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A Comparison of the Leading Trust Jurisdictions

by Jocelyn Margolin Borowsky, Esq.

Duane Morris LLP

Philadelphia, Pennsylvania and Wilmington, Delaware

and Richard W. Nenno, Esq.

Wilmington Trust Company

Wilmington, Delaware*

INTRODUCTION

Choosing an appropriate jurisdiction for a client's trusts is a critical part of the estate planning process. In a January 2012 article, two commentators, one of whom has South Dakota ties, identified the five leading personal trust jurisdictions as follows:¹

In our view, the top four jurisdictions for 2012 (listed by the year they adopted their

perpetuities legislation) remain South Dakota, Delaware, Alaska and Nevada. We believe that New Hampshire is likely the fifth best jurisdiction because of its recent efforts to improve its trust laws.

In the rest of this article, we will compare Delaware's trust laws to those of Alaska, Nevada, New Hampshire, and South Dakota. To assist with the comparison, we have prepared the following appendixes:

- Appendix A — A comparison of the Alaska, Delaware, Nevada, New Hampshire, and South Dakota trust infrastructures
- Appendix B — A comparison of the Alaska, Delaware, Nevada, New Hampshire, and South Dakota trust laws
- Appendix C — A comparison of the Alaska, Delaware, Nevada, New Hampshire, and South Dakota asset protection trust statutes

This article makes the case for Delaware. We acknowledge our Delaware bias, though, and therefore provide citations to enable readers to make their own assessments.

ALASKA VS. DELAWARE

Infrastructure

Delaware's trust infrastructure is superior to Alaska's. Some of the differences include:

1. Delaware has been trust-friendly since early in the 20th century; Alaska has been since 1997;

2. In an August 2011 *Barron's* article, Delaware placed in the top tier of states for financial soundness

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¹ Worthington & Merric, "Which Situs is Best in 2012?" 151 *Tr. & Est.* 51, 51 (Jan. 2012) (footnotes omitted). In a February 2012 article, a commentator, who practices in New Hampshire, lists the above five states and Wyoming as the most progressive trust jurisdictions (McDonald, "Emerging Directed Trust Company Model," 151 *Tr. & Est.* 49, 51 (Feb. 2012)).

(states 1–12); Alaska placed in the second tier (states 13–27);²

3. In surveys conducted by Harris Interactive, Inc., for the U.S. Chamber of Commerce Institute for Legal Reform for 2002–2008 and 2010 (all years for which the study was conducted), Delaware’s liability system was ranked as the best in the country each time; Alaska’s ranged between 21st and 43rd;³

4. In the most recent such survey — for 2010, Delaware’s liability system was ranked 1st; Alaska’s was ranked 33rd;⁴

5. Over 40 million people live within 150 miles of Wilmington, Delaware (a region from which Delaware may recruit talent for its trust business); only about 450,000 people live within that distance of Anchorage, Alaska;⁵ and

6. As of February 2011, 53 institutions conducted trust business in Delaware;⁶ only five did in Alaska.⁷

Delaware’s favorable personal trust structure has withstood the test of time. Given that Alaska’s first beneficial trust laws were enacted only in 1997, time will tell whether its efforts to attract trust business will continue. Even Alaska practitioners concede that the Alaska bankruptcy judge’s analysis in the *In re Mortensen*⁸ case is seriously deficient.⁹

Trust Laws Generally

Introduction

As shown in Appendix B, both Alaska and Delaware have attractive trust laws.

Advantages of Alaska

In our view, Alaska offers no significant advantages.

Advantages of Delaware

a. Unlike in Delaware, an Alaska statute¹⁰ provides that a future interest or trust is void if the power of alienation is suspended for more than 30 years after specified dates, which might be of concern to clients who want a family company to remain private;

b. Unlike Delaware,¹¹ Alaska has not abolished the rule against accumulations, which is a potential problem for clients wishing to create perpetual trusts;

c. Unlike Delaware,¹² Alaska has not enacted a statute that protects trustees from liability for following the directions of advisers, protectors, and committees, which reduces trustee fees and promotes the efficient operation of directed trusts;

d. Unlike Delaware,¹³ Alaska does not have a statute that addresses the ability of creditors to reach interests in third-party discretionary trusts which do not have spendthrift clauses,¹⁴ an issue that is important since the issuance of the Third Restatement of Trusts;¹⁵

e. Unlike Delaware’s,¹⁶ Alaska’s statute¹⁷ for converting income trusts into total-return unitrusts might not satisfy the safe harbor in the Treasury Department’s regulations for such conversions because a court may go outside 3%–5%;

f. Unlike Delaware,¹⁸ Alaska allows trustors to create new unitrusts only for retained interests in asset protection trusts (“APTs”) and that provision might not satisfy the above safe harbor because a trust may set a payout below 3% or above 5%;¹⁹

g. Unlike Delaware,²⁰ which has a statute that permits testators and trustors to establish perpetual non-charitable purpose trusts, Alaska’s statute²¹ limits the duration of such trusts to 21 years; and

h. Unlike Delaware,²² Alaska does not have a statute that gives the trustee of an irrevocable life-insurance trust (“ILIT”) an insurable interest.

Although some commentators suggest that Delaware’s approach to the creation of perpetual trusts

² Laing, “Good, Bad and Ugly: *Barron’s* Looks at the State of the States,” *Barron’s*, Aug. 29, 2011, available at <http://online.barrons.com/article/SB50001424052702303545104576524533718027022.html>.

³ See Appendix A, below.

⁴ See *id.*

⁵ See *id.*

⁶ To view a list of most of those institutions, go to <http://banking.delaware.gov/reports/financialinstitutions/DEFInstitutions.pdf> (last visited June 12, 2012).

⁷ Based on data in “The Best States for Trusts,” available at <http://thetrustadvisor.com/news/states2011> (Feb. 2011) (last visited July 3, 2012).

⁸ *In re Mortensen*, 2011 WL 5025288 (Bankr. D. Alaska 2011); *In re Mortensen*, 2011 WL 5025249 (Bankr. D. Alaska 2011); *In re Mortensen*, 2011 WL 5025252 (Bankr. D. Alaska 2011).

⁹ See Shaftel, “Court Finds Fraudulent Transfer to Alaska Asset Protection Trust,” 39 *Est. Plan.* 15, 18–21 (Apr. 2012).

¹⁰ See Alaska Stat. §34.27.100.

¹¹ See 25 Del. C. §506.

¹² See 12 Del. C. §3313(b).

¹³ See *id.* §3315.

¹⁴ See Alaska Stat. §34.40.110(m).

¹⁵ See, e.g., *Tannen v. Tannen*, 3 A.3d 1229, 1242 (N.J. Super. Ct. App. Div. 2010), *aff’d*, 31 A.3d 621 (N.J. 2011).

¹⁶ See 12 Del. C. §61-106.

¹⁷ See Alaska Stat. §§13.38.300–13.38.410.

¹⁸ See 12 Del. C. §61-107.

¹⁹ See Alaska Stat. §34.40.110(b)(3)(B).

²⁰ See 12 Del. C. §3556; 25 Del. C. §503(a).

²¹ See Alaska Stat. §13.12.907.

²² See 18 Del. C. §2704(c)(5).

presents problems under the Delaware tax trap,²³ a 2012 article, written by commentators with no affiliation to Alaska or Delaware, contends that Delaware's approach is superior to Alaska's: "Delaware, New Hampshire and South Dakota are the strongest of the truly perpetual jurisdictions. Alaska also is a very strong contender, but has a 1,000 year power of appointment (POA) statute."²⁴

APTs

Introduction

Much has been written about the Alaska and Delaware APT statutes since they were enacted in 1997. Each state has potential advantages over the other.

Advantages of Alaska

a. Unlike the Delaware APT statute ("Delaware Act"),²⁵ the Alaska APT statute ("Alaska Act")²⁶ does not permit a creditor to set aside an APT based on constructive fraud (i.e., if the trustor was engaged or was about to engage in a business or transaction for which the trustor's remaining assets were unreasonably small or intended to incur, or believed or reasonably should have believed that the trustor would incur, debts beyond the trustor's ability to pay as they became due).²⁷ A commentator explains that this difference probably is not significant for the following reasons:²⁸

The distinction between the Alaska and Delaware remedies is potentially significant, but probably only in a handful of cases, particularly if good planning is followed. Many instances of constructive fraud are also cases of actual fraud: transfers that result in insolvency and which also lack an exchange of reasonably equivalent value are often exchanges that were meant to hinder, delay, or defraud creditors. Indeed, insolvency or lack of reasonably equivalent value are often signs of fraudulent

intent, thus showing the potential for considerable overlap between the two species of fraud. When overlap occurs, the adverse economic effects associated with constructive fraud often arise by design. Thus, the distinction between Alaska and Delaware is limited to only the remaining cases of constructive fraud, i.e., those cases that are not also instances of actual fraud. Fortunately, transferors can avoid constructive fraud if they do not render themselves insolvent or if they receive reasonably equivalent value in exchange for property. Note, however, that reasonably equivalent value exists only if the interest received in exchange for the transferred property has utility or value to the transferor's creditors. Since the purpose of a qualified disposition is to put assets beyond the reach of creditors, it is highly unlikely that a settlor's retained interest in a Delaware trust will count as reasonably equivalent value. This means the settlor of a qualified disposition must remain solvent in order to avoid constructive fraud. This, however, is something the settlor of an Alaska trust should also strive for, as staying solvent will avoid an inference of fraudulent intent under Alaska law whereas post-transfer insolvency would jeopardize the safety of an Alaska structure. Thus, this difference between the Alaska and Delaware statutes is really more theoretical than practical.

b. The Alaska Act has a limited exception for spousal claims — unless otherwise agreed, an Alaska APT created after marriage or within 30 days before marriage (unless the trustor gives notice) is subject to division in an Alaska divorce proceeding.²⁹ The Delaware Act permits a person, who was married to the trustor at or before the time that the trust was created,³⁰ to reach the assets of a Delaware APT in certain circumstances.³¹ This Alaska advantage might not be as great as first appears, however, because the surviving spouse of a nonresident trustor of an Alaska³² (but not a Delaware)³³ APT might be able to reach trust assets if he or she elects against the trustor's will.

c. With respect to claims by minor children, an Alaska APT is defeated only if the trustor was 30 or more days behind in making child support payments

²³ See Spica, "A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute is Too Clever by Half (of Infinity)," 43 *Real Prop., Tr. & Est. L.J.* 673 (Winter 2009); Greer, "The Alaska Dynasty Trust," 18 *Alaska L. Rev.* 253, 276 (Dec. 2001).

²⁴ Worthington & Merric, "Which Situs is Best in 2012?" 151 *Tr. & Est.* 51, 53 (Jan. 2012) (footnote omitted). Accord Culp & Bennett, "Use of Trust Decanting to Extend the Term of Irrevocable Trusts," 37 *Est. Plan.* 3, 11–12 (June 2010).

²⁵ 12 Del. C. §§3570–3576.

²⁶ Alaska Stat. §34.40.110.

²⁷ See 12 Del. C. §3572(a); 6 Del. C. §1304(a)(2).

²⁸ Sullivan, III, "Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes With Offshore Trusts," 23 *Del. J. Corp. L.* 423, 455 n.83 (1998) (citations omitted).

²⁹ See Alaska Stat. §34.40.110(1).

³⁰ See 12 Del. C. §3570(9).

³¹ See *id.* §3573(1).

³² See Alaska Stat. §13.12.202(d).

