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Selecting a Trust Situs in the 21st Century

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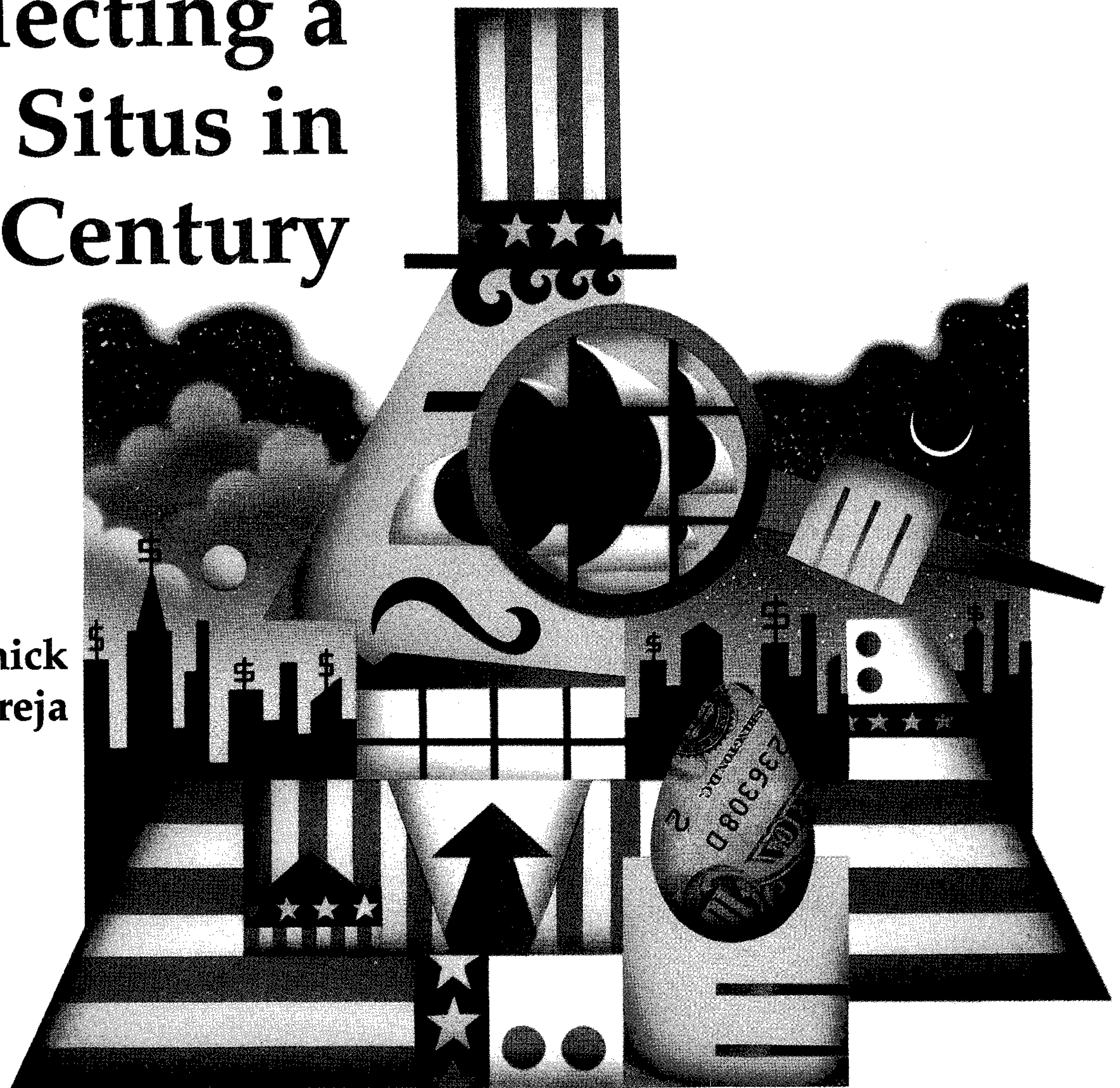
Selecting a Trust Situs in the 21st Century



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-

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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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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. GRISWOLD, 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, COLO. REV. 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.

