

# Down the Rabbit Hole and Through the Looking Glass: The Wonderland of Trust Situs and Governing Law

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*"It was much pleasanter at home," thought poor Alice, "when one wasn't always growing larger and smaller, and being ordered about by mice and rabbits. I almost wish I hadn't gone down the rabbit-hole--and yet--and yet--..."*

— Lewis Carroll, *Alice's Adventures in Wonderland*<sup>2</sup>



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<sup>2</sup> All Alice-related quotations are from "Alice's Adventures in Wonderland" (London: Macmillan, 1871) or "Through the Looking-Glass and What Alice Found There" (London: Macmillan, 1865) by Lewis Carroll. All images are from the original illustrations of Lewis Carroll's works by Sir John Tenniel.

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APPENDIX C: PENNSYLVANIA DEPARTMENT OF REVENUE PRIVATE LETTER RULING, PIT 01-040 (July 27, 2001).

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*Introduction: You might think that your trust situs is where it should be -- in a meadow in the known trust world it has long enjoyed. However, perhaps that trust should travel to a better destination. Alice is an adventuresome trustee, and her advisors need to be equipped to recommend whether or not to go down the rabbit hole and consider what she might see through the looking glass. What are some of the advantages and risks in moving trust situs? Once situs has moved to Wonderland, do the laws of the meadow or of the Queen of Hearts, or parts of both, govern? What Jabberwockies and Bandersnatches lurk? What constitute administrative laws versus construction and validity laws? What is the principal place of administration and how is that relevant? Is it "off with you heads" for trustees who do not consider taking the trip down the rabbit hole or through the looking glass? All this makes for a wonderful discussion at a tea party with Alice, the March Hare, the Mad Hatter and others. One does not want to be late for this discussion.*

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<sup>3</sup> October 2013. These materials were originally prepared for the 2012 Summer meeting of the American College of Trust and Estate Counsel ("ACTEC") at Colorado Springs, Colorado, for a presentation by Margaret E.W. Sager and Peter Gordon, Esquire, of Gordon Fournaris & Mammarella, Wilmington, Delaware, on June 16, 2012, entitled "Trust Adventures in Wonderland – From the Meadow and Through the Looking Glass; Situs and Governing Law." For related materials, see "Giving Your Trust a Facelift: Modification and Change of Situs," by Margaret E.W. Sager and Bradley D. Terebelo, for the Pennsylvania Bar Institute Estate Law Institute (revised in 2011, 2009 and 2008); and "Giving Your Trust a Facelift: Modification, Change of Situs and Decanting" by Margaret E.W. Sager, prepared for the ACTEC March 2008 Annual Meeting in Boca Raton, Florida.

## I. WHAT IS TRUST SITUS?



*"What do you mean by that?" said the Caterpillar sternly. 'Explain yourself!'*

*'I can't explain MYSELF, I'm afraid, sir' said Alice, 'because I'm not myself, you see.'*

*'I don't see,' said the Caterpillar.*

*'I'm afraid I can't put it more clearly,' Alice replied very politely, 'for I can't understand it myself to begin with; and being so many different sizes in a day is very confusing.'"*

*— Lewis Carroll, Alice's Adventures in Wonderland*

### A. Multiple Meanings of Trust Situs.

1. What does situs mean? It can have multiple meanings, and indeed a trust can have different types of situs. At the American College of Trust and Estate Counsel ("ACTEC") Fiduciary Litigation Committee meeting in March 2012, ACTEC Fellows Barry F. Spivey and Shane Kelley made a presentation addressing the relevant choice of law provisions of the Uniform Trust Code, as compared to common law and the Restatement (Second) of Conflict of Laws. See Barry F. Spivey, "Trust Situs, Choice of Law, and the Uniform Trust Code," presented to the Fiduciary Litigation Committee in March 2012, and included in the materials for the Summer 2012 ACTEC program entitled "Trust Adventures in Wonderland – From the Meadow and Through the Looking Glass; Situs and Governing Law." This is a must read, which

thoroughly discusses the multiple meanings of trust situs as well as the ability to designate the governing law under the Uniform Trust Code and the Restatement (Second) of Conflict of Laws.

2. For purposes of evaluating the situs of a trust, the primary elements are the terms of the trust, the domicile of the settlor upon executing an inter vivos trust or upon death with respect to a testamentary trust, the location of trust assets, the place of administration, the location of the trustees and the domicile of the beneficiaries. These elements, or some subset of these elements, play a role with respect to trust situs – and governing law.
3. For practical purposes, there are four primary ways to view trust situs, putting aside – and sometimes notwithstanding – the situs specified in the trust document:
  - (a) Administrative situs;
  - (b) Locational situs;
  - (c) Tax situs; and
  - (d) Jurisdictional situs.
4. Many times a trust’s jurisdictional situs, locational situs, administrative situs and tax situs are all in the same state.<sup>4</sup> Very tidy.
5. However, there are times when one or more of the administrative situs, locational situs, tax situs and/or jurisdictional situs may differ; in addition, it is possible for a trust to have a certain type of situs (such as tax or jurisdictional situs) in more than one state at the same time.

B. Administrative Situs.

1. Administrative situs refers to where the administration principally occurs. This is sometimes referred to as the “principal place of administration,” especially in states that have adopted the Uniform Probate Code or Uniform Trust Code (discussed below). This is usually the most common definition of trust situs. The comment to UTC §108 (concerning designation of the principal place of administration) provides that “[l]ocating a trust’s principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important

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<sup>4</sup> These materials do not address international trust situs and governing law. References to a “state” should be deemed to include the 50 states of the United States and the District of Columbia.

for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust.”

2. Additionally, the comment to UTC §108 provides that the principal place of administration of a trust is also important because it “will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular state (Section 204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.”

C. Locational Situs.

1. Locational situs refers to where the assets are physically located.
2. Intangible property owned by a trust is usually deemed to be located in the place of the administrative situs of a trust, although the deemed state income tax situs of intangibles may be different, depending on applicable state law. See Restatement (Second) of Conflict of Laws §§ 271 & 272.
3. In the case of real property owned by a trust, its situs for some purposes is obviously in the state where the real property is located, although the jurisdictional situs as to the real property as a trust asset may be in a different state. See, e.g., Trusteeship Created By the City of Sheridan, Colorado, 593 N.W.2d 702 (Minn. Ct. App. 1999) (discussed below); Restatement (Second) of Conflict of Laws §§ 276 & 279.

D. Tax Situs.

1. A trust’s tax situs refers to where the trust is taxable for state fiduciary income tax purposes with respect to retained income and capital gains – that is, whether the trust is a resident or nonresident trust for state fiduciary income tax purposes.
2. A trust can have the bad fortune of being a resident trust for income tax purposes in more than one state. By the same token, a trust can be a resident trust for income tax purposes of no state.

E. Jurisdictional Situs.

1. Jurisdictional situs refers to the state whose courts have jurisdiction to hear matters concerning the trust. Administrative, locational and/or tax situs play a role in determining jurisdictional situs. For example, a trust with a tax situs in State A may result in State A having jurisdictional situs over certain tax issues concerning the trust, but if the trust has real property located in

State B, State B will have jurisdiction over certain matters concerning the real property located in State B – and the trust itself may provide that State C has jurisdiction over matters concerning the trust, which may cause State C to have jurisdiction over some or all trust matters (but it may not be exclusive jurisdiction).

2. As discussed below, jurisdictional situs is non-exclusive, and therefore multiple states may be able to exert jurisdiction over the same trust as to the same issue.
3. However, and as discussed below, even though a court may have jurisdiction over a trust, it may decline to exercise jurisdiction if the court believes that another court is better positioned to exercise jurisdiction over the trust.
4. In an actual matter handled by the authors' law firm, a trust owned residential real estate (deceased settlor's former home) located in California, where settlor died, and provided that California had jurisdiction. There were also California beneficiaries. The trustee resided in Pennsylvania. The beneficiaries filed a petition in California seeking *inter alia* to have the court direct the sale of the real estate, to surcharge and remove the trustee and to terminate the trust by its terms. The trustee alleged that the California court did not have jurisdiction because the trustee resided in Pennsylvania and the trust administration was located in Pennsylvania; the California court agreed and dismissed the petition. The beneficiaries were then forced to petition the court in Pennsylvania, which exercised its jurisdiction.

## II. HOW IS SITUS DETERMINED?

*Alice: "Well, when one's lost, I suppose it's good advice to stay where you are until someone finds you. But who'd ever think to look for me here."*

— *Alice in Wonderland (Film, Walt Disney Productions 1951)*

### A. Uniform Probate Code.

1. The Uniform Probate Code ("UPC") was first promulgated in 1969, and has been amended several times, most recently in 2006. *Seventeen states* have adopted some version of the UPC in some substantial form: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts (effective March 31, 2012), Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. However, almost all states have adopted portions of the UPC.



2. The UPC uses the phrase “principal place of administration” in lieu of “situs.”
3. *Unspecified in Testamentary or Inter Vivos Trust:* If a trust does not specify the principal place of administration, the principal place of administration “is the trustee’s usual place of business where the records pertaining to the trust are kept, or at the trustee’s residence, if he has no such place of business. In the case of co-trustees, the principal place of administration . . . is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them.” UPC §7-101. Note that the UPC does not automatically designate the principal place of administration of a testamentary trust in the state of the decedent’s domicile.
4. *Specified in Testamentary or Inter Vivos Trust:* UPC §§ 7-101 and 7-305 provide that the trust may designate the trust’s principal place of administration. The UPC does not require any minimum contacts with the jurisdiction designated as the principal place of administration.
5. UPC §7-101 imposes a duty on the trustee(s) of the trust to register the trust in the court of the trust’s principal place of administration. All trustees and beneficiaries are subject to the jurisdiction of the court in which the trust is registered. UPC §7-103. The procedure to register a trust is set forth in UPC §7-102. However, registration “is not in lieu of other bases of jurisdiction during or after registration.” Comment to UPC §7-103.
6. Failing to register a trust subjects the trustee “to the personal jurisdiction of any Court in which the trust could have been registered.” UPC §7-104. In addition, a trustee who fails to register within thirty days after the demand of a settlor or beneficiary to do so “is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse a trustee from the duty to register, or directing that the trust or trustees shall not be subject to the jurisdiction of the Court, is ineffective.” *Id.*

B. Uniform Trust Code.

1. The Uniform Trust Code (“UTC”) was completed by the Uniform Law Commissioners in 2000, and amended in 2001, 2003, 2004, 2005 and 2010. The goal of the UTC was to “provide States with

precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions.” UTC PREFATORY NOTE. *Twenty-six jurisdictions* have adopted versions of the UTC: Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia and Wyoming. As of 2013, New Jersey introduced (but had not yet adopted) the UTC.

[http://www.uniformlaws.org/Act.aspx?title=Trust Code](http://www.uniformlaws.org/Act.aspx?title=Trust%20Code). In states that have also adopted the UPC, such as Arizona, Florida, Michigan and South Carolina, the terms of the UTC usually trump the UPC terms.

2. Like the UPC, the UTC uses the phrase “principal place of administration” instead of referencing “situs.”
3. *Unspecified in Testamentary or Inter Vivos Trust:* The UTC does not provide default provisions if the trust does not specify the principal place of administration. However, the comment to UTC §108 provides that a “trust’s principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.” Like the UPC, the UTC does not automatically designate the principal place of administration of a testamentary trust in the state of the decedent’s domicile.
4. *Specified in Testamentary or Inter Vivos Trust Instrument:* UTC §108(a) provides that, without “precluding other means for establishing a sufficient connection with the designated jurisdiction,” the terms of a trust designating the principal place of administration of a trust are “valid and controlling” if:
  - (a) a trustee’s principal place of business is located in or a trustee is a resident of the designated jurisdiction; or
  - (b) all or part of the administration occurs in the designated jurisdiction.

C. Selected States.

1. *Pennsylvania:* Pennsylvania enacted the “Uniform Trust Act” (“UTA”), generally effective November 6, 2006, adopting a customized version of the UTC.

(a) *Unspecified in Testamentary Trust:*

- (i) Pre-UTA: Situs is in the county where letters were granted, or could have been granted, to the personal representative. If no letters could have been granted, then situs is in a county where any trustee resides or is located. 20 Pa. C.S. §723.
- (ii) UTA: Situs determination is unchanged, except that if no letters could have been granted, situs is in a county where any trustee resides “or has a place of business” (as opposed to “is located”). 20 Pa. C.S. §7708(b)(1)(iii).

(b) *Unspecified in Inter Vivos Trust Instrument or Non-Testamentary Trust Instrument:*

(i) Pre-UTA:

- (1) For a resident settlor (20 Pa. C.S. §724(b)(1)):

a. During the settlor’s life, situs is in the county of the settlor’s residence or where any trustee resides or has a principal place of business.

b. After the settlor’s death but before the first application to a court is made, situs is determined using the same means as determining the situs of a testamentary trust.

- (2) For a non-resident settlor (20 Pa. C.S. §724(b)(2)): Situs is in the county where the principal place of the trust’s administration is located or where any trustee resides or has a place of business. If no trustee resides in or has a place of business in Pennsylvania, then the situs is where the trust property is located.

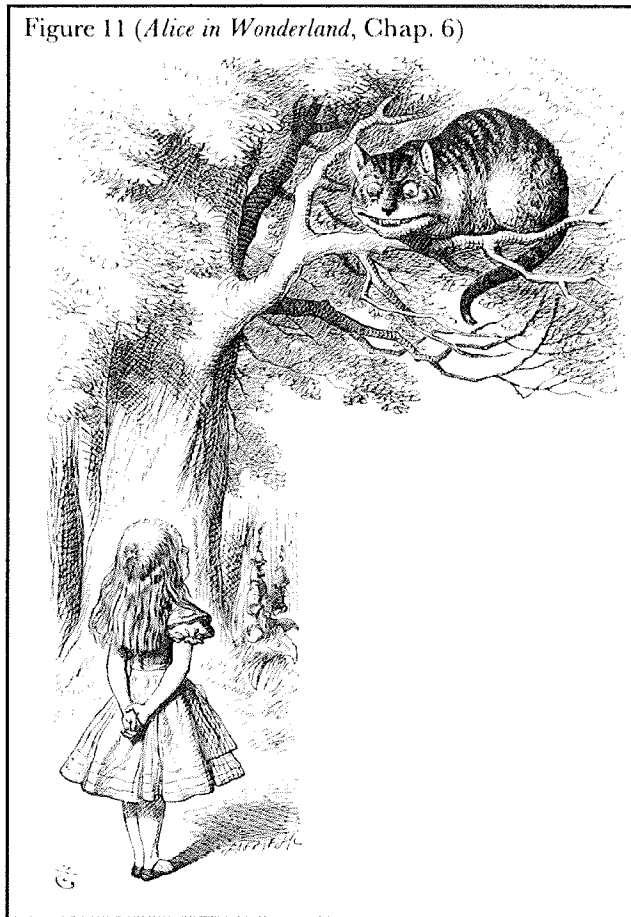
- (ii) UTA (20 Pa. C.S. §7708(b)):
  - (1) For a resident settlor: Situs is determined when the first application to the court is made in the same manner as the pre-UTA law with two additions:
    - a. During the settlor's life and after the settlor's death, situs can also be determined by the principal place of the trust's administration.
    - b. After the settlor's death, situs can also be determined by a county where one or more of the beneficiaries reside.
  - (2) For a non-resident settlor: Situs is located where (1) a trustee resides or where the trustee's principal place of business is located; (2) all or part of the trust administration occurs; or (3) at least one beneficiary resides.
- (c) *Specified in Trust Instrument*: Both residents and nonresidents may specify Pennsylvania as the situs in the trust document.
  - (i) Pre-UTA: The provision of the instrument determines situs. 20 Pa. C.S. §724(a). The designation will supersede 20 Pa. C.S. §724(b) (when the designation is not provided for in the trust instrument), but applies to inter vivos trusts only.
  - (ii) UTA:
    - (1) Under 20 Pa. C.S. §7708(a) a provision of the trust instrument designating situs is only valid and controlling if there are certain connecting factors:
      - a. A trustee is a resident or has his or her principal place of business in the designated jurisdiction; or
      - b. All or part of the trust administration occurs in the designated jurisdiction; or

c. At least one beneficiary resides in the designated jurisdiction.

(2) This provision appears to apply to both inter vivos and testamentary trusts and appears to supersede the default provisions in 20 Pa. C.S. §7708(b).

2. *Arizona:* Arizona provides that in the “absence of a controlling designation in the terms of the trust, the laws of the jurisdiction where the trust was executed determine the validity of the trust, and the laws of descent and the law of the principal place of administration determine the administration of the trust.” A.R.S. §14-107.
3. *Delaware:* Delaware has a statute that provides that if the administrative situs of a trust is transferred to Delaware, then Delaware law governs the administration of the trust, unless the trust provides otherwise. 12 Del. C. § 3332(b). Delaware does not otherwise have a statute that establishes the basis for situs or change of situs, and therefore situs is based on common law and case law. The most important factor in determining situs under Delaware law is the location of the assets and the trustee’s principal place of administration. See, e.g., Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (Del. Ch. Ct. 1940) (“if the trustee is a bank or trust company, the almost inevitable inference is that the seat of the trust is at the principal office of the bank”); Lewis v. Hanson, 128 A.2d 819, 826 (Del. 1957) (“the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration . . . [t]he manifest intention of [Settlor] to create a Delaware trust with a Delaware trustee, the deposit of trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the situs of the trust . . . is Delaware, and that, therefore, its law determines its validity”).
4. For a chart summarizing each jurisdiction’s treatment of nonjudicial change of situs, see Peter S. Gordon, “Trust Adventures in Wonderland – From the Meadow and Through the Looking Glass; Situs and Governing Law,” included in the materials for the Summer 2012 ACTEC program of the same name.

### III. WHY CHANGE SITUS?



*Alice: "Where shall I go?" Cheshire Cat: "That depends on where you want to end up."*

— *Alice in Wonderland* (Film, Walt Disney Productions 1951)

*"Where do you come from?" said the Red Queen. 'And where are you going? Look up, speak nicely, and don't twiddle your fingers all the time.'*

*Alice attended to all these directions, and explained, as well as she could, that she had lost her way."*

— *Lewis Carroll, Through the Looking Glass and What Alice Found There*

A. Three Primary Reasons. There are, broadly speaking, three primary reasons to change the situs of a trust:

1. *Income tax benefit:* Changing trust situs can in certain cases result in an absolute savings of part or even all of the trust's state fiduciary income tax exposure on retained income and realized

gains. A possible “realization event” on the horizon might make this particularly meaningful.

2. *Alluring appeal of another state’s trust laws:* The trust laws of another state may be more modernized, less restrictive, more fully developed, or in other ways more alluring than what the trust is “stuck” with under current conditions. Changing the situs of a trust may avail the trust of the laws of another state, in whole or in part.
3. *Convenience:* A desire for good old fashioned convenience may motivate a change in trust situs – and if other advantages can also apply, even better.

