

ESTATE PLANNING COUNCIL OF LONG ISLAND –

SEPTEMBER 19TH, 2024:

“POWERFUL TRUST LAWS TO COMBAT FUTURE UNCERTAINTIES: *THE NEED FOR FLEXIBILITY*”

SPEAKER:

AL W. KING III, J.D., LL.M., AEP (DISTINGUISHED), TEP



Sioux Falls Office
South Dakota Trust Company LLC
SDTC Services LLC
201 South Phillips Ave, Suite 200
Sioux Falls, SD 57104
Phone (605) 338-9170
Fax (605) 274 -9200

Rapid City Office
South Dakota Trust Company LLC
4020 Jackson Blvd, Suite 3
Rapid City, SD 57702
Phone (605) 721-0630
Fax (605) 721-0634

Wyoming Office
SDTC Services of WY
890 W Broadway
Jackson Hole, WY 83001
Phone (307) 739-4372

Nevada Office
SDTC Services of NV
3605 South Town Center Dr
Suite A
Las Vegas, NV 89135

New York Office
South Dakota Planning Company
10 East 40th Street, Suite 1900
New York, NY 10016
Phone (212) 642-8377
Fax (212) 642-8376

Westport Office
SDTC Planning of CT
274 Riverside Avenue,
2nd Floor
Westport, CT 06880
Phone (203)635-2262

“Powerful Trust Laws to Combat Future Uncertainties: The Need for Flexibility”

- Timely Topic Given Fact That:
 - Currently \$140 trillion of wealth in U.S.
 - \$84 trillion expected to pass over next 20 years
 - Mainly from Baby Boomers to Millennials

“Powerful Trust Laws to Combat Future Uncertainties: The Need for Flexibility”

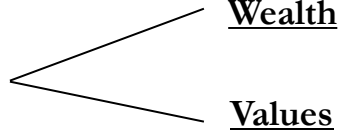
- What is interesting:

- 25% of Millennials still living with parents
- 20% of population intergenerational households
 - Silent generation, Baby Boomers & Millennials and/or Gen Z living together
- 61% of Baby Boomers do not think children can handle wealth
 - 21% of millennials not sure they are prepared to handle inheritance
 - 18% of Generation Z
- 33% of Baby Boomers have not disclosed wealth to children

“Giving While Living”

- Many families not waiting until death to set-up modern trust structures

- “Giving While Living”
- Allows for protections



[Against]

Future Uncertainties

- Reasons “Giving While Living”:

1. Baby boomers benefited from financial & housing markets

➤ Average home price → 500% increase since 1983

➤ S&P 500 → 2800% growth since 1983

2. \$13.6 mm estate, gift & GST exemptions

3. Modern trust structures & laws

➤ 12.5% gifts to irrevocable trusts (1995) to 40% (today)

“Powerful Trust Laws to Combat Future Uncertainties: The Need for Flexibility”

“Inheritance is a process
not an event!”

Important Future Uncertainties:

- Family
- Economic
- Political
- Asset Protection
 - Litigation
 - Divorce
- Tax
 - Federal
 - State
 - City
 - Insurance premiums (state)
- Other

Types of Trusts:

- Third Party – grantor establishes trust for beneficiaries
- Self-Settled – grantor establishes trust for beneficiaries
 - Grantor permissible discretionary beneficiary
- 19 states have enacted laws allowing for Self-Settled DAPT's:

Alaska	Missouri	Tennessee
Connecticut	Nevada	Utah
Delaware	New Hampshire	Virginia
Hawaii	Ohio	West Virginia
Indiana	Oklahoma	Wyoming
Michigan	Rhode Island	
Mississippi	South Dakota	

Self-Settled Trusts:

- Self-Settled Trusts:
 - Irrevocable trust established so the grantor/settlor can be a permissible discretionary beneficiary of the trust
- Gift/GST Exemption: \$13,610,000
 - Due to high exemptions client may want to be a permissible discretionary beneficiary of a trust
- Asset Protection: creditors cannot otherwise reach the trust assets to satisfy legal obligations to the settlor unless:
 - Exception creditors – varies by state
 - (or)
 - Fraudulent conveyance – typically 2-4 years (depending upon state)

