Selecting a Trust Situs in the 21st Century

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Selecting a Trust Situs in the 21st Century

By John A. Warnick and Sergio Pareja

While members of Congress vigorously debate the advantages and disadvantages of keeping the current transfer tax system, states rapidly are enacting laws that entice long-term trusts to those states. Although establishing or relocating a trust to a state other than the grantor's home state is not for every family, it is a planning technique that merits consideration by families with significant assets. The chart on pages 60-63 provides general information on the laws of all fifty states.

This article focuses on three specific considerations related to selecting a favorable trust situs. First, it considers the effect of recent repeals or modifications of the Rule Against Perpetuities (RAP). Within this context, this article primarily focuses on generation-skipping transfer tax (GST Tax) implications. Second, it considers ways to carefully select a situs that can provide families with protection from creditors. Finally, the article examines ways to use favorable state tax laws to reduce a client's state income tax. After discussing these three specific considerations, the article examines some general considerations related to trust situs.

Rule Against Perpetuities and GST Tax Implications

The Issue
The common law Rule Against Perpetuities provides that an interest must vest, if at all, no later than 21 years after some life in being at the creation of the interest. The Uniform Statutory Rule Against Perpetuities, promulgated in 1986 and adopted by about half of the fifty states, modified the common law rule by providing that the interest could vest within 90 years of the creation of the interest. The effect of either of these rules, where they exist, is that either a trust must terminate or the interest must vest within approximately a century after the creation of the trust.

In general, the GST Tax applies whenever a person transfers property, in trust or otherwise, to a person at least two generations below the trans-
feror if no gift or estate tax is applied at the “skipped” generation. There are two exceptions: (1) “grandfathered” trusts (certain inter vivos trusts created before Sept. 25, 1985, and testamentary trusts created before Oct. 22, 1986) and (2) exempt trusts (trusts to which a person has allocated his or her GST Tax exemption). A trust may exist for as long as is permitted under the situs state’s perpetuities period. This rule has the effect of subjecting grandfathered trusts as well as exempt trusts to transfer taxes once the situs state’s perpetuities period has run.

The Opportunities

In General. Although grantors may go out of their way to avoid the Rule Against Perpetuities for long-term family welfare planning purposes, the primary modern motivator is tax planning. Several states have either repealed the Rule Against Perpetuities in its entirety or significantly extended the period during which vesting must occur. See chart, pages 60-63. In addition, several states are currently considering making similar changes to their Rules Against Perpetuities. Because of the potential transfer tax savings, states that have repealed or modified the Rule Against Perpetuities have become enticing places in which to establish new trusts or to which to move existing irrevocable trusts.

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Repeal or modification of the Rule Against Perpetuities may be accomplished in a variety of ways, including (1) the repeal or modification of a state’s Rule Against Perpetuities, (2) the repeal or modification of a state’s transfer tax laws, (3) the repeal or modification of a state’s estate tax laws, (4) the creation of an exemption for certain trusts, or (5) the creation of an exemption for certain transfers.

Establishing New Trusts. Establishing a new trust in a jurisdiction without a Rule Against Perpetuities (a “dynasty trust jurisdiction”) certainly provides the greatest planning opportunities. With respect to GST Tax planning, the grantor’s objective here should be to ensure that the trust has a “situs” for federal tax purposes that

is in a dynasty trust jurisdiction. Ways to establish situs are discussed in greater detail below.

Whether the trust should be created inter vivos or at death (either directly through a will or with a will that pours into a revocable inter vivos trust) is a decision that may be motivated by many factors. Generally, if a client has significant assets, attorneys recommend irrevocable inter vivos trusts because (1) they remove anticipated appreciation from a grantor’s estate and (2) they take advantage of the tax-exclusivity of the gift tax. Despite this common recommendation, clients may focus on the disadvantages of inter vivos irrevocable trusts. The primary disadvantage is that the grantor loses control over assets earlier than he or she may want. This loss of control affects more than mere asset management powers. It also affects the grantor’s ability to change his or her

mind if there is a change in tax (or other) laws or a delay in the grantor’s dispositive wishes.

