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

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"Curiouser and curiouser!" cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English)."

. . .

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

— Lewis Carroll, Alice's Adventures in Wonderland[2]

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

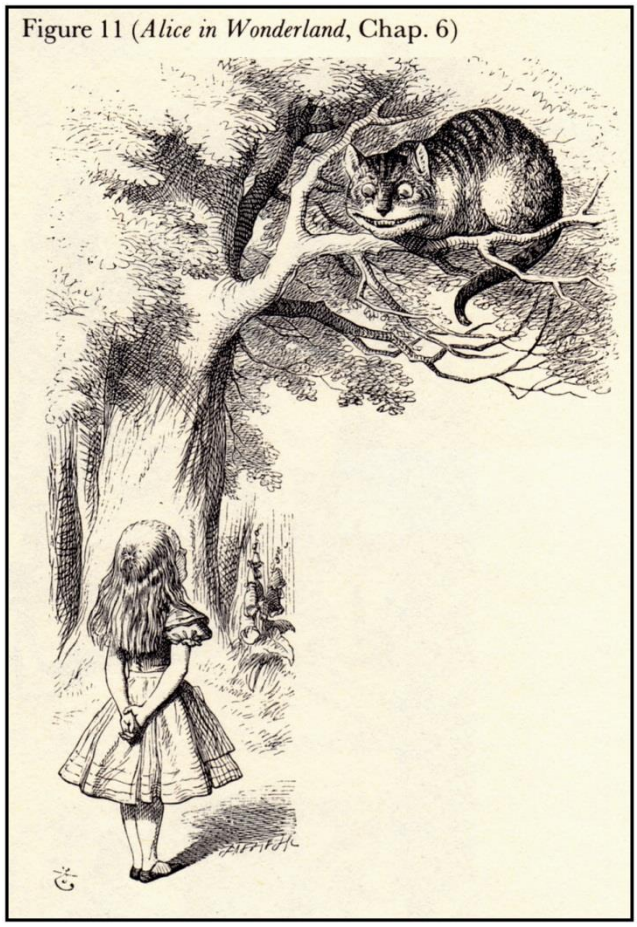
Figure 11 (*Alice in Wonderland*, Chap. 6)

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

[3] January 2019. These materials were originally prepared for the 2012 Summer meeting of the American College of Trust and Estate Counsel ("ACTEC") at Colorado Springs, Colorado, for a presentation by Margaret E.W. Sager and Peter Gordon, Esquire, of Gordon Fournaris & Mammarella, Wilmington, Delaware, on June 16, 2012, entitled "Trust Adventures in Wonderland – From the Meadow and Through the Looking Glass; Situs and Governing Law. That was followed by a reprise focused more on fiduciary income tax in a presentation at the ACTEC 2018 Spring meeting in San Antonio, Texas, with co-presenters Richard W. Nenno, of Wilmington Trust Company and Richard H. Greenberg, Esquire, of Greenberg & Schulman.

I. WHAT IS TRUST SITUS?

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

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

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

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

— Lewis Carroll, Alice's Adventures in Wonderland

A. Multiple Meanings of Trust Situs.

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

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

2. For purposes of evaluating the situs of a trust, the primary elements are the terms of the trust, the domicile of the settlor upon executing an inter vivos trust or upon death with respect to a testamentary trust, the location of trust assets, the place of administration, the location of the trustees and the domicile of the beneficiaries. These elements, or some subset of these elements, play a role with respect to trust situs – and governing law.

3. For practical purposes, there are four primary ways to view trust situs, putting aside – and sometimes notwithstanding – the situs specified in the trust document:

   (a) Administrative situs;

   (b) Locational situs;

   (c) Tax situs; and

   (d) Jurisdictional situs.

4. Many times a trust's jurisdictional situs, locational situs, administrative situs and tax situs are all in the same state.[4] Very tidy.

5. However, there are times when one or more of the administrative situs, locational situs, tax situs and/or jurisdictional situs may differ; in addition, it is possible for a trust to have a certain type of situs (such as tax or jurisdictional situs) in more than one state at the same time.

B. Administrative Situs.

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

[4] These materials do not address international trust situs and governing law. References to a "state" should be deemed to include the 50 states of the United States and the District of Columbia.

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

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

C. Locational Situs.

1. Locational situs refers to where the assets are physically located.

2. Intangible property owned by a trust is usually deemed to be located in the place of the administrative situs of a trust, although the deemed state income tax situs of intangibles may be different, depending on applicable state law. See Restatement (Second) of Conflict of Laws §§ 271 & 272.

3. In the case of real property owned by a trust, its situs for some purposes is obviously in the state where the real property is located, although the jurisdictional situs as to the real property as a trust asset may be in a different state. See, e.g., Trusteeship Created By the City of Sheridan, Colorado, 593 N.W.2d 702 (Minn. Ct. App. 1999) (discussed below); Restatement (Second) of Conflict of Laws §§ 276 & 279.

D. Tax Situs.

1. A trust's tax situs refers to where the trust is taxable for state fiduciary income tax purposes with respect to retained income and capital gains – that is, whether the trust is a resident or nonresident trust for state fiduciary income tax purposes.

2. A trust can have the bad fortune of being a resident trust for income tax purposes in more than one state. By the same token, a trust can be a resident trust for income tax purposes of no state.

E. Jurisdictional Situs.

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

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

2. As discussed below, jurisdictional situs is non-exclusive, and therefore multiple states may be able to exert jurisdiction over the same trust as to the same issue.

3. However, and as discussed below, even though a court may have jurisdiction over a trust, it may decline to exercise jurisdiction if the court believes that another court is better positioned to exercise jurisdiction over the trust.

4. In an actual matter handled by the authors' law firm, a trust owned residential real estate (deceased settlor's former home) located in California, where settlor died, and provided that California had jurisdiction. There were also California beneficiaries. The trustee resided in Pennsylvania. The beneficiaries filed a petition in California seeking *inter alia* to have the court direct the sale of the real estate, to surcharge and remove the trustee and to terminate the trust by its terms. The trustee alleged that the California court did not have jurisdiction because the trustee resided in Pennsylvania and the trust administration was located in Pennsylvania; the California court agreed and dismissed the petition. The beneficiaries were then forced to petition the court in Pennsylvania, which exercised its jurisdiction.

II. HOW IS SITUS DETERMINED?

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

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

A. Uniform Probate Code.

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

2. The UPC uses the phrase "principal place of administration" in lieu of "situs."

3. *Unspecified in Testamentary or Inter Vivos Trust*: If a trust does not specify the principal place of administration, the principal place of administration "is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence, if he has no such place of business. In the case of co-trustees, the principal place of administration . . . is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them." UPC §7-101. Note that the UPC does not automatically designate the principal place of administration of a testamentary trust in the state of the decedent's domicile.

4. *Specified in Testamentary or Inter Vivos Trust*: UPC §§ 7-101 and 7-305 provide that the trust may designate the trust's principal place of administration. The UPC does not require any minimum contacts with the jurisdiction designated as the principal place of administration.

5. UPC §7-101 imposes a duty on the trustee(s) of the trust to register the trust in the court of the trust's principal place of administration. All trustees and beneficiaries are subject to the jurisdiction of the court in which the trust is registered. UPC §7-103. The procedure to register a trust is set forth in UPC §7-102. However, registration "is not in lieu of other bases of jurisdiction during or after registration." Comment to UPC §7-103.

6. Failing to register a trust subjects the trustee "to the personal jurisdiction of any Court in which the trust could have been registered." UPC §7-104. In addition, a trustee who fails to register within thirty days after the demand of a settlor or beneficiary to do so "is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse a trustee from the duty to register, or directing that the trust or trustees shall not be subject to the jurisdiction of the Court, is ineffective." Id.

B. Uniform Trust Code.

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

precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions." UTC PREFATORY NOTE. *Thirty-three jurisdictions* have adopted versions of the UTC as of October 1, 2018: Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. As of October 1, 2018, Illinois and Connecticut have introduced (but had not yet adopted) the UTC. http://www.uniformlaws.org/Act.aspx?title=Trust Code.
In states that have also adopted the UPC, such as Arizona, Florida, Michigan and South Carolina, the terms of the UTC usually trump the UPC terms.

2. Like the UPC, the UTC uses the phrase "principal place of administration" instead of referencing "situs."

3. *Unspecified in Testamentary or Inter Vivos Trust*: The UTC does not provide default provisions if the trust does not specify the principal place of administration. However, the comment to UTC §108 provides that a "trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located." Like the UPC, the UTC does not automatically designate the principal place of administration of a testamentary trust in the state of the decedent's domicile.

4. *Specified in Testamentary or Inter Vivos Trust Instrument*: UTC §108(a) provides that, without "precluding other means for establishing a sufficient connection with the designated jurisdiction," the terms of a trust designating the principal place of administration of a trust are "valid and controlling" if:

   (a) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(b) all or part of the administration occurs in the designated jurisdiction.

C. Selected States.

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

(a) *Unspecified in Testamentary Trust*:

(i) Pre-UTA: Situs is in the county where letters were granted, or could have been granted, to the personal representative. If no letters could have been granted, then situs is in a county where any trustee resides or is located. 20 Pa. C.S. §723.

(ii) UTA: Situs determination is unchanged, except that if no letters could have been granted, situs is in a county where any trustee resides "or has a place of business" (as opposed to "is located"). 20 Pa. C.S. §7708(b)(1)(iii).

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

(i) Pre-UTA:

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

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

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

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

then the situs is where the trust property is located.

(ii) UTA (20 Pa. C.S. §7708(b)):

(1) For a resident settlor: Situs is determined when the first application to the court is made in the same manner as the pre-UTA law with two additions:

a. During the settlor's life and after the settlor's death, situs can also be determined by the principal place of the trust's administration.

b. After the settlor's death , situs can also be determined by a county where one or more of the beneficiaries reside.

(2) For a non-resident settlor: Situs is located where (1) a trustee resides or where the trustee's principal place of business is located; (2) all or part of the trust administration occurs; or (3) at least one beneficiary resides.

(c) *Specified in Trust Instrument*: Both residents and nonresidents may specify Pennsylvania as the situs in the trust document.

(i) Pre-UTA: The provision of the instrument determines situs. 20 Pa. C.S. §724(a). The designation will supersede 20 Pa. C.S. §724(b) (when the designation is not provided for in the trust instrument), but applies to inter vivos trusts only.

(ii) UTA:

(1) Under 20 Pa. C.S. §7708(a) a provision of the trust instrument designating situs is only valid and controlling if there are certain connecting factors:

a. A trustee is a resident or has his or her principal place of business in the designated jurisdiction; or

b. All or part of the trust administration occurs in the designated jurisdiction; or

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

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

2. *Arizona:* Arizona provides that in the "absence of a controlling designation in the terms of the trust, the laws of the jurisdiction where the trust was executed determine the validity of the trust, and the laws of descent and the law of the principal place of administration determine the administration of the trust." A.R.S. §14-107.

3. *Delaware*: Delaware has a statute that provides that if the administrative situs of a trust is transferred to Delaware, then Delaware law governs the administration of the trust, unless the trust provides otherwise. 12 Del. C. § 3332(b). Delaware does not otherwise have a statute that establishes the basis for situs or change of situs, and therefore situs is based on common law and case law. The most important factor in determining situs under Delaware law is the location of the assets and the trustee's principal place of administration. See, e.g., Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (Del. Ch. Ct. 1940) ("if the trustee is a bank or trust company, the almost inevitable inference is that the seat of the trust is at the principal office of the bank"); Lewis v. Hanson, 128 A.2d 819, 826 (Del. 1957) ("the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration . . . [t]he manifest intention of [Settlor] to create a Delaware trust with a Delaware trustee, the deposit of trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the situs of the trust . . . is Delaware, and that, therefore, its law determines its validity").

III. WHY CHANGE SITUS?

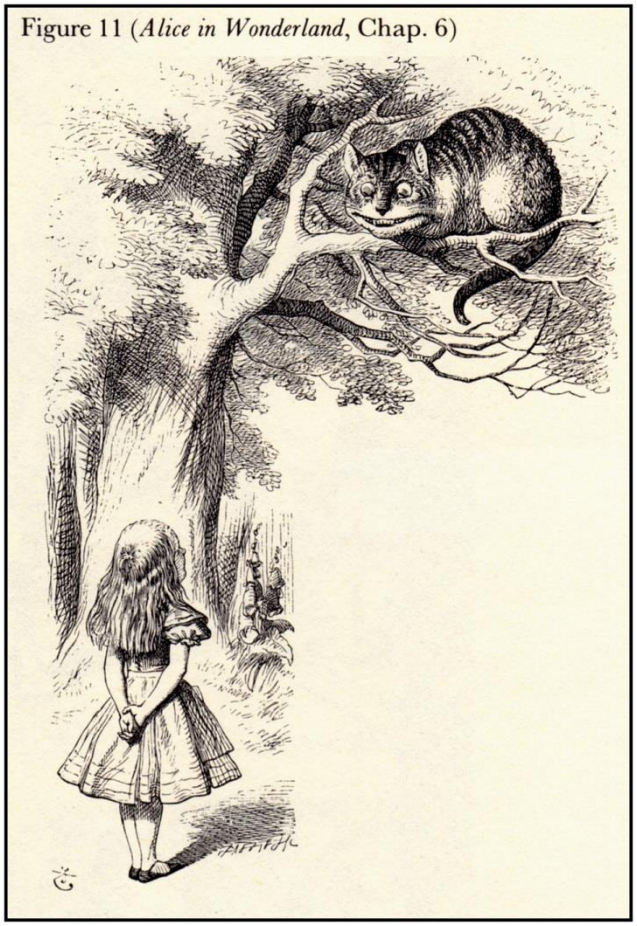
Figure 11 (*Alice in Wonderland*, Chap. 6)

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

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

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

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

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

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

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

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

2. *Alluring appeal of another state's trust laws*: The trust laws of another state may be more modernized, less restrictive, more fully developed, or in other ways more alluring than what the trust is "stuck" with under current conditions. Changing the situs of a trust may avail the trust of the laws of another state, in whole or in part.

3. *Convenience*: A desire for good old fashioned convenience may motivate a change in trust situs – and if other advantages can also apply, even better.

B. Income Tax Benefits.

1. Certain states impose lower income tax rates on trusts than others, and some states do not impose income tax on trusts at all if certain conditions are met. Depending on the fiduciary income tax regime of the state where the trust is currently situated, the trustees may wish to consider moving to a state that imposes lower income tax rates or, if possible, a state which would not impose income tax on the trust at all. Of course, the income tax treatment of trusts would only apply to tax on retained income and capital gains; income distributed to a beneficiary will be subject to income tax in the hands of the beneficiary based on the laws of the beneficiary's domicile. Thus, for simple trusts (all net income must be paid to the beneficiaries), a state's income taxation of trusts will only apply to capital gains because there would not be any retained income.