Self-Settled/Domestic Asset Protection Trusts –

4 Levels of Protection:

Domestic Asset Protection Trust

Two Self-Settled Options:

- ❖ **Excluded from Estate:** Irrevocable self-settled domestic asset protection dynasty trust
- ❖ **Included in Estate:** Incomplete gift irrevocable domestic asset protection trust
- ❖ **Combination**

Level 1 – Trust (i.e, self-settled statute)

- Fraudulent conveyance standard
 - 2 years fraudulent conveyance – SD & NV
 - 4 years fraudulent conveyance: AK, DE, NH & WY
- Prove transfer hinder, delay or defraud – Specific creditor
- Clear & convincing burden of proof

Level 2 – LLC Charging Order Protection as Sole and Exclusive Remedy

- Also sole member LLC statute so trust sole owner

Level 3 – Discretionary Interest Protection

- Not a property or enforceable right

Level 4 – Spendthrift Provision

Other Miscellaneous Statutes Helpful to Maximize DAPT's Benefits:

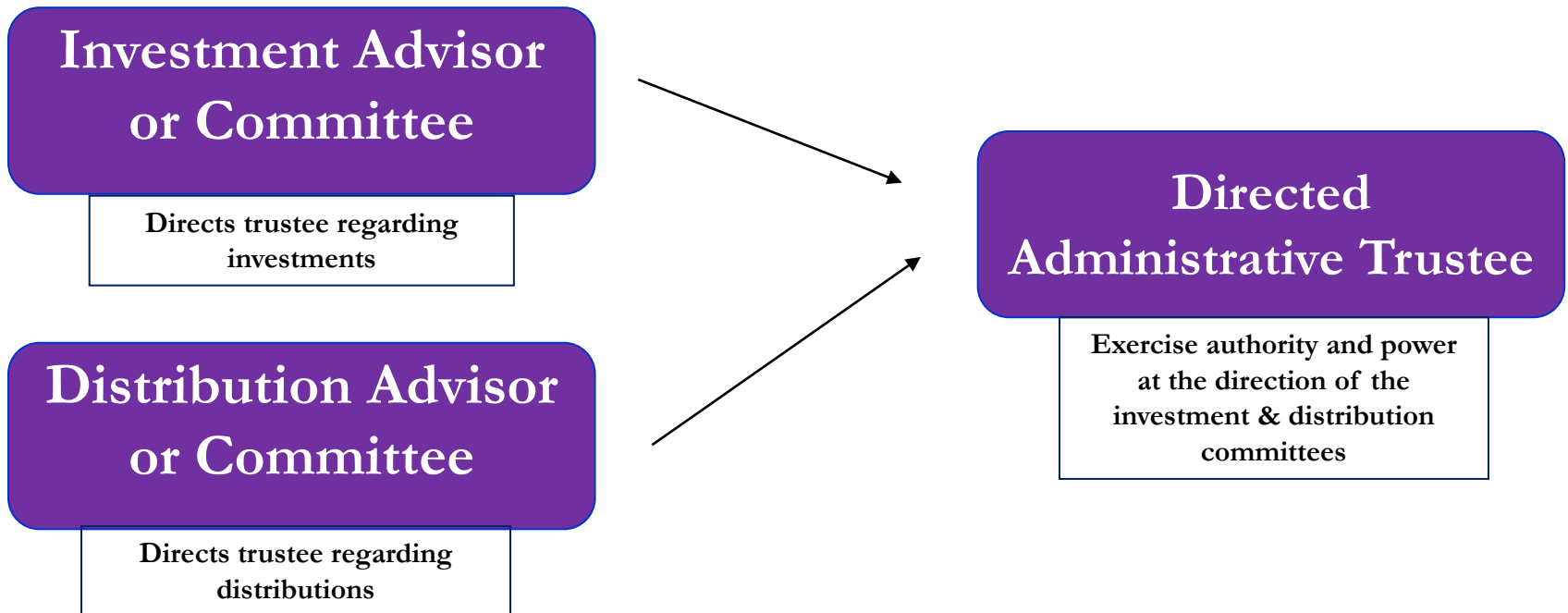
- Reimbursement of Attorney Fees:
 - DE, WY & SD: Yes for any prevailing party
 - If DAPT is sued and lawsuit unsuccessful, the trust is reimbursed for legal fees
 - AK: Yes if trust is void or set aside
 - NV: Yes to prevailing petitioner (petitioner must be beneficiary or trustee)

