Fielding, paid the tax bill, he filed a lawsuit after he was denied a \$1 million refund, which represented the difference between taxes owed as a resident trust and taxes owed as a non-resident trust. The grantor of the trust and one of the beneficiaries were Minnesota residents during the tax year at issue. Additionally, the trusts were created in Minnesota and the trust held investment stock in a Minnesota corporation. However, the trustees weren't residents of Minnesota, the trusts weren't administered in Minnesota, three of the four beneficiaries weren't residents of Minnesota and not all of the trust income was generated by Minnesota investments.<sup>7</sup>

**Increase in federal estate exemption.** The GST tax exemption in 2020 is \$11.58 million per individual/\$23.16 million per couple. As discussed above, this generous exemption may be short lived because it's scheduled to sunset at the end of 2025, and we may have a change in administration after the upcoming elections.

**Cleopatra.** In *Matter of the Cleopatra Cameron Gift Trust*, the South Dakota Supreme Court held that the trustee of a trust that was created by Cleopatra Cameron's father wasn't the support obligor and was only nominally joined in the divorce action to enforce Cleopatra's support obligations.

Cleopatra had divorced her husband, who depended on her for his support and the support of their children. Her primary means of support was a California trust set up by her father. A California court had ordered the trustee to pay Cleopatra's support obligations. The trustee complied with the order until the trust migrated to South Dakota, where the California order wasn't given deference under the full faith and credit clause of the U.S. Constitution because enforcing judgments doesn't implicate full faith and credit considerations. The South Dakota Supreme Court ruled that the South Dakota Circuit Court was correct in not enforcing the support obligation because South Dakota doesn't provide for exception creditors to the spendthrift clause, and the court rejected the *Restatement (Third) of Trusts (Restatement Third)*. The South Dakota Supreme Court also rejected the public policy claim made by Cleopatra's husband, citing the domestic asset protection trust (DAPT) statute (SDCL 55-16-15), which requires spousal notice of transfers of marital property into a DAPT. Note that separate property transferred to a DAPT under South Dakota law doesn't require notice. SDCL 55-16-15 was added to the South Dakota DAPT statute to avoid other state courts from disregarding South Dakota DAPTs on public policy grounds—for example, to avoid *Dahl v. Dahl* (“Here, the Wife, is not the settlor of the Trust, and there is no claim she transferred assets into the Trust to avoid child support obligations”<sup>8</sup>).

**Changes in Georgia's trust law.** Georgia HB 122, which was signed into law in July 2018, extends Georgia's RAP to 360 years, the same as Florida's RAP. The Georgia statute also provides for virtual representation for trusts, permits decanting of existing trusts, expands non-judicial settlement and provides for directed trusts. The Governor of Georgia, however, vetoed the proposed DAPT legislation that was submitted to him for signature.<sup>9</sup>

**Indiana's legacy trust.** Indiana's Legacy Trust Statute, Trust Code, Ind. Code Section 30-4-8, became effective on July 1, 2019. Indiana became the 18th state to permit DAPTs, and its statute is similar to DAPT statutes in other jurisdictions. Before making a “qualified disposition,” a settlor/beneficiary/debtor will have to execute a “qualified affidavit.” This affidavit is sworn to under penalties of perjury that: the settlor/beneficiary/debtor (now a “transferor”) has full right, title and authority to transfer the property to the trust; the transfer won't render the transferor insolvent; the transferor doesn't intend to defraud a creditor; there are no pending or threatened court or administrative actions against the transferor (except as disclosed in the affidavit); the transferor doesn't contemplate filing for bankruptcy; and the property transferred isn't derived from unlawful activities.

**Changes in Connecticut's trust law.** Connecticut H.B. 7104 (An Act Concerning Adoption of the Connecticut Uniform Trust Code), which was unanimously passed by both chambers of the Legislature and signed by the Governor, took effect Jan. 1, 2020. Under prior law, Connecticut's statutory RAP had provided that a future interest in property or power of appointment (POA) must vest within the later of: (1) 90 years, or (2) 21 years after the death of an individual alive at the time such interest was created; failure to vest within such period would cause the interest to become void. The new law provides four key updates. It: (1) adopts provisions of the Uniform Trust Code (UTC); (2) provides statutory guidance on directed trusts; (3) extends the RAP period to 800 years; and (4) permits DAPTs to have Connecticut situs, which makes it the 19th state to do so. Connecticut is the only state to have an 800-year term.<sup>10</sup>

## The Trust Matrix

In the design of the 2020 “Best Situs at a Glance” matrix, p. 90, we outlined five broad categories (RAP, Taxation, Modern Trust Laws, Asset Protection and Migration) and 25 subcategories for each jurisdiction, as they each relate to the strength of trust laws and how to evaluate them. Specifically, we highlighted: (1) a jurisdiction’s form of any applicable RAP or the law that determines how long a trust may legally exist; (2) whether a state has inheritance, income or premium taxes; (3) what modern trust laws have been adopted, how state courts have interpreted those laws and how accommodating the financial and legal system is to trusts; (4) what asset protection laws exist and their legal interpretations; and (5) the effect of migration on the rights of beneficial interests from state to state.

## Top-tier Jurisdictions

In our view, the four top-tier jurisdictions for 2020 (bolded in blue in our matrix by the year they adopted their RAP legislation) are Alaska,<sup>11</sup> Delaware, Nevada and South Dakota. Each of these jurisdictions scored high in most categories of the matrix.<sup>12</sup> While Delaware has been in the top four jurisdictions consistently for the past 10 years, we think its asset protection laws still need to be strengthened for it to remain competitive.

We rank Ohio, New Hampshire, Tennessee and Wyoming (bolded in tan), in the second tier. Tennessee and Wyoming have done the most recently to strengthen their trust laws. While Tennessee has a 360 term-of-years RAP period, it also has decanting and directed trust statutes and recently improved its asset protection laws. Tennessee, like Nevada, is one of the states that has a constitutional prohibition against perpetuities that may be of a concern.<sup>13</sup> Wyoming has significantly increased its discretionary asset protection. It has a 1,000-year RAP period and other features, including a decanting statute and a revamped DAPT law. It has both regulated and unregulated private family trust company (PFTC) statutes, which makes it one of the preferred choices for single family PFTCs. Wyoming also recently strengthened its DAPT laws significantly. New Hampshire is a perpetual trust jurisdiction that’s strengthened its trust laws similar to the top tier jurisdictions. But, New Hampshire’s DAPT laws and third-party discretionary protection provisions, aren’t, in our opinion, as strong as those of most of the highest ranked states. Ohio has strengthened its laws in the past several years and is an emerging jurisdiction. It’s an opt-out state but is similar to Tennessee in that it’s adopted a stellar DAPT statute. Ohio’s discretionary trust protection also remains problematic due to its incredibly restrictive definition of a “wholly discretionary trust.”

Three jurisdictions have improved their laws and asset protection reputations in the past several years and round out the third tier of ranked jurisdictions (also bolded in tan). These jurisdictions are Florida, Illinois and Utah. Illinois is an opt-out jurisdiction and has added new directed trust and trust protector provisions. Florida has a 360 term-of-years RAP period and no state income tax but lacks DAPT features. Florida’s *Casselberry* case appears to create a serious issue with Florida’s spendthrift and wholly discretionary trusts.<sup>14</sup> Utah has a 1,000 term-of-years RAP period and has adopted directed trust and self-settled trust legislation, but it has an income tax. Utah has recently adopted the Uniform Voidable Transactions Act (UVTA), which contravenes its DAPT statute.

Most of the remaining trust jurisdictions are lagging behind with respect to modern trust laws or have less impressive DAPT laws. While Connecticut, as described above, recently joined the perpetual jurisdiction ranks, it has a term-of-years statute and is newly developed law that’s yet to be tested.

We’ve created our rankings using objective criteria similar to what we used in our 2010, 2012, 2014, 2016, and 2018 articles in this journal. We have, however, modified the importance of several factors.

We hope these changes will help bring more clarity and provide you with a balanced view as you consider the nuances of all the jurisdictions' laws and how those laws might serve your clients' needs—or adversely impact them.

## **The RAP: Perpetual or Near-Perpetual**

Under the common law RAP, an interest in trust must vest, if at all, within the period of a life in being, plus 21 years (plus a reasonable period for gestation). Several states have adopted the Uniform Statutory Rule Against Perpetuities (USRAP), which sets the duration of a trust to the greater of the RAP or 90 years. In those states that have repealed or modified the RAP, it's possible to exempt from gift, estate and GST taxes all trust assets for as long as the trust is permitted to exist. Over the past 62 years, 34 states and Washington, D.C. have abolished or modified their RAPs, in whole or in part, so that trusts created in those jurisdictions can last forever or, at least, for very long periods of time.

In 1986, Congress adopted the GST tax regime, which incorporated some assumptions and safe harbors patterned after either the RAP or the USRAP. But, three jurisdictions already had abolished their RAP and, instead, adopted a more flexible Rule Against Alienation and Suspension of Powers: Idaho (1957), Wisconsin (1969) and South Dakota (1983). These actions established the first perpetual trust jurisdictions and are known as the “original *Murphy* jurisdictions” after *Murphy v. Commissioner* validated this approach.<sup>15</sup> Since the federal GST tax was adopted, 31 more jurisdictions have modified or repealed their RAP or USRAP (and Oklahoma purports to have an exception under case law). Of those, nine abolished their RAP and/or USRAP: Alaska, Delaware, Kentucky, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Rhode Island, for a total of 12 jurisdictions that abolished the RAP.

There are 22 jurisdictions that didn't abolish it altogether—some because of longstanding policy concerns, constitutional barriers or political resistance. Rather, they've merely modified the RAP in some way. In those jurisdictions, it may be impossible to abrogate the rule fully. Nine of those states have extended the RAP periods to a term of years: Colorado (1,000 years), Utah (1,000 years), Wyoming (1,000 years), Connecticut (800 years), Nevada (365 years), Florida (360 years), Georgia (360 years), Tennessee (360 years) and Washington (150 years).

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

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

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

## ***Murphy* Approach**

In *Murphy*, the Tax Court affirmed Wisconsin's method of repealing its RAP. Known as "the *Murphy* approach," this case upholds a Wisconsin law that provided for the complete repeal of the RAP and substitution of a more flexible, alternate vesting statute. This approach addresses both the RAP's timing and vesting elements for GST tax exemption purposes. The *Murphy* approach is considered the best perpetual trust jurisdiction law method.