³³ See 12 Del. C. §3573, flush language at end.

when he or she created the trust,³⁴ whereas such a claim may be brought against a Delaware APT at any time.³⁵ Federal legislation and state court decisions might override Alaska's narrow exception for family claims. Thus, a federal statute not only requires states to give full faith and credit to child support orders, but it also requires application of the limitations period of the forum state or the state that issued the support order, whichever is longer.³⁶ In addition, from a policy standpoint, the claims of spouses and children may be held enforceable against self-settled trusts.

d. Unlike Alaska, Delaware permits a person who has a tort claim against the trustor when the trustor creates a Delaware APT to reach the assets of the trust at any time.³⁷ Nevertheless, creditors availing themselves of this exception in Delaware's law almost certainly will pursue their claims within the time limits imposed by the Alaska³⁸ and Delaware Acts³⁹ for pre-existing claims (i.e., within four years after the trust was created or, if later, within one year after the creditor discovered (or should have discovered) the trust).

e. To reach the assets of an Alaska APT, a creditor whose claim existed when the trust was created must take steps to validate the claim⁴⁰ and must show by clear and convincing evidence that creation of the trust was intended to defraud (not to hinder or to delay) a creditor.⁴¹

Advantages of Delaware

a. It might be harder to establish that the creation of an APT was a fraudulent transfer in Delaware, which has adopted the Uniform Fraudulent Transfer Act ("UFTA"),⁴² than in Alaska, which has not adopted it.⁴³ In particular, commentators criticize Alaska's failure to define "creditor" for fraudulent-transfer purposes as follows:⁴⁴

Unlike the two uniform laws, the Alaska law makes no attempt to define the term "creditor," leaving the class of plaintiffs as broad as the courts wish to make it, potentially including unknown future creditors, a class of creditors that neither the UFCA nor the UFTA includes in its definition of "creditor."

b. One serious concern about the effectiveness of a domestic APT is that a court that has jurisdiction over the trustee or trust assets will decide that its law governs the trust or the effectiveness of the trust's spendthrift provision. The Delaware Act⁴⁵ (but not the Alaska Act) provides that the trustee of an APT automatically will cease to serve if a court makes such a determination.

c. A Delaware APT gives the trustor two additional distribution options. First, a trustor may obtain creditor protection if he or she creates a grantor retained income trust ("GRIT") or a trust from which he or she receives current income that meets the requirements of the Delaware Act.⁴⁶ Second, the trustor of a Delaware APT may provide for the payment of debts, expenses, and taxes from the trust after his or her death.⁴⁷ This latter option might be particularly helpful when the trustor structures the APT as an incomplete gift and the APT's value appreciates relative to the size of the trustor's gross estate.

d. The surviving spouse of a nonresident trustor of an Alaska APT might be able to reach trust assets if he or she elects against the will,⁴⁸ but the surviving spouse of a resident or nonresident trustor of a Delaware APT may not do so.⁴⁹

e. Delaware law gives protection from creditor claims to distributions made from a Delaware APT into an account at a Delaware financial institution⁵⁰ and to tenancy-by-the-entireties personal property contributed to such a trust.⁵¹

In the 2011 *In re Mortensen* case,⁵² which had bad facts for the debtor, a federal bankruptcy judge in Alaska set aside a transfer of real property to an Alaska APT as a fraudulent transfer. A comparable case has not yet arisen in Delaware.

NEVADA VS. DELAWARE

Infrastructure

Delaware's trust infrastructure is far superior to Nevada's. Some of the differences include:

1. Delaware has been trust-friendly since early in the 20th century; Nevada has been since 1999;

³⁴ See Alaska Stat. §34.40.110(b)(4).

³⁵ See 12 Del. C. §3573(1).

³⁶ See 28 USC §1738B(a), (h)(3).

³⁷ See 12 Del. C. §3573(2).

³⁸ See Alaska Stat. §34.40.110(d)(1).

³⁹ See 12 Del. C. §3572(b)(1); 6 Del. C. §1309.

⁴⁰ See Alaska Stat. §34.40.110(d)(1)(B).

⁴¹ See *id.* §34.40.110(b)(1).

⁴² See 6 Del. C. §§1301–1311.

⁴³ See Alaska Stat. §§34.40.090, 34.40.010.

⁴⁴ Osborne, Giordani & Catterall, "Asset Protection and Jurisdiction Selection," 33 *U. Miami Inst. on Est. Plan.* ¶1404.7B1 at 14-29–14-30 (1999).

⁴⁵ See 12 Del. C. §3572(g).

⁴⁶ See *id.* §3570(11)(b)(3).

⁴⁷ See *id.* §3570(11)(b)(10).

⁴⁸ See Alaska Stat. §13.12.202(d).

⁴⁹ See 12 Del. C. §3573, flush language at end.

⁵⁰ See 10 Del. C. §3502(b).

⁵¹ See 12 Del. C. §3574(f).

⁵² *In re Mortensen*, 2011 WL 5025288 (Bankr. D. Alaska 2011); *In re Mortensen*, 2011 WL 5025249 (Bankr. D. Alaska 2011); *In re Mortensen*, 2011 WL 5025252 (Bankr. D. Alaska 2011).

2. In an August 2011 *Barron's* article, Delaware placed in the top tier of states for financial soundness (states 1–12); Nevada placed in the third tier (states 28–48);⁵³

3. In surveys conducted by Harris Interactive, Inc., for the U.S. Chamber of Commerce Institute for Legal Reform for 2002–2008 and 2010 (all years for which the study was conducted), Delaware's liability system was ranked as the best in the country each time; Nevada's ranged between 28th and 40th;⁵⁴

4. In the most recent such survey — for 2010, Delaware's liability system was ranked 1st; Nevada's was ranked 28th;⁵⁵

5. Over 40 million people live within 150 miles of Wilmington, Delaware (a region from which Delaware may recruit talent for its trust business); only about 2,500,000 people live within that distance of Las Vegas, Nevada;⁵⁶ and

6. As of February 2011, 53 institutions conducted trust business in Delaware;⁵⁷ only 18 did in Nevada.⁵⁸

Delaware has maintained a trust-friendly climate for over a century. Given that Nevada's efforts to attract trust business only began in 1999, time will tell whether these efforts will continue. In an ominous sign, it has been reported that Nevada soon will consider enacting a margin or income tax to help alleviate the state's serious financial crisis.⁵⁹

Moreover, Delaware has state-of-the-art trust laws, which it refines almost every year. Because the Nevada legislature ordinarily meets only in odd years, Nevada cannot enact badly needed legislation in 2012 and other even years unless a special legislative session is convened. In addition, Nevada has not passed certain key provisions until long after its competitors. For example, it did not enact a directed trustee or de-

⁵³ Laing, "Good, Bad and Ugly: *Barron's* Looks at the State of the States," *Barron's*, Aug. 29, 2011, available at <http://online.barrons.com/article/SB50001424052702303545104576524533718027022.html>.

⁵⁴ See Appendix A, below.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ To view a list of most of those institutions, go to <http://banking.delaware.gov/reports/financialinstitutions/DEFInstitutions.pdf> (last visited July 3, 2012).

⁵⁸ Based on data in "The Best States for Trusts," available at <http://thetrustadvisor.com/news/states2011> (Feb. 2011) (last visited July 3, 2012).

⁵⁹ See "Nevada AFL-CIO Files Business Margin Tax Initiative," 2012 STT 110-23 (June 6, 2012); "Nevada AFL-CIO Drafting Language for Margin Tax Initiative," 2011 STT 251-13 (Dec. 30, 2011).

canting statute until 2009,⁶⁰ and it did not pass crucial updates to its APT statute until 2009 and even 2011.⁶¹

Trust Laws Generally

Introduction

Nevada's 365-year rule against perpetuities law probably is invalid.⁶² This is so because the Nevada Constitution continues to contain the following prohibition: "No perpetuities shall be allowed except for eleemosynary purposes."⁶³

In 2002, Nevada voters defeated a ballot proposal to repeal the above provision. Given that 365 years is much longer than the common law rule that applied almost everywhere when the constitutional prohibition was enacted, the Nevada statute certainly is open to constitutional attack. Although such an attack might be unsuccessful, the safer course is to establish long-term trusts in a state where there is no such uncertainty.

Advantages of Nevada

In our view, Nevada offers the following advantages:

a. Nevada allows trustors (but not testators) to create electronic trusts,⁶⁴ but Delaware does not have a comparable provision.

b. Unlike Delaware,⁶⁵ Nevada permits trustees to exercise a decanting power over income as well as principal.⁶⁶

Advantages of Delaware

To our knowledge, Delaware offers the following advantages:

a. As discussed above, Nevada's 365-year perpetuities period for trusts probably is invalid;

b. Unlike Delaware,⁶⁷ Nevada permits trustors to create new unitrusts only as APTs and that provision might not satisfy the Treasury Department's safe harbor because a trust may set the distribution amount below 3% or above 5%;⁶⁸

⁶⁰ See 2009 Nev. Stat. 215, §§20–35 (directed trustee); 2009 Nev. Stat. 215, §37 (decanting).

⁶¹ See 2009 Nev. Stat. 215, §§58–60; 2011 Nev. Stat. 270, §§201–206.

⁶² See Nev. Rev. Stat. §111.1031.

⁶³ Nev. Const. Art. 15, §4.

⁶⁴ See Nev. Rev. Stat. §163.0095.

⁶⁵ See 12 Del. C. §3528.

⁶⁶ See Nev. Rev. Stat. §163.556.

⁶⁷ See 12 Del. C. §61-107.

⁶⁸ See Nev. Rev. Stat. §166.040(2)(d)(1).

c. Unlike Delaware,⁶⁹ Nevada does not have a statute that allows testators and trustors to establish perpetual noncharitable purpose trusts.

APTs

Introduction

A chart titled “3rd Annual Domestic Asset Protection Trust State Rankings Chart” is posted on the website of a Las Vegas law firm.⁷⁰ The chart’s second entry is titled “2010 *Forbes* Letter Grade,” and the caption for the link to the *Forbes* article in question on the firm’s homepage is “*Forbes* Magazine grades asset protection trust states from A+ to D; Nevada only state with A+!”⁷¹ The chart entry and the link caption are misleading because they suggest that *Forbes* ranked the domestic APT states. When one goes to the *Forbes* article,⁷² though, it turns out that a member of the law firm did the ranking.⁷³

The chart referenced above ranks the domestic APT states using five factors — state income tax, statute of limitations (future creditor), statute of limitations (preexisting creditor), spouse/child support exception creditors, and preexisting torts/other exception creditors. If we were to assemble our own set of criteria for evaluating domestic APT statutes, we easily could come up with a framework (that would include a state’s financial soundness and the quality of its judiciary and take account of the huge exception in Nevada law described below) under which Delaware would be ranked first and Nevada would appear far down the list. Furthermore, the supposed Nevada advantages either are more apparent than real or do not exist at all.

Advantages of Nevada

The Nevada APT law (“Nevada Act”) supposedly has the following advantages:

a. The limitations periods for bringing actions to contest APTs are half as long under the Nevada Act as under the Delaware Act. Specifically, Nevada requires present creditors to sue within two years of a transfer or six months after the date on which a transfer was discovered or reasonably should have been discovered, whichever is later, while future creditors must

sue within two years of a transfer.⁷⁴ Delaware’s time spans are double that (four years/one year for present creditors, four years for future creditors).⁷⁵ Thus, the difference is the “added time” available to plaintiffs under Delaware law. This “advantage” is more apparent than real for the following reasons:

(1) Given that the determination as to whether the creation of an APT is a fraudulent transfer is made as of the time the trust was created and not when a creditor brings a challenge, the statute of limitations really does not matter. If an APT is properly constructed at the outset, then a creditor will lose no matter when he or she brings suit.

