# THE NEW WORLD OF TRUSTS AND TRUSTEES

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# THE NEW WORLD OF TRUSTS AND TRUSTEES

## I. INTRODUCTION.

Over the past thirty years or so, the use of the Trust entity, the Trust entity itself, the duties and the responsibilities imposed on Trustees and the concurrent rights of the Trust beneficiaries, and the role of the Trustees have all changed dramatically. These changes have been brought about by a combination of many unrelated factors, including changes in the Transfer Tax laws, competition for Trust assets and Trust business amongst states, the universal shift to the use of lifetime Trusts for beneficiaries and/or Dynasty Trusts that last for the lifetimes of multiple generations and the concurrent issues that arise from the use of such long-term Trusts, a turn toward litigation and a need for asset protection tools to adjust to that change, and expansion of wealth and particularly of wealth in the hands of younger generations, and, the normal, scholarly debate over the current viability of long standing Trust traditions. With these and other factors in place, the world of Trusts, fiduciaries, and Trust planning has been expanding, and continues to expand, before our eyes. With these thoughts in mind, the following outline will address the following issues that are present in our evolving Trust planning world:

1. Trust Situs and Governing Law – An expanding Trust world;

2. The Role of a Trust Protector – What it is, how to use it, and fiduciary liability issues; and,

3. Modifying/"Fixing" an Irrevocable Trust – Why, how, new tools, and lurking fiduciary liability and tax traps.

## II. TRUST SITUS AND GOVERNING LAW.

**A. Differences in State Trust Laws**. There are a myriad of objectives that an individual may identify in planning to establish a trust for the benefit of designated beneficiaries. The specific objectives to be accomplished by a particular Trustor will be determined by factors such as who are the designated beneficiaries (spouse, children, business partner, etc.), the assets to be owned and managed by the Trust, and the existing income, estate, gift, and generation-skipping transfer tax environment. Basically, there are two forces that operate to determine how a Trust will function to accomplish (or not accomplish) the specific objectives identified by the Trustor: the creativity of the drafter of the Trust Agreement in outlining the terms and provisions

of the Trust operations; and, the laws of the state applicable to determine the operating rules of the Trust.

There are "uniform" trust laws that are adopted by many states; however, over the last twenty plus years there have been a number of ground-breaking changes to state trust laws across the country. Further, there is no uniformity in the manner in which the states have implemented these changes. In a typical case, there will be a handful of states that will adopt the trust law change in its entirety, there will be another level of states that will adopt the change with modification, and then, finally, there will be a number of states that are silent as to the change.

Relative uniformity in state trust laws is a thing of the past as there have become significant differences in the trust laws of the various states. The result is that the choice of the state trust law that will govern the operating rules for a Trust can have a large impact on whether and to what extent the Trustor can accomplish specific objectives that he or she wants to accomplish through the Trust. From a Trust planning perspective, some of the most important areas where state trust laws differ are the following.

**1. Rule Against Perpetuities**. The Rule Against Perpetuities has been a long standing canon of trust and property law. The Rule can be stated to apply as follows: no trust shall endure longer than twenty-one (21) years after the death of the last to die of a designated group of individuals who are living at the time the Trust is created. Simply put, the function of the Rule is to provide that a Trust cannot last forever and, in fact, that the Trust must end within a set period of time.

Concern with the application of the Rule began to be voiced in the not too distant past, and a serious debate amongst legal scholars ensued with respect to its pros and cons. However, notwithstanding the intense legal debate over its merits, substantial amendments (including abolition) of the Rule Against Perpetuities that have come out of various state legislatures across the country can be connected with a somewhat unrelated act of the federal government with respect to the transfer tax system. The introduction of the current generation-skipping transfer tax system in 1986 formally imposed a transfer tax upon the death of the Trust beneficiary who was not a "skip person," if all of the remaining beneficiaries of the Trust following such death were "skip persons." As an illustration, assume that a mother establishes a Trust for the benefit of her son that is to make distributions to the son for his health, education, maintenance, and support during his lifetime. Upon the son's death, the son's interest in the Trust terminates and the remaining Trust assets are to be held in Trust for the benefit of the mother's grandchildren. In this case, the generation-skipping transfer tax would be imposed against the value of the Trust assets upon the death of the son. Thus, the tax operates to prevent a Trustor from using a Trust to pass assets from generation to generation without the imposition of an estate tax upon the death of the members of each generation.

However, in addition to imposing the generation-skipping transfer tax, the 1986 Tax Act also granted a GST exemption to each person. By granting this exemption, the 1986 Tax Act in effect enabled individuals to create trusts that would allow assets to pass from generation to generation while exempt from any transfer taxes that might otherwise apply. The only limitation on such a Trust was that its duration was limited to the applicable state law Rule Against Perpetuities.

Although a few states had abolished the Rule Against Perpetuities prior the enactment of the 1986 Tax Act, the implementation of that law opened the flood gates and led to

several additional states either abolishing or substantially modifying their Rule Against Perpetuities. A basic rule of thumb holds that a Trust created today that is subject to the traditional Rule Against Perpetuities will have a term that last from ninety (90) to one hundred (100) years. States that have abolished the Rule Against Perpetuities include Delaware, Alaska, Illinois, and Arizona. Other states, such as Michigan, Florida, and Nevada, have amended their Rule Against Perpetuities so that the life expectancy of a Trust in those states is several hundred years. Other states have made no changes to their Rule Against Perpetuities.

**2. <u>Asset Protection</u>**. Until recently, the laws of Trusts clearly defined the extent of which Trusts could be used as an asset protection tool. On the one hand, Trustors could transfer assets to a Trust for the benefit of a spouse, a child, or a charity or other organization, and the assets in that Trust would be protected from the claims of creditors to satisfy claims against the Trustor and claims against the beneficiary. An exception to this rule would be in the case of a transfer to a Trust in fraud of the Trustor's existing creditors, known as a fraudulent conveyance, in which case those creditors could reach the assets in the Trust to satisfy those preexisting claims. This asset protection aspect of Trusts is still in place today as Trusts are commonly used to segregate assets away from the reach of creditors, spouses, and other parties with claims against the beneficiary of the Trust.