B. Income Tax Benefits.

1. Certain states impose lower income tax rates on trusts than others, and some states do not impose income tax on trusts at all if certain conditions are met. Depending on the fiduciary income tax regime of the state where the trust is currently situated, the trustees may wish to consider moving to a state that imposes lower income tax rates or, if possible, a state which would not impose income tax on the trust at all. Of course, the income tax treatment of trusts would only apply to tax on retained income and capital gains; income distributed to a beneficiary will be subject to income tax in the hands of the beneficiary based on the laws of the beneficiary’s domicile. Thus, for simple trusts (all net income must be paid to the beneficiaries), a state’s income taxation of trusts will only apply to capital gains because there would not be any retained income.
2. The income tax treatment of trusts varies widely from state to state. For example:
  - (a) *Pennsylvania:*
    - (i) Pennsylvania imposes a 3.07% income tax on retained income and capital gains of any trust that is a “Resident Trust.” 72 P.S. § 7302(a). A resident trust is either: “(1) [a] trust created by the will of a decedent who at the time of his death was a resident individual; [or] (2) [a]ny trust created by, or consisting in whole or in part of property transferred to a trust by a person who at the time of such creation or transfer was a resident.” 72 P.S. §7301(s). The residency of the trustees or beneficiaries is irrelevant in determining whether a

trust is assessed Pennsylvania income tax. 61 PA. CODE §101.1.

- (ii) A resident individual for Pennsylvania income tax purposes means “an individual who is domiciled in this Commonwealth unless he maintains no permanent place of abode in this Commonwealth and does maintain a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this Commonwealth; or who is not domiciled in this Commonwealth but maintains a permanent place of abode in this Commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in this Commonwealth.” 72 P.S. §7301(p).
- (iii) Pennsylvania will only tax the retained income and capital gains of nonresident trusts (again at 3.07%) for the “privilege of receiving ... income ... from sources within [Pennsylvania]....” 72 P.S. §7302(b). Pennsylvania source income includes: (1) income earned by reason of ownership of real or tangible property in Pennsylvania (including rental income); (2) income earned in connection with a trade or profession carried on in Pennsylvania (such as operating an office in Pennsylvania or performing services within Pennsylvania); (3) dividends or interest from a Pennsylvania bank or corporation only if it was received in connection with a trade, profession, occupation or business carried on in Pennsylvania. 20 PA. CODE §101.8.
- (iv) Therefore, if a nonresident trust can be moved to Pennsylvania under 20 Pa. C.S. § 7708(c)-(e) (described below), and the trust receives no income from within Pennsylvania, there will be no Pennsylvania income tax imposed on the trust. This makes Pennsylvania an excellent destination state for trusts created by non-Pennsylvania residents – even those trusts with Pennsylvania beneficiaries.
- (v) *Practice Tip:* Practitioners with Pennsylvania clients who are beneficiaries of nonresident trusts should inquire whether such trusts should be moved to Pennsylvania, especially if the change of situs will eliminate the imposition of state income tax.



(b) *Delaware:*

- (i) Delaware tax rates for retained income and/or capital gains of trusts range from 2.2% if the taxable income/capital gains for the year is between \$2,000 and \$5,000, to 6.75% if the taxable income/capital gains for the year exceeds \$60,000. 30 Del C. §1102(a)(13).
- (ii) Pursuant to 30 Del. C. §1601(8), a resident trust in Delaware is a trust which is created by the will of a decedent who was domiciled in Delaware at the decedent's death, or was created by or consisting of property of a person domiciled in Delaware or, during more than one-half of the taxable year has at least one Delaware trustee as follows:
  - (1) "1. The trust has only one trustee who or which is (i) a resident individual of [Delaware], or (ii) a corporation, partnership or other entity having an office for the conduct of trust business in [Delaware]; [or]
  - (2) 2. The trust has more than 1 trustee, and 1 of such trustees is a corporation, partnership or other entity having an office for the conduct of trust business in [Delaware]; or
  - (3) 3. The trust has more than 1 trustee, all of whom are individuals and one half or more of whom are resident individuals of [Delaware]."
- (iii) A nonresident trust is a trust which does not satisfy the above-described factors for determining a resident trust. 30 Del. C. §1601(5).
- (iv) A nonresident trust is taxed on its retained income and capital gains from Delaware source income (minus deductions). 30 Del. C. §1639.
- (v) A trust is subject to Delaware income tax only to the extent that it accumulates income for beneficiaries who are Delaware residents, even if it is a Delaware resident trust. 30 Del. C. §1636. Thus, if all beneficiaries of a Delaware resident trust are nonresidents, then there will be no

Delaware income tax imposed on the retained income or capital gains of the trust. *Id.*

- (vi) Therefore, if a trust is moved to Delaware, so long as all beneficiaries are not Delaware residents, there will be no Delaware income tax imposed on the trust, making Delaware another good destination state for trusts.

(c) *California:*

- (i) California imposes an income tax up to 9.3% on “the entire taxable income” produced by resident trusts. Cal. Rev. & Tax. Code §§ 17742(a), 17041. A trust is a resident trust for California purposes “if the fiduciary or beneficiary (other than a beneficiary whose interest in such trust is contingent) is a resident, regardless of the residence of the settlor.” *Id.* at §17742(a).
- (ii) Note that the means of determining a resident trust in California (disregarding the residency of the settlor) is the polar opposite from the means of determining a resident trust in Pennsylvania (disregarding the residency of the beneficiaries and trustees). Thus, California may still tax trusts which have been moved from California, and further modification (such as removing California trustees) may be needed before California will not tax the trust as a resident trust. One must also exercise care in naming a California trustee even for trusts that are not otherwise resident in or have any other contacts to California.

(d) *Massachusetts:*

- (i) Massachusetts imposes a tax on trusts of 5.3% on interest and dividends retained in the trust and long-term gains, and a tax of 12% for short-term gains.
- (ii) Massachusetts imposes a tax on any trust that is a resident trust. *Id.* at §10(a), (c). A resident trust is either a testamentary trust created under the will of a Massachusetts decedent or an inter vivos trust created by a settlor who was an inhabitant of Massachusetts when the trust was created or at any time during the taxable year AND at least one

trustee or other fiduciary is an inhabitant of Massachusetts. Id. at §10(c).

- (iii) A Massachusetts inhabitant is a natural person domiciled in Massachusetts, or a natural person not domiciled in Massachusetts but who maintains a permanent place of abode in Massachusetts and spends more than 183 days in aggregate in Massachusetts during the taxable year. Id. at 1(f).
- (iv) For nonresident trusts, income is taxed at the same rate and in the same manner as if the nonresident trust were a nonresident individual. Id. at §10(d). Nonresidents are taxed on the taxable income derived from gross income “from sources within the commonwealth[.]” Id. at §5A(a). This includes gross income derived from “the ownership of any interest in real or tangible personal property located within [Massachusetts].” Id.
- (v) Thus, if a nonresident trust can be moved to Massachusetts, and the trust receives no income from within Massachusetts, there will be no Massachusetts income tax imposed on the trust.

(e) *Colorado:*

- (i) Colorado imposes an income tax on retained income and capital gains at 4.63% on trusts. C.R.S.A. §39-22-104(1.7). Colorado imposes a tax on a resident trust’s federal taxable gross income (minus deductions). C.R.S.A. §39-22-401(1). For nonresident trusts, Colorado imposes a tax on the “ratio of the Colorado-source federal taxable income to the total federal taxable income,” again subject to certain deductions. C.R.S.A. §39-22-403(1).
- (ii) A Colorado resident trust is a trust administered in Colorado. C.R.S.A. §39-22-103(10). All other trusts are nonresident trusts. Id. A trust is administered in Colorado if the principal place of administration is in Colorado. C.R.S.A. §15-16-101. The principal place of administration can be designated by the trust instrument. Id. Otherwise, the principal place of administration is the “trustee’s usual place of business [. . .] or at the trustee’s

residence if he has no such place of business.” Id. If there is more than one trustee, the principal place of administration is the place of business of the corporate trustee or, if there is no corporate trustee, the business or residence of the individual trustee who is a professional fiduciary if there is only one trustee who is a professional fiduciary. Id. If there is no corporate trustee, and there is more than one individual trustee who is a professional fiduciary or there are no individual trustees who are professional fiduciaries, the principal place of administration is “the usual place of business or residence of any of the co-trustees as agreed upon by them.” Id.

(f) *Kansas:*

- (i) Kansas imposes an income tax on retained income and capital gains of up to 4.9% on trusts. K.S.A. §79-32,110. For nonresident trusts, Kansas imposes a tax on retained income and capital gains on Kansas-source income computed “as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income.” Id.
- (ii) Like Colorado, a Kansas resident trust is a trust administered in Kansas. K.S.A. §79-32,109. However, “a trust shall not be deemed to be administered in this state solely because it is subject to the jurisdiction of a district court within this state.” Id.

(g) *Missouri:*

- (i) Missouri imposes an income tax on retained income and capital gains of up to 6% on trusts. V.A.M.S. §143.011. For nonresident trusts, Missouri imposes a tax on retained income and capital gains from sources within Missouri. V.A.M.S. §143.381.
- (ii) A testamentary trust is a Missouri resident trust in the taxable year in question if the testator was domiciled in Missouri at his or her death and at least one income beneficiary was a Missouri resident on the last day of the taxable year. V.A.M.S. §143.331(2).

- (iii) An inter vivos trust is a Missouri resident trust in the taxable year in question if the settlor was a Missouri resident when the trust became irrevocable and at least one income beneficiary was a Missouri resident on the last day of the taxable year. V.A.M.S. §143.331(3).
- (h) *New York:*
  - (i) New York will tax all retained income and capital gains on resident trusts and will only tax non-resident trusts on retained income and capital gains on property from sources within New York. A trust will be a New York resident trust if the settlor was domiciled in New York at the time the trust became irrevocable. N.Y. Tax §605(b)(3). However, New York also provides that a resident trust will not be subject to tax if: “(I) all the trustees are domiciled in a state other than New York; (II) the entire corpus of the trust, including real and tangible property, is located outside the state of New York; and (III) all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.” N.Y. Tax §605(b)(3)(D)(i). Intangible property is considered to be located in New York if one or more of the trustees is domiciled in New York. N.Y. Tax §605(b)(3)(D)(ii).
  - (ii) Thus, if a nonresident trust can be moved to New York, and the trust receives no income from within New York, there will be no New York income tax imposed on the trust.
  - (iii) The New York State Department of Taxation and Finance considered the applicability of N.Y. Tax §605(3)(D) in an advisory opinion, TSB-A-04(7)I (November 12, 2004), a copy of which is attached as Appendix A. The opinion concerned certain trusts created by John D. Rockefeller, Jr. Pursuant to the terms of the trusts, a committee was created to oversee the administration of the trusts. The committee was given such powers as the ability to direct the trustee to retain assets, to direct the trustee to approve mergers of corporations held by the trusts and to “direct the trustee to take or refrain

from taking any action which the Committee deems it advisable for the Trustee to take or refrain from taking. All of the powers of the Trustee under the Trust Agreements are subject to the directions of the Committee.” TSB-A-04(7)I at 7. The trustees argued that although the trusts had been New York resident trusts for New York income tax purposes, because the trustee was now domiciled in Delaware, the corpus of the trusts were located outside of New York, and the income and gains of the trusts were derived from sources outside of New York, the trusts had become non-resident trusts. Thus, the trustees argued that the trusts should not be taxed pursuant to N.Y. Tax §605(3)(D)(i). However, the Department of Taxation disagreed, stating that because of the “controlling power” of the committee over the trustee, and because several members of the committee were domiciled in New York, the Department of Taxation considered the members of the committee to be co-trustees. Thus, some trustees of the trusts were considered to be domiciled in New York, N.Y. Tax §605(3)(D)(i) did not apply, and the trusts were taxable as resident trusts.

- (iv) Based on the above advisory opinion, in the case of a New York resident trust that has changed situs to another state and wishes to take the position that the trust is no longer a New York resident trust for income tax purposes, care must be taken because the mere fact that there is no New York trustee (and all trust property is located outside New York) may not be sufficient to qualify the trust as a nonresident trust for New York income tax purposes if some outside source with New York contacts can exert “controlling power” over the trustees. Such New York contacts may apply not only to an investment or other committee as indicated by the advisory opinion, but perhaps also to a trust protector, investment direction advisor or similar position filled by a New York individual or entity.

(i) *Arizona:*

- (i) Arizona imposes an income tax of up to 4.54% on the “Arizona taxable income” of trusts. A.R.S. §43-1011, -1301, -1311.

- (ii) The “Arizona taxable income” for “resident trusts” is the taxable income computed according to the Internal Revenue Code and adjusted by the modifications in A.R.S. §43-1333. A.R.S. §43-1301(1).
- (iii) The “Arizona taxable income” for “nonresident trusts” is the taxable income from sources within Arizona, computed according to the Internal Revenue Code and adjusted by the modifications in A.R.S. §43-1333. A.R.S. §43-1301(2).
- (iv) A trust is a “resident trust” if at least one fiduciary of the trust is resident of Arizona. A.R.S. § 43-1301. A trust with a corporate fiduciary is a “resident trust” if the corporate fiduciary conducts the administration of the trust in Arizona. Id.
- (v) A “nonresident trust” is a trust that does not meet the definition of a “resident trust.” A.R.S. §43-1301(3).
- (j) For an overview of the basis of income taxation of trusts in the fifty states and the District of Columbia, see Richard W. Nenno and Howard M. Zaritsky, “Proposed New York Fiduciary Income Tax Changes: Let My Trustees Go!” 35 Tax Mgmt. Est. Gifts & Tr. J. 3, 147 (May 2010).

C. Alluring Appeal of Another State’s Laws.

1. Trust law can vary widely among states. Some states have more favorable trust laws (for instance, broader and easier modification options, curative failsafe provisions, no Rule Against Perpetuities, less restrictive virtual representation, and other more “modern” trust laws), and some states may (also) have more fully developed trust laws, including case law, which can make the effect of a trust’s administration more predictable. If it is possible to move the situs of a trust from a state with less favorable trust laws to a state with more favorable trust laws, the trustees may wish to change situs to take advantage of those more favorable - and alluring - trust laws. Indeed, some states change their trust laws for the specific purpose of luring trust business to their states.
2. The effect of a change of situs on applicable governing law is discussed below in Section VII below.

D. Convenience.

1. This is one of the “traditional” reasons for changing the situs of a trust. Often it is more convenient and efficient for a trust to be administered in one jurisdiction over another. However, a court may not consider convenience (or inconvenience), without more, sufficient to transfer the situs of a trust. See, e.g., In re: Harriet C. Sibley Trust, 293601, 2010 WL 4493553 (Mich. Ct. App. Nov. 9, 2010), discussed in more detail below under “Fiduciary Liability and Attorney Malpractice.”
2. Factors that are typically taken into consideration include the location of (1) trustees; (2) beneficiaries; and (3) investment, legal and other advisors.

IV. HOW CAN SITUS BE CHANGED?

*“Please, then,” said Alice, ‘how am I to get in?’*

*‘There might be some sense in your knocking,’ the Footman went on without attending to her, ‘if we had the door between us. For instance, if you were INSIDE, you might knock, and I could let you out, you know.’ He was looking up into the sky all the time he was speaking, and this Alice thought decidedly uncivil. ‘But perhaps he can’t help it,’ she said to herself; ‘his eyes are so VERY nearly at the top of his head. But at any rate he might answer questions.—How am I to get in?’ she repeated, aloud.*

*‘I shall sit here,’ the Footman remarked, ‘till tomorrow—’*

*At this moment the door of the house opened, and a large plate came skimming out, straight at the Footman’s head: it just grazed his nose, and broke to pieces against one of the trees behind him.*

*‘—or next day, maybe,’ the Footman continued in the same tone, exactly as if nothing had happened.*

*‘How am I to get in?’ asked Alice again, in a louder tone.*

*‘ARE you to get in at all?’ said the Footman. ‘That’s the first question, you know.’”*

*— Lewis Carroll, Alice’s Adventures in Wonderland*

A. “Pitching” and “Receiving” States.

1. Do you need to get approval from the “pitching” state to relinquish jurisdiction? What about the “receiving” state? Which goes first? The answer, as always, seems to be state specific.



2. Under Pennsylvania's UTA, as explained below, no court approval is needed to change situs from Pennsylvania provided that all qualified beneficiaries agree and the other requirements of the statute are fulfilled. In addition, no prior approval is needed from a Pennsylvania court as a "receiving" state if a trust's situs is moved to Pennsylvania from another state.
3. Although they were decided before Pennsylvania enacted the UTA, the following cases (discussed below in detail) include references to the "pitching" and "receiving" concepts, where Pennsylvania was the pitching state: Perelle Trust, 63 D.&C.2d 16, 23 Fid. Rep. 469 (O.C. Phila. 1973); Jadwin Trust, 45 D.&C.2d 418, 18 Fid. Rep. 445 (O.C. Mont. 1968); Kerr Trust, 40 Pa. D.&C.2d 415, 16 Fid. Rep. 485 (O.C. Chester 1966); Gundaker Estate, 29 Pa. D.&C.2d 101, 13 Fid. Rep. 111 (O.C. Phila. 1962); Newbold Trust, 28 Pa. D.&C.2d 92, 12 Fid. Rep. 547 (O.C. Phila. 1962).
4. As described below, New Jersey seems to require that the "receiving" state approve the change of situs before it will approve a change of situs out of New Jersey.
5. As illustrated in the Rockefeller case, below, New York appears to require, at a minimum, permission from the "pitching" state.

B. Uniform Probate Code.<sup>5</sup>

1. UPC §7-305 provides that a trustee "is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management."
2. *Change of Registration:* If a trust is registered in one state pursuant to UPC §§ 7-101 and 7-102, registration in another state "is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this state." UPC §7-102.
3. *In the Trust Document:* UPC §7-305 provides that the trust document may set forth a mechanism to change the principal place of administration "unless compliance would be contrary to efficient administration or the purposes of the trust."

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<sup>5</sup> As of the date of this outline, seventeen states have adopted some version of the UPC in some substantial form: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts (effective March 31, 2012), Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.

4. *With Court Approval:* UPC §7-305 provides that if “the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state.”
5. *Without Court Approval:* The UPC does not expressly provide for transferring the situs of a trust without court approval. However, as referenced above, UPC §7-102 permits the trustee and all beneficiaries to release registration in the “pitching” state.

C. Uniform Trust Code.<sup>6</sup>

1. UTC §108(b) mimics UPC §7-305 and similarly provides that a trustee “is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.”
2. The UTC does not explicitly provide a mechanism for a court to change the principal place of administration of a trust, although UTC §108(c) does acknowledge that a court may do so.
3. UTC §108(c)-(f) provides that a trustee may transfer the principal place of administration of a trust without court approval if the trustee provides notice to all qualified beneficiaries of the proposed change and no qualified beneficiary objects to the change within 60 days of the notice.
4. Pursuant to UTC §108(d), notice to the qualified beneficiaries must include:
  - (a) the name of the jurisdiction to which the principal place of administration is to be transferred;
  - (b) the address and telephone number at the new location at which the trustee can be contacted;
  - (c) an explanation of the reasons for the proposed transfer;
  - (d) the date on which the proposed transfer is anticipated to occur; and

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<sup>6</sup> As of the date of this outline, twenty-four jurisdictions have adopted versions of the UTC: Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia and Wyoming.