(2) If a trustor really is concerned about statutes of limitations, he or she will not go to Nevada. Instead, he or she will go to an offshore jurisdiction where limitations periods are even shorter and claims are harder to prove.

(3) Nevada’s limitations periods will not apply if the debtor ends up in bankruptcy.⁷⁶

b. Unlike the Delaware Act,⁷⁷ the Nevada Act contains no express exception for claims by spouses, former spouses, and minor children related to separation or divorce proceedings. It should be noted, however, that Delaware’s exception for spousal claims is far narrower than might appear because Delaware’s definitions limit who may claim as a spouse and then further limit the rights of spouses.⁷⁸ Moreover, this Nevada “advantage” might not exist at all for the following reasons:

(1) A Nevada statute,⁷⁹ as amended in 2011,⁸⁰ provides:

A creditor may not bring an action with respect to transfer of property to a spendthrift trust unless the creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that *the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor.*

It certainly appears that the italicized language will give spouses with alimony and child-support claims an opportunity to reach the assets of Nevada APTs.

(2) As noted in connection with the Alaska Act, federal law might enable persons with child-support claims to reach the assets of Nevada APTs.

⁶⁹ See 12 Del. C. §3556; 25 Del. C. §503(a).

⁷⁰ See http://www.oshins.com/images/DAPT_Rankings.pdf (last visited July 3, 2012).

⁷¹ See <http://www.oshins.com> (last visited June 13, 2012).

⁷² Available at <http://www.forbes.com/forbes/2010/0809/international-investing-asset-protection-trust-offshore-hide-money.html> (last visited July 3, 2012).

⁷³ The article reports that “they [the APT states] are ranked from A+ (the most asset protection) to D by Las Vegas attorney Steven Oshins.”

⁷⁴ See Nev. Rev. Stat. §166.170(1).

⁷⁵ See 12 Del. C. §3572(b); 6 Del. C. §1309.

⁷⁶ See 11 USC §548(a)(1), (e).

⁷⁷ See 12 Del. C. §3573(1).

⁷⁸ See *id.* §§3570(9), 3573, flush language at end.

⁷⁹ Nev. Rev. Stat. §166.170(3) (emphasis added).

⁸⁰ 2011 Nev. Stat. 270, §206.

(3) Even if these exceptions are not already in the Nevada Act, Nevada courts might add them. In cases decided before and after enactment of the Nevada Act,⁸¹ the Supreme Court of Nevada has demonstrated a propensity to establish nonstatutory exceptions to the state's homestead exemption,⁸² another state-created protection from creditor claims. Therefore, in sympathetic cases, Nevada courts might extend this judicial activism to Nevada APTs as well.

(4) This "advantage" is not important to clients. In a January 2012 article, two commentators, neither of whom practices in Nevada or Delaware, observe:⁸³

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

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

c. Nevada does not have Delaware's explicit exception for tort claims that pre-date a transfer into an APT,⁸⁴ but the holder of such a claim might fall within the italicized exception in the Nevada statute, quoted above.

Advantages of Delaware

In our view, Delaware offers the following advantages:

a. Unlike the Delaware Act,⁸⁵ the Nevada Act does not require an APT to have any particular spendthrift clause and does not provide that a spendthrift trust is to fall within the trust exclusion under the federal bankruptcy code, which might expose trust assets to creditor claims in poorly drafted instruments, particularly if, as is permitted by the Nevada Act,⁸⁶ the trustee has minimal ties to the state.

⁸¹ See *Breedlove v. Breedlove*, 691 P.2d 426, 428 (Nev. 1984); *Philips v. Morrow*, 760 P.2d 115, 116, 117 (Nev. 1988); *Maki v. Chong*, 75 P.3d 376, 379 (Nev. 2003).

⁸² See Nev. Rev. Stat. §§115.005–115.090.

⁸³ Worthington & Merric, "Which Situs is Best in 2012?" 151 *Tr. & Est.* 51, 60 (Jan. 2012) (footnote omitted).

⁸⁴ See 12 Del. C. §3573(2).

⁸⁵ See *id.* §3570(11)(c).

⁸⁶ See Nev. Rev. Stat. §166.015(2).

b. Unlike the Nevada Act, the Delaware Act⁸⁷ provides that the trustee of an APT will cease to act if a court determines that Delaware law does not govern the trust or the effect of its spendthrift clause.

c. Unlike the Nevada Act, the Delaware Act⁸⁸ describes the implications for the trust, the trustee, and the beneficiaries if a creditor brings a claim that may be paid from the trust. The inclusion of these provisions in the Delaware Act greatly increases its asset protection effectiveness.⁸⁹

d. A Delaware APT gives the trustor additional distribution options. Thus, a trustor may obtain creditor protection if he or she creates a self-settled trust that is a GRIT that meets the requirements of the Delaware Act.⁹⁰ A Delaware APT also may provide for the payment of debts, expenses, and taxes following the trustor's death.⁹¹ This latter option might be particularly helpful when the trustor structures the APT as an incomplete gift and the APT's value appreciates relative to the size of the trustor's gross estate.

e. Delaware law offers protection from creditors to distributions made from a Delaware APT into an account at a Delaware bank or trust company⁹² and to tenancy-by-the-entireties personal property contributed to a Delaware APT.⁹³

NEW HAMPSHIRE VS. DELAWARE

Infrastructure

Delaware's trust infrastructure is superior to New Hampshire's. Some of the differences include:

1. Delaware has been trust-friendly since early in the 20th century; New Hampshire has been only since 2006;

2. In an August 2011 *Barron's* article, Delaware placed in the top tier of states for financial soundness (states 1–12); New Hampshire placed in the third tier (states 28–48);⁹⁴

3. In surveys conducted by Harris Interactive, Inc., for the U.S. Chamber of Commerce Institute for Le-

⁸⁷ See 12 Del. C. §3572(g).

⁸⁸ See *id.* §3574.

⁸⁹ See Sullivan, "Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts," 23 *Del. J. Corp. L.* 423, 464, 475 (1998).

⁹⁰ See 12 Del. C. §3570(11)(b).

⁹¹ See *id.* §3570(11)(b)(10).

⁹² See 10 Del. C. §3502(b).

⁹³ See 12 Del. C. §3574(f).

⁹⁴ See Laing, "Good, Bad and Ugly: *Barron's* Looks at the State of the States," *Barron's*, Aug. 29, 2011, available at <http://online.barrons.com/article/SB50001424052702303545104576524533718027022.html>.

gal Reform for 2002–2008 and 2010 (all years for which the study was conducted), Delaware’s liability system was ranked as the best in the country each time; New Hampshire’s ranged between 6th and 16th;⁹⁵

4. In the most recent such survey — for 2010, Delaware’s liability system was ranked 1st; New Hampshire’s was ranked 16th;⁹⁶

5. Over 40 million people live within 150 miles of Wilmington, Delaware (a region from which Delaware may recruit talent for its trust business); only about 14,400,000 people live within that distance of Concord, New Hampshire;⁹⁷ and

6. As of February 2011, 53 institutions conducted trust business in Delaware;⁹⁸ only 25 did in New Hampshire.⁹⁹

Delaware has offered favorable trust laws since early in the last century. Because New Hampshire only has done so since 2006, time will tell whether New Hampshire will become and remain an attractive option.

Trust Laws Generally

Introduction

As shown in Appendix B, both New Hampshire and Delaware have attractive laws for personal trusts, although many of New Hampshire’s are new and untested.

Advantages of New Hampshire

In our view, New Hampshire offers no significant advantages.

Advantages of Delaware

a. Unlike Delaware,¹⁰⁰ it is not clear whether a testator or trustor may establish a perpetual trust because the New Hampshire statute was drafted inartfully;¹⁰¹

b. Unlike Delaware,¹⁰² New Hampshire has not repealed the rule against accumulations, which is a potential problem for perpetual trusts;

c. Unlike Delaware’s,¹⁰³ New Hampshire’s statute for converting income trusts into total-return unitrusts might not comply with the safe harbor in the §643 regulations for making such conversions because a court may go below 3% or above 5%;¹⁰⁴

d. Unlike Delaware,¹⁰⁵ no New Hampshire statute, other than the New Hampshire APT statute (“New Hampshire Act”), permits a testator or trustor to create a new trust as a unitrust;

e. Unlike in Delaware,¹⁰⁶ New Hampshire does not allow testators and trustors to create perpetual non-charitable purpose trusts; and

f. Unlike Delaware,¹⁰⁷ no New Hampshire statute gives the trustee of an ILIT an insurable interest.

APTs

Introduction

As shown in Appendix C, both the New Hampshire Act and the Delaware Act are advantageous. It is not surprising that the New Hampshire Act is desirable because New Hampshire essentially copied the Delaware Act.

Advantages of New Hampshire

In our view, New Hampshire offers no advantages in this context because it follows Delaware’s lead.

Advantages of Delaware

a. In Delaware,¹⁰⁸ a trustor may retain any interest in a grantor retained annuity trust (“GRAT”) or grantor retained unitrust (“GRUT”), whereas, in New Hampshire, a trustor may keep only up to a 5% interest in such a trust;¹⁰⁹

b. In Delaware,¹¹⁰ but not in New Hampshire, a trustor may be reimbursed for income taxes attributable to an APT on a mandatory basis, not just on a discretionary basis;¹¹¹

c. Unlike Delaware,¹¹² New Hampshire does not contemplate that an APT may be funded with tenancy-by-the-entireties property;

d. Unlike Delaware,¹¹³ New Hampshire does not specify that property-division and other agreements

⁹⁵ See Appendix A, below.

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ To view a list of most of those institutions, go to banking.delaware.gov/reports/financialinstitutions/DEFInstitutions.pdf (last visited July 3, 2012).

⁹⁹ Based on data in The Best States for Trusts, available at thetrustadvisor.com/news/states2011 (Feb. 2011) (last visited June 13, 2012).

¹⁰⁰ See 25 Del. C. §§501–505.

¹⁰¹ See N.H. Rev. Stat. Ann. §§547:3-k, 564:24, 564-A:1.

¹⁰² See 25 Del. C. §506.

¹⁰³ See 12 Del. C. §61-106.

¹⁰⁴ See N.H. Rev. Stat. Ann. §564-C:1-106.

¹⁰⁵ See 12 Del. C. §61-107.

¹⁰⁶ See 12 Del. C. §3556; 25 Del. C. §503(a).

¹⁰⁷ See 18 Del. C. §2704(c)(5).

¹⁰⁸ See 12 Del. C. §3570(11)(b)(5).

¹⁰⁹ See N.H. Rev. Stat. Ann. §564-D:2(II)(e).

¹¹⁰ See 12 Del. C. §3570(11)(b)(9).

¹¹¹ See N.H. Rev. Stat. Ann. §564-D:2(III).

¹¹² See 12 Del. C. §3574(f).

¹¹³ See *id.* §3573(1).

must be “incident to separation or divorce” to allow a spouse or former spouse to access the assets of an APT;¹¹⁴ and

e. Unlike Delaware,¹¹⁵ New Hampshire law does not provide that a trustee automatically ceases to serve if a foreign court decides that it has jurisdiction and that its law applies.

