

Southern Arizona Estate Planning Council – March 21, 2012:

“Planning Opportunities Using Domestic Trust Jurisdictions i.e. Alaska, Delaware, Nevada, New Hampshire, South Dakota & Wyoming”

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“Planning Opportunities Using Domestic Trust Jurisdictions i.e. Alaska, Delaware, Nevada, New Hampshire, South Dakota & Wyoming”

Main Factors to Consider

- Approach taken by state to abolish or modify its RAP
- Directed Trust statutes (investments and/or distributions)
- Trust Protector statutes and/or recognition
- Modification, Reformation and Decanting statutes
- Virtual Representation statutes
- Privacy statutes
- Beneficiary Notice statutes
- Domestic Asset Protection Trusts (DAPT)/Self Settled Trust Laws
- State income taxation of trusts
- Discretionary Reimbursement of Taxes (Grantor Trust 2004-64)
- State premium taxes
- Private Family Trust Company statutes
- Purpose Trust statute
- International family planning and statutes



Trust Duration: Depends upon State Law

- A Trust's maximum duration varies by state
 - Many states (i.e. 21 states) limit a trust's duration
 - (e.g., maximum in New York and many other states is the Common Law or “lives in being” plus 21 years; California is USRAP, which is the longer of 90 years or Common Law)
 - Trusts can be perpetual in 21 states plus D.C.
 - Rules are typically based on where the trust is administered
 - Client does not have to live where trust is administered



Types of RAP States:

- Common Law Rule Against Perpetuities
- Uniform Statutory Rule Against Perpetuities
- States Repealing RAP
- States Modifying RAP



Common Law Rule Against Perpetuities:

- Forces assets to vest before 21 years plus “lives in being” from the time the interest in the trust was first created.
 - Typically 80 – 90 years
- 8 States:

» Alabama	» New York
» Arkansas	» Oklahoma
» Iowa	» Texas
» Mississippi	» Vermont



Uniform Statutory Rule Against Perpetuities (USRAP):

- Allowed period to be the longer of **90 years** [or] the **common law rule**.
- **15 States:**

» Arkansas	» Kansas	» North Dakota
» California	» Massachusetts	» Oregon
» Connecticut	» Minnesota	» South Carolina
» Georgia	» Montana	» Virginia
» Indiana	» New Mexico	» West Virginia

- **Please Note:** Some states have the USRAP, but carve out exceptions:
 - **Michigan:** exception for person property held in trust.
 - **Hawaii:** exception for Permitted Transfers in Trust.
 - **D.C., Nebraska,** and **North Carolina:** general exception for trusts.



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

Unlimited Duration States: 21 States and D.C. (Listed Chronologically by Year of Statute Enactment)		
Idaho* (1959, Pre-1986)	Maine (1999)	New Hampshire* (2006)
Wisconsin* (1967, Pre-1986)	New Jersey* (1999)	North Carolina* (2007)
South Dakota* (1983, Pre-1986)	Ohio (1999)	Pennsylvania (2007)
Delaware* (1995)	Rhode Island (1999)	Michigan (2008)
Alaska* (1997, 2000)	Virginia (2000)	Hawaii (2010)
Arizona (1998)	Missouri (2001)	Kentucky (2010)
Illinois (1998)	Nebraska (2002)	
Maryland (1998)	Washington D.C. (2002)	
Long Term Duration States: 9 States (Listed Chronologically by Year of Statute Enactment) Duration:		
Delaware (1995)	Real Estate 110 Years	(transfer to LLC/LP so becomes personal property and unlimited)
Alaska (2000)	1,000 Years	Not Unlimited Duration w/LPofA's
Colorado (2001)	1,000 Years	
Florida (2001)	360 Years	
Washington (2002)	150 Years	
Wyoming (2003)	1,000 Years	
Utah (2004)	1,000 Years	
Nevada (2005)	365 Years	
Tennessee (2007)	360 Years	

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

(Please See: Worthington, Daniel G. “Perpetual Trust States – The Latest Rankings” *Trusts & Estates*, January 2007 ; “Which Situs is Best?” by Daniel G. Worthington & Mark Merric; *Trusts & Estates* January 2010; “Which Trust Situs is Best in 2012?” by Dan Worthington and Mark Merric, *Trusts & Estates*: January 2012



Various Approaches of Repealing or Modifying the RAP:

- 1) Suspension of the Power to Alienate;
- 2) Term of years approach;
- 3) Abolish the RAP as applied to trusts, but retain it in other situations;
- 4) RAP is a default and drafters are allowed to opt out;
- 5) Abrogation of RAP without leaving any rule against alienation as a stop gap.

Please See: “Location, Location, Location: Trust Situs” Notre Dame Tax and Estate Planning Institute, October 12, 2007, (pages 1-9); “Which Trust Situs is Best in 2012?” by Dan Worthington and Mark Merric, *Trusts & Estates: January 2012*



Approach #1 Suspension of the Power to Alienate:

Pre 1986:

Idaho
South Dakota
Wisconsin

Post 1986:

Alaska (Partial)
Delaware (Partial)
Kentucky
Missouri
New Hampshire
New Jersey
North Carolina

- IRS Acquiesced
- Deals with both the “Vesting” and “Timing” Issues:
 - Vesting:
 - Rule Against Suspension Power of Alienation:
 - » Limits Duration of Trust
 - » Exception to Limitation of Duration of Trust {
 - Expressed
 - Implied
 - If Trustee Power to Sell:
 - » Jump Outside Rule Against Suspension of Alienation
 - » Creates Alternative Vesting Rule to Avoid Vesting Problem
 - Timing:
 - No Common Law Rule Against Perpetuities by Statute (Did Away With/Abrogated)



Estate of Murphy v. Commissioner 71 T.C. 671 (1979) (Wisconsin):

- [IRS acquiesced](#) in *Murphy* 1979
- [Only reported case](#) involving IRC § 2041(a)(3)
- [Tax court held](#): the exercised LPofA to create another LPofA did not spring Delaware Tax

Trap because:

- Under applicable Wisconsin law, the exercise of a LPofA did not commence a new perpetuities period.
- Delaware Tax Trap was not violated in Wisconsin,
- Wisconsin has/had a perpetuities statute expressed in terms of a rule against suspension of power of alienation

[rather than]

based upon the remoteness of vesting

- [States](#) that [follow](#) the *Murphy Case*:
 - [Pre 1986](#): Idaho, South Dakota and Wisconsin relied on *Murphy* case
 - [Post 1986](#): Alaska (partial), Delaware (possible issue with LPA), Kentucky, Missouri, New Hampshire, New Jersey and North Carolina all relied upon *Murphy*.



Change of Situs – Constructive Addition:

- **Constructive Addition**: Once GST tax exemption has been allocated to a trust:
 - Any material change to the nature of beneficial interest might trigger constructive addition
 - **Result**: Erode GST tax inclusion ratio
- **Caution**: Possible constructive addition when changing situs from one RAP type jurisdiction to another.



Types of Trust Administration:

- **“Full” Trustee** – One stop shopping: Bank or Trust Company does everything.
- **“Delegated” Trustee*** – Trustee delegates to outside investment advisors
- **“Directed” Trustee*** – “Best of Class” model – Trifurcates the traditional trustee role:
 - Investment Committee, Distribution Committee and Trust Protector
 - Reformation/Modification/Decanting
 - From “Full” & “Delegated” to “Directed”
 - Control & flexibility re investments and distributions (family involvement)
- **Private Family Trust Company** (PFTC) – LLC owned by family qualified and serving as trustee
 - Regulated (SEC exempt) vs. Unregulated

***Please Note** – “Delegated vs. Directed Trusts” by Al W. King III and Pierce H. McDowell III, *Trusts & Estates*, July 2006.