2. The income tax treatment of trusts varies widely from state to state. For example:

(a) *Pennsylvania*:

(i) Pennsylvania imposes a 3.07% income tax on retained income and capital gains of any trust that is a "Resident Trust." 72 P.S. § 7302(a). A resident trust is either: "(1) [a] trust created by the will of a decedent who at the time of his death was a resident individual; [or] (2) [a]ny trust created by, or consisting in whole or in part of property transferred to a trust by a person who at the time of such creation or transfer was a resident." 72 P.S. §7301(s). The residency of the trustees or beneficiaries is irrelevant in determining whether a

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

(ii) A resident individual for Pennsylvania income tax purposes means "an individual who is domiciled in this Commonwealth unless he maintains no permanent place of abode in this Commonwealth and does maintain a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this Commonwealth; or who is not domiciled in this Commonwealth but maintains a permanent place of abode in this Commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in this Commonwealth." 72 P.S. §7301(p).

(iii) Pennsylvania will only tax the retained income and capital gains of nonresident trusts (again at 3.07%) for the "privilege of receiving … income … from sources within [Pennsylvania]…." 72 P.S. §7302(b). Pennsylvania source income includes: (1) income earned by reason of ownership of real or tangible property in Pennsylvania (including rental income); (2) income earned in connection with a trade or profession carried on in Pennsylvania (such as operating an office in Pennsylvania or performing services within Pennsylvania); (3) dividends or interest from a Pennsylvania bank or corporation only if it was received in connection with a trade, profession, occupation or business carried on in Pennsylvania. 20 PA. CODE §101.8.

(iv) Therefore, if a nonresident trust can be moved to Pennsylvania under 20 Pa. C.S. § 7708(c)-(e) (described below), and the trust receives no income from within Pennsylvania, there will be no Pennsylvania income tax imposed on the trust. This makes Pennsylvania an excellent destination state for trusts created by non-Pennsylvania residents – even those trusts with Pennsylvania beneficiaries or trustees.

(v) *Practice Tip:* Practitioners with Pennsylvania clients who are beneficiaries of nonresident trusts should inquire whether such trusts should be moved

to Pennsylvania, especially if the change of situs will eliminate the imposition of state income tax.

(b) *Delaware*:

(i) Delaware tax rates for retained income and/or capital gains of trusts range from 2.2% if the taxable income/capital gains for the year is between $2,000 and $5,000, to 6.75% if the taxable income/capital gains for the year exceeds $60,000. 30 Del C. §1102(a)(13).

(ii) Pursuant to 30 Del. C. §1601(8), a resident trust in Delaware is a trust which is created by the will of a decedent who was domiciled in Delaware at the decedent's death, or was created by or consisting of property of a person domiciled in Delaware or, during more than one-half of the taxable year has at least one Delaware trustee as follows:

(1) "1. The trust has only one trustee who or which is (i) a resident individual of [Delaware], or (ii) a corporation, partnership or other entity having an office for the conduct of trust business in [Delaware]; [or]

(2) 2. The trust has more than 1 trustee, and 1 of such trustees is a corporation, partnership or other entity having an office for the conduct of trust business in [Delaware]; or

(3) 3. The trust has more than 1 trustee, all of whom are individuals and one half or more of whom are resident individuals of [Delaware]."

(iii) A nonresident trust is a trust which does not satisfy the above-described factors for determining a resident trust. 30 Del. C. §1601(5).

(iv) A nonresident trust is taxed on its retained income and capital gains from Delaware source income (minus deductions). 30 Del. C. §1639.

(v) A trust is subject to Delaware income tax only to the extent that it accumulates income for beneficiaries who are Delaware residents, even if it is a Delaware resident trust. 30 Del. C. §1636.

Thus, if all beneficiaries of a Delaware resident trust are nonresidents, then there will be no Delaware income tax imposed on the retained income or capital gains of the trust. *Id.*

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

(c) *California*:

(i) California imposes an income tax up to 13.3% on "the entire taxable income" produced by resident trusts. Cal. Rev. & Tax. Code §§ 17742(a), 17041 & 17043; https://www.ftb.ca.gov/forms/2015_California_Tax_Rates_and_Exemptions.shtml#itr.. A trust is a resident trust for California purposes " if the fiduciary or beneficiary (other than a beneficiary whose interest in such trust is contingent) is a resident, regardless of the residence of the settlor." Id. at §17742(a).

(ii) Note that the means of determining a resident trust in California (disregarding the residency of the settlor) is the polar opposite from the means of determining a resident trust in Pennsylvania (disregarding the residency of the beneficiaries and trustees). Thus, California may still tax trusts which have been moved from California, and further modification (such as removing California trustees) may be needed before California will not tax the trust as a resident trust. One must also exercise care in naming a California trustee even for trusts that are not otherwise resident in or have any other contacts to California.

(d) *Massachusetts*:

(i) Massachusetts imposes a tax on trusts of 5.3% on interest and dividends retained in the trust and long-term gains, and a tax of 12% for short-term gains.

(ii) Massachusetts imposes a tax on any trust that is a resident trust. Id. at §10(a), (c). A resident trust is either a testamentary trust created under the will of

a Massachusetts decedent or an inter vivos trust created by a settlor who was an inhabitant of Massachusetts when the trust was created or at any time during the taxable year AND at least one trustee or other fiduciary is an inhabitant of Massachusetts. Id. at §10(c).

(iii) Massachusetts defines a Massachusetts inhabitant as a natural person domiciled in Massachusetts, or a natural person not domiciled in Massachusetts but who maintains a permanent place of abode in Massachusetts and spends more than 183 days in aggregate in Massachusetts during the taxable year. Id. at 1(f).

(iv) The Massachusetts Supreme Court considered the issue of when a corporate trustee could be considered an "inhabitant" of Massachusetts in Bank of America, N.A. v. Comm'r of Revenue, 54 N.E.3d 13 (Mass. 2016). The Massachusetts Supreme Court held that a corporate trustee will be deemed to be an "inhabitant" of Massachusetts if "it: (1) maintains an established place of business in the Commonwealth at which it abides, i.e., where it conducts its business in the aggregate for more than 183 days of a taxable year; and (2) conducts trust administration activities within the Commonwealth that include, in particular, material trust activities relating specifically to the trust or trusts whose tax liability is at issue."

(v) For nonresident trusts, income is taxed at the same rate and in the same manner as if the nonresident trust were a nonresident individual. Id. at §10(d). Nonresidents are taxed on the taxable income derived from gross income "from sources within the commonwealth[.]" Id. at §5A(a). This includes gross income derived from "the ownership of any interest in real or tangible personal property located within [Massachusetts]." Id.

(vi) Thus, if a nonresident trust can be moved to Massachusetts, and the trust receives no income from within Massachusetts, there will be no Massachusetts income tax imposed on the trust.

(e) *Colorado*:

(i) Colorado imposes an income tax on retained income and capital gains at 4.63% on trusts. C.R.S.A. §39-22-104(1.7). Colorado imposes a tax on a resident trust's federal taxable gross income (minus deductions). C.R.S.A. §39-22-401(1). For nonresident trusts, Colorado imposes a tax on the "ratio of the Colorado-source federal taxable income to the total federal taxable income," again subject to certain deductions. C.R.S.A. §39-22-403(1).

(ii) A Colorado resident trust is a trust administered in Colorado. C.R.S.A. §39-22-103(10). All other trusts are nonresident trusts. Id. A trust is administered in Colorado if the principal place of administration is in Colorado. C.R.S.A. §15-16-101. The principal place of administration can be designated by the trust instrument. Id. Otherwise, the principal place of administration is the "trustee's usual place of business [. . .] or at the trustee's residence if he has no such place of business." Id. If there is more than one trustee, the principal place of administration is the place of business of the corporate trustee or, if there is no corporate trustee, the business or residence of the individual trustee who is a professional fiduciary if there is only one trustee who is a professional fiduciary. Id. If there is no corporate trustee, and there is more than one individual trustee who is a professional fiduciary or there are no individual trustees who are professional fiduciaries, the principal place of administration is "the usual place of business or residence of any of the co-trustees as agreed upon by them." Id.

(f) *Kansas*:

(i) Kansas imposes an income tax on retained income and capital gains of up to 4.9% on trusts. K.S.A. §79-32,110. For nonresident trusts, Kansas imposes a tax on retained income and capital gains on Kansas-source income computed "as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income." Id.

(ii) Like Colorado, a Kansas resident trust is a trust administered in Kansas. K.S.A. §79-32,109. However, "a trust shall not be deemed to be administered in this state solely because it is subject to the jurisdiction of a district court within this state." Id.

(g) *Missouri:*

(i) Missouri imposes an income tax on retained income and capital gains of up to 6% on trusts. V.A.M.S. §143.011. For nonresident trusts, Missouri imposes a tax on retained income and capital gains from sources within Missouri. V.A.M.S. §143.381.

(ii) A testamentary trust is a Missouri resident trust in the taxable year in question if the testator was domiciled in Missouri at his or her death and at least one income beneficiary was a Missouri resident on the last day of the taxable year. V.A.M.S. §143.331(2).

(iii) An inter vivos trust is a Missouri resident trust in the taxable year in question if the settlor was a Missouri resident when the trust became irrevocable and at least one income beneficiary was a Missouri resident on the last day of the taxable year. V.A.M.S. §143.331(3).

(h) *New York*:

(i) New York will tax all retained income and capital gains on resident trusts and will only tax non-resident trusts on retained income and capital gains on property from sources within New York. A trust will be a New York resident trust if the settlor was domiciled in New York at the time the trust became irrevocable. N.Y. Tax §605(b)(3). However, New York also provides that a resident trust will not be subject to tax if: "(I) all the trustees are domiciled in a state other than New York; (II) the entire corpus of the trust, including real and tangible property, is located outside the state of New York; and (III) all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust." N.Y. Tax

§605(b)(3)(D)(i). Intangible property is considered to be located in New York if one or more of the trustees is domiciled in New York. N.Y. Tax §605(b)(3)(D)(ii).

(ii) Thus, if a nonresident trust can be moved to New York, and the trust receives no income from within New York, there will be no New York income tax imposed on the trust.

(iii) The New York State Department of Taxation and Finance considered the applicability of N.Y. Tax §605(3)(D) in an advisory opinion, TSB-A-04(7)I (November 12, 2004). The opinion concerned certain trusts created by John D. Rockefeller, Jr. Pursuant to the terms of the trusts, a committee was created to oversee the administration of the trusts. The committee was given such powers as the ability to direct the trustee to retain assets, to direct the trustee to approve mergers of corporations held by the trusts and to "direct the trustee to take or refrain from taking any action which the Committee deems it advisable for the Trustee to take or refrain from taking. All of the powers of the Trustee under the Trust Agreements are subject to the directions of the Committee." TSB-A-04(7)I at 7. The trustees argued that although the trusts had been New York resident trusts for New York income tax purposes, because the trustee was now domiciled in Delaware, the corpus of the trusts were located outside of New York, and the income and gains of the trusts were derived from sources outside of New York, the trusts had become non-resident trusts. Thus, the trustees argued that the trusts should not be taxed pursuant to N.Y. Tax §605(3)(D)(i). However, the Department of Taxation disagreed, stating that because of the "controlling power" of the committee over the trustee, and because several members of the committee were domiciled in New York, the Department of Taxation considered the members of the committee to be co-trustees. Thus, some trustees of the trusts were considered to be domiciled in New York, N.Y. Tax §605(3)(D)(i) did not apply, and the trusts were taxable as resident trusts.

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

(i) *Arizona:*

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

(ii) The "Arizona taxable income" for "resident trusts" is the taxable income computed according to the Internal Revenue Code and adjusted by the modifications in A.R.S. §43-1333. A.R.S. §43-1301(1).

(iii) The "Arizona taxable income" for "nonresident trusts" is the taxable income from sources within Arizona, computed according to the Internal Revenue Code and adjusted by the modifications in A.R.S. §43-1333. A.R.S. §43-1301(2).

(iv) A trust is a "resident trust" if at least one fiduciary of the trust is resident of Arizona. A.R.S. § 43-1301. A trust with a corporate fiduciary is a "resident trust" if the corporate fiduciary conducts the administration of the trust in Arizona. Id.

(v) A "nonresident trust" is a trust that does not meet the definition of a "resident trust." A.R.S. §43-1301(3).

(j) For an overview of the basis of income taxation of trusts in the fifty states and the District of Columbia, see Richard W.

Nenno, "Bases of State Income Taxation of Nongrantor Trusts," . https://actec.org/assets/1/6/Nenno_state_ nongrator_tax_servey.pdf (February 15, 2018).

C. Alluring Appeal of Another State's Laws.

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

2. The effect of a change of situs on applicable governing law is discussed below in Section VII below.

D. Convenience.

1. This is one of the "traditional" reasons for changing the situs of a trust. Often it is more convenient and efficient for a trust to be administered in one jurisdiction over another. However, a court may not consider convenience (or inconvenience), without more, sufficient to transfer the situs of a trust. See, e.g., In re: Harriet C. Sibley Trust, No. 293601, 2010 WL 4493553 (Mich. Ct. App. Nov. 9, 2010), discussed in more detail below under "Fiduciary Liability and Attorney Malpractice."

2. Factors that are typically taken into consideration include the location of (1) trustees; (2) beneficiaries; and (3) investment, legal and other advisors.

IV. HOW CAN SITUS BE CHANGED?

"'Please, then,' said Alice, 'how am I to get in?'

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

'I shall sit here,' the Footman remarked, 'till tomorrow—'

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

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

'How am I to get in?' asked Alice again, in a louder tone.

'ARE you to get in at all?' said the Footman. 'That's the first question, you know.'"

— Lewis Carroll, Alice's Adventures in Wonderland

A. "Pitching" and "Receiving" States.

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

2. Under Pennsylvania's UTA, as explained below, no court approval is needed to change situs from Pennsylvania provided that all qualified beneficiaries agree and the other requirements of the statute are fulfilled. In addition, no prior approval is needed from a Pennsylvania court as a "receiving" state if a trust's situs is moved to Pennsylvania from another state.

3. Although they were decided before Pennsylvania enacted the UTA, the following cases (discussed below in detail) include references to the "pitching" and "receiving" concepts, where Pennsylvania was the pitching state: Perelle Trust, 63 D.&C.2d 16, 23 Fid. Rep. 469 (O.C. Phila. 1973); Jadwin Trust, 45 D.&.C.2d 418, 18 Fid. Rep. 445 (O.C. Mont. 1968); Kerr Trust, 40 Pa. D.&.C.2d 415, 16 Fid. Rep. 485 (O.C. Chester 1966); Gundaker Estate, 29 Pa. D.&C.2d 101, 13 Fid. Rep. 111 (O.C.