On the other hand, under traditional Trust law, a Trustor could not transfer assets to a Trust for his or her own benefit (a "self-settled Trust") and protect those assets from the reach of his or her existing or future creditors. This aspect of Trust law has changed over the years, as this country became more litigious and people began to seek ways to shelter assets from the reach of their creditors (or potential creditors) but retain an economic interest in those assets. In response to this demand, and as a means to attract U.S. dollars and Trust business, in the 1980's a number of offshore jurisdictions changed their Trust laws to allow self-settled Trusts to be protected from the claims of the Trustor's creditors. Thus, millions of U.S. dollars began going to Trusts in places such as the Cook Islands, the Bahamas, and the Cayman Islands as doctors, real estate developers, etc. jumped at the opportunity to protect their assets from creditor's claims in self-settled asset protection Trusts.

In addition to the hefty price tag, the offshore asset protection Trusts were not without fault, including income tax reporting issues and the risk that the foreign country's Trust laws would change or the assets placed therein would be at risk to loss. Up to this point, the U.S. jurisdictions all retained the traditional rule that a Trustor's creditors would have access to a self-settled Trust to satisfy claims. This changed in 1997 when the State of Alaska became the first U.S. state to enact Trust legislation that directly authorized the use of a self-settled Trust to protect assets from the Trustor's creditors. Not surprisingly, by the end of 1997 the Delaware legislature had passed a law providing for the use of a self-settled asset protection Trust in that state. This trend was followed shortly by the States of Nevada and Rhode Island and has continued until today there are at least fifteen states having Trust laws supporting the use of self-settled asset protection Trusts.

In general, these statutes operate to allow a Trustor to place assets in a Trust established under the law of that state and have those assets protected from the reach of the Trustor's creditors, notwithstanding the fact that the Trustor has retained an economic interest in the Trust and certain rights with respect to Trust operations. Though they operate to accomplish this general purpose, the specific details of the state statutes vary from state to state. Depending upon the state, the terms of the self-settled asset protection Trust can include:

- The Trust must be irrevocable, except for the State of Oklahoma which allows asset protection for a revocable trust under specific circumstances.

- The Trustee may, in the Trustee's absolute discretion and subject to a standard, distribute income to the Trustor and may distribute Trust principal in specified circumstances.

- The Trustor may retain one or more powers including lifetime testamentary special powers of appointment, the ability to remove and replace the Trustee, and the power to veto distributions.

To access the benefits of the state's self-settled asset protection Trust statute, the Trustee must be an individual residing in or a corporate Trustee located in that state, the Trustee must materially participate in Trust administration activities, and some or all of the Trust assets must be deposited in that state.

It is clear that the resident of a state that has a self-settled asset protection Trust law can rely on that statute to protect assets placed in a self-settled Trust from his or her creditors. For example, a resident of the State of Delaware can use a self-settled Trust structured in conformity with Delaware law to protect that Trustor's assets from his or her creditors. However, though they have been in place for twenty-four years, there is still no answer to the question of whether a resident of a state that does not have an asset protection statute can establish a self-settled Trust in a state that has such a statute and assure that those assets will be protected from his or her creditors. However, the proponents of a nonresident's use of a state's asset protection statutes (and there is anecdotal evidence to support this claim), claim that the existence of the self-settled asset protection Trust and the state law protecting those assets, even if the statute were to be found ineffective, put the creditor in a favorable position for negotiating on the debt with the creditor.

**3. <u>Directed Trusts</u>**. A concern heard for many years has been that clients do not want to use Corporate Trustees because they fear that the Trustee will be insensitive to the needs of the beneficiaries and thus overly restrictive in the timing and amounts of distributions from the Trust. In other situations, clients have multiple reasons for transferring assets to a Trust but, instead of the individual or Corporate Trustee, they want the family's trusted investment advisor to continue to manage the assets after they have been placed into the Trust. It is from these very real client concerns and desires that the concept of a Directed Trust has evolved.

A typical Directed Trust is structured at follows: a single Trustee is appointed to handle all Trust administration issues (the Directed Trustee); and, an advisor or committee of advisors (the Directing Party) is appointed to provide guidance to the Directed Trustee on specific matters (*i.e.*, investment of Trust assets or distribution of Trust income or principal). In today's evolving world of Trustees and Trustee positions, it is important to distinguish Trust positions/Trust arrangements from one another. This distinction is important because the rights and responsibilities of the various parties differ as the arrangements change. In this case, the Directed Trust is not a "delegated trust" wherein the Trustee delegates or hires someone to carry out specific Trustee duties (investments, tax return preparation, etc.). Also, the Directed Trust arrangement needs to be distinguished from a Trust arrangement involving a Trust Protector (as discussed in Article III below). A Trust Protector could have one or more of the same duties that a Directing Party would have under a Directed Trust arrangement, but the office of Trust Protector is potentially much broader and could include powers such as the ability to replace the

Trustee, amend the Trust Agreement, and terminate the Trust under certain specific circumstances.

The most important issue in dealing with Directed Trusts is the questions of fiduciary responsibilities and liability. The answer to this question has important legal, practical, and economical consequences and, ultimately, can determine whether or not an effective Directed Trust arrangement is a viable option.

In basic terms, the issue posed in the following paragraph comes down to this: Will (and, if so, to what extent will) the Directed Trustee be held responsible for any losses that may occur from that Trustee following the direction of the Advisor/Directing Party? For example, assume that a Trust is structured so that there is a single, Corporate Trustee who is responsible for all administrative functions of the Trust. Further, assume that there is also appointed an Investment Advisor whose responsibility is to advise and direct the Trustee with respect to the investment of Trust assets. Further assume that the Investment Advisor directs the Trustee to sell a substantial percentage of the Trust investment assets and use the proceeds to purchase hundreds of shares of a single stock. Further assume that the company that issued that stock goes out of business within a year of the purchase, causing the Trust to lose more than half of its value. Would the Trustee, who was acting at the direction of the Investment Advisor pursuant to the terms of the Trust Agreement, be responsible for the losses to the Trust from that bad investment? More specifically, could the Trust beneficiary sue the Trustee for breach of fiduciary duty for the stock losses suffered by that Trust?

That is the legal issue posed for the Directed Trust. The practical consequences of this question are that it can be very difficult to find a Trustee who would be willing to serve in the position of Directed Trustee if they were (1) required to follow the direction of the Investment Advisor and (2) have the same fiduciary responsibility and liability exposure for the actions directed by the Investment Advisor as if they had taken those actions on their own accord. This is particularly true if the client, having designated the Investment Advisor to handle investment duties, expects the Directed Trustee to charge a reduced fee for their services as Trustee.