Example: Typical Modern 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 (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**

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Directed Trust:

- [Section 185 2nd Restatement 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](#) take [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 and willful misconduct 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](#) regarding investment and distributions.
- [Delegating](#)
 - Selection – experience, track record, ADV, Compensation, Duration
 - Monitoring – Asset allocation, FMV Drop, Large Concentration, Investment
 - Investment Policy Statement
 - Exoneration for testamentary trusts not allowed in many jurisdictions (Example: NYEPTL 11-1.7)



Selected Directed Trust Statutes for Investments:

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

* Also have specific directed trust statutes for distributions.

** Also unregulated special purpose or trust protector entities, i.e. LLCs housing the Investment and Distribution Committees as well as Trust Protectors: Delaware, Nevada, South Dakota, and Wyoming.

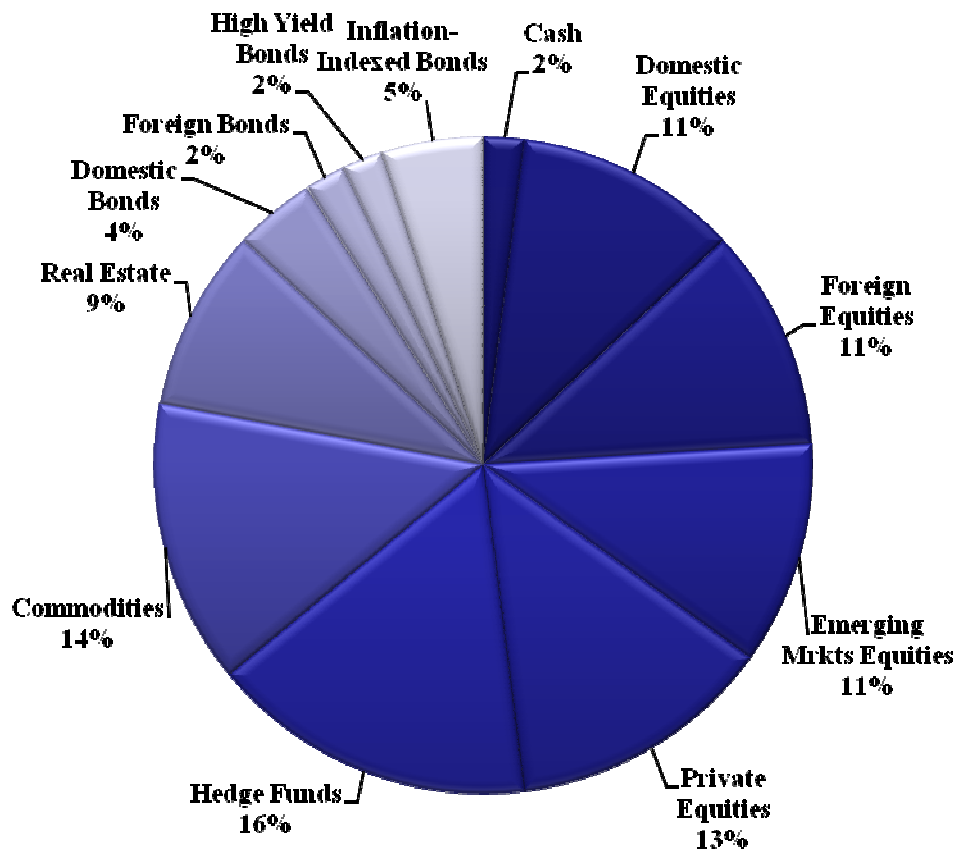


Directed Trust Structure vs. Individual and Corporate New York/California Trustee:

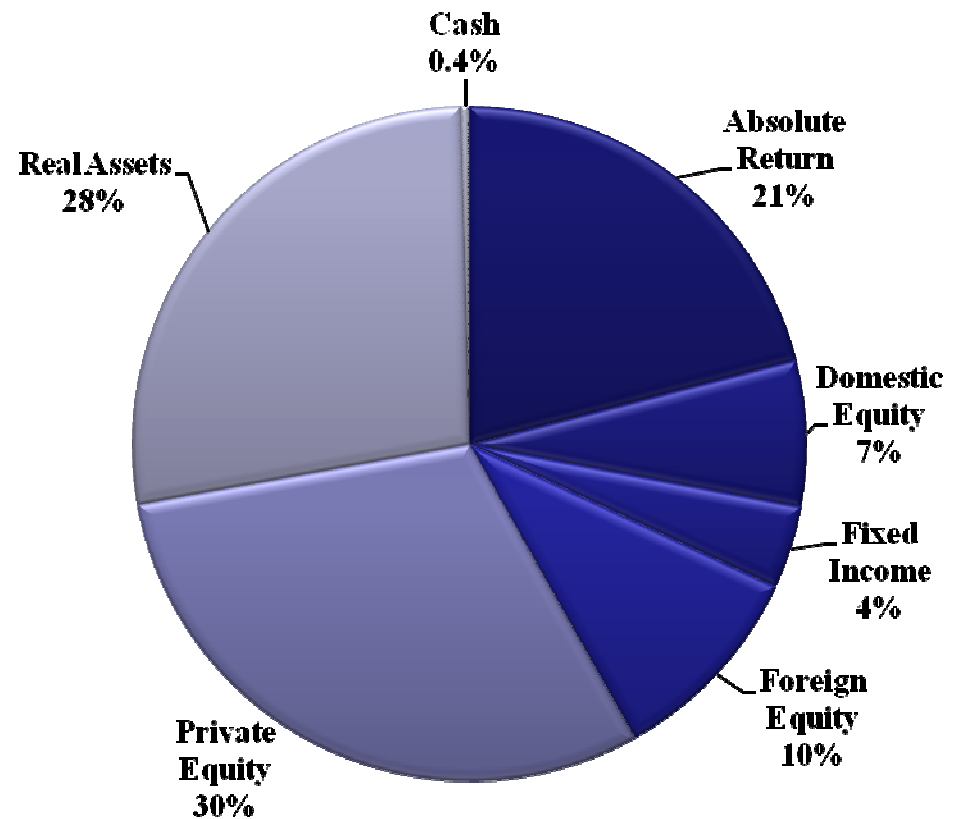
	Individual NY/CA Trustee	Corporate NY/CA Trustee	Directed Trust Structure
Family & Friends Can Control Investments	Yes	Not Usually	Yes
Family & Friends Can Control Distributions	Yes (Need Independent Trustee for tax sensitive)	No	Yes (Need Independent distribution committee member(s) for tax sensitive)
Personal Liability	Yes, as a Personal Trustee (High)	Yes, as a Personal Co-Trustee with Corporate Trustee (High)	Yes, but very limited and only as a fiduciary (not trustee) running the investment and/or distribution committees with gross negligence or willful misconduct standard
Trust Protector	No	No	Yes
Power to Remove Trustee and/or Fiduciary	Yes	Yes	Yes
State Income Tax	Yes	Yes	No
Asset Diversification Requirements	Yes	Yes	No
Broad Based Investments Allowed in the Trust (Investment Flexibility)	No	No	Yes
Trustee Initial Due Diligence and Quarterly Monitoring of Trust Assets	High Level (Need to document file)	High Level (Need to document file)	Low Level (Left to Trust Family Investment Committee)



Investments – Allocation of Investable Assets Overseen by University Endowments:



Source: Harvard University Endowment, Harvard Management Company, 2011



Source: Yale University Endowment, Yale University Investments Office, 2011

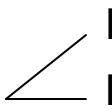


Duemler v. Wilmington Trust Co. (Delaware):

- Upheld “Directed” Trust Statute
- Involved a “directed” trust invested in a non-diversified portfolio with extremely risky assets
 - Portfolio that required diligent monitoring
- Administrative Trustee forwarded a prospectus to investment advisor (Duemler)
 - To make a decision regarding one of the investments
 - Investment advisor did not provide trustee with any direction
 - Investment experienced a significant drop in value
- Court Held:
 - Delaware “Directed” Trust statute upheld
 - Investment advisor must make decisions in isolation
 - Without oversight from administrative trustee
 - If the “directed” administrative trustee was required to oversee the investment advisor, the role of “directed” administrative trustee would not work because the “directed” administrative trustee would be required to second guess the investment advisor.
 - This is not the intent of the “directed trust” statute.