Alaska, Delaware, New Hampshire and South Dakota are the strongest of these truly perpetual jurisdictions. South Dakota is the only original *Murphy* jurisdiction of the four. Alaska is also a very strong contender but has a 1,000-year POA statute. Delaware has similar issues if a limited POA (LPOA) is used.

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

### **Term-of-Years Approach**

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

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

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

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

### **Opt-out Approach**

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

administration and court supervision of trusts in which there are contingent, unborn or unascertainable beneficiaries).

Arizona has an income tax, and it now has directed trust, trust protector, decanting and reformation and virtual representation statutes.<sup>21</sup> Maine, Virginia and Washington, D.C. also have directed trust statutes, and Virginia has added additional creditor protection and self-settled trusts. The remaining opt-out jurisdictions lack any modern trust features that are important in our rankings.

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

## State Income Tax

Whether a state imposes a state income tax and, to a lesser extent, taxes insurance premiums, are important issues. The state income taxation of a non-grantor trust accumulating income can have a deteriorating effect on trust corpus. This erosion is particularly evident with perpetual trusts. Often, clients choose to change the situs of their trust just to legally avoid the payment of state income taxes. Six states—Alaska, Florida, Nevada, South Dakota, Washington and Wyoming—are the only perpetual or nearly perpetual jurisdictions with no state income tax.

However, Nevada enacted a “commerce tax” several years ago, which taxes business activity in the state when revenues are in excess of \$4 million annually. The applicable tax rate differs depending on the primary market sector in which business activity is engaged. An annual report is required from all businesses, even if they're exempt from the tax.<sup>22</sup> There are eight additional jurisdictions that have a state income tax for residents but exempt non-resident grantors and beneficiaries of perpetual trusts from state income tax: Connecticut, Delaware, Georgia, Illinois, New Hampshire, Ohio, Tennessee and Wisconsin.<sup>23</sup>

Income taxation of trusts is becoming a more complex question resulting from states eager to extend the reach of their taxing authority. The Supreme Court case in *Kaestner* is a punctuation mark with this issue. While the *Kaestner* case is important, it really only affected North Carolina and Georgia, which had similar laws.

A case that may have broader import is *Fielding*, discussed above. A handful of states still attempt to tax a trust regardless of a change of situs to another jurisdiction. This trend has become more common as states have looked for additional tax revenues in a tight economy.<sup>24</sup>

## Premium Taxes

Taxes on insurance premiums are another factor to consider with billions of insurance premium dollars at play. The least expensive premium tax jurisdiction, at least in some cases, is now Delaware (0 basis points (bps) after premiums of \$100,000 for policies in trust). Policies owned by limited liability companies (LLCs) are still subject to Delaware's higher premium tax. These are the insurance premium taxes in highly ranked jurisdictions: South Dakota (8 bps), Alaska (8 bps), Illinois (50 bps), Wyoming (75 bps) and Nebraska (100 bps). The other highly ranked jurisdictions have higher premium taxes:



New Hampshire (125 bps), Ohio (140 bps), Florida (175 bps), Tennessee (175 bps), Utah (225 bps) and Nevada (350 bps). (See “Best Situs at a Glance,” p. 90, for a list of premium taxes.)

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

## Modern Trust Laws

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

1. Effective flexible trust planning and administration tools, including LPOAs and the ability to decant or reform a trust if necessary;
2. The ability to change situs for income tax and estate tax purposes without triggering a constructive addition for GST tax exemption purposes;
3. An effective directed trust statute so that investment and distribution direction may be separated from the duties of the administrative trustee;
4. Statutory acknowledgment of the role of trust protector;
5. Statutory ability to change provisions in an irrevocable trust through decanting or reformation;
6. Clear situs rules (including possible conflict-of-law issues) and setting unambiguous standards for which situs’ laws to apply;
7. Statutory authority for trust reformation and decanting, with clear access to courts;
8. Statutory authority for virtual representation of all beneficial interests;
9. Effective privacy laws and beneficiary quiet statutes;
10. The ability to facilitate and administer PFTCs in a Securities and Exchange Commission exempt environment; and
11. Asset protection features of the state’s trust laws, including discretionary beneficiary definitions and self-settled trust statutes.

**LPOA.** This tool is included to create intergenerational flexibility by allowing a powerholder to appoint assets to various beneficiaries. But, note IRC Section 2041(a)(3), which prevents the abuse known as the “Delaware tax trap,”<sup>25</sup> referring to the exercise of successive LPOAs over successive generations, allowing for a virtual perpetual trust without federal transfer taxes. As such, the use of LPOAs are generally reserved for beneficiaries and decedents who are ascertainable on the creation of

the trust to prevent the inadvertent violation of Section 2041(a)(3). Otherwise, this action could be considered a constructive addition (that is, a material or substantial change in the beneficial interests of the beneficiaries) and potentially endanger a trust's zero GST tax-exempt inclusion ratio.

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

Alaska and Tennessee are the only perpetuities jurisdictions that have adopted a POA statute that exceeds what would be typically permitted under the safe harbor under Section 2041(a)(3). While Alaska is a *Murphy* jurisdiction for RAP purposes, at least one authority<sup>26</sup> is concerned that the use of a POA provision beyond the safe harbor would create a constructive addition for GST tax purposes.

**Change of situs.** The ability to change the situs of trusts is often important to HNW clients who seek to shop for the most favorable laws. When considering a situs change, examine the wording of the trust's provisions, including perpetuities language and the applicable law. Look at a possible negative impact such a change would have on the GST tax-exempt status of the trust and its effect on beneficiary rights.

Another related issue is which law may apply to a trust that's changed its situs to take advantage of a perpetual state's trust laws. The Delaware Supreme Court *Peierls* decisions<sup>27</sup> make clear that Delaware law will govern the administration of any trust that allows for the appointment of a successor trustee without geographic limitation once a Delaware trustee is appointed and the trust is administered in Delaware, unless the choice-of-law provision expressly provides that another jurisdiction's laws shall always govern the administration (even if the place of administration or situs changes). According to *Peierls*, the ability to appoint a trustee in Delaware reflects the settlor's implied intent that Delaware law will govern the administration of the trust.

This result occurs when the trust instrument is silent as to governing law or even when the trust instrument provides that some other jurisdiction's laws shall govern. A change of situs among *Murphy* states isn't likely to create a constructive addition because the perpetuities laws are the same. But, a change in situs may affect which state's law applies. It should be noted that, for example, a Florida trust with specific language requiring the Florida perpetuities period to apply could be administered in another state that would continue to honor and apply Florida law.<sup>28</sup>

**Directed trust statute.** A directed trust statute generally provides that an administrative or directed trustee be appointed and then permits bifurcating or even trifurcating the fiduciary responsibility among different trust advisors. This freedom allows the client to select independent parties, typically designated as co-trustees or trust advisors, to manage both closely held and investment assets, distributions or other fiduciary duties. This selection relieves the directed or administrative trustee from the duty and liability to manage the trust assets. Directed trusts also provide more flexibility and control over asset allocation, concentration and selection of investments. They also allow the client to continue to employ trusted advisors in the professional roles to which the client is accustomed.<sup>29</sup>

A national survey we recently conducted reveals that directed trust fees are typically lower to reflect the fact that the administrative trustee isn't liable for the trust's investment activities because other fiduciaries have those duties.<sup>30</sup> See "Best Situs at a Glance," p. 90, for a list of jurisdictions with directed trust statutes.

**Trust protector statute.** Such a statute recognizes the authority and limitations of a person or entity that's been appointed as a trust protector. A trust protector is any disinterested third party whose appointment is provided by the trust instrument and whose powers are provided in the governing instrument and in state law. This recognition provides greater flexibility for future generations as conditions change. The strongest trust protector statutes are in Alaska, Delaware, Nevada, New Hampshire, South Dakota and Wyoming.<sup>31</sup>

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; the power to remove and replace a trustee; and modifications of the terms of a POA.

A trust protector is highly recommended for a non-charitable purpose trust (NCPT) (that is, a trust that lacks beneficiaries and, instead, exists for advancing a non-charitable purpose of some kind). Hawaii, Idaho, Illinois, Michigan and Tennessee are newer states that have passed trust protector statutes. The UTC also permits trust protectors in a more limited way in states that have adopted its provisions.<sup>32</sup>

**NCPTs.** NCPTs generally require a trust protector and trust enforcer because the trusts aren't required to have beneficiaries. Their sole purpose is to care for the underlying property that's the corpus of the trusts. For example, some of the common purposes for establishing an NCPT are: (1) pet care (including offspring); (2) support of religious gravesite ceremonies; (3) maintenance of gravesites, honorary trusts, family property (for example, antiques, cars, jewelry and memorabilia), art collections, family homes (residence and vacation), buildings, property/land and PFTCs;<sup>33</sup> (4) protection of business interests, royalties and digital assets; and (5) to provide for a philanthropic purpose not qualifying for a charitable deduction. NCPTs are also often used to hold PFTCs. Delaware and South Dakota allow very broad NCPTs.

## Changing Irrevocable Trusts

Changing irrevocable trusts is done on a case-by-case approach because of the sensitivity to gift, estate and GST tax issues that may be triggered. There are certain ways to modify irrevocable trusts: trusts settling trusts; decanting; distributing property to a beneficiary in trust; trust protector amendment powers; and reformation. The first three methods involve the creation of a new trust. The latter two methods involve amendment of the current trust. Historically, only judicial action could reform a trust; this process often required the consent of all the beneficiaries or a court-approved equitable deviation.<sup>34</sup>

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

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

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

## Estate Inclusion Issues

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

As to the settlor, the estate inclusion issue is whether the settlor, with the consent of anyone, is involved in modifying the old trust or creating a new trust that changes the dispositive provisions. If he is, then there's an estate tax inclusion issue under IRC Section 2036(a)(2). You can remove this estate tax inclusion issue if the settlor's power is limited by an ascertainable standard. While it's a remote argument, if the settlor is attributed the powers of the trustee or protector under an implied (generally oral) promise, and the trustee or protector has the ability to create a new trust or modify a current trust, then there's an estate tax inclusion issue under Section 2036(a)(1).<sup>35</sup>

As it relates to a beneficiary, if an independent trustee exercises the power to create or modify the dispositive provisions, generally there shouldn't be an estate tax inclusion issue, unless the implied promise argument is used to attribute the trustee or protector powers to the beneficiary. By definition, an independent person isn't a beneficiary of the trust, and estate and gift tax inclusion issues apply to the settlor or a person who holds a POA.<sup>36</sup> While most estate planners aren't concerned with an attribution issue when using an independent trustee or protector to modify the dispositive provisions of a trust, the IRS hasn't issued definitive guidance and is currently studying the issue. Therefore, some conservative planners advocate that when they use one of the trust creation or modification techniques, the dispositive provisions should remain the same.