SOUTH DAKOTA VS. DELAWARE

Infrastructure

Delaware’s trust infrastructure is superior to South Dakota’s. Some of the differences include:

1. Delaware has been trust-friendly since early in the 20th century; South Dakota has been since 1983;

2. In an August 2011 *Barron’s* article, Delaware placed in the top tier of states for financial soundness (states 1–12); South Dakota placed in the second tier (states 13–27);¹¹⁶

3. In surveys conducted by Harris Interactive, Inc., for the U.S. Chamber of Commerce Institute for Legal Reform for 2002–2008 and 2010 (all years for which the study was conducted), Delaware’s liability system was ranked as the best in the country each time; South Dakota’s ranged between 4th and 17th;¹¹⁷

4. In the most recent such survey — for 2010, Delaware’s liability system was ranked 1st; South Dakota’s was ranked 10th;¹¹⁸

5. Over 40 million people live within 150 miles of Wilmington, Delaware (a region from which Delaware may recruit talent for its trust business); only about 1,650,000 people live within that distance of Sioux Falls, South Dakota;¹¹⁹ and

6. As of February 2011, 53 institutions conducted trust business in Delaware;¹²⁰ 58 (many of which were private trust companies) did in South Dakota.¹²¹

¹¹⁴ See N.H. Rev. Stat. Ann. §564-D:15(I)(a).

¹¹⁵ See 12 Del. C. §3572(g).

¹¹⁶ See Laing, “Good, Bad and Ugly: *Barron’s* Looks at the State of the States,” *Barron’s*, Aug. 29, 2011, available at <http://online.barrons.com/article/SB50001424052702303545104576524533718027022.html>.

¹¹⁷ See Appendix A, below.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ To view a list of most of those institutions, go to <http://banking.delaware.gov/reports/financialinstitutions/DEFInstitutions.pdf> (last visited July 3, 2012).

¹²¹ Based on data in “The Best States for Trusts,” available at <http://thetrustadvisor.com/news/states2011> (Feb. 2011) (last visited July 3, 2012).

Trust Laws Generally

Introduction

As shown in Appendix B below, both South Dakota and Delaware have attractive statutes for personal trusts.

Advantages of South Dakota

In our view, South Dakota offers no significant advantages over Delaware.

Advantages of Delaware

a. Over many decades, Delaware courts have rendered numerous leading trust decisions,¹²² whereas South Dakota courts have yet to display such leadership;

b. The rule against accumulations has not applied in Delaware since at least 1986.¹²³ South Dakota enacted a comparable statute in 2012, but it is unclear whether it applies retroactively or prospectively;¹²⁴ and

c. Unlike Delaware,¹²⁵ South Dakota’s statutes for converting income trusts into total-return unitrusts and for creating new trusts as unitrusts¹²⁶ might not satisfy the safe harbor in the IRC §643 regulations because they permit departure from the 3%–5% range.

APTs

Introduction

As shown in Appendix C, both the South Dakota APT statute (“South Dakota Act”) and the Delaware Act are attractive. It is not surprising that the South Dakota Act is beneficial because South Dakota essentially follows Delaware.

Advantages of South Dakota

In our view, the South Dakota Act offers the following advantages:

¹²² See, e.g., *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059 (Del. 2011) (stranger originated life insurance); *Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), *aff’d*, 357 U.S. 235 (1958) (applicability of Delaware law); *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309 (Del. 1942) (same); *Merrill Lynch Trust Co., FSB v. Campbell*, 2009 WL 2913893 at 10 (Del. Ch. 2009) (discretionary interests); *Duemler v. Wilmington Trust Co.*, 2004 WL 5383927 (Del. Ch. 2004) (directed trusts); *Delaware Trust Co. v. Partial*, 517 A.2d 259, 262 (Del. Ch. 1986) (spendthrift trusts); *Gibson v. Speegle*, 184 Del. Ch. Lexis 475 at 6–7 (Del. Ch. 1984) (same).

¹²³ See 25 Del. C. §506.

¹²⁴ See 2012 S.D. HB 1045, §26.

¹²⁵ See 12 Del. C. §§61-106–61-107.

¹²⁶ See S.D. Codified Laws §§55-15-1–55-15-15.

a. Whereas the general limitations rule in Delaware is four years,¹²⁷ South Dakota's general limitations rule is two years.¹²⁸ For reasons discussed above, this "advantage" might be more apparent than real.

b. Delaware's "date of discovery" rule, which extends the limitations period for certain existing creditors, requires that plaintiffs file suit within one year of the time they discover or should have discovered, a claim against the APT.¹²⁹ South Dakota's six-month date of discovery rule also imposes on plaintiffs a duty to file suit on the underlying claims within certain time periods.¹³⁰ Further, Delaware requires that future creditors prove an intent to defraud, and does not allow future creditors to prevail based on showings of intent to hinder or delay. However, existing creditors can still prevail by proving an intent to hinder or delay.¹³¹ South Dakota, however, has eliminated the "hinder or delay" theory for all creditors.¹³²

c. Unlike South Dakota, Delaware permits a person who has a tort claim against the trustor when the trustor creates a Delaware APT to reach the assets of the trust at any time.¹³³ Nevertheless, creditors availing themselves of this exception in Delaware's law almost always will pursue their claims within the time limits imposed by the South Dakota Act for pre-existing claims, i.e., within two years after the trust was created or, if later, within six months after the creditor discovered (or should have discovered) the trust.

Advantages of Delaware

In our view, the Delaware Act offers the following advantages:

a. Unlike in Delaware,¹³⁴ a trustor of a South Dakota APT may not keep an interest in a GRAT or GRUT.¹³⁵

b. Unlike Delaware,¹³⁶ the South Dakota Act does not allow a trustor to be reimbursed for income taxes attributable to an APT;

c. In Delaware,¹³⁷ but not in South Dakota,¹³⁸ a spouse or former spouse may reach the assets of an

APT for property division, etc., only if it is "incident to separation or divorce";

d. In South Dakota,¹³⁹ but not in Delaware,¹⁴⁰ a surviving spouse might be able to reach the assets of a South Dakota APT by electing against the will of a South Dakota resident or nonresident decedent; and

e. Unlike South Dakota, Delaware provides protection for tenancy-by-the-entireties personal property contributed to an APT¹⁴¹ and for amounts distributed from an APT into an account with a financial institution.¹⁴²

OTHER ISSUES

Structuring APT to Be Completed Gift and Excludible from Gross Estate

In 2009, the IRS ruled that the transfer of assets by an Alaska resident to an Alaska APT was a completed gift and that the trustee's discretion to pay income and principal to the trustor, the trustor's spouse, and the trustor's descendants was not sufficient, by itself, to cause inclusion of the trust's assets in the trustor's gross estate.¹⁴³ But, the IRS warned that:¹⁴⁴

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.

Although Alaska, Delaware, New Hampshire, and South Dakota allow the assets of APTs to be reached to pay certain claims of current and former spouses and minor children, the author of a recent Chief Counsel Advice Memorandum observed that:¹⁴⁵

[T]he Supreme Court considered various situations in which a trust instrument purported to divest the respective grantor of all dominion and control over property to the extent that the property could not be returned to the grantor except by reason of contingencies beyond his control. In these cases, the Court

¹²⁷ See 12 Del. C. §3572; 6 Del. C. §1309.

¹²⁸ See S.D. Codified Laws §55-16-10, as amended by 2012 S.D. HB 1045, §16.

¹²⁹ See 12 Del. C. §3572(b)(1).

¹³⁰ See S.D. Codified Laws §55-16-10, as amended by 2012 S.D. HB 1045, §16.

¹³¹ See 12 Del. C. §3572(a); 6 Del. C. §§1304-1305.

¹³² See S.D. Codified Laws §55-16-9.

¹³³ See 12 Del. C. §3573(2).

¹³⁴ See *id.* §3570(11)(b)(5).

¹³⁵ See S.D. Codified Laws §55-16-2(2)(f).

¹³⁶ See 12 Del. C. §3570(11)(b)(9).

¹³⁷ See *id.* §3573(1).

¹³⁸ See S.D. Codified Laws §55-16-15.

¹³⁹ See *id.* §§29A-2-202(d), 29A-2-205(2)(i).

¹⁴⁰ See 12 Del. C. §3573, flush language at end.

¹⁴¹ See *id.* §3574(f).

¹⁴² See 10 Del. C. §3502(b).

¹⁴³ PLR 200944002.

¹⁴⁴ *Id.*

¹⁴⁵ CCA 201208026.

noted that the respective grantor lost all economic control upon making the transfer, which he would not regain unless certain contingencies occurred. The Court concluded that the respective gifts were complete

To support the above proposition, the writer cited two U.S. Supreme Court cases and one Tax Court case.¹⁴⁶ The foregoing authorities and cases involving the acts-of-independent-significance doctrine indicate that completed gift treatment should be available in these four states.¹⁴⁷

Apparently without studying the Nevada Act closely, some commentators have opined that Nevada is comparable to Alaska for these purposes.¹⁴⁸ But, as mentioned above, Nevada permits the assets of APTs to be accessed not only to pay fraudulent-transfer claims but also if “the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor.”¹⁴⁹ We are not aware of any authority that supports the proposition that a transfer to an APT will be a completed gift and excludible from the gross estate where such an open-ended exception exists.

In any event, in 2011, Wilmington Trust Company engaged counsel to attempt to obtain a Delaware private letter ruling comparable to the Alaska ruling. Late in the year, representatives of the IRS told counsel that the IRS is not willing to issue the ruling. According to counsel, the IRS’s unwillingness to rule was not attributable to Delaware’s family exceptions, etc. Rather, the IRS appears to be troubled by commentary about the 2011 *Mortensen* bankruptcy case in Alaska, cited above. The IRS representative said that the Alaska ruling probably would not be issued if they were looking at it now and that the IRS since has declined other Alaska ruling requests.

¹⁴⁶ See *Smith v. Shaughnessy*, 318 U.S. 176, 181 (1943) (“grantor has neither the form nor substance of control and never will have unless he outlives his wife”); *Robinette v. Helvering*, 318 U.S. 184, 187 (1943) (property “could not be returned to them except because of contingencies beyond their control” — whether daughter had children); *Kolb Est. v. Comr.*, 5 T.C. 588, 596 (1945) (“the donor decedent had no power to modify the trust in any way and never could have except upon the happening of an event beyond his control” — birth of more grandchildren).

¹⁴⁷ See *U.S. v. Byrum*, 408 U.S. 125, 150 (1972); *Ellis v. Comr.*, 51 T.C. 182, 187–188 (1968), *aff’d*, 437 F.2d 442 (9th Cir. 1971); *Tully Est. v. U.S.*, 528 F.2d 1401, 1406 (Ct. Cl. 1976); TAM 8819001; PLR 9141027.

¹⁴⁸ See Gassman, Crotty & Pless, “Safe Trust Guide — Why Your Family Needs a Safe Trust and What to Do to Implement One by the End of 2012 (the Spouse and Family Exempt (“Safe”) Trust),” 37 *Tax Mgmt. Est., Gifts & Tr. J.* 193 (May/June 2012); Rothschild, et al., “IRS Rules Self-Settled Alaska Trust Will Not Be In Grantor’s Estate,” 37 *Est. Plan.* 3, 12 (Jan. 2010).

¹⁴⁹ Nev. Rev. Stat. §166.170(3).

Favorable FLP/LLC Laws

It generally is agreed that a leading trust jurisdiction should have favorable FLP/LLC statutes. Specifically, those statutes should provide that a charging order is a creditor’s sole remedy and that other remedies, particularly foreclosure, are not available. Whereas Alaska has met these requirements since 2000,¹⁵⁰ Delaware since 2005,¹⁵¹ Nevada since 2011,¹⁵² and South Dakota since 2007,¹⁵³ New Hampshire has not updated its statutes to preclude foreclosure and other remedies.¹⁵⁴

Because there has been some confusion over the status of FLPs and LLCs in Delaware, we summarize those rules briefly here. Not only do Delaware’s FLP and LLC statutes stipulate that a charging order is a creditor’s sole remedy and that other remedies, including foreclosure, are unavailable, but Delaware and non-Delaware caselaw confirms these results.

