



Maintaining Control & Flexibility with Trusts in Uncertain Times: *Key considerations for year-end planning*

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Today's Speaker



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Al W. King III is the Co-Founder, Co-Chairman and Co-Chief Executive Officer of South Dakota Trust Company LLC (SDTC) and SDTC Related Companies with offices in South Dakota, New York, Wyoming, Nevada and Westport, CT where Mr. King is based.

SDTC is a national trust boutique serving wealthy families in 54 countries around the world. SDTC currently has more than \$80 billion in assets under administration.

Previously, Mr. King was Managing Director and National Director of Estate Planning for Citigroup and also the Co-Founder and Vice Chairman of Citicorp Trust South Dakota.

Mr. King is the Co-Vice Chairman of the Editorial Board for Trusts & Estates magazine. He has been inducted into the National Association of Estate Planning Council's (NAEPC) Hall of Fame and is a member of the NAEPC webinar and publication committees. He is also a member of many other groups and organizations.

Mr. King received his J.D. degree from Syracuse University Law School; his LL.M. in tax law from Boston University School of Law; and his B.A. degree from Holy Cross College.

Learning Objectives:

1. Essential strategies to be considered in today's environment when updating pre-existing trusts and new trusts
2. Trust provisions promoting control and flexibility to be considered in year-end estate planning
3. Techniques to maximize trust structures to meet the needs of the grantor and beneficiaries

Key Reasons for Establishing Trusts:

1. Asset Protection: (Self-Settled Trusts, Third-Party Beneficiary Trusts, Discretionary Interests, LLCs/FLPs)

- Both settlor/grantor [and] beneficiaries (born and unborn)

2. Tax Savings: (Estate, GST, State Income and Premium Taxes)

3. Family Management: Promotion of Social and Fiscal Responsibility:

- Modern “Directed” Dynasty **Incentive Trusts**:
 - “I want to leave my family enough money so they do something; not leave enough money so they do nothing.” – **Warren Buffet**
 - Remember **names and values** of **great great grandparents**
 - **Videotape** of family values and goals (transcribe)
 - Draft Family **Mission Statement**

4. Family Governance/Involvement, Education, and Succession

5. Privacy:

- **Court proceedings involving trusts**: (Litigation and/or reformation/modification) – Sealed in perpetuity or for time period
- **Beneficiary quiet** – Keeping trust and related information silent from beneficiaries

6. Protecting against uncertainty

“Maintaining Control & Flexibility with Trusts in Uncertain Times”:

Key reasons for uncertainty:

- **Politics**
- **Taxes** Federal
- **Economy** State
- **Investments**
- **Pandemics** / Healthcare
- **Litigation**: Divorce and asset protection
- **Defining future family**
- **Residences** and **vacation homes**
- **Other**
 - Family heirlooms
 - Pets
 - Cryogenics

“Modern Trusts” Provide Control and Flexibility:

1. Grantor, spouse and beneficiary clauses and powers

- Co-trustees and fiduciaries

2. Family advisors and friends as co-trustees and fiduciaries

3. Control and flexibility regarding trust administration and distributions

4. Control and flexibility regarding trust investment management and planning

Summary:

- In 1995, only 12.5% of all gifts were to trusts (IRS)
- Currently the wealthy are contributing approximately 40% of all gifts to trusts
- “Trusts are no longer vehicles that lawyers and banks create to keep what is rightfully the beneficiaries.” – Dick Oshins
- “Directed Trusts”, “Special Purpose Entities/Trust Protector Companies” and “Private Family Trust Companies”

- Newly drafted trusts

- Existing trusts:
 - Reformation/Modification (judicial & non-judicial)

 - Decanting

Grantor Powers:

- Remove and replace trustees and fiduciaries
 - Trustee (family and/or independent)
 - Replace with similar
 - Investment committee – directed trust
 - Distribution committee – directed trust
 - Trust protector
 - Family advisor

- Revenue Ruling 95-58 (August 4, 1995)