Many states have stepped in and addressed these issues by passing Directed Trustee statutes. The states have addressed this question of the responsibilities and liability of the Directed Trustee in three basic ways:

- A number of states have adopted the approach taken under the Uniform Trust Code. Under this approach, the Directed Trustee is to act in accordance with the person's direction unless (1) the direction is manifestly contrary to the terms of the Trust or (2) the Directed Trustee knows that the direction would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the Trust. States that have adopted this approach include Florida, Michigan, Pennsylvania and South Carolina.

- Other states have adopted a statute addressing the Directed Trust arrangement, but have included provisions further limiting the Directed Trustee's potential liability for following the directions of the advisor. These statutes hold the Directed Trustee liable only in cases such as willful misconduct, bad faith or reckless indifference, and intentional

misconduct. States following this course include Arizona, Colorado, Delaware, Illinois, and Nevada.

- Other states have yet to take up these issues and have no statutes pertaining to Directed Trusts. In these states, the use of Directed Trusts is complicated by the fact that there is no guidance as to the responsibilities of the Trustee to follow the directions of the Directing Party and, to the extent that they do so follow those directions, the responsibilities the Directed Trustee has with respect to losses that may result therefrom. States with no Directed Trustee statute include Alaska, California, and New York.

**4.** **Silent Trusts**. Throughout its evolution the law of Trust has always taken care to respect and protect the rights of the primary parties, the Trustee and the beneficiary. This principle is manifested in the longstanding duty of the Trustee to keep the beneficiary informed of Trust assets and operations. This duty of the Trustee/right of the beneficiary, amongst other things, provides the beneficiary with the opportunity to check on the Trustee's behavior and performance and thus protect his or her Trust interest, while also enabling the beneficiary to be aware of the opportunities to seize or claim Trust benefits. On the other hand, the duty to notify is beneficial to the Trustee in that it is typically the act of giving information to the beneficiary that will trigger the running of the statute of limitations on that beneficiary's opportunity to file a claim against the Trustee for malfeasance.

Traditionally, the duty of a beneficiary to be informed runs to current and remainder beneficiaries of the Trust, but may not accrue to the benefit of contingent beneficiaries. The Trustee's duty to inform can include the responsibility to give notice of the creation of the Trust to a beneficiary, keep the beneficiary informed of Trust operations on a timely basis, and to respond to information requests from the beneficiary.

There are times, however, that Trust law responds to the desires and objectives of another party to the transaction, that party being the Trustor. The reasons that a Trustor may have for establishing a Trust are many and diverse, including transfer tax savings, creditor protection, spendthrift protection, and divorce protection. A recent trend has been for Trustors to understand the benefits to be gained from the Trust, but to also perceive adverse consequences that may arise from placing large sums of wealth in a Trust for the benefit of an individual. Specifically, Trustors worry that the beneficiary's knowledge of the creation of the Trust can leave them to lose their drive to lead a productive life and become a "slacker" waiting for their wealth to solve their life's goals and problems. Another perceived problem is that the notified beneficiary may make excessive demands on the Trustee for distributions and/or information pertaining to the Trust and, further, there is the concern that the knowledge of the Trust may expose the beneficiary to the attention and ultimate claims of greedy spouses and/or creditors.

For these reasons, Trustors and planners in the estate planning community have been touting the need for "Silent Trusts". Under the Silent Trust arrangement, the Trustee has no duty to notify the beneficiary of the existence of the Trust or provide the beneficiary with any information as to the Trust terms, the Trust assets, or operations of the Trust. In response to these calls, a majority of the state legislatures have passed laws addressing the creation of Silent Trusts or variations thereof.

The laws that have emerged can be categorized as follows.

a. A starting point for this analysis can be the applicable provisions of the Uniform Trust Code ("UTC"). The UTC provides that a Trustee has a duty to notify the beneficiaries of the existence of the Trust, to keep Trust beneficiaries (defined to exclude contingent beneficiaries) reasonably informed about Trust operations, and respond to beneficiaries' request for information. The UTC does have one exception to this rule. Under that exception, the Trustee does not have a duty to inform the beneficiary until the beneficiary reaches age twenty-five. However, that exception aside, a key provision of the UTC is that the Trustor is prohibited from overriding the duties of the Trustee to inform the beneficiaries. On a whole, the UTC "duty to inform" provision is regarded as overly burdensome on Trustees and most states have either rejected the UTC approach or accepted it with modifications.

b. Some states take the approach of giving broad authority to the Trustor to limit the Trustee's duty to inform and/or notify the beneficiary of the Trust existence and operations. States that fall into this category include Delaware, Illinois, Nevada, and South Dakota. Under the laws of these states, you can create a "Silent Trust."

c. Other states give the Trustor the authority to limit the Trustee's duties to inform beneficiaries, but put statutory restrictions on those rights.

i. Some states follow the lead of the UTC and allow beneficiaries to remain in the dark until they reach the age of twenty-five. Some states like Missouri, limit that age to twenty-one.

ii. Some states allow the Trustor to deny access to information to the beneficiary, but only during the period while the Trustor is living and possessing legal capacity.

iii. Other states, like Florida, require that information be provided by the Trustee, but allows that information to be provided to a surrogate on behalf of the beneficiary.

iv. Some states limit the ability of the Trustor to remove the duty to inform by combining one or more of the requirements listed in i. – iii. above.

The use of Silent Trusts is a relatively new phenomenon and the perceived benefits of this trust technique have not been tested over time. Before responding to a client's wishes in this regard, a planner should take the time to consider all potential adverse consequences that can come from adding this provision to a Trust agreement and, most importantly, considering alternative, tested means of accomplishing the Trustor's objective.

**5. Irrevocable Life Insurance Trusts ("ILIT")**. The ILIT is a popular, now standard, estate planning tool that is implemented to accomplish many tax and non-tax objectives. Basically, the ILIT is an irrevocable Trust that is established to own a life insurance policy or policies on the life of the Trustor. In establishing the ILIT, Trustors identify one or more of many important non-tax objectives to be accomplished, including:

a. Providing cash for the payment of federal estate taxes due by the Trustor's estate;

b. Providing financial security for the lifetime of the Trustor's spouse;

c. Creating wealth to provide an equalization gift to children of the Trustor to balance out the gift of a family-owned business, ranch, or like assets to other children of the Trustor;

d. Creating wealth to provide the inheritance for the Trustor's spouse, or children of the Trustor from a prior marriage, in a blended family situation; and

e. Protecting the insurance proceeds from creditors, spend-thrift mismanagement, and loss upon death or divorce of the Trustor's descendants by structuring the ILIT as a Dynasty Trust.