- (a) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.
5. Pursuant to UTC §103(13), a qualified beneficiary is a beneficiary who:
- (a) is a distributee or permissible distributee of trust income or principal;
  - (b) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees terminated on the relevant date (for instance, when the trust is to change situs) without causing the trust to terminate; or
  - (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

D. Selected States.

1. *Pennsylvania:*

- (a) Pre-UTA: Prior to the enactment of the UTA, only a court could change the situs of the trust. 20 Pa. C.S. §725 dictated how trust situs could be changed, as follows (emphasis added):

“A court having jurisdiction of a testamentary or inter vivos trust, on application of a trustee or of any party in interest, after such notice to all parties in interest as it shall direct and aided if necessary by the report of a master, and after such accounting and such provision to insure the proper payment of all taxes to the Commonwealth and any political subdivision thereof as the court shall require, may direct, notwithstanding any of the other provisions of this chapter, that the situs of the trust shall be changed to any other place within or without the Commonwealth if the court shall find the change necessary or desirable for the proper administration of the trust. Upon such change of situs becoming *effective by the assumption of jurisdiction by another court*, the jurisdiction of the court as to the trust shall cease and thereafter the situs of the trust for all purposes shall be as directed by the court.”

(b) UTA:

- (i) Under 20 Pa. C.S. §7708(c), regardless of court approval, situs can be transferred to another jurisdiction only if:
  - (1) The trustee resides in or has its principal place of business in the proposed jurisdiction; or
  - (2) All or part of the trust administration occurs in the proposed jurisdiction; or
  - (3) One or more of the beneficiaries resides in the jurisdiction.
- (ii) Notice requirement for transfers without court approval (20 Pa. C.S. §7708(d)): At least 60 days before the proposed transfer, all qualified beneficiaries must be notified of the proposed transfer together with certain information, including, for example:
  - (1) The reasons for the transfer;
  - (2) A statement that if the situs changes, venue will also change;
  - (3) Notice that all qualified beneficiaries must agree.
- (iii) Without court approval: No court approval is necessary to transfer a trust's situs under §7708 provided that all qualified beneficiaries provide written consent. 20 Pa. C.S. §7708(e).
- (iv) The definition of a qualified beneficiary under 20 Pa. C.S. §7703 is essentially identical to the definition under UTC §103(13).
- (v) Court-directed/approved changes in situs: The court still has the ability to direct or approve a change in situs, pursuant to 20 Pa. C.S. §7708(g), as follows:

“A court having jurisdiction of a testamentary or inter vivos trust, on application of a trustee or of any party in interest, after such notice as the court

shall direct and aided if necessary by the report of a master, and after accounting as the court shall require, may direct, notwithstanding any of the other provisions of this chapter, that the situs of the trust shall be changed to any other place within or without the Commonwealth if the court shall find the change necessary or desirable for the proper administration of the trust.”

- (vi) 20 Pa. C.S. §7708(g) retains the “necessary or desirable” requirement for court-directed changes in situs from prior law 20 Pa. C.S. §725. Interestingly, 20 Pa. C.S. §7708(g) deletes the language “after . . . such provision to insure the proper payment of all taxes to the Commonwealth and any political subdivision as the court shall require . . . .”
- (vii) Inconsistencies between 20 Pa. C.S. §722 and 20 Pa. C.S. §§ 7708(c)(5), 7708(e) and 7714:
  - (1) Although the enactment of the UTA invalidated 20 Pa. C.S. §§ 723 - 725, §722, entitled “Venue of trust estates,” remains unchanged. 20 Pa. C.S. §722 reads as follows:

“When a Pennsylvania court has jurisdiction of any trust, testamentary or inter vivos, except as otherwise provided by the law, the venue for all purposes shall be in the county where at the time being is the situs of the trust. The situs of the trust shall remain in the county of the court which first assumed jurisdiction of the trust, *unless and until such court shall order a change of situs under the provisions of this chapter.*”  
(Emphasis added.)
  - (2) According to this language, in order to change a trust’s venue, a court order changing situs is needed. But because 20 Pa. C.S. §§ 723 - 725 are no longer valid, there are no provisions in “this chapter” (subchapter 7) to allow for a change of situs.
  - (3) Mirroring 20 Pa. C.S. §722, 20 Pa. C.S. §7714(a) states that “venue for a judicial

proceeding involving a trust is in the county of this Commonwealth in which the trust's situs is located. . . ." Given the fact that 20 Pa. C.S. §7708(e) provides for a change in situs without court approval if all qualified beneficiaries agree, and that before agreeing, all qualified beneficiaries must be notified that, inter alia, venue will change to the county where the new situs is located (20 Pa. C.S. §7708(d)(5)), it appears that 20 Pa. C.S. §722 may simply need to be viewed as revoked due to inconsistency.

- (viii) Change of trustee. Often a change of situs involves a change of trustee, which is acknowledged in 20 Pa. C.S. §7708(f).
- (c) Pennsylvania Case Law and Other Authority.
  - (i) There are no reported cases in Pennsylvania under the UTA regarding change of situs. However, the reported cases under pre-UTA law are of interest and would likely have application even now, particularly if there is opposition to the situs change and court approval is necessary. Ease of changing situs under pre-UTA law can generally be divided into three categories (from easiest to most difficult): (1) when the change is provided for in the trust document, (2) when there are no adverse parties to the change and (3) when there is a party who does not agree to the change.
  - (ii) *Provision in trust permitting change of situs.* Under pre-UTA law, if the trust document had a provision permitting a change of situs, Pennsylvania courts adhered to the "desirable" requirement under §725 (now revoked and replaced by UTA provisions) and were fairly liberal in granting a change. For example, in Kerr Trust, 40 Pa. D.&C.2d 415, 16 Fid. Rep. 485 (O.C. Chester 1966), the trust included a provision which essentially permitted the beneficiaries to change the trust situs: the provision stated that if the beneficiaries of over half of the income resided in a state other than the state in which the corporate trustee was located, the beneficiaries could replace the corporate trustee with another corporate trustee. The petitioner was a

resident of Oregon and sought to have the court approve the change of situs to Oregon with an Oregon based corporate trustee based on the terms of the trust. Given the facts and because the request was permitted by the terms of the trust, the court found the change of situs “desirable” and granted the change. Interestingly, the trust also required that the successor corporate trustee be “trustee of individual trusts in excess of ... \$250,000,000,” but apparently there was no corporate trustee in Oregon that would have qualified. The court waived that requirement.

- (iii) *No adverse parties.* If the governing instrument does not have a provision permitting a change of situs, then under pre-UTA law the Pennsylvania courts were nevertheless liberal in granting a change of situs if there was no adverse party to the petition. Where both the trustees and beneficiaries are out of state, the court was likely to grant a change of situs based on the grounds that change was “desirable.” See, e.g., Brown Estate, 12 Pa. D.&C.2d 227, 7 Fid. Rep. 559 (O.C. Mont. 1957) (moving situs of testamentary trust to California).
- (1) In Perelle Trust, 63 D.&C.2d 16, 23 Fid. Rep. 469 (O.C. Phila. 1973), the court approved the change in situs to California with the consent of all parties, including the guardian and trustee ad litem on the basis that the transfer was desirable for the proper administration of the trust. The court also approved the appointment of a California corporate trustee in place of the Pennsylvania corporate trustee, which resigned. Most of the beneficiaries resided in or near California. The transfer was to become effective upon either the California corporate trustee’s consent to act and its qualification to act as a trustee under California law, or an exemplified copy of its appointment as co-trustee by the California court. Finally, the court noted that “[i]t is understood that the change in situs of the trust will have no effect on the governing law clause in the deed which requires that

Pennsylvania law be applied to the operation of the trust.”

- (2) In Newbold Trust, 28 Pa. D.&C.2d 92, 12 Fid. Rep. 547 (O.C. Phila. 1962), the court approved moving situs of the trust to Connecticut, where settlor-decedent had resided at death, where the son/co-trustee/life tenant and remaindermen lived, and where it would be “more convenient” and “desirable.” All parties consented to the move, including the guardian ad litem. The court also noted that the trustees had filed their acceptance of trust with the Connecticut Probate Court, which had approved petitioners as trustees of this trust appointed by the settlor-decedent. The fact of the Connecticut court’s involvement seemed to give the court “comfort” that the trust would be overseen in a meaningful way: “The difficulties encountered by the official examiners appointed by the court in making examination of trust assets in the hands of out-of-state trustees, especially individual trustees, makes it desirable from an administrative standpoint to remove the situs to the court which has assumed jurisdiction over the trustees.” NOTE: In terms of the “now what” issues addressed below, the court noted that “[w]hile it is conceivable that the trust may later come back to this jurisdiction if it should turn out that Stephen (son/primary beneficiary) and his issue do not survive the termination of the trust, the likelihood thereof is too remote to prevent the removal of the situs at this time.”
- (3) In Gundaker Estate, 29 Pa. D.&C.2d 101, 13 Fid. Rep. 111 (O.C. Phila. 1962), the court granted a change of situs of this testamentary trust despite concerns that the proposed new situs, Ohio, might not protect the spendthrift provision as vigorously as Pennsylvania would. Because the testator himself named an Ohio trust company as trustee, the court inferred the testator’s



consent to a change of situs to Ohio. The court noted that the relevant Ohio Probate Court had assumed jurisdiction over the trust and the Ohio corporate trustee, and that the corporate trustee had entered security.

- (iv) *Adverse parties.* Pennsylvania courts have been relatively strict about granting change of situs petitions when there are adverse parties. Under pre-UTA law, in order for the court to approve a situs change under such circumstances, there must be clear and convincing evidence that the change was both necessary and desirable for the proper administration of the trust. See, e.g., Black Estate, 7 Pa. D.&C.4th 228, 10 Fid. Rep. 2d 342 (O.C. Mont. 1990). However, under the UTA, a change of situs requires only the consent (or no objection) of all of the qualified beneficiaries; the trustee's consent is not necessary. Having said that, if a trustee opposes the change of situs otherwise agreed to by all the qualified beneficiaries, and a petition is filed with the court (most likely by the beneficiaries seeking to have the court compel the trustee to proceed with the change of situs) the court would undoubtedly look more closely at whether or not the change is "necessary or desirable for the proper administration of the trust."

- (1) In Black Estate, settlor petitioned the court to either change situs of her inter vivos trust to Florida or terminate the trust, and the Pennsylvania corporate trustee opposed the petition. Settlor had moved from Pennsylvania to Florida, had a good relationship with a Florida corporate trustee which was already handling her other financial affairs and was dissatisfied with the Pennsylvania corporate trustee "because they didn't consult her about the administration of the trust, and just [sent] her papers to sign instead." The court noted that "[i]n all but two of the cases in which the courts have been called upon to order a change of situs, all of the interested parties have agreed that the change is 'necessary or desirable.'" The court involved granted the petition for change of

situs in one of the two contested cases [Carr Estate], and denied it in the other [Parriott Trust].” In denying the petition, the court noted that because the change of situs by necessity required the removal of a trustee, the party seeking to change situs must “present clear and convincing evidence that change of situs is necessary *and* desirable in order to meet its burden of proof,” and settlor did not meet her burden. 7 Pa. D.&C.4th at 230, 10 Fid. Rep. 2d at 344 (emphasis added).

- (2) In Parriott Trust, 48 Pa. D.&C.2d 597, 19 Fid. Rep. 596 (O.C. Allegh. 1969), the court refused to approve a change in situs from Pennsylvania to Oklahoma. The trust was created by settlor for her own benefit and would be paid to her estate upon her death. The Pennsylvania corporate trustee opposed the petition. Settlor lived in Oklahoma, had all her other affairs administered in Oklahoma, and the trust assets would be administered as part of her Oklahoma estate upon her death. It appears the settlor originally chose Pennsylvania as the situs only because of her (now deceased) husband’s Pennsylvania business connections. The court noted that the settlor did not supply “any reason why the trust cannot be continued to be properly administered in its present situs [and] ... that the petition, as filed, is bare of any allegation that the trust has been improperly administered [and settlor had not objected for the past ten years],” and stated that “such a change shall not be made to satisfy the mere whim or caprice of any party in interest ... [t]he change of situs of the trust is not a matter to be taken lightly but one which must be carefully considered by the court and all aspects of such a change carefully reviewed.” The court held that the move was neither necessary nor desirable, and in fact that the laws of Oklahoma had “nothing to add.”

- (3) In Parriott Trust, the court discussed an unreported Allegheny County case, Estate of Clarence P. Byrnes, No. 518 of 1955, decided in 1959. The facts were quite similar to those in Parriott, and the court denied the change of situs to California where the settlor-beneficiary lived with her family/remaindermen. The interesting element is that in Byrnes the petitioner-settlor provided a laundry list of complaints about the Pennsylvania corporate trustee to support her request for change of situs, including “that many of the men employed by the ... corporate trustee in whom settlor had had confidence were no longer employed there; that communication with the trustee’s representatives was difficult; and that her children, as eventual corpus beneficiaries, could become acquainted with investments and procedures if a Los Angeles corporate trustee was appointed.” 48 Pa. D.&C.2d at 603, 19 Fid. Rep. at 602-603. This litany of complaints looks quite “modern.” NOTE: One sees from this case and others that a change of situs might really be a trustee removal action in disguise. In those cases the Pennsylvania courts, at least under prior law, were not inclined to permit the petitioner to accomplish through the “back door” what they could not accomplish directly -- that is, removal of the trustee without cause via a change of situs. Whether or not that would still be the case given that trustee consent/approval is not required if all qualified beneficiaries consent, remains to be seen.
- (4) A change in situs from Pennsylvania to North Carolina was granted over the objections of the corporate trustee in Carr Estate, 5 Pa. D.& C.3d 359, 27 Fid. Rep. 650 (O.C. Phila. 1977). Similar to Kerr Trust, supra, the trust instrument permitted the beneficiaries to remove and replace the corporate trustee, and the beneficiaries had already removed the Pennsylvania corporate trustee and replaced it with a North Carolina

corporate trustee. Despite this, the (removed) Pennsylvania corporate trustee objected to the change of situs. None of the individual co-trustees or any of the beneficiaries were residents of Pennsylvania, and two-thirds of the assets were invested in North Carolina based assets. The court held that the beneficiaries' power in the instrument to change the corporate trustee implied that the settlor intended that the situs of the trust could also be changed. In holding that the situs could be moved, the court rejected the argument that the provision in the trust stating that the laws of Pennsylvania were at all times to govern the construction, validity and effect of the deed of trust and that the administration of the trust prohibited a change of situs. The court found that similar governing law provisions in other trusts did not preclude a change of situs. See Perelle Trust, supra, and Jadwin Trust, 45 D.&C.2d 418, 18 Fid. Rep. 445 (O.C. Mont. 1968) ("The language . . . regardless of title, simply applies Pennsylvania law to the operation of the trust wherever it is situated, and does not therefore prevent *per se* the requested change of situs"). Interestingly, although the court indicated that "change of circumstances" was a dubious basis for changing situs, it noted that the change from a Pennsylvania corporate trustee to a North Carolina corporate trustee, and the change in investments from Pennsylvania municipal bonds to North Carolina municipal bonds, were in fact "altered circumstances." Note that under the UTA, §7766(b), pertaining to removal of a trustee, "change of circumstances" is one element in determining if a trustee can be removed.

- (5) In Jadwin Trust, 45 D.&C.2d 418, 18 Fid. Rep. 445 (O.C. Mont. 1968), the court approved the change in situs from Pennsylvania to Illinois where all of the trustees (all individuals) and beneficiaries resided and all the trust assets were located.

The guardian and trustee ad litem raised objections to the change of situs because the trust stated that its situs was in Pennsylvania and he believed (armed with an opinion from Illinois counsel) that an Illinois court would not take jurisdiction of the trust due to this provision. As noted above, the court determined that the situs and governing law provisions of the trust did not *per se* preclude a change of situs. The court relied on Kerr, *supra*, for the proposition that it is sufficient to have a corporate trustee in Illinois agree to serve, and that there was no need to have a court in Illinois take jurisdiction because the Pennsylvania court would continue to exercise its jurisdiction over the trust until another court took jurisdiction.

- (v) Other cases of interest regarding change of situs include: Thatcher Trust, 19 Fid. Rep. 531 (O.C. Allegh. 1969), annotated in *Fiduciary Review*, October 1969; Katz Trust, 27 Fid. Rep. 449 (O.C. Phila. 1977), annotated in *Fiduciary Review*, September 1977; Rice Trust, 6 Fid. Rep. 225 (O.C. Mont. 1956); Tyler Trust, 1 Fid. Rep. 159 (O.C. Phila. 1951), annotated in *Fiduciary Review*, April 1951; In re Cronin, 192 A. 397 (Pa. 1937).

2. *Delaware:*

(a) For a trust's situs to be changed to Delaware, a Delaware trustee should be appointed and the administration of the trust should be in Delaware. If the trust document itself does not have flexible language permitting a change of situs and the removal and replacement of the non-Delaware trustee, then it is recommended (although not explicitly required) that a court decree be sought that appoints a Delaware trustee (which can be the Delaware affiliate of the current corporate trustee), accepts Delaware jurisdiction over the trust and confirms that the new situs of the trust is Delaware. This is especially so where the trustees of the trust will be taking the position that the "pitching" state's fiduciary income tax no longer applies to the trust due to the change of situs.

(b) Effective May 1, 2012, the Delaware Court of Chancery amended its Rule 100, concerning what elements a petition to modify a trust by consent must contain. Rule 100(d) sets forth the following requirements if, in connection with the modification of the trust, the parties seek to confirm a change of situs from another jurisdiction to Delaware:

"(d) In addition to the foregoing, any petition to modify a trust by consent that seeks to confirm a change of situs of a trust from another jurisdiction to Delaware, or that seeks to apply Delaware law to a trust despite a choice of law provision selecting the law of another jurisdiction, also shall address:

(1) Whether the trust instrument contains a provision expressly allowing the situs of the trust or the law governing the administration of the trust to be changed;

(2) If the trust was settled or created in a jurisdiction other than Delaware or contains a choice of law provision in favor of the law of a jurisdiction other than Delaware, whether or under what circumstances the law of the other jurisdiction authorizes changing the situs of the trust or the law governing the administration of the trust;

(3) Whether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change of situs to Delaware for approval of the transfer of situs of the trust to Delaware,

and the status of the application, or if no application was made, why such approval need not be sought;

(4) Whether Delaware law governs the administration of the trust, and, if so, why. To the extent that the petition relies upon the domicile of the trustee as support for a determination that the trust situs is Delaware or that Delaware law governs the administration of the trust, the petition shall explain why Delaware is the principal place of trust administration, taking into account the administrative tasks and duties that will be carried out by the trustee, any tasks and duties assigned to advisers, trust protectors or other persons, and any other factors counting in favor of or against Delaware jurisdiction, such as the ability of the Delaware trustee to resign automatically or under specific circumstances; and

(5) Whether a court of any other jurisdiction has taken any action relating to the trust.”

(c) See Richard W. Nenno, Delaware Trusts 2011, §§ 35 & 50 (Wilmington Trust 2011).

3. *New Jersey*: New Jersey change of situs law is based on common law. It appears that any change of situs from New Jersey requires court approval.