Typical Trust Protector Powers:

- Flexibility  Future Circumstances
Drafting
- Personal vs. fiduciary powers
- Power to remove or to replace trustees
- Power to veto or direct trust distributions
- Power to add or remove beneficiaries
- Power to change situs and the governing law of the trust
- Power to veto or direct investment decisions
- Consent to exercise power of appointment
- Amend the trust as to the administrative and dispositive provisions
- Approve trustee accounts
- Terminate the Trust



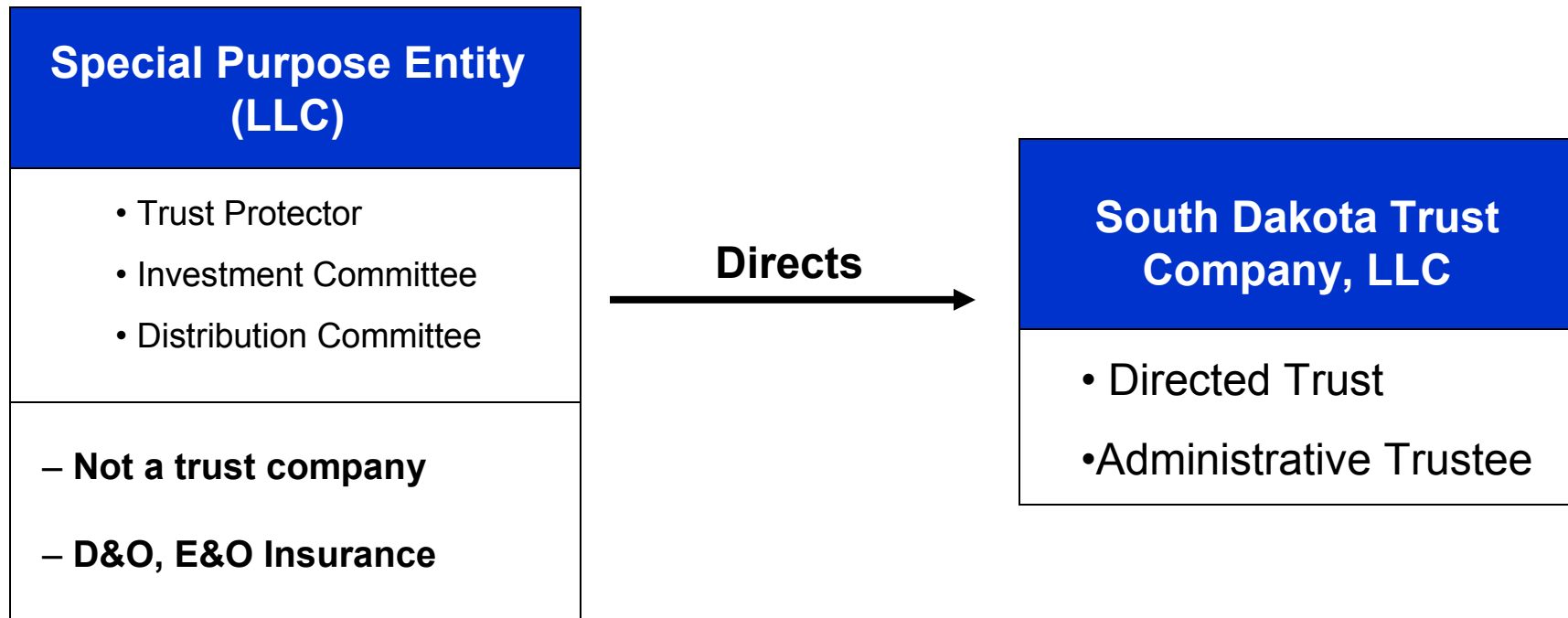
Selected States with Trust Protector Statutes:

» Alaska	» Hawaii	» New Hampshire
» Arizona	» Idaho (1999)	» South Dakota (First State Statute – 1997)
» Delaware	» Nevada	» Wyoming



Special Purpose Entity

(i.e., Delaware, Nevada, South Dakota & Wyoming):





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

Unregulated Special Purpose Entities: The unregulated special purpose entity 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 only state with a specific state statute for these special purpose unregulated entities. Delaware, Nevada, and Wyoming also allow on a case by case basis. These entities are generally exempt from regulated Private Trust Company status and are typically special purpose type entities with limited defined duties.



Are Irrevocable Trusts Really Irrevocable - Reformation and/or Modification:

- **Modification:**
 - “Carry out the material purpose of the trust had the grantor known”
 - **Example:** “Directed” Trust with Trust Protector
- **Reformation:**
 - Mistake of law or fact
 - “What was actually intended”



Selected States with Reformation/Modification Statues:

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

*** No State Income Tax**



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

- **Change** the **administrative terms** of the **trust** from a delegated to **add directed trust structure** with investment and distribution committees/ advisors;
 - **Add trust protector**;
- **Change** the **governing law** applicable to the trust;
- **Add flexibility regarding appointment** of **trustees** and **other fiduciaries**;
- **Improve** the trust's **governance structure**;
- **Modernize** an outdated **trust agreement**;



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 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 SDTC as to distribution).
 - **Cannot change** trust **duration** (i.e., RAP).



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: Change of Trust Situs and Reformation/Modification:

Existing Trust

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**

Existing Trust Modified

Reformed/Modified New York Trust	
<u>New York Law:</u> Construction, Validity and Interpretation	<u>South Dakota Law:</u> Administration – • “Directed” • “Trust Protector”



South Dakota 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:
 - **Existence of Decanting Power: Statute, Trust Provisions, Common law**
 - 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.
 - **Popular States with Decanting Statutes and no income taxes on trusts**: Alaska, Delaware, Florida, Nevada, New Hampshire, South Dakota and Wyoming
 - **Please see**: “Trust Remodeling” by Rashad Wareh, *Trusts & Estates*, August 2007.



Selected States with Decanting Statutes:

» Alaska*	» Kentucky	North Carolina
» Arizona	» Missouri	» Ohio
» Delaware*	» Nevada*	» South Dakota*
» Florida*	» New Hampshire*	» Tennessee
» Indiana	» New York	» Virginia

*** No State Income Tax**



Example: Trust Decanting:

Existing Trust

New York Law Trust:
(Interpretation, Validity,
Construction and
Administration)

- Trustee Power to Distribute Assets
- Appoint a South Dakota Trust Company as Trustee

Trustee Decants →

New Trust

South Dakota Law Trust
with South Dakota Trustee

(Interpretation, Validity,
Construction and
Administration)



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;
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** in a **beneficiary release**.

* Daniel Worthington and Mark Merric, "Which Situs is Best in 2012?", Trusts & Estates, Jan. 1, 2012.



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:
 - **Alaska**: Up to a court
 - **Delaware** : Up to a court (limited 3 years)
 - **Nevada**: Up to a court
 - **New Hampshire**: Up to a court
 - **South Dakota**: Automatic seal in perpetuity (statute)
 - **Wyoming**: Up to a court



Selected Beneficiary Notice Statutes - (Optional 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** is **silent** on **waiver** of notice to beneficiaries.



Two Major Types of Irrevocable Intervivos Trusts (Non-Charitable):

- **Self Settled**: Grantor is permissible beneficiary along with family and/or others;
 - Only available in 13 states with statutes;
 - Not in CA, FL, CT, NJ, and NY.
- **Third Party**: Grantor is not a permissible beneficiary. The only beneficiaries are family and others;
 - Available in all 50 states.