In addition, Trustor's identify a number of federal transfer tax objectives to be accomplished through the ILIT, including:

- Sheltering insurance proceeds from federal estate and generation-skipping transfer tax; and
- Leveraging the Trustor's annual gift tax exclusion, gift tax exemption, and GST exemption.

The traditional model of the ILIT has evolved that include the following features:

- the Trust is formed to accomplish the specific objectives identified by the Trustor, including one or more of those mentioned above;
- likewise, the specific life insurance policy or policies owned by the Trust are chosen by the Trustor and the only asset owned by the Trust is the life insurance policy, and perhaps a small amount of cash;
- the Trustee is someone that the Trustor feels that he or she can work with, such as a family member, a family friend, or the Trustor's CPA, and that Trustee takes the job out of accommodation for the Trustor and without the expectation that he or she will actively manage the assets of the ILIT;
- the Trustee is paid no compensation; and,
- the Trustee carries out only the administrative actions with respect to the Trust, including issuing gift notice letters and paying the insurance premiums.

In some cases the traditional operating model is modified and the Trustee position is held by a bank trust department, but that trust department performs only the administrative duties carried out by the individual Trustee under the standard model, with no or minimal

compensation, and only takes the position due to a long-standing relationship to the Trustor and the expectation of future business.

For many reasons, the traditional method of structuring and operating an ILIT needs to be reviewed and either abandoned, or at a minimum, substantially restructured. The weakness of the traditional model can be pinned primarily to one feature, and that is the lack of active management of Trust assets. The owner of a life insurance policy can shift the risk of policy performance to the insurance company by purchasing a fixed premium, guaranteed benefit policy. However, the vast majority of life insurance policies owned by ILITs involve an assumption of the policy performance risk by the ILIT because they own policies with variable premiums and non-guaranteed proceeds. A substantial number of ILITs existing today own life insurance policies that were structured with premiums and proceed payouts amounts that were based upon interest rate and policy performance assumptions that were unrealistic at the time and unrecognized to date. These policies, to varying degrees depending upon the specific policy involved, can require frequent, sometimes annual premium analysis and periodic premium adjustments to assure that the policy will perform and payout according to expectations. In addition to monitoring the premiums being paid on an insurance policy, other steps, including monitoring the performance of the underlying assets behind the policy and the financial health of the insurance company, are required to assure that policy performance expectations are met. However, as noted above, the traditional operating model for ILITs does not include active management of Trust assets so the performance of the sole asset for the Trust (the insurance policy) and the continued suitability of that asset to accomplish the Trust's objective goes effectively unchecked from the inception of the Trust. As a result, many ILITs today are holding life insurance policies that will lapse before the termination of the Trust or, at a minimum, substantially under-perform compared to the policy expectation and Trust objectives.

The bottom line is that the traditional method of operating an ILIT positions the Trustee as the captain of a sinking ship subject to lawsuits and fiduciary liability exposure. The reality of the risk faced by the ILIT Trustees in today's environment is founded in beneficiary dissatisfaction with the under-performance of ILIT assets, the ramped-up statutory and judicial responsibilities imposed upon Trustees in their management of Trust assets, and increasing number of lawsuits against Trustees alleging breach of fiduciary duty.

With respect to the ramped-up statutory duties imposed on Trustees, the Uniform Prudent Investor Act (UPIA), as adopted by a majority of the states in various formats, provides fundamental statutory criteria for the investment management responsibilities of a Trustee. The UPIA made fundamental changes to the former criteria for prudent investing, including incorporating the requirement that fiduciaries diversify their investments. The UPIA integrates the diversification requirement into the concept of prudent investing by obligating the Trustee to diversify the investments of the Trust unless the Trustee reasonably determines that, because of special circumstances, the purposes of the Trust are better served without diversifying. The commentary within the UPIA lists examples of circumstances that would overcome the traditional duty to diversify, including the goal of retaining a family business, but does not list owning a single life insurance policy as such a special circumstance. In addition to the duty to diversify, the UPIA imposes several other duties on the Trustees (*i.e.,* duty of loyalty) that could be seen as violated by the Trustee if the Trustee allows the Trust investment portfolio to consist solely of one or more life insurance policies. Still, the UPIA makes no distinction between the investment management responsibilities of a Trustee of a Trust designed to own numerous and varied assets and the Trustee of a Trust designed to hold only a life insurance policy, so arguably

the same investment management standards apply to all Trustees unless the Trust provision or a state's statute provide otherwise.

Several states have recognized the heightened investment and management standards applicable to Trustees under the UPIA, and in what could be seen as an acknowledgement of the application of those standards to an ILIT Trustee, created an exception in the context of an ILIT. The following provides a brief overview of the different approaches taken by several states.

- The Delaware legislature has carved out a specific exception for the duties of an ILIT Trustee. Under Delaware law, when the fiduciary is investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for another, he or she must act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to obtain the purposes of the account. This is consistent with the standard duties imposed upon a Trustee under the UPIA. However, notwithstanding the foregoing management and investment standard a Delaware Trustee may acquire a contract of life insurance upon the life of the Trustor or the Trustor's spouse, or both, without liability for a loss arising from the Trustee's failure to: 1) determine whether the contract is or remains a proper investment; 2) investigate the financial strength or changes in the financial strength of the life insurance company; 3) make a determination of whether to exercise any policy option available under the contract; 4) make a determination of whether to diversify such contracts relative to one another or to other assets, if any, administered by the Trustee; or 5) inquire about changes in the health or financial condition of the insurer or insured relative to any such contract, so long as the Trustee discloses such limitation of the Trustee's duties either in the governing instrument or in a separate writing delivered to each insured at the inception of the contract of life insurance or thereafter if prior to an event giving rise to a claim under such contract.

- While not as expansive as the Delaware statute, a Pennsylvania statute shields a Trustee of an ILIT from certain liabilities by providing that a Trustee may acquire or retain a contract of life insurance upon the life of the Trustor or the Trustor's spouse, or both, without liability for a loss arising from the Trustee's failure to: 1) determine whether the contract is or remains a proper investment; 2) investigate the financial strength of a life insurance company; 3) exercise non-forfeiture provisions available under the contract; or 4) diversify the contract.