If a client wants to use a will or a revocable trust to create a long-term trust at death and if the client would like the new trust to be located in a dynasty trust jurisdiction, special care must be taken by the drafting lawyer to ensure that the arrangement and the documents, as well as the mechanics of the execution of the documents, comply with the laws of both states. In this situation, it is advisable to seek the assistance of co-counsel from the other state.

Moving Existing Trusts. If a client already has established an irrevocable trust, another option may be to move that trust to a dynasty trust jurisdiction. Whether this may actually be accomplished is controlled by many factors, such as the terms of the trust and the laws of the relevant states. This method, however, can only work with respect to a trust to which a grantor has allocated some or all of his or her GST Tax exemption. With respect to grandfathered trusts, discussed further below, the situation is entirely different.

The Risks

Grandfathered Trusts. It is impossible to change the situs of a grandfathered trust to a dynasty trust jurisdiction without losing the trust’s grandfathered status if the new situs’s Rule Against Perpetuities governs. Under Treas. Reg. § 26.2601-1(b)(4)(i)(D), changing a grandfathered trust’s situs will not cause a loss of the trust’s exemption only if the change does not extend the time for vesting of any beneficial interest beyond the period provided in the original trust and provided the change does not shift a beneficial interest to a lower generation.

If a trust agreement contains a perpetuities savings clause that operates independent of state law, then any effort to extend the length of a trust by changing its situs will certainly cause the trust to violate the above rule and lose its exempt status. See Treas. Reg. § 26.2601-1(b)(4)(i)(E), Ex. 4. If, on the other hand, a trust agreement does not contain a perpetuities savings clause or does contain a clause that merely makes reference to the law of the state in which the trust originally has its situs, then any change would appear to shift beneficial enjoyment to a generation lower than that originally provided for. Such a change also is likely to cause the trust to lose its exempt status.

Moving to a Perpetuities Jurisdiction. It is important to consider the Rule Against Perpetuities when making situs decisions based on other factors, such as creditor protection, income tax savings, or convenience. A client may desire to move a trust to an income tax free state that appears to have a similar Rule Against Perpetuities as has the client’s home state. It is essential that, before making such a move, care be taken to determine if
there is any pending legislation that could alter the perpetuities period in one of the states.

**Change in Federal Law.** The possibility of a future enactment of a federal Rule Against Perpetuities for GST Tax purposes must be considered. Indeed, such a regulation was promulgated (and later deleted) in 1997. As mentioned above, the Code currently ties the duration of trusts for GST Tax purposes to state law. Congress, however, has the power to create a federal definition of the duration of trusts for GST Tax purposes. This would make efforts at the state level for federal tax planning purposes virtually worthless.

Although it is impossible to predict what laws will be enacted in the future, it is important to keep possible changes in mind when drafting. In the event of such legislative action, for example, it may be desirable to give the trustee the power to terminate the trust.

**Asset Protection**

**In General**

In the race to provide the most advantageous situs for trusts, a few dynasty trust jurisdictions have adopted laws that facilitate asset protection strategies. This type of self-settled, creditor-resistant trust is often referred to as an Asset Protection Trust (APT) or an onshore trust. Its much older cousin, the self-settled foreign trust, is referred to popularly as an Offshore Asset Protection Trust (OAPT). The major difference between a conventional spendthrift trust and the APT or OAPT is that only through the asset protection trusts can a settlor establish a trust to protect his assets from the claims of future creditors while still exercising some degree of control over the trust assets and continuing to receive discretionary distributions of income and principal.

Alaska, Colorado, Delaware, Missouri, Nevada, and Rhode Island are most frequently cited as domestic APT jurisdictions. Clients can establish a “Dynasty APT” in all but one of these jurisdictions. Nevada may become a sixth alternative soon if its voters amend that state’s constitution to repeal the RAP. See Jeffrey L. Burr, *Recent Legislative Changes Impacting Trusts and Estates*, 9 NEV. LAW. No. 7, at 10, 11 (July 2001).