Phila. 1962); Newbold Trust, 28 Pa. D.&C.2d 92, 12 Fid. Rep. 547 (O.C. Phila. 1962).

4. As described below, New Jersey seems to require that the "receiving" state approve the change of situs before it will approve a change of situs out of New Jersey.

5. As illustrated in the Rockefeller case, below, New York appears to require, at a minimum, permission from the "pitching" state.

B. Uniform Probate Code.[5]

1. UPC §7-305 provides that a trustee "is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management."

2. *Change of Registration*: If a trust is registered in one state pursuant to UPC §§ 7-101 and 7-102, registration in another state "is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this state." UPC §7-102.

3. *In the Trust Document*: UPC §7-305 provides that the trust document may set forth a mechanism to change the principal place of administration "unless compliance would be contrary to efficient administration or the purposes of the trust."

4. *With Court Approval*: UPC §7-305 provides that if "the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state."

5. *Without Court Approval*: The UPC does not expressly provide for transferring the situs of a trust without court approval. However, as referenced above, UPC §7-102 permits the trustee and all beneficiaries to release registration in the "pitching" state.

[5] As of the date of this outline, seventeen states have adopted some version of the UPC in some substantial form: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.

C. Uniform Trust Code.[6]

1. UTC §108(b) mimics UPC §7-305 and similarly provides that a trustee "is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries."

2. The UTC does not explicitly provide a mechanism for a court to change the principal place of administration of a trust, although UTC §108(c) does acknowledge that a court may do so.

3. UTC §108(c)-(f) provides that a trustee may transfer the principal place of administration of a trust without court approval if the trustee provides notice to all qualified beneficiaries of the proposed change and no qualified beneficiary objects to the change within 60 days of the notice.

4. Pursuant to UTC §108(d), notice to the qualified beneficiaries must include:

   (a) the name of the jurisdiction to which the principal place of administration is to be transferred;

   (b) the address and telephone number at the new location at which the trustee can be contacted;

   (c) an explanation of the reasons for the proposed transfer;

   (d) the date on which the proposed transfer is anticipated to occur; and

   (e) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

5. Pursuant to UTC §103(13), a qualified beneficiary is a beneficiary who:

   (a) is a distributee or permissible distributee of trust income or principal;

   (b) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees

[6] As of the date of this outline, Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

terminated on the relevant date (for instance, when the trust is to change situs) without causing the trust to terminate; or

(c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

D. Selected States.

1. *Pennsylvania*:

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

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

(b) UTA:

(i) Under 20 Pa. C.S. §7708(c), regardless of court approval, situs can be transferred to another jurisdiction only if:

(1) The trustee resides in or has its principal place of business in the proposed jurisdiction; or

(2) All or part of the trust administration occurs in the proposed jurisdiction; or

(3) One or more of the beneficiaries resides in the jurisdiction.

(ii) Notice requirement for transfers without court approval (20 Pa. C.S. §7708(d)): At least 60 days before the proposed transfer, all qualified beneficiaries must be notified of the proposed transfer together with certain information, including, for example:

(1) The reasons for the transfer;

(2) A statement that if the situs changes, venue will also change;

(3) Notice that all qualified beneficiaries must agree.

(iii) Without court approval: No court approval is necessary to transfer a trust's situs under §7708 provided that all qualified beneficiaries provide written consent. 20 Pa. C.S. §7708(e).

(iv) The definition of a qualified beneficiary under 20 Pa. C.S. §7703 is essentially identical to the definition under UTC §103(13).

(v) Court-directed/approved changes in situs: The court still has the ability to direct or approve a change in situs, pursuant to 20 Pa. C.S. §7708(g), as follows:

"A court having jurisdiction of a testamentary or inter vivos trust, on application of a trustee or of any party in interest, after such notice as the court shall direct and aided if necessary by the report of a master, and after accounting as the court shall require, may direct, notwithstanding any of the other provisions of this chapter, that the situs of the trust shall be changed to any other place within or without the Commonwealth if the court shall find the change necessary or desirable for the proper administration of the trust."

(vi) 20 Pa. C.S. §7708(g) retains the "necessary or desirable" requirement for court-directed changes in situs from prior law 20 Pa. C.S. §725. Interestingly, 20 Pa. C.S. §7708(g) deletes the language "after . . . such provision to insure the proper payment of all taxes to the Commonwealth and any political subdivision as the court shall require . . . ."

(vii) Inconsistencies between 20 Pa. C.S. §722 and 20 Pa. C.S. §§ 7708(c)(5), 7708(e) and 7714:

(1) Although the enactment of the UTA invalidated 20 Pa. C.S. §§ 723 - 725, §722, entitled "Venue of trust estates," remains unchanged. 20 Pa. C.S. §722 reads as follows:

"When a Pennsylvania court has jurisdiction of any trust, testamentary or inter vivos, except as otherwise provided by the law, the venue for all purposes shall be in the county where at the time being is the situs of the trust. The situs of the trust shall remain in the county of the court which first assumed jurisdiction of the trust, *unless and until such court shall order a change of situs under the provisions of this chapter*." (Emphasis added.)

(2) According to this language, in order to change a trust's venue, a court order changing situs is needed. But because 20 Pa. C.S. §§ 723 - 725 are no longer valid, there are no provisions in "this chapter" (subchapter 7) to allow for a change of situs.

(3) Mirroring 20 Pa. C.S. §722, 20 Pa. C.S. §7714(a) states that "venue for a judicial proceeding involving a trust is in the county of this Commonwealth in which the trust's situs is located. . . ." Given the fact that 20 Pa. C.S. §7708(e) provides for a change in situs without court approval if all qualified beneficiaries agree, and that before agreeing, all qualified beneficiaries must be notified that, inter alia, venue will change to the county where the new situs is located (20 Pa. C.S. §7708(d)(5)), it appears that 20 Pa. C.S. §722 may simply need to be viewed as revoked due to inconsistency.

(viii) Change of trustee. Often a change of situs involves a change of trustee, which is acknowledged in 20 Pa. C.S. §7708(f).

(c) Pennsylvania Case Law and Other Authority.

(i) There are only two reported cases in Pennsylvania under the UTA regarding change of situs and venue: *Warriner Trusts [No. 1]*, 4 Fid. Rep. 3d 254 (O.C. Susq. 2014) and *Warriner Trusts [No.2]*, 4 Fid. Rep. 3d 317 (O.C. Mont. 2014). Because *Warriner Trusts* concerned an intra-state change of situs, the issue was really one of venue – which county had jurisdiction over the trust?

(1) *Warriner Trusts [No. 1]*

a. In 2011, the situs and venue of one of three trusts under the will of Stella Warriner were changed from Susquehanna County, Pennsylvania, to Montgomery County, Pennsylvania with the consent of all trustees and beneficiaries, and the Montgomery County Orphans' Court accepted jurisdiction over that trust.

b. In 2014, the individual co-trustee and all beneficiaries of a trust signed a nonjudicial settlement agreement under 20 Pa. C.S. §7710.1(d)(5), which permits a nonjudicial change of situs with the consent of all trustees and beneficiaries, to change the situs and venue of the Montgomery County trust back to Susquehanna County, Pennsylvania. The corporate co-trustee did not sign the agreement.

c. The individual co-trustee and the beneficiaries thereafter filed a petition in the Susquehanna County Orphans' Court to accept jurisdiction over that trust. The corporate co-trustee objected to the change of situs on grounds that there had not been a proper nonjudicial change of situs because 20 Pa. C.S. §7710.1 requires <u>all</u> trustees and beneficiaries to consent, and the Bank had not consented. Citing the statutes with respect to situs and nonjudicial settlement agreements (20 Pa. C.S. §§ 7708, 7710.1), the court concluded that the situs change required the corporate co-trustee's approval

to change situs under 20 Pa. C.S. §7710.1(d)(5), and, therefore, determined that the change of situs was ineffective and that Montgomery County was the proper forum to consider the request to change situs.

(2) Warriner Trusts [No. 2]

a. Following the Susquehanna Orphans' Court's refusal to accept jurisdiction over the Montgomery County trust, the corporate trustee filed a petition with the Montgomery County Orphans' Court to confirm the Montgomery County situs and asking that court to retain jurisdiction.

b. The individual co-trustee, who was also a beneficiary and had the consent of all other beneficiaries, filed a response and counter-petition in which he requested that situs be transferred to Susquehanna County. The court recounted the procedural history, including the 2011 transfer from Susquehanna County to Montgomery County with the consent of both trustees and the beneficiaries.

c. The court cited 20 Pa. C.S. §7708(g), which permits a court to change situs upon a finding that the change is "necessary or desirable for the proper administration of the trust." The court further considered that five other family trusts had a Susquehanna County situs, the trust at issue owned real estate in Susquehanna County, a proposed trust modification before the Susquehanna County court could require interpretation of the trust instrument, and all parties in interest, other than the corporate trustee, consented to the change. Under those circumstances, the court approved the situs change because it was desirable for the proper administration of the trust, and would serve judicial economy.

(ii) Certain reported cases under pre-UTA law are also of interest and would likely have application even now, particularly if there is opposition to the situs change and court approval is necessary. Ease of changing situs under pre-UTA law can generally be divided into three categories (from easiest to most difficult): (1) when the change is provided for in the trust document, (2) when there are no adverse parties to the change and (3) when there is a party who does not agree to the change.

(iii) *Provision in trust permitting change of situs*. Under pre-UTA law, if the trust document had a provision permitting a change of situs, Pennsylvania courts adhered to the "desirable" requirement under §725 (now revoked and replaced by UTA provisions) and were fairly liberal in granting a change. For example, in Kerr Trust, 40 Pa. D.&.C.2d 415, 16 Fid. Rep. 485 (O.C. Chester 1966), the trust included a provision which essentially permitted the beneficiaries to change the trust situs: the provision stated that if the beneficiaries of over half of the income resided in a state other than the state in which the corporate trustee was located, the beneficiaries could replace the corporate trustee with another corporate trustee. The petitioner was a resident of Oregon and sought to have the court approve the change of situs to Oregon with an Oregon based corporate trustee based on the terms of the trust. Given the facts and because the request was permitted by the terms of the trust, the court found the change of situs "desirable" and granted the change. Interestingly, the trust also required that the successor corporate trustee be "trustee of individual trusts in excess of ... $250,000,000," but apparently there was no corporate trustee in Oregon that would have qualified. The court waived that requirement.

(iv) *No adverse parties*. If the governing instrument does not have a provision permitting a change of situs, then under pre-UTA law the Pennsylvania courts were nevertheless liberal in granting a change of situs if there was no adverse party to the petition. Where both the trustees and beneficiaries are out of state, the court was likely to grant a change of situs based on the grounds that change

was "desirable." See, e.g., Brown Estate, 12 Pa. D.&C.2d 227, 7 Fid. Rep. 559 (O.C. Mont. 1957) (moving situs of testamentary trust to California).

(1) In Perelle Trust, 63 D.&C.2d 16, 23 Fid. Rep. 469 (O.C. Phila. 1973), the court approved the change in situs to California with the consent of all parties, including the guardian and trustee ad litem on the basis that the transfer was desirable for the proper administration of the trust. The court also approved the appointment of a California corporate trustee in place of the Pennsylvania corporate trustee, which resigned. Most of the beneficiaries resided in or near California. The transfer was to become effective upon either the California corporate trustee's consent to act and its qualification to act as a trustee under California law, or an exemplified copy of its appointment as co-trustee by the California court. Finally, the court noted that "[i]t is understood that the change in situs of the trust will have no effect on the governing law clause in the deed which requires that Pennsylvania law be applied to the operation of the trust."

(2) In Newbold Trust, 28 Pa. D.&C.2d 92, 12 Fid. Rep. 547 (O.C. Phila. 1962), the court approved moving situs of the trust to Connecticut, where settlor-decedent had resided at death, where the son/co-trustee/life tenant and remaindermen lived, and where it would be "more convenient" and "desirable." All parties consented to the move, including the guardian ad litem. The court also noted that the trustees had filed their acceptance of trust with the Connecticut Probate Court, which had approved petitioners as trustees of this trust appointed by the settlor-decedent. The fact of the Connecticut court's involvement seemed to give the court "comfort" that the trust would be overseen in a meaningful way: "The difficulties encountered by the official examiners appointed by the court in

making examination of trust assets in the hands of out-of-state trustees, especially individual trustees, makes it desirable from an administrative standpoint to remove the situs to the court which has assumed jurisdiction over the trustees." NOTE: In terms of the "now what" issues addressed below, the court noted that "[w]hile it is conceivable that the trust may later come back to this jurisdiction if it should turn out that Stephen (son/primary beneficiary) and his issue do not survive the termination of the trust, the likelihood thereof is too remote to prevent the removal of the situs at this time."

(3) In Gundaker Estate, 29 Pa. D.&C.2d 101, 13 Fid. Rep. 111 (O.C. Phila. 1962), the court granted a change of situs of this testamentary trust despite concerns that the proposed new situs, Ohio, might not protect the spendthrift provision as vigorously as Pennsylvania would. Because the testator himself named an Ohio trust company as trustee, the court inferred the testator's consent to a change of situs to Ohio. The court noted that the relevant Ohio Probate Court had assumed jurisdiction over the trust and the Ohio corporate trustee, and that the corporate trustee had entered security.

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

seeking to have the court compel the trustee to proceed with the change of situs) the court would undoubtedly look more closely at whether or not the change is "necessary or desirable for the proper administration of the trust."

(1) In Black Estate, settlor petitioned the court to either change situs of her inter vivos trust to Florida or terminate the trust, and the Pennsylvania corporate trustee opposed the petition. Settlor had moved from Pennsylvania to Florida, had a good relationship with a Florida corporate trustee which was already handling her other financial affairs and was dissatisfied with the Pennsylvania corporate trustee "because they didn't consult her about the administration of the trust, and just [sent] her papers to sign instead." The courted noted that "[i]n all but two of the cases in which the courts have been called upon to order a change of situs, all of the interested parties have agreed that the change is 'necessary or desirable.'" The court involved granted the petition for change of situs in one of the two contested cases [Carr Estate], and denied it in the other [Parriott Trust]." In denying the petition, the court noted that because the change of situs by necessity required the removal of a trustee, the party seeking to change situs must "present clear and convincing evidence that change of situs is necessary *and* desirable in order to meet its burden of proof," and settlor did not meet her burden. 7 Pa. D.&C.4th at 230, 10 Fid. Rep. 2d at 344 (emphasis added).