- South Carolina has adopted a similar statute to that adopted by Pennsylvania. Since these Delaware-type statutes negate most of the duties of a Trustee of an ILIT, the risk of loss for inadequate or negligent investment management shifts from the Trustee to the beneficiaries of the Trust.

- A different approach to this issue is taken under Florida law wherein the Trustee of an ILIT may delegate certain investment functions with respect

> to the insurance policy to: (1) the beneficiaries of the Trust; 2) the spouse or issue of a beneficiary; 3) any person or entity nominated by a majority of the beneficiaries; or 4) an investment agent if the fiduciary exercises reasonable care, judgment and caution in selecting the investment agent and in establishing the scope and specific terms of any delegation, without any continuing any obligation to review the agent's actions provided that the Trustee has given written notice of its intention to delegate investment functions to all beneficiaries within thirty days of the delegation. In contrast to the UPIA's delegation provisions, the Florida legislature has carved a specific exception to the continuing obligation to review the agent's actions for an ILIT Trustee who delegates investment functions.

Notwithstanding its shortcomings, many Trustors would still prefer to structure and operate an ILIT under the traditional method outlined above. One reason is the additional cost that would be incurred to pay a Trustee to perform traditional due diligence with respect to the operation of the life insurance policies owned by the Trust. In this case, both the Trustor and the Trustees must recognize the enhanced fiduciary liability exposure faced by this ILIT Trustee as discussed above. One response to this liability issue would be to have the terms of the ILIT governed by a jurisdiction which has adopted a Delaware-type statute that provides protection for an ILIT Trustee. As noted above, in many cases a corporate Trustee will not assume the position of Trustee of an ILIT. However, in those cases in which they will assume that ILIT Trustee position they will generally require that the Trustee operate under their Delaware Trust company so that it may achieve the protection of the Delaware ILIT statutes.

**6. <u>Trust Income Taxes</u>**. In planning for the creation of a Trust and whether to hold or distribute Trust income to beneficiaries, one of the key factors to consider has been for some time the fact that Trusts carry a substantial income tax burden due to the compressed Trust tax rate structure. For example, in 2013, an individual who is married and files a joint income tax return with his or her spouse will have to pay the maximum income tax rate on income in excess of $450,000. On the other hand, income accumulated in a Trust will be subject to the maximum income tax rate to the extent it exceeds $11,950.

This Trust income tax burden was increased for tax years beginning in 2013. One, the maximum income tax rate was increased enhancing the tax costs to a Trust for incurring that maximum rate. Second, the qualified dividends and capital gains tax rate was raised from 15% to 20% for taxpayers with qualified dividends and capital gains in excess of a set dollar amount. For a married couple filing jointly, that income level is $450,000. Alternatively, the Trust will pay the 20% rate on qualified dividends and capital gains in excess of $11,950. Third, the introduction of the 3.8% Medicare tax hits Trusts harder than individuals. For a married individual filing jointly, the Medicare tax imposed on net investment income will be applied to that income above a $250,000 level. For a Trust, the Medicare tax is imposed on accumulated net investment income above $11,950.

With this tax burden already in place, the last thing a planner wants to do is to add to that income tax burden by creating a Trust whose income would be subject to state income tax. As outlined above, there are numerous reasons that a Trustor might choose to establish a Trust in a state other than the state of his or her domicile. Many of the states that have adopted favorable laws pertaining to the Rule Against Perpetuities, self-settled asset protection Trusts, Directed Trusts, etc. have also made sure that those favorable laws are not negated by the existence of a state income tax on Trust income. For example, Delaware, Alaska, and Nevada

have laws that make it favorable to establish Trusts in those states and also have no state income tax on the income of those Trusts. However, many states impose a state income tax on Trust income and this factor must be considered in choosing where to establish a Trust.

Unlike situations in which a particular state is chosen in which to establish a Trust, in some cases the location of the Trust will be the result of overriding planning objectives. For example, in today's mobile society it is not unusual for a Trustor to want to establish a Trust for the benefit of a child who lives in another state. In that case, it is possible that the objectives of the Trust will include having the child serve as Trustee of the Trust and have the assets of the Trust invested in the state of that child's domicile. In this case, the planner needs to take special care to determine whether or not that state imposes a state income tax on Trust income and, if so, whether or not the contacts with that state necessary to trigger the tax are a part of the plan for Trust formation and operation.

**B.** **Comparison of Texas Trust Law to Other States**. Many of the states that have changed their Trust laws, particularly to the extent that the changes have made the state a more attractive place for establishing and operating a Trust, have done so for the purpose of attracting Trust business to the state. As noted above, some of these legislative steps have caused the state's Trust laws to deviate sharply from traditional Trust rules (*i.e.,* abolishing the Rule Against Perpetuities). In other cases, the legislative changes can be seen as reacting to current needs of Trustors and adapting Trust laws accordingly (*i.e.,* self-settled asset protection Trusts, Silent Trusts, and Directed Trusts). In Texas, the approach to date has been to not aggressively change the long-standing traditions of Trust law. Based on the items listed in A. above, here is a look at the current state of Trust law in Texas.

**1.** **Rule Against Perpetuities**. Texas still operates under the traditional Rule Against Perpetuities which provides that a Trust must end no later than twenty-one years after the death of the last to die of a designated group of individuals living at the time the Trust is created. As a rule of thumb, this is generally thought to mean that a Texas Trust can last at a maximum for 90 to 100 years.

**2.** **Asset Protection**. Texas has not adopted rules allowing for a self-settled asset protection Trust. Thus, the general Trust rules still apply to provide that an existing or future creditor of a Trustor can reach the assets in a self-settled Trust to satisfy claims against the Trustor.

**3.** **Directed Trusts**. Texas Trust Code 114.003 provides that "The terms of a trust may give a trustee or other person a power to direct the modification or termination of the trust." As noted above, a Directed Trust arrangement typically involves the authority of a Trustor to designate a Directing Party to advise and/or otherwise direct the Directed Trustee with respect to specific assets normally pertaining to investments and/or Trust distributions. Thus, this provision in the Texas Trust Code is more in line with authorizing the Trustor to create a Trust Protector in that the powers of that office are broad, including that power to modify or terminate a Trust.