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

For example, Ohio's UTC takes the most restrictive definition of a discretionary trust. Under common law, a beneficiary of a discretionary trust didn't have an enforceable right to a distribution or a property interest, and the trustee's discretion could only be challenged for: (1) improper motive; (2) dishonesty; and (3) failure to act.<sup>37</sup> The Ohio UTC restricts a discretionary trust to one that has no standards or guidelines. Conversely, the top trust jurisdictions generally define a discretionary trust as one that gives the trustee any discretion in making a distribution, regardless of whether there's a standard or guideline. For example, in Alaska, South Dakota, Tennessee and Wyoming, the following language would be classified as a common law discretionary trust: "The trustee may make distributions to the beneficiaries on Section 2.01 for health, education, maintenance, and support."

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

reviewed the South Dakota discretionary support statute. Hence, we use the term “Covey Provision” in one of the columns in “Best Situs at a Glance ,” p. 90.

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

UTC Section 411(a) provides two options: modification with, or without, court approval. Older versions of the UTC didn't require court approval for a modification with the consent of the settlor and all the beneficiaries.<sup>38</sup> 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.<sup>39</sup>

South Dakota's decanting statute appears to provide the best example of flexibility for trust remodeling.<sup>40</sup> Several states have followed this model.<sup>41</sup>

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

1. Improve a trust's governance structure;
2. Change the law applicable to the trust when the terms of the trust don't facilitate a change to its governing law;
3. Change dispositive provisions;
4. Change the administrative terms of the trust to ensure that the trust provides the proper tools to its fiduciaries for the best management of the trust; or
5. Modernize an outdated trust agreement.

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

Both reformation and decanting statutes provide trustees and trust beneficiaries flexibility without negative GST tax consequences if certain requirements are met. The GST tax regulations create a safe harbor for four types of modifications, none of which affect the grandfathered status of a trust.<sup>42</sup> A decanting or modification that qualifies for one of these safe harbors won't cause a GST tax-exempt trust to lose its exempt status.<sup>43</sup> In 2015, the National Conference of Commissioners on Uniform State laws issued a Uniform Trust Decanting Act.<sup>44</sup> See “Best Situs at a Glance ,” p. 90, for the jurisdictions that have adopted decanting statutes.

**Special purpose entities (SPEs).** New Hampshire, Tennessee and South Dakota have a specific SPE statute. SPEs are important because unregulated SPEs are, generally, business entities used in combination with a directed trust structure to limit the liability of fiduciaries and more directly tie the trust to the chosen jurisdiction. These may include trust protector companies, trust advisors and

investment and distribution committees, as well as other individuals and professional entities that serve in advisory and investment roles on behalf of a directed trust or the family. These entities are typically in the form of an LLC organized under the laws of the jurisdiction that permits them. The purpose of such entities is generally limited by statute to a single client or family group. SPEs can be created to act on behalf of a family or family group to provide non-trustee fiduciary services akin to a family office. Only Alaska, Arizona, Delaware, Illinois, Nevada, New Hampshire, South Dakota, Tennessee and Wyoming permit SPEs.<sup>45</sup>

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

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

Several jurisdictions that have specific virtual representation statutes include: Alaska, Arizona, Florida, Georgia, Illinois, Nevada, South Dakota and Washington. Delaware has a limited version of virtual representation. The UTC also provides a form of virtual representation.<sup>46</sup> Under South Dakota's virtual representation statute,<sup>47</sup> service of process when notifying beneficiaries is generally limited to persons in being and parties to the proceeding. The court shall appoint a guardian ad litem to represent or protect the persons who may eventually become entitled to an interest, if it doesn't appear that there's a person in being or ascertained as having the same interest. Further, under South Dakota law, it may not be necessary to serve the potential appointees of a POA or the takers in default of the exercise of a general POA. Alaska has a comparable statute, while Delaware and Nevada's virtual representation statutes are more limited. See "Best Situs at a Glance," p. 90.

**Privacy laws and quiet statutes.** Of the top tier jurisdictions, South Dakota has the best trust privacy laws. For example, its quiet statute not only allows a trust to be quiet during the grantor's life but also applies after the grantor's death or disability in perpetuity, which is unique. Delaware and Alaska's privacy laws aren't as extensive.<sup>48</sup> For example, Delaware only provides a 3-year seal period. In South Dakota, the privacy seal is automatic and extends to any possible future litigation or court reformation, which is a significant advantage.<sup>49</sup>

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

In 2019, the most popular perpetual or near-perpetual jurisdictions that permitted PFTCs were: Nevada, South Dakota and Wyoming. These are still the most popular jurisdictions in 2020. Tennessee's PFTC statute attempts to permit a PFTC and business in one entity. Missouri is the most recent state to enact PFTC legislation.<sup>50</sup> Of all these jurisdictions, Nevada and South Dakota have historically contained the greatest number of PFTCs.<sup>51</sup>

The capital requirements for establishing a PFTC differ by jurisdiction and remain the same as they did in 2016. Currently, in capital, Nevada requires \$300,000, New Hampshire requires \$250,000,<sup>52</sup> South Dakota requires \$200,000<sup>53</sup> and Wyoming requires \$500,000 for regulated PFTCs. Increasingly, banking regulators are encouraging PFTCs to pledge larger capital requirements than just the minimum amount, especially as PFTCs mature.<sup>54</sup>

Of the key PFTC states, Florida, Ohio, South Dakota, Tennessee and Wyoming are accredited by the Conference of State Bank Supervisors. New Hampshire and Nevada aren't accredited; only four of the 50 states aren't accredited. This accreditation may be a key point if a family is seeking to qualify for an SEC exemption via a regulated PFTC.<sup>55</sup>

## **Independent Trust Companies**

Independent trust companies give HNW families more flexibility and choices. As reported in 2018, many independent trust companies have emerged because of the modernization of trust laws, which means that HNW clients have many choices for trust laws and services across 34 different jurisdictions within the United States that offer multigenerational trust planning opportunities.

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

The modern trust can provide individuals and families far more flexibility intergenerationally, so it's no longer true that the trust needs to be governed by the "dead hand," as some in academia have accused. Rather, modern trusts are living and adaptable documents capable of being managed in a dynamic way. Gone are the days of the slanted standard trust forms written to confine clients behind the walls of big bank trust departments and to tie the hands of future generations. This flexibility requires more involvement and training of members of the next generation so that they have the maturity and sophistication to participate in the inevitable course corrections that are required to take place over time.

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

## **Asset Protection—Third-Party Trusts**

More states continue to adopt discretionary trust asset protection statutes codifying the *Restatement (Second) of Trusts (Restatement Second)*. In particular, one of the top trust law states, Wyoming, has recently significantly expanded its protection in this area.

In our 2012 article,<sup>56</sup> we discussed in detail the greater asset protection provided by a discretionary trust, particularly when states had codified the *Restatement Second*.<sup>57</sup> This is because discretionary trust protection originated under English common law and has nothing to do with spendthrift protection. Rather, it's based on the fact that a beneficiary doesn't have an enforceable right to a distribution,<sup>58</sup> and therefore, no creditor may stand in the shoes of a beneficiary. In this respect, the beneficiary's interest isn't a property interest<sup>59</sup> and is nothing more than an expectancy that can't be attached by any creditor.<sup>60</sup>

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

1. Because a beneficiary's interest in a trust doesn't rise to the level of property, it doesn't become marital property, and therefore, it isn't subject to division in a divorce.
2. An estranged guardian spouse can't stand in the shoes of a minor child beneficiary and force a distribution on behalf of a minor child.
3. Maintenance or child support is determined by historic distributions to a beneficiary, not an imputed amount that's based on what the trust could have distributed to a beneficiary.<sup>61</sup>

The asset protection planning key to almost all of the aforementioned issues is to draft a discretionary trust when the beneficiary doesn't have an enforceable right to a distribution.<sup>62</sup> Under English common law, the *Restatement of Trusts (Restatement First)*, the *Restatement Second*, 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 had neither an enforceable right to a distribution nor a property interest. Unfortunately, with almost no case law to support its position, the *Restatement Third* reverses how a court should interpret a distribution standard so that it will almost always create an enforceable right in a discretionary trust. Many estate planners believe that the national version of the UTC follows the *Restatement Third's* position regarding this issue. In response to this problem created by the *Restatement Third*, states (including some UTC states) are responding with statutes codifying the *Restatement Second* in this area. Absent such statute, even if a state has strong *Restatement Second* case law, a court may reverse its position and inadvertently adopt the *Restatement Third's* new view of discretionary trusts. In this respect, a statute codifying the *Restatement Second* is the only sure method to preserve the asset protection of a common law discretionary trust.

The importance of a discretionary support trust statute can't be overemphasized, as displayed by a 2019 Massachusetts Court of Appeals decision, *Levitan v. Rosen*.<sup>63</sup> In that case, the appellate court correctly noted the beginning step to determine whether a trust becomes a marital asset subject for division in divorce in certain states. The appellate court stated, "Whether a trust may be included in the . . . marital estate requires close examination of the particular trust instrument to determine whether the interest is a 'fixed and enforceable' property right . . ."<sup>64</sup> While Massachusetts has a broad interpretation of marital property, the major key to determining whether a bundle of rights rises to the level of a property interest is whether the beneficiary has an enforceable right to a distribution. Unfortunately, the appellate court made no analysis of this most important issue.

After starting with a correct statement regarding discretionary trust law, the rest of the analysis was best summarized by our esteemed colleagues Alexander A. Bove, Jr. and Melissa Langa by the title of one of their articles, "Challenging the Judge: The Massachusetts Appeals Court Continues to Make its



Own Rules of Trust Law.”<sup>65</sup> In *Levitan*, the appellate court had held that the following factors resulted in the trust being available for equitable division:

1. The discretionary trust had only one current beneficiary and five remainder beneficiaries; and
2. Such beneficiary held a 5 x 5 withdrawal power.