**History**

To understand the rise in popularity of domestic APTs, it is helpful to understand the history and definition of spendthrift trusts. See ERWIN N. GRIEWOLD, *SPENDTHRIFT TRUSTS* (2d ed. 1947). A spendthrift trust prohibits attachment by creditors of the beneficiary’s interest in the trust and may forbid voluntary assignment by a beneficiary of his beneficial interest in the trust. Spendthrift trusts are almost universally accepted in the United States today. But it was not until the Supreme Court’s 1875 decision in *Nichols v. Eaton*, 91 U.S. 716 (1875), that the Court broke with English tradition and asserted, in dicta, that spendthrift trusts should be permitted to protect the beneficiary “from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection.” *Nichols*, 91 U.S. at 727.

As the use and popularity of spendthrift trusts increased, the courts consistently refused to permit an individual to create a spendthrift trust for his own benefit and shield the assets he transferred to the trust from the reach of his present or future creditors. Section 156 of the *Restatement (Second) of Trusts* provides that creditors of a settlor/beneficiary can reach the maximum amount that the trustee, exercising its discretion, could distribute to the settlor/beneficiary. Until recently, the only significant exception to the American bias against a self-settled trust was the protection given retirement plans under most state bankruptcy exemption laws.

Some foreign jurisdictions, in varying degrees, have allowed self-settled trusts as creditor protection devices for some time. See Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts*, 23 EST. PLAN. 65 (1996). For an excellent article highlighting the advantages and drawbacks of many of the offshore trust jurisdictions, see Duncan E. Osborne et al., *Asset Protection and Jurisdiction Selection*, 33 U. MIAMI PHILLIP E. HECKERLING INST. ON EST. PLAN. 14-1 (1999).

Although it is not a “modern-era” domestic APT statute, a few dynasty APT statute, a few dynasty trusts have adopted laws allowing self-settled spendthrift trusts. See *Fulton Investment Co. v. Smith*, 149 P. 444 (Colo. Ct. App. 1915), affirmed, *Smith v. Fulton Investment Co.*, 170 P. 1183 (Colo. 1918); see also *Campbell v. Colorado Coal & Iron Co.*, 10 P. 248 (Colo. 1885). A more recent decision upholding the validity of a self-settled spendthrift trust under Colorado law is *In re Baum*, 22 F.3d 1014 (10th Cir. 1994). But the comparatively narrow scope of the Colorado statute may account for the dearth of marketing by Colorado financial institutions of APT services.

In 1989 Missouri adopted legislation under which a self-settled spendthrift clause will be upheld against future creditors except when the settlor (1) is the only beneficiary of the trust, (2) has retained a power to revoke or amend the trust, or (3) has retained the right to a specific portion of the trust. Mo. ANN. STAT. § 38-10-111 (2000) has for some time been interpreted to provide spendthrift protection to self-settled trusts in which there were no creditors existing at the time the trust was created and a principal purpose of the trust is for the use of the settlor. See *Fulton Investment Co. v. Smith*, 149 P. 444 (Colo. Ct. App. 1915), affirmed, *Smith v. Fulton Investment Co.*, 170 P. 1183 (Colo. 1918); see also *Campbell v. Colorado Coal & Iron Co.*, 10 P. 248 (Colo. 1885). A more recent decision upholding the validity of a self-settled spendthrift trust under Colorado law is *In re Baum*, 22 F.3d 1014 (10th Cir. 1994). But the comparatively narrow scope of the Colorado statute may account for the dearth of marketing by Colorado financial institutions of APT services.

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lature, followed shortly thereafter by the Delaware legislature, amended the state’s trust laws to permit a settlor to include an enforceable restriction on the power of certain creditors to reach the settlor’s interest in a self-settled trust. In 1999, Nevada and Rhode Island entered the competition for domestic APT business.

Comparison of Jurisdictions
Alaska and the other states that followed its lead do not offer settlers all the perceived advantages of offshore jurisdictions, but the domestic APT jurisdictions attempt to differentiate themselves from offshore jurisdictions by offering, to a greater or lesser extent, economy in the establishment and operation of the APT, enhanced political stability, and easier access to trust assets and service providers.

Although all of the Dynasty APT jurisdictions are similar in that they require the APT to be irrevocable, there are a few potentially material differences in the statutory schemes of the domestic Dynasty APT jurisdictions. See Stewart E. Sterk, Asset Protection Trusts: Trust Law’s Race to the Bottom?, 85 CORNELL L. REV. 1035 (2000), at 1037. For instance, Rhode Island requires that all trustees be a resident or authorized to do business in that state. R.I. GEN. LAWS § 18-9.2-2(8)(i) (1999). Alaska and Delaware require merely that one trustee be resident in the host jurisdiction. Nevada does not require that any of the trust property be located in Nevada if the settlor is domiciled in Nevada or created the trust in Nevada. The other three jurisdictions require that at least some of the trust assets be located in or administered in the host jurisdiction.