There have been attempts in the past to modify Section 114.003 so that it would in fact allow the creation of a Directed Trust. Those proposals would have added to the power of the Directing Party under that statute to not only direct the modification or termination of the Trust, but would have allowed the Directing Party to direct, consent to, or block a Trustee's

investment decisions, distribution decisions or other decisions. However, those proposals were not adopted into Texas Trust Code Section 114.003.

Whether it is a Directed Trust arrangement or a provision authorizing a Trust Protector, Section 114.003 follows the approach taken of the Uniform Trust Code with respect to the responsibilities and liability of the Trustee of a Trust and providing that "If the terms of a trust give a person the power to direct certain actions of the trustee, the trustee shall act in accordance with the person's direction unless: (1) the direction is manifestly contrary to the terms of the trust; or (2) the trustee knows the direction would constitute a serious breach of a fiduciary duty that the person holding the power to direct owes to the beneficiaries of the trust."

Once again, with reference to the statutes of other states, there have been proposals to modify Section 114.003 in this regard, including proposals to provide that:

1. the Trustee will only be liable for following the directions of the Directing Party in cases of willful misconduct or gross negligence;

2. specifically providing that the Trustee of a Trust shall have no duty (and thus no responsibility) to monitor the conduct of the Directing Party or provide advice to the Directing Party with respect to any matter.

**4.** **Silent Trusts**. Texas has adopted the general rule under the Uniform Trust Code that provides that a Trustee can withhold notice of a Trust and information pertaining to a Trust from a beneficiary until that beneficiary reaches age twenty-five. However, once the beneficiary reaches age twenty-five, the Trustee has the duty to inform and disclose the Trust existence and operations to the beneficiary.

**5.** **Irrevocable Life Insurance Trusts**. Texas has adopted and retained the general provisions of the UPIA that provide that the Trustee of an ILIT has the full responsibility pertaining to diversification of Trust assets, duty of loyalty, and other requirements that, generally, will require the ILIT Trustee to invest and manage the assets of the ILIT as they would with respect to the Trust owning cash, marketable securities, and/or other investments. Thus, ILIT Trustees in Texas have significant exposure to liability for the performance of the Trust's insurance policy(ies).

**6.** **State Income Taxes.** Trust income is not subject to an income tax under Texas law.

## III. THE WORLD OF TRUST PROTECTORS.

### A. What is a Trust Protector?

The evolution of the office and the role of the Trust Protector follows the path taken by the self-settled asset protection Trust discussed in Section II.A.2 above. As noted therein, a litigious environment combined with the public policy weaved into the trust laws that prohibited an individual from establishing a trust for his or her benefit that would be protected from his or her creditors caused many doctors, other professionals, and others to take advantage of laws in foreign jurisdictions that would protect the assets of a self-settled Trust. However, the Trustors of the self-settled Trusts were not comfortable in releasing full control of their assets to the

foreign Trustees. To address this concern the trust agreements created the office of a Trust Protector who could monitor the actions of the Trustee, override Trustee actions, and, if necessary, remove and replace the Trustee.

As the U.S. jurisdictions started allowing Trustors to establish self-settled asset protection Trusts, those Trusts came "onshore" and the concept of the Trust Protector came with them. Still today, there is a lack of a consistent definition of a "Trust Protector" in the state statutes or the trust agreements. In the same light, there is no uniform name for this office. Depending upon the statute or the Trust Agreement, you can see terms such as Trust Protector, Special Trustee, Trust Advisor, Trust Consultant, etc.

Interestingly, the various names used for this office shed some light into the various roles that the office holder can be asked to serve.

1. Protector – Protect the interests and objectives of the Trustor and the interest of the beneficiaries.

2. Advisor – Advise the Trustee of specific issues, including investments, distributions, interpretation of Trust provisions and resolution of ambiguities, etc.

3. Special Trustee – A fiduciary position like a Trustee but with expanded powers outside the traditional realm of a Trustee

In the current environment, the role of the Trust Protector can be limited to one or more specific duties outlined in the Trust Agreement. In this context, the Trust Protector position can resemble the position of a Directing Party in a Directed Trust arrangement. Generally, however, whereas the Directed Trust arrangement usually involves an Advisor or Directing Party with specific powers limited to investments or distributions to beneficiaries, the role of a Trust Protector can be very broad to include numerous powers over the Trustee, the beneficiaries, and the terms and provisions of the Trust Agreement.

Whether the Trust Protector role is a limited role with one or more duties and powers or a very broad role, some of the powers granted to the Trust Protector in current practice include:

1. The power to remove and replace a Trustee;

2. The power to change the situs and governing law of the Trust;

3. The power to consent to a beneficiary's exercise of a power of appointment granted the beneficiary under the terms of the Trust Agreement;

4. The power to amend or modify the terms of the Trust Agreement, including adding beneficiaries, granting inter vivos or testamentary special powers of appointment and or general powers of appointment, and changing the distribution standard;

5. The power to direct a special distribution of Trust income and/or principal to one or more beneficiaries of the Trust; and

6. The power to terminate a Trust.

## B. Is That All There Is?

The real answer to the question "What is a Trust Protector?" is not provided by the name of the office and a listing of the powers to be held by that office holder. That answer cannot be revealed without due consideration being given to the following questions.

1. Is the Trust Protector a fiduciary?

2. If so, to whom does the Protector owe a duty?

3. Can the Trustor modify or eliminate that duty of the Trust Protector in the Trust Agreement?

## C. Is the Trust Protector a Fiduciary?

A power granted in a Trust Agreement can be characterized as either a fiduciary power or a personal power.

1. A fiduciary power exists wherein the holder of the power owes a duty to one or more parties. For example, a Trustee of a Trust that is granted the right to make discretionary distributions to the Trust beneficiaries based upon a health, education, maintenance and support standard owes a fiduciary duty to the beneficiaries of the Trust.

2. A power is a personal power if there is no fiduciary duty in connection with the power holder's exercise of the power. For example, if a Trust Agreement grants a testamentary special power of appointment to a beneficiary, allowing that beneficiary to appoint the assets remaining in his or her trust at the time of his or her death amongst the beneficiary's descendants, the beneficiary holds no fiduciary duty to anyone in connection with the exercise of that power. Thus, if the beneficiary has three children and exercises the special testamentary power of appointment and appoints the remaining assets in the Trust to one of those children, the other two children have no claim against the beneficiary for breach of a fiduciary duty that that beneficiary may have had in relation to them.