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. § 456.080(3)(2) (West 1992). Nevertheless, at least two courts have refused to apply Missouri's statute to self-settled trusts. See *In re Markmueller*, 51 F.3d 775 (8th Cir. 1995), and *In re Enfield*, 133 B.R. 515 (Bankr. W.D. Mo. 1991).

The big domestic APT push started in 1997. In that year, the Alaska legis-

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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 settlors 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-

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tled 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 sited 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? 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.

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?

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.

Due Process Clause. 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.

STAT. § 12-701(a)(4)(A), or (2) consisted of property that was transferred to an irrevocable trust by a person who was a Connecticut resident at the time of the transfer, CONN. GEN. STAT. § 12-701(a)(4)(D)(i).

The Connecticut court upheld the taxation and the statute with respect to *testamentary* trusts on the grounds that beneficiaries of a decedent's estate benefit from the fact that they can appeal to Connecticut courts on issues of administration of any testamentary trust.

With respect to *inter vivos* irrevocable trusts, the Connecticut court held that

> a state may . . . tax the income of an inter vivos trust that is accumulated for the ultimate benefit of a noncontingent domiciliary, and that is subject to her ultimate power of disposition. Although the connection is more attenuated than in the case of a testamentary trust, it is sufficient for purposes of due process of law.

Chase Manhattan Bank, 733 A.2d at 802.

Commerce Clause. Unlike the Due Process Clause's concern with the fundamental fairness of governmental activity, the Commerce Clause focuses on the effects of state regulation on the national economy. In its Commerce Clause analysis, the U.S. Supreme Court also has developed a multi-part test. The Court will sustain state taxation of an out-of-state entity against a Commerce Clause challenge if 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.

Quill Corp., 504 U.S. at 311.

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 a single employee or even a broker in a state is enough to establish a sufficient nexus for Commerce Clause purposes. *See Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975), and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

In the realm of the taxation of trusts, the cases appear to focus on the risk of multiple taxation in any Commerce Clause analysis.

In the realm of the taxation of trusts, the cases appear to focus on the risk of multiple taxation in any Commerce Clause analysis. Lawyers seeking to invalidate states' taxation of out-of-state trusts based on the Commerce Clause have argued that a potential for multiple taxation by different states influences grantors to choose trustees in states that will not tax the out-of-state trust. This influence, argue the lawyers, unfairly shifts the tax burden. Unfortunately, the argument has not met with much success. See *Chase Manhattan Bank*, 733 A.2d at 782, and *McCulloch v. Franchise Tax Board*, 390 P.2d 412 (Cal. 1964). Despite the lack of success, the cases and trends should be monitored carefully if a move to a tax-free state is being contemplated.

General Considerations in Establishing or Changing Trust Situs

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. 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.

In the case of an existing trust, the question of whether a trust may be relocated is primarily a question of what the settlor intended; however, the issue also may involve questions as to whether the situs of the trust assets themselves can or should be moved. When creating a new trust, the settlor can specify which state's law will govern the administration and construction of the trust, but it is prudent to review the law of the states involved to make sure that there will be sufficient contacts to make the choice of law effective. The rest of this section provides some general guidelines that should always be kept in mind when attempting to move or establish a trust's situs.

Choice of Law

One of the most interesting features of the situs rules is that a trust may be governed by different laws for different purposes. See James S. Sligar, *Changing Trust Situs: The Legal Consid-*

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 relocated 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 a 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 registered, the trustees will have to initiate proceedings or comply with local law in order to de-register the trust. It also may be necessary or advisable to move trust records to the new jurisdiction. 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 consequences 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 advantage of the laws of the new jurisdiction or to make relocation more convenient or effective.

In addition to ensuring that the situs of the trust can be moved, it is important to consider other factors to make sure that relocation of the trust will accomplish all or most of the desired results. As discussed above, moving a grandfathered trust to a dynasty jurisdiction may not only be ineffective to extend the trust's finite duration, but may also have adverse GST Tax consequences. 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 generally 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 accomplish 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 beneficiaries 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 taxation. See James B. Ellis, *Forum Shopping for Your Trust's Tax Law,* University of Southern California Tax Institute, January 2001, at 15.