Specifically, the pertinent provision of Delaware’s LLC statute provides that: “The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member’s assignee may satisfy a judgment out of the judgment debtor’s limited liability company interest.”¹⁵⁵

The synopsis to the 2005 legislation that enacted the above provision describes the law in Delaware as follows:¹⁵⁶

Sections 9, 10, 11, 12, 13, 14 and 15. These sections amend Section 18-703 to clarify the nature of a charging order and provide that a charging order is the sole method by which a judgment creditor may satisfy a judgment out of the limited liability company interest of a member or a member’s assignee. Attachment, garnishment, foreclosure or like remedies are not available to the judgment creditor and a judgment creditor does not have any right to become or to exercise any rights or powers of

¹⁵⁰ See Alaska Stat. §32.11.340 (FLPs); Alaska Stat. §10.50.380 (LLCs).

¹⁵¹ See 6 Del. C. §17-703 (FLPs); 6 Del. C. §18-703 (LLCs).

¹⁵² See Nev. Rev. Stat. §88.535, as amended by 2011 Nev. Stat. 455, §82 (FLPs); Nev. Rev. Stat. §86.401, as amended by 2011 Nev. Stat. 455, §69 (LLCs). See also *Weddell v. H2O, Inc.*, 2012 Nev. Lexis 26 at 26 (Nev. 2012) (“a judgment creditor may obtain the rights of an assignee of the member’s interest, receiving only a share of the economic interests in a limited-liability company, including profits, losses, and distributions of assets”).

¹⁵³ See S.D. Codified Laws §48-7-703 (FLPs); S.D. Codified Laws §47-34A-504 (LLCs).

¹⁵⁴ See N.H. Rev. Stat. Ann. §304-B:41 (FLPs); N.H. Rev. Stat. Ann. §304-C:47 (LLCs).

¹⁵⁵ 6 Del. C. §18-703(d).

¹⁵⁶ 75 Del. Laws 51, synopsis to §§9–15 (2005). A bill’s synopsis constitutes legislative history in Delaware.

a member (other than the right to receive the distribution or distributions to which the member would otherwise have been entitled, to the extent charged).

Delaware's FLP statute¹⁵⁷ and the synopsis to the 2005 legislation that updated it¹⁵⁸ contain comparable language. In 2010, Judge Sleet of the U.S. District Court for the District of Delaware wrote: "Because Delaware law does not permit foreclosure on charging orders, Bay Guardian would be unable to foreclose against New Times and the entities."¹⁵⁹

In the same year, Judge Ericksen of the United States District Court for the District of Minnesota wrote: "[A] charging order is the exclusive remedy under Delaware law by which a judgment creditor

may satisfy a judgment out of a member's interest in a limited liability company."¹⁶⁰

If a resident of State 1 creates an LLC or FLP of personal property in State 2, does State 1 or State 2 law determine whether a creditor may reach a partner's or member's interest? A 2011 article suggests that State 2 law should be used:¹⁶¹

[I]f an individual resides in one state but has a personal property interest in a limited partnership or LLC located in another state, he or she may be held to the law of the state where the entity is located. The courts have consistently leaned toward finding that the controlling law with respect to the entity is the state law where the entity was formed. . . .

CONCLUSION

We hope that this article will begin a productive discussion of trust jurisdiction selection.

¹⁵⁷ 6 Del. C. §17-703.

¹⁵⁸ 75 Del. Laws 31, synopsis to §§10-16 (2005).

¹⁵⁹ *New Times Media, LLC v. Bay Guardian Co., Inc.*, 2010 WL 2573957 at 2 (D. Del. 2010).

¹⁶⁰ *General Elec. Capital Corp. v. JLT Aircraft Holding Co., LLC*, 2010 WL 3023316 at 3 (D. Minn. 2010).

¹⁶¹ Gassman & Denicolo, "Pass-Through Entities Have Protections in Charging Order Law," 38 *Est. Plan.* 31, 36 (Nov. 2011).

APPENDIX A

A COMPARISON OF THE ALASKA, DELAWARE, NEVADA, NEW HAMPSHIRE, AND SOUTH DAKOTA TRUST INFRASTRUCTURES *

1. CREDIT RATINGS ¹⁶²

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Ranking	Tier 2 (AA+ – states 13-27)	Tier 1 (AAA – states 1-12)	Tier 3 (AA – states 28-48)	Tier 3 (AA – states 28-48)	Tier 2 (AA+ – states 13-27)
Federal Spending as % of State GDP (FY 2008)	19.6%	10.6%	13.2%	17.2%	23.2%
Medicaid as % of State GDP (FY 2008)	12.0%	14.0%	17.0%	25.0%	23.0%
% Change in Tax Receipts (Yearly, as of Q1 FY 2011)	16.7%	4.8%	4.1%	1.7%	10.3%
Tax-Backed Debt As % of State GDP	8.88%	6.35%	2.44%	3.75%	1.3%
Funded % of State Pensions	61.0%	94.0%	72.0%	58.0%	92.0%
Troubled Mortgages (Foreclosed and “Seriously Delinquent” Home Loans)	2.2%	7.2%	16.0%	5.2%	2.9%
June 2011 Unemployment Rate %	7.5%	8.0%	12.4%	4.9%	4.8%

2. LIABILITY SYSTEM RANKINGS (2002-2010) ¹⁶³

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
2010	33	1	28	16	10
2008	21	1	40	16	12
2007	43	1	28	7	11
2006	36	1	37	6	7
2005	33	1	29	12	8
2004	33	1	34	7	17
2003	32	1	34	10	4
2002	37	1	30	16	9

3. 2010 LIABILITY SYSTEM RANKINGS (BY CATEGORY) ¹⁶⁴

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Overall Ranking	33	1	28	16	10
Overall Treatment of Tort and Contract Litigation	33	1	32	17	9
Having and Enforcing Meaningful Venue Requirements	39	1	17	35	31
Treatment of Class Action Suits & Mass Consolidation Suits	40	1	39	24	25

* Prepared by: Matthew J. Canner, Richard W. Nenno, Christia M. Schmidt, and Andrea B. Spahr
Wilmington Trust Company
Wilmington, Delaware

¹⁶² Sources: U.S. Census Bureau; Janney Capital Markets; Evercore; Chart in Laing, *Good, Bad and Ugly: Barron’s Looks at the State of the States*, *Barron’s*, Aug. 29, 2011, available at <http://online.barrons.com/article/SB50001424052702303545104576524533718027022.html>.

¹⁶³ Based on data in U.S. Chamber of Commerce survey available at www.instituteforlegalreform.com/states (last visited July 3, 2012).

¹⁶⁴ Based on data in U.S. Chamber of Commerce survey available at www.instituteforlegalreform.com/states (last visited July 3, 2012).

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Damages	40	2	25	10	6
Timeliness of Summary Judgment or Dismissal	36	1	20	23	11
Discovery	28	1	24	22	17
Scientific and Technical Evidence	37	1	32	27	38
Judges' Impartiality	32	1	35	19	3
Judges' Competence	30	1	33	18	8
Juries' Fairness	38	5	28	13	6

4. POPULATION IN REGION ¹⁶⁵

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
	291,826	70,851	583,756	42,695	153,888
Within 50-mile radius	386,682	7,151,472	1,992,016	2,229,280	335,369
Within 100-mile radius	432,682	20,464,043	2,177,630	8,919,974	908,084
Within 150-mile radius	449,604	40,244,858	2,505,505	14,418,374	1,656,250

APPENDIX B

A COMPARISON OF THE ALASKA, DELAWARE, NEVADA, NEW HAMPSHIRE, AND SOUTH DAKOTA TRUST LAWS *

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Trust-friendly structure	Since 1997.	Since early 20 th century.	Since 1999.	Since 2006.	Since 1983.
2010 liability system ranking ¹⁶⁶	# 33.	# 1. Judges are appointed by Governor with consent of Senate and must come as equally as possible from two major political parties (Del. Const. Art. IV, §3). Judges decide all trust issues. Petitions to modify administrative terms or to correct scrivener error must be filed electronically and may be kept confidential and approved within a few weeks, provided that all parties consent (Del. Ct. Ch. Rs. 100–103).	# 28.	# 16. Judges are appointed by Governor with consent of Executive Council (N.H. Const. Pt. II, Art. 46).	# 10.
Number of trust companies ¹⁶⁷	5	53	18	25	58 (Many are private trust companies).

¹⁶⁵ Sources: City Populations: U.S. Census 2010; Populations per radii: Alteryx Allocate (software licensed by M&T Bank), STI: Pop-Stats Q1 2011 (figures based on U.S. Census 2000).

* Prepared by Richard W. Neno, Esquire

Wilmington Trust Company
Wilmington, Delaware

¹⁶⁶ Based on data in U.S. Chamber of Commerce survey available at www.instituteforlegalreform.com/states (last visited July 3, 2012).

¹⁶⁷ Based on data in The Best States for Trusts, available at www.thetrustadvisor.com/news/states2011 (Feb. 2011) (last visited July 3, 2012).

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Terms of trust in relation to common law	Trust may modify trustee's duties and powers (Alaska Stat. §13.36.192).	Regardless of common law or other statute, governing instrument may expand, restrict, eliminate, or otherwise vary rights and interests of beneficiaries. Specifically, trust may negate duty to diversify investments and defer age at which trustee must notify beneficiary of trust interest (12 Del. C. §3303(a)).	Since 2011, trust instrument may expand, restrict, eliminate or otherwise vary rights of beneficiaries. Specifically, trust may negate duty to diversify investments and defer age at which trustee must notify beneficiary of trust interest (Nev. Rev. Stat. §165.160).	Since 2011, settlor's intent as expressed in terms of trust is paramount. (N.H. Rev. Stat. Ann. §564-B:1-112).	Statute implies that trust instrument may override common law (S.D. Codified Laws §55-3-5).
Disclosure to beneficiaries	Since 2000, trust instrument and settlor may restrict (Alaska Stat. §13.36.080 (b)).	Since 2003, trust instrument may restrict (12 Del. C. §3303(a)).	Since 2011, trust instrument may restrict (2011 Nev. Stat. 270, §192).	Since 2006, trust instrument may restrict (N.H. Rev. Stat. Ann. §564-B:1-105).	Since 2002, trust instrument or settlor may restrict (S.D. Codified Laws §55-2-13).
Rule against perpetuities	Since 2000, perpetual trusts permitted (Alaska Stat. §34.27.075). Effective for instruments executed after April 1, 1997, creating new or successive powers of appointment, all such powers must be irrevocably exercised or terminate within 1,000 years of their creation (Alaska Stat. §§34.27.051, 34.27.070(c)). Effective for instruments executed after April 21, 2000, future interest or trust is void if power of alienation is suspended for more than 30 years after specified dates (Alaska Stat. §34.27.100), which might discourage testators/settlors wishing stock in family companies to be retained from creating Alaska trusts.	Since 1933, perpetual trusts possible through exercise of Del. limited powers of appointment. Since 1995, trust interest in personal property may be perpetual; trust interest in real property must vest within 110 years after creation of interest (limitation may be avoided by putting interest in FLP, LLC, or other entity) (25 Del. C. §§501-505).	Since 2005, 365-year trusts permitted (Nev. Rev. Stat. §111.1031). Statute probably is unconstitutional because Nev. constitution provides that "No perpetuities shall be allowed except for eleemosynary purposes" (Nev. Const. Art. 15, §4) and because 2002 ballot initiative to repeal prohibition was disapproved by voters.	Since 2004, common-law rule does not apply if instrument contains provision expressly exempting instrument from application of rule against perpetuities and if trustee or other person has power to sell, mortgage, or lease property for period beyond period required for interest created under instrument to vest to be valid under rule against perpetuities (N.H. Rev. Stat. Ann. §§547:3-k, 564:24, 564-A:1). Not clear whether perpetual trust may be created.	Since 1983, perpetual trusts permitted (S.D. Codified Laws §§43-5-1-43-5-9).
Rule against accumulations	No statute.	Since 1986, no provision directing or authorizing accumulation of trust income is invalid (25 Del. C. §506).	Provision directing accumulation of trust income beyond perpetuities period is invalid (Nev. Rev. Stat. §166.150).	No statute.	In 1998, statute prohibiting accumulation of income beyond minority repealed (1998 S.D. Laws 282, §§27-29); in 2012, statute was enacted specifying that no provision directing or authorizing accumulation of trust income is invalid but unclear whether statute applies retroactively or prospectively (2012 S.D. HB 1045, §26).