All of the Dynasty APT jurisdictions other than Delaware would not recognize the spendthrift clause in an APT in which the settlor retained an absolute right to principal. In Delaware, however, it appears that a settlor can insulate an income interest in the APT from the claims of his creditors even though he has retained an absolute, rather than discretionary, right to distributions of income. It has been suggested that only in Delaware would it be possible to establish a Delaware APT that is a charitable remainder trust or total return trust. See Richard W. Nenno & W. Donald Sparks II, Delaware Dynasty Trusts and Asset Protection Trusts, in ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS ch. 14A, § 14A:68 (Duncan E. Osborne ed., 2001).

The Nevada statute distinguishes itself by halving the two relevant periods of limitations during which creditors can attack the APT. In the other jurisdictions existing creditors may attack the transfer by the later of four years from funding or one year from the time the transfer was or could have been reasonably discovered by the creditor. Future creditors must present a claim within the initial four-year period of limitation in all of the Dynasty APT states but Nevada. Exceptions exist in Delaware and Rhode Island, which allow claims for alimony, child support, and property division, as well as certain tort claims that arose before the APT was created, despite the spendthrift protection in the self-settled trust. Alaska does not follow these exceptions, which raises the question of whether the Alaska law may face a more rigorous challenge in the future. Alaska also requires a showing of actual intent to defraud when a creditor challenges an APT. Delaware, Nevada, and Rhode Island require proof only of constructive fraud to successfully avoid the APT’s spendthrift protection.

Drawbacks
Perhaps the greatest drawback to the use of any of the domestic APT jurisdictions is uncertainty over whether the asset protection offered will withstand various constitutional challenges by creditors. For instance, if a creditor brings suit in a state that does not recognize the validity of self-set-
settled spendthrift trusts and obtains a judgment, will the Full Faith and Credit Clause of the U.S. Constitution require that the courts of the state in which the trust is situs enforce that judgment? Could the Contract Clause be used to strike down the laws of a domestic APT jurisdiction that preclude enforcement of judgments against property a grantor/debtor has transferred to a self-settled trust for his own benefit? See Leslie C. Giordani & Duncan E. Osborne, *Will the Alaska Trusts Work?*, *J. Asset Protection*, September/October 1997, at 13. Finally, if creditors are unsuccessful in attacking a domestic APT on constitutional grounds, might they turn to existing or future bankruptcy laws and invoke the Supremacy Clause to argue that federal bankruptcy law overrides state law when the two conflict? See Karen E. Boxx, *Gray’s Ghost—A Conversation About the Onshore Trust*, 85 Iowa L. Rev. 1195 (2000), for a lengthy review of arguments creditors might make to challenge the validity of domestic APT legislation.

**State Income Tax Savings**

*In General*

One of the most significant reasons for moving the situs of a presently existing (nongrantor) trust is to move an income-accumulation trust from a high income tax state to a low income tax state. Obviously a state with an income tax does not want to lose such a trust to a state without an income tax. Before attempting to change the situs of any trust with significant assets, it is imperative to examine both the trust instrument and the laws of the relevant states.

As a general matter, states tax trusts as either “resident” or “nonresident” trusts. A preliminary matter is usually to determine if the trust is treated as a resident or nonresident trust in a particular state. States tend to tax worldwide income of resident trusts but grant a credit for taxes paid to other states. For nonresident trusts, however, states tend to tax only income derived from sources in that state. Income from a state’s sources almost always includes income from real estate and businesses located in the state. It rarely includes publicly traded securities. The location of real estate is not a difficult matter. The location of business interests is more complicated because businesses may operate in various states (or over the Internet). Given this, the ideal trust to attempt to move from a state that has an income tax (a taxing state) to a state that does not have an income tax (a tax-free state) is a trust that solely contains publicly traded securities or interests in businesses that are clearly located in tax-free states.