Modern Directed Trusts:

- Directed Trusts created with “open architecture”
- Collaborative relationship among beneficiaries and trustee
- Multiple trustees/fiduciaries and managers assume duties once assigned to single trustee:
 - Specialization of function (distributions, investments, custody, administration)
 - Active family and family advisor involvement
- Provide flexibility and control

Flexible Modern Directed Trust:

Directed Trust (Trifurcated Fiduciary Structure):



***Please note: Combine Investment Advisor and Distribution Advisor → Trust Advisor**

Traditional Trust Investing [Versus] Flexible Modern Directed Trust:

- Prudent Investor Act (PIA) – (1994) holds trustees to higher standard
 - Requires trustees:

to pursue an **overall** investment strategy (rather than performance of individual investments)

to consider various factors in formulating an investment program, including:

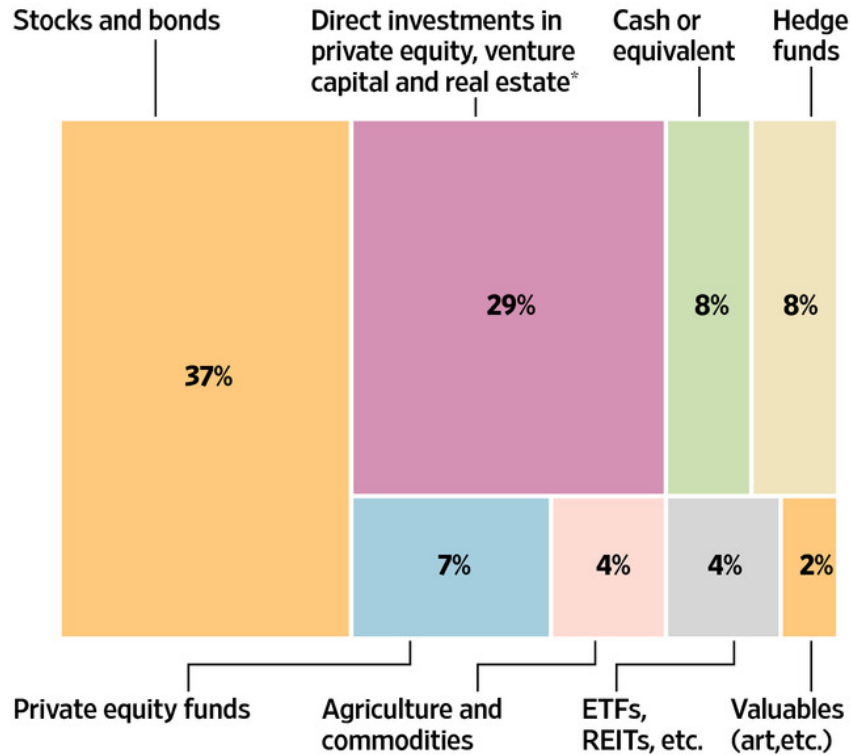
 - size of portfolio
 - nature and likely duration of trust
 - liquidity and distribution requirements
 - general economic conditions – inflation/deflation
 - tax consequences of investment/distribution decisions
 - Expected total return
 - Role of individual investments in portfolio
 - Requires diversification

Investment Flexibility - Key Advantage of the Flexible Modern Directed Trust (cont'd):

- Directed Trust:
 - Ability to override Prudent Investor Act (PIA)
 - More flexibility and less fiduciary liability than a traditional trust
 - Gross negligence/willful misconduct versus reasonable care
 - Ability to hold one trust asset – public, private or cash
 - No requirement to diversify
 - Ability to broadly diversify if desired with sophisticated investment allocation
 - Alterative investments
 - Reduced fiduciary risk

Please see: “Myths About Trusts and Investment Management: The Glass is Half Full!” *Trusts & Estates Magazine*, December 2014.