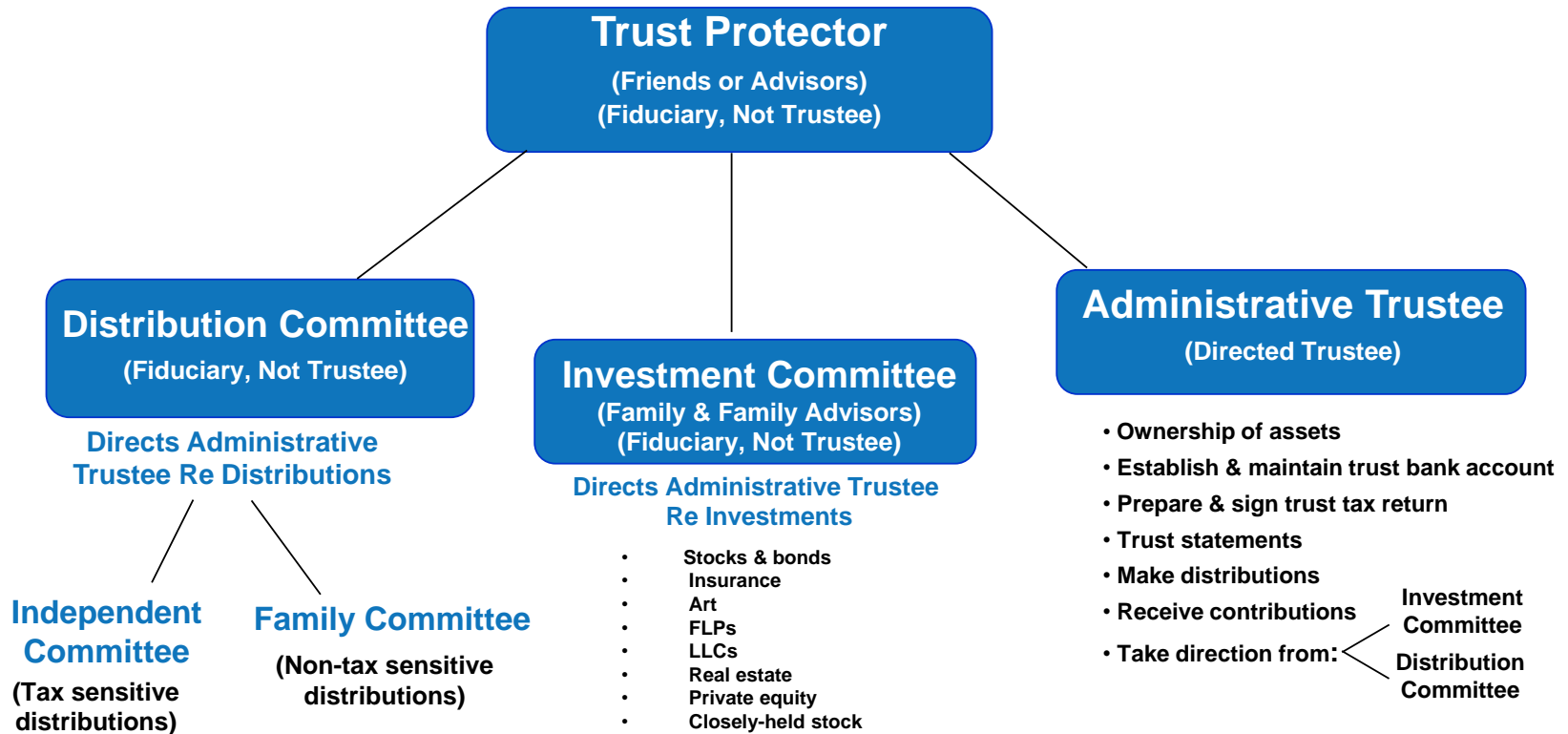
- If, grantor possesses **power to remove the trustee** and **appoint** an individual or corporate successor **trustee**, the grantor **will not be treated as having retained** a trustee's discretionary **control** over the trust income if the **successor can not** be **related or subordinate** to the decedent within the meaning 672(c)

- Revoked Rev. Rul. 79-353

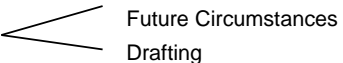
Poll: How many of you have established a directed trust?

