

BERKS COUNTY ESTATE PLANNING COUNCIL – MARCH 16, 2016:

**“ARE IRREVOCABLE
TRUSTS TRULY IRREVOCABLE? -
REFORMATION, MODIFICATION, DECANTING &
TRUST PROTECTORS”**

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Summary of the Most Popular Desires of a Wealthy Person's Trust Planning:

1. **Family governance/involvement, education, and succession**

2. **Control and flexibility regarding trust administration:**
 - In 1995, only **12.5% of all gifts** were to trusts (IRS)
 - **Currently** the wealthy are contributing approximately **40% of all gifts to trusts***
 - “Trusts are no longer vehicles that lawyers and banks create to keep what is rightfully the beneficiaries.” – Dick Oshins
 - **“Directed Trusts”, “Special Purpose Entities” and “Private Family Trust Companies”****

3. **Control and flexibility regarding trust investment planning and management:**
 - Modern **Directed Trust** with **family** and **family advisor investment committee:**
 - Ability to **accommodate a Yale or Harvard endowment type asset allocation**
 - Ability to **hold one asset (public and/or private/closely-held) without asset diversification**
 - Ability to **hold illiquid assets**

4. **Privacy:**
 - **Court proceedings including trusts:** Litigation and/or reformation/modification
 - **Beneficiary quiet** – Keeping trust and related information silent from beneficiaries

* **Source:** Wolff, E. N. (2012). *The Asset Price Meltdown and the Wealth of the Middle Class*. New York: New York University

** **Please see:** “Drafting Modern Trusts” December 2015 *Trusts & Estates* magazine; “Myths About Trusts & Investment Management: The Glass is Half Full!” December 2014 *Trusts & Estates* magazine; “Should you keep a trust quiet (silent) from beneficiaries?” April 2015 *Trusts & Estates* magazine



Summary of the Most Popular Desires of a Wealthy Person's Trust Planning (cont'd):

5. Family Management: Promotion of Social and Fiscal Responsibility:

– Modern “Directed” Dynasty incentive trusts:

- “I want to leave my family enough money so they do something; not leave enough money so they do nothing.” – Warren Buffet
- Remember names and values of great great grandparents
- Videotape of family values and goals (transcribe)
- Draft Family Mission Statement

5. Asset Protection: (Self Settled Trusts, Third Party Beneficiary Trusts, Discretionary Interests, LLCs/FLPs) – Both settlor/grantor [and] beneficiaries

6. Tax Savings: (Estate, GST, State Income and Premium Taxes)



Factors Governing the Interpretation and Administration of Trusts:

- 1.) Location of trustee
- 2.) Location of administration of the trust
- 3.) Location of trust assets
- 4.) Governing law provision in trust
- 5.) Domicile of testator or grantor
- 6.) Location of beneficiaries



Characteristics of a Trust Affected by Situs:

A different state law may be applied to each of the four different aspects of a trust:

- 1.) **Construction/interpretation**: Meant to determine the grantor's intention, not the validity of the trust.
 - Meaning and explanation of trust terms
- 2.) **Validity/substantive matters**: Legal strength or force of the trust if executed with proper formalities.
 - Rule Against Perpetuity – Validity
- 3.) **Administration**: Directed vs. delegated, reformation/modification, decanting, duties given to beneficiaries, trustee/fiduciary liability, principal and income issues, removal of trustees, Trust Protectors, etc...
- 4.) **Taxation**: Depends upon the state –
 - **Some problem states** – CT, D.C., MN
 - **Possible problem states** – NY, CA
 - **Newest trend** – PA, IL



Selected Popular No State Income Tax Modern Trust States:

Alaska

Delaware

Florida

(Limited Directed Trust Statute)

Nevada

New Hampshire

South Dakota

Wyoming

Please note: Client does not have to live in these states to take advantage of their favorable trust and tax laws. All they need to do is to establish a trust in the states administered by a trustee in these states.



Selected List of High Income Tax States for Trusts

Arizona 4.54%	Illinois 3.75%	Minnesota 9.85%	Rhode Island 5.99%
California 13.30%	Iowa 8.98%	Missouri 6%	South Carolina 7%
Colorado 4.63%	Kansas 4.6%	New Jersey 8.97%	Tennessee 6% Dividends & Interest Only (TN Beneficiaries)
Connecticut 6.7%	Louisiana 6%	New York 8.82% <u>New York City 3.876%</u> Total 12.696%	Utah 5%
Georgia 6%	Maryland 5.75%	North Carolina 5.75%	Virginia 5.75%
Hawaii 11%	Massachusetts 5.15%	Ohio 5.33%	D.C. 8.95%
Idaho 7.4%	Michigan 4.25%	Oregon 9.90%	Wisconsin 7.65%

Source: Steven J. Oshins, “1st Annual Non-Grantor Trust State Income Tax Chart (July 2015),
[http://www.oshins.com/images/State_Income_Tax_Chart.pdf].



Connecticut & D.C. - Taxation Based Upon Domicile of Person Creating Trust (cont'd) [Tough Cases for Tax Payers]:

- **CT** – ***Chase Manhattan Bank vs. Gavin (1999)***
 - CT Supreme Court upheld the income tax on trust income that other state courts have held unconstitutional.
 - Testator or Settler domiciled in CT at the time the trusts were created.
 - Both Intervivos and Testamentary Trusts
 - **Court Held:** CT Tax – If the trusts were created there, courts open for accounting and trust administration.
 - A resident of CT when trust created
 - Trustee, Beneficiaries, Assets & Administration – outside CT

- **D.C.** – ***D.C. vs. Chase Manhattan Bank (1997)***
 - Same as *Gavin* – Trust created by Will of individual domiciled in D.C.
 - **Court Held:** Even though another state court may also have jurisdiction, D.C. also retains jurisdiction due to power to tax trust, even if the trustee, trust assets and trust beneficiaries are located outside D.C.
 - **Conclusion:** D.C. court had continuing “supervisory relationship” regarding the administration of the trust.



Quill Corp. vs. North Dakota

U.S. Supreme Court - 504 U.S. 298 (1992)

- Both CT & D.C. cases based upon Quill.
- Supreme Court upheld “use tax” statute for goods shipped to ND customers.
 - Pursuant to due process clause
- Court Held – State may tax a taxpayer if “minimum contacts” with taxing state.
- Rationale:
 - Imposed same test for state taxation under due process clause.
 - Previously applied to questions of state court jurisdiction for non-residents.
 - Test de-emphasized physical contacts with state.
 - Created extremely broad constitutional justification for imposing state income tax on trusts.



Illinois & Pennsylvania – Recent Tax Payer victories:

- **IL, PA and MN** – Attempts to reach trust if settlor was resident when trust became Irrevocable (**PA**: or when trust was created)
 - **MN**
 - Grantor Trust - Resident (Non-MN Residents; Non-Grantor Trust)
 - Post 1995 Trust, Non-Grantor Trust Tax
- **IL** – ***Linn v. Department of Revenue (The Pritzker Case) (2014)***
 - IL Statute – If grantor is a resident at the time trust becomes irrevocable, trust subject to IL income tax; A.N. Pritzker was an Illinois resident when established.
 - Trustee properly distributed and removed trust property to a new Texas trust. The IL Dept. of Rev. determined trust was still a resident for tax purposes.
 - **Court Held:** The court sided with the trustee based on due process grounds
 - No non-contingent trust beneficiary resided in Illinois, no trust officeholder resided in Illinois, all trust assets were outside Illinois; and Illinois law wasn't referenced in the trust instrument.
 - Inter vivos trust's connections with a state are more attenuated than in the case of a testamentary trust.



Illinois & Pennsylvania (cont'd) – Recent Tax Payer victories:

- **PA** – ***McNeil v. Commonwealth of Pennsylvania (2013)***
 - PA grantor created two trusts governed and administered under DE with DE trustee and DE assets.
 - PA Dept. of Rev. applied its ‘single controlling factor’ test, and it assessed state income tax because the trust was created by a Pennsylvania resident.
 - **Court Held:** Imposing PA income tax unconstitutional because it violated Commerce Clause; only three of four prong test met (SCOTUS Complete Auto 1977).
 - “Substantial nexus” in PA not created by grantor’s and discretionary beneficiaries presence.
 - “Fair apportionment” prong of the test not met, concluding that the assessments were out of proportion to the trusts’ activity in the state.
 - “Fairly related” prong, determining that there was no relationship between the burden of taxes on the trusts and any benefits they received from the state.



Other Specific States:

- **California** – Long arm statute (Pro Rata Test):
 - **3 Levels:**
 - CA trustees
 - CA non-contingent beneficiaries
 - CA assets – Source income
 - **Possible solution:**
 - **Dynasty Trust in favorable trust jurisdiction (e.g., Alaska, Delaware, South Dakota, Wyoming)**
 - **Local trustee as distribution committee/trustee**
 - **Out of State Special Purpose Entity** – Distribution and Investment Committees, Trust Protector as employees/agents
 - **Investment LLC in favorable trust jurisdiction (e.g., Alaska, Delaware, South Dakota, Wyoming)**
- **Florida** – Intangibles Taxes Trust if:
 - Repeal effective 1/1/07 (left statute in place?)
 - For tax year 1/1/06 – 5 basis points on intangible assets
 - \$250k exemption per person
 - Specific asset exemptions: Florida Munis, retirement plans, life insurance, annuities
 - FLINT Trust
 - Consider **Dynasty Trust** in *Murphy* case – RAP state versus Florida (Term RAP)
 - **If the intangible tax returns**, possible RAP issues to change situs of Florida trust due to its term RAP statute



Taxation Based Upon Domicile of Person Creating Trust: (NY, NJ, CT, DC, MN, IL, PA)

- **Testamentary Trusts** – Subject trust to tax if testator domiciled in state at death.
- **Intervivos Trusts** – Domicile of settlor at time the trust became Irrevocable or ceased to be a Grantor Trust.
 - NY and NJ – Trust created by resident is not subject to tax if no trustee or beneficiary is resident and none of assets in NY or NJ.
 - » NY Resident Trust – Tax Law Sec. 605(b)(3) reg. 105.23
- **Please note: In Matter of Rockefeller Advisory Opinion**
 - Court declined to rule whether the trust would avoid NY taxes
 - **Question: Whether certain resident trusts would be subject to NY state & city tax if:**
 - The NY corporate trustee was replaced by a Delaware corporate trustee
 - Trustee advisory committee replaced two NY domiciled members with non-NY members
 - **Involved 1934 John D. Rockefeller Trusts:**
 - Trustee had broad powers over trust assets
 - Subject to direction by the committee should it decide a particular action should be taken or avoided
 - Mr. Rockefeller domiciled in NY when he created trust [and] NY Trustee
 - Consequently, NY Resident trust
 - **Proposed: J.P. Morgan NY be replaced as trustee with J.P. Morgan Delaware:**
 - Title & Custody – Delaware
 - To administer trust in Delaware – purchase services from J.P. Morgan NY (client support, processing, ministerial services – trustee agent)
 - Two NY members of advisory committee would resign
 - Replaced with Non-NY members
 - Still give advice
 - **Please Note - Trusts were not drafted as “Directed Trusts” where trustee takes total direction from the committees.**
 - More supervisory role
- **Increased Filing Requirements** – Previously if no tax, no filing (IT-205).
 - **Beginning 2010-** All new & existing NY trusts must file IT-205
 - **NY Resident** – Also IT-205C – To certify trust is not taxable to NY
- **New York 2014-2015 Executive Budget** – Brought significant changes to NY trust and estate tax law.
 - Effective April 1, 2014
 - DINGs/NINGs as grantor trust for income tax purposes
 - Accumulated earnings tax on other third party trusts for distributions made after January 1, 2014