Situs Considerations When Drafting a New Trust
Careful drafting of a new trust instrument 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 jurisdiction. For instance, the drafter should include a "jurisdiction-skipping" clause that would permit the trustee to change the situs of the trust, perhaps even to an offshore jurisdiction. 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 purposes 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 sufficient 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 independent trustee to have the power to effectively terminate the trust by distributing 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 advantages and the opportunity to create perpetual trusts. Opportunities for tax savings and investment or administrative 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 jurisdictions as well as to the terms and restrictions of the existing trust. When recommending a situs for a client establishing a new trust, each planning objective will need to be carefully weighed 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[1]

State	Rule Against Perpetuities	Asset Trust Jurisdiction	State Noncorporate Income Tax Rate
Alabama	Common Law[2]; Ala. Code § 35-4-4 (2000).	No.	2% to 5%; Ala. Code § 40-18-5.
Alaska	1000 years; Alaska Stat. § 34.27.051; H.B. 34 (2001).	Yes; Alaska Stat. § 13.12.205.	0%; Alaska Stat. §§ 36.10.005 and 43.20.010 (repealed tax).
Arizona	Opt out of USRAP[3] is possible; Ariz. Rev. Stat. §§ 14-2901–2906.	No.	2.87% to 5.04%; Ariz. Rev. Stat. § 43-1011.
Arkansas	Common Law; Ark. Const. Art. 2, § 9 and 677 S.W.2d 851, 854 (1984).	No.	1% to 7%; Ark. Code Ann. § 26-51-201.
California	USRAP; Cal. Prob. Code §§ 21205–21208 (2000).	No.	1% to 9.3%; Cal. Rev. & Tax Code § 17041 (2000).
Colorado	USRAP; but Colo. Rev. Stat. § 15-11-1102 (1)(c) permits Dynasty Trusts.	Yes; Colo. Rev. Stat. § 38-10-111 (2000).	4.63%; Colo. Rev. Stat. § 39-22-104(1.7).
Connecticut	USRAP; Conn. Gen. Stat. § 45a-491.	No.	3% to 4.5%; Conn. Gen. Stat. § 12-700.
Delaware	Real property—110 years; personal property—no limit; 25 Del. Code Ann. § 503.	Yes; 12 Del. Code Ann. §§ 3570–3576.	2.2% to 5.95%; 30 Del. Code Ann. § 1102(a)(11).
Florida	360 years; Fla. Stat. § 689.225.	No.	0%; Fla. Stat. §§ 220.03 & 220.11(4).
Georgia	USRAP; Ga. Code Ann. § 44-6-201; H.B. 663 (2001).	No.	1% to 6%; Ga. Code Ann. § 48-7-20.
Hawaii	USRAP; Haw. Rev. Stat. § 525-1.	No.	1.5% to 8.5%; Haw. Rev. Stat. § 235-51(c).
Idaho	No limit; Idaho Code § 55-111.	No.	1.9% to 8.1%; Idaho Code § 63-3024.
Illinois	Opt out possible; 765 Ill. Comp. Stat. §§ 304 & 305.	No.	3.0%; 35 Ill. Comp. Stat. § 5/201(2)(ii).
Indiana	USRAP; Ind. Code § 32-1-4.5-3.	No.	3.4%; Ind. Code § 6-3-2-1(a).

[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.