- Yes
- No
- In the process of doing so
- Considering doing so

Typical Modern Directed Trust Structure with a Trust Protector Promoting Flexibility and Control (AK, DE, NH, NV, SD, TN, WY):



Typical Trust Protector Powers (Vary by State Statute):

- Grantor appoints trust protector
- Typically family friend and/or advisor
- Flexibility  Future Circumstances
Drafting
- Personal vs. fiduciary powers
 - No personal gain, duty of loyalty & impartiality, actions for good of trust & beneficiaries
- Power to remove or to replace trustees
- Power to veto or direct trust distributions
- Power to veto or direct investment decisions
- Approve trustee accounts
- Power to add or remove beneficiaries
- Power to add grantor as beneficiary from a class of beneficiaries (Self-settled trust)
- Consent to exercise power of appointment
- Amend the trust as to the administrative and dispositive provisions
- Power to change situs and the governing law of the trust
- Terminate the Trust
- Liability standard – gross negligence and/or willful misconduct

Family Advisor Statute:

- Grantor appoints family advisors
- Typically working or retired lawyer and/or CPA
- Provides for the power to appoint a “family advisor”:
 - Person who is authorized to consult or advise a fiduciary with regard to fiduciary or non-fiduciary matters
- The “family advisor” may have the following powers:
 - Remove and appoint trustee, a fiduciary, trust advisor, investment committee member or distribution member
 - Appointment of successor trust protector or successor family advisor
 - Advise the trustee on matters concerning a beneficiary and consult with a fiduciary or advisor
 - Provide direction regarding notification of qualified beneficiaries (beneficiary quiet)
- Powers granted are in sole discretion of family advisor
 - Non-fiduciary capacity
 - Limited liability to dishonest or improper motive
- Selected State Statutes: Delaware and South Dakota

Grantor – Control & Flexibility:

- Family values

- Incentive trusts

- Works best with directed trusts

- Promote social & fiscal responsibility in family

- Add charitable beneficiaries to non-charitable trusts

- Beneficiary quiet

Please see: Al W. King, III “Are Incentive Trusts Gaining Popularity?” *Trusts & Estates Magazine*, October 2017

Beneficiary Quiet Statute:

- **Beneficiary Quiet Trust:** state statutes vary
 - Option of whether to **provide beneficiaries** with trust information
 - Can **select** which **beneficiaries** will not receive trust information
 - If make **trust distribution** to beneficiary (unique)
 - Not necessary to provide any trust information other than the distribution check
 - Even **after grantor's death** or **incapacity** (unique)
 - **Still** able to **keep** the trust **quiet**
 - **Trust Protector** can decide
 - **Not limited** to a **time period** (unique)
- **State statutes:** SD, NV, DE, TN, NH, WY, AK

Common Reasons for Keeping a Trust Quiet to Beneficiaries:



Reasons for Silence:

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

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



Grantor as Investment Co-Trustee/Investment Committee Fiduciary:



- **Authority:**

- No IRC section 2036 or 2038 issues:
 - **IRC Section 2036(a)(2)** – Right to designate who will enjoy the trust property
 - **IRC Section 2038** – Power to alter a beneficiary's interest
- *Jennings v. Smith*, 161 F. 2d 74 (2nd Cir. 1947)
- *Estate of Willard V. King v. Commissioner*, 37 T.C. 973 (1962)
- *U.S. v. Byrum*, 408 U.S. 125 (1972)

- **Alternatives for Grantor:**

- Grantor as **co-trustee** for investments
- **Directed trust investment committee**: Grantor and/or family
- **LLC** – Manager (Trust 100% member/owner)

- **Possible Issues:**

- State income tax?
- Asset protection?

Poll: How many of you have established a self-settled trust?

- Yes
- No
- In the process of doing so
- Considering doing so

Grantor – as a Beneficiary:

- **Self-Settled Trust:**

- An **irrevocable trust** that provides for the **grantor/settlor** to be as a **permissible beneficiary** of the trust
 - No estate tax inclusion
 - No IRC section 2036 or 2038 issues if properly planned
- **19 states** have enacted **laws** allowing for **Self-Settled DAPTs:**

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

- **Grantor as current beneficiary**
- **Grantor as possible future beneficiary** – added by trust protector from class of beneficiaries (i.e. Hybrid Dynasty Trust)
 - **Example** – Grantor’s grandparents’ descendants