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Taxation of trust income	No income tax imposed.	Nongrantor trust with no Del. beneficiaries not taxed. Although, in 2012, tax of up to 6.75% payable by trustee on accumulated ordinary income and capital gains of nongrantor trust if trust has Del. testator, settlor, or trustee, but tax is not payable and return is not due if trust has no Del. resident beneficiary. Unborn and unascertained persons generally treated as nonresidents (30 Del. C. §§1102(a), 1105, 1601(8), 1605(b), 1631, 1635-1636). Because Del. has small population, few trusts created by nonresidents pay Del. income tax.	No income tax imposed.	In 2012, tax of 5.00% payable by trustee on taxable dividends and interest of nongrantor trust that has N.H. trustee to extent trust has resident beneficiary. In 2010, unborn and unascertained persons were treated as residents. That rule was repealed for 2011 and later years, but not clear what rule is in its absence (N.H. Rev. Stat. Ann. §§77:1, 77:3, 77:4, 77:4-c, 77:10-77:12; N.H. Code Admin. R. Ann. 902.07).	No income tax imposed.
Investment rules	In 1998, Uniform Prudent Investor Act was adopted (Alaska Stat. §§13.36.225-13.36.290).	In 1986, prudent-investor rule was adopted. Trustee may consider other resources and trust interests in determining investment policy for trust (12 Del. C. §3302).	In 2003, Uniform Prudent Investor Act was adopted (Nev. Rev. Stat. §§164.700-164.775).	In 2004, Uniform Prudent Investor Act was adopted (N.H. Rev. Stat. Ann. §§564-B:9-901-564-B:9-907).	In 1995, prudent-investor rule was adopted (S.D. Codified Laws §§55-6-55-5-16).
Diversification of investments	Trust may modify trustee's duties (Alaska Stat. §13.36.192).	Trustee not liable (except for wilful misconduct) for not diversifying if retained original investments pursuant to direction in governing instrument. Direction in governing instrument not to diversify will be respected (12 Del. C. §§3303(a), 3304).	Direction in governing instrument not to diversify will be respected (Nev. Rev. Stat. §165.160).	Trustee not liable if did not diversify in good faith reliance on governing instrument or court order (N.H. Rev. Stat. Ann. §564-B:9-901(b)).	Trustee may invest regardless of any lack of diversification (S.D. Codified Laws §55-1A-9).
Division of trustee duties (directed trusts)	Since 2003, trust may designate person to direct trustee on investment, distribution, and other decisions. But, statute does not relieve directed trustee from liability for following advisor's directions or for failing to monitor advisor's activities (Alaska Stat. §13.36.375).	Since 1986, trust may designate person to direct trustee on investment, distribution, and other decisions. Directed trustee not liable for following direction except for wilful misconduct and has no duty to monitor adviser's activities. Adviser is fiduciary unless instrument provides otherwise and must furnish directed trustee with specified information (12 Del. C. §§3301(g), 3313, 3317). Del. Court of Chancery enforced statute in unreported 2004 <i>Duemler</i> case (2004 WL 5383927).	Since 2009, trust may designate person to direct trustee on investment and distribution decisions. Directed trustee not liable for following such directions (Nev. Rev. Stat. §163.5549).	Since 2008, trust, agreement of beneficiaries, or court order may designate person to direct trustee on investment, distribution, and other decisions. Directed trustee not liable for following direction and has no duty to monitor advisor's activities. Advisor (other than beneficiary) generally is fiduciary and must furnish directed trustee with specified information (N.H. Rev. Stat. Ann. §§564-B:1-103(23), (24), (27), 564-B:7-703(i), 564-B:7-711, 564-B:7-712, 564-B:8-808, 564-B:8-813(k), 564-B:12-1201-564-B:12-1205).	Since 1997, trust may designate person to direct trustee on investment, distribution, and other decisions. Directed trustee not liable for following directions (S.D. Codified Laws §§55-1B-1-55-1B-4, 55-1B-9-55-1B-11).

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Protector recognized	Since 2003 (Alaska Stat. §13.36.370).	Since 2008 (12 Del. C. §3313(f)).	Since 2009 (Nev. Rev. Stat. §§163.554, 163.5547, 163.5553–163.5555).	Since 2006 (N.H. Rev. Stat. Ann. §§564-B:1-103(28), 564-B:7-711, 564-B:7-712, 564-B:8-813(k), 564-B:12-1201–564-B:12-1205).	Since 1997 (S.D. Codified Laws §§55-1B-1–55-1B-3, 55-1B-5–55-1B-8).
Third-party trusts/spendthrift trusts	Trust income and principal not subject to voluntary or involuntary transfer (Alaska Stat. §34.40.110).	By caselaw, trust income may be reached for separate maintenance of spouse. Otherwise, trust income and principal not subject to voluntary or involuntary transfer. Amount that may be protected is not limited. Creditor protection available for lifetime marital-deduction trust (12 Del. C. §3536).	Trust income and principal not subject to voluntary or involuntary transfer (Nev. Rev. Stat. §§166.010–166.180).	Trust income and principal may be reached to pay support or maintenance claims of children, spouses, or former spouses; claims of persons who provided services to protect beneficiary's trust interest; and claims by N.H. or U.S. Otherwise, trust income and principal not subject to voluntary or involuntary transfer (N.H. Rev. Stat. Ann. §§564-B:5-502–564-B:5-503).	Trust income and principal not subject to voluntary or involuntary transfer. Amount that may be protected is not limited (S.D. Codified Laws §§55-1-24–55-1-26, 55-1-34–55-1-35, 55-1-37, 55-1-41–55-1-42).
Third-party trusts—discretionary interests	Since 1998, creditor may not reach discretionary interest in third-party trust that contains spendthrift clause (Alaska Stat. §34.40.110(m)).	Since 2007, creditor may not compel distribution of discretionary interest. Court may change trustee's exercise of discretion only for abuse of discretion within meaning of Second Restatement of Trusts (12 Del. C. §§3315, 3536).	Since 2009, no one may interfere with trustee's exercise of discretion. Trustee's exercise of absolute discretion not subject to reasonableness standard (Nev. Rev. Stat. §§166.110, 163.4185, 163.419).	Since 2004, if trustee has not complied with standard of distribution or has abused discretion, trust income and principal may be reached for support of child or spouse. Otherwise, trust income and principal not reachable by creditor. Discretionary interest is mere expectancy not property interest or enforceable right (N.H. Rev. Stat. Ann. §§564-B:5-504, 564-B:8-814(a)–(c)).	Since 2007, discretionary interest is not property interest or enforceable right—it is mere expectancy. Creditor may not require trustee to make distribution or cause court to foreclose discretionary interest. Court may review trustee's distribution discretion only if trustee acts dishonestly, acts with improper motive, or fails to act (S.D. Codified Laws §§55-1-24–55-1-26, 55-1-38–55-1-40, 55-1-43).
Self-settled trusts (asset-protection trusts)	Since 1997, creditor may reach trustor's interest only in limited circumstances (Alaska Stat. §34.40.110).	Since 1997, creditor may reach settlor's interest only in limited circumstances under Qualified Dispositions in Trust Act (12 Del. C. §§3570–3576).	Since 1999, creditor may reach trustor's interest only in limited circumstances (Nev. Rev. Stat. §§166.010–166.180).	Since 2009, creditor may reach settlor's interest only in limited circumstances under Del.-based Qualified Dispositions in Trust Act (not incorporating recent Del. changes) (N.H. Rev. Stat. Ann. §§564-B:5-505(c), 564-D:1–564-D:18).	Since 2005, creditor may reach trustor's interest only in limited circumstances under Del.-based Qualified Dispositions in Trust Act (not incorporating recent Del. changes) (S.D. Codified Laws §§55-1-36, 55-3-47, 55-16-1–55-16-17).
Power to adjust between income and principal under §104 of 1997 Uniform Principal and Income Act	Since 2003 (Alaska Stat. §13.38.210).	Since 2005. Includes tax-ordering rule (12 Del. C. §§61-104–61-105).	Since 2003 (Nev. Rev. Stat. §164.795).	Since 2007. Includes tax-ordering rule (N.H. Rev. Stat. Ann. §564-C:1-104).	Since 2007 (S.D. Codified Laws §§55-13A-104–55-13A-105).
Procedure for converting income trust into total-return unitrust	Since 2003. Might not satisfy IRS safe harbor because court may depart from 3%–5% range (Alaska Stat. §§13.38.300–13.38.410).	Since 2001. 3%–5% range permitted (12 Del. C. §61-106).	Since 2009. 3%–5% range permitted (Nev. Rev. Stat. §§164.796–164.799).	Since 2003. Might not satisfy IRS safe harbor because court may depart from 3%–5% range (N.H. Rev. Stat. Ann. §564-C:1-106).	Since 2002. Might not satisfy IRS safe harbor because may depart from 3%–5% range (S.D. Codified Laws §§55-15-1–55-15-15).

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Recognition of trust created as unitrust	Since 2003. For APTs only (Alaska Stat. §34.40.110(b)(3)(B)). Might not satisfy IRS safe harbor because trust may set payout below 3% or above 5%.	Since 2004. 3%–5% range permitted (12 Del. C. §61-107).	Since 2011. For APTs only (Nev. Rev. Stat. §166.040(2)(d)(1)). Might not satisfy IRS safe harbor because trust may set payout below 3% or above 5%.	Since 2009. For APTs only (N.H. Rev. Stat. Ann. §564-D:2(II)(e)). Might not satisfy IRS safe harbor because trust may set payout below 3%.	Since 2009. Might not satisfy IRS safe harbor because trust may set payout below 3% or above 5% (S.D. Codified Laws §55-15-1(7A)).
Noncharitable purpose trusts	Since 1996. For 21 years only (Alaska Stat. §13.12.907(a)).	Since 2007, perpetual trust for any noncharitable purpose is valid. Separate common-law rule limiting duration of noncharitable purpose trust repealed in 2008 (12 Del. C. §3556, 25 Del. C. §503(a)).	Since 2001. For lives of animals only (Nev. Rev. Stat. §163.0075).	Since 2006, common-law rule against perpetuities does not apply (N.H. Rev. Stat. Ann. §§547:3-k, 564-B:4-409, 564:24). But, perpetual trust might not be possible because separate common-law rule limiting duration of noncharitable purpose trust has not been repealed.	Since 2008, perpetual trusts permitted. Separate common-law rule limiting duration of noncharitable purpose trust repealed in 2011 (S.D. Codified Laws §55-1-20, 55-1-22).
Decanting power	Since 1998 (Alaska Stat. §13.36.157).	Since 2003 (12 Del. C. §3528).	Since 2009 (Nev. Rev. Stat. §163.556).	Since 2008 (N.H. Rev. Stat. Ann. §564-B:4-418).	Since 2007 (S.D. Codified Laws §§55-2-15–55-2-21).
Trustee of ILIT has insurable interest	No statute.	Since 1998 (18 Del. C. §2704(c)(5)).	Since 2009 (Nev. Rev. Stat. §687B.040(2)).	No statute.	Since 2006 (S.D. Codified Laws §58-10-4(6)).
No-contest (in terrorem) clauses	Since 1998, no-contest clause enforceable in Will or trust (Alaska Stat. §13.36.330).	Since 2003, beneficiary barred from bringing judicial proceeding to contest validity of trust 120 days after receiving specified notice. No-contest clause generally enforceable in Will or trust (12 Del. C. §§3546, 3329).	Since 2009, no-contest clause generally enforceable in Will or trust (Nev. Rev. Stat. §§137.005, 163.00195).	Since 2011, no-contest clause generally enforceable in Will or trust (N.H. Rev. Stat. Ann. §§551:22, 564-B:10-1014).	Since 1994, no-contest clause generally enforceable in Will (S.D. Codified Laws §§29A-2-517, 29A-3-905). Effective July 1, 2012, no-contest clause generally enforceable in trust (2012 S.D. HB 1045, §§8–13).