Iowa	Common Law; IOWA CODE § 558-68; H.B. 534 (2001).	No.	.36% to 8.98%; IOWA CODE § 422-5.
Kansas	Common Law; 524 P.2d 1187 (Kan. 1974).	No.	3.5% to 6.45%; KAN. STAT. ANN. § 79-32, 110.
Kentucky	Common Law; KY. REV. STAT. ANN. § 381.215.	No.	2% to 6%; KY. REV. STAT. ANN. § 141.020.
Louisiana	Contingent future estates apparently not permitted; LA. REV. STAT. § 47:32 (2000).	No.	2% to 6%; LA. CIV. CODE ANN. art. 1520.
Maine	Opt out of Wait and See Rule is possible (review facts existing at termination of period); ME. REV. STAT. ANN. tit. 33, §§ 101–106.	No.	3.5% to 8.93%; ME. REV. STAT. tit. 36, § 5200.
Maryland	Opt out of Common Law is possible; MD. CODE ANN., EST. & TRUSTS § 11-102.	No.	2% to 4.8%; MD. CODE ANN., TAX-GEN. § 10-105(a).
Massachusetts	USRAP; MASS. GEN. LAWS ch. 184A.	No.	5.6% (maximum); MASS. GEN. LAWS ch. 62, § 4.
Michigan	USRAP; MICH. COMP. LAWS § 554.71.	No.	4.4%; MICH. COMP. LAWS § 206.51.
Minnesota	USRAP; MINN. STAT. § 501A-01.	No.	5.35% to 7.85%; MINN. STAT. § 290.06.
Mississippi	Common Law; MISS. CODE ANN. § 79-15-21.	No.	3% to 5%; MISS. CODE ANN. § 27-7-5(1).
Missouri	Opt out of Common Law is possible; MO. REV. STAT. § 456.236.	Yes; MO. REV. STAT. §§ 456.080 & 456.072.	1.5% to 6%; MO. REV. STAT. § 143.011.
Montana	USRAP; MONT. CODE ANN. § 72-2-1001.	No.	2% to 11%; MONT. CODE ANN. § 15-30-103(1).
Nebraska	Common Law; 152 NEB. § 753, 760 (2001).	No.	3.7%; NEB. REV. STAT. ANN. § 77-2701-01.
Nevada	USRAP; NEV. REV. STAT. § 111-1031.	Yes NEV. REV. STAT. §§ 21.080 & 166.020.	0%.
New Hampshire	Common Law; H. 739 (2001).	No.	0%.
New Jersey	No limit; N.J. STAT. ANN. §§ 45-2-901–906.	No.	1.4% to 6.37%; N.J. STAT. ANN. § 54A:2-1.

New Mexico	USRAP; N.M. STAT. ANN. § 45-2-901; S.B. 424 (2001).	No.	1.7% to 8.2%; N.M. STAT. ANN. § 7-2-7.
New York	Common Law; N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(a)(2); H.B. 7317 (2001).	No.	4% to 6.85%; N.Y. TAX LAW § 601.
North Carolina	USRAP; N.C. GEN. STAT. § 41-15.	No.	6% to 7.75%; N.C. GEN. STAT. § 105-134.2(a).
North Dakota	USRAP; N.D. CENT. CODE § 47-02-27.1.	No.	2.67% to 12%; N.D. CENT. CODE § 57-38-29.
Ohio	Opt out of Common Law is possible; OHIO REV. CODE ANN. § 2131.08.	No.	.743% to 7.5%; OHIO REV. CODE ANN. § 5747.02.
Oklahoma	Common Law; 435 P.2d 107, 111 (Okla. 1967).	No.	.5% to 6.75%; 68 OKLA. STAT. § 2355.
Oregon	USRAP; OR. REV. STAT. § 105.950.	No.	5% to 9%; OR. REV. STAT. § 316.037.
Pennsylvania	Common Law; 20 PA. CODE § 6104.	No.	2% to 8%; 72 PA. CODE § 3402-201(A).
Rhode Island	Abolished RAP: R.I. GEN. LAWS § 34-11-38.	Yes; R.I. GEN. LAWS § 18-9.1-1.	25.5% of Federal income tax liability; R.I. GEN. LAWS § 44-30-2(A)(1)(xi).
South Carolina	USRAP; S.C. CODE ANN. § 27-6-20.	No.	2.5% to 7%; S.C. CODE ANN. § 12-6-510(A).
South Dakota	No limit; S.D. CODIFIED LAWS § 43-5-8.	No.	0%; S.D. CODIFIED LAWS § 10-54-1.
Tennessee	USRAP; TENN. CODE ANN. § 66-1-202.	No.	0%.
Texas	Common Law; 106 S.W.2d 247 (Tex. 1937); TEX. PROP. CODE §§ 112.036 & 121.004.	No.	0%; TEX. TAX CODE § 141.00.1.
Utah	Common Law; 584 P.2d 875, 876 (Utah 1978).	No.	2.3% to 7.0%; UTAH CODE ANN. § 59-10-104.
Vermont	Common Law; 118 A. 527, 528 (Vt. 1922).	No.	24% of federal income tax liability; 32 VT. STAT. ANN. § 5822.
Virginia	Opt out of USRAP is possible; VA. CODE ANN. §§ 55-12.1 & 13.3(c).	No.	2% to 5.75%; VA. CODE ANN. § 58.1-320.