Various Trust Distributions Options:

- **Mandatory Distribution Standards:**
 - **All income** distributed
 - 1/3 of **principal age 25**, 1/3 of **principal age 30**, **balance 35**
 - **Not great** for **state income tax savings** and **asset protection**
- **Discretionary Support Interest:**
 - **Health, Education, Maintenance** and **Support** (HEMS) distributions
 - **Better** for **state income tax savings** and **asset protection**
- **Total Discretionary Trust:**
 - **Total discretion** – **best interests** of **beneficiary**
 - **Powerful** for **state income tax savings** and **asset protection**

Grantor – Control & Flexibility – Asset Protection:

- Discretionary trust
- Self-settled and third-party trusts
- Discretionary interest in trust is not:
 - Rather a “mere expectancy”
 - Same with limited power of appointment and remainder interest
- Follows Restatement Second and case law
 - Statutes – Alaska, Delaware, Nevada, and South Dakota
- Most states follow Restatement Third (possible problems)

Property Interest
Enforceable Right

Spendthrift Clause:

- **Both third party** and **self-settled trusts**
- **All trust jurisdictions** offer asset protection through the incorporation of the **spendthrift clause** to a trust
- **Spendthrift clause:**
 - Prevents the attachment or assignment of a beneficiary's interest in a trust
 - Prevents all but exception creditors from attaching the trust
- **Spendthrift clause exception creditors:**
 - Alimony
 - Child Support
- **Problem cases:**
 - **Florida case:** *Berlinger v. Casselberry*, 38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App. Nov. 27, 2013); companion case *Berlinger v. Casselberry*, 38 Fla. L. Weekly D 2480 (Fla. Dist. Ct. App. Nov. 27, 2013)
 - **Massachusetts cases:**
 - *Pfannenstiehl v. Pfannenstiehl*, Mass. App. Ct., Nos. 13-P-906, 13-P-686 & 13-P-1385, August 27, 2015 rev'd, 2016 WL 4131248, SJC 12031 (Mass. August 4, 2016)
 - *Levitan v Rosen*, Mass. Appeals Court No 18-P-847, May 6, 2019
 - **California case:** *In re Cameron-Pallanck*, 2011 Cal. App. Unpub. LEXIS 2824 (Cal. Ct. App. 2011)
- **Please note:** Court determines if beneficiary has property interest under state law [or] whether the interest has any value
- **Solution to spendthrift clause exception creditors:**
 - Discretionary interest in trust is not a property right statute (AK, DE, NV & SD)

***Source:** Al W. King III, "Tips From the Pros: The Trust Spendthrift Provision – Does it Really Protect?" *Trusts & Estates Magazine*, December 2016.

Non-grantor Trusts – Trust Separate Taxpayer (Excluded from Estate):



- Trust saves state income and capital gains taxes - if no income tax state
- Selected no income tax trust states - AK, DE, NH, NV, SD, WY
- Discretionary trusts - *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019)
- Other recent favorable cases for taxpayer:
 - PA – *McNeil v. Commonwealth of Pennsylvania* (2013)
 - IL – *Linn v. Department of Revenue (The Pritzker Case)* (2014)
 - MN – *Fielding v. Commissioner of Revenue* (2018)
- Distribution to beneficiary from trust taxed if beneficiary is a resident of a state with an income tax

Grantor Trusts (Excluded from Estate):

- **Definition** - grantor retains one or more powers over the trust so that the trust income is taxable to the grantor but not included in the grantor's estate.
- **Four popular ways** to cause grantor trust status but not inclusion in the gross estate:
 1. **Loan** power to grantor for **less than adequate security**
 2. **Actual loan** to grantor
 3. **Add charitable beneficiaries**
 4. **Swap power** – see Rev. Rul. 2008-22 for two requirements:
 1. Equivalent value; and
 2. Exercise of power can't shift beneficial interests
- Grantor trust tax reimbursement clause

Revenue Ruling 2004-64:

- Discretionary power of independent trustee to reimburse grantor for income taxes of grantor trust – will not cause inclusion in estate
 - Power does not make grantor a trust beneficiary
 - Can't be implied agreement
 - Reformation/Modification
- Allows grantor's creditors to get at reimbursable amount – if no state statute [or] not self-settled state that protects such discretionary payments
 - Clause states – reimbursement only for preceding tax year
 - Direct payment versus reimbursement – only taxing authority can get at it
- Selected State Statutes:
 - AK, DE, NV, NH, NY, SD, WY
 - NY Statute è 5/31/05 EPTL - § 7-3.1

EPTL § 7.31(d): "If a trustee has discretionary power to reimburse grantor for income tax payments or to pay taxing authorities directly (under EPTL § 7.11(a) or governing instrument) the trust shall not be considered for use of grantor."
- Alternatives:
 - Spouse as beneficiary of trust
 - Self-cancelling installment note (SCIN) – higher Section 1274 rates

Spousal Powers – Control & Flexibility:

Trusts established by grantor:

- **Power to remove and replace trustees & other fiduciaries**
- **Power to be co-trustees and fiduciaries**
 - **Investment and distribution committees**
- **Power to be a beneficiary of both:**
 - **Third party trusts**
 - [and]
 - **Self-settled trusts**

Beneficiary Powers – Control & Flexibility:

Trusts established by grantor:

- **Power to be co-trustees and fiduciaries**
 - Investment & distribution committees
- **Power to remove & replace trustees & fiduciaries**
- **Limited powers of appointment**
- **General powers of appointment** – older family beneficiary
 - Step-up in basis
 - High estate tax exemptions

Summary of Family, Independent, and Administrative Fiduciary Powers

| Roles – Trustees and Fiduciaries | Family Trustee or Fiduciary | Independent Trustee or Fiduciary | Administrative Trustee |
|---|---|---|---|
| Primary Role | The Family Trustee will control most distributions and will look out for the interests of the beneficiaries | The Independent Trustee will have certain responsibilities, and be able to make certain types of distributions, that the Family Trustee cannot perform without adverse transfer tax consequences | The Administrative Trustee provides trust administrative functions. This role is necessary to ensure that the trust always has sufficient contacts with its chosen trust situs |
| Initial Appointee | Spouse and/or adult children | Either Independent Institutional Trustee, may also be administrative trustee or an individual who is not an employee or related to the trust beneficiaries by blood or marriage (i.e. CPA, lawyer) - Check tax consequences | Independent Institutional Trustee (AK, DE, NH, NV, SD, TN, WY) |
| Distribution Powers | May distribute income or principal for beneficiaries' needs (health, education, maintenance, and support) | May distribute income or principal for beneficiaries' best interests | May distribute income or principal for beneficiaries best interests |
| Investment Powers | May impose Investment Guidelines, appoint an Investment Committee to direct, or delegate the administration of investments to an Investment Advisor | Unless an Investment Trustee is appointed, must approve any investments that would create a potential conflict of interest with the Family Trustee | Administers investments, subject to Investment Guidelines or Investment Trustee/Committee, unless power is delegated to an Investment Advisor |
| Removal of Trustee (which hopefully never becomes necessary) | By donor during his lifetime, then by donor's spouse as long as she survives. After both donor and spouse are deceased, successor selected by a majority of the adult, competent beneficiaries of the trust | By donor during his lifetime, then by donor's spouse as long as she survives; after both donor and spouse are deceased, the Independent Trustee may be removed by the Family Trustee | By donor during his lifetime, then by donor's spouse as long as she survives. After both donor and spouse are deceased, the Independent Trustee may be removed by the Family Trustee and the Independent Trustee acting together |
| Appointment of Successor Trustee Upon Trustee's Death, Incapacity, Resignation, or Removal | By donor during lifetime, then by donor's spouse as long as she survives; after both donor and spouse are deceased, successor selected by a majority of the adult, competent beneficiaries of the trust | By donor during his lifetime, then by donor's spouse as long as she survives; after both donor and spouse are deceased, successor selected by the Family Trustee (but may be rejected by a majority of the adult, competent beneficiaries of the trust) | By donor during his lifetime, then by donor's spouse as long as she survives; after both donor and spouse are deceased, successor selected by the Family Trustee and the Independent Trustee acting together (incase of deadlock, by a majority of the adult, competent beneficiaries of the trust) |
| Who may serve | Any individual, but typically members of the trust beneficiaries' family | Either Independent Institutional Trustee, LLC or an individual not an employee or related to the trust beneficiaries by blood or marriage (i.e. CPA, lawyer) - Check tax consequences | Independent Institutional Trustee (AK, DE, NH, NV, SD, TN, WY) |