Model Family Office Portfolio:



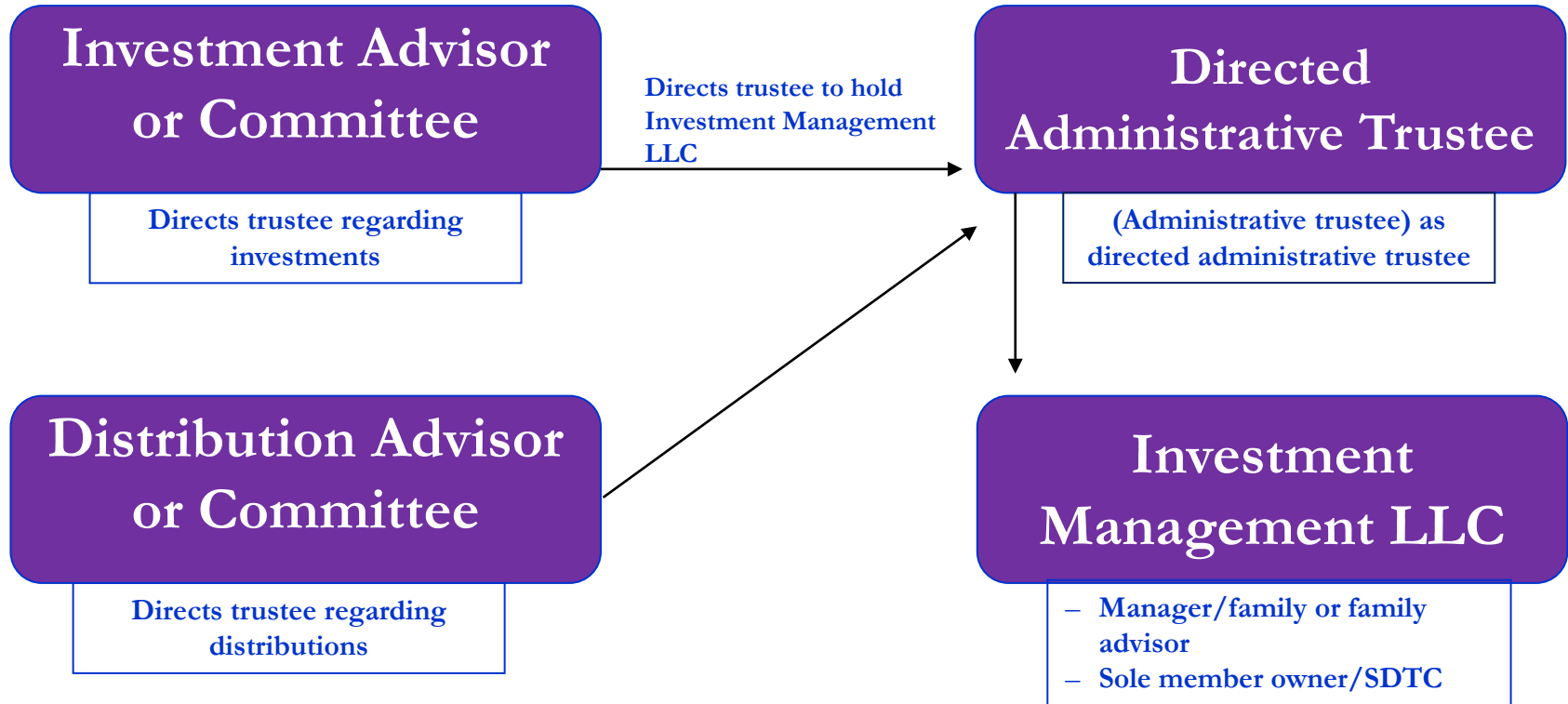
Note: Due to rounding, totals may not add up to 100%. *Includes co-investments.
 Source: UBS/Campden Wealth Global Family Office Report 2016

THE WALL STREET JOURNAL.

[Please see:](#) Al W. King III and Pierce H. McDowell III, “Selecting Modern Trust Structures Based on a Family’s Assets” *Trusts & Estates Magazine*, August 2017.