(2) In Parriott Trust, 48 Pa. D.&C.2d 597, 19 Fid. Rep. 596 (O.C. Allegh. 1969), the court refused to approve a change in situs from Pennsylvania to Oklahoma. The trust was created by settlor for her own benefit and would be paid to her estate upon her death. The Pennsylvania corporate trustee opposed the petition. Settlor lived in Oklahoma, had all her other affairs administered in

Oklahoma, and the trust assets would be administered as part of her Oklahoma estate upon her death. It appears the settlor originally chose Pennsylvania as the situs only because of her (now deceased) husband's Pennsylvania business connections. The court noted that the settlor did not supply "any reason why the trust cannot be continued to be properly administered in its present situs [and] … that the petition, as filed, is bare of any allegation that the trust has been improperly administered [and settlor had not objected for the past ten years]," and stated that "such a change shall not be made to satisfy the mere whim or caprice of any party in interest … [t]he change of situs of the trust is not a matter to be taken lightly but one which must be carefully considered by the court and all aspects of such a change carefully reviewed." The court held that the move was neither necessary nor desirable, and in fact that the laws of Oklahoma had "nothing to add."

(3) In Parriott Trust, the court discussed an unreported Allegheny County case, Estate of Clarence P. Byrnes, No. 518 of 1955, decided in 1959. The facts were quite similar to those in Parriott, and the court denied the change of situs to California where the settlor-beneficiary lived with her family/remaindermen. The interesting element is that in Byrnes the petitioner-settlor provided a laundry list of complaints about the Pennsylvania corporate trustee to support her request for change of situs, including "that many of the men employed by the … corporate trustee in whom settlor had had confidence were no longer employed there; that communication with the trustee's representatives was difficult; and that her children, as eventual corpus beneficiaries, could become acquainted with investments and procedures if a Los Angeles corporate trustee was appointed." 48 Pa. D.&C.2d at 603, 19 Fid. Rep. at 602-603.

This litany of complaints looks quite "modern." NOTE: One sees from this case and others that a change of situs might really be a trustee removal action in disguise. In those cases the Pennsylvania courts, at least under prior law, were not inclined to permit the petitioner to accomplish through the "back door" what they could not accomplish directly -- that is, removal of the trustee without cause via a change of situs. Whether or not that would still be the case given that trustee consent/approval is not required if all qualified beneficiaries consent, remains to be seen.

(4) A change in situs from Pennsylvania to North Carolina was granted over the objections of the corporate trustee in Carr Estate, 5 Pa. D.& C.3d 359, 27 Fid. Rep. 650 (O.C. Phila. 1977). Similar to Kerr Trust, supra, the trust instrument permitted the beneficiaries to remove and replace the corporate trustee, and the beneficiaries had already removed the Pennsylvania corporate trustee and replaced it with a North Carolina corporate trustee. Despite this, the (removed) Pennsylvania corporate trustee objected to the change of situs. None of the individual co-trustees or any of the beneficiaries were residents of Pennsylvania, and two-thirds of the assets were invested in North Carolina based assets. The court held that the beneficiaries' power in the instrument to change the corporate trustee implied that the settlor intended that the situs of the trust could also be changed. In holding that the situs could be moved, the court rejected the argument that the provision in the trust stating that the laws of Pennsylvania were at all times to govern the construction, validity and effect of the deed of trust and that the administration of the trust prohibited a change of situs. The court found that similar governing law provisions in other trusts did not preclude a change of situs. See Perelle Trust, supra, and Jadwin Trust, 45 D.&.C.2d

418, 18 Fid. Rep. 445 (O.C. Mont. 1968) ("The language . . . regardless of title, simply applies Pennsylvania law to the operation of the trust wherever it is situated, and does not therefore prevent *per se* the requested change of situs"). Interestingly, although the court indicated that "change of circumstances" was a dubious basis for changing situs, it noted that the change from a Pennsylvania corporate trustee to a North Carolina corporate trustee, and the change in investments from Pennsylvania municipal bonds to North Carolina municipal bonds, were in fact "altered circumstances." Note that under the UTA, §7766(b), pertaining to removal of a trustee, "change of circumstances" is one element in determining if a trustee can be removed.

(5) In Jadwin Trust, 45 D.&.C.2d 418, 18 Fid. Rep. 445 (O.C. Mont. 1968), the court approved the change in situs from Pennsylvania to Illinois where all of the trustees (all individuals) and beneficiaries resided and all the trust assets were located. The guardian and trustee ad litem raised objections to the change of situs because the trust stated that its situs was in Pennsylvania and he believed (armed with an opinion from Illinois counsel) that an Illinois court would not take jurisdiction of the trust due to this provision. As noted above, the court determined that the situs and governing law provisions of the trust did not *per se* preclude a change of situs. The court relied on Kerr, *supra*, for the proposition that it is sufficient to have a corporate trustee in Illinois agree to serve, and that there was no need to have a court in Illinois take jurisdiction because the Pennsylvania court would continue to exercise its jurisdiction over the trust until another court took jurisdiction.

(vi) Other cases of interest regarding change of situs include: Thatcher Trust, 19 Fid. Rep. 531 (O.C. Allegh. 1969), annotated in Fiduciary Review,

October 1969; Katz Trust, 27 Fid. Rep. 449 (O.C. Phila. 1977), annotated in Fiduciary Review, September 1977; Rice Trust, 6 Fid. Rep. 225 (O.C. Mont. 1956); Tyler Trust, 1 Fid. Rep. 159 (O.C. Phila. 1951), annotated in Fiduciary Review, April 1951; In re Cronin, 192 A. 397 (Pa. 1937).

2. *Delaware*:

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

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

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

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

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

the other jurisdiction authorizes changing the situs of the trust or the law governing the administration of the trust;

(3) Whether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change of situs to Delaware for approval of the transfer of situs of the trust to Delaware, and the status of the application, or if no application was made, why such approval need not be sought;

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

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

(c) Delaware's nonjudicial settlement statute, 12 Del. C. §3338, provides that "interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust[,]" including the "transfer of a trust's principal place of administration. "Interested Persons" means "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the Court of Chancery."

(d) See Richard W. Nenno, Delaware Trusts 2017, §§ 35 &50 (Wilmington Trust 2017).

3. ***[ADD NEW JERSEY UTC LAW]****New Jersey*: New Jersey change of situs law is based on common law. It appears that any change of situs from New Jersey requires court approval.

(a) In deciding whether to approve the change of situs, and in the absence of specific direction in the trust, New Jersey courts focus on whether the new situs will provide the same level of supervision over the trust as New Jersey. For

example, in Martin v. Haycock, 123 A.2d 223 (N.J. 1956), the trustees petitioned the court to change the situs of a charitable trust from New Jersey to Ireland. The court stated New Jersey courts should, "before ordering transfer of the funds of the foreign charity to the Locus [and thus releasing jurisdiction over the trust], be satisfied as to the qualifications and competency of the foreign agencies or trustees to discharge and administer the trust as the testator planned it." Id. at 227.

(b) Similarly, the New Jersey Superior Court in In re: Henderson's Will, 123 A.2d 78 (N.J. Super. 1956), approved a change of situs of a New Jersey trust to California where the trustees, beneficiaries and remaindermen were all California residents and where the California Superior Court had already approved the transfer. Both Henderson and Martin imply that approval from the "receiving state" is required before New Jersey, as the "pitching state," will approve the change.

4. *New York*:

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

The court noted that it would permit a change of situs to a new state either if a beneficiary resides in the new state or because administration of the trust had become difficult due to the distance between the place of business of the corporate trustee and the residence of the individual trustee. In this case, no beneficiary resided in Delaware, and the court determined that "the fact that the successor trustee is

located in Delaware does not by itself support a change in the situs of the trust any more than the individual trustee's residence in Connecticut would have called for a transfer to that state [because no administrative difficulties would be relieved]." Id. at 556. Furthermore, there was no income tax reason to approve a change of situs because, by changing the corporate trustee to the Delaware office, New York income tax was already eliminated. Thus, the court denied the change of situs request. The court concluded: "this decision puts future applicants on notice that, where the desired tax savings can be achieved by a change of trustee, a change of situs will not be allowed unless it would result in some benefit to the trust apart from the tax considerations themselves." Id. at 556-557.

(b) Question: We note that although in Rockefeller the court described the "change" of corporate trustee as the "resignation of the New York corporate trustee and the appointment of its Delaware affiliate" -- the "change" being from JP Morgan Chase Bank to its Delaware affiliate, JP Morgan Trust Company of Delaware -- is the resignation and appointment of the affiliate necessary, or is it sufficient to simply shift the administration of the trust from New York to Delaware and assert that the assets were "shifted" to Delaware?

5. *Missouri*: Missouri's change of situs statute, V.A.M.S. §456.1-108, is essentially identical to UTC §108, although Missouri has not enacted UTC §108(b).

6. *Kansas*: Kansas' change of situs statute, K.S.A. §58a-108, is essentially identical to UTC §108. Kansas has adopted UTC §108(b), although it has also added that "[i]n determining the appropriate place for the administration of the trust, consideration shall be given to the designation of the settlor, the purposes of the trust, the interests of the beneficiaries and the manner and costs of trust administration." K.S.A. §58a-108(b).

7. *Arizona:*

(a) Arizona permits a trustee to change of the situs of a trust, without court approval, under substantially identical terms as UTC §108. A.R.S. §14-10108.

(b) Arizona provides that in connection with a change of situs, the trustee may change the applicable law governing the trust. A.R.S. §14-10108(C).

(c) Arizona also permits "interested persons" to change the trust situs, without court approval, by entering into a nonjudicial settlement agreement. A.R.S. §14-10111.

(d) An "interested person" is defined as including "any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons. Interested person, as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding." A.R.S. §14-1201.

E. Role of State Tax Authorities in Changing Situs.

1. Separate notice and/or final return? Can the state of origin still subject the trust to its state income tax even if the trust is moved? How sticky is your state's fiduciary income tax? What's the buzz?

2. Constitutionality of tax – Commerce Clause and Due Process Clause:

(a) In order to survive a challenge under the Commerce Clause of the U.S. Constitution (Article I, Section 8), the state's tax must be "applied to an activity with a substantial nexus with the taxing State, [it must be] fairly apportioned, [it must] not discriminate against interstate commerce, and [it must be] fairly related to the services provided by the State. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). All four prongs of the test must be satisfied; otherwise the tax is unconstitutional.

(b) The Due Process Clause of the Fourteenth Amendment does not allow a state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, §1.

(i) The Due Process Clause requires "some definite link, some minimum connection" between the state and the property, person or transaction it seeks to tax. Allied Signal, Inc. v. Director, Division of Taxation, 504 US 768 (1992). This "definite link"

requirement is "guided by the basic principle that a state's power to tax an individual's ... activities is justified by the protections, opportunities and benefits the state confers on those activities." Id.

(ii) To ensure the constitutionality of a state's taxation of interstate commerce, there must be (1) a "minimal connection between interstate activities and the taxing State…. [and (2)] the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978) (citing Norfolk & Western R. Co. v. State Tax Comm., 390 U.S. 317, 325 (1968)). See also Quill Corp. v. North Dakota, 504 US 298(1992); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)

3. In both Pennoyer v. Taxation Div. Director, 5 N.J. Tax 386 (N.J. T.C. 1983), overruled in part on other grounds, Heico Corp. v. Director Div. of Taxation, 20 N.J. Tax 106 (N.J. T.C. 2002), and Potter v. Taxation Div. Director, 5 N.J. Tax 399 (N.J. T.C. 1983), overruled in part on other grounds, Heico Corp. v. Director Div. of Taxation, 20 N.J. Tax 106 (N.J. T.C. 2002), the New Jersey Tax Court disallowed the imposition of income tax on retained income and capital gains of resident trusts because no beneficiary was a resident of New Jersey, the assets were not held in New Jersey, and the trustees were not residents of New Jersey. Thus, New Jersey did not maintain sufficient minimum contacts to justify the imposition of income tax despite each trust's status as a resident trust. See also Residuary Trust A (Kassner) v. Dir., Div. of Taxation, Dep't of Treasury, 28 N.J. Tax 541 (N.J. Super. Ct. App. Div. 2015).

4. In Blue v. Michigan Department of Treasury, 462 N.W. 2d 762 (Mich. Ct. App. 1990), the Court of Appeals of Michigan disallowed the imposition of income tax on retained income and capital gains of a resident trust because no beneficiary was a resident of Michigan, no trustee of the trust was a resident of Michigan and no property was located in Michigan, with the exception of one non-income-producing parcel of real estate. The court considered six factors to determine whether there were sufficient minimum contacts to justify the continued imposition of Michigan income tax on retained income and capital gains: (1) the domicile of the settlor (Michigan), (2) the state in which the trust is created (Michigan), (3) the location of the trust property (Florida,

with the exception of one non-income-producing parcel of real estate), (4) the domicile of the beneficiaries (Florida), (5) the domicile of the trustees (Florida), and (6) the location of the administration of the trust (Florida). Although the answer to the first two factors was "Michigan," the court concluded that these factors "require the ongoing protection for benefits of [Michigan] state law only to the extent that one or more of the other four factors is present." Because the answers to factors 3 through 6 were all Florida, the court determined that there were not sufficient contacts to justify the continued imposition of Michigan income tax on retained income and capital gains notwithstanding the trust's status as a "resident trust."

5. Fielding v. Commissioner of Revenue, 916 N.W.2d 323 (Minn. 2018), aff'g 2017 WL 2484593 (Minn. Tax Ct. May 31, 2017), concerned the constitutionality of Minnesota's fiduciary income tax as it applies to resident trusts created after December 31, 1995.

   (a) Minnesota has two sets of criteria for determining whether a non-grantor trust is a "resident trust" for Minnesota fiduciary income tax purposes.[7]

      (i) For non-grantor trusts that became irrevocable before December 31, 1995, a trust is a resident trust if two or more of the following conditions are satisfied: (1) a majority of discretionary decisions of the trustees with respect to investments are made in Minnesota; (2) a majority of discretionary decisions of the trustees with respect to distributions of income and principal are made in Minnesota; and (3) the books and records of the trust are located in Minnesota. Minn. Stat. §290.01, subd. 7b(b). This is referred to in Fielding as the "Minnesota-nexus rule."

      (ii) For non-grantor trusts that became irrevocable after December 31, 1995 or are first administered in Minnesota after December 31, 1995, a testamentary trust is a resident trust if the testator was domiciled in Minnesota at the time of death and an inter vivos trust is a resident trust if the grantor was domiciled in Minnesota at the time the trust became

[7] We have been advised by Walter A. Pickhardt, Esquire, at Faegre Baker Daniels, LLP, who represented the trustees, that the reason for the law change was that the "Minnesota-nexus rule" was too-easily manipulated by transferring administration to another state. Furthermore, the legislature wanted to encourage the use of Minnesota trustees and to encourage trusts to be administered and "sited" in Minnesota.

irrevocable. Minn. Stat. §290.01, subd. 7b(a). This is referred to in Fielding as the "grantor-domicile rule."