In 2015, in the case of *Pfannenstiehl v. Pfannenstiehl*, the Massachusetts Appellate Court held that a discretionary trust with an ascertainable standard was a marital asset eligible for division.<sup>66</sup> In our 2016 “Which Situs is Best?” article in this journal, we noted that in *Pfannenstiehl*, the court could have decided it either way based on the differences among common law, the UTC and, in particular, the *Restatement Third*. We also asked the question, “Should discretionary trusts with any standards flee Massachusetts and move to a jurisdiction with more favorable trust law?” Fortunately, in *Pfannenstiehl*, the Supreme Court of Massachusetts found that the discretionary trust with a standard wasn’t marital property.<sup>67</sup> Unfortunately this time, in *Levitan*, the Supreme Court of Massachusetts denied review of the appellate case.<sup>68</sup> Discretionary support trust statutes were originally adopted to codify the *Restatement Second* and prevent the expansion of largely unsupported discretionary trust law espoused by the *Restatement Third*. However, they also serve result-oriented courts with imaginative views of discretionary trust law.

## Alter Ego Arguments

Another method that a creditor might use to pierce a third-party trust is an alter ego argument, which also may be known as a “dominion and control” argument or a “sham” trust or transaction.<sup>69</sup> A lively discussion broke out in Steven Leimberg’s *Leimberg Information Sciences Inc.* online newsletters when a Nevada court held that a pierce-the-veil type of argument could be applied against a Nevada trust.<sup>70</sup>

As well noted by Richard Nenno and John E. Sullivan III in their BNA portfolio, “Domestic Asset Protection Trusts,”<sup>71</sup> pierce-the-veil arguments are rarely, if ever, encountered when a professional trustee is appointed. This is because professional trustees almost always follow the terms of the trust. On the other hand, when a beneficiary is the trustee or co-trustee, or when the trustee isn’t a professional trustee, trustee formalities, as well as the terms of the trust, aren’t always followed.

This latter scenario was the Nevada case, *Transfirst Group, Inc. v. Magliarditi*, in which the trust was pierced.<sup>72</sup> A little about the case: It demonstrates that blatant disregard of trustee formalities will, generally, result in a pierce-the-veil argument against a third-party trust. This is particularly the case when a debtor may well have engaged in several fraudulent conveyances to fund a trust and related entities. In *Transfirst Group*, the debtor, Dominic, had severed his community property and transferred his property to his spouse, Francine. Francine then created a trust that owned various entities. Francine was the president of these entities, but she knew nothing about their operations. Rather, Dominic controlled everything in those entities, which had paid for his gym membership and flying lessons, made unexplained intercompany loans amounting to \$2 million, made unexplained deposits of “hundreds of thousands of dollars” and had \$3 million of intercompany payables. This case was an egregious violation of fiduciary principles. No wonder the Nevada District Court initially held that the alter ego document applied to the Nevada trust.

The authors are aware of 17 cases<sup>73</sup> in which various jurisdictions have applied or acknowledged the alter ego concept to piercing third-party trusts. Conversely, the authors are aware of only one state, Florida, where a court found that a pierce-the-veil argument didn't apply to trusts.<sup>74</sup> This particular Florida case was followed by an Ohio Bankruptcy Court that correctly looked to Florida law to apply the law of Florida under conflict-of-law principles to a Florida trust.<sup>75</sup> The Ohio Bankruptcy Court correctly noted that it appeared that Florida was the only state that prevented a pierce-the-veil argument against a trust. However, this may no longer be Florida law, because a Florida case involving the SEC in the same year as the Ohio Bankruptcy Court noted that an alter ego theory could be brought against a Florida trustee, but this argument didn't apply to the facts of the case before it.<sup>76</sup> Also, in *In re Trujillo*,<sup>77</sup> Florida's Southern District Bankruptcy Court rejected the defendants' argument that alter ego can't apply to a trust, but at the same time, distinguished that the argument was being made against a private (noncharitable) foundation that was created for the benefit of the settlor's family.

Six states, Indiana, Mississippi, Nevada, Oklahoma, South Dakota and Tennessee, have passed anti-pierce-the-veil arguments against minor mistakes by co-trustees, non-professional or even professional trustees. Mississippi is the strongest statute running slightly ahead of South Dakota, as Mississippi also provides protection if a beneficiary serves as co-trustee, trust advisor or trust protector.

## Self-Settled Trust Legislation

During the last two years, three more states have adopted self-settled trust legislation, bringing the total to 19 states. Space doesn't permit a detailed discussion of the pros and cons of each of these statutes, except for the limited discussion below. In this respect, the matrix has been limited to a "Yes, best," "Yes" or "No" approach. In our 2017 article about DAPTs in this journal, we opined that Nevada, Ohio and South Dakota had the best self-settled trust legislation.<sup>78</sup>

## Charging Order Protection

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

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

## Migration

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

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

## Endnotes

1. The federal estate tax is paid only when property and other assets passed on to heirs exceed the federal estate tax exemption. In 2018, the exemption was \$5.49 million for individuals; it more than doubled in 2019 to \$11.4 million (\$22.8 million for couples), resulting in much fewer individuals paying the tax in 2019. In 2020, the exemption amount is \$11.58 million for individuals and \$23.16 million for couples. Some wealthy business owners have been able to take advantage of the lower pass-through rate as well. Overall, the Tax Policy Center found that half the benefits of the Tax Cuts and Jobs Act will go to the top 1% by 2027. See [www.washingtonpost.com/news/wonk/wp/2017/11/16/the-house-is-voting-on-its-tax-bill-thursday-heres-what-is-in-it/](http://www.washingtonpost.com/news/wonk/wp/2017/11/16/the-house-is-voting-on-its-tax-bill-thursday-heres-what-is-in-it/).
2. Daniel G. Worthington and Mark Merric, "Which Trust Situs is Best in 2018?" *Trusts & Estates* (January 2018); Daniel G. Worthington and Mark Merric, "Which Situs is Best in 2016?" *Trusts & Estates* (January 2016); Daniel G. Worthington and Mark Merric, "Which Trust Situs is Best in 2014?" *Trusts & Estates* (January 2014); Daniel G. Worthington and Mark Merric, "Which Situs is Best in 2012?" *Trusts & Estates* (January 2012); Daniel G. Worthington and Mark Merric, "Which Situs is Best?" *Trusts & Estates* (January 2010); Daniel G. Worthington, "Latest Perpetual Trust States—Latest Rankings," *Trusts & Estates* (January 2007); Mark Merric, "How to Draft Distribution Standards for Discretionary Dynasty Trusts," *Estate Planning* (March 2009). Compare Steven J. Oshins, "4th Annual Dynasty Trust State Rankings Chart" (updated 2014), [www.oshins.com/images/Dynasty\\_Trust\\_Rankings.pdf](http://www.oshins.com/images/Dynasty_Trust_Rankings.pdf) with "6th Annual Domestic Asset Protection Trust State Rankings Chart" (updated January and February 2015), [www.oshins.com/images/DAPT\\_Rankings.pdf](http://www.oshins.com/images/DAPT_Rankings.pdf).
3. See Howard Zaritsky, "The Rule Against Perpetuities, A Survey of State (and D.C.) Law," American College of Trust and Estate Counsel (ACTEC) (2014), [https://www.actec.org/assets/1/6/Zaritsky\\_RAP\\_Survey.pdf](https://www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf); Jesse Dukeminier and James E. Krier, "The Rise of the Perpetual Trust," 50 *UCLA L. Rev.* 1303, 1316. See Idaho Code Section 55-111 (Michie 2000); Wisconsin Statute Section 700.16(5) (1999); South Dakota Codified Laws Section 43-5-8 (Michie 1997). See also Delaware Code Ann. Tit. 25 Section 503(a) (Supp. 2000); 765 Illinois Comp. Stat. Ann. 305/4 (West 2001); Alaska Stat. Section 34.27.100 et al.; New Jersey Stat. Ann. Section

46:2F-9 (West Supp. 2002); Ohio Rev. Code Ann. Section 2131.08(B) (West Supp. 2003); Maryland Code Ann. Estates & Trusts Section 11-102(C) (2001); Florida Stat. Ann. Section 689.225 (West 2003); Arizona Rev. Stat. Ann. Section 14-2901(A)(1) (West Supp. 2002); Missouri Ann. Stat. Section 456.025 (West Supp. 2003); Nebraska Rev. Stat. Section 76-2001 (1996 and Supp. 2002); Colorado Rev. Stat. Section 15-11-1102.5 (2006); Maine Rev. Stat. Ann. Tit. 33, Section 101 (West 1964); Rhode Island Gen. Laws Section 34-11-38 (Supp. 2003); Virginia Code Ann. Section 55-13-3(C) (Michie Supp. 2002); District of Columbia Code Sections 19-904(a)(10), 19-901 (2002); Washington Rev. Code Ann. Section 11.98.130 (West 2002); Wyo. Stat. Ann. Section 34-1-139 (2003); New Hampshire Rev. Stat. Ann. Section 547:3-k and 564:24 (West, Westlaw through 2003 Sess.); Utah Code Ann. Section 75-2-1201 (Lexis Supp. 2002); Nevada Rev. Stat. Section 111.1031 (Nev. Rev. Stat. Ann. 2 Section 111.103-1039 (Michie Supp. 2004)); Tennessee Code Ann. Section 66-1-202(f) (2007); North Carolina Gen. Stat. Section 41-15 (2007); PSA Section 6107.1 (2007); MCLA Section 554.71 (2008); Haw. Rev. Stat. Section 525-4(6) (2010); Ala. Code Section 35-4A-5(9) and N.D. Cent. Code Sections 47-02-27.1 to 47-02-27.4; KRS Chapter 381.224 (2010); Georgia, H.B. 122 (July 2018) and Connecticut, H.B. 7104 (2019); *see generally* Richard A. Oshins and Steven J. Oshins, "Protecting and Preserving Wealth into the Next Millennium [Part Two]," *Trusts & Estates* (October 1998); Daniel G. Worthington, "The Problems and Promises of Perpetual Trusts," *Trusts & Estates* (December 2004); N.D. Cent. Code Sections 47-02-27.1 to 47-02-27.5: The Rule Against Perpetuities (RAP) doesn't apply to a "fiduciary's power relating to the administration or management of assets" or to a "discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;" Oklahoma: The RAP doesn't apply to a trust if the trustee is granted the full power to sell or transfer the trust assets. *See Pipkin v. Pipkin*, 370 P.2d 826 (Okla. 1962).