(a) In deciding whether to approve the change of situs, and in the absence of specific direction in the trust, New Jersey courts focus on whether the new situs will provide the same level of supervision over the trust as New Jersey. For example, in Martin v. Haycock, 123 A.2d 223 (N.J. 1956), the trustees petitioned the court to change the situs of a charitable trust from New Jersey to Ireland. The court stated New Jersey courts should, “before ordering transfer of the funds of the foreign charity to the Locus [and thus releasing jurisdiction over the trust], be satisfied as to the qualifications and competency of the foreign agencies or trustees to discharge and administer the trust as the testator planned it.” Id. at 227.

(b) Similarly, the New Jersey Superior Court in In re: Henderson’s Will, 123 A.2d 78 (N.J. Super. 1956), approved a change of situs of a New Jersey trust to California where the trustees, beneficiaries and remaindermen were all California residents and where the California Superior Court had already approved the

transfer. Both Henderson and Martin imply that approval from the “receiving state” is required before New Jersey, as the “pitching state,” will approve the change.

4. *New York:*

- (a) New York similarly bases change of situs law on common law. In re: Estate of Rockefeller, 2 Misc. 3d 554 (N.Y. Sur. Ct., N.Y. Cty. 2003) (concerning a different Rockefeller than discussed above), a copy of which is attached as Appendix B, is illustrative of when New York courts will, and will not, permit a change of situs from New York to another jurisdiction. In Rockefeller, the court in a prior decree permitted the corporate trustee to resign in favor of the corporate trustee’s Delaware affiliate. The trustees then petitioned the court to permit the change of situs to Delaware. The purpose of the proposed move was to “eliminate the high New York State fiduciary income tax payable by the trust.” Id. at 555. However, the court noted that by changing the corporate trustee from its New York affiliate to its Delaware affiliate, the trust was no longer taxable by New York (because no trustees resided in New York), and thus concluded that a change of situs was no longer necessary.

The court noted that it would permit a change of situs to a new state either if a beneficiary resides in the new state or because administration of the trust had become difficult due to the distance between the place of business of the corporate trustee and the residence of the individual trustee. In this case, no beneficiary resided in Delaware, and the court determined that “the fact that the successor trustee is located in Delaware does not by itself support a change in the situs of the trust any more than the individual trustee’s residence in Connecticut would have called for a transfer to that state [because no administrative difficulties would be relieved].” Id. at 556. Furthermore, there was no income tax reason to approve a change of situs because, by changing the corporate trustee to the Delaware office, New York income tax was already eliminated. Thus, the court denied the change of situs request. The court concluded: “this decision puts future applicants on notice that, where the desired tax savings can be achieved by a change of trustee, a change of situs will not be allowed unless it would result in some benefit to the trust apart from the tax considerations themselves.” Id. at 556-557.



- (b) Question: We note that although in Rockefeller the court described the “change” of corporate trustee as the “resignation of the New York corporate trustee and the appointment of its Delaware affiliate” -- the “change” being from JP Morgan Chase Bank to its Delaware affiliate, JP Morgan Trust Company of Delaware -- is the resignation and appointment of the affiliate necessary, or is it sufficient to simply shift the administration of the trust from New York to Delaware and assert that the assets were “shifted” to Delaware?
5. *Missouri*: Missouri’s change of situs statute, V.A.M.S. §456.1-108, is essentially identical to UTC §108, although Missouri has not enacted UTC §108(b).
6. *Kansas*: Kansas’ change of situs statute, K.S.A. §58a-108, is essentially identical to UTC §108. Kansas has adopted UTC §108(b), although it has also added that “[i]n determining the appropriate place for the administration of the trust, consideration shall be given to the designation of the settlor, the purposes of the trust, the interests of the beneficiaries and the manner and costs of trust administration.” K.S.A. §58a-108(b).
7. *Arizona*:
- (a) Arizona permits a trustee to change of the situs of a trust, without court approval, under substantially identical terms as UTC §108. A.R.S. §14-10108.
- (b) Arizona provides that in connection with a change of situs, the trustee may change the applicable law governing the trust. A.R.S. §14-10108(C).
- (c) Arizona also permits “interested persons” to change the trust situs, without court approval, by entering into a nonjudicial settlement agreement. A.R.S. §14-10111.
- (d) An “interested person” is defined as including “any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons. Interested person, as the term relates to particular persons, may vary from time to time and must be

determined according to the particular purposes of, and matter involved in, any proceeding.” A.R.S. §14-1201.

E. Role of State Tax Authorities in Changing Situs.

1. Separate notice and/or final return? Can the state of origin still subject the trust to its state income tax even if the trust is moved? How sticky is your state’s fiduciary income tax? What’s the buzz?
2. When was the last time you had a fiduciary income tax audit?
3. The Due Process Clause of the Fourteenth Amendment does not allow a state to “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law.” U.S. CONST. amend. XIV, §1.
  - (a) The Due Process Clause requires “some definite link, some minimum connection” between the state and the property, person or transaction it seeks to tax. Allied Signal, Inc. v. Director, Division of Taxation, 504 US 768 (1992). This “definite link” requirement is “guided by the basic principle that a state’s power to tax an individual’s ... activities is justified by the protections, opportunities and benefits the state confers on those activities.” Id.
  - (b) To ensure the constitutionality of a state’s taxation of interstate commerce, there must be (1) a “minimal connection between interstate activities and the taxing State.... [and (2)] the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.” Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978) (citing Norfolk & Western R. Co. v. State Tax Comm., 390 U.S. 317, 325 (1968)). See also Quill Corp. v. North Dakota, 504 US 298(1992); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)
  - (c) In both Pennoyer v. Taxation Div. Director, 5 N.J. Tax 386 (N.J. T.C. 1983), overruled in part on other grounds, Heico Corp. v. Director Div. of Taxation, 20 N.J. Tax 106 (N.J. T.C. 2002), and Potter v. Taxation Div. Director, 5 N.J. Tax 399 (N.J. T.C. 1983), overruled in part on other grounds, Heico Corp. v. Director Div. of Taxation, 20 N.J. Tax 106 (N.J. T.C. 2002), the New Jersey Tax Court disallowed the imposition of income tax on retained income and capital gains of resident trusts because no beneficiary was a

resident of New Jersey, the assets were not held in New Jersey, and the trustees were not residents of New Jersey. Thus, New Jersey did not maintain sufficient minimum contacts to justify the imposition of income tax despite each trust's status as a resident trust.

- (d) In Blue v. Michigan Department of Treasury, 462 N.W. 2d 762 (Mich. Ct. App. 1990), the Court of Appeals of Michigan disallowed the imposition of income tax on retained income and capital gains of a resident trust because no beneficiary was a resident of Michigan, no trustee of the trust was a resident of Michigan and no property was located in Michigan, with the exception of one non-income-producing parcel of real estate. The court considered six factors to determine whether there were sufficient minimum contacts to justify the continued imposition of Michigan income tax on retained income and capital gains: (1) the domicile of the settlor (Michigan), (2) the state in which the trust is created (Michigan), (3) the location of the trust property (Florida, with the exception of one non-income-producing parcel of real estate), (4) the domicile of the beneficiaries (Florida), (5) the domicile of the trustees (Florida), and (6) the location of the administration of the trust (Florida). Although the answer to the first two factors was "Michigan," the court concluded that these factors "require the ongoing protection for benefits of [Michigan] state law only to the extent that one or more of the other four factors is present." Because the answers to factors 3 through 6 were all Florida, the court determined that there were not sufficient contacts to justify the continued imposition of Michigan income tax on retained income and capital gains notwithstanding the trust's status as a "resident trust."
- (e) In Chase Manhattan Bank v. Gavin, 733 A.2d 782 (Conn. 1999), the Connecticut Supreme Court analyzed whether Connecticut could tax a number of different trusts.
  - (i) *Testamentary trusts*. The court noted that testamentary trusts created in Connecticut (which has a definition of a resident trust similar to Pennsylvania) avail themselves of Connecticut law on the grounds that Connecticut law determines if the decedent's will, and therefore the testamentary trust, is valid, and that Connecticut laws "assure the continued existence of the trusts as mechanisms for the disposition of the testators' property according

to the terms of the trusts as provided by the respective wills.” Gavin, 733 A.2d at 795. Even though the trustees, trust assets, and beneficiaries were all out of state, the court found a minimum connection by virtue of validating the will and continuing to oversee the trust’s management: “the viability of the trust as a legal entity is inextricably intertwined with the benefits and opportunities provided by the legal and judicial systems of Connecticut....” Id. at 799.

- (ii) *Inter vivos/non-testamentary trusts.* The situation is different in the case of an inter vivos trust. In Gavin, sufficient connections were found because the current beneficiary was a Connecticut resident and therefore received the “protection and benefits of its laws” even though the connection is “more attenuated” than in the case of the testamentary trust. Gavin, 733 A.2d at 801-802. Query if Connecticut would find sufficient contacts to tax an inter vivos trust if there was no resident beneficiary given that the court described the connection as “attenuated” when there was only one resident beneficiary.
- (f) Similarly, in D.C. v. Chase Manhattan Bank, 689 A.2d 539 (D.C. App. 1997), the court upheld as constitutional the imposition by the District of Columbia of fiduciary income tax on a testamentary trust created by a D.C. resident decedent even though the trustee, assets and beneficiaries were all located elsewhere because, by continuing to supervise the administration of the trust, D.C. maintained the necessary minimal contacts.
- (g) Based on Gavin and D.C. v. Chase, a state could theoretically take the position that it could continue to tax the income generated by resident testamentary trusts under the will of that state even if there were no trust assets, trustees or beneficiaries located in the state. It is less clear if the state could continue to impose fiduciary income tax on a resident inter vivos/non-testamentary trust that was created by a resident of that state or which simply states that the trust has situs in that state if no trustee, beneficiary or assets are located in the state. Some commentators have argued that the holdings of Gavin and D.C. v. Chase are unconstitutional, however, and other states have reached

different conclusions (see, e.g., Pennoyer and Potter, discussed above).

- (h) If a state relinquishes jurisdiction over a trust, it ceases to provide protective and administrative functions in exchange for receiving income tax, and therefore Gavin and D.C. v. Chase should not apply because in those cases, income tax was imposed on the trusts in exchange for providing protective and administrative functions. Even if the trust was a resident trust of that state (because, for example, the settlor was a resident of that state when the trust was created), so long as there are no beneficiaries, trust assets or trustees within that state and the state has given up jurisdiction, then it might not be constitutional for that state to tax the trust as a resident trust.

4. Pennsylvania recognizes the fact that its law is unconstitutional in certain cases.

- (a) The Pennsylvania Personal Income Tax Guide, Chapter 14: Estates, Trusts, and Decedents, states (at page 10) as follows (obtain via [www.revenue.state.pa.us](http://www.revenue.state.pa.us), go to “Tax Professionals” and then “Personal Income Tax”):

“EXEMPTION FOR CERTAIN RESIDENT TRUSTS. No Personal Income Tax shall be imposed upon an inter vivos resident trust if all of the following conditions are met:

1. The assets of the trust currently consist in no part of real property or tangible personal property located within Pennsylvania or intangible personal property, the documents, certificates or other instruments evidencing which are physically located, or have a business situs, within the Commonwealth.
2. The trust has no resident fiduciary, beneficiary or remainderman.
3. All administration, accounting, bookkeeping or sales or purchases currently take place outside Pennsylvania.
4. The settlor is no longer a Pennsylvania resident or died a nonresident.
5. The settlor is not a resident at the times when during his or her lifetime:
  - Application is made to a court concerning the trust; or

- He or she or another might have exercised a reserved power of revocation.

6. The trust is taxable as a resident elsewhere for the period in question.

7. A Pennsylvania court having jurisdiction of the trust has directed that the situs of the trust be changed to a place outside the Commonwealth, and the courts of such place have assumed jurisdiction to adjudicate disputes involving the trust or order accountings to protect the trust corpus, beneficiaries and remaindermen.”

- (b) The foregoing is also mirrored in the directions to the Pennsylvania fiduciary income tax return, PA-41.
- (c) *Private Letter Ruling.* Pennsylvania has also issued a private letter ruling, PIT 01-040 (July 27, 2001), a copy of which is attached as Appendix C, in which it allowed a trust to cease being subject to Pennsylvania income tax. In that case the trust was created under the will of an individual who died a resident of Pennsylvania in 1925. The trustee was not a Pennsylvania resident, the trust was administered outside of Pennsylvania and none of the beneficiaries lived in Pennsylvania. The trustee intended to file a court petition asking the Pennsylvania court with jurisdiction over the trust to approve a change of situs to New Jersey. The trustee asked the Pennsylvania Department of Revenue if, given these facts, the trust would be subject to Pennsylvania income tax. The Pennsylvania Department of Revenue stated that on those facts, and assuming that the court approved the change of situs, the trust would no longer be subject to Pennsylvania income tax.
- (d) *McNeil Trusts.* In a recently-published case, McNeil Trusts v. Com., 651 F.R. 2010, 2013 WL 2257832 (Pa. Commw. Ct. May 24, 2013), the Pennsylvania Commonwealth Court (which is an intermediate appellate court that handles appeals from state agencies, including the Pennsylvania Department of Revenue) addressed, for the first time, the constitutionality of Pennsylvania income tax on trusts and estates.
  - (i) In McNeil, a Pennsylvania resident created two inter vivos trusts in 1959 appointing a Delaware trustee and provided in each trust instrument that

the situs of the trusts was Delaware and was governed by the laws of Delaware. None of the trustees of the trusts resided in Pennsylvania, there was no Pennsylvania-source income and no administration of the trusts occurred in Pennsylvania. However, all beneficiaries resided in Pennsylvania. The trustees had discretion to distribute principal and income to the beneficiaries. Because the settlor was a Pennsylvania resident when he created the trusts, and all of the beneficiaries were Pennsylvania residents, the Pennsylvania Department of Revenue imposed income tax on the trusts as resident trusts. The trustees appealed to the Commonwealth Court, arguing, in part, that the imposition of Pennsylvania income tax under these facts violated the Commerce Clause of the United States Constitution (Article I, Section 8).

- (ii) The Pennsylvania Commonwealth Court agreed with the trustees that the imposition of Pennsylvania income tax on the trusts violated the Commerce Clause and therefore reversed the Department of Revenue's imposition of Pennsylvania fiduciary income tax. In reaching this decision, the Commonwealth Court turned to the four-part test set forth by the United States Supreme Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) to determine whether a state tax is constitutional: "(1) the taxpayer must have a substantial nexus to the taxing jurisdiction; (2) the tax must be fairly apportioned; (3) the tax being imposed upon the taxpayer must be fairly related to the benefits being conferred by the taxing jurisdiction; and (4) the tax may not discriminate against interstate commerce." All four prongs of the test must be satisfied; otherwise the tax is unconstitutional.
- (iii) With respect to the first prong (substantial nexus), the Commonwealth Court held that there was not a substantial connection because the beneficiaries were discretionary beneficiaries who have "no current or future right to the income or assets of the Trust." In addition, although the settlor was a Pennsylvania resident, he designated Delaware as the place of administration and held "that to rely on

Settlor's residence in Pennsylvania approximately forty-eight years before the [tax year] in question to establish the *Trusts'* physical presence in Pennsylvania in 2007 would be the equivalent of applying the slightest presence standard rejected by the U.S. Supreme Court[.]” Accordingly, the Commonwealth Court held that the substantial nexus prong of the Complete Auto test was not satisfied.

- (iv) With respect to the second prong (fair apportionment), the Commonwealth Court noted that a tax “must be both internally and externally consistent.” The Commonwealth Court held that because none of the income derived from Pennsylvania assets and none of the administration occurred in Pennsylvania, but the Department of Revenue sought to impose a tax on *all* income, the imposition of Pennsylvania income tax was not externally consistent and therefore does not satisfy the fair apportionment prong of the Complete Auto test.
- (v) With respect to the third prong (fairly related), the Commonwealth Court noted that taxes “are fairly related to the services a state provides where the taxpayer benefits directly or indirectly from the states protections, opportunities, and services.” Such services include “benefits and protections of the state’s courts, laws and law enforcement[.]” The Commonwealth Court found the trusts, which did not avail themselves to the benefits of Pennsylvania courts and laws, did not receive any services from Pennsylvania. The fact that the beneficiaries, who lived in Pennsylvania, received benefits from Pennsylvania was not sufficient to meet this prong because “they are not the taxpayer in this matter and, importantly, as discretionary beneficiaries, they have no present or future right to distributions from the Trust. Moreover . . . the beneficiaries will pay [Pennsylvania income tax] on any distributions they do receive from the Trusts, which are fairly related to the benefits they receive from residing in Pennsylvania.” Accordingly, the Commonwealth Court held that the fairly related prong was not satisfied.



- (vi) Because none of the other prongs were satisfied, the Commonwealth Court did not analyze whether the fourth prong (tax cannot discriminate against interstate commerce) was satisfied.
  - (vii) Accordingly, because the first three prongs of the Complete Auto test were not satisfied, the Commonwealth Court held that the imposition of Pennsylvania fiduciary income tax on the trusts in McNeil was unconstitutional.
- (e) Based on the foregoing, it is likely that Pennsylvania will not tax trusts that have changed situs, even without court approval, so long as the change of situs requirements under §7708(c)-(e) are met. However, the better practice, especially where a Pennsylvania court may have already exerted jurisdiction over a trust, is to seek a court decree confirming the change of situs and releasing jurisdiction over the trust if the trust will take the position that it is no longer subject to Pennsylvania income tax.
- (f) *Voluntary Disclosure Program.* In certain cases, a trustee might take the position that a particular trust is not subject to Pennsylvania income tax, for instance on the basis that the situs of the trust is outside Pennsylvania, but at a later date the trustee concludes that Pennsylvania might be successful in assessing its income tax after all. There is no statute of limitations on taxpayers that do not file a tax return. 72 P.S. § 7348(c). Therefore, Pennsylvania could assert that income tax is due for all years since the inception of the tax or other relevant date, with interest due on each return. There could also be substantial penalties, totaling at least 50% of the tax due in the case of fraud. In such a case, a trustee might consider Pennsylvania's Voluntary Disclosure Program to attempt to reduce the total amount of tax, interest and penalties that may be imposed on a delinquent taxpayer. In order to take advantage of this program, a taxpayer must apply to the Pennsylvania Department of Revenue. There is no obvious statutory or regulatory authority for the Voluntary Disclosure Program. This description of the program is based on information provided in the Department of Revenue's website, [www.revenue.state.pa.us](http://www.revenue.state.pa.us) (go through "Tax Professionals" to "Incentives & Programs" to "Voluntary Disclosure Program"), and on direct experience with the program. If accepted for the Voluntary Disclosure Program, the taxpayer must apparently file returns for the three prior

years (per the Department of Revenue’s website), plus the current year, and pay the tax and interest due.

## V. GOVERNING LAW

*Alice: “How puzzling all these changes are! I’m never sure what I’m going to be, from one minute to another.”*

— *Lewis Carroll, Alice’s Adventures in Wonderland*

### A. Designating a Trust’s Governing Law.

#### 1. *Uniform Probate Code:*

- (a) The UPC does not address the validity of trusts (whether testamentary or inter vivos). UPC §2-506 provides that, with respect to the choice of law as to the execution of a will, it “is valid if executed in compliance with Section 2-502 or 2-503 [concerning requirements for executing a valid will under the UPC] or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.” The comment to UPC §2-506 provides the following example: “if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this State would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or, if a national of Mexico executes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators.”
- (b) UPC §2-703 provides that the “meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4, or any other public policy of this State otherwise applicable to the disposition.”