(b) In Fielding, a Minnesota grantor created four irrevocable grantor trusts in 2009, one for the benefit of each of his children. After he created the trusts, the grantor transferred shares of nonvoting common stock of a Minnesota S corporation to the trusts. For two years, the trusts were "grantor" trusts, and therefore all income and capital gains were taxable to the grantor. Effective in 2012, the trusts ceased to be grantor trusts (because the grantor released his power to exchange trust assets), and the trusts became "resident trusts" under Minnesota law pursuant to Minnesota's grantor-domicile rule.

(c) The trusts never had a Minnesota trustee at any time. In the tax year in question (2014), all of the trusts' records were maintained out of state. No administration for any of the trusts occurred in Minnesota. The trusts had never been involved in any legal action in Minnesota (it is not clear whether the governing instruments for the trusts stated where the trusts' situs was located, although the governing instruments provided that the trusts were governed by Minnesota law). For three of the trusts, the primary beneficiary was not domiciled in Minnesota in the year in question. The primary beneficiary of the fourth trust was domiciled in Minnesota in the year in question.

(d) In 2014, the trusts sold the Minnesota S Corporation stock, realizing gain. Each trust filed a 2014 Minnesota fiduciary income tax return taking the position that it was a "resident trust," paid the tax under protest and included a statement that the statutory definition of a "resident trust" was unconstitutional. Each trust then filed an amended return excluding any gain on the sale on the basis that the stock was intangible personal property located outside of Minnesota and requested a refund. The Minnesota Department of Revenue denied the refund, and the matter came before the Minnesota Tax Court.

(e) The issue before the Minnesota Tax Court was whether Minnesota's definition of "resident trust" as applied to the trusts was unconstitutional. The trusts challenged the constitutionality of the statute on Due Process and Commerce Clause grounds, although the Tax Court only analyzed the Due Process claim.

(f) The Tax Court presented the issue as whether "for due process purposes, the domicile of the grantor alone is a sufficient connection with Minnesota to justify taxing the Trusts as residents (that is, on a base that includes intangible personal property not related to Minnesota). We agree with the Trusts, in other words, that the issue is not simply whether the State has personal jurisdiction to tax the Trusts."

(g) In determining which factors to consider in its Due Process analysis, the Tax Court considered the two separate definitions of "resident trust" depending on the date of creation of the trust – the "Minnesota-nexus rule" for trusts created prior to December 31, 1995 and the "grantor-domicile rule" for trusts created after December 31, 1995. The Tax Court held that "it is clear that the Legislature intended Minnesota's two definitions of 'resident trust' to be mutually exclusive, and to apply to two discrete categories of trusts. Accordingly, we conclude that the sole factor upon with the Legislature intended to base residency for purposes of the grantor-domicile rule is the domicile of the grantor at the time a trust became irrevocable" and therefore the other "nexus" factors are irrelevant. "Consequently, when analyzing the Trusts' as-applied challenge to the grantor-domicile rule, we will ask whether the domicile of the grantor – standing alone – is a sufficient connection upon which to justify taxing the Trusts as Minnesota residents."

(h) The Tax Court concluded "that the domicile of the grantor at the time a trust became irrevocable – standing alone – is not a sufficient basis to justify the resident tax treatment of an inter vivos trust. We have previously ruled that the sole state connection we may consider when evaluating residency under [the grantor-domicile rule] is the domicile of the grantor at the time the inter vivos trust became irrevocable. . . . Consequently, we conclude that [the grantor-domicile rule] as applied to the Trusts for tax year 2014, violates the due process provisions of the Minnesota and the United States constitutions."

(i) On appeal, the Minnesota Supreme Court affirmed the Tax Court's holding.

(j) As an initial matter, however, in analyzing whether Minnesota's resident trust tax statute violated the Due Process Clause, the Supreme Court concluded that it must

"look beyond the statutory definition that identifies who is subject to a tax in order to evaluate the relationship between the income taxed and the benefits provided by the state." That is, regardless of the definition of resident trust in the statute, if there are sufficient contacts to tax the trust as a resident trust, the tax will be upheld as constitutional as applied to that trust.

(k) The Commissioner of Revenue argued that there were sufficient contacts to tax the trust as a resident trust, including:

(i) The settlor was domiciled in Minnesota when the trusts were created and remains domiciled in Minnesota;

(ii) The trusts were drafted by a Minnesota attorney and are to be interpreted pursuant to Minnesota law;

(iii) Until late 2014, the trusts' governing instruments were kept in Minnesota;

(iv) The primary beneficiary of one of the trusts was domiciled in Minnesota in the tax year in question (2014); and

(v) The trusts' primary asset and source of income in 2014 was Minnesota S Corporation stock for a company that was incorporated in Minnesota and headquartered in Minnesota.

(l) The trusts countered that for the tax year in question, no trustee was a Minnesota resident, the trusts were not administered in Minnesota, the records of the trusts were not maintained in Minnesota, some of the income was derived from investments outside of Minnesota and three of the four beneficiaries reside outside Minnesota.

(m) The Supreme Court concluded that the "contacts on which the Commissioner relies are either irrelevant or too attenuated to establish that Minnesota's tax on the Trusts' income from all sources complies with due process requirements[,]" as follows:

(i) The grantor's connections to Minnesota "are not relevant to the relationship between the *Trusts'* income that Minnesota seeks to tax and the protection and benefits Minnesota provided to the

Trusts' activities that generated that income. The relevant connections are Minnesota's connection to the trustee, not the connection to the grantor who established the trust years earlier." (Emphasis in original.)

(ii) The use of a Minnesota law firm to draft the documents is irrelevant; nothing in the record established that the law firm represented the trustees "in connection with the activities that led to the income that the State seeks to tax, let alone during the tax year at issue."

(iii) The trusts did not own any physical property in Minnesota. Although the trusts owned stock in a Minnesota S corporation (which held physical property in Minnesota), "the intangible property that generated the Trusts' income was *stock* in [the corporation] and funds held in investment accounts. These intangible assets were held outside of Minnesota, and thus do not serve as a relevant or legally significant connection with the State." (Emphasis in original.)

(iv) Any pre-2014 contacts were not relevant because the tax must satisfy the Due Process clause for the tax year at issue. The Supreme Court also noted that "allowing the State to pick and choose among historical facts unrelated to the tax year at issue is unworkable. This ad hoc approach could force taxpayers to challenge tax liability annually until a court determines that the past contacts have been sufficiently decayed such that they are no longer sufficient to support taxation as a resident. Nor can we see any reasonable means of determining when the decay will be sufficient."

(v) The trustees had "almost no contact with Minnesota during the applicable tax year. All trust administration activities by the trustees occurred in states other than Minnesota." No trustee travelled to Minnesota for any purposes related to the trusts in that year (and one trustee never travelled to Minnesota during her time as a trustee).

(vi) The choice of Minnesota law as the governing law for the trusts was also not a sufficient contact. "We

will not demand that every party who chooses to look to Minnesota law – not necessarily to invoke the jurisdiction of Minnesota's courts – must pay resident income tax for the privilege. . . . [U]nlike cases in other states that considered testamentary trusts, the *inter vivos* trusts at issue here have not been probated in Minnesota's courts and have no existing relationship to the courts distinct from that of the trustee and trust assets." (Emphasis in original.)

(vii) Thus, the Supreme Court concluded that the "State lacks sufficient contacts with the Trusts to support taxation of the Trusts' entire income as residents consistent with due process. The State cannot fairly ask the Trusts to pay taxes as residents in return for the existence of Minnesota law and the physical storage of trust documents in Minnesota. Attributing all income, regardless of source, to Minnesota for tax purposes would not bear a rational relationship with the limited benefits received by the Trusts from Minnesota during the tax year at issue. We therefore hold that [Minnesota's resident trust taxation statute] is unconstitutional as applied to the Trusts."

(n) The Minnesota Commissioner of Revenue filed a petition for writ of certiorari with the United States Supreme Court. That petition is currently pending.

6. The North Carolina Court of Appeals considered the constitutionality of that state's resident trust statute in Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue, 814 S.E.2d 43 (N.C. 2018). North Carolina determines whether a trust is a resident trust based solely on whether there is a North Carolina non-contingent beneficiary. In Kaestner, the trust was created by a New York resident and had New York trustees. The discretionary beneficiaries were all North Carolina residents, which qualified the trust as a resident trust for North Carolina fiduciary income tax purposes. The North Carolina Supreme Court, affirming the North Carolina Court of Appeals and North Carolina Business Court, held that "[w]hen, as here, the income of a foreign trust is subject to taxation solely based on its beneficiaries' availing themselves of the benefits of our economy and the protections afforded by our laws, those guarantees are violated" because there were not sufficient minimum contacts to satisfy the Due Process Clause Thus, the North Carolina Supreme Court held that North

Carolina's resident trust statute was unconstitutional as it applied to the trust. On January 11, 2019, the United States Supreme Court granted certiorari upon petition by the North Carolina Department of Revenue and will hear the matter on appeal.

7. In Linn v. Dep't of Revenue, 2 N.E.3d 1203 (Ill. App. Ct. 2013), an Illinois resident created an irrevocable trust and named an Illinois resident as the initial trustee. However, in the tax year in question, none of the beneficiaries, trustee or trust protector were Illinois residents, no administration took place in Illinois and no assets were located in Illinois. The Illinois Appellate Court held that Illinois's attempt to continue to tax the trust as a resident trust (which determines a resident trust based on the residence of the settlor) violated the Due Process Clause.

8. In Chase Manhattan Bank v. Gavin, 733 A.2d 782 (Conn. 1999), the Connecticut Supreme Court analyzed whether Connecticut could tax a number of different trusts.

   (a) Testamentary trusts. The court noted that testamentary trusts created in Connecticut (which has a definition of a resident trust similar to Pennsylvania) avail themselves of Connecticut law on the grounds that Connecticut law determines if the decedent's will, and therefore the testamentary trust, is valid, and that Connecticut laws "assure the continued existence of the trusts as mechanisms for the disposition of the testators' property according to the terms of the trusts as provided by the respective wills." Gavin, 733 A.2d at 795. Even though the trustees, trust assets, and beneficiaries were all out of state, the court found a minimum connection by virtue of validating the will and continuing to oversee the trust's management: "the viability of the trust as a legal entity is inextricably intertwined with the benefits and opportunities provided by the legal and judicial systems of Connecticut…." Id. at 799.

   (b) Inter vivos/non-testamentary trusts. The situation is different in the case of an inter vivos trust. In Gavin, sufficient connections were found because the current beneficiary was a Connecticut resident and therefore received the "protection and benefits of its laws" even though the connection is "more attenuated" than in the case of the testamentary trust. Gavin, 733 A.2d at 801-802. Query if Connecticut would find sufficient contacts to tax an inter vivos trust if there was no resident beneficiary

given that the court described the connection as "attenuated" when there was only one resident beneficiary.

9. Similarly, in D.C. v. Chase Manhattan Bank, 689 A.2d 539 (D.C. App. 1997), the court upheld as constitutional the imposition by the District of Columbia of fiduciary income tax on a testamentary trust created by a D.C. resident decedent even though the trustee, assets and beneficiaries were all located elsewhere because, by continuing to supervise the administration of the trust, D.C. maintained the necessary minimal contacts.

10. Based on Gavin and D.C. v. Chase, a state could theoretically take the position that it could continue to tax the income generated by resident testamentary trusts under the will of that state even if there were no trust assets, trustees or beneficiaries located in the state.

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

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

    (a) *Private Letter Ruling*. Pennsylvania issued a private letter ruling, PIT 01-040 (July 27, 2001), in which it allowed a trust to cease being subject to Pennsylvania income tax. In that case the trust was created under the will of an individual who died a resident of Pennsylvania in 1925. The trustee was not a Pennsylvania resident, the trust was administered outside of Pennsylvania and none of the beneficiaries lived in Pennsylvania. The trustee intended to file a court petition asking the Pennsylvania court with jurisdiction over the trust to approve a change of situs to New Jersey. The trustee asked the Pennsylvania Department of Revenue if, given these facts, the trust would be subject to Pennsylvania income tax. The Pennsylvania Department of Revenue stated that on those facts, and assuming that the court approved the change of

situs, the trust would no longer be subject to Pennsylvania income tax.

(b) *McNeil Trusts*. In McNeil Trusts v. Com., 67 A.3d 185 (Pa. Commw. Ct. 2013), the Pennsylvania Commonwealth Court (which is an intermediate appellate court that handles appeals from state agencies, including the Pennsylvania Department of Revenue) addressed, for the first time, the constitutionality of Pennsylvania income tax on trusts and estates.

(i) In McNeil, a Pennsylvania resident created two inter vivos trusts in 1959 appointing a Delaware trustee and provided in each trust instrument that the situs of the trust was Delaware and Delaware law governed. None of the trustees of the trusts resided in Pennsylvania, there was no Pennsylvania asset or Pennsylvania-source income and none of the administration occurred in Pennsylvania. However, all beneficiaries resided in Pennsylvania. The trustees had discretion to distribute principal and income to the beneficiaries Because the settlor was a Pennsylvania resident when he created the trusts, and all of the beneficiaries were Pennsylvania residents, the Pennsylvania Department of Revenue imposed income tax on the trusts as resident trusts. The trustees appealed to the Commonwealth Court, arguing, in part, that the imposition of Pennsylvania income tax under these facts violated the Commerce Clause of the United States Constitution (Article I, Section 8).

(ii) The Pennsylvania Commonwealth Court agreed with the trustees that the imposition of Pennsylvania income tax on the trusts violated the Commerce Clause and therefore reversed the Department of Revenue's imposition of Pennsylvania fiduciary income tax. In reaching this decision, the Commonwealth Court turned to the four-part test set forth by the United States Supreme Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) to determine whether a state tax is constitutional: "(1) the taxpayer must have a substantial nexus to the taxing jurisdiction; (2) the tax must be fairly apportioned; (3) the tax being imposed upon the taxpayer must be fairly related to the benefits being conferred by the taxing

jurisdiction; and (4) the tax may not discriminate against interstate commerce." All four prongs of the test must be satisfied; otherwise the tax is unconstitutional.

(iii) With respect to the first prong (substantial nexus), the Commonwealth Court held that there was not a substantial connection because the beneficiaries were discretionary beneficiaries who have "no current or future right to the income or assets of the Trust." In addition, although the settlor was a Pennsylvania resident, he designated Delaware as the place of administration and held "that to rely on Settlor's residence in Pennsylvania approximately forty-eight years before the [tax year] in question to establish the *Trusts'* physical presence in Pennsylvania in 2007 would be the equivalent of applying the slightest presence standard rejected by the U.S. Supreme Court[.]" Accordingly, the Commonwealth Court held that the substantial nexus prong of the Complete Auto test was not satisfied.