Numerous Reasons for a South Dakota Dynasty Trust Even with New NY Accumulated Earnings Tax (Effective 2014):

	NY GST Trust	South Dakota Dynasty Trust
Federal Death Tax Savings	90-110 years	Perpetual
NY Death Tax Savings	90-110 years	Perpetual
Self-Settled DAPT (Client Permissible Beneficiary)	No	Yes
Third Party Asset Protection	Spendthrift only (possible issue see <i>Casselberry</i> case- FL & <i>Pfannenstiebl</i> case - MA)	Spendthrift & discretionary interest not a property right/entitlement
Privacy – Reformations/Litigation	No	Yes – Automatic total seal in perpetuity
Keeping Trusts Private From Beneficiaries (Beneficiary Quiet)	No	Yes – Even after grantor’s death and/or disability
Investment flexibility – Ability to hold one asset or allow a sophisticated asset diversification	Limited, possible issues	Yes
Ability to hold closely-held stock	Limited, possible issues	Yes
State Income Tax on Trust	Yes	No
State Income Tax on Trust Distributions	Yes (assuming NY resident)	Possibly? <ul style="list-style-type: none"> • Appears as though NY accumulated earnings tax applies to only income not capital gains • May not apply if beneficiary moves to Florida • Distributions from PPLI policy not taxed - (SD has the lowest premium tax in the U.S.)



Are Irrevocable Trusts Truly Irrevocable?:

- Trust provision to add, remove or replace corporate trustee
- Trust provision for change of situs/change of law
- Trust Protector
- Reformation/Modification
- Restatement
- Decanting
- Transfer/sell insurance from old ILIT to new ILIT
 - Decant



Are Irrevocable Trusts Truly Irrevocable?:

- Trust provision to add, remove or replace corporate trustee
 - Revenue Ruling 95-58
- Existing trust: If appoint a corporate trustee in Alaska, Delaware, Nevada or South Dakota this generally changes the situs of a trust
 - Trust administration – Original situs? New situs? Both?
 - Directed trust
 - Reformation/modification – Once trustee is appointed in Alaska, Delaware, Nevada or South Dakota can reform/modify the trust
 - Decant – Once trustee is appointed in Alaska, Delaware, Nevada or South Dakota can decant the trust
 - Alternatively - Decanting statute in client/grantor's home state



Trust Provisions for Changing Trustees, Fiduciaries, Situs and Law:

- Change of situs and change of law clause:
 - Interpretation/construction, validity & administration:
 - Example: If existing trust provides the validity, interpretation/construction and administration will be governed by a specific state:
 - May be difficult to change situs and law to Alaska, Delaware, Nevada or South Dakota
 - Example: Trust provides that the law of a state that the trust is originally sited in is to govern the administration of a trust, but then a trustee is added in a boutique trust state (e.g., Alaska, Delaware, Nevada or South Dakota)?
 - Onshore/offshore
 - Inter galactic?
 - Termination fees- negotiate upfront: hourly vs. 1%
 - Reformation/modification of existing trust once situs is changed
 - Decanting of existing trust (statute, common law or trust document) once situs is changed or before if decanting statute in client's home state



Example - Power to Transfer Situs and Laws of a Trust:

“To change the situs of any trust held hereunder by written instrument signed and acknowledged by the trustee; and, in conjunction with any such change and without any need to obtain the approval of any court, to elect that such trust shall be subject to the jurisdiction of, and to move the assets of such trust to, the state, country or place of the new situs; and if, such election shall be made, such trust shall be administered and the validity* and effect of the provisions of this instrument applicable to such trust shall be determined in accordance with the laws of such jurisdiction”

* Please note – Generally cannot extend the RAP



Example: Typical South Dakota Directed Trust Structure

with a **Trust Protector** Promoting Flexibility and Control:

Trust Protector

(Family, Friends or Advisors)
(Fiduciary, Not Trustee)

Powers include:

- Terminate the trust
- Modify or reform the trust
- Veto or direct trust distributions
- Add or remove beneficiaries
- Change situs and/or governing law of the trust
- Appoints successor trustees & fiduciaries
- Replaces trustees and fiduciaries

Distribution Committee

(Fiduciary, Not Trustee)

Directs Administrative Trustee
Re Distributions

Investment Committee

(Family & Family Advisors)
(Fiduciary, Not Trustee)

Directs Administrative Trustee
Re Investments

Administrative Trustee

(i.e., Sitused in South Dakota)

- Ownership of assets
- Establish & maintain trust bank account
- Prepare & sign trust tax return
- Trust statements
- Make distributions
- Receive contributions
- Take direction from:

Investment
Committee

Distribution
Committee

- Stocks & bonds
- Insurance
- Art
- FLPs
- LLCs
- Real estate
- Private equity
- Closely-held stock

**Independent
Committee**
(Tax sensitive
distributions)

Family Committee
(Non-tax sensitive
distributions)

***Combine all functions → Full Trustee**



The Trust Protector and Typical Trust Protector Powers

(Vary by State Statute):

- Flexibility
 - Future Circumstances
 - Drafting
- Personal vs. fiduciary powers
 - No personal gain, duty of loyalty & impartiality, actions for good of trust & beneficiaries
- **Power to remove or to replace trustees**
- **Power to add or remove beneficiaries**
- **Amend the trust as to the administrative and dispositive provisions**
- **Power to change situs and the governing law of the trust**
- Power to veto or direct trust distributions
- Power to veto or direct investment decisions
- Consent to exercise power of appointment
- Approve trustee accounts
- Terminate the trust

Detailed Specific Trust Protector Statute States:
Alaska
Delaware
Missouri
Nevada
New Hampshire
South Dakota
Wyoming

Statutory Reference Trust Protector States:
Hawaii
Ohio
Oklahoma
Rhode Island
Tennessee
Utah
Virginia



Key Trust Protector Power for Dealing with Self-Settled Trusts:

- Hybrid Dynasty Trust

- Trust Protector has power to add beneficiaries
(Grantor? Grantor Spouse?)

- Possible solution to estate, GST and/or gift tax issues of a self-settled trust
- Either grantor, grantor's spouse or use class of grandparents' descendants
 - Example: x's [grantor's grandparent's] descendants
- Grantor trust status?



Trust Protector Succession:

- Add Trust Protector provisions to the trust even if do not immediately appoint a Trust Protector
- Trust Protector role may temporarily end upon death of initial Trust Protector chosen by grantor; or
 - Usually retain flexibility in trust document to add a Trust Protector in the future
- Provisions built into the trust for grantor's family to select a successor or successors:
 - The family lines
 - Different Trust Protector for each family member
 - Trust Protector committee – majority rules



Are Irrevocable Trusts Truly Irrevocable?:

- Trust Document:
 - Ability to change and/or add trustee
 - Change of situs language
 - Change of law language
 - Trust Protector
- Reformation/Modification
- Restatement
- Decanting



Reformation vs. Modification:

- **Modification:**
 - “Carry out the material purpose of the trust had the grantor known”

- **Reformation:**
 - Mistake of law or fact
 - “What was actually intended”



Reformation/Modification:

- **Reform/Modify Existing Trust:**

- Reformation **cannot conflict** with the grantor’s **“material purpose”** or **“probable intention”**
- Generally **keeps original state law** for **construction, validity, interpretation** purposes
- Reform/Modify **administrative provisions**
 - Once trust situs moved to state with reformation/modification statute
 - Change situs by naming a trustee in that state
- **Example:** Reformation/Modification **process is generally quick** and **inexpensive** in most of the boutique trust states
- **Grandfathered Generation Skipping Trusts** – OK (cannot extend duration)
- **Virtual Representation:** Unborn beneficiaries represented
- **Privacy:** Court seal (varies by state)

- **Please Note – The Peierls Cases in Delaware:**

- *In re Peierls Family Inter Vivos Trusts*, 59 A.3d 471 (Del. Ch. 2012), aff’d in part & rev’d in part, 77 A.3d 249 (Del. 2013); *In re Ethel F. Peierls Charitable Lead Unitrust*, 59 A.3d 464 (Del. Ch. 2012);
- *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013); and
- *In re Peierls Family Testamentary Trusts*, 58 A.3d 985 (Del. Ch. 2012), aff’d in part & rev’d in part, 77 A.3d 223 Del. 2013)

- **Please Note – The Wallace Case in Delaware:**

- *In re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek*, 118 A.3d 182 (Del. Ch. 2015)



Peierls Case (Chancery Court):

- **Several sets of governing law provisions among the Inter-Vivos trusts:**
 - **Inter-Vivos Trusts created in 1953:** “All questions pertaining to its validity, construction, and administration shall be determined in accordance with the laws of the State of New York”
 - **Inter-Vivos Trusts created in 1957:** “...validity and effect [are] determined by the laws of the State of New Jersey”
 - **Inter-Vivos Trusts created in 1975:** “...shall be governed by and [their] validity, effect and interpretation determined by the laws of the State of New York”



Peierls Case (Chancery Court)(cont'd):

- The Chancery Court denied the modification because:
 - Delaware law did not yet govern administration of the trust
[and]
 - The parties did not brief the issue of modification or reformation under applicable law
- The court ruled modification is not an exercise of equitable powers that court can simply exercise based on consents of all parties, without regard to the law that governs trust administration



Peierls Case (Chancery Court) (cont'd):

- The Chancery Court explained that the settlor's intent to choose a particular law may be implied from the trust document as a whole and when a settlor has selected a governing law, the power to appoint a successor trustee in and of itself is insufficient to override intent
 - Unless the trust document expressly provides for such a change.
- The Court held that the appointment of a successor trustee combined with a change in situs will change the law governing the administration
 - Only if the trust document so provides [or] can be construed to contemplate such a change



Peierls Chancery Court

- Court explained settlor's intent to choose a particular law:
 - Implied from trust document as a whole
[and]
 - When the settlor has selected a governing law
 - The power to appoint successor trustee in and of itself is insufficient to override this intent
[unless]
 - Trust document expressly provides for change



Delaware Supreme Court Reviewed *Peierls* Chancery Court Decision – End of 2012

- *Peierls* Supreme Court decision made clear:
 - Delaware law will govern the administration of any trust
 - That allows for appointment of successor trustee without geographic limitation
 - Once Delaware trustee is appointed
[and]
 - Trust is administered in Delaware
[unless]
 - Choice of law provision expressly provides that another jurisdiction laws shall always govern administration
 - Even if place of administration [and] situs changes [or] governing instrument does not provide ability to appoint successor trustee or limited to original jurisdiction



Example Statute:

- Unless court order or trust document
- Prohibits change of law to govern administration of the trust
- Laws of South Dakota will govern
- When trust is administered in South Dakota
- Examples:
 - “the administration of this trust shall be governed by California law”
 - Will not stop South Dakota from applying its administration of trust law to trusts transferred to South Dakota
 - “the administration of this trust shall be governed by California law and it may not be changed to law of any other state”
 - Potential problem



In re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek, 118 A.3d 182 (Del. Ch. 2015)

- See also recent Delaware Case, *In re Trust Under Will of Wallace B. Flint*:
 - The Court of Chancery rejected an unopposed petition in October 2014 by income beneficiary of a trust to modify its administrative terms to allow for an investment advisor and a directed trustee.
 - The trust was originally established in a Will in 1934 and situated in New York, but situs was changed to Delaware in 2002.
 - Court held that modifying administrative terms of trusts would contradict settlor's intent.
 - Court took firm stance that the despite arguments that the beneficiaries may be better served by the directed trust, settlor's intent still rules.