Flexible Modern Directed Trust

With Investment Management LLC:



Investment Management LLC:

- Instead of trust owning individual financial and non-financial assets



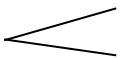
Investment Management LLC (IMLLC)

- Owns trust assets
 - Assets titled to IMLLC which is titled to the trust
 - Sole member
- Investment committee directs
 - SDTC to hold Investment Management LLC (IMLLC)

Flexible Modern Directed Trust with Investment Management LLC:

- Key Uses of Investment Management LLC:
 - Grantor – self direct investments (no IRC 2036 or 2038 issues)
 - Millennial beneficiaries – self direct investments (social impact)
 - Real estate – residence and/or vacation home
 - Beneficiaries “use” tax free
 - Change character of real estate
 - Private Placement Life Insurance
- Important Advantages:
 - Ease of administration
 - Added asset protection – sole remedy – “charging order protection”
 - Added state income tax and other situs advantages

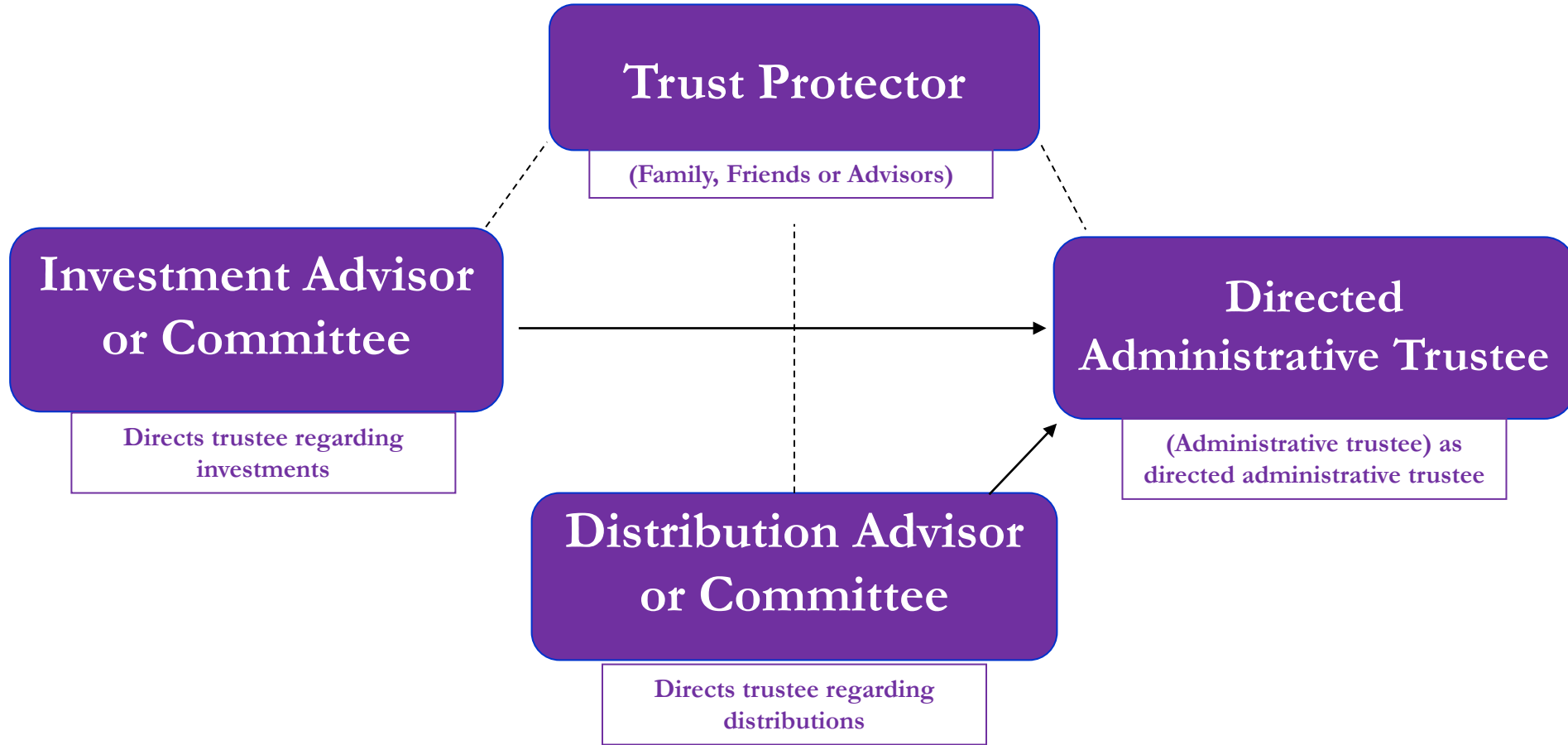
Trust Protector (Vary by State Statute):