(iv) With respect to the second prong (fair apportionment), the Commonwealth Court noted that a tax "must be both internally and externally consistent." The Commonwealth Court held that because none of the income derived from Pennsylvania assets and none of the administration occurred in Pennsylvania, but the Department of Revenue sought to impose a tax on *all* income, the imposition of Pennsylvania income tax was not externally consistent and therefore did not satisfy the fair apportionment prong of the Complete Auto test.

(v) With respect to the third prong (fairly related), the Commonwealth Court noted that taxes "are fairly related to the services a state provides where the taxpayer benefits directly or indirectly from the states protections, opportunities, and services." Such services include "benefits and protections of the state's courts, laws and law enforcement[.]" The Commonwealth Court found that the trusts, which did not avail themselves of the benefits of Pennsylvania courts and laws, did not receive any services from Pennsylvania. The fact that the

beneficiaries, who lived in Pennsylvania, received benefits from Pennsylvania was not sufficient to meet this prong because "they are not the taxpayer in this matter and, importantly, as discretionary beneficiaries, they have no present or future right to distributions from the Trust. Moreover . . . the beneficiaries will pay [Pennsylvania income tax] on any distributions they do receive from the Trusts, which are fairly related to the benefits they receive from residing in Pennsylvania." Accordingly, the Commonwealth Court held that the fairly related prong was not satisfied.

(vi) Because none of the other prongs were satisfied, the Commonwealth Court did not analyze whether the fourth prong (tax cannot discriminate against interstate commerce) was satisfied.

(vii) Accordingly, because the first three prongs of the Complete Auto test were not satisfied, the Commonwealth Court held that the imposition of Pennsylvania fiduciary income tax on the trusts in McNeil was unconstitutional.

(c) Based on the foregoing:

(i) It is likely that Pennsylvania will not tax trusts that have changed situs that have no further connection to Pennsylvania, even if the change of situs was accomplished without court approval, so long as the change of situs requirements under §7708(c)-(e) are met. However, the better practice, especially where a Pennsylvania court may have already exerted jurisdiction over a trust, is to seek a court decree confirming the change of situs and releasing jurisdiction over the trust if the trust will take the position that it is no longer subject to Pennsylvania income tax.

(ii) If a trust was filing Pennsylvania fiduciary income tax returns in a matter where the fact pattern follows that set forth above in McNeil, and as a result of that case the trustees decide to stop filing Pennsylvania fiduciary income tax returns, consideration should be given to filing a "zero"/final Pennsylvania fiduciary income tax return. Query also if the trustee of such a trust

would want to (or should) seek a refund of Pennsylvania fiduciary income tax paid for prior open years.

(d) In response to McNeil, the Pennsylvania Department of Revenue revised its instructions to its fiduciary income tax return (Form PA-41), addressing when a resident trust can "become a nonresident trust":

> A nonresident trust is any irrevocable trust that is not a Pennsylvania resident trust. An inter vivos trust or a testamentary trust created by a resident can become a nonresident trust if the settlor is no longer a resident or is deceased, and the trust lacks sufficient contact with Pennsylvania to establish nexus. Any one of the following conditions provides sufficient contact for a resident trust to remain a resident trust or to requalify as a resident trust:
>
> - The trust has a resident trustee;
>
> - Any trust administration occurs in Pennsylvania;
>
> - Trust assets include:
>
> - Real or tangible personal property located within Pennsylvania, or
>
> - Stock, securities or intangible personal property, evidence by the documents, certificates or other instruments that are physically located, or have a business situs within Pennsylvania; or
>
> - The situs of the trust is Pennsylvania as provided in 20 PA. C.S. §7708.

(e) *Voluntary Disclosure Program.* In certain cases, a trustee might take the position that a particular trust is not subject to Pennsylvania income tax, for instance on the basis that the situs of the trust is outside Pennsylvania, but at a later date the trustee concludes that Pennsylvania might be successful in assessing its income tax after all. There is no statute of limitations on taxpayers that do not file a tax return. 72 P.S. § 7348(c). Therefore, Pennsylvania could assert that income tax is due for all years since the inception of the tax or other relevant date, with interest due

on each return. There could also be substantial penalties, totaling at least 50% of the tax due in the case of fraud. In such a case, a trustee might consider Pennsylvania's Voluntary Disclosure Program to attempt to reduce the total amount of tax, interest and penalties that may be imposed on a delinquent taxpayer. In order to take advantage of this program, a taxpayer must apply to the Pennsylvania Department of Revenue. There is no obvious statutory or regulatory authority for the Voluntary Disclosure Program. This description of the program is based on information provided in the Department of Revenue's website, www.revenue.state.pa.us (go through "Tax Professionals" to "Incentives & Programs" to "Voluntary Disclosure Program"), and on direct experience with the program. If accepted for the Voluntary Disclosure Program, the taxpayer must apparently file returns for the three prior years (per the Department of Revenue's website), plus the current year, and pay the tax and interest due.

V. GOVERNING LAW

Alice: "How puzzling all these changes are! I'm never sure what I'm going to be, from one minute to another."

— Lewis Carroll, Alice's Adventures in Wonderland

A. Designating a Trust's Governing Law.

1. *Uniform Probate Code*:

(a) The UPC does not address the validity of trusts (whether testamentary or inter vivos). UPC §2-506 provides that, with respect to the choice of law as to the execution of a will, it "is valid if executed in compliance with Section 2‑502 or 2‑503 [concerning requirements for executing a valid will under the UPC] or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national." The comment to UPC §2-506 provides the following example: "if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this State would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or, if a national of Mexico executes a written will in this state which does not meet the

requirements of Section 2‑502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators."

(b) UPC §2-703 provides that the "meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4, or any other public policy of this State otherwise applicable to the disposition."

2. *Uniform Trust Code*:

(a) Laws governing construction:

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

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

(1) The requirements for creating a trust under Pennsylvania law;

(2) The duty of a trustee to act in good faith and in accordance with the purposes of the trust;

(3) The power of the court to modify or terminate a trust under 20 Pa. C.S. §§ 7740-7740.6;

(4) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust;

(5) The duty of a trustee under §7780.3 to provide certain information to beneficiaries (therefore a Pennsylvania settlor cannot create a so-called "silent trust" in another jurisdiction);

(6) The effect of an exculpatory provision (that may relieve trustee of liability for breach of trust) under 20 Pa. C.S. §7788;

(7) Periods of limitation for commencing a judicial proceeding; and

(8) The power of the court "to take action and exercise jurisdiction as may be necessary in the interests of justice."

(b) Laws Governing Validity:

(i) UTC §403 provides that, for inter vivos trusts, a trust is validly executed "if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located." The comment to UTC §403 states that the validity of a testamentary trust "is ordinarily determined by the law of the decedent's domicile."

(ii) In 20 Pa. C.S. §7733, Pennsylvania has applied UTC §403 only to trusts created by non-Pennsylvania resident, not to trusts created by Pennsylvania residents. Therefore, a non-Pennsylvania resident could designate that Pennsylvania law governs the validity of a trust, but a Pennsylvania resident could not designate that the laws of a foreign jurisdiction govern the validity of the trust. The laws in Pennsylvania concerning

whether a trust is validly created in Pennsylvania are found in 20 Pa. C.S. §§ 7731 & 7732.

B. Sample Change of Situs Provisions

1. With the ever-increasing mobility of people, and the changing landscape of various state laws, it is hard to justify drafting wills and trusts that do not include modernized provisions permitting the change of a trust's situs and governing law.

2. The following sample provision provides that the trustee can change situs without permission from the "pitching" or "receiving" states, subject to applicable state law (but query whether a provision in the trust trumps the requirements of state law), and also permits the trustee to change the governing law to the law of the "receiving" state:

"Situs and Governing Law.

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

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

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

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

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

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

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

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

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

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

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

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

See the summary of In re Peierls Family Testamentary Trusts, 77 A.3d 223 (Del. 2013) below for a discussion concerning whether such a provision would prevent the governing law from changing following a change of situs.

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

VI. FIDUCIARY LIABILITY AND ATTORNEY MALPRACTICE

Queen of Hearts: "Sentence first – verdict afterwards."

— Lewis Carroll, Alice's Adventures in Wonderland

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

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

A. Trustee's Duty to Change Situs.

1. Does a trustee breach the trustee's duty of care if he or she fails to move a trust to a state with more favorable tax/fiduciary laws? What if the corporate trustee already has a presence in the other, favorable state? Should a corporate trustee resign if it is in the trust's best interest to move the trust and the corporate trustee cannot serve in the new state or is the only remaining connection to the state of origin? Why limit the options to other states, when moving a trust to another country might also be beneficial?

2. Comment b(2) to Restatement (Third) of Trusts §76 provides that a "trustee's duty to administer a trust includes an initial and continuing duty to administer it at a location that is reasonably suitable to the purposes of the trust, its sound and efficient administration, and the interests of its beneficiaries. Terms of the trust, however, may establish expressly or by implication a place of administration, initially at least, and may affect the trustee's duty in the matter." In addition, Comment b(2) further provides that "[u]nder some circumstances the trustee may have a duty to change or to permit (e.g., by resignation) a change in the place of administration. Changes in the place of administration by a trustee, or even the relocation of beneficiaries or other developments, may result in costs or geographic inconvenience serious enough to justify removal of the trustee."

3. As mentioned above, UPC §7-305 provides that a "trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state."

4. Similar to UPC §7-305, UTC §108(b) provides that "[a] trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries."

5. UPC §7-305 and UTC §108(b) could be interpreted to place an affirmative duty on the trustee to find the most advantageous state for the trust.

    (a) The following 28 jurisdictions have adopted some form of UPC §7-305 or UTC §108(b): **Alabama** (Ala. Code §19-3B-108); **Alaska** (Alaska Stat. §13.36.090); **Arizona** (Ariz. Rev. Stat. §14-10108); **Arkansas** (Ark. Code Ann. §14-10108); **Colorado** (Colo. Rev. Stat. §15-16-305 [until December 31, 2018] & Colo. Rev. Stat. §15-5-108 [after December 31, 2018]); the **District of Columbia** (D.C. Code §19-1301.08); **Florida** (Fla. Stat. §736.0108); **Hawaii** (Haw. Rev. Stat. §560:7-305); **Idaho** (Idaho Code Ann. §15-7-305); **Indiana** (Ind. Code §30-4-6-3); **Kansas** (Kan. Stat. Ann. §58a-108); **Kentucky** (Ky. Rev. Stat. §386B.1-060); **Maine** (Me. Rev. Stat. Ann. Tit. 18-B, §108); **Maryland** (Md. Code Ann., Est. & Trusts § 14.5-108); **Michigan** (Mich. Comp. Laws §700.7108);

Minnesota (M.S.A. §501C.0108); **Nebraska** (Neb. Rev. Stat. §30-3808); **New Hampshire** (N.H. Rev. Stat. Ann. §564-B:1-108); **New Jersey** (N.J.S.A. §3B:31-8); **New Mexico** (N.M. Stat. §46A-1-108); **North Dakota** (N.D. Cent. Code §59-09-08); **Ohio** (Ohio Rev. Code Ann. §5801.07); **Oregon** (Or. Rev. Stat. §130.022); **South Carolina** (S.C. Code Ann. §62-7-801); **Tennessee** (Tenn. Code Ann. §35-15-108); **Utah** (Utah Code Ann. §75-7-305); **Vermont** (Vt. Stat. Ann. Tit. 14A, §108) and **Wyoming** (Wyo. Stat. Ann. §4-10-108).

(b) Pennsylvania's situs statute, 20 Pa. C.S §7708, omits UTC §108(b). The comment to 20 Pa. C.S. §7708 states that "UTC §108(b) is omitted to avoid the implication of a duty that the trustee consider the laws of all conceivable jurisdictions to which the situs of a trust may be moved and establish and re-establish situs accordingly." North Carolina has also omitted UTC §108(b) from its situs statute for the same reason. See comment to N.C. Gen. Stat. Ann. § 36C-1-108.

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

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

In affirming the removal and replacement, the Michigan Court of Appeals noted that the granddaughter "advanced two primary reasons that Grand Rapids had become an inappropriate place of administration: (1) the distance between Grand Rapids and her home and its impact on her relationship with the trustee and on the administration of the Trust to her satisfaction, and (2) her lack of confidence and trust in the Bank, because of its ties to [an asset held by the trust], the amount of [such asset the bank] holds as beneficial owner, and the perceived lack of loyalty, responsiveness and information afforded to [the granddaughter by Fifth Third]." Fifth Third argued that, given advancements in technology, especially e-mail, the location where a trust is administered is generally immaterial to its sound and efficient management." The court rejected that argument, stating that "such a reading is contrary to the plain language of the statute, and that it presents an overly restrictive view, which would eviscerate the statute. The statute plainly permits removal when the place of administration becomes inappropriate for any reason even in this age of improved technology and communication." Accordingly, the court affirmed the removal of Fifth Third Bank in favor of SunTrust.

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

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

(d) There appear to be no reported cases surcharging a trustee for failing to change the situs of a trust in violation of UPC §7-305 or UTC §108(b). The damages for any such alleged "breach" could be fairly easy to compute, especially if the situs should have been changed to avoid state fiduciary income tax.

(e) Clearly a trustee has a duty to know the circumstances of the beneficiaries of a trust. If the trustee knows that none of the beneficiaries lives in the state in which the trust has its situs, and there are no trust assets that are tied to the state, then does a trustee at least have the duty to consider the options for alternative situs? Obviously, doing so could cause the trustee to lose the trusteeship, or perhaps just the direct relationship.

(f) What if the trustee knows that there is likely to be a substantial "liquidation event" in a near future, that will result in substantial capital gains, and as a result of the change of situs the trust would no longer be subject to state income tax on capital gains?

B. Attorney Liability.

1. If the attorney represents the trustee, can the attorney be held liable for malpractice if the attorney fails to advise the trustee to consider moving a trust? Is there a duty on the attorney to know all the

different state laws so that the attorney can tell the trustee where a trust should be moved for maximum benefit? Is there a duty on the attorney to know all the different trust laws in the world so that the attorney can tell the trustee which country would have the best situs for the trust?

2. If the attorney knows that none of the beneficiaries lives in the state in which the trust has its situs, and there are no trust assets that are tied to the state, then does the attorney have the duty to advise the trustee to consider the options for alternative situs?

3. By making the recommendation to change situs, the attorney could end up losing the representation of the trustee and/or the beneficiaries. Should that have any impact on liability?

4. What if the trustee knows that there is likely to be a substantial "liquidation event" in a near future, that will result in substantial capital gains, and as a result of the change of situs the trust would no longer be subject to state income tax on capital gains?

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

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

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

— Lewis Carroll, Alice's Adventures in Wonderland

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

'Who are YOU?' said the Caterpillar.