2. *Uniform Trust Code:*

(a) Laws governing construction:

(i) UTC §107 provides that “[t]he meaning and effect of the terms of a trust are determined by: (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.” The comment to UTC §107 states that this only applies to “determining the law that will govern the meaning and effect of particular trust terms.”

(ii) Similar to the UTC, Pennsylvania permits the settlor of a trust to designate the governing law of the trust pursuant to 20 Pa. C.S. §7707. However, Pennsylvania sets forth “mandatory rules” that apply even if the provisions of the trust provide otherwise (such as by designating in the trust instrument that the governing law of another jurisdiction applies). Such mandatory rules include:

- (1) The requirements for creating a trust under Pennsylvania law;
- (2) The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) The power of the court to modify or terminate a trust under 20 Pa. C.S. §§ 7740-7740.6;
- (4) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust;
- (5) The duty of a trustee under §7780.3 to provide certain information to beneficiaries (therefore a Pennsylvania settlor cannot create a so-called “silent trust” in another jurisdiction);

- (6) The effect of an exculpatory provision (that may relieve trustee of liability for breach of trust) under 20 Pa. C.S. §7788;
- (7) Periods of limitation for commencing a judicial proceeding; and
- (8) The power of the court “to take action and exercise jurisdiction as may be necessary in the interests of justice.”

(b) Laws Governing Validity:

- (i) UTC §403 provides that, for inter vivos trusts, a trust is validly executed “if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located.” The comment to UTC §403 states that the validity of a testamentary trust “is ordinarily determined by the law of the decedent’s domicile.”
- (ii) In 20 Pa. C.S. §7733, Pennsylvania has applied UTC §403 only to trusts created by non-Pennsylvania resident, not to trusts created by Pennsylvania residents. Therefore, a non-Pennsylvania resident could designate that Pennsylvania law governs the validity of a trust, but a Pennsylvania resident could not designate that the laws of a foreign jurisdiction govern the validity of the trust. The laws in Pennsylvania concerning whether a trust is validly created in Pennsylvania are found in 20 Pa. C.S. §§ 7731 & 7732.

B. Sample Change of Situs Provisions

- 1. With the ever-increasing mobility of people, and the changing landscape of various state laws, it is hard to justify drafting wills and trusts that do not include modernized provisions permitting the change of a trust’s situs and governing law.
- 2. The following sample provision provides that the trustee can change situs without permission from the “pitching” or “receiving” states, subject to applicable state law (but query whether a provision in the trust trumps the requirements of state law), and

also permits the trustee to change the governing law to the law of the “receiving” state:

“Situs and Governing Law.

(1) The situs of the trusts hereunder shall be [STATE X].

(2) All questions pertaining to the validity, construction, interpretation and administration of the trusts hereunder shall be determined in accordance with the laws of [STATE X].

(3) Notwithstanding the foregoing, the trustee or a majority of trustees shall have the power to change the situs of any trust hereunder by written instrument signed and acknowledged by the trustee or a majority of trustees. The trustee or a majority of trustees may, in connection with any such change of situs and without court approval if permissible under state law, elect by signed instrument filed with the trust records any one or more of the following:

(a) that such trust shall be subject to the jurisdiction of the state, country or other place of the new situs;

(b) that the assets of such trust shall be moved to the place of the new situs;

(c) that such trust shall be administered in accordance with the laws of the place of the new situs;

(d) that the validity, construction and/or interpretation of the provisions of such trust shall be governed by the place of the new situs, and, if the trustee makes an election under this subparagraph, to elect further that the rule against perpetuities or other law limiting duration of trusts of the new situs shall apply to the trust.

(4) To the extent that the power to change the situs and/or governing law of any trust hereunder pursuant to subparagraph (3) above would cause any part or all of any trust hereunder to be included in a trustee’s estate for federal estate tax purposes or to the extent that the exercise of such power would constitute a taxable gift for federal gift tax purposes of any part or all of the trust’s assets from a trustee to any beneficiary hereunder, such trustee may not act pursuant to subparagraph (3). All such decisions shall be made solely by the other trustee or trustees. Furthermore, the trustee shall not have the ability to change the situs or governing law of any Exempt Trust hereunder pursuant to

subparagraph (3) above if such action shall cause any portion of an Exempt Trust to be treated as a Non-Exempt Trust.”

3. The following permits a change of situs, but says nothing about which governing law applies if the trust situs is changed; in that case a conflicts of laws analysis would be applied:

“The trustee may in his, her or its discretion change the situs of any trust hereunder, in which case the trustee shall notify in writing all beneficiaries currently eligible to receive income or principal from such trust of the new situs.”

4. The following permits a change of situs, but directs that the laws of the initial state of situs govern:

“The trustee may in his, her or its discretion change the situs of the trust hereunder, in which case the trustee shall notify in writing all beneficiaries currently eligible to receive income or principal from such trust of the new situs. All questions pertaining to the validity, construction, interpretation and administration of the trusts hereunder shall be determined in accordance with the laws of [STATE X].”

See the summary of In re: Peierls Family Inter Vivos Trusts, --- A.3d ---, 2013 WL 5539329 (Del. October 4, 2013) below for a discussion concerning whether such a provision would prevent the governing law from changing following a change of situs.

5. If the governing law remains that of the original state pursuant to the terms of the trust, then it may be that the only real impact of a change of situs, aside from convenience, might be the avoidance of income tax on retained income and capital gains.

## VI. FIDUCIARY LIABILITY AND ATTORNEY MALPRACTICE

*Queen of Hearts: “Sentence first – verdict afterwards.”*

— *Lewis Carroll, Alice’s Adventures in Wonderland*

*Beware the Jabberwock, my son!  
The jaws that bite, the claws that catch!  
Beware the Jubjub bird, and shun  
The frumious Bandersnatch!”*

— *Lewis Carroll, Through the Looking-Glass and What Alice Found There*



A. Trustee's Duty to Change Situs.

1. Does a trustee breach the trustee's duty of care if he or she fails to move a trust to a state with more favorable tax/fiduciary laws? What if the corporate trustee already has a presence in the other, favorable state? Should a corporate trustee resign if it is in the trust's best interest to move the trust and the corporate trustee cannot serve in the new state or is the only remaining connection to the state of origin? Why limit the options to other states, when moving a trust to another country might also be beneficial?
2. Comment b(2) to Restatement (Third) of Trusts §76 provides that a "trustee's duty to administer a trust includes an initial and continuing duty to administer it at a location that is reasonably suitable to the purposes of the trust, its sound and efficient administration, and the interests of its beneficiaries. Terms of the trust, however, may establish expressly or by implication a place of administration, initially at least, and may affect the trustee's duty in the matter." In addition, Comment b(2) further provides that "[u]nder some circumstances the trustee may have a duty to change or to permit (e.g., by resignation) a change in the place of administration. Changes in the place of administration by a trustee, or even the relocation of beneficiaries or other

developments, may result in costs or geographic inconvenience serious enough to justify removal of the trustee.”

3. As mentioned above, UPC §7-305 provides that a “trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state.”
4. Similar to UPC §7-305, UTC §108(b) provides that “[a] trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.”
5. UPC §7-305 and UTC §108(b) could be interpreted to place an affirmative duty on the trustee to find the most advantageous state for the trust.
  - (a) The following 26 jurisdictions have adopted some form of UPC §7-305 or UTC §108(b): Alabama (Ala. Code §19-3B-108); Alaska (Alaska Stat. §13.36.090); Arizona (Ariz. Rev. Stat. §14-10108); Arkansas (Ark. Code Ann. §14-10108); Colorado (Colo. Rev. Stat. §15-16-305); the District of Columbia (D.C. Code §19-1301.08); Florida (Fla. Stat. §736.0108); Hawaii (Haw. Rev. Stat. §560:7-305); Idaho (Idaho Code Ann. §15-7-305); Indiana (Ind. Code §30-4-6-3); Kansas (Kan. Stat. Ann. §58a-108); Kentucky (Ky. Rev. Stat. §386.725); Maine (Me. Rev. Stat. Ann. Tit. 18-B, §108); Massachusetts (Mass Gen. Laws ch. 190B, §7-305); Michigan (Mich. Comp. Laws §700.7108); Nebraska (Neb. Rev. Stat. §30-3808); New Hampshire (N.H. Rev. Stat. Ann. §564-B:1-108); New Mexico (N.M. Stat. §46A-1-108); North Dakota (N.D. Cent. Code §59-09-08); Ohio (Ohio Rev. Code Ann. §5801.07); Oregon (Or. Rev. Stat. §130.022); South Carolina (S.C. Code Ann. §62-7-801); Tennessee (Tenn. Code Ann. §35-15-108); Utah (Utah Code Ann. §75-7-305); Vermont (Vt. Stat. Ann. Tit. 14A, §108) and Wyoming (Wyo. Stat. Ann. §4-10-108).
  - (b) Pennsylvania’s situs statute, 20 Pa. C.S §7708, omits UTC §108(b). The comment to 20 Pa. C.S. §7708 states that “UTC §108(b) is omitted to avoid the implication of a duty that the trustee consider the laws of all conceivable jurisdictions to which the situs of a trust may be moved and



establish and re-establish situs accordingly.” North Carolina has also omitted UTC §108(b) from its situs statute for the same reason. See comment to N.C. Gen. Stat. Ann. § 36C-1-108.

- (c) There are only a handful of cases that reference UPC §7-305 in any manner (no cases address UTC §108(b), although the provisions are similar). See, e.g., Trusteeship Created By the City of Sheridan, Colorado, 593 N.W.2d 702 (Minn. Ct. App. 1999) (summarized in Section VII below); Marshall v. First Nat. Bank Alaska, 97 P.3d 830, 836 (Alaska 2004) (summarized in Section VII below); In re Wege Trust, 271244, 2008 WL 2439904 (Mich. Ct. App. June 17, 2008); In re: Harriet C. Sibley Trust, 293601, 2010 WL 4493553 (Mich. Ct. App. Nov. 9, 2010).

- (i) In In re Wege Trust, 271244, 2008 WL 2439904 (Mich. Ct. App. June 17, 2008), the decedent died a Michigan resident. Pursuant to his will, a trust was created for the benefit of his granddaughter, who resided out of state. The granddaughter petitioned for the removal of Fifth Third Bank in Michigan and the appointment of SunTrust Bank in Georgia pursuant to Michigan’s version of UPC §7-305 (then Mich. Comp. Law 700.7305, which has since been repealed and replaced by Michigan’s version of UTC §108(b): Mich. Comp. Law 700.7108). The probate court granted the removal and Fifth Third Bank appealed.

In affirming the removal and replacement, the Michigan Court of Appeals noted that the granddaughter “advanced two primary reasons that Grand Rapids had become an inappropriate place of administration: (1) the distance between Grand Rapids and her home and its impact on her relationship with the trustee and on the administration of the Trust to her satisfaction, and (2) her lack of confidence and trust in the Bank, because of its ties to [an asset held by the trust], the amount of [such asset the bank] holds as beneficial owner, and the perceived lack of loyalty, responsiveness and information afforded to [the granddaughter by Fifth Third].” Fifth Third argued that, given advancements in technology, especially e-mail, the location where a trust is administered is generally immaterial to its sound and efficient

management.” The court rejected that argument, stating that “such a reading is contrary to the plain language of the statute, and that it presents an overly restrictive view, which would eviscerate the statute. The statute plainly permits removal when the place of administration becomes inappropriate for any reason even in this age of improved technology and communication.” Accordingly, the court affirmed the removal of Fifth Third Bank in favor of SunTrust.

- (ii) In In re: Harriet C. Sibley Trust, 293601, 2010 WL 4493553 (Mich. Ct. App. Nov. 9, 2010), the decedent died a Michigan resident. The decedent’s will created a trust for the benefit of her husband. In 2000, the decedent’s husband died, and the decedent’s son, a Colorado resident, became the current income beneficiary. In 2009, the son requested that Citizens Bank, the corporate trustee, resign in favor of a Colorado trustee (it is not clear whether the proposed successor trustee was a corporate entity or an individual). Citizens Bank refused to resign, and the son filed a petition in Michigan probate court to remove Citizens Bank, alleging that “his geographic distance from the trustee was not in his best interest and interfered in the development of a personal relationship with the trustee.” The probate court denied the removal of Citizens Bank, and the son appealed.

The Michigan Court of Appeals affirmed the probate court’s denial of the removal of Citizens Bank, noting that the son “has not asserted any mismanagement or breach of fiduciary duty by Citizens Bank in administration of the Trust [contrasted with the facts in Wege]. He has not indicated any difficulty or delay in having contact with Citizens Bank or a lack of responsiveness to his contacts or inquiries as the basis for his request for removal of the current trustee. In effect, [the son] only asserts that the geographic location of the trustee is inconvenient and preclusive to a more personal relationship, but not that it has impacted the efficient administration of the Trust.” In addition, the court stated that the nine-year span of time between the son becoming a beneficiary and asking Citizens Bank to resign belied the son’s

argument that the corporate trustee should be removed.

- (d) There appear to be no reported cases surcharging a trustee for failing to change the situs of a trust in violation of UPC §7-305 or UTC §108(b). The damages for any such alleged “breach” could be fairly easy to compute, especially if the situs should have been changed to avoid state fiduciary income tax.
- (e) Clearly a trustee has a duty to know the circumstances of the beneficiaries of a trust. If the trustee knows that none of the beneficiaries lives in the state in which the trust has its situs, and there are no trust assets that are tied to the state, then does a trustee at least have the duty to consider the options for alternative situs? Obviously, doing so could cause the trustee to lose the trusteeship, or perhaps just the direct relationship.
- (f) What if the trustee knows that there is likely to be a substantial “liquidation event” in a near future, that will result in substantial capital gains, and as a result of the change of situs the trust would no longer be subject to state income tax on capital gains?

B. Attorney Liability.

- 1. If the attorney represents the trustee, can the attorney be held liable for malpractice if the attorney fails to advise the trustee to consider moving a trust? Is there a duty on the attorney to know all the different state laws so that the attorney can tell the trustee where a trust should be moved for maximum benefit? Is there a duty on the attorney to know all the different trust laws in the world so that the attorney can tell the trustee which country would have the best situs for the trust?
- 2. If the attorney knows that none of the beneficiaries lives in the state in which the trust has its situs, and there are no trust assets that are tied to the state, then does the attorney have the duty to advise the trustee to consider the options for alternative situs?
- 3. By making the recommendation to change situs, the attorney could end up losing the representation of the trustee and/or the beneficiaries. Should that have any impact on liability?
- 4. What if the trustee knows that there is likely to be a substantial “liquidation event” in a near future, that will result in substantial

capital gains, and as a result of the change of situs the trust would no longer be subject to state income tax on capital gains?

5. If the attorney represents a beneficiary, can the attorney be held liable for malpractice if the attorney fails to advise a beneficiary with a remove and replace power to change trustees in order to move the trust?

## VII. NOW WHAT? WHAT HAPPENS WHEN SITUS IS CHANGED?



*“I wonder if I’ve been changed in the night. Let me think: was I the same when I got up this morning? I almost think I can remember feeling a little different. But if I’m not the same, the next question is, Who in the world am I? Ah, THAT’S the great puzzle!”*

— Lewis Carroll, *Alice’s Adventures in Wonderland*

*“The Caterpillar and Alice looked at each other for some time in silence: at last the Caterpillar took the hookah out of its mouth, and addressed her in a languid, sleepy voice.*

*‘Who are YOU?’ said the Caterpillar.*

*This was not an encouraging opening for a conversation. Alice replied, rather shyly, ‘I—I hardly know, sir, just at present—at least I know who I WAS when I got up this morning, but I think I must have been changed several times since then.’”*

— Lewis Carroll, *Alice’s Adventures in Wonderland*

### A. After Trust Situs is Moved, Which State(s) Laws Apply?

1. Validity and construction v. administration: Do the validity and construction laws of the original situs state still apply?
  - (i) Definitions:
    - (1) *Validity*: Validity refers to such issues as whether the trust was properly executed, whether the trust

violates the rule against perpetuities or a rule against accumulations, whether the person creating the trust had the proper competency or capacity, and whether the trust was created due to fraud or undue influence. See Bogert on Trusts § 293 at 253–254; Restatement (Second) of Conflict of Laws § 269 cmt. d (1971).

- (2) *Construction:* Construction pertains to questions such as the “identity of the beneficiaries and their respective interests,” especially in default of explicit direction in the instrument itself, whether adopted children are considered descendants, the rights of illegitimate children have in the trust, the disposition of property when a named beneficiary or class of beneficiaries is unable to take, and, in some instances, allocation between principal and income. Bogert on Trusts §293 at 252; See also Restatement (Second) of Conflict of Laws §§ 268 cmts. a, h, 271 cmt. a (1971).
  - (3) *Administration:* Administration involves matters such as the powers and duties of the trustee, trust investments, compensation of the trustee and its right to indemnity, liability for breach of trust, the power of the beneficiaries to terminate the trust, and, in some instances, allocation between principal and income. See Bogert on Trusts §293 at 253; Restatement (Second) of Conflict of Laws §§ 268 cmt. h, 271 cmt. a (1971).
- (ii) In terms of the impact on governing law, the comment to UTC §108 provides that, while “transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 615 (4th ed. 1989).” However, as discussed above, under the UPC and UTC, the trust instrument itself may designate which state’s (or states’) laws apply to the validity, construction or administration of the trust notwithstanding any change in the principal place of administration, and such designation may supersede default statutory or common laws for determining validity, construction and administration. Although not a UTC state, Delaware has codified this in 12 Del. C. §3332:

“(a) The duration of a trust and time of vesting of interests in the trust property shall not change merely because the place of administration of the trust is changed from some other jurisdiction to this State.

(b) Except as otherwise expressly provided by the terms of a governing instrument or by court order, the laws of this State shall govern the administration of a trust while the trust is administered in this State.”

- (iii) Arizona provides that in connection with a change of situs, the trustee may change the applicable law governing the trust. A.R.S. §14-10108(C).
- (iv) Decanting: Alaska, Arizona, Missouri and South Dakota provide that their decanting provisions apply to a trust “whose governing jurisdiction is transferred to [that] state.” Alaska Stat. §13.36.157(b), Ariz. Rev. Stat. §14-10819; Mo. Ann. Stat. § 456.4-419; S.D. Codified Laws §55-2-15. Thus, at least these three states consider decanting to be “administrative” in nature. If a trust’s situs is moved to a state permitting decanting, such as Alaska, Arizona, Missouri or South Dakota, and the trust is decanted into a new trust, will the new trust be governed by the new state’s validity and construction trust law? Query also if a provision in a trust instrument dictating that the governing law shall always be in a certain state regardless of whether situs is moved (as permitted in UTC §107 and many UTC jurisdictions) would that trump such a statute? See IRS Notice 2011-101, in which the IRS and the Treasury Department seek comments on the income, estate, gift and GST tax implications, if any, from decanting the assets of one trust into another; see also ACTEC’s comments submitted to the IRS in response to Notice 2011-101, at [http://www.actec.org/public/Governmental\\_Relations/Mezzullo\\_Comments\\_04\\_02\\_12.asp](http://www.actec.org/public/Governmental_Relations/Mezzullo_Comments_04_02_12.asp)
- (v) Does the explicit or implicit designation of governing law in the trust instrument result in the law of the original state applying to the validity, construction AND administration of the trust even after the situs of the trust is changed to a new state? This issue was examined by the Delaware Supreme Court in the recently-published case In re: Peierls Family Inter Vivos Trusts, --- A.3d ---, 2013 WL 5539329 (Del. October 4, 2013).