The first place to look to answer the question of whether or not a Trust Protector in a Trust Agreement has a fiduciary duty is the state trust laws that apply to the Trust. State laws vary on this point, but the following are some common approaches that you will see from the states.

1. If the powerholder is a beneficiary of the Trust, there is a presumption that the power is personal to the holder.

2. If the powerholder is not a beneficiary of the Trust, then:

   a. the holder is not a fiduciary, unless otherwise provided in the Trust Agreement;

   b. the holder is a fiduciary, unless otherwise provided in the Trust Agreement;

   c. there is a rebuttable presumption that the holder is a fiduciary.

No matter how they are drafted, the state laws seem to allow the Trustor to declare in the Trust Agreement that the Trust Protector is not a fiduciary and thus holds no fiduciary duty to the beneficiaries of the Trust. Some states reach this conclusion without any action by the Trustor in the Trust Agreement, by stating that the Trust Protector is not a fiduciary unless the Trust Agreement provides otherwise. Other states provide that the Trust Protector is a fiduciary unless the Trustor declares otherwise in the Trust Agreement. Still, other states further cloud the issue by stating that there is a presumption that the Trust Protector is a fiduciary. For example, Section 114.003 of the Texas Trust Code states that "The terms of a trust may give a trustee or other person a power to direct the modification or termination of the trust…. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary."

### D. <u>To Whom Does the Trust Protector Owe a Duty and What is the Standard of Conduct that that Fiduciary Will Be Held To</u>?

This is a very important question because it will determine which parties have the rights to bring a cause of action against the Trust Protector on the grounds that he or she has violated their fiduciary duty. Basically, there is no clear answer to this question under the statutes and very little if any court cases that have resolved ambiguities that makes sense in the statutes. One thing that does seem clear is that the Trust Protector, as a fiduciary owes a fiduciary duty to the beneficiaries of the Trust. Once again, Texas Trust Code Section 114.003 provides "A person, other than a beneficiary, who holds a power a power to direct is presumptively a fiduciary required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries."

This clearly states the standard of conduct owing by a Trust Protector under Texas law has a standard tied to good faith with regard to the purposes of the Trust and the interests of the beneficiaries.

## IV. <u>MODIFYING/"FIXING" AN IRREVOCABLE TRUST</u>.

**A. <u>Why – Reasons to Want/Need to Modify an Irrevocable Trust</u>**. Most estate plans include the use of one or more irrevocable trusts. As a result of the passage of time and changes in circumstances and laws, beneficiaries and trustees are often frustrated by the constraints imposed by trust agreements. Trust laws have changed drastically over the years, and an existing irrevocable trust may lack the terms necessary to provide the flexibility to adjust to unforeseeable changes in circumstances or laws. In addition, the grantor's intent may no longer be satisfied by the terms of the trust agreement.

Trustees and beneficiaries may desire to modify an irrevocable trust for countless different reasons, including to protect the tax treatment of a trust, grant a beneficiary a power of appointment, reduce administrative costs, alter trusteeship provisions, extend the termination date of a trust, change a trust's governing law, reduce potential liability, or any other reason imaginable.

There are several tools available under Texas law to amend an irrevocable trust agreement to better fulfill the grantor's intent and the beneficiaries' objectives.

### B. Methods Under Texas Law.

**1. Judicial Modification or Termination of Trust**. The Texas Trust Code §112.054 ("Section 112.054") sets out the framework for modifying or terminating an irrevocable trust through a judicial proceeding. A trustee or a beneficiary of a trust may bring an action under Section 112.054 to reform or terminate a trust, but a settlor cannot. Pursuant to Section 112.054, if one of six reasons for modification has been met, a court may order that the trustee be changed, that the trust terms be modified, that the trustee be permitted or directed to take acts that are unauthorized or forbidden in the trust agreement, that the trustee be prohibited from doing acts that are required by the trust agreement, or that the trust be terminated in part or in whole. The six permissible reasons for modification or termination of a trust include: (1) the purposes of the trust have been fulfilled or have become impossible or illegal to fulfill, (2) due to circumstances not anticipated by the settlor, the order will further the purpose of the trust, (3) modification of administrative terms is necessary to prevent waste, (4) the order is necessary to achieve the settlor's tax objectives, (5) continuance of the trust is not necessary to achieve a material purpose of the trust and all beneficiaries consent to the order, or (6) the order is not inconsistent with the material purpose of the trust and all beneficiaries consent to the order. The consent required for permissible reasons (5) and (6) can sometimes result in adverse tax consequences to the beneficiaries and may raise other issues.

Although judicial modifications and terminations have been frequently granted under the fairly liberal Texas statutes, the procedure is complex and often takes several months to accomplish. Below is a brief outline of the steps that need to be taken in a judicial modification. Similar steps would need to be taken with respect to a trust termination proceeding.

**a. Filing of the Original Petition**. The trustee of the trust or a beneficiary has the power to file the petition with the court. The person filing the petition should be represented by counsel.

**b. Representation of the Parties**. Each party to the action will need to be represented during the proceeding. Each adult beneficiary can represent himself or herself. Each minor beneficiary who has a parent without a conflict (e.g., he or she has a parent who is not a beneficiary of the trust) can be represented by that parent. Any other minor or unborn beneficiary's interest can be represented by one of the individuals described above if that individual beneficiary's interest is substantially identical to that of the minor or unborn beneficiary. If for any reason a beneficiary cannot be "virtually" represented in this manner, a guardian ad litem will need to be appointed by the court to represent those beneficiaries.

**c. Notice to the Parties**. Each party to the action will be required to receive notice of the action. If a charity is a contingent beneficiary, notice of the action is sent to the Texas Attorney General, who can intervene to protect the rights of the charity. Each party can sign a waiver stating that the party has read the petition and voluntarily appears in the proceeding.

**d. Filing of Waivers**. Waivers are filed with the court. If the Attorney General is a party, he will file a waiver if he chooses not to intervene.

**e. Agreed Judgment, Court Hearing, and Order**. If permissible reason (5) or (6) is used, then all beneficiaries will need to consent to the action by signing an

Agreed Judgment. This Agreed Judgment, if required, along with a proposed court order will be submitted to the judge for his review. Assuming there are no objections by any parties to the action, there is usually a short hearing to enter evidence into the court record and the judge will then sign the order with any changes he deems necessary. Conformed copies of the order are sent to all of the interested parties after it becomes final, which is usually 30 days after the judge signs the order.