Please Note:

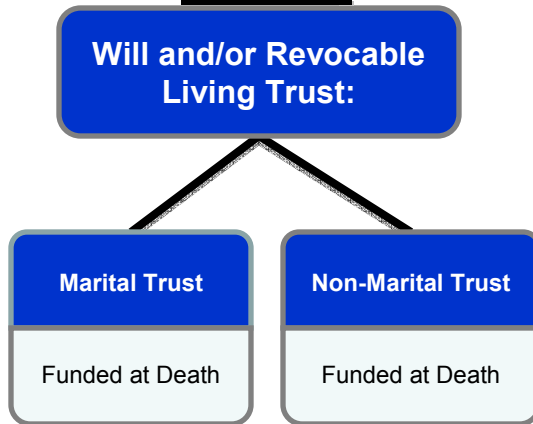
- **Domestic Asset Protection Trusts (DAPTs)**- Self Settled
- **Dynasty Trusts, GST, ILITs** - Either Self Settled or Third Party
- **GRAT, QPRT, HEET**: Third Party



Common Estate Planning Strategy –

Separating DAPT (included in estate) from
Family Bank Dynasty Trust (excluded from estate):

Arizona:



Domestic Asset Protection Trust (DAPT):

- Self Settled
- Grantor Remains Permissible Discretionary Beneficiary
- Purposefully Included in Estate
- Grantor Trust for Income Tax Purposes
- Funded Lifetime
- > Generally 10-40% of Assets
- Situs in Self Settled Trust State (i.e., Alaska, Delaware, Nevada or South Dakota)

Family Bank Dynasty Trust:

- Third Party*
- Excluded from Estate
- Generally Grantor Trust (Initially)
- Funded Lifetime, death, or both
- Situs either in Grantor's resident state (i.e., Arizona) [or] in another Dynasty State (i.e., Alaska, Delaware or South Dakota)
- Multigenerational

*** Please Note:** Dynasty Trust can also be Self Settled.

Trusts Often Used to Supplement the Above:

Grantor Retained Annuity Trust (GRAT)

Charitable Trusts:

- Charitable Remainder Trust
- Charitable Lead Trust
- Private Foundation


Purpose Trusts:

- Pets
- Key Family Assets
- Private Family Trust Company

(Delaware & South Dakota)



Trend From Offshore Asset Protection Trusts to Domestic Asset Protection Trusts (DAPTs):

- **Improved** Domestic **Asset Protection** (Layering) 
 - Self Settled
 - LLC Sole Remedy Charging Order Protection
 - Discretionary
 - Spendthrift
- **U.S. Courts** not always looking favorably on Offshore Trusts
- **IRS Scrutiny** (i.e. Audits, etc...)
- **U.S. Government** Scrutiny (i.e. FBAR, OVDI, etc...)
 - **OVDI 2009 & 2011**(9/15): 33,000 participants telling IRS about offshore assets ➔ \$4.4 billion taxes
 - **New Foreign Bank Account Reporting (FBAR) Form 8938**: 7 million U.S. people living overseas and many U.S. citizens with offshore accounts (est. 50,000)
 - **U.S. person** with **authority** or **interest** over a **foreign financial account** must **disclose** if the account is **over \$10k**
 - **New Foreign Account Tax Compliance (FATCA)**: reporting of specified foreign financial assets that exceed certain thresholds.
- **Flexibility & Control**- Modern Domestic Trust Laws:
 - **“Directed”** Trusts (Investment & Distribution committees and Trust Protectors)



Domestic Asset Protection Trusts (DAPT):

Four Levels of Protection:

1. **Self-Settled** Trust Statute:
 - **Fraudulent Conveyance** Period;
 - **Exception Creditors**;
2. **Discretionary Interest Protection Based Upon Restatement 2nd:**
 - **SD**: 4 levels;
 - **NV**: 2 levels;
 - **DE**: 1 level;
 - **AK**: None.
3. **SD LLC- Sole Remedy Charging Order** Protection as Exclusive Remedy;
 - AK, DE, NV and SD.
4. **Spendthrift** Protection (weakest level of protection, but available in all DAPT states)

Plus Other Domestic Advantages:

- * **Privacy**: Total Seal
- * **Attorney Fees**: Reimburse trustee if unsuccessful



General Domestic Asset Protection Planning/Self-Settled Trusts:

Self-Settled Trusts:

- Irrevocable trust is established so the grantor or settlor can be a permissible discretionary beneficiary of the trust;

[IF]

- Creditors cannot otherwise reach the trust assets to satisfy legal obligations to the settlor.

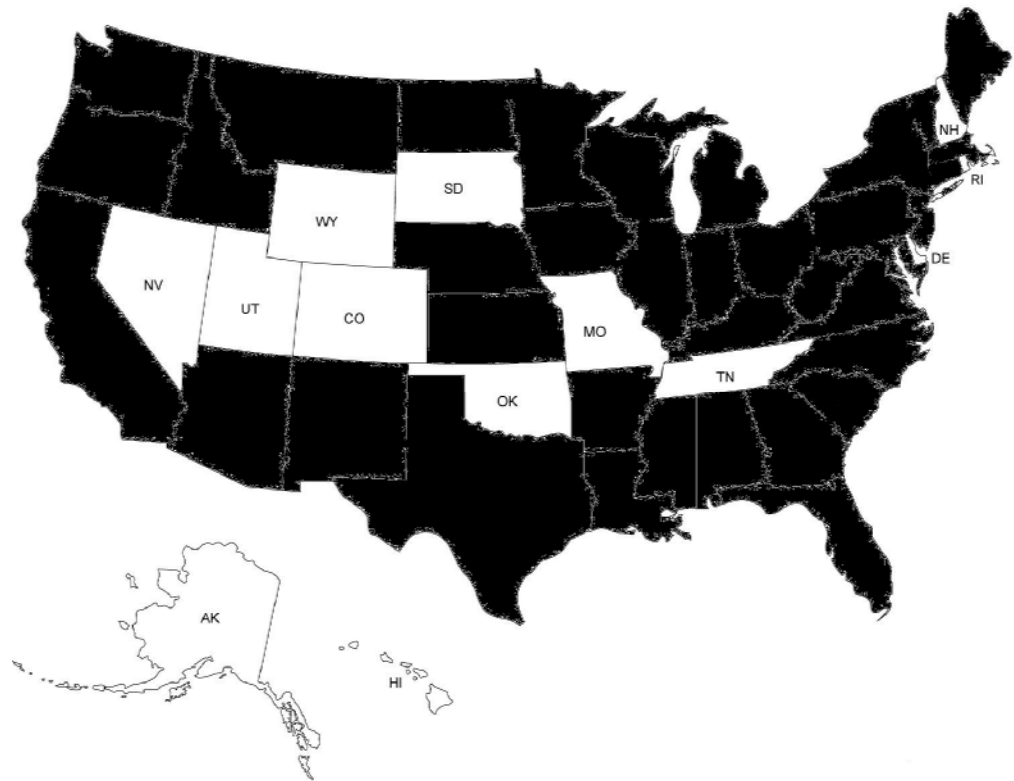
Three Key Requirements:

1. No pre-existing understanding or arrangement between settlor or the trustee;
2. Creditors of settlor are unable to access trusts property interests as defined by state law;
3. The assets were not transferred fraudulently
 - Generally determined by presumption after statutory time period has expired.