Reformation/Modification:

- Irrevocable trust may be modified for almost any reason
 - With consent of grantor and all beneficiaries
- If grantor is deceased, unwilling or unable to participate
 - Trust can be modified with consent of all beneficiaries
 - As long as existing trust terms not necessary to carry out material purpose of trust
 - Beneficiary consent does not have to be in writing
- If non-consenting beneficiaries – modification allowed if their rights not significantly impacted
- Virtual representation



Example - South Dakota as Jurisdiction for Reformation/Modification:

One or More of the Following is Necessary:

1. Part of trust property situs in South Dakota

- Move some assets to South Dakota
- South Dakota LLC

2. Beneficiary located in South Dakota

3. Trustee located in South Dakota

- Need to check existing trust document for the ability to appoint South Dakota Trustee



Example - After South Dakota Trustee Appointed and Jurisdiction Obtained:

1. Consents

2. Petition Court

- Grantor, trustee or beneficiary petitions the court for reformation/modification
- Non-South Dakota trustee can petition court
- Not investment or distribution committee
- Not Trust Protector

3. Hearing

- Not necessary if all consent



Example - After South Dakota Trustee Appointed and Jurisdiction Obtained (Cont'd):

- Consents:

- If all beneficiaries sign up front: reformation/modification process can take as little as 2 days to 2 weeks

[OR]

- If not upfront, then notice to primary and contingent beneficiaries, (3 weeks notice plus 3 days mail adds month)
- If beneficiary does not show or answer then treated like consent
- Virtual representation: primary beneficiaries can represent contingent beneficiaries with same interest:
 - Minors
 - Disabled



Example - After South Dakota Trustee Appointed and Jurisdiction Obtained (Cont'd):

- Hearing:
 - Copies of certified trusts
 - All beneficiary information (primary and contingent)
 - Grantor: deceased, unwilling or unable to participate
 - Can still modify with consent of beneficiaries
 - Can still modify if non-contingent beneficiaries' rights are not significantly impacted



Selected States with Reformation/Modification Statues:

» Alaska*	» Florida*	» Ohio
» Arizona	» Nevada*	» South Dakota*
» California	» New Hampshire*	» Tennessee
» Delaware*	» New York	» Wyoming*

* No state income tax

Please Note: Approximately 33 states total have Reformation/Modification statutes



Trustees or Beneficiaries Might Wish to Reform or Modify an Existing Irrevocable Trust in Order to:

- **Modernize** an outdated **trust agreement**
 - **Change** the **administrative terms** of the **trust** to **add directed trust structure** with **investment** and **distribution committees**/advisors
 - **Add Trust Protector**
 - **Add Special Purpose Entity**
- **Improve** the trust's **governance structure**
- **Add flexibility regarding appointment** of **trustees**
- **Change** the **governing law** applicable to the trust



Trustees or Beneficiaries Might Wish to Reform or Modify an Existing Irrevocable Trust in Order to (Cont'd):

- Improve tax provisions
- Save state income taxes
- Change term/dispositive provisions
 - Change term: I.e., remove 1/3 of principal at age 25, 1/3 at age 30, and 1/3 at age 35 and make discretionary for asset protection purposes (family as distribution committee directs administrative trustee as to distribution).
 - Cannot change trust duration (i.e., RAP)
- Improve asset protection: Discretionary interest not a property right or entitlement



Example: Change of Trust Situs and Reformation/Modification:

New York “Delegated” Trust

New York Law for
Construction, Validity
Interpretation and
Administration

1. Change Situs to South Dakota by naming a South Dakota Trustee;
2. Upon change of Situs and appointment of South Dakota Trustee, reform/modify to SD Law for administration



**To Save State Income Tax/
Modernize Administration**

Reformed/Modified New York Trust

New York Law:

Construction,
Validity and
Interpretation

South Dakota Law:

Administration –
• “Directed”
• “Trust Protector”



Trust Restatement (Similar to Decant):

- Step One – Reformation/Modification:
 - Court involvement
 - Beneficiary consent
 - Amend administrative provisions (i.e., add directed trust provisions and a Trust Protector)
- Step Two – Restatement:
 - Court involvement (follows reformation/modification)
 - Amend interpretation, construction, and validity provisions
 - **Result:** similar to a decant, except court involvement and approval



Reformation/Modification Vs. Decanting:

- Reformation/Modification – Keep old trust but modernize
- Decanting – Distribution from old trust to new trust:
 - If trustee has discretionary power to distribute assets:
 - Generally appoint trustee in a state with a decanting statute (i.e., change trust situs) who then decants.
 - Decanting is a distribution from old trust to new trust in state with decanting statute, modern trust laws and usually no income tax.
 - Generally decanting is considered to be an exercise of special power of appointment
 - Generation-skipping trusts OK, but caution and cannot generally extend the duration beyond the existing duration.
 - Summary – Trustee with discretionary distribution authority may exercise that authority to appoint property further in trust rather than make outright distributions.

Please see: “Decanting: A Statutory Cornucopia” by Rashad Wareh & Eric Dorsch, *Trusts & Estates*, March 2012. “Trust Remodeling” by Rashad Wareh, *Trusts & Estates*, August 2007. Susan Bart, *Decanting: Refining an Old Vintage Trust*, The 2013 Probate & Trust Law Section Conference, Minnesota Bar, June 10, 2013.



Trustee's Decanting Authority:

- **Statute:** States with decanting statutes:

» Alaska*	» Kentucky	» New York	» Tennessee
» Arizona	» Michigan	» North Carolina	» Texas*
» Delaware*	» Minnesota	» Ohio	» Virginia
» Florida*	» Missouri	» Rhode Island	» Wisconsin
» Illinois	» Nevada*	» South Carolina	» Wyoming*
» Indiana	» New Hampshire*	» South Dakota*	

* No state income tax

- **Trust Provision:** Decanting power may be drafted into the trust – which may be broader than statute
- **Common Law:** Power to decant also exists in common law:
 - *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940)
 - *Wiedenmayer v. Johnson* 161 aff'd sub. nom. *Wiedenmayer v. Villanova*, 55 N.J. 81 (1969)
 - *Morse v. Kraft*, SJC-11233 (Mass. 2013): Trustee's discretionary authority to distribute trust principal for benefit of beneficiaries.



Trustee's Decanting Authority:

- When decanting the trustee takes into account:
 - 1.) Purpose of trust from which property decanted
 - 2.) Terms of new trust
 - 3.) Consequences of decanting
- Decanting is at trustee's discretion: When distribution decisions are left to trustees discretion:
 - Courts do not generally substitute judgment unless abuse by the trustee
- Trustee may possibly decant into a trust giving the current beneficiaries a power of appointment which would be equivalent of outright distribution.



Example: Trust Decanting:

Existing Trust

<p>New York Law Trust: (Interpretation/ Construction, Validity, and Administration)</p>
<ul style="list-style-type: none">- Trustee Power to Distribute Assets- Appoint a South Dakota Trust Company as Trustee

Trustee Decants →

New Trust

<p>South Dakota Law Trust with South Dakota Trustee</p>
<p>(Interpretation, Validity, Construction and Administration)</p>

Please note – Generally cannot extend the RAP



Tax Consequences of Decanting:

- **Estate & GST Taxes:**

- Generally **cannot extend** the **RAP** of either **grandfathered** or **exempt** GST trusts
 - **Grandfathered** – Treasury reg. § 26.2601-1(b)(4)
 - **Exempt** – PLR 200919009; PLR 200714016

- **Income Taxes:**

- Decanting is a **non-recognition event**:
 - **Transfer disregarded** for **income tax purposes**
 - Constitutes trust modification and **second trust** is **treated** as **continuation** of **original trust**
 - **PLR 200736002**
 - **New** trust **tax ID #?**
 - **DNI** shifts to new trust
 - If decanting **from grantor** trust to **non-grantor trust** – Possible taxes if negative basis assets
 - Tax issues if decanting to **foreign trust?**



Tax Consequences of Decanting (cont'd):

No adverse effects of decanting as general rule:

- PLR 201418005
- PLR 200013025
- PLR 9804046
- PLR 9737024
- PLR 9438023
- PLR 9332004
- Recent IRS Information Gathering – IRS Notice 2011-101
 - But see 2012-2013, 2013-2014, 2014-2015, and 2015-2016 Treasury-IRS Priority Guidance Plans, decanting has been omitted



Decanting From an Existing Foreign Offshore Trust to a Domestic Trust

Decanting:

- **Modern states decanting statutes**
- If trustee has both **statutory authority** and appropriate **discretionary power** in the trust document to distribute assets:
 - Change trust situs
 - Generally appoint a new U.S. trustee who then decants
 - Trustee decants (distributes all trust assets) from old trust to new trust
 - Generation-Skipping Trusts OK, but caution and cannot extend the duration beyond the existing duration
- **Rev Proc- 2011-3:** Decanting on no ruling list
 - Guidance forthcoming by the IRS
 - Not IRS priority
- **Example:** Change of Trust Situs and Decanting:

Existing Trust:

Foreign Law Trust: (Interpretation, Validity, Construction and Administration)
<ul style="list-style-type: none"> – Decanting statute – Trustee power to distribute assets – Appoint a U.S. trustee in a state with the appropriate decanting statute



Trustee Decants

New Trust:

South Dakota Law Trust with South Dakota Trustee
(Interpretation, Validity, Construction and Administration)

Please see: “Decanting: A Statutory Cornucopia” by Rashad Wareh & Eric Dorsch, *Trusts & Estates*, March 2012. “Trust Remodeling” by Rashad Wareh, *Trusts & Estates*, August 2007.