APPENDIX C
A COMPARISON OF THE ALASKA, DELAWARE, NEVADA, NEW HAMPSHIRE, AND
SOUTH DAKOTA ASSET-PROTECTION TRUST STATUTES *

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Citation	Alaska Stat. §§34.40.110, 13.36.035, 13.36.043, 13.36.320, 13.36.370, 13.36.375, 13.36.390, 13.12. 202, 13.12.205	12 Del. C. §§3570–3576	Nev. Rev. Stat. §§166.010–166.180	N.H. Rev. Stat. Ann. §§564-D:1–564-D:18	S. D. Codified Laws §§55-16-1–55-16-17, 55-3-39, 55-3-41, 55-3-47, 29A-2-202, 29A-2-2-205; 2012 S.D. HB 1045, §§15–19
Effective Date	Apr. 1, 1997 (1997 Alaska Sess. Laws 6, §8)	July 1, 1997 (12 Del. C. §3575)	Oct. 1, 1999 (1999 Nev. Stat. 299)	Jan. 2, 2009 (N.H. Rev. Stat. Ann. §564-D:17)	July 1, 2005 (S.D. Codified Laws §55-16-17)
What requirements must trust meet to come within protection of statute?	Trust instrument must: (1) be irrevocable; (2) expressly state Alaska law governs validity, construction, and administration of trust; (3) contain spendthrift clause; and (4) appoint Alaska trustee (Alaska Stat. §13.36.035(c)). Before transferring assets to trust, settlor must sign solvency affidavit (Alaska Stat. §34.40.110(j)). Some assets must be deposited and some administration must occur in Alaska (Alaska Stat. §13.36.035(c)).	Trust instrument must: (1) be irrevocable; (2) expressly state Del. law governs validity, construction, and administration of trust (unless trust is being transferred to Del. trustee from non-Del. trustee); (3) contain spendthrift clause; and (4) appoint Del. trustee (12 Del. C. §3570(11)).	Trust instrument must: (1) be irrevocable; and (2) all or part of corpus of trust must be located in Nev., domicile of settlor must be in Nev., or trust instrument must appoint Nev. trustee (Nev. Rev. Stat. §§166.015(2), 166.040(1)(b)–(c)). Some administration must occur in Nev. (Nev. Rev. Stat. §166.015(1)(d)).	Trust instrument must: (1) be irrevocable; (2) expressly state N.H. law governs validity, construction, and administration of trust (unless trust is being transferred to N.H. trustee from non-N.H. trustee); (3) contain spendthrift clause; and (4) appoint N.H. trustee (N.H. Rev. Stat. Ann. §564-D:2).	Trust instrument must: (1) be irrevocable; (2) expressly state S.D. law governs validity, construction, and administration of trust (unless trust is being transferred to S.D. trustee from non-S.D. trustee); (3) contain spendthrift clause; and (4) appoint S.D. trustee. (S.D. Codified Laws §55-16-2).
What interests in principal and income may trustor/settlor retain?	Settlor may retain: (1) distributions from CRT; (2) interest in total-return unitrust, GRAT, or GRUT; (3) interest in QPRT; (4) interest in IRA; (5) income/principal in discretion of person (including trustee) other than settlor; and (6) ability to be reimbursed for income taxes attributable to trust on mandatory or discretionary basis (Alaska Stat. §34.40.110(b)(2)–(3), (m)).	Trustor may retain: (1) current income; (2) distributions from CRT; (3) interest in GRAT or GRUT or up to 5% interest in total-return unitrust; (4) income/principal in sole discretion or pursuant to standard; (5) interest in QPRT or qualified annuity interest; (6) ability to be reimbursed for income taxes attributable to trust on mandatory or discretionary basis; or (7) ability to provide for payment of debts, expenses, and taxes following death (12 Del. C. §3570(11)(b)). Tenancy-by-entireties property transferred to trust retains character until death of first spouse (12 Del. C. §3574(f)).	Settlor may retain: (1) distributions from CRT; (2) interest in total-return unitrust or qualified retirement or deferred compensation plan; (3) interest in GRAT or GRUT; (4) interest in QPRT or qualified annuity interest; (5) right to use real or personal property owned by trust; (6) income/principal in discretion of another person; and (7) ability to have trust property used to obtain loan secured by mortgage or deed of trust on such property (Nev. Rev. Stat. §§166.040(2), 166.170(4)).	Settlor may retain: (1) current income; (2) distributions from CRT; (3) up to 5% interest in initial value of trust or its value determined from time to time; (4) principal in sole discretion or pursuant to standard; (5) interest in QPRT or qualified annuity interest; (6) ability to be reimbursed for income taxes attributable to trust on discretionary basis; or (7) ability to provide for payment of debts, expenses, and taxes following death (N.H. Rev. Stat. Ann. §564-D:2(II)–(III)).	Settlor may retain: (1) current income; (2) distributions from CRT; (3) interest in total-return unitrust, not exceeding amount that maybe defined as interest under IRC §643(b); (4) income/principal in sole discretion or pursuant to standard; (5) interest in QPRT; or (6) ability to pour back assets to probate estate or revocable trust (S.D. Codified Laws §55-16-2(2)).

* Prepared by Richard W. Nenno, Esquire
Wilmington Trust Company
Wilmington, Delaware

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
What powers may trustor/settlor retain?	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) right to appoint trust protector or trustee advisor (Alaska Stat. §34.40.110 (b)(2), (h)).	Trustor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor (12 Del. C. §§3570(8)(d), 3570(11)(b)).	Settlor may retain: (1) power to veto distributions; (2) lifetime or testamentary special power of appointment; and (3) power to remove or replace trustee (Nev. Rev. Stat. §166.040(2)-(3)).	Settlor may retain: (1) power to veto distributions; (2) non-general testamentary power of appointment; and (3) power to replace trustee/advisor with unrelated/nonsubordinate party (N.H. Rev. Stat. Ann. §§564-D:2(II), 564-D:5).	Settlor may retain: (1) power to veto distributions; (2) non-general inter vivos or testamentary power of appointment effective on death; and (3) power to replace trustee, protector, or trust advisor, provided that successor trustee must not be related or subordinate party (S.D. Codified Laws §55-16-2(2)).
Who must serve as trustee to come within protection of statute?	Resident individual or trust company or bank that possesses trust powers and has principal place of business in Alaska (Alaska Stat. §§13.36.035(c)(1)-(2), 13-36.390(3)).	Resident individual (other than trustor) or corporation whose activities are subject to supervision by Del. Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift Supervision (12 Del. C. §3570(8)(a)). Del. trustee automatically ceases to serve if it fails to meet these requirements (12 Del. C. §3570(8)(e)).	Resident individual or trust company or bank that maintains office in Nev. (Nev. Rev. Stat. §166.015(2)).	Resident individual (other than transferor) or state or federally chartered bank or trust company having place of business in N.H. and is authorized to engage in trust business in N.H. N.H. trustee automatically ceases to serve if it fails to meet these requirements (N.H. Rev. Stat. Ann. §§564-D:3, 564-D:6).	Resident individual (other than transferor) or corporation whose activities are subject to supervision by S.D. Division of Banking, FDIC, Comptroller of Currency, or Office of Thrift Supervision (S.D. Codified Laws §55-3-41). S.D. trustee automatically ceases to serve if it fails to meet these requirements (S.D. Codified Laws §55-16-6).
May nonqualified trustees serve?	Yes (Alaska Stat. §13.36.320).	Yes (12 Del. C. §3570(8)(f)).	Yes (Nev. Rev. Stat. §166.015(2)).	Yes (N.H. Rev. Stat. Ann. §564-D:7).	Yes (S.D. Codified Laws §55-16-7).
May trust have distribution adviser, investment adviser, or trust protector?	Yes. Trust may have trust protector (who must be disinterested third party) and trustee advisor (Alaska Stat. §34.40.110(h)). Settlor may be advisor if does not have trustee power over discretionary distributions (Alaska Stat. §34.40.110(f)).	Yes. Trust may have one or more advisers (other than trustor) who may remove and appoint Del. trustees or trust advisers or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment adviser, including trustor (12 Del. C. §3570(8)(c)-(d)).	Yes. Settlor may have power to direct investments and other management powers, but settlor may not have power to make distributions to self without consent of another person (Nev. Rev. Stat. §166.040(3)). Statute does not say whether person other than settlor may have these powers.	Yes. Trust may have one or more advisers (including settlor) who may remove and appoint qualified trustees or trust advisers; direct, consent to, or disapprove distributions from trust (except that settlor may not participate in distribution decisions for own benefit); and direct, consent to, or veto proposed investment decisions (N.H. Rev. Stat. Ann. §§564-D:4, 564-D:5).	Yes. Trust may have one or more advisers (other than settlor) who may remove and appoint qualified trustees or trust advisers or who have authority to direct, consent to, or disapprove distributions from trust. Trust may have investment adviser, including settlor (S.D. Codified Laws §§55-16-4-55-16-5).
What responsibilities must qualified trustee have?	Alaska trustee must: (1) maintain trust records on exclusive or nonexclusive basis; (2) prepare or arrange for preparation of fiduciary income tax returns on exclusive or nonexclusive basis; and (3) handle part or all of administration (Alaska Stat. §13.36.035(e)).	Del. trustee must: (1) have custody of some or all of corpus; (2) maintain trust records on exclusive or nonexclusive basis; (3) prepare or arrange for preparation of fiduciary income tax returns; or (4) otherwise materially participate in administration of trust (12 Del. C. §3570(8)(b)).	Nev. trustee must: (1) maintain trust records; and (2) prepare income tax returns (Nev. Rev. Stat. §166.015(1)(d)).	N.H. trustee must: (1) have custody of some or all of corpus; (2) maintain trust records on exclusive or nonexclusive basis; (3) prepare or arrange for preparation of fiduciary income tax returns; or (4) otherwise materially participate in administration of trust (N.H. Rev. Stat. Ann. §564-D:3).	S.D. trustee must: (1) have custody of some or all of corpus; (2) maintain trust records on exclusive or nonexclusive basis; or (3) prepare or arrange for preparation of fiduciary income tax returns (S.D. Codified Laws §55-3-39).