States with Self-Settled (DAPT) Trust Statutes:

Alaska
Colorado
Delaware
Hawaii
Missouri
Nevada
New Hampshire
Oklahoma
Rhode Island
South Dakota
Tennessee
Utah
Wyoming





Key Factors to Asset Protection/Self Settled Trust Situs:

1. **Self-Settled/DAPT Statute** (See list of States pg. 43)
 - **Top Asset Protection States**: Alaska, Delaware, Nevada & South Dakota
2. **Governing law in trust document?**
 - Self Settled Trust Jurisdiction (i.e. Alaska, Delaware, Nevada, South Dakota)
3. **Location of trustee/where is trust administered?**
 - Same as governing law of trust (i.e. Alaska, Delaware, Nevada, South Dakota)
 - Location of Trust Protector, Distribution Committee, Investment Committee?
 - Best if not in resident state of grantor.
 - South Dakota Special Purpose Entity LLC?
 - Delegated vs. Directed?
4. **Where are the assets?**
 - In addition to the trust, the trust property is held in an LLC in DAPT state.
 - **DAPT State LLC/LP Laws**: Alaska, Delaware, Nevada, South Dakota (Sole Remedy Charging Order Protection)
5. **Discretionary** trust **interest not a property right** – **Restatement 2nd**
 - DE (1 level), NV (2 levels) and SD (4 levels)
 - Alaska - None
6. **Location of Beneficiaries?**
7. **Location of Grantor?**



DAPT Fraudulent Conveyance Statutes:

- **2 Years**: Nevada, Hawaii &
South Dakota (2012 Legislation)
 - **South Dakota**: 3 years in 2011
- **3 Years**: Utah
- **4 Years**: Alaska, Delaware and all other
Self-Settled DAPT States

Please Note: All one year discovery except South Dakota (2012 Legislation)
& Nevada: Both 6 months



DAPT – Exception Creditor Statutes:

- **Torts:**
 - **Only problematic** in **Delaware** (not Alaska, Nevada, or South Dakota)
- **Divorcing Spouse - Property Settlement:**
 - **Alaska**- No problem, unless DAPT funded within 30 days of marriage or during marriage.
 - **Delaware** – No problem, if funded prior to marriage.
 - **Nevada** – silent.
 - **South Dakota** – No problem, if funded prior to marriage.
 - Many **courts award** divorcing spouse **marital property outside** of the trust to make up the deficiency.



DAPT – Exception Creditor Statutes (Cont'd):

- **Divorcing Spouse - Child Support & Alimony:**
 - **Delaware** and **South Dakota** have child support and alimony as exception creditors.
 - Both **Alaska** and **Nevada** are silent as to child support and alimony.
 - Many **litigators feel child support** and **alimony** are **difficult to avoid** and can upset the courts in resident states, if attempt to avoid.
 - **Courts** often **even up property** in **resident state** of **client**
 - **Delaware (One Level), Nevada (Two Levels), and South Dakota's (Four Levels) Key Asset Protection Statute** - “Discretionary Interest Not a Property Right”
 - **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



Discretionary Trusts:

- **Self Settled** (also Third Party Trusts)
- **Asset Protection Following Restatement Second and Common Law:**
 - Discretionary Interest in trust **is not:**
 - Rather a “mere expectancy”
 - Same with limited power of appointment and remainder interest
 - **Statutes** – South Dakota (4 Levels), Nevada (2 Levels), and Delaware (1 Level).
 - **Case Law:** Limited + Few States
- **Restatement Third** – Most Other States

[Please see “SB 98 Classification of Trusts” Merric Law Firm (Denver, CO) for more information www.internationalcounselor.com]



Asset Protection: LLC's and LP's

- “Sole Remedy Charging Order” [versus] “Judicial Foreclosure Sale”
- Sole Remedy Charging Order Statute States for both LLC's and LP's:

- Alaska*
- Arizona
- Delaware *
- Florida
- Nevada
- New Jersey * (LLC only)
- Oklahoma
- South Dakota *
- Texas
- Virginia
- Wyoming (LLC only)

*Also Murphy Case State

- Please See:
 - Mark Merric “Updated LLC Asset Protection Planning Table” *Steve Leimberg’s Asset Protection Newsletter*, January 23, 2012.
 - Mark Merric “Charging Order: What Does Sole or Exclusive Remedy Mean?” *Trusts & Estates Magazine*, April 2010.
 - Mark Merric “Forum Shopping for Favorable FLP and LLC Legislation” *Steve Leimberg’s Asset Protection Planning Newsletter*, August 8, 2007.



Sole Remedy Charging Order:

- **Only right to distribution** (when and if made)
 - Rather than allowing creditor to attach all rights of an LLC or LP Interest
- **No method to force a distribution**
 - No voting rights
- **Waiting game**
- **Sole and exclusive remedy** – No other legal or equitable remedies
- **Use two LLCs**
 - Rainy Day
 - Expenses, if needed



DAPT – Spendthrift Clause:

- Most all states have spendthrift clause protection for both self-settled and third party trusts:
 - Alaska
 - Delaware
 - Nevada
 - South Dakota

Please Note: Possible Exception Creditors



Miscellaneous DAPT Considerations:

- **Reimbursement of Attorney Fees:**
 - **DE** & **SD**: any prevailing party
 - If DAPT is sued and lawsuit unsuccessful, the trust is reimbursed for legal fees
 - **AK**: only if trust is void or set aside
 - **NV**: only to prevailing petitioner (petitioner must be beneficiary or trustee)
- **Privacy** – (National Trend is Public):
 - **AK**: Up to a court
 - **DE**: Up to a court (limited 3 years)
 - **NV**: Up to a court (not perpetual)
 - **SD**: Automatic seal in perpetuity



Miscellaneous DAPT Considerations (Cont'd)

- **Exclusive Jurisdiction** over DAPTs:
 - **Yes**: All
- **Automatic Removal** of **Trustees**:
 - **Yes**: Delaware & South Dakota
 - **No**: Alaska & Nevada
- **Protection** of **Advisors**:
 - **Yes**: All



DAPTs – Typically Tax Neutral:

- **Income Taxes**: Grantor Trust
 - Grantor pays taxes with Non-Trust Property
- **Gift Taxes**: Incomplete Gifts
 - Settlor holds Power of Appointment
- **Estate Taxes**: Included in Estate
- **Generation Skipping Taxes**: Not Applicable



Summary of Key DAPT Considerations:

DAPT State	Fraudulent Conveyance	Exception Creditors			Statutory Award – Attorney Fees to Trustees	Lawsuit Privacy	Discretionary Interest Not Property	LLC & LP Sole Remedy Charging Order	Special Purpose Entity
		Tort Preexisting Creditor	Divorcing Spouse	Alimony & Child support					
Alaska	4 Years	No	No Problem, unless DAPT set up within 30 days before marriage or after marriage	Silent	No (only if trust voided)	No Statute (left to courts)	No	Yes	-
Delaware	4 Years	Yes, Preexisting Torts (Problem)	No Problem, except if DAPT set up after marriage	Yes	Yes (any prevailing party)	Yes Statute but limited & 3 years	Yes (1 Level)	Yes	Yes
Nevada	2 Years	No	Silent	Silent	No (only prevailing petitioner)	No Statute (left to courts)	Yes (2 Level)	Yes	Yes
South Dakota	2 Years (2012) 3 Years (2011)	No	No Problem, except if DAPT set up after marriage	Yes (See Discretionary interest: not a property right)	Yes (any prevailing party)	Yes Statute – Perpetual Total Seal	Yes (4 Levels)	Yes	Yes (Statute)



Potential Challenges to DAPTs:

- **Fraudulent Conveyance**;
- **Exception Creditors**;
- **Situs Issues**;
- **Possible Constitutional issues**:
 - Full Faith & Credit Clause;
 - Due Process Clause;
 - Contract Clause;
 - Supremacy Clause;
- **Super Creditors**: Tax Claims, Security Claims & Environmental
 - **Source**: “Beware of Federal Super Creditors - Are Traditional Asset Protection Tools Bulletproof against federal claims?” by Mark Merric, Michael J. Bland & Mark Monasky, M.D., *Trusts and Estates Magazine*: July 2010
- **Bankruptcy**