Decanting From Foreign Trusts to Domestic Trusts Possible Tax Issues:

- Transfer may carry out foreign trusts UNI (undistributed net income)

[and]

- Trigger throwback rules of Subchapter J

[and]

- Reporting Obligations – section 6048



Ease of Change of Situs – Foreign Offshore Trust to Domestic Trust Jurisdiction:

- Generally the situs of a foreign (offshore/non-US law) trust can be changed to U.S. situs
- Procedure:
 - Domestic trustee reviews existing trust and newly drafted domestic trust;
 - Domestic trustee declares new U.S. trust (or offshore trustee declares);
 - Purpose of new trust part of declaration;
 - Foreign trustee pays over trust assets with deed of distribution to new domestic trust.
 - Please note potential tax issues similar with decanting, i.e., UNI, accumulations distributions, throwback rules and extensive reporting obligations
- The benefits include:
 - A stable domestic corporate trustee
 - Directed trust
 - Trust protector
 - Ability to reform/modify/restate in the future (depending upon domestic trust jurisdiction) the trust for administrative purposes



Extending the Trust Term vs. the Trust Duration:

- **Trust Duration:**

- **Period trust terminates** pursuant to **state law**
 - Most states subject to **Rule Against Perpetuities** (RAP):
 - **Common Law** – 90-110 Years
 - **USRAP** – 90 Years
 - **Term states** (arbitrary term of years)
 - **Unlimited duration states**
- Trust **duration may not** generally **be extended** via **decanting** or **reformation/modification**

- **Trust Term:**

- **Period trust terminates** pursuant to **terms** of **trust agreement**
 - Independent of perpetuities period
- **Examples:**
 - 1/3 of trust principle at age 25, 1/3 of trust principal at age 30, and 1/3 of trust principle at age 35.
 - Trust terminates when minor reaches age 21
- Trust **term may** generally **be extended** via **decanting** or **reformation/modification**



Modern No [or] Long Term “Rule Against Perpetuity” States:

Common Law Rule Against Perpetuities States (90-110 years)	Uniform Statutory Rule Against Perpetuities (USRAP) States (90 years)	Term States**	Unlimited Duration States (Listed Chronologically by Year of Statute Enactment)
Iowa	Arkansas	Delaware*** (1995) (Real Estate 110 years)	Idaho* (1959, Pre-1986)
Mississippi	California	Alaska (2000) (1000 years) w/ LPofA	Wisconsin* (1967, Pre-1986)
New York	Connecticut	Colorado (2001) (1000 years)	South Dakota* (1983, Pre-1986)
Oklahoma	Georgia	Florida (2001) (360 years)	Delaware* (1995)
Texas	Indiana	Washington (2002) (150 years)	Alaska* (1997, 2000)
Vermont	Kansas	Wyoming (2003) (1000 years)	Arizona (1998)
	Massachusetts	Utah (2004) (1000 years)	Illinois (1998)
	Minnesota	Nevada (2005) (365 years)	Maryland (1998)
	Montana	Tennessee (2005) (360 years)	Maine (1999)
	New Mexico	Alabama (2011) (360 years)	New Jersey* (1999)
	North Dakota		Ohio (1999)
	Oregon		Rhode Island (1999)
	South Carolina	*** Generally place real estate in LLC, hence subject to unlimited duration	Virginia (2000)
	West Virginia		Missouri (2001)
			Nebraska (2002)
			Washington D.C. (2001)
			New Hampshire* (2006)
			North Carolina* (2007)
			Pennsylvania (2006)
			Michigan (2008)
			Hawaii (2010)
			Kentucky (2010)

* Eight states follow the Murphy case in whole or in part re the method for abolishing their RAP by dealing with both the required “vesting” and “timing” issues associated with the RAP. The IRS acquiesced in the Murphy case, which allows for an unlimited trust duration.

** Please note the term states do not address both the required vesting and timing issues associated with the RAP and the IRS may only recognize 90 years. No authority for the term states to arbitrarily choose a term extending the 90 year statute.



Unlimited Duration Rule Against Perpetuities (RAP):

Existing Dynasty (GST) Trust/Change of Situs/Extend the RAP (Duration)?:

	Grandfathered GST Trust	Exempt GST Trust
Decanting Existing Trust	Problem to extend RAP Reg. section 26.2601-1(b)(4)(i)(D)(I). See South Dakota statute: SDCL 55-2-20	Problem to extend RAP See South Dakota statute: SDCL 55-2-20
Reform/Modifying Existing Trust	Problem to extend RAP (ok, for administrative purposes and other possible non-RAP modifications)	Problem to extend RAP PLR 200714016* (Change of situs of exempt trust did not affect its tax status because duration of trust not lengthened)
Change of Situs by Naming SD Trustee (and Change of Law Provision)	Problem to extend RAP? (Generally keep existing RAP)	Problem to extend RAP? (Generally keep existing RAP)
Springing Situs SD Law Trust (Initially administered in another state, then moved to SD)	Problem to extend RAP? (Generally keep existing RAP)	Problem to extend RAP? (Generally keep existing RAP)

* **IRS ruled** that a **GST exempt trust** will **not lose** its **exempt status** if it is **moved in a way** that is **acceptable** for **grandfathered trusts**.



Spendthrift Clause - Exception Creditors:

- **Spendthrift Clause: Exception creditors** (both self-settled and third-party trusts)
 - **Alimony** and **Child Support**
- **Divorcing spouse of trust beneficiaries - Child Support & Alimony:**
 - Key asset protection statute regarding alimony and child support - “**Discretionary interest not a property right or enforceable right rather a mere expectancy**” (Restatement 2nd and common law):
 - **Argument- If no property interest** – Consequently, cannot become marital property.
 - **Key to protection against a marital claim of:**
 - ❖ Property settlement
 - ❖ Imputation of income for child support or alimony
 - ❖ Spouse suing through a minor beneficiary
 - **State Statutes:** Alaska, Delaware, Nevada and South Dakota
 - **In-laws not named in trust document.**
 - **In-laws named in trust document:** Use **discretionary interest** not a property right statute (see above); floating spouse clause (i.e., “spouse I am living with and married to”)
 - **Florida case:** *Berlinger v. Casselberry*, 38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App. Nov. 27, 2013); companion case *Berlinger v. Casselberry*, 38 Fla. L. Weekly D 2480 (Fla. Dist. Ct. App. Nov. 27, 2013)
 - **Massachusetts. case:** *Pfannenstiehl v. Pfannenstiehl*, Mass. App. Ct., Nos. 13-P-906, 13-P-686 & 13-P-1385, August 27, 2015.



Berlinger v. Casselberry,

38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App., Nov. 27, 2013)

- Florida Trust Code interpreted so former spouse can access trust assets to satisfy alimony
- Court held - Florida state allows court to order writ of garnishment against Florida discretionary trust



Berlinger v. Casselberry,

38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App., Nov. 27, 2013)
(Discretionary Interest, Spendthrift Clause)

- The judge quoted in the first sentence of the background section of the opinion, “Oh what a tangled web we weave when we first practice to deceive” (quoting Sir Walter Scott).
- Facts:
 - Husband and wife divorced and entered into a marital settlement agreement (2007). The husband agreed to pay the ex-wife (Casselberry) a certain amount per month.
 - In 2011, husband voluntarily stopped paying.
 - Husband and current (new) wife “enjoyed a substantial lifestyle” from direct payments to the husband by his discretionary trusts.
 - Ex-wife filed for contempt, but the parties entered into settlement. However, the husband was still in arrears.
 - The husband, in 2011, transferred property into another trust, but never disclosed this to the wife in any of his amended or supplemental financial disclosures. The husband even gave a deposition 8 days after he made the transfer that he did not set up any new trusts.
 - The husband and new wife continued to live off of his discretionary trusts throughout this time. Suntrust, issued the husband a credit card, which the trust paid the bills. The husband would pay his expenses and would get cash advances on the credit card.



Berlinger v. Casselberry,

38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App., Nov. 27, 2013)
(Discretionary Interest, Spendthrift Clause)

- Court Findings:

- This case follows a similar fact pattern and outcome as another Florida case, *Bacardi v. White*.

- The court stated that *Bacardi* was controlling, and not the Florida discretionary interest statute. The court quoted *Bacardi*, “if disbursements are wholly within the trustee’s discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment.”

- The court also stated, “according to section 736.0504(2) (discretionary interest statute), a former spouse may not compel a distribution that is subject to the trustee’s discretion or attach or otherwise reach the interest, if any, which the beneficiary may have. The section does not expressly prohibit a former spouse from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. As a result, it makes no difference that the instant trusts are discretionary” (emphasis added).

- Please note - State statutes: “Discretionary interest not a property right or enforceable interest” (i.e., restatement second/common law) (AK, DE, NV & SD)

- Consider - Change of situs: Reformation/modification/restatement or decanting



**Pfannenstiehl v. Pfannenstiehl, Mass. App. Ct.,
Nos. 13-P-906, 13-P-686 & 13-P-1385, August 27,
2015**

- See also recent Massachusetts Case, *Pfannenstiehl v. Pfannenstiehl*
 - Father/Settlor formed a irrevocable spendthrift trust for a class composing of his living issue, which included his son (the husband in the case).
 - Trust provided for income/principal to the class (i.e. the Husband) for HEMS in sole discretion of trustee; at later event to be separated into shares for siblings and trust was “open to future offspring” (i.e. multi-generational).
 - Appeals Court of MA affirmed trial court holding that a spouse’s interest in a third-party discretionary spendthrift trust constituted divisible property for purposes of property division in divorce.
 - Writ of certiorari granted by the MA Supreme Judicial Court on December 22, 2015.