**2. Nonjudicial Modification – Division and Combination**. The Texas Trust Code §112.057 ("Section 112.057") allows a trustee to divide one trust into multiple trusts or combine two or more trusts into one trust without a judicial proceeding so long as, by doing so, no rights of a beneficiary are impaired and the purposes of the original trust are not adversely affected. Because it does not involve a judicial process, a merger pursuant to Section 112.057 is much easier to accomplish than a judicial modification pursuant to Section 112.054. A merger is often used in situations where administrative provisions are being changed to be more consistent with the original purposes of the trust. This method of trust modification cannot be used, however, to eliminate any beneficiaries or in any way impair the rights of a beneficiary. The steps necessary for merger include the following:

**a. Creation of New Trust**. A new trust is created that includes desired trust agreement provisions.

**b. Notice of Merger**. Written notice of the proposed merger is given to each beneficiary of the trust who is then entitled to distributions. A beneficiary can waive the right to this notice in writing.

**c. Merger**. The trustee will sign a notarized document that describes the provisions of and effects the merger. After this document is executed, the assets of the old trust can be transferred to the trustee of the new trust.

**3. Nonjudicial Termination of Uneconomic Trust**. Texas Trust Code § 112.059 ("Section 112.059") allows a trustee to terminate a trust if the trust property has a total value of less than $50,000 and the trustee concludes that the value of the trust property is insufficient to justify the cost of continued administration. To terminate a trust pursuant to Section 112.059, the trustee must give prior notice to all the beneficiaries and must distribute the trust property in a manner consistent with the purposes of the trust.

**4. Trust Protector**. A recent trend among estate planning attorneys is to include the concept of a "Trust Protector" or "Special Trustee" within the trust agreement. The Trust Protector is an individual or an entity appointed by the settlor who may be granted broad powers to terminate the trust, change the trustee lineup, or otherwise amend the provisions of the trust. The Trust Protector may be given these broad powers without causing the inclusion of trust assets in the estate of the settlor, beneficiary, or Trust Protector as long as the Trust Protector is not a settlor, a beneficiary, or someone who is related or subordinate (within the meaning of Section 672(c) of the Internal Revenue Code) to a settlor or a beneficiary of the trust.

**5. Decanting.** The word decant means to pour a liquid from one container to another. In the trust context, "decant" is the term used to describe the distribution of trust property to another trust pursuant to the trustee's authority to make distributions to, or for the benefit of, the trust beneficiaries.

Under the common law of certain states, a trustee who has the authority to distribute principal outright to a beneficiary may instead distribute the principal into another trust for the beneficiary. Several states have codified this common law concept of decanting.

Not all state decanting statutes are alike, but they do have common provisions. Some states allow decanting only if the trustee's distribution power is absolute, and others allow decanting even when the trustee's distribution power is limited. Most statutes state that a trustee cannot decant to eliminate an income interest, extend the term of the trust beyond the applicable rule against perpetuities, or add to the class of beneficiaries.

**C. Decanting in Texas**. Texas has recently enacted a decanting statute, but it is fairly limited. Other jurisdictions have more expansive statutes, but a transfer of trust situs would be required to take advantage of those provisions. This is a very new area of the law. It is likely that the trustee will require substantive legal advice before proceeding with decanting.

**1. Overview and Impact of New Legislation.** The Governor signed House Bill 2913 into law on June 14, 2013, adding Texas Trust Code §§112.071-112.087, which becomes effective on September 1, 2013. This new subchapter adds statutory decanting provisions that supplement terms in trust agreements unless the trust agreement expressly prohibits decanting. Please note that a spendthrift clause in a trust agreement is not considered such a prohibition.

There are two levels of decanting in the new statute: one for a trustee with full discretion, and one for a trustee with limited discretion. Texas Trust Code §112.072 applies to a trustee with full discretion (*i.e.*, the power to distribute trust assets is not limited in any manner). Such a trustee may decant trust assets from a first trust to a second trust for the benefit of one or more of the current beneficiaries of the first trust. If the trustee could have made an outright distribution of principal to the beneficiary pursuant to the terms of the first trust agreement, then the trustee may give such beneficiary a power of appointment in the second trust in favor of one or more beneficiaries of the first trust.

Texas Trust Code §112.073 applies to a trustee with limited discretion (*i.e.*, the power to distribute is limited in some way, such as a distribution standard for health, education, maintenance, and support). Such a trustee may decant trust assets from a first trust to a second trust so long as the current, successor, and remainder beneficiaries are the same in both trusts. The distribution language must also be the same in the second trust as the first trust. If a beneficiary has a power of appointment in the first trust, such beneficiary must be given the same power of appointment in the second trust. In other words, a trustee with limited discretion is restricted to decanting primarily to change administrative provisions.

Under either level, the trustee "shall exercise a power to distribute . . . in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries."

A trustee may not decant if doing so would (1) modify a beneficiary's current vested right to receive a mandatory distribution or withdraw trust assets, (2) materially impair any beneficiary's rights, (3) materially limit the trustee's fiduciary duty, (4) exonerate a trustee from liability for failure to exercise reasonable care, (5) eliminate a provision granting someone the authority to remove the trustee, or (6) modify the perpetuities provision in the first trust.

Furthermore, a trustee may not decant if doing so would cause any intended tax benefits, such as the marital deduction, charitable deduction, or annual gift tax exclusion, to be lost. A trustee also cannot decant without court approval if the sole purpose of decanting is to change the trustee compensation provisions.

**2. How to Decant a Texas Trust**. As an example of the process, below are the steps necessary to decant trust assets to a new Texas trust:

**a. Creation of New Trust**. A new trust is created. Under the limited new law in Texas, unless there are no limitations on the trustee's discretion, this trust will need to be virtually identical to the old trust.

**b. Notice to beneficiaries**. The trustee will be required to give notice of the decanting to all current and presumptive remainder beneficiaries of the decanting decision. Notice can be avoided for certain descendants of beneficiaries if their interests are similar to their ancestor and no apparent conflict of interest exists between them.

**c. Decanting of the Old Trust into the New Trust**. The trustee will transfer the trust assets to the new trustee.