Summary of 21st Century Family Estate Plan:

- ✓ Will/Revocable Living Trust
- ✓ Education Planning and Trusts
- ✓ Irrevocable Insurance Trust
- ✓ Private Foundation and Charitable Trusts
- ✓ Advanced Trust Planning – See Below:

Asset Protection:

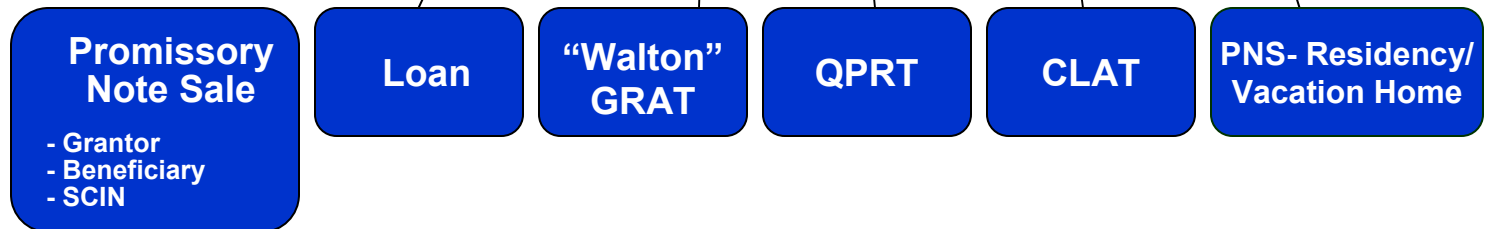
Domestic Asset Protection Trust

- ✓ Included in the estate
- ✓ Self-Settled – Grantor as a permissible beneficiary
- ✓ Grantor Trust for income tax purposes
- ✓ Typically transfer 10-40% of assets

Shifting Growth on Assets:

Dynasty Trust “Defective”

- ✓ Excluded from Estate
- ✓ Third Party (vs. Self-Settled)
- ✓ Grantor Trust for income tax purposes





Key Considerations for Dynasty Trusts as a Sister Trust to the DAPT:

- Generally always Excluded from the Estate – Utilizing the \$5 million Gift and GST Exemptions?
- Third Party vs. Self-Settled?
- Type of RAP Statute?
- No Trust State Income Tax?
- “Directed” Trust Re Administration?
- Trust Protector?
- Good State Trust Laws?
- Restatement 2nd “Discretionary Interest not a Property Right”
Asset Protection?
- Grantor Defective?
- “Discretionary” Distributions vs. “Mandatory” or “Support”?
- Single Pot vs. Separate Shares?



Self Settled Dynasty Trusts – Estate + Gift Tax Consequences?

(drafted to be either included or excluded from the estate):

- **Gift Taxes** – PLR 9837007 (Completed Gift)
 - IRS Refused to rule whether excluded from estate.
- **Estate Taxes** – PRL 200944002 (Estate Tax Certainty?)
 - Possible Issues - Two prong test:
 - 2036(a) – retain
 - possession or enjoyment of property
 - right to income
 - right to designate who shall possess on enjoy property
 - 2038 – Revocable transfers
 - Three Possibilities:
 - No withdrawals – Not included in estate
 - Periodic hardship withdrawals – Maybe not included in estate
 - Live off trust – Included in estate
 - **2036:** “Implied agreement can be inferred from circumstances”
- **Generation Skipping Taxes** – ETIP issue as a result of uncertainty regarding estate tax inclusion?



IRS PLR- 200944002

“We are specifically not ruling on whether Trustee’s discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust’s assets in Grantor’s gross estate for federal estate tax purposes under § 2036.”



Third Party Dynasty Trust:

- **Third Party vs. Self-Settled:**
 - **Self-Settled:** Gift Tax, Estate Tax and/or GST Issues?;
 - **Trust Protector** has **power** to **add** **Beneficiaries** (Grantor? Grantor Spouse?);
 - Use **Class** of **Grandparents'** descendents.



Factors Affecting Taxes on a Trust:

- Domicile of the Settlor
- The State in which the trust is created
- The Location of trust property
- The Domicile of the Beneficiaries
- The Domicile of the Trustees
- The Location of the Administration of the trusts



Three Basic Models for Subjecting Trusts to Income Tax:

- 1) Domicile of Person Creating Trust
- 2) Residence of Trustees
- 3) Place of Administration



Popular No Income Tax Dynasty Trust States:

- **Alaska***
- **Delaware*** (Exception: Tax on residents)
- **Nevada** (Not *Murphy* case state, term state)
- **New Hampshire*** (Exception: Dividends & Interest Tax on Residents)
- **South Dakota***
- **Wyoming** (Not *Murphy* case state, term state)

* *Murphy* Case state



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



Taxation Based Upon Domicile of Person Creating Trust (Con't):

- **IL, MN and PA** – Attempts to reach trust if settlor was resident when trust became Irrevocable (**PA**: or when trust was created)
- **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)

- 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.



Other Specific States:

- **California** – (Pro Rata Test) –
 - Trustees
 - Beneficiaries
 - Assets
- **Florida** – Intangibles Taxes Trust if:
 - Repeal effective 1/1/07 (left statute in place?)
 - For tax year 1/106 – 5 basis points or intangible assets
 - » \$250k exemption per person
 - » Specific asset exemptions: Florida Munis, retirement plans, life insurance, annuities
 - » FLINT Trust



Large Grantor Dynasty Trusts Utilizing the \$5 million Gift & GST Exemptions:

- Revenue Ruling 2004-64: Discretionary power of independent trustee to reimburse grantor for income taxes of grantor trust – will **not cause inclusion in estate**
 - Can't be **implied agreement**
 - Two Possible Issues:
 1. Allows grantor's **creditors** to get at reimbursable amount – if **not self-settled** state that protects such discretionary payments.
 2. Do Discretionary Tax Reimbursement clauses make the grantor a beneficiary of the trust?
 - If so, state law may allow **creditors to reach the trust**
[and]
grantor's gift to trust **incomplete gift** (included in estate)



Large Grantor Dynasty Trusts Utilizing the \$5 million Gift & GST Exemptions (Cont'd):

- **Solutions:**

1. **Specific State Statutes:** Alaska, Arizona, Delaware, Nevada, New York & South Dakota
2. Clause states – **reimbursement only** for **preceding tax year**
3. **Direct payment vs. reimbursement** – only taxing authority can get at it
4. **SCIN-** higher Section 1274 rates
5. **Spouse as beneficiary** of trust



State Premium Taxes:

- Planning
 - Irrevocable Trust
 - Revocable Trust w/Tax ID #
 - LLC
- Types of Policies Affected
 - Domestic Fixed and Variable Policies
 - Domestic Private Placement Life Insurance
- Retaliatory Provisions
- Versus Offshore – Now an even playing field

Please See: Al King & Pierce McDowell: “Trust Administration: The Domestic Advantage” *The PPLI Solution: Chapter 6*, Bloomberg Wealth Manager, February 2005.

Al King & Pierce McDowell: “Estate Planning and the State Premium Tax” *Advanced Underwriting Service*, February 2005.



Insurance Taxes:

1. U.S. Insurance Company / Off Shore Operation (953(d))
 - DAC Tax
 - No Premium Tax

2. International Insurance Company (non – 953(d))
 - 1% Fed Excise Tax
 - Have to Travel to Country

 - DAC Tax
 - Premium Tax (SD – 8 bpts.)

3. U.S. Company



Selected State Premium Taxes:

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.
Ohio	140 bpts.
Pennsylvania	200 bpts.
South Dakota	8 bpts. (Lowest)
Washington	200 bpts.
Wyoming	75 bpts.