States with Decanting Statutes

» Alaska*	» Kentucky	» New York	» Tennessee
» Arizona	» Michigan	» North Carolina	» Texas*
» Delaware*	» Minnesota	» Ohio	» Virginia
» Florida*	» Missouri	» Rhode Island	» Wisconsin
» Illinois	» Nevada*	» South Carolina	» Wyoming*
» Indiana	» New Hampshire*	» South Dakota*	

* No state income tax



Existence and Scope of Decanting Power:

1. Existence of Power:

- Statute
- Trust power
- Common law

2. Degree of discretionary authority trustee must possess to decant:

- Absolute discretion to invade principal: Florida, Illinois, Indiana, Ohio, Rhode Island
- Any discretion to invade principal: Alaska, Delaware, New York, Tennessee
- Any discretion over principal or income: Arizona, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, South Dakota, Virginia

Please Note: Trustee who is also beneficiary of first trust **cannot decant** unless exercise is for HEMS (SD, NV, NC, NY)



Existence and Scope of Decanting Power (cont'd):

3. Consent or Notice:

- No state requires beneficiaries to consent to trust decanting
 - Possible gift tax issues?
- Several states do not require notice to beneficiaries: Alaska, Arizona, Delaware, New Hampshire and Tennessee.
 - Nevada and South Dakota permit but do not require notice
 - Several states require notice to the beneficiaries of the first trust: Florida, Illinois, Indiana, North Carolina and Ohio (between 20-60 days notice)
 - New York: mandates a copy of decanting instrument be sent to:
 - Creator of first trust;
 - Any person with right to remove trustee of first trust; and
 - Any person interested in first or second trust.
 - Kentucky: Notice required to all current beneficiaries and oldest generation of remaining beneficiaries of the first trust
 - Missouri: Only notify permissible beneficiaries of second trust, not first trust
- Notify or not? Duty of loyalty?
- Virtual representation – Unborn beneficiaries and minors
- Decanting from a quiet trust?



Existence and Scope of Decanting Power (cont'd):

4. **Court Approval** – Not usually required except:
- **Ohio**: Requires **court approval** for a **testamentary trust**
 - **New York**: Requires a **copy** of the **decanting instrument** be **filed with** the **court** if trust ever subject to surrogate court approval
 - **Statute allows** for trustee to obtain **court approval**:
Arizona, Illinois, Nevada, New York and North Carolina
 - South Dakota also allows for court approval of a decant



Existence and Scope of Decanting Power (cont'd):

5. States may limit trustee's authority to alter beneficial interests -

Power exercised to:

- One or more of the beneficiaries of the first trust (primary and/or contingent beneficiaries): Kentucky, Missouri, South Dakota, Virginia
- For the benefit of one, more than one, or all of the current beneficiaries of the first trust and for the benefit of one, more than one, or all of the successor and remainder beneficiaries of the first trust: Illinois
- Proper object of trustee's discretion: Delaware, Tennessee – only primary beneficiaries
- One or more current beneficiaries: Nevada, New York, North Carolina, Ohio
- The beneficiaries of the second trust are the same as the beneficiaries of the first trust: Indiana
- One or more of those beneficiaries (the "second trust"): New Hampshire
- The beneficiaries of the trust: Arizona
- The beneficiaries of the invaded trust: Alaska
- One or more persons ("The beneficiaries of the second trust may include only beneficiaries of the first trust"): Rhode Island
- Beneficiaries of the second trust may include only beneficiaries of the first trust: Florida



Existence and Scope of Decanting Power (Cont'd):

6. No statute prohibits granting of powers of appointment to beneficiaries of new trusts
 - Specific State Statutes: Delaware, Nevada, New Hampshire, New York, North Carolina, Ohio, South Dakota
7. Some states limit trustee's ability to change distribution provisions (Alaska, North Carolina, Arizona)
8. Extending the term and/or duration of the trust:
 - Term vs. Duration: generally permissible to extend terms of a trust with a decant (i.e., Delaware, New York, South Dakota). The term is the period that the trust terminates independent of the perpetuities period:
 - Trust ends when minor attains age 21
 - Trust principle distributed 1/3 at 25, 1/3 at 30, and 1/3 at 35
 - Duration – Perpetuities period:
 - May extend perpetuities period: Arizona, Nevada, New Hampshire
 - Major Issues
 - Constructive addition
 - Possible IRS scrutiny
 - May not extend perpetuities period: Indiana, Nevada, Ohio, South Dakota, Tennessee
9. Trustee compensation: New York prohibits increase in trustee fees.



Existence and Scope of Decanting Power (Cont'd):

10. Unrestricted decanting power to a trustee/beneficiary when a beneficiary has a power to replace the trustee:
- May cause the trust to be included in the estate of the beneficiary
 - NY and NC prohibit decanting when the trustee is also a beneficiary
 - FL, OH, and TN have similar prohibition in general trust law
 - AK, AR, DE, MO, NV, NH, and SD provide that a trustee/beneficiary may not decant unless distribution power in the second trust is limited by an ascertainable standard
 - SD goes further, and removes the above limitations when the trust, trustee, and beneficiaries wouldn't be subject to U.S. estate or gift tax.
 - FL, NY, NC, OH, and TN are silent as to decanting power when a beneficiary has the power to remove the trustee



Existence and Scope of Decanting Power (Cont'd):

11. If the trustee can decant to a trust that removes the vesting conditions for a gift that qualified as a present interest under IRC section 2503(c), there may be a concern that the IRS may treat the transfer as a future interest (regardless of whether the trust is ever decanted).
 - Some state statutes require a minor beneficiary's interest, which previously qualified under section 2503(c), must vest no later than the date on which it would have vested under the first trust: SD, DE, NC, NH, NV, AZ, MO, and OH.

12. Most state statutes contain a provision that prohibits changing a trust term necessary for qualifying for the marital or charitable deduction
 - Only AK and TN lack such a provision



Existence and Scope of Decanting Power (Cont'd):

13. Most states mandate that a decanting cannot reduce a fixed income, annuity, or unitrust interest
14. MO and OH prohibit changing trust terms necessary to qualify as an electing small business trust or qualified Subchapter S trust.
15. OH also prohibits changes that would jeopardize a trust's exemption under the GST tax or tax treatment under IRC Section 401.

Source: Rashad Wareh & Eric Dorsch, *Decanting: A Statutory Cornucopia*, TRUSTS & ESTATES, Mar. 2012, at 22.



Summary of Some of the More Popular Reasons to Decant are as follows

(Most are also reasons for Reformation/Modification/Restatement):

1. Modifying [powers of appointment](#);
2. Amending [administrative provisions](#) of a trust;
3. Adding [spendthrift](#) protections;
 - Also eliminating spendthrift provisions so interests may be assigned
4. Adding (or removing) [grantor trust provisions](#);
5. Qualifying a trust as a qualified [subchapter S trust](#), a QDOT, an IRA conduit trust, etc.;
6. [Combining](#) trusts for greater efficiencies;
7. [Separating](#) trusts to allow investment philosophies to be "fine tuned" for beneficiaries;
8. [Segregating](#) higher risk assets;
9. Avoiding state and local [taxes](#);
10. [Reducing distribution rights](#) for Medicaid eligibility planning purposes;
11. [Amending trustee succession](#) provisions, removing or replacing a trustee;
12. [Extending](#) the term of a trust;
13. Changing the [governing law](#) provisions of a trust;
14. Correcting a [scrivener's error](#) or ambiguity;
15. Decanting a beneficiary's share of a trust to a [supplemental needs trust](#) in order to preserve or obtain eligibility for public benefits;
16. [Combing](#), segregating or otherwise improving [irrevocable life insurance trusts \(ILITs\)](#) and [credit shelter trusts](#);
17. [Dynasty trusts](#), although less common, are also excellent candidates for decanting.

Source: "Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts" by Thomas E. Simmons [South Dakota Law Review](#), 2010.



Virtual Representation:

- **Definition:** These **statutes** are designed to **facilitate** the **administration** and/or **court supervision of trusts** in which there are **contingent**, **unborn**, or **unascertainable beneficiaries** so they can be properly represented.*
 - **Reformation/Modification:** Typically, these statutes allow the contingent, unborn, or unascertainable beneficiaries to be represented by a person with the same or similar interests in a court reformation, modification and/or restatement.
 - **Decanting:** In a trust decanting, generally **consent is not recommended** of trust beneficiaries for gift tax purposes and the **court is not generally involved**.
 - However, with virtual representation statutes, the contingent, unborn, or unascertainable beneficiaries might be **represented**.

* Daniel Worthington and Mark Merric, “Which Situs is Best in 2014?”, *Trusts & Estates*, Jan. 1, 2014.



Selected States with Virtual Representation Statutes:

» Alaska	» Florida	» New York
» Arizona	» Illinois	» South Dakota
» California	» Nevada	» Washington
» Delaware	» New Hampshire	» Wyoming



Privacy:

- **Privacy**: Very important to clients, particularly for either a lawsuit involving the trust, a reformation/modification/restatement or an optional court approved decant.
 - Privacy statutes vary by state. Please see selected list of states with privacy statutes below:

Alaska: Up to the court

Delaware: Up to a court (limited to 3 years)

Nevada: Up to the court (not perpetual)

New Hampshire: Up to the court

South Dakota: Automatic seal in perpetuity

Wyoming: Up to the court (not perpetual)



Keeping a Trust Quiet to Beneficiaries – Selected Beneficiary Notice Statutes (Notice of Trust/Trust Assets):

- **South Dakota**: Ability to waive beneficiary notice of trusts assets. **Trust document** provides:
 - The **settlor, trust protector** and/or **advisor**
 - The **ability** to **expand, restrict, eliminate, or modify**
 - The **rights of beneficiaries** to receive **trust information**
 - **Sample Trust Provision Notice**: “I hereby direct that the Trustee is not required to provide the notice set forth in SDCL § 55-2-13 to qualified beneficiaries.”
- **Alaska** allows for beneficiary waiver of notice but limits settlor to exempt the trustee from the notice requirements during the **life of the settlor** or until the **settlor’s incapacity**, whichever is shorter
- **Delaware** does allow for the waiver of beneficiary notice but does **not expressly allow** for the trust **advisor** or **protector** to **modify notice** to beneficiaries
- **Nevada** enacted new legislation effective 10/1/2015, but does **not expressly allow** for the trust **advisor** or **protector** to **modify notice** to beneficiaries

Please see: Al W. King, “Should You Keep a Trust Quiet (Silent) From Beneficiaries?” *Trusts & Estates* (April 2015).