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

— Lewis Carroll, Alice's Adventures in Wonderland

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

1. Validity and construction v. administration: Do the validity and construction laws of the original situs state still apply?

(i) Definitions:

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

(2) *Construction*: Construction pertains to questions such as the "identity of the beneficiaries and their respective interests," especially in default of explicit direction in the instrument itself, whether adopted children are considered descendants, the rights of illegitimate children have in the trust, the disposition of property when a named beneficiary or class of beneficiaries is unable to take, and, in some instances, allocation between principal and income. Bogert on Trusts §293 at 252; See also Restatement (Second) of Conflict of Laws §§ 268 cmts. a, h, 271 cmt. a (1971).

(3) *Administration*: Administration involves matters such as the powers and duties of the trustee, trust investments, compensation of the trustee and its right to indemnity, liability for breach of trust, the power of the beneficiaries to terminate the trust, and, in some instances, allocation between principal

and income. See Bogert on Trusts §293 at 253; Restatement (Second) of Conflict of Laws §§ 268 cmt. h, 271 cmt. a (1971).

(ii) In terms of the impact on governing law, the comment to UTC §108 provides that, while "transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 615 (4th ed. 1989)." However, as discussed above, under the UPC and UTC, the trust instrument itself may designate which state's (or states') laws apply to the validity, construction or administration of the trust notwithstanding any change in the principal place of administration, and such designation may supersede default statutory or common laws for determining validity, construction and administration. Although not a UTC state, Delaware has codified this in 12 Del. C. §3332:

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

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

(iii) Arizona provides that in connection with a change of situs, the trustee may change the applicable law governing the trust. A.R.S. §14-10108(C).

(iv) Decanting: Alaska, Arizona, Missouri and South Dakota provide that their decanting provisions apply to a trust "whose governing jurisdiction is transferred to [that] state." Alaska Stat. §13.36.157(b), Ariz. Rev. Stat. §14-10819; Mo. Ann. Stat. § 456.4-419; S.D. Codified Laws §55-2-15. Thus, at least these four states consider decanting to be "administrative" in nature. If a trust's situs is moved to a state permitting decanting, such as Alaska, Arizona, Missouri or South Dakota, and the trust is decanted into a new trust, will the new trust be governed by the new state's validity and construction trust law? Query also if a provision in a trust instrument dictating that the governing

law shall always be in a certain state regardless of whether situs is moved (as permitted in UTC §107 and many UTC jurisdictions) would that trump such a statute? See IRS Notice 2011-101, in which the IRS and the Treasury Department seek comments on the income, estate, gift and GST tax implications, if any, from decanting the assets of one trust into another; see also ACTEC's comments submitted to the IRS in response to Notice 2011-101, at http://www.actec.org/public/Governmental_Relations/Mezzullo_Comments_04_02_12.asp

(v) Does the explicit or implicit designation of governing law in the trust instrument result in the law of the original state applying to the validity, construction AND administration of the trust even after the situs of the trust is changed to a new state? This issue was examined by the Delaware Supreme Court in In re Peierls Family Testamentary Trusts, 77 A.3d 223 (Del. 2013), discussed below.

2. What's what? The following chart provides a short sampling of what constitutes (or might constitute) matters of validity and construction, and thus depend on the law of the original or "pitching" state versus matters of administration, as to which a court will (or might) apply the law of the new or "receiving" state. This listing is by no means exhaustive or even correct; opinions will differ as to whether a certain issue might be considered validity or construction on the one hand and administrative on the other. Thus, this chart is for illustrative and discussion purposes only:

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

B. Human Nature and the Passage of Time.

1. Will trustees, trust officers, beneficiaries and courts eventually "forget" that the trust was moved in the first place and will any applicable laws of the original situs state "stick" in real life? Should they?

2. One needs to think beyond that first change of situs. A long-term trust could be moved several times. This will create even more complexity, which in turn only may compound the impact of the vagaries of certain elements of human nature -- avoidance of complexity, disregard for things we don't understand, short attention spans, etc.

C. Effect of Change of Situs on Jurisdiction.

1. Once situs is changed which court has jurisdiction? What happens if there are contacts in more than one state and thus multiple potential options for jurisdiction? Jurisdiction in turn carries with it governing law, in whole or in part, depending on the circumstances, as addressed above.

2. When there are multiple options for jurisdiction, a "race to the courthouse" can become important because courts will often defer to another state that has already exercised jurisdiction over a trust.

3. Early on Pennsylvania declined to exercise jurisdiction over a testamentary trust where another state had already exercised jurisdiction over the trust (and continued to do so). In In re: Cronin, 192 A. 397 (Pa. 1937), a decedent died a resident of New York, and his will was probated in New York. Decedent directed in his will that certain assets be held in trust by a Pennsylvania corporate trustee for the decedent's niece, who was a Pennsylvania resident. The trustee filed an account with the Surrogate Court of Broome County, New York, and, before the audit of the account in Broome County, the Commonwealth of Pennsylvania filed a petition in the Court of Common Pleas of Philadelphia County, Pennsylvania, for the repayment of funds expended in caring for decedent's niece. The Pennsylvania Supreme Court held that the Pennsylvania court should have declined to exercise jurisdiction. In deferring to the jurisdiction of New York, the Pennsylvania Supreme Court noted that the trust:

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

4. *Practice Tips:*

   (a) If a party feels that it is important to establish a state's jurisdiction over a trust to preclude the jurisdiction of another state, then it may be wise to affirmatively create an opportunity for the state to exercise its jurisdiction, even as to something rather mundane. In doing so, the party can improve the likelihood of securing that state as the jurisdiction with respect to potential later proceedings.

   (b) In connection with a change of situs, practitioners should consider recommending that clients obtain a court order from the pitching state relinquishing jurisdiction over the trust (or, at a minimum, if situs is being transferred without court approval, including a recitation in a nonjudicial settlement agreement that actions concerning the trust may only be brought in the receiving state). Seeking to have the receiving state accept jurisdiction may also strengthen the position that the receiving state – and not the pitching state – has jurisdiction. A court order from both the pitching and receiving states is ideal.

5. UTC and jurisdiction:

   (a) As previously noted, the UTC refers to the "principal place of administration" rather than to situs. The comment to UTC §108 (concerning designation of the principal place of administration) provides that "[l]ocating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust."

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

6. UPC and jurisdiction:

   (a) In an effort to "center litigation involving the trustee and beneficiaries at the principal place of administration," UPC

§7-203 provides that a court "will not, over the objection of a party, entertain proceedings . . . involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to the jurisdiction of the state in which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order." The Comment to UPC §7-203 recognizes that while a trust may be subject to the jurisdiction of many states, UPC §7-203 "employs the concept of *forum non conveniens* to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust[.]"

(b) UPC §7-203 has been adopted in seven jurisdictions: Alaska (Alaska Stat. §13.36.045); Colorado (Colo. Rev. Stat. §15-16-203) [this is scheduled to be repealed January 1, 2019]; Hawaii (Haw. Rev. Stat. §560:7-203); Michigan (Mich. Comp. Laws §700.7205); South Carolina (S.C. Code Ann. §62-7-201); Utah (Utah Code. Ann. §75-7-204); and Idaho (Idaho Code Ann. §15-7-203).

D. Contested Jurisdiction - Selected Case Law.

1. There are a few cases that shed light in a meaningful and interesting fashion on how trust matters play out when more than one state legitimately has or may have jurisdiction over a trust, and the parties litigate over which state should exercise jurisdiction over the matters in dispute (that is, what is the proper forum). For example, there is an interesting series of Florida cases, beginning with Henderson v. Usher, 160 So. 9 (Fla. 1935), which provide a microcosm of the evolution of how courts view or may view jurisdiction and forum/venue in such circumstances.[8]

2. Forum/Venue. In Perry v. Agnew, 903 So.2d 376 (Fla. Dist. Ct. App. 2005), summarized below, which distinguishes Henderson, the concept of venue is addressed. However, "venue" as used in these trust situs cases is not about which local court within a state

[8] Henderson v. Usher, 160 So. 9 (Fla. 1935), and Saffan v. Saffan, 588 So.2d 684 (Fla. Dist. Ct. App. 1991), were discussed by Barry F. Spivey and Shane Kelley during a presentation at the ACTEC Fiduciary Litigation Committee meeting in March 2012 in Miami, Florida, addressing the relevant choice of law provisions of the Uniform Trust Code, as compared to common law and the Restatement (Second) of Conflict of Laws.

is the proper venue. Instead, "venue" issues arise when more than one state has some form of jurisdiction over the trust, and the question is which state – which venue – is the most appropriate, or is even the most convenient and least "harmful." The word "forum" could also be used in place of venue in such cases.

3. In reviewing case law in matters of contested trust jurisdiction, it may be helpful to consider the primary ways to view situs outlined at the beginning of these materials:

   (a) Administrative situs;

   (b) Locational situs;

   (c) Tax situs; and

   (d) Jurisdictional situs.

4. Henderson v. Usher, 160 So. 9 (Fla. 1935):

   (a) In Henderson, decedent died a Florida resident, survived by his wife and a child from a prior marriage. Decedent had a power of appointment over an inter vivos trust created by his mother, who was a Florida resident at the time she executed the trust. For a time the administrative situs of the mother's trust was in Florida. Pursuant to decedent's will, he exercised his power of appointment over his mother's inter vivos trust, appointing the income to his wife and the remainder to his child from a prior marriage. Decedent's widow (who moved from Florida to New York after decedent died) elected against husband's will under Florida law. A dispute arose as to whether, because of her election against decedent's will, decedent's wife was entitled to the income decedent appointed to her from his mother's trust. Trustees of the testamentary trust under decedent's will (who were also New York residents) filed a petition in Florida to determine what rights decedent's wife (and the other beneficiaries) had in decedent's mother's trust in light of the widow's election.

   (b) Decedent's wife filed a motion to quash the service of the petition on the basis that she was no longer a resident of Florida and the trust res, consisting of equities, was not within the jurisdiction of the Florida court (that is, the locational situs of the assets of the trust was no longer in Florida). The trial court denied the motion, and decedent's wife appealed to the Florida Supreme Court.

(c) The Florida Supreme Court affirmed dismissal of the motion. The court noted that, as to questions concerning decedent's estate and will, Florida retained jurisdiction: "The testator was a citizen and resident of Florida when the will was executed and when he died, [decedent's wife] was a citizen of Florida when the will was executed, the will was probated under Florida law, and has been brought into the courts of Florida to be construed. Since the interpretation of the will is the primary question with which we are confronted, we are impelled to hold that the res is at least constructively in this state and that the Florida courts are empowered to advise the trustees how to proceed under it and what rights those effected [*sic*] have in it. For the immediate purpose of this suit the will is the res, and when that is voluntarily brought into the courts of Florida to be construed, the trust created by it is to all intents and purposes brought with it."

(d) With respect to which jurisdiction was proper for decedent's mother's inter vivos trust, as appointed by decedent, the court determined that the jurisdictional situs remained in Florida even though the administrative situs may be in New York: "The rule is settled in this country that an inter vivos trust has its situs at the residence of the creator of the trust even though he subsequently removes to the state where the trustees and beneficiaries reside and dies there. This rule is not changed by reason of the fact that the trustee resides in another state, there being no duty imposed on him to remove the property to his state, or by reason of the fact that the trust property has been converted under a general authority in the trust instrument and removed to another state. " Accordingly, the Florida Supreme Court seemed to suggest that jurisdictional situs would always remain in Florida notwithstanding any administrative or locational situs change (presumably absent court approval releasing jurisdiction over the trust).

5. In re Henderson's Will, 123 A.2d 78 (N.J. Super. 1956):

(a) In Henderson's Will, the testator died a resident of New Jersey and created a testamentary trust. All of the beneficiaries and remaindermen resided in California. The initial trustee was a New Jersey corporation; however, the New Jersey Superior Court later discharged the corporate trustee and appointed the beneficiaries as successor trustees.

(b) The beneficiaries filed an application in New Jersey to transfer the trust from New Jersey to California, pursuant to N.J.S. 3A:23-1. The statute allowed a New Jersey county court to authorize, if in the interest of the beneficiaries, the transfer of New Jersey property in trust to the state where the beneficiaries reside if they are not New Jersey residents. In anticipation of the transfer, the beneficiaries applied and were appointed successor trustees in a California court.[9]

(c) The court noted that the trust consisted of cash and securities, which require constant investment supervision. Because all of the trustees were in California, the court approved the transfer. However, the court noted that "since this is a testamentary of personalty, it is to be administered by the substituted trustees in accordance with the law of New Jersey." Henderson's Will, 123 A.2d at 79.

6. Lewis v. Hanson, 128 A.2d 819 (Del. 1957), *aff'd sub nom*. Hanson v. Denckla, 357 U.S. 235 (1958):

(a) In Lewis, a Pennsylvania resident created an inter vivos trust in Delaware and gave herself a power of appointment. Settlor named Wilmington Trust Company, a Delaware corporation, trustee and gave it "ordinary powers granted to a trustee." Lewis, 128 A.2d at 824. However, settlor specified three powers that required written consent from a designated trust advisor before execution: (1) selling trust assets, (2) investing proceeds of sale of trust property, and (3) participating in mergers of corporations whose securities were trust assets.

(b) Settlor subsequently moved to Florida, where she resided until her death. While in Florida, settlor exercised her power of appointment by directing the trustee how to distribute the trust funds upon her death. Upon settlor's death, the trustee distributed funds pursuant to this power of appointment. However, the beneficiaries under settlor's will differed from those in her power of appointment.

(c) Residuary beneficiaries under the will, who were also Florida residents, brought action in a Florida court for declaratory relief concerning the validity of the power of appointment. The parties were divided into two groups: (1) the "Lewis Group," which argued that the trust and settlor's

[9] It is not clear whether the appointment of the successor trustees by the California court was contingent upon the New Jersey court's approval of the change of situs and jurisdiction to California.

exercised power of appointment were invalid and (2) the "Hanson Group," which argued the trust and settlor's exercised power of appointment were valid. The Florida court dismissed the action for lack of jurisdiction over the Delaware trustee because no trust assets were ever held or administered in Florida and the trustee never did business in Florida. Despite this dismissal, the court ruled on the issue for those parties subject to the court's jurisdiction, holding that the settlor's exercise of her power of appointment was testamentary. Because there were not two witnesses at the time of this testamentary exercise, the court ruled that the exercise was void. Therefore, the court held that distribution should be in accordance with the terms of the will.

(d) Both groups of defendants appealed. The Lewis Group appealed the dismissal for lack of jurisdiction and the Hanson Group appealed the finding of invalidity. The Supreme Court of Florida affirmed the finding of invalidity and found that the lower court erred in concluding it lacked jurisdiction over the nonresident defendants.