- (1) Peierls concerned five trusts: the 1953 Trusts (two), the 1957 Trust (one) and the 1975 Trusts (two). The 1953 Trusts provided that “all questions pertaining to the validity, construction, and administration shall be determined in accordance with the laws of the State of New York” and provided that the trustee commissions were to be determined pursuant to New York law. The 1953 Trusts contained provisions for the appointment of successor trustees and did not include any geographic limitation. The 1957 Trust provided that the “validity and effect is determined by the laws of the State of New Jersey” and provided that trustees were entitled to commissions pursuant to New York Law. The 1957 Trust contained provisions for the appointment of successor trustees and did not include any geographic limitation. The 1975 Trusts provided that they are “governed by, and [their] validity, effect and interpretation determined by the laws of the State of New York” and provided that the trustee commissions were to be determined pursuant to New York law. The 1975 Trusts contained provisions for the appointment of successor trustees and did not include any geographic limitation.
- (2) The Delaware Supreme Court noted that absent provisions in the trust instrument to the contrary, the law governing the administration of a trust is determined by the trust’s place of administration absent specific direction in the trust. The Court then turned to whether the provisions of the 1953, 1957 or 1975 Trusts would prevent the law governing the administration of such trusts to change following a change of situs.
- (3) With respect to the 1953 Trust, the Court noted that the settlor’s initial intent was that New York law would govern the Trusts’ administration. However, because the 1953 Trusts permitted the appointment of trustees without any geographic limitation, and the Trusts did not explicitly provide that New

York administrative law must *always* govern, the Court held that the settlor “implicitly permitted the law of administration to change with a change in the place of administration.”

- (4) With respect to the 1957 Trust, the Court noted that while the settlor selected New Jersey law as initially governing the administration, the trust contained no geographical limitation on trustees (and in fact the initial trustee was a New York corporate trustee). The Court therefore held that while New Jersey law currently governed the administration of the 1957 Trust, there was “no evidence that the settlor’s initial choice that New Jersey law ‘regulate’ the Trust be eternal[,]” and therefore a change of administration to another jurisdiction would change the law governing the administration.
- (5) Finally, and for the same reasons with respect to the 1953 and 1957 Trusts, the Court held that “nothing in the 1975 Trust Instrument indicates that the settlor intended to limit the law of administration to New York. We therefore conclude that the 1975 Trusts’ law of administration would change with a change in the place of administration.”
- (6) It remains to be seen whether courts in other jurisdictions would come to the same conclusion as the Delaware Supreme Court in the Peierls based on similar circumstances. Accordingly, drafting attorneys should be careful to consider the possible effect their change of situs, governing law and trustee succession provisions may have on the ability to change (or not) the law governing validity, construction or administration.

- 2. What’s what? The following chart provides a short sampling of what constitutes (or might constitute) matters of validity and construction, and thus depend on the law of the original or



“pitching” state versus matters of administration, as to which a court will (or might) apply the law of the new or “receiving” state. This listing is by no means exhaustive or even correct; opinions will differ as to whether a certain issue might be considered validity or construction on the one hand and administrative on the other. Thus, this chart is for illustrative and discussion purposes only:

<u>Theoretically the Law of the “State of Origin” or “Pitching” State</u>	<u>Theoretically the Law of the State of the New Situs or “Receiving” State</u>
<u>Validity and Construction</u>	<u>Administration</u>
Capacity of Settlor (validity)	
Effectiveness of Execution (validity)	
Rights of Adoptees (construction)	
Rights of Illegitimates (construction)	
Rule Against Perpetuities (validity)	
Principal versus Income (construction ?)	Principal versus Income (?)
Unitrust/Power to Adjust (construction ?)	Unitrust/Power to Adjust (?)
Per Stirpes / Per Capita (construction)	
Entitlement to Distribution (construction)	
	Qualification of Trustees
	Removal and Replacement of Trustees
	Prudent Investor Act
	Self-Dealing of Fiduciary
Failure of Beneficiaries (i.e., intestacy; escheat) (construction)	
Marital Rights (i.e., election against will; upon divorce) (construction)	
	Rights of Creditors
Beneficiary Notice Requirements (?)	Beneficiary Notice Requirements (?)
Decanting (?)	Decanting (?)
	Virtual Representation
	Delegation of Fiduciary Responsibilities
	Directed Trusts

B. Human Nature and the Passage of Time.

1. Will trustees, trust officers, beneficiaries and courts eventually “forget” that the trust was moved in the first place and will any applicable laws of the original situs state “stick” in real life? Should they?
2. One needs to think beyond that first change of situs. A long-term trust could be moved several times. This will create even more

complexity, which in turn only may compound the impact of the vagaries of certain elements of human nature -- avoidance of complexity, disregard for things we don't understand, short attention spans, etc.

C. Effect of Change of Situs on Jurisdiction.

1. Once situs is changed which court has jurisdiction? What happens if there are contacts in more than one state and thus multiple potential options for jurisdiction? Jurisdiction in turn carries with it governing law, in whole or in part, depending on the circumstances, as addressed above.
2. When there are multiple options for jurisdiction, a "race to the courthouse" can become important because courts will often defer to another state that has already exercised jurisdiction over a trust.
3. Early on Pennsylvania declined to exercise jurisdiction over a testamentary trust where another state had already exercised jurisdiction over the trust (and continued to do so). In In re: Cronin, 192 A. 397 (Pa. 1937), a decedent died a resident of New York, and his will was probated in New York. Decedent directed in his will that certain assets be held in trust by a Pennsylvania corporate trustee for the decedent's niece, who was a Pennsylvania resident. The trustee filed an account with the Surrogate Court of Broome County, New York, and, before the audit of the account in Broome County, the Commonwealth of Pennsylvania filed a petition in the Court of Common Pleas of Philadelphia County, Pennsylvania, for the repayment of funds expended in caring for decedent's niece. The Pennsylvania Supreme Court held that the Pennsylvania court should have declined to exercise jurisdiction. In deferring to the jurisdiction of New York, the Pennsylvania Supreme Court noted that the trust:

"was distributed by administration according to the law of New York. That administration included the award of trust property to the appellant trustee [a Pennsylvania bank which administered the trust in Pennsylvania]. . . . The award was, however, not absolute; it was conditioned, as required by New York Law, by the decree of the Surrogate's Court on the entry of a bond that the trustee 'shall faithfully discharge trust reposed in it . . . , and also obey all lawful decrees and orders of the Surrogate's Court of the County of Broome touching the administration of the estate committed to it \* \* \*.' In addition, the trustee also executed, as required, a certificate appointing the Superintendent of Banks of the State of New York its attorney to receive service of process against the trustee in any proceeding 'affecting or relating to the Estate

represented or held by it as such Trustee, or the acts or defaults of such corporation in reference to such Estate', etc. We think, therefore, that the New York court retained jurisdiction over the continued administration of the trust."

4. *Practice Tips:*

- (a) If a party feels that it is important to establish a state's jurisdiction over a trust to preclude the jurisdiction of another state, then it may be wise to affirmatively create an opportunity for the state to exercise its jurisdiction, even as to something rather mundane. In doing so, the party can improve the likelihood of securing that state as the jurisdiction with respect to potential later proceedings.
- (b) In connection with a change of situs, practitioners should consider recommending that clients obtain a court order from the pitching state relinquishing jurisdiction over the trust (or, at a minimum, if situs is being transferred without court approval, including a recitation in a nonjudicial settlement agreement that actions concerning the trust may only be brought in the receiving state). Seeking to have the receiving state accept jurisdiction may also strengthen the position that the receiving state – and not the pitching state – has jurisdiction. A court order from both the pitching and receiving states is ideal.

5. UTC and jurisdiction:

- (a) As previously noted, the UTC refers to the "principal place of administration" rather than to situs. The comment to UTC §108 (concerning designation of the principal place of administration) provides that "[l]ocating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust."
- (b) Additionally, the comment to UTC §108 provides that the principal place of administration of a trust is also important because it "will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular state (Section 204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum."

6. UPC and jurisdiction:

- (a) In an effort to “center litigation involving the trustee and beneficiaries at the principal place of administration,” UPC §7-203 provides that a court “will not, over the objection of a party, entertain proceedings . . . involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to the jurisdiction of the state in which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.” The Comment to UPC §7-203 recognizes that while a trust may be subject to the jurisdiction of many states, UPC §7-203 “employs the concept of *forum non conveniens* to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust[.]”
- (b) UPC §7-203 has been adopted in ten jurisdictions: Alaska (Alaska Stat. §13.36.045); Colorado (Colo. Rev. Stat. §15-16-203); Florida (Fla. Stat. §736.0205); Hawaii (Haw. Rev. Stat. §560:7-203); Michigan (Mich. Comp. Laws §700.7205); Kentucky (Ky. Rev. Stat. §386.685); Massachusetts (Mass Gen. Laws ch. 190B, §7-203); South Carolina (S.C. Code Ann. §62-7-201); Utah (Utah Code Ann. §75-7-204); and Idaho (Idaho Code Ann. §15-7-203).

D. Contested Jurisdiction - Selected Case Law.

- 1. There are a few cases that shed light in a meaningful and interesting fashion on how trust matters play out when more than one state legitimately has or may have jurisdiction over a trust, and the parties litigate over which state should exercise jurisdiction over the matters in dispute (that is, what is the proper forum). For example, there is an interesting series of Florida cases, beginning with Henderson v. Usher, 160 So. 9 (Fla. 1935), which provide a microcosm of the evolution of how courts view or may view jurisdiction and forum/venue in such circumstances.<sup>7</sup>

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<sup>7</sup> Henderson v. Usher, 160 So. 9 (Fla. 1935), and Saffan v. Saffan, 588 So.2d 684 (Fla. Dist. Ct. App. 1991), were discussed by Barry F. Spivey and Shane Kelley during a presentation at the ACTEC Fiduciary Litigation Committee

2. Forum/Venue. In Perry v. Agnew, 903 So.2d 376 (Fla. Dist. Ct. App. 2005), summarized below, which distinguishes Henderson, the concept of venue is addressed. However, “venue” as used in these trust situs cases is not about which local court within a state is the proper venue. Instead, “venue” issues arise when more than one state has some form of jurisdiction over the trust, and the question is which state – which venue – is the most appropriate, or is even the most convenient and least “harmful.” The word “forum” could also be used in place of venue in such cases.
3. In reviewing case law in matters of contested trust jurisdiction, it may be helpful to consider the primary ways to view situs outlined at the beginning of these materials:
  - (a) Administrative situs;
  - (b) Locational situs;
  - (c) Tax situs; and
  - (d) Jurisdictional situs.
4. Henderson v. Usher, 160 So. 9 (Fla. 1935):
  - (a) In Henderson, decedent died a Florida resident, survived by his wife and a child from a prior marriage. Decedent had a power of appointment over an inter vivos trust created by his mother, who was a Florida resident at the time she executed the trust. For a time the administrative situs of the mother’s trust was in Florida. Pursuant to decedent’s will, he exercised his power of appointment over his mother’s inter vivos trust, appointing the income to his wife and the remainder to his child from a prior marriage. Decedent’s widow (who moved from Florida to New York after decedent died) elected against husband’s will under Florida law. A dispute arose as to whether, because of her election against decedent’s will, decedent’s wife was entitled to the income decedent appointed to her from his mother’s trust. Trustees of the testamentary trust under decedent’s will (who were also New York residents) filed a petition in Florida to determine what rights decedent’s wife (and the other beneficiaries) had in decedent’s mother’s trust in light of the widow’s election.

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meeting in March 2012 in Miami, Florida, addressing the relevant choice of law provisions of the Uniform Trust Code, as compared to common law and the Restatement (Second) of Conflict of Laws.

- (b) Decedent's wife filed a motion to quash the service of the petition on the basis that she was no longer a resident of Florida and the trust res, consisting of equities, was not within the jurisdiction of the Florida court (that is, the locational situs of the assets of the trust was no longer in Florida). The trial court denied the motion, and decedent's wife appealed to the Florida Supreme Court.
- (c) The Florida Supreme Court affirmed dismissal of the motion. The court noted that, as to questions concerning decedent's estate and will, Florida retained jurisdiction: "The testator was a citizen and resident of Florida when the will was executed and when he died, [decedent's wife] was a citizen of Florida when the will was executed, the will was probated under Florida law, and has been brought into the courts of Florida to be construed. Since the interpretation of the will is the primary question with which we are confronted, we are impelled to hold that the res is at least constructively in this state and that the Florida courts are empowered to advise the trustees how to proceed under it and what rights those effected [*sic*] have in it. For the immediate purpose of this suit the will is the res, and when that is voluntarily brought into the courts of Florida to be construed, the trust created by it is to all intents and purposes brought with it."
- (d) With respect to which jurisdiction was proper for decedent's mother's inter vivos trust, as appointed by decedent, the court determined that the jurisdictional situs remained in Florida even though the administrative situs may be in New York: "The rule is settled in this country that an inter vivos trust has its situs at the residence of the creator of the trust even though he subsequently removes to the state where the trustees and beneficiaries reside and dies there. This rule is not changed by reason of the fact that the trustee resides in another state, there being no duty imposed on him to remove the property to his state, or by reason of the fact that the trust property has been converted under a general authority in the trust instrument and removed to another state." Accordingly, the Florida Supreme Court seemed to suggest that jurisdictional situs would always remain in Florida notwithstanding any administrative or locational situs change (presumably absent court approval releasing jurisdiction over the trust).

5. Saffan v. Saffan, 588 So.2d 684 (Fla. Dist. Ct. App. 1991):

- (a) In Saffan, settlor created an irrevocable trust while a resident of Florida. The trust provided that the trust would be “construed in accordance with the laws of the State of Florida[.]” Settlor first amended the trust in Florida while still a Florida resident, and then later executed another amendment while actually in Georgia. The second amendment removed two of settlor’s children as beneficiaries of the trust, and also provided that the trust was to be “read and interpreted in accordance with the Law of Florida of which State GRANTOR, is a legal resident.”
- (b) The disinherited children brought an action in Florida contesting the validity of the trust. The beneficiaries and trustee filed a motion to dismiss the action for lack of jurisdiction because neither the beneficiaries nor the trustee resided in Florida. The trial court denied the motion, and the beneficiaries and trustee appealed.
- (c) On appeal, the Florida Court of Appeals noted that the settlor was a Florida resident when he executed the trust, the administrative situs of the trust from inception until after settlor’s death was in Florida (it is not clear from the case whether settlor died a Florida resident), and locational situs of the trust assets had been in Florida during settlor’s lifetime. Relying on Henderson, the court held that jurisdiction remained in Florida.
- (d) Although a version of UPC §7-203 was enacted by Florida in 1974, more than 15 years before the Saffan decision, the court in Saffan did not engage in any comparative analysis of one possible jurisdiction versus another, when a party objected to the jurisdiction of the Florida court, which UPC §7-203 seems to require.

6. Perry v. Agnew, 903 So.2d 376 (Fla. Dist. Ct. App. 2005):

- (a) In Perry, the beneficiaries (one of whom was a Florida resident) brought an action in Florida seeking to remove the trustee, who was an individual residing in Boston. The trust provided that it was to be governed by Florida law (it is not clear from the case whether the settlor was a Florida resident when he executed the trust). The trustee moved to dismiss pursuant to Florida’s version of UPC §7-203, arguing that the principal place of administration (administrative situs) was in Massachusetts and therefore

the proper forum was in Massachusetts. The trial court denied the trustee's motion, and the trustee appealed.

- (b) The beneficiaries argued that, pursuant to Henderson, Florida retained jurisdiction over the trust. However, the court of appeals noted that Henderson “was a case involving jurisdiction, not venue, and it predated [Florida’s version of UPC §7-203] . . . . Therefore, Henderson does not control.” The court also noted that although the trust designated Florida as the governing law, such provision “does not designate Florida as the principal place of administration.”
- (c) Because the trust’s principal place of administration (administrative situs) was in Massachusetts, the court of appeals reversed the trial court and remanded the matter to the trial court “to determine whether all interested parties could be bound by litigation in Massachusetts.”
- (d) For other cases discussing the application of UPC §7-203, especially in the context of Florida, see also Meyer v. Meyer, 931 So. 2d 268 (Fla. Dist. Ct. App. 2006); Covenant Trust Co. v. Guardianship of Ihrman, 45 So. 3d 499 (Fla. Dist. Ct. App. 2010), reh'g denied (Nov. 3, 2010).

7. Trusteeship Created By the City of Sheridan, Colorado, 593 N.W.2d 702 (Minn. Ct. App. 1999):

- (a) In Sheridan, the city of Sheridan, Colorado, sold “certificates of participation” totaling \$3,525,000 to construct a municipal building in Sheridan. After construction was complete, the municipal facility was placed in trust, and the trust leased the facility back to the city of Sheridan, and distributed the income from the lease to the certificate shareholders. The trustee was a corporate trustee located in Minnesota, and the trust was administered in Minnesota. In February 1996, Sheridan commenced eminent domain proceedings against the facility. The certificate holders opposed the sale, and the trustee filed a petition in Minnesota district court for instruction as to whether it should accept the city’s offer to buy the facility. The district court held that it had jurisdiction over the trust, approved the sale and discharged the trustee. The certificate holders appealed.
- (b) The Minnesota Court of Appeals held that Minnesota courts did have jurisdiction over the trust. In determining



whether or not jurisdiction was appropriate, the court applied a seven-part test, considering: “(1) the location of the trust property (the situs of the trust assets), (2) the domicile of the trust beneficiaries, (3) the domicile of the trustees, (4) the location of the trust administrator, (5) the extent to which the litigation has been resolved, (6) the applicable law, and (7) an analysis of *forum non conveniens* principles.” (Emphasis in original.)

- (c) The court noted that because a majority of the trust’s assets (the facility) and beneficiaries (the certificate holder) were in Colorado, factors 1 and 2 favored Colorado jurisdiction. However, the court then noted that all of the other factors in the seven-part test favored jurisdiction in Minnesota, as follows:
  - (i) Factor (3) (the domicile of the trustees): The trustee was domiciled in Minnesota.
  - (ii) Factor (4) (the location of the trust administrator): The trust was administered in Minnesota.
  - (iii) Factor (5) (the extent to which the litigation has been resolved): Prior litigation concerning the trust, unrelated to the eminent domain issue, had occurred in Minnesota.
  - (iv) Factor (6) (the applicable law): The trust stated that Colorado governing law applied, but it did not state that the situs was in Colorado, and it did not otherwise provide that Colorado courts had jurisdiction (exclusive or otherwise) to hear matters concerning the trust. In addition, the court noted that Colorado’s version of UPC §7-203 would defer to Minnesota jurisdiction because the principal place of administration (administrative situs) was in Minnesota, and “the opposing certificate holders have not asserted that all appropriate parties will not be bound by the Minnesota court’s orders. Nor have they demonstrated that exercise of jurisdiction by a Minnesota court seriously impairs the interests of justice.”
  - (v) Factor (7) (*forum non conveniens* principles): The court found that *forum non conveniens* principles did not apply because of the “location in Minnesota

of the trustee and the trust administrator's records[.]”