Other Clauses – Control and Flexibility with Trusts:

- Change of situs and law
- Decanting
- Judicial and non-judicial reformation/modification
- Future family defined

Investment Flexibility and Control:

- **Modern directed trust** (AK, DE, NH, NV, SD, TN and WY)
- **No requirement to diversify** trust **investments/assets**
 - Can hold large concentration in one stock (public or closely-held)
- **Ability to provide broad asset allocation** models for trust assets, for example:

Harvard University Endowment:

| Asset Class | Strategic Asset Allocation |
|-------------------|----------------------------|
| Public Equity | 10.5% |
| Private Equity | 7.0% |
| Hedge Funds | 11.5% |
| Real Estate | 20.0% |
| Natural Resources | 14.0% |
| Bonds/TIPS | 14.5% |
| Other Real Assets | 10.0% |
| Cash & Other | 9.0% |

Source: Harvard University Endowment, Harvard Management Company, 2020

Yale University Endowment:

| Asset Class | Strategic Asset Allocation |
|-------------------|----------------------------|
| Absolute Return | 23.5% |
| Venture Capital | 23.5% |
| Leveraged Buyouts | 17.5% |
| Foreign Equity | 11.75% |
| Real Estate | 9.5% |
| Bonds and Cash | 7.5% |
| Natural Resources | 4.5% |
| Domestic Equity | 2.25% |

Source: Yale University Endowment, Yale University Investments Office, 2020

- Investment committee responsible for initial **due diligence** and **quarterly monitoring** of investment assets
 - Directed Administrative Trustee does not have to interfere
- Excellent **control** and **flexibility** in both up and down economic cycles
- **Fiduciary Liability:** Investment Committee - Subject to gross negligence/willful misconduct standard (liability much higher with delegated trust)

- **Purchase Residential Real Estate For Child or Grandchild:**
 - Rather than purchase home outright for child or grandchild, **purchase in trust** so divorce & creditor proof
 - Children or grandchildren **live rent-free**: “use” provision
 - Creditors?
- **Grantor Transfer Existing Residential Real Estate**
 - **Qualified Personal Residence Trust (QPRT):**
 - Typically uses too much of gift tax exemption
 - Cannot get house back out of QPRT
 - Not a GST trust
 - Sale of remainder interest to Dynasty Trust
 - IRC section 7520 rate
 - Grantor lease back
 - **Promissory Note Sale** of residential real estate to Defective Grantor Trust
 - GST trust
 - Leverages gift and GST exemptions 9 to 1
 - Can get house back out of trust if desired (Step-up in cost basis?)
 - IRC section 1274 rate (lower hurdle than IRC section 7520 rate of QPRT)
 - “Use” factor
 - Family time share
 - Grantor lease back
- **Administration** – LLC owned by trust owns residence
 - Family and/or family advisors - manager of LLC

Control and Flexibility for Family Heirlooms and Other Treasured Property:



- **Purpose trust statute** (no beneficiaries – protects an asset(s)):
- **Definition:**
 - Trust that **exists** for stated (non-charitable) **purpose**
 - Established to **care** for “**something**” **rather than “someone”**
 - No beneficiaries
- **Trust Enforcer:**
 - Appointed to ensure the trustees carrying out their obligations in fulfilling the trust’s purpose
 - Ability to go to court
 - Also **Trust Protector**: Amend trust if needed in event circumstances change
 - May reform/modify to beneficiary trust in the future
 - May combine Trust Enforcer and Trust Protector functions
 - South Dakota: First domestic Trust Protector statute (top ranked)
- **Taxes:** Typically **excluded** from **estate** as completed gift dynasty trusts (either grantor or non-grantor)
 - Also pour over revocable purpose trust with dynasty provisions
- **Statutes:** DE, NV, NH, SD, TN, WY (Dynasty and long term)

Please note: Future publication: “Trusts without Beneficiaries – What is the Purpose?” by Al W. King III, *Trusts & Estates* magazine, Feb 2015

Poll: How many of you have established a purpose trust?