In our view, the methodology for ranking trust jurisdictions addresses two related questions: (1) Does the jurisdiction permit truly perpetual trusts or something less? and (2) Does the jurisdiction have other trust laws and practices that give it an edge? We believe that experience with existing perpetual trust laws, administrative issues, ease of interaction with the courts and other trust law issues are all important considerations. Stat. Section 111.1031 (Nev. Rev. Stat. Ann. 2 Sections 111.103-1039 (Michie Supp. 2004)); Tennessee Code Ann. Section 66-1-202(f) (2007); North Carolina Gen. Stat. Section 41-15 (2007).

4. *See* "Tracking the 2020 Presidential Tax Plans," Tax Foundation (November 2019), <https://taxfoundation.org/2020-tax-plans/>.

5. *See* "Bernie Sanders estate plan proposal," [www.forbes.com/sites/martinshenkman/2019/03/21/sanders-estate-tax-proposal-estate-planning-steps-to-take-now/#635a4af899f5](http://www.forbes.com/sites/martinshenkman/2019/03/21/sanders-estate-tax-proposal-estate-planning-steps-to-take-now/#635a4af899f5).

6. *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. \_\_\_\_ (June 21, 2019).

7. *Comm. of Rev. v. William Fielding, et al.*, U.S., No. 18-664 (Sup. Ct. Minn. 2018), *cert. denied*, *Bauerly v. Fielding* (U.S. Sup. Ct. June 28, 2019). *See also* [https://uniqueestatelaw.com/lawyer/2019/08/13/Trusts/Minnesota-Trust-Taxation-\\_bl38299.htm](https://uniqueestatelaw.com/lawyer/2019/08/13/Trusts/Minnesota-Trust-Taxation-_bl38299.htm).

8. *Matter of Cleopatra Cameron Gift Trust*, 931 N.W.2d 244 (Sup. Ct. S.D. 2019), <https://ujs.sd.gov/uploads/sc/opinions/28424f6gygv9.pdf>; *Klabacka v. Nelson*, 133 Nev. Adv. Op. 24 (May 25, 2017). Similarly, in *Klabacka*, a Nevada case, the court held that because no child or

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

9. Georgia House Bill 121. *See also* Richard M. Morgan, "Factors to Consider When Contemplating Trust Modification," [www.wealthmanagement.com/estate-planning/factors-consider-when-contemplating-trust-modification](http://www.wealthmanagement.com/estate-planning/factors-consider-when-contemplating-trust-modification).

10. Leonard Leader, "Estate Planning Alert: Connecticut Legislature Passes Overhaul of Connecticut Trust Law," *National Law Review* (Nov. 20, 2019), [www.natlawreview.com/article/estate-planning-alert-connecticut-legislature-passes-overhaul-connecticut-trust-law](http://www.natlawreview.com/article/estate-planning-alert-connecticut-legislature-passes-overhaul-connecticut-trust-law). Almost all commentators have noted that 800 years should be long enough, except for possibly China's Zhou Dynasty that lasted 825 years. It isn't the number of years that matters, it's the interaction of the term-of-years statutes with the Internal Revenue Code and Treasury regulations.

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

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

13. *See Klabacka, supra* note 8.

14. *See Berlinger v. Casselberry*, 133 So.3d 961 (Fla. Dist. Ct. App. 2013). The Florida District Court of Appeals upheld a writ of garnishment issued by the trial court against the trustee of a discretionary trust over any present or future distributions made to or for the benefit of the trust beneficiary. The case is unique as it's the first case to interpret the Florida Trust Code spendthrift/discretionary trust provision (because the Florida Trust Code became effective on July 1, 2007, and it's the first case to hold that the well-known decision in *Cacardid v. White*, 463 So.2d 218 (1985) is still applicable to Florida trusts, both for those protected by spendthrift clauses and for those that are wholly discretionary).

15. *See Estate of Murphy v. Comm'r*, 71 T.C. 671 (1979), in which the Tax Court held that the Delaware tax trap wasn't violated in Wisconsin. The Internal Revenue Service acquiesced in *Murphy*.

16. See Garrett Moritz, "Dynasty Trusts and the Rule Against Perpetuities," 116 *Harv. L. Rev.* 8 (June 8, 2003). See also Daniel G. Worthington, "Problems and Promises of Perpetuities Planning," *Trusts & Estates* (October 2005).
17. *Berlinger*, *supra* note 14.
18. The GST tax result in the term-of-years states may be different from the result in *Murphy* unless: There's a real possibility of a vesting or alienation of the trust interests; and that method of vesting is described in the statute (for example, vesting or alienation occurs with the trustee's ability to sell or distribute assets). If these conditions are met, the term-of-years period should work for purposes of the GST tax and continued GST tax exemption for the term of the trust. For a contrary view, see *Neeno*, *supra* note 11, at 3-1; 3-51.
19. See Tennessee Code Ann. Section 66-1-202(f). The common law rule is generally applicable, but: "[a]s to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust may require that all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years. Provided, however, this section (f) shall only apply to trusts that grant a power of appointment at death to at least one member of each generation of beneficiaries who are beneficiaries of the trust more than ninety (90) years after the creation of the interest. The permissible appointees of each such power of appointment must at least include all descendants of the beneficiary yet may include other persons."
20. Residency is determined by the domicile of the individual who transferred the net assets to the trust. See OHIO R.C. 5747.01(A)(6), (I) and (S), 5747.02 and 5747.05, at Section 5.
21. See Arizona's ARS Section 14-2901(A)(3) and compare with Illinois' IL ST Ch. 765, Section 305/4 and Maine's 33 MERSA Section 101-A. See also Maryland's MD Est. & Trust Section 11-102(5); Missouri's V.A.M.S. Section 456.025(1); and Elizabeth M. Schurig and Amy P. Jetel, "Summary of State Rule Against Perpetuities Laws," [www.abanet.org/rppt/meetings\\_cle/2007/Jointfall/Jointo7/JointEstateandGiftax/50-statecomparison\\_ofspendthrifttrustlaws.pdf](http://www.abanet.org/rppt/meetings_cle/2007/Jointfall/Jointo7/JointEstateandGiftax/50-statecomparison_ofspendthrifttrustlaws.pdf).
22. On June 10, 2015, Governor Brian Sandoval of Nevada signed Senate Bill 483 (S.B. 483), thus enacting a new "commerce tax" (effective July 1, 2015) applicable to each "business entity" engaged in business in Nevada with Nevada situs gross revenue exceeding \$4 million in a taxable year. If a business entity's Nevada gross revenue exceeds \$4 million, the excess is subject to tax at various rates that depend on the industry in which the business entity is "primarily engaged."
23. See Steven J. Oshins, "5th Annual Non-Grantor Trust Statute Income Tax Chart" (July 2019), [www.oshins.com/images/State\\_Income\\_Tax\\_Chart.pdf](http://www.oshins.com/images/State_Income_Tax_Chart.pdf) for reference statutes, rates and conditions.
24. See also <https://uniqueestatelaw.com/lawyer/2019/08/13/Trusts/Minnesota-Trust-Taxation-bl38299.htm>. See [www.mprnews.org/story/2019/08/19/court-defeat-could-cost-minnesota-treasury-100-million](http://www.mprnews.org/story/2019/08/19/court-defeat-could-cost-minnesota-treasury-100-million).
25. The so-called "Delaware tax trap" is one example of how the federal and state laws may interact to create unexpected results. It may be a concern for a trust created in a state where a trust might last beyond the common law RAP or the Uniform Statutory Rule Against Perpetuities. Prior Delaware law provided the opportunity for a perpetual trust without federal transfer taxes through the exercise of

successively limited POAs over generations. IRC Section 2514(d) was enacted to prevent this result from happening. The current section dealing with this issue is IRC Section 2041(a)(3).

26. See Nenno, *supra* note 11.

27. See *In the Matter of Peierls Family Inter Vivos Trusts*, No. 16812 (Del. Oct. 4, 2013); *In the Matter of Ethel F. Peierls Charitable Lead Trust*, No. 16811 (Del. Oct. 4, 2013); and *In the Matter of Peierls Family Testamentary Trusts*, No. 16810 (Del. Oct. 4, 2013). See also “Todd Flubacher & the Delaware Supreme Court’s Opinions in *Peierls*,” *Steve Leimberg’s Estate Planning Newsletter #2152*. See also Nenno, *supra* note 11; Dukeminier and Krier, *supra* note 3, at p. 1316.

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

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

30. Daniel G. Worthington conducted a survey of 50 trust companies that offer directed trust services, and the results were similar throughout the United States. See, e.g., SDCL 55-1B et seq. Similar directed trust statutes were patterned after the South Dakota law in other jurisdictions, including Nevada, New Hampshire, Utah, Wyoming and, most recently, Alaska’s newest statute. See “Best Situs at a Glance,” at p. 90.

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

32. South Dakota is followed by Idaho, Alaska, Wyoming, New Hampshire, Tennessee, Delaware, Arizona, Michigan, Nevada and Vermont in adopting a modern trust protector statute. Connecticut’s statute dealing with the creation of a trust to provide for the care of animals contains the concept of a trust protector, but otherwise there isn’t a specific trust protector statute. Alaska Stat. Section 13.36.370; Ariz. Rev. Stat. Ann. Section 14.10818; 12 Del. C. Section 3570(8)c; Idaho Code Ann. Section 15-7-501; Nev. Rev. Stat. Section 163.5553; N.H. Rev. Stat. Ann. Section 564-B:12-1201(a); S.D. Codified Laws Section 55-1B-6; Vt. Stat. Ann. Section 1101(a); and Wyo. Stat. Section 4-10-710(a). Uniform Trust Code (UTC) trust protectors permitted: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia and Wyoming. Six of these states, Arizona, Michigan, New Hampshire, Tennessee, Vermont and Wyoming and the District of Columbia, also have a specific trust protector statute; [www.naela.org/Public/Library/ResourceDatabase/Topics/5Estate\\_Planning/5a\\_Trusts\\_Wills/Desig.aspx](http://www.naela.org/Public/Library/ResourceDatabase/Topics/5Estate_Planning/5a_Trusts_Wills/Desig.aspx).