If the trust instrument permits the change of situs, two questions should be asked: What do the states’ laws say on their face? Are the states’ laws constitutional? What do the states’ laws say on their face? Are the states’ laws constitutional? Because generally the objective is to move a trust from a state that has an income tax (a taxing state) to one that does not have an income tax (a tax-free state), the law of the taxing state is the law that is usually at issue. The information to look for at this point is whether the law of the taxing state provides any guidance on how to “officially” remove a trust from the state and whether the law of the taxing state permits the state to tax a trust that has, to the greatest extent possible, relocated to another state. If state law does allow such taxation, it is necessary to analyze the constitutionality of the taxing state’s laws.

**Constitutional Law Issues**

The constitutional provisions that are most frequently invoked to challenge state taxes are the Due Process Clause and the Commerce Clause. Challenges are most common when a taxing state attempts to treat a trust almost exclusively containing publicly traded securities as a resident trust. The Due Process Clause focuses on the fundamental fairness of a governmental activity. In its Due Process Clause analysis of state income taxes, the U.S. Supreme Court has refined what was formerly a broad inquiry into whether the state has given anything for which it can ask something in return into a two-part test:

1. Is there a minimal connection between a state and the person, property, or transaction that that state seeks to tax; and

2. Is the income attributed to the state for income tax purposes rationally related to values connected with that state?

*Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). In the seminal case of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the U.S. Supreme Court extended the “minimal connection” prong of this test to apply to cases in which an entity does not have a physical presence in a state (*Quill* required only an “economic presence”). Although due process once provided a strong argument against taxing states, a Connecticut Supreme Court case has increased the difficulty of a successful challenge on due process grounds. *Chase Manhattan Bank v. Gavin*, 733 A.2d 782 (Conn. 1999). *Chase Manhattan Bank*, which the U.S. Supreme Court declined to review, dealt with Connecticut’s taxation of the income of a New York trust (even though it resulted in double taxation by New York and Connecticut) under a Connecticut statute that allowed for Connecticut to tax any trust if it (1) consisted of property transferred by will of a decedent who was a resident of Connecticut at the time of his or her death, *Conn. Gen.*
In the realm of the taxation of trusts, the cases appear to focus on the risk of multiple taxation in any Commerce Clause analysis.

...the following requirements are met:
1. the tax must be applied to an activity with a substantial nexus with the taxing state;
2. the tax must be fairly apportioned among all jurisdictions with which the activity has a nexus;
3. the tax must not discriminate against interstate commerce; and
4. the tax must be fair relative to the services provided by the state.

Under the Commerce Clause analysis, the second and third prongs of the test prohibit taxes that unfairly shift the tax burden onto interstate commerce. Recent cases, however, have made a shift of the tax burden onto interstate commerce very difficult to prove. In the seminal South Carolina Supreme Court case of Geoffrey Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.C. 1993), for example, which dealt with corporate tax issues, the court held that a regular or systematic exploitation of a market, even without a physical presence, was a sufficient nexus for withstanding a Commerce Clause challenge to a South Carolina tax of an out-of-state corporation. Other cases dealing with corporate tax issues have held that the situs of the trust is that of the settlor; however, the argument has not met with much success, argue the lawyers, unfairly shifts the tax burden onto interstate commerce.

In the case of a newly established trust, the choice of situs offers an exciting opportunity to maximize the benefits that the settlor wants to achieve through the trust. When establishing or changing situs, it will be essential to consider not only whether the law of a particular jurisdiction will produce the desired results but also whether the move into that jurisdiction can be accomplished without adverse consequences.

Although the reasons for moving an existing trust to a new jurisdiction are often tax-motivated, at least in part, there may be practical or legal advantages to relocation. For instance, the new situs may have adopted the Uniform Prudent Investor Act or may be the new domicile of one or more of the principal beneficiaries of the trust. In the case of a newly established trust, the choice of situs offers an exciting opportunity to maximize the benefits that the settlor wants to achieve through the trust.