- Grantor appoints trust protector
- Typically family friend and/or advisor
- Flexibility 
 - Future Circumstances
 - Drafting
- Personal vs. fiduciary powers
 - No personal gain, duty of loyalty & impartiality, actions for good of trust & beneficiaries
- Successors

Grantor Appoints a Trust Protector With Following Powers: (Vary by State Statute)

- Power to remove or to replace trustees
- Power to change situs and the governing law of the trust
- Power to veto or direct trust distributions
- Power to veto or direct investment decisions
- Approve trustee accounts
- Amend the trust as to the administrative, dispositive and tax provisions
- Power to add or remove beneficiaries
- Consent to exercise power of appointment
- Advise the trustee on matters concerning a beneficiary
- Provide direction regarding notification of qualified beneficiaries (Beneficiary quiet trusts)
- Terminate the trust

Typical Flexible Modern Directed Trust *with Trust Protector*:



Please note: Investment advisor/committee and distribution advisor/committee may be combined as a **trust advisor**.

Keeping Trust Information From One or More Beneficiaries – Beneficiary Quiet Statutes (Varies by States and Not in All States):

- Beneficiary Quiet Statutes:
 - Optional to **provide beneficiaries** with trust information
 - Can **select** which **beneficiaries** will not receive trust information
 - If make **trust distribution** to beneficiary
 - Not necessary to provide any trust information other than the distribution check
 - Even **after grantor's death** or **incapacity**
 - **Still** able to **keep** the trust **quiet**
 - **Trust Protector** can decide
 - **Not limited** to a **time period**

Keeping Trust Information From One or More Beneficiaries – Beneficiary Quiet Statutes (Varies by States and Not in All States) (cont'd):

Common Reasons for Silence:

- Beneficiary isn't financially mature
- Trust Baby Syndrome – Trust knowledge might negatively affect the promotion of social and fiscal responsibility of beneficiaries (viable alternative: directed incentive trust)
- Privacy
- Asset Protection
- Prevent unnecessary lawsuits
 - Bad in-laws/undesirable friends (current or future)
- Identity theft
- Family safety
- Non-voting business stock

Source: Al W. King III “Should you keep a trust quiet (silent) from beneficiaries?” *Trusts & Estates*, April 2015.

Inheritance & Divorce:

- All 50 trust jurisdictions:
 - Offer asset protection
 - Through the incorporation of the spendthrift clause to a trust
- Spendthrift Clause:
 - Prevents the attachment or assignment of a beneficiary's interest in a trust
 - Prevents all but exception creditors from attaching the trust
- Spendthrift Clause Exception Creditor:
 - Alimony
 - Possible issues in some states

Inheritance & Divorce (cont'd):

- *Berlinger v. Casselberry*, 38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App., Nov. 27, 2013)
- Father set up third party trust for family (i.e., Son)
- Florida Trust Code interpreted so former spouse of son could access trust assets to satisfy alimony:
 - Florida Spendthrift Clause exception creditor: Alimony
- Court held - Florida state law allows court to order writ of garnishment against Florida discretionary trust
- Solution: Flexible Modern Directed Trust states – Discretionary Interest statutes prevent garnishment

Discretionary Interest Statute *(Flexible Modern Directed Trust):*

- Beneficiary does not have right to distribution
- Beneficiary does not have property interest
- No creditor may attach [or] force distribution
from the trust
- Reason no enforceable right
 - Discretionary Interest statute (Restatement 2nd) in
many Flexible Modern Directed Trust states