33. Al W. King, III, “Trusts Without Beneficiaries—What’s the Purpose?” *Trusts & Estates* (February 2015).

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

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

36. This case provides a better analysis of a gift tax issue to a beneficiary. In *Estate of Franklin Lewis Hazelton*, 29 T.C. 637 (1957), Frank was the primary discretionary beneficiary of a trust created by his father in 1935. His sister was a contingent beneficiary. Any future wife or child would also be a discretionary beneficiary but only up to one-third of the income. In 1942, Frank married, and it appears that the couple had no children. In 1951, Frank eventually convinced the trustees to transfer part of the trust property to a new trust for the benefit of himself, as the primary discretionary beneficiary, and his spouse, with the same terms as the first trust, except with no restriction that distributions to the spouse were limited to one-third of the income. The Tax Court held there was no gift tax issue because the trust was the donor, not Frank. The Tax Court secondarily noted that, "the transfer resulted in no decrease in the decedent's interest . . . over what he had before [under the first trust]. . . So long as the only interest he had, namely, a primary life interest, was not decreased by the transaction he cannot be said to have parted with anything."

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

38. Wareh, *supra* note 34, at p. 14. The UTC was amended at the request of ACTEC to include an option requiring court approval. See *infra* note 43 for ACTEC's concern. Blattmachr, *supra* note 34, at p. 3. See Diana S.C. Zeydel, *LISI Estate Planning Newsletter #2139* (Sept. 10, 2013), [www.LeimbergServices.com](http://www.LeimbergServices.com), citing *Morse v. Kraft*, 466 Mass. 92 (2013); *Phipps v. Palm Beach Trust Company*, 142 Fla. 782 (1940); *Wiedenmayer v. Johnson*, 106 N.J. Super. 161 (App. Div.), *aff'd sub. nom.*, *Wiedenmayer v. Villaneuva*, 55 N.J. 81 (1969); *Restatement Third*; Treasury Regulations Section 26.2601-1(b)(4)(i)(A)(I)(i).

39. Wareh, *supra* note 34, at endnote 3. First New York (1991), then Alaska (1998), Delaware (2003), Tennessee (2004), South Dakota (2007) and North Carolina (2009) enacted decanting statutes. See New York Estates Powers & Trusts Law 10-6.6(b); Alaska Statutes Section 13.36.157; Delaware Code Annotated 12 Section 3528; Tennessee UTC Section 816(b)(27); South Dakota 2007 Session Laws HB 1288; North Carolina General Statutes, Section 36C-8-816.1. See also Blattmachr, *supra* note 34, at p. 1 (Arizona and Florida as additional states that have adopted decanting statutes).



40. Blattmachr, *supra* note 34, at p. 19 (South Dakota's decanting statute, effective July 1, 2007, provides the most flexibility for trust remodeling). Compare Jonathan G. Blattmachr, Bethann B. Chapman, Mitchell M. Gans and David D. Shaftel, "New Alaska Law Will Enhance Nationwide Estate Planning—Part 1," *Estate Planning*, Vol. 40/No. 9, at p. 3 (September 2013).

41. In "4th Annual Trust Decanting State Rankings Chart," Steven J. Oshins ranks 25 jurisdictions based on decanting statutes and various factors. The top 11 listed are: (1) South Dakota; (2) Nevada; (3) Tennessee; (4) New Hampshire; (5) Delaware; (6) Ohio; (7) Alaska; (7) Illinois; (9) Indiana; (10) Missouri; and (10) Wyoming. In addition, some states have newer statutes that may have never been fully tested in the courts. Some of the more established jurisdictions have more streamlined procedures. Legal fees and other considerations may differ based on the court required process and delays. See Wyo. Stat. Ann Section 4-10-816(a)(xxviii) for an example of a basic decanting statute.

42. Treas. Regs. Section 26.2601-1(b)(4). One safe harbor applies to the exercise by a trustee of a discretionary power to distribute trust principal from a grandfathered trust to a new trust, but only if the discretionary power is pursuant either to the terms of the trust instrument or to the state law in effect at the time the trust became irrevocable.

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

44. Uniform Trust Decanting Act (2015), National Conference of Commissioners on Uniform State Laws, [www.uniformlaws.org/shared/docs/trustdecanting/UTDA\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act.pdf).

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

46. As of Jan. 1, 2020, 34 states and the District of Columbia have adopted some form of the UTC (Illinois became the 34th on Jan. 1, 2020). See

<https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d>. See also "Virtual Representation Statutes Chart" (Revised Oct. 1, 2018), [www.actec.org/assets/1/6/Bart-Virtual-Representation-Statutes-Chart.pdf](http://www.actec.org/assets/1/6/Bart-Virtual-Representation-Statutes-Chart.pdf).

47. See Chapter 55-18, "Virtual Representation,"

[https://sdlegislature.gov/Statutes/Codified\\_Laws/DisplayStatute.aspx?Type=Statute&Statute=55-18](https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=55-18): Sample Trust Provision Notice: "I hereby direct that the Trustee is not required to provide the notice set forth in SDCL Section 55-2-13 to qualified beneficiaries."

48. Alaska Stat. Section 13.36.080(b) allows for beneficiary waiver of notice but limits the settlor to exempt the trustee from the notice requirements during the life of the settlor or until the settlor's incapacity, whichever is shorter; Del. Code Ann. Tit. 12 Section 3303 does allow for the waiver of beneficiary notice but restricts it to a period of time and doesn't expressly allow for the trust advisor or trust protector to modify notice to beneficiaries; Nev. Rev. Stat. Section 163.004, effective 2015,

restricts waiver of notice to a period of time and doesn't expressly allow for the trust advisor or trust protector to modify notice to beneficiaries; North Dakota Cent. Code 59-14-03 enacted legislation in 2017 that makes an exception for cases in which the qualified beneficiary is unknown because an individual holds a power to change such qualified beneficiary; New Hampshire RSA 564-B:1-105; RSA 564-B:8-813(d) is silent on timing, but no specific provision regarding whether advisors can withhold after death/disability (as compared with South Dakota, that so provides). See Al W. King III, "Should You Keep a Trust Quiet (Silent) From Beneficiaries?" *Trusts & Estates* (April 2015).

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

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

51. South Dakota and New Hampshire have regulated private family trust companies (PFTCs), while Nevada and Wyoming focus on unregulated PFTCs for families, even though they have regulated statutes. While Texas isn't a perpetual jurisdiction, it ranks third with Nevada as the state that has the largest number of PFTCs. See John P.C. Duncan, "Risks and Opportunities for Private Trust Companies and Family Offices from State and Federal (Non-Tax) Legislative Developments and Proposals, Fiduciary Income Tax Committee," ABA Section on Taxation 2010 ABA Mid-Year Meeting (Jan. 21-23, 2010), [Users/Daniel/Downloads/\\_TX322000\\_relatedresources\\_ABA\\_Slides\\_Exhs\\_JPCD012310.pdf](http://Users/Daniel/Downloads/_TX322000_relatedresources_ABA_Slides_Exhs_JPCD012310.pdf).

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

53. South Dakota regulators prefer that applicants meet larger capital requirements.

54. Some commentators view lower capital requirements as an advantage because they're less of a barrier to entry into the PFTC arena. Others say that having larger capital requirements tends to weed out less serious and capable PFTC candidates. However, compare Todd Ganos, "Putting 'Family' In Private Family Trust Companies—A Follow-Up Discussion on Regulation," *Forbes* (Nov. 10, 2015), [www.forbes.com/sites/toddganos/2015/11/10/putting-family-in-private-family-trust-companies-a-follow-up-discussion-on-regulation/#b4fbf1528cd8](http://www.forbes.com/sites/toddganos/2015/11/10/putting-family-in-private-family-trust-companies-a-follow-up-discussion-on-regulation/#b4fbf1528cd8).

55. The Conference of State Bank Supervisors is the nationwide organization of financial regulators from all 50 U.S. states, the District of Columbia, Guam, Puerto Rico, American Samoa and the U.S. Virgin Islands.

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

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

58. *Ibid.*

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

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

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

62. One of the other issues discussed in *Tannen* 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.

63. *Levitan v. Rosen*, 124 N.E.3d 148 (Mass. App. Ct. 2019).

64. *Ibid.*, at p. 253.

65. Alexander A. Bove, Jr. and Melissa Langa, "Challenging the Judge: The Massachusetts Appeals Court Continues to Make Its Own Rules of Trust Law," *LISI Asset Protection Planning Newsletter* #338.

66. *Pfannenstiehl v. Pfannenstiehl*, 88 Mass. App. Ct. 121 (2015).

67. *Pfannenstiehl v. Pfannenstiehl*, 105 N.E.3d 933 (Sup. Ct. Mass. 2016).

68. *Levitan v. Rosen*, 482 Mass. 1105 (2019). There are many factors to evaluate when changing the situs of a trust. Further, whether the Massachusetts Appellate Court will apply conflict-of-law principles to determine the bundle of rights held by the beneficiary is questionable. *Levitan* involved a Florida trust. As the court made no analysis of the enforceable right or marital property issue, it naturally didn't discuss Florida law on this issue.

69. The terms "sham trust" or "sham transaction" are primarily used in Tax Court cases, *Loving Saviour Church v. U.S.*, 728 F.2d 1085 (8th Cir. 1984); *Dean v. U.S.*, 987 F. Supp. 1160 (W.D. Mo.).

70. Jay D. Adkisson, Chris Riser and David Slenn, "*Transfirst Group, Inc. v. Magliarditi*: U.S. District Court Holds that Nevada Law Permits Piercing of Nevada, LLLs, Nevada Partnerships, and Nevada Trusts," *LISI Asset Protection Planning Newsletter* #344; Richard W. Nenno, "Transfirst Group, Inc.

v. Magliarditi, Using the Alter-Ego Doctrine to Reach Assets of Third-Party Trusts—Setting the Record Straight,” *LISI Asset Protection Planning Newsletter #347*.

71. BNA Portfolio, “Domestic Asset Protection Trusts” (TMP 868).

72. In *Transfirst Group, Inc. v. Magliarditi*, 2017 WL 3723652 (D. Nev. 2017), in light of the Nevada Supreme Court’s decision in *Klabacka*, *supra* note 8, the District Court Judge held that the alter ego doctrine may not apply to a Nevada spendthrift trust and that the judge would certify the question to the Nevada Supreme Court.