Domestic Asset Protection Trust (DAPT):

- **General Definition:**
 - **Irrevocable trust**
 - **Properly established** and **administered** under the **laws** of one of the **DAPT jurisdictions**
 - Allow **settlor** to be **permissible discretionary beneficiary** of the trust (i.e., self-settled)
 - **No preexisting understanding** between settlor and trustee
 - **Protects trust assets** from settlor's creditors, if structured properly
 - **Creditors** of settlor are generally **unable** to **access** trust **property interest** as defined by state law unless they are **exception creditors**
 - **Assets not transferred fraudulently** (no fraudulent conveyance)
 - **Nevada** and **South Dakota** – **2 Years**
 - **Alaska**, **Delaware**, **New Hampshire** and **Wyoming** – All **4 Years**
 - Either **established** to be **excluded** from or **included** in the estate of settlor [or] **both**



Domestic Asset Protection Trust (DAPT)(cont'd):

- Change Situs of DAPT:
 - Reform/Modify/Restate
 - Decant
- Tacking statute:
 - A trust transfer from one DAPT state to another will be deemed to be made on the original date of transfer to the original DAPT
 - This can be utilized to take advantage of favorable DAPT statute in the new DAPT state
 - For example, moving a trust from a 4-year fraudulent conveyance state to a 2-year fraudulent conveyance state to utilize the state's shorter fraudulent conveyance period:
 - Still retain the time that has run on the conveyance period with the original trust
 - The prior time tacks
 - Nevada and South Dakota – 2 Years
 - Alaska, Delaware, New Hampshire & Wyoming – 4 Years



“A Trust without beneficiaries: What is the Purpose?” – *The Non-Charitable Purpose Trust:*

- **Trend:** Domestic versus offshore non-charitable purpose trusts
- **Definition:**
 - Trust that **exists** for stated (non-charitable) **purpose**
 - Established to **care** for “**something**” **rather than “someone”**
 - No beneficiaries
- **Trust Enforcer:**
 - Appointed to ensure the trustees carrying out their obligations in fulfilling the trust’s purpose
 - Ability to go to court
 - Also **Trust Protector:** Amend trust if needed in event circumstances change
 - May **reform/modify** to beneficiary trust in the future
 - May combine Trust Enforcer and Trust Protector functions
- **Taxes:** Typically excluded from estate as completed gift trusts (either grantor or non-grantor)
 - Also pour over revocable purpose trust with dynasty provisions

Please note: “Trusts without Beneficiaries – What is the Purpose?” by Al W. King III, *Trusts & Estates* magazine, Feb 2015



“A Trust without beneficiaries: What is the Purpose?”

– *The Non-Charitable Purpose Trust (Cont’d)*

- **Examples:**

- Pet care (i.e., dogs, cats, horses, birds, tortoises, snakes, etc.)
 - Including offspring
 - Charitable gift over when pet dies
- Maintenance of grave sites (honorary)
 - Also supporting religious ceremonies (anniversaries, etc.) – Charitable donations
- Maintenance of family property (i.e., antiques, cars, jewelry, memorabilia, etc.)
- Maintenance of an art collection
- Maintain family homes (residence and vacation)
- Long term maintenance of building, property or land
- Maintain business interests
- Royalties
- Digital assets
- Provide for philanthropic purpose not qualifying for a charitable deduction
- Maintain Private Family Trust Companies

- **Charitable gift over:** Possibly when assets in purpose trust are sold

***Please see:** “Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws” by Adam J. Hirsch, Florida State University Law Review, Vol.26:913



“A Trust without beneficiaries: What is the Purpose?”

– *The Non-Charitable Purpose Trust (Cont’d)*

- **Term and Duration:**
 - Most states 21 year term
 - Approximately 10 states GST, long term or unlimited duration
 - Delaware and South Dakota – Separate RAP statutes for Purpose Trusts*
- **States with Broadest and most flexible non-charitable purpose trust statutes are: Delaware, New Hampshire, South Dakota and Wyoming****

***Please see:** “Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws” by Adam J. Hirsch, Florida State University Law Review, Vol.26:913

****Please see:** “Trusts without Beneficiaries – What is the Purpose?” by Al W. King III, *Trusts & Estates* magazine, Feb 2015



Pet Trusts:

- **Selected life expectancies of various animals and pets:**
 - Horses 25-30 years
 - Macaws 35-60 years
 - Parrot 80 years
 - Tortoises 100 years
 - American box turtle 123 years
 - Chimpanzee 40 years
 - Donkey 45 years
 - Eagle 55 years
- **Need to coordinate selection of pet trust statute with life expectancy and desires for care of a pet**
- **Cryogenics?**

Source: Passion for Pets



Pet Trusts (cont'd):

Purpose Trust and Charitable Gift over:

- **Pet Trust Statutes:** 49 States and the District of Columbia (Minnesota is the only state not to adopt)
- **Normal Pet Trust duration** – Life of animal or 21 years (some states in perpetuity i.e. animal cryogenics)
- **Pet Cryogenics**
- **Helmsley Pet Trust:**
 - 9 year old Maltese named “Trouble” lives in Florida with General Manager of Helmsley Sandcastle Hotel as well as with Ms. Helmsley’s brother, Alvin Rosenthal.
 - Two dozen death and kid napping threats on dog- \$100K/yr security
 - \$12M funding, reduced to \$2M by Surrogate Court Judge
 - \$10 million to Helmsley Private Foundation
 - Pet trust changed situs to South Dakota
- **Prior to Hotel Tycoon Leona Helmsley’s death in 2007:**
 - Pet spa in Chicago – Trump Plaza (12 years)
 - \$8,000 for yearly grooming fees
 - \$666/month covered 4 weekly days of beauty
 - 1 hour deep body massage
 - Paw dipping, filing and manicure
 - Tooth brushing, flossing and polishing
 - 15-20 minutes hot oil conditioning
 - Food: Only Kobe Beef (several special chefs brought in)
 - Also hand fed crab cakes, cream cheese, steamed vegetables with chicken
 - Trouble passed away in 2011
- **Overall Estate will fund Foundation:** Estimated \$5 Billion
 - 1st goal- to help indigent- cancelled
 - 2nd goal- provide for care and welfare of dogs
 - 10 times the combined assets of the 7,381 Animal non-profits



Summary of Planning Options:

1. Reformation/Modification by court;
2. Reformation/Modification to “directed trust”
 - [and then either]
 - Restatement – court approval (change laws for interpretation, construction, validity)
 - [or]
 - Decant: trustee with distribution power can be non-South Dakota trustee
3. Court Approval of Decant;
4. Decant without Court Approval.



Possible Results of Reformation/ Modification or Decant: Directed Trust Structure with a Trust Protector Promoting Flexibility and Control:

Trust Protector

(Family, Friends or Advisors)
(Fiduciary, Not Trustee)

Powers Include:

- Terminate the Trust
- Modify or Reform the Trust
- Veto or Direct Trust Distributions
- Add or Remove Beneficiaries
- Change Situs and/or Governing Law of the Trust
- Appoints Successor Trustees & Fiduciaries
- Replaces Trustees and Fiduciaries

Distribution Committee

(Fiduciary, Not Trustee)

Directs Administrative Trustee
(SDTC) Re Distributions

**Independent
Committee**

(Tax sensitive
distributions)

Family Committee

(Non-tax sensitive
distributions)

Investment Committee

(Family & Family Advisors)
(Fiduciary, Not Trustee)

Directs Administrative Trustee
(SDTC) Re Investments

- Stocks & Bonds
- Insurance
- Art
- FLPs
- LLCs
- Real Estate
- Private Equity
- Closely-Held Stock

Administrative Trustee

(South Dakota Administrative Trustee)

- Ownership of Assets
- Establish & Maintain Trust Bank Account
- Prepare & Sign Trust Tax Return
- Trust Statements
- Make Distributions
- Receive Contributions
- Take Direction from:
 - Investment Committee
 - Distribution Committee

*Combine all functions → Full Trustee



Directed Trust:

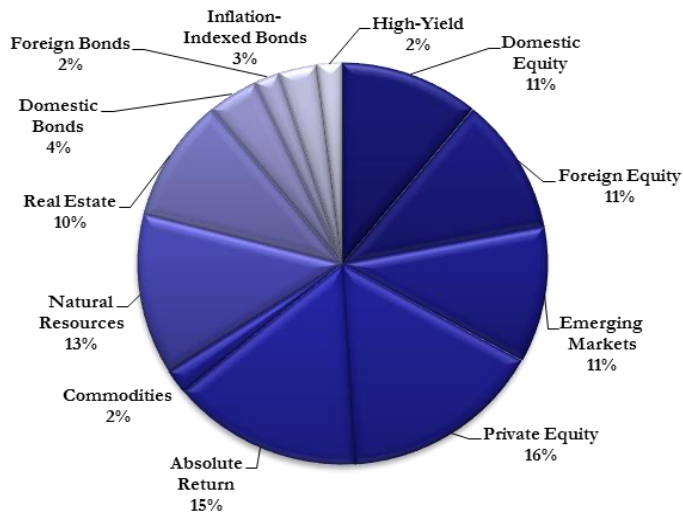
- Section 185 Restatement 2nd of Trusts – Trustee is generally not liable for following the instructions of an empowered person within the trust instrument – State Statutes.
- The administrative trustee has no discretionary investment (3rd party) duties regarding the trust.
- The administrative trustee takes direction from either a co-trustee, trust advisor, investment committee, or LLC.
- State statute and the trust document exonerate the administrative trustee from taking direction for investments and/or distributions. Typically “gross negligence statutes”.
 - **Please Note:** Some advisors utilize “directed” trust language without state “directed” trust statutes.
- **FLP:** Client may be GP of FLP.
- GP interest held by client outside of trusts and LP interests held within trust. Administrative trustee is directed to hold and is also protected by document.
- Directed trustee must make sure trust document is followed.
- **Selected Best Directed Trust states:** Alaska, Delaware, Nevada, New Hampshire, South Dakota and Wyoming.
- **Delegating:**
 - Due Diligence and Selection of Investment Advisors** – experience, track record, ADV, Compensation, Duration
 - Monitoring of Investment Advisors** – asset allocation, FMV drop, large concentration, investment performance
 - Investment Policy Statement** – creation, monitoring and updates
 - Exoneration** – for testamentary trusts not allowed in many jurisdictions (Example: NYEPTL 11-1.7)



Advantages of a Modern Directed Trust:

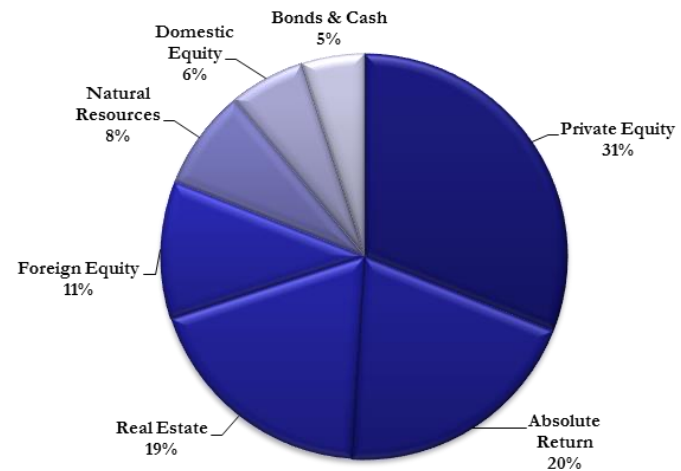
- **No requirement to diversify** trust **investments/assets**
 - Can hold large concentration in one stock (public or closely-held)
- **Ability to provide broad asset allocation** models for trust assets, for example:

Harvard University Endowment:



Source: Harvard University Endowment, Harvard Management Company, 2013

Yale University Endowment:



Source: Yale University Endowment, Yale University Investments Office, 2013

- Investment committee responsible for initial **due diligence** and **quarterly monitoring** of investment assets
 - Directed Administrative Trustee does not have to interfere
- Excellent **control** and **flexibility** in both up and down economic cycles
- **Fiduciary Liability:** Investment and Distribution Committees - Subject to gross negligence/willful misconduct standard (liability much higher with delegated trust)



Selected Directed Trust Statutes for Investments:

» Alaska	» Nevada*	» Virginia
» Arizona	» New Hampshire*	» Wyoming
» Delaware*	» South Dakota*	
» Hawaii*	» Texas	

* Also have [specific directed trust statutes](#) for [distributions](#).