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continued to be governed by the law
cated to another state for state income
taxes, provided that the trust
would not lose its exemption if it relo-
Priv. Ltr. Rul. 200012053, the IRS
EST., July 1996, at 40. For instance, in

erations of "Forum Shopping," TR. &
Est., July 1996, at 40. For instance, in
Priv. Ltr. Rul. 200012053, the IRS
determined that a grandfathered trust
would not lose its exemption if it relo-
cated to another state for state income
tax purposes, provided that the trust
continued to be governed by the law
of the original state for Rule Against
Perpetuities purposes.

Changing Situs of an Existing Trust
In analyzing whether the situs of an
existing trust can be changed, the
lawyer must determine whether the
instrument expressly authorizes such
change or whether authority can be
found in applicable state law. After
determining that the change of situs is
possible, the lawyer must advise on
all the steps necessary to make the
relocation fully effective.

Relocation steps can be very
complicated and time consuming.
It may, for example, be necessary to
obtain approval from a court in
the state from which the trust will
be moved. See, e.g., CAL. PROB. CODE
§§ 17400-17405. Also, if the laws of the
current situs require a trust to be reg-
istered, the trustees will have to initi-
ate proceedings or comply with local
law in order to de-register the trust. It
may also be necessary or advisable to
move trust records to the new jurisdic-
tion. The lawyer also must consider
whether the "location" of trust assets
can or should be moved to the new
situs. It may be advisable to consider
transferring difficult-to-move assets
such as real estate or a business into a
limited liability company. This will
involve consideration of the tax, asset
protection, and administrative conse-
quences that may flow from a change
in the form of ownership. Finally, the
lawyer must carefully analyze trust
instrument restrictions to determine if
a proceeding should be commenced to
"reform" the trust to take advan-
tage of the laws of the new jurisdic-
tion or to make relocation more con-
venient or effective.

In addition to ensuring that the situs
of the trust can be moved, it is impor-
tant to consider other factors to make
sure that relocation of the trust will
achieve all or most of the desired
results. As discussed above, moving a
grandfathered trust to a dynasty jurisdic-
tion may not only be ineffective to
extend the trust's finite duration, but
may also have adverse GST Tax conse-
quences. If the sole asset of the trust
consists of real property or a business
interest in the original situs, which is
subject to state income taxation in that
state, the relocation of the trust gener-
ally would not produce tax savings.
Similarly, if all of the beneficiaries of
the trust reside in states that impose
state income taxes, moving a trust that
is required to distribute all of its
income to its beneficiaries may accom-
plish little or no tax savings unless the
beneficiaries are willing to move to one
of the states that does not have a state
income tax. Even if all of the beneficiar-
ies reside in states that impose no state
income tax, if one of the trustees is a
resident of California, the trust may be
subject to California state income taxa-
tion. See James B. Ellis, Forum Shopping
for Your Trust's Tax Law, University of
Southern California Tax Institute, Janu-
ary 2001, at 15.

Situs Considerations When
Drafting a New Trust
Careful drafting of a new trust instru-
ment can provide planning flexibility
even if the immediate goal is not to
place the situs of the trust in a
dynasty, APT, or income tax free jurisdic-
tion. For instance, the drafter
should include a "jurisdiction-skip-
ning" clause that would permit the
trustee to change the situs of the trust,
perhaps even to an offshore jurisdic-
tion. Trustees may be directed to move
the situs to a more favorable location
if the laws of the original jurisdiction
are ever altered in some manner that
would defeat one of the original pur-
poses of the trust.

Flexibility in the trusteeship is
another important consideration. If the
trust is located initially in a Dynasty
APT jurisdiction, it may be necessary
to require that at all times there be suf-
icient trustees resident in that state to
ensure that the favorable legal climate
of the host jurisdiction will not be lost.
The drafter may want to permit an
"investment trustee" located outside the
host jurisdiction to have sole
responsibility for investment decisions
or to provide for a "committee of trust
advisors" that would not serve as
trustees but that would guide or direct
a trustee in the host jurisdiction. In
anticipation of the death or resignation
of a trustee, it may be desirable to be
able to easily effect changes in the
number or identity of trustees and
either to repose this power in one or
more of the beneficiaries or to create a
trust protector. If the new trust is to
serve as a dynasty or APT trust,
empowering a trust protector to deal
with changes in tax laws, local trust
law, or other unforeseen circumstances
in a manner that will preserve all or
most of the trust's original advantages
may prove invaluable. Similarly, the
drafter may want to permit an inde-
pendent trustee to have the power to
effectively terminate the trust by dis-
tributing all of its assets to a new trust
established for the benefit of existing
beneficiaries.