Inheritance & Divorce (cont'd):

- Possible Trust Provisions:

- Floating Spouse Clause (in-laws): define in-law spouses as “spouse I am married to and living with”;
- Deny trust payments unless beneficiary has a prenuptial agreement;
- Real Estate – “Use Factor”: buy real estate for children, grandchildren within the trust and they “use” it tax free (protects house from divorce);
 - Versus - upon marriage, check to purchase home or to place down payment on home (possible divorce problem)
- Clause to encourage descendants to stay in marriage while children are minors – “vest” extra in trust
- Beneficiary conflict clause – if beneficiary sues, they get nothing;

Summary of Popular Methods for Changing Existing Trust Situs to Another State:

- Trust document:
 - Ability to change and/or add trustees
 - Change of situs and change of law clause
 - Trust Protector provisions
- Reformation/Modification
 - Non-Judicial
 - Judicial
- Decanting – discretionary trustee distribution of trust assets (total or partial) from existing trust to new trust
- Virtual representation – ability to represent minors and unborns at reformations/modifications and decants

Advantages of Non-Judicial Validation Statutes:

- Trust validation provides a **powerful tool** for **settlers who live anywhere** who can **create a trust in**, or **move a trust to**, (*example*: South Dakota) and **follow** the **notice procedure** to avoid validity challenges
- Can be **directed** to only **specific individuals** (e.g. those who pose the threat of a contest)
- Can **target non-beneficiaries**
- **Faster** and **cheaper**
- **None** of the **disadvantages accompanying litigation** which could deter the use of the procedure
- Simply uses a **statute of limitations instead** of **adjudication**

Non-Judicial Validation Statute:

- Example: A person may not commence a legal proceeding to contest the validity of a trust later than “Sixty days after the trustee, trust advisor, trust protector, or the settlor sent the person who is contesting the trust a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding”
- Generally, 60 to 90 day statute of limitations period

Modern Trusts:

- Traditional trust – “How soon can we get the assets out of a trust?”
[versus]
- Modern trust – “How long can we leave assets in a trust?”
 - Dynasty Trust – perpetual or long term
 - Flexibility to deal with future uncertainties
 - Control – family and family advisor fiduciary involvement
 - Powerful trust, tax, asset protection and privacy laws

Selected Popular Directed Trust States with No State Income Tax:

Alaska

Delaware

Nevada

New Hampshire

South Dakota

Tennessee

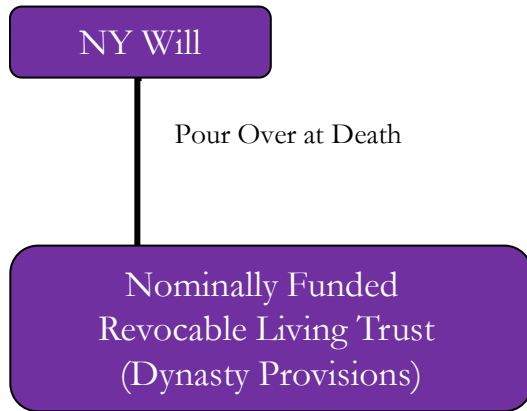
Wyoming

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

Do You Need to Be Wealthy to Have a Dynasty Trust?

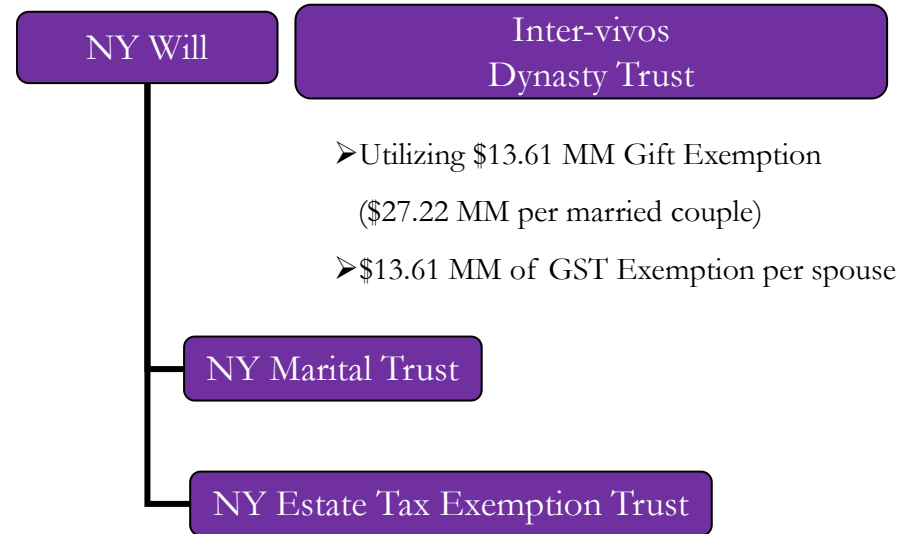
Typical Dynasty GST Trust Planning Scenarios (unlimited duration/perpetual):