73. *Transfirst Group, ibid.*; *In re Schwarzkopf*, 626 F.3d 1032 (9th Cir 2010); *Wood v. Ellings Corp.*, 572 P.2d 755 (Cal. 1977); *Greenspan v. LADT*, 191 Cal. App. 4th 486 (2011); *Babbit v. Venbeliunas*, 332 F.3d 85 (2d Cir. 2003) (South Dakota court predicting New York law); *Gordon v. Harmon*, 512 B.R. 321 (N.D. Ga 2014) (reverse veil pierce not precluded at dismissal stage); *Laborer’s Pension Fund v. Lay-Com*, 580 F.3d 602 (7th Cir. 2009); *Dexia Credit Local v. Rogan*, 2008 WL 4543013 (ND III Oct 2008); *Vaughn v. Sexton*, 954 F.2d 498 (8th Cir. 1992); *Acheff v. Lazare*, 2014 WL 894491 (2014); *In re Gillespie*, 269 B.R. 383 (Ark. 2001); *Bracken v. Early*, 40 S.W.3d 499 (Ct. App. Tenn 2000); *William L. Comer Equity Trust v. U.S.*, 732 F. Supp. 755 (E.D. Mich 1990); *SEC v. Greenberg*, 105 F. Supp.3d 1342 (S.D. Fla. 2015) (alter ego didn’t apply to the facts, but the court acknowledged it could apply to a trust); *In re Trujillo and Anguiria*, 2019 WL 169196 (Bank SD Fla 2019). *See also In re Reuter*, 499 B.R. 655 (Bankr. W.D. 2013), in which the court acknowledged the claim but the necessary facts weren’t plead to support an alter ego argument; *In Re Raymond*, 2014 WL 3534038 (Bkr D. Mass. 2014) (court held it was a valid claim, but no authority when debtor wasn’t a trustee or a beneficiary).

74. *Henkel v. Brothers Mill*, 2015 WL 1585513 (Bankr. M.D. Fla 2015).

75. *Bash v. Williams*, 2016 WL 1592445 (Bankr. Oh 2016).

76. *S.E.C. v. Greenberg*, 105 F. Supp.3d. 1342 (S.D. Fla. 2015).

77. *In re Trujillo*, *supra* note 73.

78. *See* Mark Merric and Daniel G. Worthington, “Based DAPT Jurisdictions Based on Three Types of Statutes,” *Trusts & Estates* (January 2017); David G. Shaftel, “Comparison of Domestic Asset Protection Trust Statutes,” *Estate Planning* (March 2008). Mark Merric, John E. Sullivan III and Robert D. Gillen, “Wyoming Enters the DAPT Legislation Arena,” *LISI Asset Protection Planning Email Newsletter #109* and “Searching For Favorable DAPT Legislation: Tennessee Enters the Arena,” *LISI Asset Protection Planning Email Newsletter #105*.

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# Best Situs at a Glance\*

## Thirty-four perpetual and close-to-perpetual trust jurisdictions

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

### Modern Trust Laws

### Modern Trust Law

Year RPP Modified	State (constitution) RPP Applies	Murphy Case Applies	Effective Date Limit	Taxation			Modern Trust Laws						Enhanced Virtual Rep. Laws
				State Income Tax	State Premium Tax	United POA (RPS)	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reforms/Beaufort Statute	Gov't Provision		
1957	ID	Abolished	N/A	Yes	4-402 bps	2045(a)(3)	Perpetual	Yes	Yes	No/Ltd	No	Yes	Public
1959	WI	Abolished	N/A	Yes	350 bps	2045(a)(3)	Perpetual	No	No	Yes	No	Yes	Public
1983	SD	Abolished*	N/A	Yes	8 bps	2045(a)(3)	Perpetual	Yes	Yes	Yes	Yes	Yes	Yes, pub
1998	DE	Abolished	N/A	Yes	0 bps**	2045(a)(3)	Perpetual	Yes	Yes	Yes	No	Yes	Limited 3-year se
1998	AZ	Opt out	Yes	No	200 bps	2045(a)(3)	No	Yes	Yes	Yes	No	Yes	UTC
1998	IL	Opt out	N/A	No	50 bps	2045(a)(3)	No	Yes	Yes	Yes	No	Yes	UTC
1998	MD	Opt out	N/A	No	200 bps	2045(a)(3)	No	UTC	No	No	No	Yes	Limited
1999	ME	Opt out	N/A	Yes	200 bps	2045(a)(3)	No	UTC	UTC	No	No	Yes	UTC
1999	NJ	Abolished	N/A	Yes	200 bps	2045(a)(3)	Limited statute	No	No	No	No	Yes	Case law
1999	OH	Opt out	N/A	No	140 bps	2045(a)(3)	No	Yes	UTC	Yes	No	Yes	UTC
1999	RI	Abolished	N/A	Yes/POA	200 bps	2045(a)(3)	No	No	No	Yes	No	Yes	Yes
2000***	AK	Abolished	N/A	Yes/POA	8 bps	1000 years	Perpetual/POA	Yes	Yes	Yes	No	Yes	Limited fil
2000	VA	Opt out	N/A	No	225 bps	2045(a)(3)	No	UTC	UTC	Yes	No	Yes	UTC
2001	CO	1000 years	N/A	No	200 bps	2045(a)(3)	1000 years	Yes	No	No	No	Yes	Yes (formal)
2001	FL	350 years	Remedied	No	115 bps	2045(a)(3)	TH, AI	Yes	UTC	Yes	No	Yes	UTC
2001	MO	Abolished	N/A	No	200 bps	2045(a)(3)	Perpetual	No	UTC	UTC	No	Yes	UTC
2002	DC	Opt out	N/A	No	170 bps	2045(a)(3)	No	UTC	UTC	UTC	No	Yes	UTC
2002	NE	Opt out	N/A	No	100 bps	2045(a)(3)	No	UTC	UTC	UTC	No	Yes	UTC
2002	WA	150 years	N/A	No	200 bps	2045(a)(3)	No	Yes	Maybe	No	No	Yes	Yes
2003	WY	1000 years	Yes	No	75 bps	2045(a)(3)	WY, CO	Yes	Yes	Yes	No	Yes	Yes, pub
2004	UT	1000 years	N/A	No	225 bps	2045(a)(3)	WY, CO	Yes	UTC	Yes	No	Yes	UTC
2005	NV	355 years	Yes	No	350 bps	2045(a)(3)	No	Yes	Yes	Yes	No	Yes	Yes, pub

TC—private family trust con  
 ST—generation-skipping tr  
 LLC—limited liability com  
 FLP—family limited partn

# FEATURE: FIDUCIARY PROFESSIONS

**P**—Rule Against Perpetuities  
**OA**—power of appointment  
**BPS**—basis points  
**800(b)** (directed trustee liable  
 terms of trust, or trustee knows  
 or has reason to know of the  
 duty of directing individual)

**C**—private family trust company  
**ST**—step-transaction skipping transfer  
**LLC**—limited liability company  
**FLP**—family limited partnership

**Restatement 2d**—Restatement (Second) of Trusts  
**Restatement 3d**—Restatement (Third) of Trusts  
**JF**—judicial foreclosure  
**SR**—sole remedy  
**2**—jurisdiction is undecided whether charging order  
 is the sole remedy for creditors  
**Murphy**—Estate of Murphy v. Commissioner, 711 C.671 (1979)  
**Covey**—Richard Covey, Practical Drafting, U.S. Trust Bank of  
 America Private Wealth Management (2007)

**No statute**—Issue hasn't been addressed by statute and it will be up to the  
 courts to determine whether the Restatement 2d or Restatement 3d's view prevails

Reform's Beginning Statute	Gov't Provision	Modern Trust Laws			Asset Protection						Look to Beneficiaries' Resources			
		Enhanced Virtual Rep.	Priority Legis.	Popular PTC State	Discretionary Trust Protection	Not Enforceable Right	Creditor Part Affect	Restatement Judicial Review	Definition of Discretionary	Protects Domest./ Control		Protects Alter FOI	Self-settled Trust Legislation	Sole Remedy Disposing Over Protection
No/Ltd	No	Yes	Public	No	No case law	No case law	No case law	No	No	No	No	No	FP-2 LLC-F	No statute
Yes	No	Yes	Public	No	No case law	No case law	No case law	Case law	No	No	No	No	FP-2 LLC-2	No statute
Yes	Yes	Yes	Public	No	Yes	Yes	Yes	Yes	Yes, best	Yes, best	Yes, best	Yes, best	FP-Best LLC-Best	Restatement 2d
Yes	Yes	Yes	Yes, seal	Yes, regulated	No	Yes	Probably <sup>1</sup>	No	Yes	No	Yes, best	Yes, best	FP-SR LLC-SR	No statute
Yes	No	Limited	3-year seal	No	No	Yes	Probably <sup>1</sup>	No	No	No	No	No	FP-SR LLC-SR	Restatement 3d
Yes	No	UTC	Public	No	Conflicting-No Provisions <sup>2</sup>	Case law	Case law	Case law	No	No	No	No	FP-JF LLC-JF	No statute
Yes	No	UTC	Public	No	Case law	Case law	Case law	Case law	No	No	No	No	FP-JF LLC-JF	No statute
No	No	Limited	Public	No	Yes	Yes	Case law <sup>3</sup>	Yes	No	No	No	No	FP-JF LLC-JF	Restatement 3d
No	No	UTC	Public	No	No	No <sup>4</sup>	No	Probably <sup>5</sup>	No	No	No	No	FP-JF LLC-JF	Restatement 3d
No	No	Case law	Public	No	Case law	No	No	Probably	No	No	No	No	FP-2 LLC-F	No statute
Yes	No	UTC	Public	Yes	Case law	Yes	Probably <sup>6</sup>	Restrictive <sup>2</sup>	No	No	No	Yes, best	FP-SR LLC-Best	Restatement 3d
Yes	No	UTC	Public	Yes	Yes	Yes	Probably <sup>6</sup>	Restrictive <sup>2</sup>	No	No	No	Yes	FP-2 LLC-2	No statute
Yes	No	Yes	Limited filings	No	Case law	Case law	Case law	Case law	No	No	No	Yes	FP-Best LLC-Best	Restatement 3d
Yes	No	UTC	Public	No	No	Yes	No	No	No	No	No	Yes	FP-SR LLC-SR	Restatement 3d
Yes	No	UTC	Public	No	Case law	Case law	Case law	Case law	No	No	No	No	FP-2 LLC-F	No statute
No	No	Yes (formal)	Public	No	Case law	Case law	Case law	Case law	No	No	No	No	FP-SR LLC-SR	Restatement 3d
Yes	No	UTC	Public	Yes	No	No	No	No	No	No	No	No	FP-2 LLC-2	Restatement 3d
Yes	No	UTC	Public	No	Yes	Yes	No	No	No	No	No	No	FP-JF LLC-JF	Restatement 3d
No	No	UTC	Public	No	No	No	No	No	No	No	No	No	FP-2 LLC-F	Restatement 3d
No	No	UTC	Public	No	No	Yes	No	No	No	No	No	No	FP-2 LLC-F	Restatement 3d
No	No	UTC	Public	No	No	No	No	Little to no	No	No	No	No	FP-JF LLC-F	No statute
No	No	UTC	Public	No	No	No	No	Yes	No	No	No	Yes	FP-2 LLC-SR	Restatement 2d
Yes	No	Yes	Yes, public	Yes, unregulated	Yes	Yes	Yes	Yes	No	No	No	Yes	FP-2 LLC-JF	Restatement 3d