Conclusion
There is no "perfect" trust situs. A
handful of states with no state income
tax also offer asset protection advan-
tages and the opportunity to create
perpetual trusts. Opportunities for tax
savings and investment or administra-
tive considerations will most heavily
influence the choice of a situs when
relocating an existing trust. Careful
attention needs to be paid to the laws
of the outbound and inbound jurisdic-
tions as well as to the terms and
restrictions of the existing trust. When
recommending a situs for a client
establishing a new trust, each plan-
ning objective will need to be carefully
weighted with the relative strengths
and weaknesses of each jurisdiction.
In addition, the draftsman should
carefully consider what additional
provisions beyond a "jurisdiction-
skipping" clause may give the newly
formed trust the greatest degree of
mobility and flexibility to cope with
future changes in tax or trust laws.
# Overview of State Laws

<table>
<thead>
<tr>
<th>State</th>
<th>Rule Against Perpetuities</th>
<th>Asset Trust Jurisdiction</th>
<th>State Noncorporate Income Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>1000 years; ALASKA STAT. § 34.27.051; H.B. 34 (2001).</td>
<td>Yes; ALASKA STAT. § 13.12.205.</td>
<td>0%; ALASKA STAT. §§ 36.10.005 and 43.20.010 (repealed tax).</td>
</tr>
<tr>
<td>Arizona</td>
<td>Opt out of USRAP is possible; ARIZ. REV. STAT. §§ 14-2901-2906.</td>
<td>No.</td>
<td>2.87% to 5.04%; ARIZ. REV. STAT. § 43-1111.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>USRAP; CONN. GEN. STAT. § 45a-491.</td>
<td>No.</td>
<td>3% to 4.5%; CONN. GEN. STAT. § 12-700.</td>
</tr>
<tr>
<td>Delaware</td>
<td>Real property—110 years; personal property—no limit; 25 DEL. CODE ANN. § 503.</td>
<td>Yes; 12 DEL. CODE ANN. §§ 3570-3576.</td>
<td>2.2% to 5.95%; 30 DEL. CODE ANN. § 1102(a)(11).</td>
</tr>
<tr>
<td>Florida</td>
<td>360 years; FLA. STAT. § 689.225.</td>
<td>No.</td>
<td>0%; FLA. STAT. §§ 220.03 &amp; 220.11(4).</td>
</tr>
<tr>
<td>Georgia</td>
<td>USRAP; GA. CODE ANN. § 44-6-201; H.B. 685 (2001).</td>
<td>No.</td>
<td>1% to 6%; GA. CODE ANN. § 48-7-20.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>USRAP; HAW. REV. STAT. § 525-1.</td>
<td>No.</td>
<td>1.5% to 8.5%; HAW. REV. STAT. § 235-51(3).</td>
</tr>
<tr>
<td>Idaho</td>
<td>No limit; IDAHO CODE § 55-111.</td>
<td>No.</td>
<td>1.9% to 8.1%; IDAHO CODE § 63-3024.</td>
</tr>
<tr>
<td>Illinois</td>
<td>Opt out possible; 765 ILL. COMP. STAT. §§ 304 &amp; 305.</td>
<td>No.</td>
<td>3.0%; 35 ILL. COMP. STAT. § 5/201(2)(ii).</td>
</tr>
<tr>
<td>Indiana</td>
<td>USRAP; IND. CODE § 32-1-4.5-3.</td>
<td>No.</td>
<td>3.4%; IND. CODE § 6-3-2-1(b).</td>
</tr>
</tbody>
</table>