State Premium Tax Planning with Non-South Dakota Trusts:

South Dakota LLC/FLP



New York GST Trust

- **Co-managing member South Dakota Entity**
- **Purchases Insurance**
- **8 basis point premium tax vs. New York 200 basis points, Delaware 200 basis points and Florida 175 basis points (Alaska – 10 basis points)**



Favorable Insurable Interest Statutes:

- Delaware
- California (Standard State Definition)
- Oklahoma
- South Dakota
- Texas (Best Definition – Can designate)
- Wisconsin



Regulatory Reform – Family Offices (FO's):

- Applies to Investment Advisors:
 - FO is considered investment advisor [if]
 - Compensated for advising regarding value of securities [or]
 - The advisability of investing, purchasing or selling securities.
- Private Advisors Exemption – Fewer than 15 clients (past 12 months)
 - Wall Street Reform and Consumer Protection Act (Signed by President 7/21/10)
removes “fewer than 15 clients” exemption
 - Requires investment advisors with \$150MM or more to register with the SEC
 - Includes FO's
 - FO's – Are not defined, but left to SEC interpretation
 - Act directed SEC to adopt definition consistent with previous policy.



New SEC Family Office Definition - 6/22/2011:

Under the new S.E.C. exemption a family office may not have to register if it:

- Provides advice about securities only to “family clients”;
 - Family Clients Defined: Family members (including ex-spouses), key family office employees, family office charities, estates, trusts and companies.
- Is completely owned by family clients;
- Is exclusively controlled by family members or family entities;
- Does not hold itself out to the public as an investment advisor; or
- Does not serve multiple families.

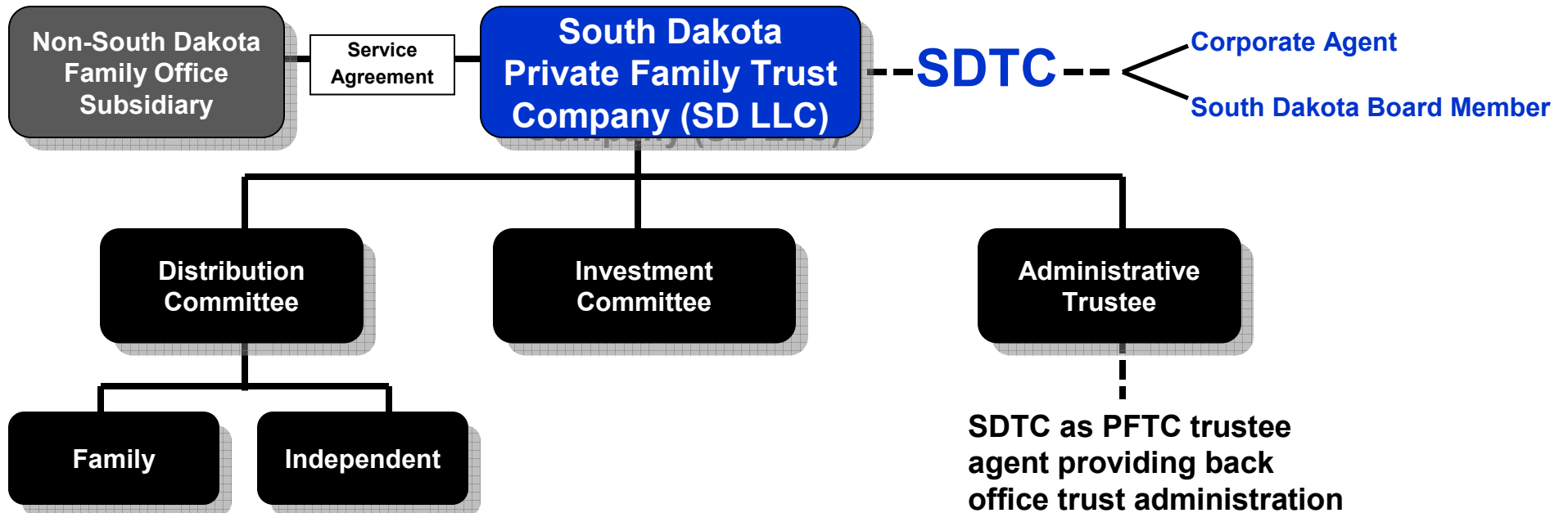


Regulatory Reform – Family Offices (FO's) Cont'd:

- **Main exception to FO SEC Registration – Regulated Private Trust Company (PTC):**
 - **Regulated** by a **State Division of Banking** vs. SEC
 - **State's level of regulation** needs to satisfy SEC
- **Most Popular PTC States:**
 - Nevada (previously all unregulated, now regulated?), New Hampshire (new- mostly regulated), South Dakota (regulated – Industry leader), Wyoming (traditionally unregulated)
- **All PTC states differ re:**
 - Division of Banking audit **experience, history and desire to audit** FO PTCs
 - Crucial for SEC exemption purposes
 - Many states favor commercial entities, since FO PTCs are viewed as competition for commercial trust companies and banks (i.e., Delaware, Nevada in the past (present & future?))
 - **State Banking Accreditation** (New Hampshire and Nevada not accredited)
 - Supplemental **trust**, **asset protection**, and **tax statutes**, etc.



Example: Typical Modern PFTC – Promoting Flexibility and Control:



Step 1: Form a SD LLC and apply to SD Banking Commission to be a PFTC

- Need office in South Dakota, one SD Board Member, and a SD Corporate Agent – SDTC sits on the board and serves the role as corporate agent i.e. providing office space to PFTC, collecting mail and answering the phone.

Step 2: South Dakota PFTC leases services from FO in another state.

Step 3: Trust administration can be done in South Dakota to benefit from South Dakota's favorable trust laws by hiring SDTC as trustee agent for PFTC [or] administration can be done in another state (interstate administration allowed) by family office and its advisors. The latter will not garner the benefits of South Dakota trust and tax laws.



Key Advantages to a Regulated Private Family Trust Company (PFTC):

- **Exemption from SEC registration**, since the PFTC is audited by banking division within the PFTC state;
- **Liability protection**, family acts as trustee with a LLC/PFTC entity owned by family with directors and officers insurance protection versus family members serving individually as trustees with personal liability;
- **Planning opportunities for deducting investment fees** (in light the *Knight* case, a decision by the U.S. Supreme Court);
- Resolution of **successor trustee issues**;
- **Convenience** and **accessibility**;



Key Advantages to a Regulated Private Family Trust Company (PFTC) (Cont'd):

- **Improved family governance** with LLC/PFTC structure;
- Enhanced ability to properly **administer and operate illiquid family assets** in trust (i.e. LLCs, FLPs, real estate, oil and gas, etc.);
- Allows for holding **large concentrations of stock on any asset class** and provides extensive flexibility with asset allocations;
- Ability to establish **SEC exempt business trusts** and **common trusts funds** as an alternative to collective investment vehicles/partnerships, which are generally required to register with the SEC and limited to 99 investors;
- **Privacy**;
- **IRS ruled** if properly established, the PFTC will not be subject to estate tax inclusion (I.R.S. Notice 2008-63).
 - **Prior Private Letter Rulings** (IRS – No longer issuing PLRs): Three Key PRLs – PLR 200546055, PLR 200548035, PLR20053003



South Dakota “Purpose Trust” Statute:

- **Definition:**
 - Trust that exists for stated (non-charitable) purpose:
 - Established to care for “something” rather than “someone”
- **Trust Enforcer:**
 - Appointed to ensure the trustees carrying out their obligations in fulfilling the trust’s purpose
- **Examples:**
 - Pet Care
 - Maintain Family Property – Antique cars, homes
 - Sustain Family Business
 - Private Family Trust Company
- **Statutes:**
 - Delaware and South Dakota (perpetual)
 - Alaska and Nevada (pets only)
 - New Hampshire