- (d) The court also noted that although the locational situs of the property was in Colorado, the administrative situs of the trust was Minnesota, and the case focused on issues relating to the administration of the trust and not the trust property itself. Therefore action was properly brought in Minnesota: “The district court recognized the distinction between control over the trust and control over the land, and it followed the Restatement principles by retaining jurisdiction over the trust and ordering the trustee to oppose the city's eminent domain proceedings in Colorado courts. See Restatement (Second) of Conflict of Laws § 276 cmt. b (‘A court of a state other than that of the [locational] situs may exercise jurisdiction if this does not unduly interfere with the control by the courts of the situs.’). The case before us is analogous to an action involving an accounting by a trustee, which allows a court to ‘entertain the action if it has jurisdiction over the trustee, even though the trust property is land situated in another state.’ [VA Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §646, at 513 (4th ed. 1989)].”

8. Peterson v. Feldmann, 784 N.W.2d 493 (S.D. 2010):

- (a) In Peterson, Laurence and May Peterson, South Dakota residents, each executed a living trust (presumably revocable). Each placed their interest in a family farm in South Dakota in the trust, and each trust gave their son Milton the right to purchase the real property in the trust. Laurence died in 2001 a resident of South Dakota, and Milton exercised his right to purchase the real property in his father’s trust.
- (b) Following Laurence’s death, May moved to Missouri, where two of her daughters lived. One of the daughters took May to a Missouri attorney, who prepared a new will for her and an amendment to her trust. The amendment, *inter alia*, eliminated Milton’s option to purchase the real property in the trust, giving that right to three of her other children, removed Milton as trustee and added a no contest/*in terrorem* clause. May died in 2008 a resident of Missouri. At her death, the trust consisted of Missouri bank accounts and an interest in the South Dakota family farm. In 2009, Milton filed an action in South Dakota Circuit Court challenging the trust amendment on the

grounds of undue influence. The South Dakota court dismissed the action, concluding that Missouri was the more appropriate forum, and Milton appealed to the South Dakota Supreme Court.

- (c) The South Dakota Supreme Court held that the Circuit Court did not abuse its discretion in finding Missouri the more convenient forum. The court noted that the first question was “whether there is an adequate alternative forum available in which the dispute can be resolved.” Because no party disputed that Missouri had jurisdiction to handle the undue influence claim, the court concluded that there was an appropriate alternative forum.
- (d) The court then had to consider whether the “private and public interest factors . . . outweigh the deference ordinarily attended to the plaintiff’s choice of forum.”
  - (i) The private factors include the following:  
“[r]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” The court concluded that the private factors favored Missouri as the appropriate forum, noting that May was a Missouri resident for the last four years of her life, the amendment was prepared by a Missouri attorney and most of the witnesses lived in Missouri. Although the real estate was located in South Dakota, the court noted that “the fact that the trust assets include the South Dakota farmland does not heavily favor South Dakota as a forum, because the specific property held by the trust has little bearing on the question of undue influence in the execution of the Amendment.” (This concept that the issue is about the real estate as a trust asset, rather than a real estate issue, is similar to Trusteeship Created By the City of Sheridan, Colorado, 593 N.W.2d 702 (Minn. Ct. App. 1999), discussed above.)
  - (ii) The public factors include the following:  
“[t]administrative difficulties flowing from court congestion; the ‘local interest in having localized controversies decided at home’; the interest in

having the trial ... in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.” The court concluded that both South Dakota and Missouri “have an interest in the outcome of the litigation, and the case would not unduly burden either forum or present complex questions of choice laws.” Accordingly, the public factors did not favor one jurisdiction over the other.

- (iii) Based on the foregoing, the court concluded that, while “some deference should be given to the forum choice by plaintiffs[,]” the consideration of the factors (specifically the fact that Missouri was an appropriate available forum and the private factors favored Missouri) “made Missouri an easier, more expeditious, and less expensive forum.” Accordingly, the South Dakota Supreme Court affirmed the circuit court’s dismissal of the action.

9. Marshall v. First Nat. Bank Alaska, 97 P.3d 830, 836 (Alaska 2004):

- (a) In Marshall, two Alaska residents created a trust for their granddaughter, who was also an Alaska resident, naming First National Bank of Alaska as trustee. Settlers both died in 1997 (presumably in Alaska), and the granddaughter moved to Colorado in 1999. In 2001, the granddaughter asked First National to resign in favor of Morgan Stanley Dean Witter Trust (the main office of which was in Jersey City, New Jersey), but First National refused to resign. Following a hearing with a master, the Alaska probate court removed First National and replaced it with Morgan Stanley.
- (b) First National transferred all of the assets of the trust to Morgan Stanley, along with an accounting (it is not clear whether the accounting had not been filed with any court at that time, although it does not appear that it was). The granddaughter then filed a petition with the Alaska probate court seeking to surcharge First National for attorney’s fees and “special trustee fees” paid to First National from the trust in connection with the substitution petition. Following a hearing with a master, the Alaska probate court

denied the surcharge petition, and the granddaughter appealed.

- (c) On appeal to the Alaska Supreme Court, First National argued, *inter alia*, that Alaska should not have exercised jurisdiction over the surcharge request because, relying on Alaska's version of UPC §7-203, the administrative situs was no longer in Alaska. Presumably First National made this argument because no court outside of Alaska could have obtained jurisdiction over First National as to this issue. The Alaska Supreme Court noted that Alaska's version of UPC §7-203 did not prevent the Alaska courts from considering the surcharge petition "because at all pertinent times (before the final accounting and final substitution order) the trust was situated and administered in Alaska and the former trustee's disputed services were performed here. That the savings clause of subsection .045(a)(2) [which states that Alaska must decline to exercise jurisdiction in the state where the trust was registered unless 'the interests of justice would be seriously impaired'] potentially extends Alaska jurisdiction to foreign trusts does, however, implicitly confirm that Alaska courts must have jurisdiction to consider a surcharge petition directed at an Alaska trust's former trustee which is still domiciled in Alaska." The court therefore concluded that Alaska courts had jurisdiction to consider the surcharge petition because the granddaughter "(and the trust, acting through the successor trustee) could not have obtained jurisdiction over First National in any court outside Alaska. Depriving Alaska courts of jurisdiction under these circumstances might allow the former trustee to avoid a claim for repayment." The Alaska Supreme Court then remanded the case to determine whether or not the fees claimed by First National were excessive.



*The foregoing  
is just a peek  
into the  
**Wonderland**  
of trust situs!*

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# APPENDIX A

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-04(7)I  
Income Tax  
November 12, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I031015B

On October 15, 2003, a Petition for Advisory Opinion was received from JPMorgan Chase Bank, as Trustee of the 1934 Trusts, c/o John Powers, 345 Park Avenue, New York, NY 10154.

The issue raised by Petitioner, JPMorgan Chase Bank, as Trustee of the 1934 Trusts, is whether the trusts, described below, will be subject to New York State or New York City income tax if (a) the Committee, described below, replaces the trustee with a trustee not domiciled in New York State, and (b) the two Committee members who are currently domiciled in New York State are replaced by individuals who are not domiciled in New York State.

Petitioner submits the following facts as the basis for this Advisory Opinion.

John D. Rockefeller, Jr., as grantor (the Grantor), and The Chase National Bank of the City of New York (now JPMorgan Chase Bank), as trustee (the Trustee), created five irrevocable trusts by written instruments (the Agreements of Trust), dated December 18, 1934, for the benefit of Abby Rockefeller Milton, John D. Rockefeller 3<sup>rd</sup>, Nelson A. Rockefeller, Laurance S. Rockefeller, and David Rockefeller, respectively (collectively, the Trusts). The Grantor was a domiciliary of New York, New York when the Trusts were created.

Under the terms of the Agreements of Trust, the Trustee is given broad powers over the Trusts' assets. The Agreements of Trust appoint a committee which is empowered to instruct the Trustee in the exercise of the Trustee's powers under the Agreements of Trust (the Committee). Specifically, the Agreements of Trust provide that the payment of income and principal to any beneficiary should be made in accordance with the Committee's instructions. Moreover, the Agreements of Trust provide that the Committee may direct the Trustee, and the Trustee must obey such direction, to take or refrain from taking any action which the Committee deems it advisable for the Trustee to take or refrain from taking.

Subject to the directions of the Committee, the Trustee is given certain powers and authority over the Trusts' assets pursuant to Section II of the Agreements of Trust. Specifically, the Trustee has the power to: (1) retain any stocks, bonds, securities or other property, real or personal, which at any time form part of any Trust; (2) consent to the reorganization, consolidation, or merger of any corporation or the sale or lease to any corporation or person of the property of any corporation, any of the stocks, bonds, notes or other securities which are held by the Trustee under the Agreements of Trust and do any act with respect to such stocks, bonds, notes or other securities; (3) exercise any option contained in any stocks, bonds, notes or other securities held by it for the conversion of the same to other securities and make any payments in



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connection therewith and decide whether to make such payment from principal or income; (4) make advances for the protection or preservation of any of the securities held by it or for the foreclosure of any mortgage or otherwise and decide whether to make such payment from principal or income; (5) borrow money for any purposes connected with the protection or preservation of the principal of any Trust and mortgage or pledge any real estate or personal property forming a part of any Trust; (6) accept deeds of real property in satisfaction of bonds and mortgages and pay consideration in connection therewith; (7) pay and discharge any taxes, assessments or other charges levied or made upon any Trust; (8) determine whether or not to maintain a sinking fund; (9) incur and pay out of the income or principal any and all expenses in connection with the discharge of the Trustee's duties; (10) vote any shares of stock held in trust; and (11) in the case of a minor entitled to receive any property hereunder, to pay over the same to the parent of the minor.

Pursuant to Section III of the Agreements of Trust, the Trustee has full power and authority to: (1) sell, exchange or otherwise dispose of any Trust's assets; (2) invest and reinvest any Trust's funds in any stocks, bonds, securities, personal property or real estate as the Trustee deems advisable; (3) establish a trust fund and make distributions to any person entitled to any or all of the principal of any Trust fund in any securities or other property held by it; and (4) in making distributions in kind among two or more persons, to distribute the same or different property to such persons and to conclusively determine the value of the property distributed. However, the Agreements of Trust provide that the Trustee shall not take any action under and pursuant to Section III of the Agreements of Trust unless directed by the Committee or until it shall have notified the Committee in writing of the action it contemplates taking and shall have requested the Committee's approval thereof and it shall have received permission from the Committee to take such action. In the event that the Committee does not respond to the request from the Trustee for permission to take such action within ten days of the Trustee's mailing of such request, or if the Committee states that the Trustee may exercise its own discretion over such action, the Trustee has discretion over whether or not to take such action.

The Trustee is a corporation, incorporated under the laws of New York State. Pursuant to Section X of the Agreements of Trust, the Committee may, by unanimous vote of all of its members, remove the Trustee and appoint a bank or trust company organized under the laws of any state in the United States to act as trustee. The Committee proposes to remove the Trustee and appoint a successor trustee incorporated under the laws of Delaware (hereinafter sometimes referred to as the Successor Trustee). It expects to appoint J.P. Morgan Trust Company of Delaware, a Delaware limited purpose trust company (hereinafter sometimes referred to as the Proposed Successor Trustee). Both the Trustee and the Proposed Successor Trustee are indirectly wholly owned subsidiaries of J.P. Morgan Chase & Co., a Delaware corporation. Once the Proposed Successor Trustee has been appointed, it will take title to, and be the custodian of, all the Trusts' assets, which assets will be recorded on and become part of the Proposed Successor Trustee's books and records and fiduciary assets. As it does for all trusts for

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which the Proposed Successor Trustee acts as a trustee, it will purchase certain administrative services in connection with the administration of the Trusts from its affiliate, Petitioner, a New York State banking corporation, pursuant to the terms of an existing agency agreement. These services will include tax preparation services for fiduciary income tax returns, client relationship support services and certain other processing and ministerial services. The Proposed Successor Trustee will be responsible for the monitoring and oversight of its agent in providing these services and will conduct a full review of the Trusts quarterly.

The Proposed Successor Trustee is a corporation of substantial significance. It has an annual revenue of \$2.4 million, assets under management of \$1.4 billion and capitalization of \$30 million. Delaware law governs the Proposed Successor Trustee's capitalization, and the Proposed Successor Trustee is regulated and supervised by the Office of the State Bank Commissioner. The State of Delaware conducts annual examinations of the Proposed Successor Trustee's policies and procedures, accounts under administration, financial records and statements and the daily administration of the trust company. In addition, the Proposed Successor Trustee maintains over 900 fiduciary accounts from its Delaware headquarters, which is located at 500 Stanton Christiana Road, Newark, Delaware 19713.

Four of the Proposed Successor Trustee's seven directors are Delaware residents. Of the Proposed Successor Trustee's eighteen officers, fourteen, including the President and Chief Executive Officer, live and/or work in Delaware. Meetings of the Board of Directors are held in Delaware. The Board of Directors must approve the activities of the Proposed Successor Trustee's Trust and Investment Committee at its quarterly meetings. In addition to the fourteen fiduciary professionals who work out of offices in Delaware, an administrative staff maintains the Proposed Successor Trustee's records, including Board minutes, the corporate charter and license, the Trust and Investment Committee minutes, files for trust accounts and original agreements, in Delaware. The Board of Directors, therefore, makes major policy decisions from the Delaware headquarters, and the administrative staff carries out day-to-day operations in Delaware.

The Proposed Successor Trustee acts as Trustee of and administers trusts in many states, not just in Delaware. In that connection, it retains from time to time non-Delaware service providers such as accountants, investment managers, legal counsel, administrative support and others (including its corporate affiliates) in connection with managing trusts of which it is Trustee. However, it has no exclusive relationship with such service providers. Rather, the Proposed Successor Trustee uses in-state providers when convenient and is free to use various out-of-state service providers depending upon the differing needs of its clients.

The Committee directs the Trustee on all decisions regarding the investment of the Trusts' assets. For more than a decade, the Committee has retained advisors to make recommendations regarding the allocation of the Trusts' assets among various asset classes, such

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as large cap equities and small cap equities, both domestic and international, bonds and alternative investments, such as venture capital and other private funds. Before the merger of Morgan Guaranty Trust Company of New York with and into The Chase Manhattan Bank, the Committee retained Morgan Guaranty Trust Company of New York to manage the investments of a portion of the equity portfolio and its affiliate, J.P. Morgan Investment Management, Inc., to provide asset allocation advice. The Committee also retained Cambridge Associates to provide related advice regarding the Trusts' investments. After the merger of Morgan Guaranty Trust Company of New York with and into The Chase Manhattan Bank, which resulted in the formation of Petitioner, the Committee continued to retain Petitioner for investment management services and its affiliate, J.P. Morgan Investment Management, Inc., for asset allocation advice and plans to continue to do so, subject to the Committee's right to replace any of the advisors it retains at any time.

The Committee is comprised of five individuals, two of whom are currently domiciled in New York State. The two members of the Committee who are currently domiciled in New York State are considering resigning from the Committee and it is expected that the three remaining members of the Committee will fill the vacancies created by the resignation of the two Committee members who are currently domiciled in New York State by appointing two individuals who are domiciled outside New York State as Committee members. If the said Committee members elect to resign from the Committee and two new Committee members, neither of whom is domiciled in New York State, are appointed to the Committee, the Committee will then comprise five individuals, none of whom is domiciled in New York (hereinafter sometimes referred to as the Proposed Committee). The Proposed Committee may, however, meet from time to time in New York State and will itself retain one or more advisors, selected by the Proposed Committee, some of whom may be domiciled in New York State. More specifically, the Proposed Committee will retain a New York law firm to provide it with ongoing legal advice and representation. Also, the Proposed Committee will retain one or more investment management firms domiciled in and outside of New York State to provide it with investment advice and management, including Petitioner and J.P. Morgan Investment Management, Inc., as more fully set forth above. Also, the two Committee members who are considering resigning from the Committee, should they decide to resign, will be retained as independent advisors (without vote) to provide the Proposed Committee with general advice on distributions and management of the Trusts' assets. The advisors of the Proposed Committee will not have any authority or power to direct or control in any manner any decision or action of the Proposed Committee.

None of the Trusts' assets includes real or tangible property located in New York State. None of the Trusts' assets are used in a trade or business carried on in New York State. All income and gains of the Trusts are derived from or connected to sources outside of New York State, determined as if the Trusts were nonresidents.

### **Applicable law and regulations**

Section 605(b)(3) of the Tax Law defines a resident estate or trust, and provides, in part:

Resident estate or trust. A resident estate or trust means:

- (A) the estate of a decedent who at his death was domiciled in this state,
- (B) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at his death was domiciled in this state, or
- (C) a trust, or portion of a trust, consisting of the property of:
  - (i) a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or
  - (ii) a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.

For the purposes of the foregoing, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

Section 605(b)(3)(D) of the Tax Law, as added by Chapter 658 of the Laws of 2003, applicable to tax years beginning on or after January 1, 1996, provides as follows:

- (i) Provided, however, a resident trust is not subject to tax under this article if all of the following conditions are satisfied:
  - (I) all the trustees are domiciled in a state other than New York;
  - (II) the entire corpus of the trusts, including real and tangible property, is located outside the state of New York; and
  - (III) all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.

(ii) For purposes of item (II) of clause (i) of this subparagraph, intangible property shall be located in this state if one or more of the trustees are domiciled in the state of New York.

(iii) Provided further, that for the purposes of item (I) of clause (i) of this subparagraph, a trustee which is a banking corporation as defined in subsection (a) of section fourteen hundred fifty-two of this chapter and which is domiciled outside the state of New York at the time it becomes a trustee of the trust shall be deemed to continue to be a trustee domiciled outside the state of New York notwithstanding that it thereafter otherwise becomes a trustee domiciled in the state of New York by virtue of being acquired by, or becoming an office or branch of, a corporate trustee domiciled within the state of New York.

Section 605(b)(4) of the Tax Law defines a nonresident estate or trust, and provides:

Nonresident estate or trust. (A) A nonresident estate means an estate which is not a resident.

(B) A nonresident trust means a trust which is not a resident or part-year resident.

Section 105.20(d)(1) of the Personal Income Tax Regulations (Regulations) provides:

Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.

Section 105.23(c) of the Regulations provides:

The determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided, however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

(1) all the trustees are domiciled in a state other than New York State;

(2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and

(3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

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## Opinion

The Trusts in this case consist of property of the Grantor who was domiciled in New York State at the time such property was transferred to the Trusts, and when the Trusts became irrevocable. Accordingly, the Trusts are resident trusts of New York pursuant to section 605(b)(3)(C) of the Tax Law. However, this fact does not, by itself, mean that they are subject to New York State personal income tax under Article 22 of the Tax Law.