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1. This chart is solely intended to serve as a general overview. Advice of counsel licensed in the pertinent state should be sought before considering any acts in that state.
2. Common law: twenty-one years after a life in being at the creation of the interest.
3. USRAP (Uniform Statutory Rule Against Perpetuities): either (1) 21 years after a life in being at the creation of the interest or (2) 90 years after the creation of the interest.
<table>
<thead>
<tr>
<th>State</th>
<th>Common Law;</th>
<th>Disposition</th>
<th>Rate</th>
<th>Statute/Code References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>IOWA Code § 558-68; H.B. 534 (2001).</td>
<td>No.</td>
<td>.36% to 8.98%</td>
<td>IOWA Code § 422-5.</td>
</tr>
<tr>
<td>Michigan</td>
<td>USRAP; MICH. COMP. LAWS § 554.71.</td>
<td>No.</td>
<td>4.4%</td>
<td>Mich. Comp. Laws § 206.51.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>USRAP; MINN. STAT. § 501A-01.</td>
<td>No.</td>
<td>5.35% to 7.85%</td>
<td>Minn. Stat. § 290.06.</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Common Law; H. 739 (2001).</td>
<td>No.</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Statute Details</td>
<td>Method</td>
<td>Percentages</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
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<td></td>
</tr>
<tr>
<td>New York</td>
<td>Common Law; N.Y. Est. POWERS &amp; TRUSTS LAW § 9-1.1(a)(2); H.B. 7317 (2001); No. 4% to 6.85%; N.Y. Tax Law § 601.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>USRAP; N.C. Gen. Stat. § 41-15. No. 6% to 7.75%; N.C. Gen. Stat. § 105-134.2(a)</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>USRAP; N.D. Cent. Code § 47-02-27.1; No. 2.67% to 12%; N.D. Cent. Code § 57-38-29.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>Opt out of Common Law is possible; Ohio Rev. Code Ann. § 2131.08; No. 74% to 7.5%; Ohio Rev. Code Ann. § 5747.02.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Common Law; 435 P.2d 107, 111 (Okla. 1967); No. .5% to 6.75%; 68 Okla. Stat. § 2355.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>USRAP; Or. Rev. Stat. § 105.950. No. 5% to 9%; Or. Rev. Stat. § 316.037.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>USRAP; S.C. Code Ann. § 27-6-20. No. 2.5% to 7%; S.C. Code Ann. § 12-6-510(A).</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>No limit; S.D. Codified Laws § 43-5-8. No. 0%; S.D. Codified Laws § 10-54-1.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>USRAP; Tenn. Code Ann. § 66-1-202. No. 0%.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>Common Law; 106 S.W.2d 247 (Tex. 1937); Tex. Prop. Code §§ 112.036 &amp; 121.004. No. 0%; Tex. Tax Code § 141.001.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>Common Law; 584 P.2d 875, 876 (Utah 1978). No. 2.3% to 7.0%; Utah Code Ann. § 59-10-104.</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Law Code/Accordion</td>
<td>No.</td>
<td>Rate</td>
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</tr>
<tr>
<td>Washington</td>
<td>Wash. Rev. Code §§ 11.98.130–150</td>
<td>No.</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>USRP; W. Va. Code § 36–1A–1</td>
<td>No.</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>No RAP but life in being plus 30 years for power of alienator; Wis. Stat. § 700.16.</td>
<td>No.</td>
<td>0%</td>
<td></td>
</tr>
</tbody>
</table>
Theme Calendar

Readers are invited to submit articles for consideration, both on the listed themes and on other topics. Publication deadlines require that articles editors receive article drafts several months before publication. The magazine’s memorandum for authors gives more details on the format, length, and style of the articles. The memorandum may be obtained by contacting the managing editor or at www.abanet.org/rppt/memorandum.html.

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Real Estate Financing
Charitable Planning/Nonprofit Organizations
*Article submission deadline: May 1, 2002*

**Issue—November/December 2002**
Land Use/Growth Management
Tax Planning
*Article submission deadline: July 1, 2002*

**Issue—January/February 2003**
Leasing and Property Management
Basic Estate Planning
*Article submission deadline: September 2, 2002*

**Issue—March/April 2003**
Exotic Real Estate
Estate and Trust Administration
*Article submission deadline: November 1, 2002*

**Issue—May/June 2003**
Title Insurance
Employee Benefits and Retirement Benefits Planning
*Article submission deadline: January 2, 2003*

**Issue—July/August 2003**
Management/Technology
*Article submission deadline: March 1, 2003*
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Drafting for Tax and Administration Issues

Thomas M. Featherston, Jr.
Nancy G. Henderson
M. Read Moore
David F. Powell

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