- Yes
- No
- In the process of doing so
- Considering doing so

Examples of Purpose Trust Assets:

- **Pet care** (i.e., dogs, cats, horses, birds, tortoises, snakes, etc.)
 - Including offspring
- **Maintenance of grave sites** (honorary)
 - Also supporting religious ceremonies (anniversaries, etc.)
- **Maintenance of family property** (i.e., antiques, cars, jewelry, memorabilia, etc.)
- **Maintenance of an art collection**
- **Maintain family homes** (residence and vacation)
- **Long term maintenance of building, property or land**
- **Maintain business interests**
- **Royalties**
- **Digital assets**
- **Provide for philanthropic purpose not qualifying for a charitable deduction**
- **Cryogenics**
- **Own and maintain Private Family Trust Companies**
- **Own and maintain Special Purpose Entities/Trust Protector Companies**

Grantor, Spouse and Beneficiaries – Distribution Trustees/Fiduciaries:



- [SLAT](#) – Spousal Lifetime Access Trust
- [Dynasty/GST](#) (Generation Skipping Trust)
- [ING](#) – Incomplete Non-grantor Trust

Summary of Popular Year End (12/31/20) Planning Options:

| | GST Exemption Allocated | Grantor v. Non-Grantor | Situs |
|----------------------|---|-------------------------------|----------------------------|
| Dynasty Trust | Yes (Excluded from estate) | Either | AK, DE, NH, NV, SD, TN, WY |
| SLAT | Optional (Excluded from estate) | Grantor | AK, DE, NH, NV, SD, TN, WY |
| SLANT | Optional (Excluded from estate) | Non-Grantor | AK, DE, NH, NV, SD, WY |
| ING | No (Included in estate) | Non-grantor | AK, DE, NH, NV, SD, WY |

Dynasty Trust – Overview:

- **What is a Dynasty Trust?**

- A **Dynasty Trust** is an **irrevocable trust** drafted to provide a substantial **legacy** promoting family values for **current** and **future generations**, for a long term or in perpetuity
 - i.e. Spouse, grandchildren, great-grandchildren, unborns etc.

- **Why use a Dynasty Trust?**

- **\$11.58 million** estate, gift and GST tax **exemptions** (\$23.16m for married couple)
- A Dynasty Trust **minimizes federal** and **state death taxes** in **perpetuity**, if properly structured
 - i.e. no death taxes at the death of the grantor's children, grandchildren and any other descendants
- **No state income tax**
- **Asset protection** – wealth preservation
- **Provides** maximum **control** and **flexibility** to deal with future uncertainties
 - Spouse and family as beneficiaries
 - Grantor as discretionary beneficiary if self-settled
 - Spouse and family beneficiaries – investment and distribution fiduciaries

- **What are the typical assets used to fund a Dynasty Trust?**

- LLCs, partnerships, closely-held entities, securities, real estate, family business, art, etc.

- **Where to establish a Dynasty Trust?**

- **Long-term or perpetual directed trust** state with **no income tax**
 - E.g., (AK, DE, NH, NV, SD, TN and WY)

Example: SLAT Design – Non-Reciprocal

| SLAT | Husband Trust fbo Wife | Wife Trust fbo Husband |
|--|---|--|
| Administrative Trustee: | South Dakota Trust Company LLC (SDTC) | South Dakota Trust Company LLC (SDTC) |
| Beneficiaries | Wife, son and son's descendants (Wife needs being primary) | Husband, son and son's descendants (Husband needs being primary) |
| Distribution Advisor/Committee (DA) | SDTC | Husband (HEMS) SDTC (Independent) |
| Successor DA | SDTC | SDTC |
| Investment Advisor/LLC Manager | Husband | Husband |
| Successor Investment Advisor/Committee | Wife, then children/primary beneficiary | Husband, then children/primary beneficiary |
| Distribution Standard | Fully discretionary | HEMS distributions by "interested DA"; fully discretionary by "independent DA" |
| Assets to be contributed | Form single member LLC to hold assets once transferred to trust | Form single member LLC to hold assets once transferred to trust |
| Power of Appointment | Wife has LPOA exercisable in favor of descendants and charity | Husband has LPOA exercisable in favor of descendants only |
| Trust Protector | CPA or trusted family advisor | CPA or trusted family advisor |
| Withdrawal Right | Wife has "5x5" power to withdraw greater of \$5,000 or 5% of trust assets on annual basis | None |
| Funding Dates | Before 12/31/20 to utilize \$11.58 million estate, gift and GST exemptions | Before 12/31/20 to utilize \$11.58 million estate, gift and GST exemptions |