Washington	Modified Common Law to 150 years; WASH. REV. CODE §§ 11.98.130–150.	No.	0%.
West Virginia	USRAP; W. VA. CODE § 36-1A-1.	No.	3.0% to 6.5%; W. VA. CODE § 11-21-4e.
Wisconsin	No RAP but life in being plus 30 years for power of alienator; WIS. STAT. § 700.16.	No.	4.3% to 6.75%; WIS. STAT. § 71.06(2)(e)(a–b).
Wyoming	Common Law; WYO. STAT. ANN. § 34-1-139 (2001).	No.	0%; WYO. STAT. ANN. § 39-7-101 (repealed tax).

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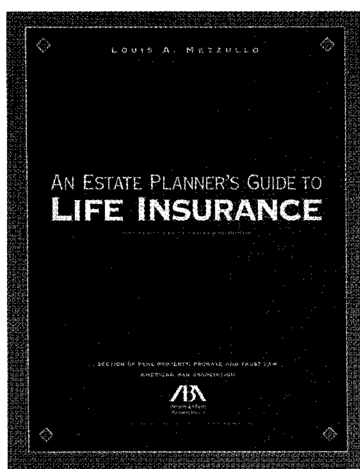

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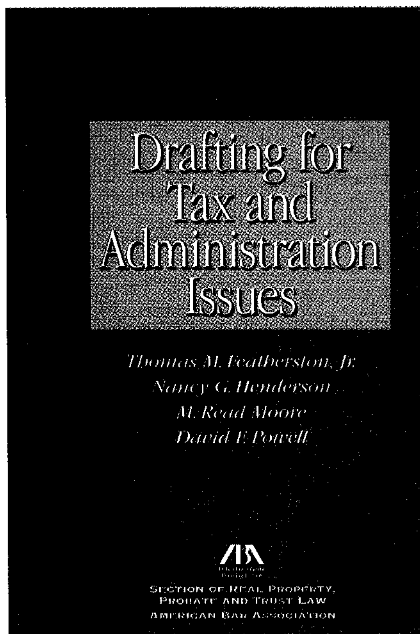

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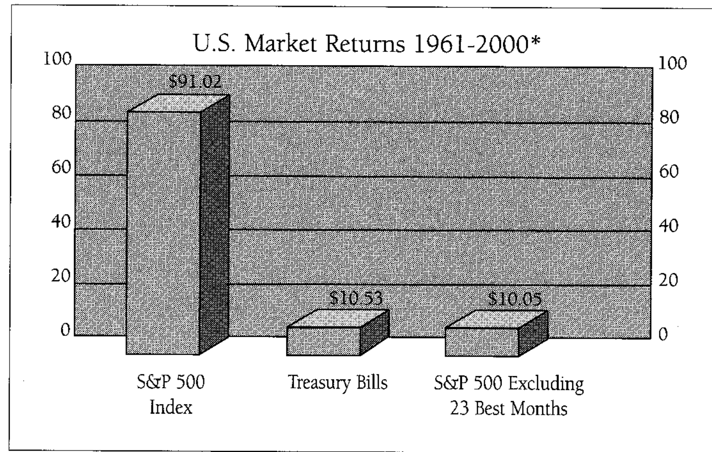

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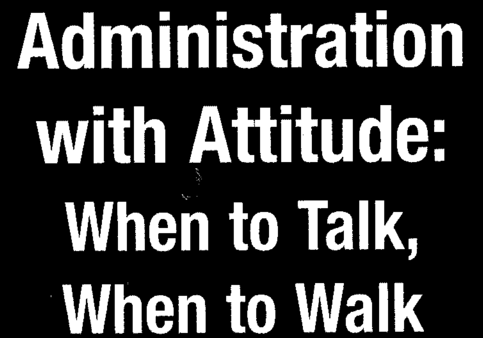

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