U.S. Situs Trusts For International Clients

- **NRA Dynasty Trust**
 - Parents and/or Grandparents – Foreign Citizens (no ties to U.S.)
 - Children and/or Grandchildren – U.S. Citizens or Green card holders
 - Unlimited Gifting to South Dakota trust w/o gift, estate and/or generation skipping taxes
 - No state income tax, if trust is in a no income tax state for trusts
 - No federal taxes, if trust invests in life insurance
- **Pre-immigration Planning with Self Settled Trusts**
- **Foreign Grantor Trust**
 - Domestic trust for foreign citizens holding offshore assets
 - No U.S. tax, no black listing
- **Standby –Dynasty Trust for U.S. citizen or Green card Beneficiary with inheritance from foreign parent or grandparent**
 - Avoids accumulated earnings tax and burdensome tax reporting
- **Foreign Law Trust administered in the U.S.**
- **Second Residence/Vacation Home**: Alternatives to foreign corporation: NRA Dynasty Trust and Special Purpose Trusts
- **Key State Statutes**: Reformation/Modification, “Directed”, Forced Hardship and Privacy.



Selected “Directed” Trust States

(Popular Dynasty Trust States Four/Five Checks and Possibly a *):

	Dynasty	Trust Protector	DAPT	No Income Tax	Discretionary Interest and Powers of Appointment Not a Property Right
Alaska	✓*	✓	✓	✓	
Arizona	✓	✓			
Colorado	1000 Years		✓		
Delaware	✓*	✓	✓	✓	✓ (One Level)
Florida	360 Years			✓	
Nevada	365 Years	✓	✓	✓	✓ (Two Levels)
New Hampshire	✓*	✓	✓	✓	
Ohio	✓		✓		
South Dakota	✓*	✓	✓	✓	✓ (4 Levels – Max)
Tennessee	360 Years		✓		
Washington	150 Years			✓	
Wyoming	1000 Years	✓	✓	✓	

***Murphy Case RAP State (IRS acquiesced in Unlimited Duration RAP)**

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Domestic Trust Situs Comparison Summary:

As of 3/2012

	Alaska	Arizona	Delaware	New Hampshire	Nevada	South Dakota	Wyoming
Ranking*	#3 (2007), #1 many categories (2010/2012)	Not Ranked (2007; 2010; 2012)	#2 (2007), #1 many categories (2010/2012)	#3 (2007), Honorable Mention (2010), Rated #5 (2012)	#9 (2007), #1 many categories (2010/2012)	#1 (2007), #1 all categories (2010/2012)	#9 (2007), Honorable Mention (2010/2012)
RAP	Unlimited; Partially Follows <u>Murphy</u> Case -1000 year limit with LPA	Unlimited; Opt-Out Method	Unlimited; Partially Follows <u>Murphy</u> Case	Unlimited; Follows <u>Murphy</u> Case Post 1986	365 years; "Timing" Only (Problematic?)	Unlimited; Follows <u>Murphy</u> Case and pre-1986	1000 Years; "Timing" Only (Problematic?)
Directed Trust Statute	Yes (Hybrid Statute)	Yes	Yes	Yes	Yes (New)	Yes	Yes
Trust Protector Statute	Yes	Yes	Yes	Yes	Yes (New)	Yes	Yes
Modification/ Reformation/ Decanting Statutes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Virtual Representation	Yes	Yes	Yes	No	Yes	Yes	Yes
Unregulated Entities allowed for Committees and Protectors	Yes?	No	Yes	No	Yes	Yes (statute)	Yes
Non-Charitable Purpose Trust Statute	Yes (Pets Only)	Yes	Yes (Perpetual)	Yes	Yes (Pets Only)	Yes (Perpetual) Broadest Statute	Yes
Self-Settled Statutes	Yes	No	Yes	Yes	Yes	Yes	Yes
Waiver of Beneficiary Notice (Optional Notice of Trust/Trust Assets)	Yes, during the life of settlor or until incapacity	Yes	Yes	Yes	Silent	Yes	Yes
Fraudulent Conveyance Period	4 Years	N/A	4 Years	4 Years	2 Years	2 Years (2012) 3 Years (2011)	4 Years
Sole Remedy Charging Order: both LLC/LP	Yes	Yes	Yes	No	Yes	Yes	Only LLC
Discretionary Trusts – Not Property Interest	No	No	Yes (1 Level)	No	Yes (2 Levels)	Yes (4 levels)	No
State Income Tax	No	Yes	No: non-resident Yes: resident	No	No	No	No
State Insurance Premium Tax	10 basis points	200 basis points	200 basis points	125 basis points	350 basis points	8 basis points	75 basis points
Privacy	Open (Courts Option)	Open	Seal 3 years, Then Open	Open	Open (Courts Option)	Total Seal Forever (Statute)	Open
Private Family Trust Companies	Yes	No	Yes, But Favor Commercial	Yes, Regulated (New)	Yes, Previously Unregulated Unless Commercial New Regulated?	Yes – Excellent Statutes and Extensive Experience, Regulated - Families	Mainly Unregulated
Accredited State Banking Department**	Yes	Yes	Yes	No	No	Yes	Yes

Please See: "Perpetual Trust States: The Latest Rankings" by Dan Worthington, *Trusts & Estates: January 2007*), "Which Situs is Best?" by Dan Worthington & Mark Merric, *Trusts & Estates: January 2010*. "Which Trust Situs is Best in 2012?" by Dan Worthington and Mark Merric, *Trusts & Estates: January 2012*;

** - Conference of State Banking Supervisors (CSBS)



Example: Typical South Dakota Non-Resident Estate Plan:

- ✓ Will/Revocable Living Trust
- ✓ Education Planning
- ✓ Irrevocable Insurance Trust
- ✓ Private Foundation
- ✓ Advanced Trust Planning – See Below:

Asset Protection:

South Dakota Self-Settled Trust

- ✓ Included in the estate
- ✓ Self-Settled – Grantor as a permissible beneficiary
- ✓ Grantor Trust for income tax purposes
- ✓ Typically transfer 10-40% of assets

Preserve Key Assets:

South Dakota Purpose Trust

- ✓ Pets
- ✓ Key Family Assets
- ✓ Private Family Trust Company

Sale of Appreciated Assets:

South Dakota Charitable Remainder Trust

- ✓ Sale of appreciated property without immediate income or capital gains taxes
- ✓ Income tax deduction
- ✓ Estate tax reduction
- ✓ Income to Donor and family
- ✓ Beneficiary: Fund Private Foundation or provide for charity directly
- ✓ Hedges the CLAT

Education Planning:

South Dakota HEET Trust

- ✓ Education planning for children, grandchildren and other descendants in perpetuity
- ✓ Without using GST Exemption

Shifting Growth on Assets:

South Dakota Dynasty Trust “Defective”

- ✓ Excluded from Estate
- ✓ Third Party
- ✓ Grantor Trust

Promissory Note Sale
- Grantor
- Beneficiary
- SCIN

Loan

“Walton”
GRAT

QPRT

CLAT

PNS- Residence/
Vacation Home





Contact Information:

South Dakota Office

South Dakota Trust Company LLC
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(Fax) 605 274-9200
piercemcdowell@sdtrustco.com

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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

IRS Circular 230 Disclaimer:

To ensure compliance with requirements imposed by the IRS, please note that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code; or (ii) promoting, marketing or recommending to another party any transaction or tax-related matter addressed herein.



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)
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 and Estates Magazine*. He has been a member of the Editorial Board for 18 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 the NAEPC and the NAEPC Foundation. 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)

Co-Chairmen 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 Solomon 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)



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

Co-Chairmen and Co-Chief Executive Officer

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 [Trust & 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?"