Incomplete Non-Grantor Trust (ING):

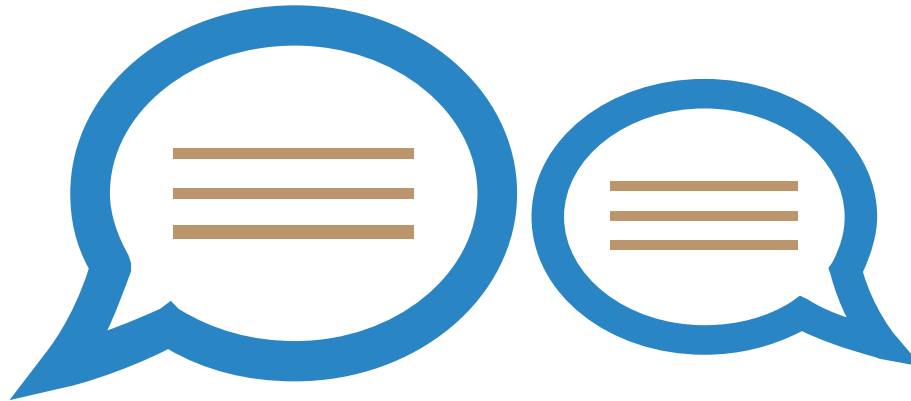
- **What is an ING trust?**
 - A **non-grantor trust** for **income tax purposes** (i.e. the trust is responsible for tax payments)
 - An **incomplete gift** for **transfer tax purposes** (i.e. the trust remains in the grantor's estate)
- **Why use an ING trust?**
 - An ING trust can be an effective strategy to **save state** and **local income taxes**
- **What are the typical assets used to fund an ING trust?**
 - **Appreciated assets** or property that is anticipated after transfer
 - E.g., sale of closely-held business or sale of a family business or the sale of an appreciated concentrated stock position
 - Generally does not minimize “source income”
- **Where to establish an ING trust?**
 - **No income tax state** with **self-settled** statutes (i.e. DAPT states)
 - E.g., DE, NV, SD, WY

Incomplete Non-Grantor Trust (“ING) (Cont’d):

- **Non-grantor trust/includable in the grantor's estate**
 - Key to **avoid** drafting **grantor trust** status
 - Trust assets are **includable** in the **grantor’s estate**
- Establishing in a **DAPT state** with an institutional trustee in the DAPT state (e.g. Delaware, Nevada, South Dakota, Wyoming)
- **Grantor, spouse, descendants, family members** may be beneficiaries
- **Distribution committee** consists of **grantor and “adverse parties”** within the meaning of 672(a)
 - **Adverse** parties’ **consent** required for grantor or spouse to receive discretionary distributions
 - Adverse = other trust beneficiaries
- **Power of appointments** – to ensure not a completed gift
 - Grantor retains a **limited testamentary power of appointment**; and
 - Grantor retains a **lifetime power of appointment** or **distribution power**

Additional References:

- **“Maintaining Control in an Uncertain Environment”** June 2020 Trusts & Estates Magazine
- **“How Long-Term Trusts Can Assist With Uncertainties Like Covid-19”** August 2020 Trusts & Estates Magazine
- **“Anticipating the Unanticipated With Trust Planning”** October 2018 Trusts & Estates Magazine
- **“Does Estate Tax Repeal Really Matter?”** November 2017 Trusts & Estates magazine
- **“Can a Grantor Have His Cake and Eat It Too?”** November 2019 Trusts & Estates Magazine
- **“Myths About Trusts & Investment Management: The Glass is Half Full!”** December 2014 Trusts & Estates magazine
- **“Charitable Giving with Non-Charitable Trusts”** June 2015 Trusts & Estates magazine
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