# Best Situs at a Glance\*

## Thirty-four perpetual and close-to-perpetual trust jurisdictions

### LEGEND:

**RAP**—Rule Against Perpetuities  
**POA**—power of appointment  
**bps**—basis points  
**UTC**—Uniform Trust Code Section 808(1) (directed trustee liable if direction is manifestly contrary to terms of trust, or trustee knows direction is a serious breach of fiduciary duty of directing person)

**FTC**—private family trust company  
**IST**—generation-skipping trust  
**LLC**—limited liability company  
**FLP**—family limited partners

Year RAP Modified	Situs	Rule Against Perpetuities (RAP)			Taxation		Modern Trust Laws				Modern Trust Laws			
		State Constitution Prohibits	Murphy Case Applies	Effective GST Tax Limit	State Income Tax	State Premium Tax	Limited POA (RPS)	Change of Situs	Directed Trust Statute	Trust Protector Statute	Reform & Uberting Statute	Power of Appointment Provision	Enhanced Virtual Reg.	Privacy Laws
2006	NH	Abolished	Yes	Perpetual	Interest	125 bps	2043(a)(3)	Perpetual	Yes	Yes	Yes	No	UTC	Public
2007	TN	360 years	Yes	360 years	Interest	175 bps	360 years	TN, AL	Yes	Yes	Yes	Yes	UTC	Public
2007	NC	Abolished	Yes	Perpetual	Yes	190 bps	2043(a)(3)	Perpetual	Yes	UTC	Yes	No	UTC	Public
2007	PA	Abolished	N/A	Uncertain	No	200 bps	2043(a)(3)	Uncertain	UTC	UTC	No	No	Yes	Public
2008	MI	Opt out	N/A	Uncertain	Yes	125 bps	2043(a)(3)	No	UTC	Yes	Yes	No	UTC	Public
2010	HI	Opt out	N/A	Uncertain	Yes	275 bps	2043(a)(3)	No	Not yet	Yes	No	No	Yes	Public
2010	KY	Abolished	N/A	Perpetual	Yes	150 bps	2043(a)(3)	Perpetual	No	UTC	Yes	No	No	No
2012	AL	Opt out	N/A	Uncertain	Yes	230bps	2043(a)(3)	FL, TN, GA	UTC	UTC	Yes/No	No	UTC	Public
****	ND	Opt out	N/A	Uncertain	Yes	200 bps	2043(a)(3)	No	UTC	UTC	No	No	UTC	Public
****	OK	Case law	Yes	Uncertain	Yes	225 bps	2043(a)(3)	No	Yes	No	No	No	No	Public
2018	GA	360 years	N/A	360 years	Residents	225 bps	2043(a)(3)	FL, TN, AL	Yes	UTC	Yes	No	Yes	Public
2019	CT	800 years	N/A	800 years	Residents	175 bps	2043(a)(3)	No	Yes	UTC	Yes	No	No	Public

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

### 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 14-1050 states that a creditor can't attach a discretionary interest. However, A.R.S. Section 14-1050 allows a child support exception creditor to attach. Query: If a child support exception creditor can attach, does this create a procreant 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 judicial review standard as set forth in *G.G. Bogert and G.I. Bogert, The Law of Trusts and Trustees* (1) improper motive; (2) dishonesty; and (3) acting arbitrarily. Bogert's standard is a little more expansive than the Restatement (Second) of Trusts Section 128 comment d, which uses "failure to use judgment," rather than "acting arbitrarily." Naturally, since Austin W. Scott, Jr. was the reporter for the Restatement (Second), Scott on Trusts uses the more restrictive standard. See also *Offutt v. Offutt*, 102 A.2d 554 (App. Ct. 1954) using only improper motive and dishonesty. Standard Uniform Trust Code (UTC) Section 814(a) is removed.
4. 18-B Maine Revised Statutes Annotated (M.R.S.A.) Section 501 provides that unless a trust has a spendthrift clause, any creditor may attach. The common law discretionary trust protection against attachment wasn't preserved, regardless of Maine's comment under Section 504 indicating an intent to preserve the discretionary/support distinction.
5. 18-B M.R.S.A. Section 814 provides some guidance to a court on what a discretionary distribution may be by stating, "A trustee's power to make distributions is discretionary notwithstanding terms of the trust providing that the trustee shall make distributions exercising a discretionary power, with or without standards."
6. For a wholly discretionary trust, the Ohio UTC removes the judicial standard of reasonableness, similar to Restatement (Second) Section 187. However, it doesn't use the much more precise language that a judge will only review a trustee's discretion for an improper motive, dishonesty or failure to use judgment.

\*\*\*\* Although North Dakota is a sufficient legal basis

8. Nevada Revised Statute 5 trustee or a court as necessary discretionary trust.
9. A New Hampshire Supreme Court found to be either an entitlement or a right to the imputation of income App. 2004), in which a father's trust can easily be terminated (January 2000), that entitles the trustee to the income. *In re Goodlander, et al.*
10. North Carolina General Statute 36-21.1 allows a creditor to attach and force a discretionary distribution.
11. While Section 705 of the Ohio UTC removes the judicial standard of reasonableness, similar to Restatement (Second) Section 187. However, it doesn't use the much more precise language that a judge will only review a trustee's discretion for an improper motive, dishonesty or failure to use judgment.

# FEATURE: FIDUCIARY PROFESSIONS

**AP**—Rule Against Perpetuities  
**OA**—power of appointment  
**BPS**—basis points  
**808B(d)**—directed trustee fails terms of trust or trustee knows (fiduciary duty of directing person)

**TC**—private family trust company  
**ST**—generation-skipping transfer  
**LLC**—limited liability company  
**FLP**—family limited partnership

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

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

Reform & Describing Statute	Covey Provision	Modern Trust Laws				Discretionary Trust Protection						Asset Protection			Migration
		Enabled Virtual Rep.	Privacy Plans	Popular PPTC State	Not Enforceable Right	Creditors Can't Attach	Restatement 2d/Judicial Review	Definition of Discretionary	Projects Dominant/Control	Projects Alier Ego	Self-Settled Trust Legislation	Sole Remedy/Changing Order Protection	Look to Beneficiaries' Resources		
Yes	No	UTC	Public	Yes	Yes <sup>3</sup>	No	No	Case law <sup>6</sup>	No	No	Yes	FP-1F LLC-SR	Restatement 3d		
Yes	Yes	UTC	Public	Yes	Yes	Uncertain <sup>8</sup>	No	No	Yes	Yes	Yes, best	FP-2 LLC-SR	Restatement 2d		
Yes	No	UTC	Public	No	No	Uncertain <sup>8</sup>	No	No	No	Yes	Yes	FP-2 LLC-SR	Restatement 3d		
No	No	Yes	Public	No	No	No	No	No	No	No	No	FP-1F LLC-SR	Restatement 3d		
Yes	No	UTC	Public	No	Yes	Yes	Probably <sup>2</sup>	Yes	No	No	No	FP-2 LLC-SR	Restatement 3d		
No	No	Yes	Public	No	No	No	No	No	No	Yes	Yes	FP-1F LLC-SR	No statute		
Yes	No	No	No	No	No	No	No	No	No	No	No	FP-1F LLC-SR	Restatement 3d		
Yes/No	No	UTC	Public	No	No	No	No	No	No	No	No	FP-Best LLC-Best	Restatement 3d		
No	No	UTC	Public	No	No	No	No	No	No	No	No	FP-1F LLC-SR	Restatement 3d		
No	No	No	Public	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	FP-1F LLC-SR	Restatement 2d		
Yes	No	Yes	Public	No	No	No	No	No	No	No	No	FP-1F LLC-SR	Restatement 3d		
Yes	No	No	Public	No	No	No	No	No	No	No	No	FP-1F LLC-SR	Restatement 3d		

\*\*\*\* Although North Dakota's statute became effective in 1991, the exception in it is very narrow, and few practitioners are aware of its existence. However, the fiduciary exception does provide a sufficient legal basis for North Dakota to be considered an exception-only state. \*\*\*\* *Pipkin v. Pipkin*, 962 OK 58 (Supreme Ct. Okla. 1992).

8. Nevada Revised Statute Section 163.017(9) 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.
9. A New Hampshire Supreme Court case, *In re Goodlander*, 20 A.S.J. 199 (N.H. 2010), favorably interpreted Section 84(a) of the New Hampshire UTC so that a discretionary current distribution interest wasn't found to be either an enforceable right or a property interest in the marital property context. We're still somewhat uncertain whether the good faith standard proposition may have some effect on the imputation of income in a child support alimony type of case when no distributions have been made. See *Ventura County Department of Child Support Services v. Brown*, 117 Cal. App. 4th 144 (Cal. App. 2004), in which a California judge held that a child support exception creditor had more rights than the beneficiary. Most commentators disagree with the court's holding, but it's an example of how a court can easily twist a judicial review standard such as "good or bad faith," because the term is ambiguous. See Daniel G. Worthington and Mark Merric, "Which Situs is Best?" *Trusts & Estates* (January 2010), chart endnotes.
10. *In re Goodlander*, *ibid.*
11. North Carolina General Statutes (N.C.G.S.) Section 36C-5-501 provides that a creditor can't attach a discretionary trust. However, for child support, N.C.G.S. Section 36C-5-504(d) allows a child support protection against attachment.