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
What is statute of limitations for claims existing on date of transfer?	<p>Later of four years after transfer or one year after transfer was or could reasonably have been discovered by creditor (Alaska Stat. §34.40.110(d)(1)). Requirements set for creditor to establish claim (Alaska Stat. §34.40.110(d)(1)). Creditor must prove by clear and convincing evidence that transfer was fraudulent (Alaska Stat. §34.40.110(b)(1)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (Alaska Stat. §34.40.110(k)).</p>	<p>Later of four years after transfer or one year after transfer was or could reasonably have been discovered by creditor. Creditor must prove by clear and convincing evidence that transfer was fraudulent (12 Del. C. §3572(b)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (12 Del. C. §3572(a)). Subsequent transfer does not affect statute of limitations for prior transfer (12 Del. C. §3572(f)).</p>	<p>Later of two years after transfer or six months after transfer was or could reasonably have been discovered by creditor (Nev. Rev. Stat. §166.170(1)(a)). But, under conflict-of-laws principles, longer limitations period of forum state might be applied in nonbankruptcy proceeding; longer limitations period will apply in federal bankruptcy proceeding. Creditor must prove by clear and convincing evidence that transfer was fraudulent or violated legal obligation (Nev. Rev. Stat. §166.170(3)). Procedure provided to establish discovery through disclosure (Nev. Rev. Stat. §166.170(2)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (Nev. Rev. Stat. §166.170(8)). Subsequent transfer does not affect statute of limitations for prior transfer (Nev. Rev. Stat. §166.170(7)).</p>	<p>Later of four years after transfer or one year after transfer was or could reasonably have been discovered by creditor (N.H. Rev. Stat. Ann. §564-D:10(I)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (N.H. Rev. Stat. Ann. §564-D:9). Subsequent transfer does not affect statute of limitations for prior transfer (N.H. Rev. Stat. Ann. §564-D:14).</p>	<p>Later of two years after transfer or six months after transfer was or could reasonably have been discovered by creditor (S.D. Codified Laws §55-16-10(I)). But, under conflict-of-laws principles, longer limitations period of forum state might be applied in nonbankruptcy proceeding; longer limitations period will apply in federal bankruptcy proceeding. Requirements set for creditor to establish claim (S.D. Codified Laws §55-16-10(1)). Creditor must prove by clear and convincing evidence that transfer was fraudulent (S.D. Codified Laws §55-16-10, last sentence).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (S.D. Codified Laws §55-16-9). Subsequent transfer does not affect statute of limitations for prior transfer (S.D. Codified Laws §55-16-14).</p>
What is statute of limitations for claims arising after date of transfer?	<p>Four years after transfer (Alaska Stat. §34.40.110(d)(2)). Creditor must prove by clear and convincing evidence that transfer was fraudulent (Alaska Stat. §34.40.110(b)(1)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (Alaska Stat. §34.40.110(k)).</p>	<p>Four years after transfer. Creditor must prove by clear and convincing evidence that transfer was made with actual intent to defraud (not hinder or delay) that creditor (12 Del. C. §3572(b)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (12 Del. C. §3572(a)). Subsequent transfer does not affect statute of limitations for prior transfer (12 Del. C. §3572(f)).</p>	<p>Two years after transfer. But, under conflict-of-laws principles, longer limitations period of forum state might be applied in nonbankruptcy proceeding; longer limitations period will apply in federal bankruptcy proceeding. Creditor must prove by clear and convincing evidence that transfer was fraudulent or violated legal obligation (Nev. Rev. Stat. §166.170(3)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (Nev. Rev. Stat. §166.170(8)). Subsequent transfer does not affect statute of limitations for prior transfer (Nev. Rev. Stat. §166.170(7)).</p>	<p>Four years after transfer (N.H. Rev. Stat. Ann. §564-D:10(II)).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (N.H. Rev. Stat. Ann. §564-D:9). Subsequent transfer does not affect statute of limitations for prior transfer (N.H. Rev. Stat. Ann. §564-D:14).</p>	<p>Two years after transfer (S.D. Codified Laws §55-16-10(2)). But, under conflict-of-laws principles, longer limitations period of forum state might be applied in nonbankruptcy proceeding; longer limitations period will apply in federal bankruptcy proceeding. Creditor must prove by clear and convincing evidence that transfer was fraudulent (S.D. Codified Laws §55-16-10, last sentence).</p> <p>Statute bars enforcement of judgment obtained in another jurisdiction (S.D. Codified Laws §55-16-9). Subsequent transfer does not affect statute of limitations for prior transfer (S.D. Codified Laws §55-16-14).</p>

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
May spouses or children of trustor/settlor proceed against trust?	Yes. Creditor due child support may proceed against trust if, at time of transfer, settlor was 30 days or more in default of making payment under child support judgment or order (Alaska Stat. §34.40.110(b)(4)). Unless otherwise agreed, Alaska APT created after marriage or, unless settlor gives notice, within 30 days before marriage subject to division in Alaska divorce proceeding (Alaska Stat. §34.40.110(I)), but surviving spouse of non-Alaska settlor might be able to reach trust if elects against settlor's Will (Alaska Stat. §§13.12.202(d), 13.12.205(a)(2)(A)). Federal law and court precedents might enable minor children and ex-spouses to access trust for support.	Yes. Creditors whose claims result from trustor's breach of an agreement or court order as to child support, alimony, or equitable distribution incident to separation or divorce proceeding may proceed against trust but (in case of alimony or equitable distribution) only if ex-spouse was married to trustor before or on date of transfer (12 Del. C. §§3570(9), 3573(1)). Statute bars claims for forced heirship, legitimate, or elective share (12 Del. C. §3573).	No. But, federal law, Nev. Rev. Stat. §166.170(3), and Nevada Supreme Court precedents might enable minor children and ex-spouses to access trust for support.	Yes. Creditors whose claims result from settlor's breach of antenuptial agreement or of agreement or court order as to child support, alimony, or equitable distribution may proceed against trust but (in case of antenuptial agreement, alimony or equitable distribution) only if ex-spouse was married to settlor before or on date of transfer; surviving spouse may not reach trust by electing against Will unless trust was created to defeat elective-share rights (N.H. Rev. Stat. Ann. §564-D:15(I)(a)).	Yes. Creditors whose claims result from settlor's breach of an agreement or court order as to child support, alimony, or equitable distribution may proceed against trust but (in case of alimony or equitable distribution) only if ex-spouse was married to settlor on or before date of transfer (S.D. Codified Laws §§55-16-1(7), 55-16-15). Surviving spouse of resident settlor may reach trust by electing against Will; surviving spouse of nonresident settlor may reach trust if permitted by law of settlor's domicile (S.D. Codified Laws §§29A-2-202, 29A-2-205(2)(i)).
May tort creditors proceed against trust?	No. Presumably, however, tort creditor as of date of transfer would be able to proceed against trust, subject to statute of limitations set forth above.	Yes. Creditors whose claims arise as result of death, personal injury, or property damage occurring before or on date of transfer, for which trustor was liable either directly or through vicarious liability, may proceed against trust (12 Del. C. §3573(2)).	Not explicitly. But, Nev. Rev. Stat. §166.170(3), might allow; presumably, tort creditor as of date of transfer would be able to proceed against trust, subject to statute of limitations set forth above.	Yes. Creditors whose claims arise as result of death, personal injury, or property damage occurring before or on date of transfer, for which settlor was liable either directly or through vicarious liability, may proceed against trust (N.H. Rev. Stat. Ann. §564-D:15(I)(b)).	No. Presumably, however, tort creditor as of date of transfer would be able to proceed against trust, subject to statute of limitations set forth above.
Are there any other circumstances under which creditor may proceed against trust?	No.	No.	Yes. If transfer violates certain existing legal obligations under contracts or court orders (Nev. Rev. Stat. §166.170(3)).	No.	No.

ITEM	ALASKA	DELAWARE	NEVADA	NEW HAMPSHIRE	SOUTH DAKOTA
Are there provisions for moving trust to state and making it subject to statute?	Yes. Trust must meet all requirements of statute, and Alaska trustee must serve (Alaska Stat. §13.36.043).	Yes. Trust may become subject to statute if moved to Del., provided that trust meets requirements of statute (irrevocability, spendthrift clause, Del. trustee), except that trust instrument need not state that Del. law applies (12 Del. C. §3570(11), flush language at end). If trust is moved from another jurisdiction, for purposes of statute of limitations, transfer deemed made on date property was originally transferred in trust (12 Del. C. §§3572(c), 3575).	Yes. Trust may become subject to statute if moved to Nev., provided that trust meets requirements of statute (New. Rev. Stat. §166.180(1)). If trust is moved from another jurisdiction, for purposes of statute of limitations, transfer deemed made on date property was originally transferred in trust (Nev. Rev. Stat. §166.180(2)).	Yes. Trust may become subject to statute if moved to N.H., provided that trust meets requirements of statute (irrevocability, spendthrift clause, N.H. trustee), except that trust instrument does not have to state that N.H. law applies (N.H. Rev. Stat. Ann. §564-D:2(IV)). If trust is moved from another jurisdiction, for purposes of statute of limitations, transfer deemed made on date property was originally transferred in trust, whether before or after effective date of N.H. statute (N.H. Rev. Stat. Ann. §§564-D:11, 564-D:17).	Yes. Trust may become subject to statute if moved to S.D., provided that trust meets requirements of statute (irrevocability, spendthrift clause, S.D. trustee), except that trust instrument does not have to state that S.D. law applies (S.D. Codified Laws §55-16-2, last sentence). If trust is moved from another jurisdiction, for purposes of statute of limitations, transfer deemed made on date property was originally transferred in trust (S.D. Codified Laws §55-16-11).
Does statute provide that spendthrift clause is transfer restriction described in §541(c)(2) of Bankruptcy Code?	Yes (Alaska Stat. §34.40.110(a)).	Yes (12 Del. C. §3570(11)(c)).	No.	Yes (N.H. Rev. Stat. Ann. §564-D:2(I)(c)).	Yes (S.D. Codified Laws §55-16-2(3)).
Does statute provide that trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply?	No.	Yes (12 Del. C. §3572(g)).	No.	No.	Yes (S.D. Codified Laws §55-3-47).
Does statute provide that express/implied understandings regarding distributions to trustor/settlor are invalid?	Yes (Alaska Stat. §34.40.110(i)).	Yes (12 Del. C. §3571).	Yes (Nev. Rev. Stat. §166.045).	Yes (N.H. Rev. Stat. Ann. §564-D:8).	Yes (S.D. Codified Laws §55-16-8).
Does statute provide protection for attorneys, trustees, and others involved in creation and administration of trust?	Yes (Alaska Stat. §34.40.110(e)).	Yes (12 Del. C. 3572(d)–(e)).	Yes (Nev. Rev. Stat. §166.170(5), (6), (10)(a)).	Yes (N.H. Rev. Stat. Ann. §§564-D:12–564-D:13).	Yes (S.D. Codified Laws §§55-16-12–55-16-13).
2010 Liability System Ranking ¹⁶⁸	33	1	28	16	10
Number of trust companies in state ¹⁶⁹	5	53	18	25	58 (Many are private trust companies).

¹⁶⁸ Data comes from the 2010 State Liability Systems Ranking Study, dated March 2010, conducted by Harris Interactive, Inc., for the U.S. Chamber of Commerce Institute for Legal Reform. The study was based on interviews with 1,482 practicing corporate attorneys and general counsels from October 22, 2009–January 21, 2010, available at www.instituteforlegalreform.com/states (last visited July 3, 2012).

¹⁶⁹ Data comes from *The Best States for Trusts*, available at www.thetrustadvisor.com/news/states2011 (Feb. 2011) (last visited July 3, 2012).