In *Charles B. Moss Trust*, Adv Op Comm T & F, April 8, 1994, TSB-A-94(7)I, it was determined that where the three conditions of section 105.23(c) of the Regulations were met, no New York State personal income tax was imposed on the trust even though the trust was a New York resident trust pursuant to section 605(b)(3)(C) of the Tax Law. In that case, the sole trustee was domiciled in Colorado. The corpus of the trust consisted solely of intangibles (cash, securities and U.S. Government obligations) that were held by Fiduciary Trust Company located in New York State. These intangibles were deemed to be located at the domicile of the trustee in Colorado. (See *Safe Deposit & Trust Co. v Virginia*, 280 US 83; *Mercantile-Safe Deposit and Trust Company v Murphy*, 19 AD2d 765, *affd* 15 NY2d 579; *Taylor v State Tax Commission*, 85 AD2d 821, 822.) Also, none of the assets of the trust were employed in a business carried on in New York and all income and gains of the trust were derived from sources outside of New York, determined as if the trust were a nonresident. A similar conclusion was reached in *Harry J. Benton Trust*, Adv Op Comm T&F, October 25, 1996, TSB-A-96(4)I.

Section 605(b)(3)(D) of the Tax Law was added to codify section 105.23(c) of the Regulations which in turn was promulgated to codify the holding in *Mercantile-Safe Deposit and Trust Co. v. State Tax Commission*, *supra*. In that case, the grantor of an *inter vivos* trust was domiciled in New York at the time the trust was created. The trust consisted only of intangible assets, and the trustee, a Maryland corporation, managed the trust from its principal office in Maryland. New York State conceded that the Maryland corporation was domiciled in Maryland for purposes of the personal income tax rules relating to resident trusts. The court held that the New York taxation of the trust under these circumstances would extend New York's taxing power beyond its jurisdiction because the trust had no connection with New York other than the fact that the grantor of the trust was domiciled in New York at the time the trust was created, and thus conflicted with the due process clause of the Fourteenth Amendment of the Federal Constitution. However, since the issue of domicile was conceded, the court did not discuss whether the domicile determination was based on the fact that the trustee was incorporated in Maryland or on some other factors.

The term *domicile* as defined in section 105.20(d) of the Regulations pertains to an individual. The domicile of a trustee that is a corporation is not addressed in Article 22 of the Tax Law or the Regulations promulgated thereunder. Therefore, it must be determined what *domicile* means with respect to a corporation that is a trustee, within the context of section

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605(b)(3)(D)(i)(I) of the Tax Law and sections 105.20(d)(1) and 105.23(c)(1) of the Regulations in light of the holding in *Mercantile, supra*.

It has been held that the domicile of a corporation is the state in which it is incorporated. (*Sease v Central Greyhound Lines, Inc.*, 306 NY 284.) However, under Article 22 of the Tax Law, the concept of domicile with respect to an individual is based on the intent of the individual. Once a domicile is established for an individual, it does not necessarily continue for the individual's lifetime. An individual's domicile may change from time to time as the individual's intentions change. Therefore, it would be inappropriate to define domicile for purposes of section 605(b)(3)(D)(i)(I) of the Tax Law and section 105.23(c)(1) of the Regulations with respect to a corporation that is a trustee as narrowly as in *Sease, supra*; that is, the state of incorporation. To set a rigid standard with respect to a corporation, under which a domicile could not be changed, would be contrary to the basic domicile concept of intent.

Therefore, for purposes of section 605(b)(3)(D)(i)(I) of the Tax Law and section 105.23(c)(1) of the Regulations, it is held that the domicile of a corporation is the principal place from which the trade or business of the corporation is directed or managed. A corporation's principal place of business is the location where the corporation manages, conducts, or directs its business. For example, a corporation manages, conducts or directs its business where the main office and regular meeting place of the board of directors is located, regardless of where the administrative departments and the physical property of the corporation are situated. A corporation's principal place of business may be established by the activity of the corporation within New York State and the absence of a trade or business conducted by the corporation elsewhere. A corporation having its principal place of business in New York State is considered to be domiciled in New York State for purposes of section 605(b)(3)(D)(i)(I) of the Tax Law and section 105.23(c)(1) of the Regulations regardless of the state of incorporation. This treatment is consistent with the holding in *Mercantile, supra*. This definition of a corporation's principal place of business for purposes of Article 22 of the Tax Law is consistent with federal diversity jurisdiction decisions of the United States District Court, Southern District of New York, in which the court addressed whether it has jurisdiction over a corporation that engages in activities in different states (see *Scot Typewriter Co. v Underwood Corp.*, 170 F Supp 862 (SD NY 1959); *Center for Radio Information, Inc. v Herbst*, 876 F Supp 523 (SD NY 1995)).

Accordingly, for purposes of section 605(b)(3)(D) of the Tax Law and section 105.23(c) of the Regulations, the domicile of the Proposed Successor Trustee will be the state where its principal place of business is located, as set forth in the above guidelines for determining the domicile of a corporation. The determination of domicile is a factual matter that is not susceptible of determination in this Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.24; 20 NYCRR 2376.1(a).

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A *trustee* is defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another (106 NY Jur 2d, Trusts, §6). *Trustee* is also used to denote a person to whom the management of the property of others is entrusted. *Id.* (See also *Re Eptein's Estate*, 278 NYS 260 [1935]).

An *advisor to a trustee* has been interpreted by the courts to include not only a person who has been designated by particular terminology in the trust instrument but also any other individual who, by the terms of the trust instrument, has been given power to direct or control a trustee in the performance of some part or all of that trustee's functions and duties, or who has been invested with a form of veto power over particular actions of a trustee through the medium or device of requiring that those actions be taken only with the consent and approval of such advisor (see 56 ALR 3d, *Wills; Trusts - Appointment of Advisor*, §1).

It is well settled under New York law that a grantor of a trust may limit a trustee's powers. In *Matter of Rubin*, 143 Misc 2d 303, *aff'd* 172 AD2d 841, the court addressed the status of advisors. The court held that the designation of an advisor is a valid limitation on a trustee's powers, and noted that the courts have generally considered an advisor to be a fiduciary, somewhat in the nature of a co-trustee. Another term that may be employed, said the court, is quasi-trustee or special trustee. The court's statement "since the relationship between the fiduciary and the advisor is that of a co-trustee, with the advisor having the controlling power, the fiduciary is justified in complying with the directives and will not generally be held liable for any losses," *Id.* 307, indicates a tacit acceptance of the characterization of the advisor as a trustee. However, an advisor that does not have any powers under the terms of the trust instrument to direct or control a trustee in the performance of some part or all of that trustee's functions and duties, and has not been invested with a form of veto power over particular actions of a trustee through the medium or device of requiring that those actions be taken only with the consent and approval of the advisor, will not be considered a co-trustee.

Under the facts in this case, the Committee has been granted broad powers over the assets of the Trusts. For example, the Committee may direct the Trustee to take or refrain from taking any action which the Committee deems it advisable for the Trustee to take or refrain from taking. All of the powers of the Trustee under the Trust Agreements are subject to the directions of the Committee. Since the Committee is an advisor having the controlling power over the Trustee, following *Rubin, supra*, the members of the Committee are considered to be co-trustees of the Trusts. Therefore, for purposes of the first condition under section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations, the individuals comprising the Committee are considered to be trustees of the Trusts.

However, the determination of whether Petitioner or any other investment management firms or former Committee members that may be retained by the Proposed Committee to provide investment advice or management services would also be treated as co-trustees of the Trusts for



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purposes of section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations is a factual matter that is not susceptible of determination in this Advisory Opinion.

In conclusion, Petitioner states that all real and tangible property included in the corpus of the Trusts, is located outside New York and all the income and gains of the Trusts are derived or connected from sources outside of New York State, determined as if the Trusts were a nonresident. Pursuant to section 605(b)(3)(D)(ii) of the Tax Law, any intangible property included in the corpus of the Trusts is located in New York State if any of the trustees are domiciled in New York State. Therefore, the determination of whether the Trusts will be exempt from New York State personal income tax for purposes of section 605(b)(3)(D) of the Tax Law and section 105.23(c) of the Regulations will depend on whether the Proposed Successor Trustee, any member of the Proposed Committee or any other investment advisor or manager that is considered to be a co-trustee is domiciled in New York State. The Trusts will meet the three conditions of section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations only if all of the trustees are domiciled outside of New York State. In the case of the Proposed Successor Trustee, pursuant to the concept of domicile with respect to an individual, the domicile of the corporation is the principal place from which the trade or business of the corporation is directed or managed. In the case of any member of the Proposed Committee or any other investment advisor or manager that is considered to be a co-trustee, pursuant to section 105.20(d)(1) of the Regulations, the domicile of an individual is the place which such individual intends to be such individual's permanent home.

The New York City personal income tax is similar to the New York State personal income tax and is administered by New York State the same as Article 22 of the Tax Law. Accordingly, for the taxable years that the Trusts have not met the three conditions contained in section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations, New York State personal income tax is imposed on the Trusts, and if any of the trustees are domiciled in New York City, New York City personal income tax authorized under Article 30 of the Tax Law is imposed on the Trusts for those taxable years that a trustee is domiciled in New York City.

DATED: November 12, 2004

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

# APPENDIX B

2 Misc.3d 554, 773 N.Y.S.2d 529, 2003 N.Y. Slip Op. 23912

In the Matter of the Estate of William Rockefeller, Deceased

Surrogate's Court, New York County  
December 19, 2003

CITE TITLE AS: Matter of Rockefeller

#### HEADNOTE

Trusts  
Transfer of Situs

Petitioner trustees were not entitled to an order changing the situs of their trust from New York to Delaware. Petitioners' desire to eliminate the high New York State fiduciary income tax payable by the trust was met by the resignation of the New York corporate trustee and the appointment of its Delaware affiliate. The transfer of the situs of a trust is permissible for specific purposes, but not simply because the parties request it.

#### TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Trusts §§ 323, 365, 441.

NY Jur 2d, Trusts § 27.

#### ANNOTATION REFERENCE

See ALR Index under Trusts and Trustees.

#### FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: situs /4 transfer! chang! /4 trust

#### APPEARANCES OF COUNSEL

*Shearman & Sterling*, New York City (*Jack D. Gunther, Jr.*, of counsel), for petitioner.

#### OPINION OF THE COURT

Renee R. Roth, S.

The trustees of the trust established under the will of William Rockefeller ask the court to allow the corporate trustee, the Chase Manhattan Bank (now known as JP Morgan Chase Bank), to resign in favor of its affiliate, JP Morgan Trust Company of Delaware, and to change the situs of the trust to the State of Delaware. By order dated May 15, 2002, the request for the change of corporate trustee was granted. The sole issue remaining is whether under the circumstances presented changing the situs of the trust is also warranted.

Testator died on June 24, 1922, domiciled in New York County, leaving a will dated September 5, 1919, which was duly admitted to probate by this court on July 5, 1922. Under articleseventh \*555 of the will, a trust was created for the benefit of

decedent's son, William G. Rockefeller, and his descendants. Letters of trusteeship for such trust were issued to three individuals. Pursuant to article eighth of the will, the individual trustees then acting were given the power to nominate a corporate fiduciary to act with them, and by order dated July 18, 1937, the predecessor to JP Morgan Chase Bank was appointed to serve with the individual trustees.

Petitioners' application for a change of situs was based on the trustees' desire to eliminate the high New York State fiduciary income tax payable by the trust. But that objective concededly is met by the resignation of the New York corporate trustee and the appointment of its Delaware affiliate, as a result of which the trust will no longer be taxable by this State (Tax Law § 605). Petitioners nevertheless request a change of situs.

The income tax benefit obtainable by the substitution of the corporate trustee's Delaware affiliate is clearly in the interests of the beneficiaries. Indeed, the frequency with which such applications are made reflects an understandable eagerness on the part of persons interested in trusts to be rid of the high tax price payable where the fiduciary is a New Yorker. Although no formal tally has been made of the number of such applications, it is clear that their combined \*\*2 result—a loss of trust business by this state—is sufficiently serious to suggest that New York's high fiduciary income tax may be counterproductive to the state's overall economic interests. The New York Legislature is urged to evaluate the present fiduciary income tax scheme in light of its negative repercussions, including the trend embodied by applications such as the one presently before the court.

Achieving the desired tax relief, however, is not inconsistent with the continued supervision of the trust by the courts of this state and the application of New York law. The requested change of situs would make the trustees accountable in the courts of Delaware, rather than of New York, and subject the administration of this trust to the laws of Delaware. Petitioners have not identified, nor does the record otherwise reflect, any basis for granting this relief.

None of the beneficiaries or the individual trustees reside in Delaware, and there is thus no basis for arguing that the convenience of the beneficiaries would be served by this change or that the location of the trust's administration otherwise impels it. Nor does the parties' seeming preference for the trust law of Delaware necessarily outweigh the choice of law principles that normally \*556 point to the testator's domicile as the source of the law that should govern a testamentary trust. That is particularly so in this case, where the trust was established under a will probated in this state, has been administered under New York law for more than 80 years and will be confided to a successor corporate trustee that is an affiliate of a financial institution whose principal place of business is in New York.

It is undisputed that the court has the authority to change the situs of a trust subject to its jurisdiction (SCPA 201, 203; *Matter of Benedito*, 83 Misc 2d 740 [1975]) and that the transfer of the situs of a trust is permissible for specific purposes (*see, Matter of Weinberger*, 21 AD2d 780 [1964]; *Matter of Matthiessen*, 195 Misc 598 [1949]; *Matter of Smart*, 15 Misc 2d 906 [1958]). Special circumstances such as tax savings aside (*Matter of Dornbush*, 164 Misc 2d 1028 [1995]), however, there is no authority for a change of situs simply because the parties request it (*see, Matter of Flexner*, 7 Misc 2d 621, 622-623 [1957] [transfer of situs denied where trust instrument specifically provided that it be governed under New York law, even though settlor herself requested transfer]).

A change in the situs of a trust has been permitted where it would facilitate the administration of the trust, such as where administration of the trust had “become difficult due to the distance between the place of business of the corporate trustee and the residence of the individual trustee” (*Matter of Weinberger*, 21 AD2d at 781) or where the requested transfer was to the place of the beneficiaries' residence (*Matter of McComas*, 165 Misc 2d 947, 949). However, such a change has been denied where there is no such benefit to be achieved by a transfer of situs (*see, Matter of Turrentine*, 83 Misc 2d 170, 174, 175). The fact that the successor corporate trustee is located in Delaware does not by itself support a change in the situs of the trust any more than the individual trustee's residence in Connecticut would have called for a transfer to that state.

Decedent's will is silent concerning the permissibility of a change of situs of the trust. The provision authorizing the then acting individual trustees to appoint a corporate cotrustee expressly contemplates the appointment of a trust company located “in the City of New York or elsewhere.” Appointment of an out-of-state trust company, however, would not necessitate a change of situs since many out-of-state trust companies are eligible to serve as New York trustees (Banking Law § 201-b).

**Matter of Rockefeller, 2 Misc.3d 554 (2003)**

773 N.Y.S.2d 529, 2003 N.Y. Slip Op. 23912

Petitioners' application to change the situs of this trust is accordingly denied. This decision puts future applicants on notice that, \*557 where the desired tax savings can be achieved by a change of trustee, a change of situs will not be allowed unless it would result in some benefit to the trust apart from the tax considerations themselves.

Copr. (C) 2012, Secretary of State, State of New York

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# APPENDIX C

# Pennsylvania Department of Revenue

## Personal Income Tax

July 27, 2001

Pennsylvania Personal Income Tax

No. PIT-01-040

Estates and Trusts  
Return Filing Requirement

### ISSUE

Whether the taxpayer-trust will be subject to Pennsylvania Personal Income Tax if the Orphans' Court orders that the situs of taxpayer-trust be changed to a place outside of the Commonwealth?

### CONCLUSION

If the Orphans' Court having jurisdiction over the taxpayer-trust approves the transfer of the situs of the trust to another state pursuant to the Probate, Estates and Fiduciaries Code, 20 Pa.C.S. § 101 *et seq.*, for that portion of the trust's taxable year and taxable years thereafter it will not be subject to Pennsylvania Personal Income Tax. This is based on the factual representations made in your request plus the assumptions noted below.

### FACTS

The Taxpayer is a testamentary trust that was created in 1925 under the will of the decedent who was a Pennsylvania resident at the time of his death. Presently, the Taxpayer's assets are located, managed and administered outside of the Commonwealth. The 1997 PA-41 discloses that the fiduciary is located in the city/municipality of Cranbury, New Jersey. The Taxpayer's representative apparently indicated to the Board of Finance and Revenue that Taxpayer's assets consist of intangibles, including bank and money market accounts and stocks and bonds. The 1997 PA Schedule L shows the names of six beneficiaries and their addresses are all listed as "c/o Cranbury, NJ . . ." Zero appears in the Column for "Resident Taxable Income" and an asterisk appears next to each name. This is accompanied by the notation, "for information purposes only." A review of the Department's records under the Identification numbers of the beneficiaries disclosed that none of these beneficiaries filed Pennsylvania tax returns. For purposes of this ruling, the Department will assume that they are nonresidents of the Commonwealth.

Taxpayer-trust intends or has petitioned the Court of Common Pleas of Carbon County, Orphans' Court Division (Orphans' Court) to approve the transfer of the trust situs to a state outside of the Commonwealth and terminate the Orphans' Court's jurisdiction over the trust upon assumption of jurisdiction by a court outside of

Pennsylvania. You would like this office to confirm that the Department would not subject the taxpayer-trust's income to personal income tax after the Orphans' Court's relinquishment of jurisdiction over the trust on the basis that the taxpayer-trust would no longer have any nexus with the Commonwealth.

#### DISCUSSION

As you know, under Article III of the Tax Reform Code of 1971 (the Personal Income Tax):

Every resident individual, estate or trust shall be subject to and pay for the privilege of receiving each of the classes of income herein enumerated in section 303 a tax upon each dollar of income received by that resident during that resident's taxable year . . .

72 P.S. § 7302(a).

The personal income tax defines a resident trust as:

Resident trust means:

(1) A trust created by the will of the decedent who at the time of his death was a resident individual. . .

72 P.S. § 7301(s)(1).

Section 305, 72 P.S. § 7305 of this law provides, in part, that:

. . . The income or gains of the estate or trust, if any, taxable to such estate or trust shall consist of the income or gains received by it which has not been distributed or credited to its beneficiaries.

72 P.S. § 7305.

Section 725 of the Probate, Estates and Fiduciaries Code provides that:

A court having jurisdiction of a testamentary or Inter vivos trust, upon application of a trustee or of any party in interest, after such notice to all parties in interest as it shall direct and aided if necessary by the report of a master, and after such accounting and such provision to insure the proper payment of all taxes to the Commonwealth and any political subdivision thereof as the court shall require, may direct, notwithstanding any of the other provisions of this chapter, that the situs of the trust shall be changed to any other place within or without the Commonwealth if the court shall find the change necessary or desirable for the proper administration of the trust. Upon such change of situs becoming effective by the assumption of jurisdiction by another court, the jurisdiction of the court as to the trust shall cease and thereupon the situs of the trust for all purposes shall be as directed by the court.

20 Pa.C.S. § 725.

The Department agrees with your assertion that for taxable periods after the Orphans' Court approves the change of situs of taxpayer-trust to a place outside of the Commonwealth and upon assumption of jurisdiction by another court, Taxpayer's income will not be subject to Pennsylvania Personal Income Tax. This assumes that the taxpayer-trust does not acquire assets within Pennsylvania, derive income from



sources within this Commonwealth or otherwise establish nexus with the Commonwealth.

This ruling applies only to taxable years beginning on or after the day the Orphans' Court approves the transfer of situs and for taxable years thereafter.

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