Scenario #1- New York Will pours over at death to nominally funded revocable trust with dynasty trust provisions:



- Account opened and nominally funded with \$10
- Dynasty trust awaiting pour over from NY Will at death
- \$2,500 one time set up fee – no other fees until fully funded
- Advantages of a Dynasty Trust at death without the need to fully fund during lifetime

Scenario #2- Inter-vivos (Lifetime) Dynasty Trust



Scenario #3- Dynasty Trust ILIT (\$1,750 set-up fee and \$2,500 annual fee)



“Powerful Trust Laws to Combat
Future Uncertainties: *The Need for
Flexibility*”

QUESTIONS?



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

Al W. King III is the Co-Founder, Co-Chairman and Co-Chief Executive Officer of South Dakota Trust Company LLC (SDTC) and SDTC Related Companies with offices in South Dakota, New York, Wyoming, Nevada and Westport, CT. SDTC is a national trust boutique serving wealthy families from 54 countries and 47 states. SDTC currently has more than \$155 billion in assets under administration.

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

Mr. King is the Co-Vice Chairman of the Editorial Board of *Trusts & Estates* Magazine. He has been a member of the Editorial Board for over 31 years. Mr. King has been inducted into the National Association of Estate Planners & Councils (NAEPC) *Estate Planning Hall of Fame* as an Accredited Estate Planner (AEP), Distinguished. Mr. King previously served on the Board of Directors for NAEPC and is the Former Chairman of the NAEPC Foundation Advisory Board. He is currently a member of both the NAEPC webinar and publications committees. He is also a member of several groups and organizations including the Society of Trust and Estate Professionals (STEP), the International Association of Advisors in Philanthropy (AiP), New York Philanthropic Advisors Network (NYPAN), Fairfield County and New York City Estate Planning Councils, etc. In addition, he is frequently published and quoted by several publications on various Estate Planning topics and addresses several professional organizations, special interest groups, and general audiences on the subject of estate and trust planning.

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



SDTC Contact Information:

Sioux Falls Office:

South Dakota Trust Co LLC
SDTC Services LLC
201 South Phillips Ave, Suite 200
Sioux Falls, SD 57104
Phone (605) 338-9170
Fax (605) 274 -9200

Rapid City Office:

South Dakota Trust Co LLC
4020 Jackson Blvd, Suite 3
Rapid City, SD 57702
Phone (605) 721-0630
Fax (605) 721-0634

Wyoming Office:

SDTC Services of WY
890 W Broadway
Jackson Hole, WY 83001
Phone (605) 338-9170

Nevada Office:

SDTC Services of NV
3605 S Town Center Dr
Suite A
Las Vegas, NV 89135
Phone (702) 952-1617

New York Office:

South Dakota Planning Co
10 East 40th Street, Suite 1900
New York, NY 10016
Phone (212) 642-8377
Fax (212) 642-8376

Westport Office:

South Dakota Planning Co
274 Riverside Avenue
2nd Floor
Westport, CT 06880
Phone (203) 635-2262

Info@sdtrustco.com

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

www.sdtrustco.com
www.sdplanco.com
www.privatefamilytrustcompany.com
www.directedtrust.com
www.sdtcservicesofnevada.com
www.sdtcservicesofwyoming.com
www.internationalfamilytrust.com

IRS Circular 230 Disclaimer:

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