Special Purpose Entity (SPE) or Trust Protector Company (i.e., Delaware, Nevada, New Hampshire, South Dakota & Wyoming) (Combined with Separate Investment Management LLC):

Typical South Dakota Example:

Special Purpose Entity (South Dakota LLC)

- Board of Managers
- Trust Protector
- Investment Committee
- Distribution Committee

- Unique South Dakota SPE Statute
- Not a trust company
 - Registers with the South Dakota Division of Banking
- D&O, E&O Insurance
 - Ability to attract key advisors
- More ties to South Dakota situs
- Meetings outside client's resident state
- Governance

Directs:



- Trust Protector
- Investments:
 - Directs directed administrative trustee to hold investment management LLC
- Distributions:
 - As determined, usually discretionary

Directed Trust

South Dakota Trust Company- Administrative Directed Trustee

- Directed Trust
- Administrative Trustee



Trust assets

South Dakota Investment LLC

(South Dakota Trust Company – Member)
(Family members or other – Manager)
Investment Management

• Trust protector, investment committee and distribution committee are housed in an LLC acting as agents or employees of the LLC to further tie the trust to the favorable situs state and reduce their liability by purchasing insurance (D&O) as well as provide continuity.

• Other states: Delaware Trust Protector company, Nevada and Wyoming (all less formal, and case-by-case)



Special Purpose Entity or Trust Protector Company (i.e., Delaware, Nevada, South Dakota & Wyoming):

Unregulated Special Purpose Entities or Trust Protector Companies: The unregulated special purpose entity or trust protector company alternative is generally used in combination with the "directed trust" structure. A recent trend is to establish unregulated entities such as a limited liability company to place a liability umbrella over the heads of the individuals filling the roles of Trust Protector, Investment Committee and/or Distribution Committee.

Unregulated Special Purpose South Dakota LLC

Serves the role of:

- Trust Protector;
- Investment and/or Distribution Committees
- [And]
- Provides liability protection through D&O/E&O to independent advisors serving the family in these roles.

It is very difficult, if not impossible, to acquire individual liability insurance coverage to serve as committee members and/or trust protector. However, some insurance companies will provide coverage to an entity established specifically for these purposes, thus protecting the trust protector and committee members. Such an entity would also provide legal continuity of its corporate existence by continuing without regard to any single individual's death, disability or resignation. The entity typically has by-laws that allow for additional members to be added or removed so that the entity can continue along with the trust. These entities have to be properly structured so as to avoid estate tax inclusion issues. South Dakota is the first and one of only two states (New Hampshire is the other state) with a specific state statute for these special purpose unregulated entities. Delaware, Nevada, and Wyoming also allow on a case by case basis and may refer to them as trust protector companies. These entities are not Private Trust Companies and are typically special purpose type entities with limited defined duties (i.e. investment and distribution direction as well as Trust Protector functions).



Transfer For Insurance From Old ILIT to a New ILIT:

- **Transfer** insurance from **grantor trust** to another **grantor trust**:
 - No transfer for value problem
 - No taxable event
 - PLRs – 200518061, 200228019, 201235006
- **Transfer** insurance from **non-grantor trust** to **grantor trust**:
 - No transfer for value problem
 - Possible taxable event if FMV of policy exceeds basis.
 - Generally taxable if policy is 7 years old or more
 - Possibly borrow against cash value or take a distribution before the policy is sold to reduce policy value
- **Decant**: Distribute insurance policy from old trust to new trust



Selected State Premium Tax Rates:

Alaska	10 bpts.
Arizona	200 bpts.
California	235 bpts.
Connecticut	175 bpts.
Delaware	200 bpts.
Florida	175 bpts.
Georgia	225 bpts.
Hawaii	275 bpts.
Illinois	50 bpts.
Massachusetts	200 bpts.
Minnesota	200 bpts.
Nevada	350 bpts.
New Hampshire	125 bpts.
New Jersey	210 bpts.
New York	200 bpts.
North Dakota	200 bpts.
Ohio	140 bpts.
Pennsylvania	200 bpts.
South Dakota	8 bpts. (Lowest)
Washington	200 bpts.
Wyoming	75 bpts.

Ways to take advantage of low premium tax:

1. Establish trust in low premium state with resident trustee (e.g., corporate trustee) – Purchase policy
- [or]**
2. Establish a LLC in low premium state with resident LLC agent (e.g., corporate agent) – Purchase policy

What if existing trust with situs outside of low premium tax state?:

1. Set up a LLC in low premium state with resident LLC agent (e.g., corporate agent) to purchase the policy
- [and]**
2. Allocate low premium state LLC units to trust with situs outside of low premium state



**“Are Irrevocable Trusts Truly
Irrevocable?”**

QUESTIONS?



Disclaimer:

These informational materials are intended to provide and advise clients, prospects and advisors with guidance in estate planning. The materials do not constitute, and should not be treated as, legal and/or tax advice regarding the use of any particular tax, trust or estate planning technique. South Dakota Trust Company, LLC and South Dakota Planning Company, LLC and any of their related entities and/or Holding Company do not assume responsibility for any individual's reliance on the written or oral information disseminated. Current strategies and techniques should be independently verified by the client and/or prospect's legal and/or tax advisors before applying them to a particular fact situation and should be independently verified to determine both the tax and non-tax consequences of using any particular tax, trust or estate planning technique.



Al W. King III, J.D., LL.M., AEP (Distinguished), TEP Co-Chairman and Co-Chief Executive Officer, South Dakota Trust Company, LLC

Al W. King III is based in New York City and the Co-Founder, Co-Chairman and Co-Chief Executive Officer of South Dakota Trust Company, LLC (SDTC), South Dakota Planning Company, LLC (SDPC) and the Estate Planning Institute (EPI). South Dakota Trust Company is a national trust boutique for the wealthy based out of Sioux Falls, South Dakota serving clients nationally and internationally.

Mr. King was previously Managing Director and National Director of Estate Planning for Citigroup. Mr. King was also the Co-Founder and Vice Chairman of Citicorp Trust South Dakota. Mr. King also previously served as Director of Financial and Estate Planning for Coopers and Lybrand in Stamford, Connecticut.

Prior to joining Coopers and Lybrand, Mr. King was a Vice President and Director of Financial and Estate Planning with Shawmut Bank and the Northeast Director of Financial and Estate planning for Prudential-Bache Securities. Mr. King was also a Senior Staff Attorney/Financial Counselor with the AYCO Corporation, a fee-based financial counseling firm.

Mr. King is the Co-Vice Chairman of the Editorial Board of *Trusts & Estates Magazine*. He has been a member of the Editorial Board for 20 years. Mr. King has been inducted into the National Association of Estate Planners & Councils (NAEPC) *Estate Planning Hall of Fame* as an Accredited Estate Planner (AEP), Distinguished. In addition, Mr. King currently serves on the Board of Directors for NAEPC and is the Chairman of the NAEPC Foundation Advisory Board. He is also a member of several groups and organizations including the Society of Trust and Estate Professionals (STEP), the International Association of Advisors in Philanthropy (AiP), New York Philanthropic Advisors Network (NYPAN), Fairfield County and New York City Estate Planning Councils, etc. In addition, he is frequently published and quoted by several publications on various Estate Planning topics and addresses several professional organizations, special interest groups, and general audiences on the subject of estate and financial planning.

Mr. King received a Bachelor of Arts cum laude from Holy Cross College, a Juris Doctor from Syracuse University Law School and an LL.M. in Tax Law from Boston University School of Law.



Al W. King III, J.D., LL.M., AEP (Distinguished), TEP

Co-Chairman and Co-Chief Executive Officer

Selected List of Speaking Engagements:

NY State Banker's Association (Marketing and Estate Planning Seminars)
National AICPA Personal Financial Planning Conference
National Conference of CPA Practitioners
NY State Society of CPAs Personal Financial Planning Conference (95-96)
NAPFA - Advanced Planners Conference (Williamsburg, VA)
Institute of Certified Financial Planners (NYC)
International Association of Financial Planners
National Fortress Conference (Dallas)
American Association of Retired Persons
American Association of Independent Investors
Connecticut Estate and Gift Tax Council
Connecticut Society of CLUs
CPAs in Industry Society (Ohio)
Financial Executives Institute (NJ)
Long Island Federation of Women's Clubs
California CPAs
Colorado CPAs
Los Angeles CPAs - October 1996
New Jersey State CPA Society Seminar 1996, 1997
Million Dollar Round Table Conference - June 1997
Hawaii Tax Institute - October 1997
American Bar Association - August 1997, 1998
Nevada Estate Planning Council
Estate Planning Councils: Hartford, Westchester, Rockland, Miami
Maryland Bar Association
Bank Administration Institute (BAI)-March 2002
President Bush Inaugural Dinner Sponsored by Salomon Smith Barney
The Planned Giving Council of Central Florida - September 19, 2002
NY State CPA's Estate Administration Conference NYC - May, 2003
NYC Trusts & Estates Magazine Conference - October 20, 2003
Nevada Estate Planning Council - January, 27 2004
Long Island Estate Planning Council - September, 2004
International Forum - January, 2005
Red River Estate Planning Council (ND) - February, 2005
NYU Tax Institute - July, 2005
Citco Seminar - October 2005
San Francisco CPA/Bar Alliance
Tri-State LINC CPA Society
New York State Bar Association
Florida Bar Association

Cleveland Clinic Donors
Sacred Heart University Alumni
Merrimac College Alumni
Hofstra University Alumni
Syracuse University Alumni
Holy Cross College Donors
Bridgeport Hospital Medical Staff
Various Rotary and Jaycees Events
Several Fortune 500 Companies
Florida Bar (Business Section)
New York CPA Network (NYC)
Florida CPAs
Denver CPAs
San Francisco CPAs - October 1996
Chicago CPAs - November 1996
New York Society of CPAs PFP Seminar - June 1997
New York City Bar - June 1997
Washington County Hospital Association
National AICPA PFP Technical Conference - 1999
Institute for Private Investors (NYC 2001)
Long Island Bar Association (2001)
Naples, Florida Estate Planning Council-March 2002
Fairfield County Connecticut Estate Planning Council - Oct 15, 2002
AIG Adv. Pl. Seminars LI, NYC, NJ, Westchester County Feb/Mar 03
NY CPA's Closely-Held Group - June, 2003
UNCW Institute for Tax and Investment Planning - November 2003
Southern California (Orange County) Estate Planning Council - March, 2004
South Dakota Estate Planning Council - November, 2004
Producers Group - February 2005
AXA Advisors (PPG) - March 2005
Los Angeles STEP Chapter - May 2006
Lorman (Buffalo and NYC) 2006
Million Dollar Round Table - June 2006 (San Diego)
Naples Estate Planning Council - September 2007
Lorman Teleconference - November 2006
Heckerling Luncheon - January 2007 (Orlando)
AXA Equitable Agents - Feb 2007 (Boca Raton)
Lorman - February 2007 (NYC)
NYCLE - May 2007
American Bar Association (ABA) Webinar - August 2007

InfoVisa Technology Conference - Key Note Speaker - Sept 2007 (TX)
Hawaii Tax Institute - Oct 2007
Notre Dame Tax Institute 2007
Heckerling Insurance - January 2008
AICPA Tax Strategies for the High-Income Individual (Las Vegas, NV) - May 2008
AALU Annual Meeting (D.C.) - May 2008
Financial Events International - Advanced Trust Planning (NYC) - 2008
Family Office Seminar (Aventura, FL) - May 2008
STEP (San Francisco) - September 2008
NAEPC Webinar - September 2008
Hawaii Tax Institute - October 2008
Heckerling Luncheon - January 2009 (Orlando)
Lorman - February 2009
Rockland County Estate Planning Council - February 2009
WTAS Webinar - February 2009
NAEPC Webinar - March 2009
Wealth Counsel Annual Meeting (Chicago, IL) - August 2009
Institute for Private Investors (New York, NY) - December 2009
Family Office Exchange Webinar - January 2010
Heckerling Luncheon - January 2010 (Orlando)
Ventura County EPC - May 2010
American Bar Association (ABA) Webinar - June 2010
Interactive Legal Webinar - September 2010
Hawaii Tax Institute - October 2010
South California Tax Institute - October 2010
NAEPC Annual Conference - November 2010
Heckerling Luncheon - January 2011 (Orlando)
Family Office Exchange (FOX) - February 2011
NYCPA Family Office Group - February 2011
Estate Planning Council of San Gabriel Valley - March 2011
Todorovitch Lecture - March 2011
Estate Planning Council of New York City's Estate Planner's Day - May 2011
Hawaii Tax Institute on Estate Planning - December 2011
Heckerling Luncheon - January 2012 (Orlando)
Southern Arizona Estate Planning Council - March 2012
Sioux Falls Estate Planning Council - April 2012
Family Office Exchange Webinar - May 2012
West River Estate Planning Council - June 2012
CalCPA Peninsula/Silicon Valley Annual Estate Planning Symposium - July
Hawaii Tax Institute - November 2012



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Selected List of Speaking Engagements (cont'd):

Fargo Estate Planning Council – November 2012
Bergen County Estate Planning Council – November 2012
Heckerling Luncheon – January 2013
Southern Nevada Estate Planning Council – March 2013
Central New York Estate Planning Council – May 2013
2013 Business and Economic Forum – May 2013
Minnesota CLE's Probate and Trust Law Conference – June 2013
Lorman's New Era of Estate Planning in New York – July 2013
Hawaii Tax Institute – October 2013
Inland Empire Estate Planning Seminar – November 2013
Heckerling Luncheon – January 2014
STEP 4th Annual Institute on Tax, Estate Planning & the Economy – January 2014
New York IPI Roundtable – April 2014
Ave Maria School of Law – April 2014
Northern Florida (Jacksonville) Estate Planning Council - May 2014
San Francisco IPI Roundtable – September 2014
Society of FSP Webinar – September 2014
Trusts & Estates Magazine Webinar - October 2014
Hawaii Tax Institute – November 2014
Heckerling Luncheon – January 2015
STEP 5th Annual Institute on Tax, Estate Planning & the Economy – January 2015
New York IPI Roundtable – March 2015
Advisors In Philanthropy Conference – April 2015



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Selected List of Publications:

Recent Selected Publications:

“When to Consider a Corporate Trustee” Part I November 1995 [AICPA Planner](#)

“When to Consider a Corporate Trustee” Part II December/January 1996, [AICPA Planner](#)

“Dynasty Trusts: What the Future Holds for Today’s Technique” April 1996 [Trusts & Estates Magazine](#)

“Dynasty Trust Planning and Your Artwork” May 1996 [Christie’s Auction News](#)

“Trust Planning: Experts Critical Analysis of the Dynasty Trust, A Unique Planning Device to Preserve and Create Wealth” June 1996
[Insights and Strategies CCH](#)

“Dynasty Trust” September 1996 [The CPA Journal](#)

“Who benefits from the Suspension of Sec 4980A’s Excise Tax?” April 1997 [Trusts & Estates Magazine](#)

“Trust Forum Shopping: The Next Generation” August 1997 [Trust & Estates Magazine](#)

“The Modern Dynasty Trust: Flexibility is more important than ever” January 1998 [Trusts & Estates Magazine](#)

“Sale to a “Defective” Trust Application as a Life Insurance Technique” April 1998 [Trusts & Estate Magazine](#)

“Modern Trusts Are Being Created With More Flexibility Resulting in Assets Remaining in Trusts for Longer Periods of Time” January 1999 [Trusts & Estates Magazine](#)

“Delegating Responsibility: Trustees Explore The Once Taboo” March 1999 [Trusts & Estates Magazine](#)

“A Generation Skipping Trust: Unlimited Duration? Why Not?” June 1999 [Trust & Estates Magazine](#)

“Changing the Situs of a Trust: Shopping for Income Tax Savings” September 1999 [Trust & Estates Magazine](#)

“Population Trends, New Wealth Creation and HR 10 are Keys to the Future” January 2000 [Trust & Estates Magazine](#)

“South Dakota Dynasty Trust” June 2000 [Millionaire](#)

“Smart Start - Establishing A Dynasty Trust in South Dakota” November 2000 [Departures Magazine](#)

“Death Tax Uncertainty Makes Flexible and Family Value Estate Planning More Important Than Ever” January 2001 [Trust & Estates Magazine](#)

“Multi-Disciplinary Practices Important due to Economic, Tax Uncertainty” August 2001 [Trusts & Estates Magazine](#)

“Non-Disclosure Agreements – Help or Hindrance to a Client’s Planning” August 2001 [Trusts & Estates Magazine](#)

“How To Play the Current Downturn – And Plan for a Decade of Evolving Estate Tax Rules” January 2002 [Trusts & Estates Magazine](#)

“Freezers - our Future Coffins” August 2002 [Trusts & Estates Magazine](#)

Footnoted: “Dynasty Trusts and the Rule Against Perpetuities” 116 [Harvard Law Review](#) 2588 (2003)

“What Does the 2001 Tax Relief Act and Estate Tax Phase-Out Mean for the States? It Is Not a Rosy Picture – the Impact Is Already Dramatic!” March 2004 [Nebraska Lawyer](#)

“Estate Planning and the State Premium Tax” February 2005 [AUS](#)



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Selected List of Publications (cont'd):

"The PPLI Solution (Chapter 6: "Trust Administration: The Domestic Advantage")" February 2005 [Bloomberg Press](#)

"Delegated Vs. Directed Trusts" July 2006 [Trusts & Estates Magazine](#)

Family Office Exchange (FOX) 2009: Fall Forum Resource Center White Paper – "Directed Trusts, Trust Protectors & Special Purpose Entities"

Family Office Exchange (FOX) 2009: Fall Forum Resource Center White Paper – "Large Domestic Insurance Premiums: Do Not Forget to Plan for the State Premium Tax"

Family Office Exchange (FOX) 2009: Fall Forum Resource Center White Paper – "Modernizing an Existing Irrevocable Trust: Reformation, Modification and Decanting"

Family Office Exchange (FOX) 2009: Fall Forum Resource Center White Paper – "Trust Administration of the Ultra Wealth: The Private Trust Company and Other Key Alternatives"

Family Office Exchange (FOX) 2009: Fall Forum Resource Center White Paper – "The Modern Dynasty Trust: Flexibility and Control"

"Private Trust Company 101" April 2011, Family Office Exchange (FOX) [FOXConnects](#)

"State Premium Tax Planning" June 2011 [Trusts & Estates](#) magazine

"Trust Planning in 2012 and Beyond" May 2012 [Trusts & Estates](#) magazine

"What's Trending in the Estate Planning World" August 2014 [Trusts & Estates](#) magazine

"Defend Against Attacks on DAPTs" October 2014 [Trusts & Estates](#) magazine

"Myths About Trusts & Investment Management: The Glass is Half Full!" December 2014 [Trusts & Estates](#) magazine

"Trusts without Beneficiaries – What is the Purpose?" February 2015 [Trusts & Estates](#) magazine

"Should you keep a trust quiet (silent) from beneficiaries?" April 2015 [Trusts & Estates](#) magazine

Tapes and Published Outlines Available:

1997 Million Dollar Roundtable - Atlanta, Georgia (Dynasty Trusts)

1998 American Bar Association Advanced Drafting Meeting - Dallas, Texas (Dynasty Trusts)

1998 Texas Bar Association Advanced Drafting Meeting - Dallas, Texas (Dynasty Trusts)

1999 National AICPA Technical PFS Conference - Las Vegas, Nevada (Dynasty Trusts)

2000 Sky – TV Net Worth (Dynasty Trusts)

2000 Salomon Smith Barney National Sales and Marketing Focus (Dynasty Trusts)

2004 Society of Financial Services Professionals (SFSP) – "Park Avenue Meets Main Street: Family Office Techniques for the Millionaire Next Door" DVD

2005 International Forum – "Advanced Planning with a Modern Corporate Trustee"

2006 Society of Financial Services Professionals (SFSP) – "Advanced & Creative Estate Planning (with a Modern Corporate Trustee) in an Uncertain Tax and Economic Environment"

2006 Million Dollar Round Table – "Creative Uses of Life Insurance in Trust Planning" San Diego

2007 AALU National Webinar – "Creative Uses of Life Insurance in Trust Planning"

2008 AICPA Tax Strategies for the High-Income Individual- May 9, 2008 – "Selection of Domestic Trust Jurisdictions: Does It Make A Difference?"

2009 Family Office Metrics Webinar – "The 21st Century Private Family Trust Company"

2009 Institute for Private Investors (IPI) – "2010: Uncertainty Means Opportunity for Modern Trust Planning"

2010 Family Office Exchange (FOX) Webinar – "The 21st Century Family Bank Dynasty Trust: What, Why, When, Where, How, Who?"



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If you have any questions or would like any additional information, please do not hesitate to call or e-mail us at the numbers and addresses listed above. We also invite you to visit our websites:

www.sdtrustco.com

www.privatefamilytrustcompany.com

www.directedtrust.com

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