(e) While this appeal was pending in Florida, the Lewis Group argued the jurisdictional issue in a Delaware court. However, before addressing the jurisdictional issue, the Delaware court addressed whether Delaware or Florida law applied in determining the validity of the trust and power of appointment. The court concluded that Delaware law governed this issue because Delaware was the place of administration and the trustee's domicile. Most importantly, the settlor intended for Delaware to be the situs of the trust, as evidenced by her signing the agreement in Delaware and delivering trust assets to a trustee doing business in Delaware.

(f) The court then addressed whether the trust and power of appointment were valid under Delaware law. The Lewis Group argued that the settlor was the sole present interest remainderman, making her power of appointment an invalid testamentary disposition under Florida law. The court rejected this argument because the trust also created present interests in those beneficiaries named in the trust in case settlor failed to exercise her power of appointment. The Lewis Group further argued that the trust provisions invalidated the trust because the settlor retained substantial control over the assets by requiring the trustee to obtain the written consent of a designated trust advisor to exercise

specified powers. The court also rejected this argument, equating the trust advisor to a co-trustee with the same fiduciary duties. Therefore, the Delaware court held that the settlor created a valid inter vivos trust, and therefore the trustee should have distributed trust assets in accordance with the terms of the power of appointment.

(g) Next, the court addressed the effect of the adverse Florida judgment on the defendants' right to litigate in Delaware. The Delaware court denied full faith and credit over the personal liability of the Delaware trustee and the in rem judgment over Delaware assets. The Lewis Group argued that the Florida judgment precluded Delaware litigation under *res judicata* or collateral estoppel. The court held that *res judicata* did not apply because the two courts addressed different issues: the Delaware court addressed whether the trust and power of appointment were valid while the Florida court addressed which assets passed under the will. The court also found that collateral estoppel did not apply because the action fell within a recognized exception, which "exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first action." The Lewis Group further argued that the Delaware trustee was bound to the Florida decision, and therefore estopped, because the trust beneficiaries are bound to it regardless of the trustee's absence in the Florida court. The court rejected this argument, noting that the trustee's duty was to defend the trust. As such, the trustee was an indispensable party to a suit regarding trust property and was not estopped by the Florida judgment.

(h) On certiorari, the United States Supreme Court addressed two issues: (1) whether the Supreme Court of Florida erred in holding that it had jurisdiction over non-resident defendants and (2) whether the Supreme Court of Delaware erred in refusing full faith and credit to the Florida decree.

(i) In addressing the jurisdictional issue, the Court provided separate analyses for in rem jurisdiction and in personam jurisdiction. The Court found that Florida did not have in rem jurisdiction over the trust for several reasons, such as the parties' agreement that the trust assets were in Delaware. The Court specifically noted that Florida's authority over the probate and construction of the settlor-decedent's will and the settlor-decedent's Florida domicile

were insufficient contacts to establish in rem jurisdiction. Furthermore, the Court expanded the well-established personal jurisdiction principle from Pennoyer v. Neff, 95 U.S. 714 , to in rem jurisdiction, holding that a court cannot "enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction." The Court also found insufficient contacts for in personam jurisdiction. The appellees relied on McGee v. International Life Ins. Co., 355 U.S. 220, which loosened the requirements for in personam jurisdiction due to increased interstate commerce. However, the Court distinguished this case by noting that the defendant trust company had no Florida office and didn't engage in Florida business, the trust assets were never held or administered in Florida, and there was no solicitation in Florida. The Court further noted that the settlor-decedent's execution of her power of appointment in Florida did not create a sufficient connection for in personam jurisdiction. In concluding its jurisdictional analysis, the Court reversed the Florida judgment for both the non-resident defendants and appellees, who were subject to Florida's jurisdiction, because the trustee was an indispensable party in such a proceeding. Therefore, the trustee's absence nullified the entire judgment.

(j) The Supreme Court also held that Delaware had no obligation to give full faith and credit to a judgment that was invalid in the home state for due process violations, giving the same reasons for which it reversed the Florida judgment. The Court noted that it need not wait until the Florida court remanded the case to determine if the trustee was indispensable because the state court had previously ruled on that issue: "To withhold affirmance of a correct Delaware judgment until Florida has had time to rule on another question would be participating in the litigation instead of adjudicating its outcome." Therefore, the Court affirmed the Delaware judgment.

(k) In his dissenting opinion, Justice Black concluded that Florida had the power to adjudicate the effectiveness of the power of appointment exercised in Florida because there was a Florida domiciliary, Florida beneficiaries and the settlor-decedent's will was administered in Florida. Aside from the jurisdictional holding, Justice Black also concluded that the Court was unjustified in affirming the Delaware decision before allowing the Florida court to hear the case on remand.

(l) In another dissenting opinion, Justice Douglas concluded that Florida had jurisdiction over the Delaware trustee because the trustee was the agent of the settlor-decedent, meaning that they both represented the same legal right. Therefore, the executrix properly stood in judgment for the trustee in a Florida court.

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

(a) In Saffan, settlor created an irrevocable trust while a resident of Florida. The trust provided that the trust would be "construed in accordance with the laws of the State of Florida[.]" Settlor first amended the trust in Florida while still a Florida resident, and then later executed another amendment while actually in Georgia. The second amendment removed two of settlor's children as beneficiaries of the trust, and also provided that the trust was to be "read and interpreted in accordance with the Law of Florida of which State GRANTOR, is a legal resident."

(b) The disinherited children brought an action in Florida contesting the validity of the trust. The beneficiaries and trustee filed a motion to dismiss the action for lack of jurisdiction because neither the beneficiaries nor the trustee resided in Florida. The trial court denied the motion, and the beneficiaries and trustee appealed.

(c) On appeal, the Florida Court of Appeals noted that the settlor was a Florida resident when he executed the trust, the administrative situs of the trust from inception until after settlor's death was in Florida (it is not clear from the case whether settlor died a Florida resident), and locational situs of the trust assets had been in Florida during settlor's lifetime. Relying on Henderson, the court held that jurisdiction remained in Florida.

(d) Although a version of UPC §7-203 was enacted by Florida in 1974, more than 15 years before the Saffan decision, the court in Saffan did not engage in any comparative analysis of one possible jurisdiction versus another, when a party objected to the jurisdiction of the Florida court, which UPC §7-203 seems to require.

8. Lampe v. Hoyne, 652 So. 2d 424 (Fla. Dist. Ct. App. 1995):

(a) In Lampe, a Florida couple created an inter vivos trust. After the wife died, her niece, a Kansas resident, became

successor trustee. The husband subsequently remarried, but died six months later. The second wife filed a complaint against the successor trustee in a Florida court alleging breach of trust, unjust enrichment and for declaratory relief. The successor trustee filed a motion to quash and dismiss.

(b) The second wife claimed that the court had jurisdiction over the successor trustee due to her substantial connection with the state. The successor trustee claimed that Florida did not have jurisdiction because Kansas was the principal place of administration, only two assets remained in Florida after she began serving as successor trustee (which were subsequently removed), and she only conducted two brokerage transactions in the Florida via telephone while she remained in Kansas. The trial court relied on Saffan v. Saffan (discussed above) in holding that Florida, as the situs of the trust, had jurisdiction. The successor trustee appealed.

(c) The Florida District Court of Appeal reversed the trial court's decision because the necessary facts to establish jurisdiction under Saffan were not included in the complaint or in the successor trustee's affidavit: "Instead of asserting jurisdiction over [the successor trustee] because the trust situs was in Florida, the complaint alleged jurisdiction because of [the successor trustee's] substantial and not isolated activities within the state." Lampe, 652 So. 2d at 426. Due to this misstep, the court held that the second wife did not properly allege or prove that Florida had jurisdiction and remanded the case.

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

(a) In Sheridan, the city of Sheridan, Colorado, sold "certificates of participation" totaling $3,525,000 to construct a municipal building in Sheridan. After construction was complete, the municipal facility was placed in trust, and the trust leased the facility back to the city of Sheridan, and distributed the income from the lease to the certificate shareholders. The trustee was a corporate trustee located in Minnesota, and the trust was administered in Minnesota. In February 1996, Sheridan commenced eminent domain proceedings against the facility. The certificate holders opposed the sale, and the trustee filed a petition in Minnesota district court for instruction as to

whether it should accept the city's offer to buy the facility. The district court held that it had jurisdiction over the trust, approved the sale and discharged the trustee. The certificate holders appealed.

(b) The Minnesota Court of Appeals held that Minnesota courts did have jurisdiction over the trust. In determining whether or not jurisdiction was appropriate, the court applied a seven-part test, considering: "(1) the location of the trust property (the situs of the trust assets), (2) the domicile of the trust beneficiaries, (3) the domicile of the trustees, (4) the location of the trust administrator, (5) the extent to which the litigation has been resolved, (6) the applicable law, and (7) an analysis of *forum non conveniens principles*." (Emphasis in original.)

(c) The court noted that because a majority of the trust's assets (the facility) and beneficiaries (the certificate holder) were in Colorado, factors 1 and 2 favored Colorado jurisdiction. However, the court then noted that all of the other factors in the seven-part test favored jurisdiction in Minnesota, as follows:

(i) Factor (3) (the domicile of the trustees): The trustee was domiciled in Minnesota.

(ii) Factor (4) (the location of the trust administrator): The trust was administered in Minnesota.

(iii) Factor (5) (the extent to which the litigation has been resolved): Prior litigation concerning the trust, unrelated to the eminent domain issue, had occurred in Minnesota.

(iv) Factor (6) (the applicable law): The trust stated that Colorado governing law applied, but it did not state that the situs was in Colorado, and it did not otherwise provide that Colorado courts had jurisdiction (exclusive or otherwise) to hear matters concerning the trust. In addition, the court noted that Colorado's version of UPC §7-203 would defer to Minnesota jurisdiction because the principal place of administration (administrative situs) was in Minnesota, and "the opposing certificate holders have not asserted that all appropriate parties will not be bound by the Minnesota court's orders. Nor have they demonstrated that exercise of jurisdiction by a

Minnesota court seriously impairs the interests of justice."

(v) Factor (7) (*forum non conveniens* principles): The court found that *forum non conveniens* principles did not apply because of the "location in Minnesota of the trustee and the trust administrator's records[.]"

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

10. Rosenberg v. Bank of America, No. 05-02-01051-CV, 2003 WL 1823467 (Tx. Ct. App. April 8, 2003):

(a) In Rosenberg, the testator created a testamentary trust in Virginia whose beneficiaries resided in Texas. The beneficiaries filed a petition in a Texas probate court seeking appointment of a Texas successor trustee with the ultimate goal of transferring the trust's corpus and place of administration (locational and administrative situs) to Texas. The Virginia trustee opposed the petition, and the Texas probate court denied the beneficiaries' request.

(b) On appeal in Texas, the beneficiaries maintained three issues: (1) the trial court erred in failing to properly apply Virginia law under the doctrine of comity and conflict of law principles, (2) the trial court weighed the trustee's interest over the beneficiaries' interests, and (3) the trial

court's judgment was so against the evidence that it was clearly wrong and unjust.

(c) The court only addressed the beneficiaries' first issue to resolve the appeal. In filing the petition, the beneficiaries relied on § 26-64 of the Virginia Code, which states that a nonresident beneficiary can compel a resident trustee to transfer an estate to a trustee in the state where the beneficiaries reside. The Virginia trustee claimed that a more specific Virginia statute, § 26-46.2 of the Virginia Code, controlled. That statute mandates that if a will that created a testamentary trust was probated in Virginia, the jurisdiction where the will was probated is "the exclusive jurisdiction for qualification of the trustee or trustees." Rosenberg, 2003 WL 1823467 at *2.

(d) The court noted under conflict of law principles, when one statute is generally relevant and another is more specifically relevant, the latter governs. Because the trust at issue was a testamentary trust, § 26-46.2 controlled the issue. Therefore, the court held that "the Virginia courts have exclusive jurisdiction to determine the qualification of the trustee in this Virginia testamentary trust." Id. at *3.

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

(a) In Marshall, two Alaska residents created a trust for their granddaughter, who was also an Alaska resident, naming First National Bank of Alaska as trustee. Settlors both died in 1997 (presumably in Alaska), and the granddaughter moved to Colorado in 1999. In 2001, the granddaughter asked First National to resign in favor of Morgan Stanley Dean Witter Trust (the main office of which was in Jersey City, New Jersey), but First National refused to resign. Following a hearing with a master, the Alaska probate court removed First National and replaced it with Morgan Stanley.

(b) First National transferred all of the assets of the trust to Morgan Stanley, along with an accounting (it is not clear whether the accounting had not been filed with any court at that time, although it does not appear that it was). The granddaughter then filed a petition with the Alaska probate court seeking to surcharge First National for attorney's fees and "special trustee fees" paid to First National from the trust in connection with the substitution petition.

Following a hearing with a master, the Alaska probate court denied the surcharge petition, and the granddaughter appealed.

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

12. Killilea Trust, 25 Pa. Fid. Rep. 2d 86 (O.C. Westm. 2004).

(a) In Killilea Trust, the settlor created an inter vivos trust in Florida for which she served as initial trustee. The settlor, who resided in New Jersey for most of her life, subsequently resigned as trustee and appointed her brother, a New Jersey resident, trustee and her niece, a Pennsylvania resident, successor trustee. Settlor's brother served as trustee until his death and administered the trust using professional advisors from New Jersey. Settlor's brother predeceased settlor, leaving settlor's niece as

trustee. Upon settlor's death, the trust assets were divided among her five nieces and nephews in unequal shares. At that point, the trustee filed a petition for summary administration of settlor's estate in Florida, which the court granted and ordered that the assets of settlor's estate be distributed to the trustee. The trustee, who was a Pennsylvania resident, continued to consult with professional advisors, such as attorneys and accountants, in New Jersey to manage the trust.

(b) One of the beneficiaries, an Ohio resident, filed a petition for an accounting and appointment of a co-trustee in the Pennsylvania Court of Common Pleas of Westmoreland County, Orphans' Court Division. The trustee subsequently filed a motion to dismiss for improper situs, alleging that New Jersey was the proper situs.

(c) In determining that the proper situs was New Jersey, the Orphans' Court identified the trust's contacts with New Jersey: records pertaining to the trust were held in New Jersey; over 90% of the trust assets were in New Jersey; four of the five beneficiaries, amounting to 80% of the trust's interest, had ties to New Jersey either through residence or retaining representatives there; and, most importantly, the settlor resided in New Jersey for most of her life and manifested her intent for New Jersey to be the trust situs by choosing a New Jersey resident, her brother, as the trustee.

(d) The court further relied on the official comment to the Pennsylvania statute, 20 Pa. C.S. §724(b), which states that the UTC relies on the concept of principal place of administration, which is oftentimes not the trustee's resident state, to determine trust situs if it is not specified in the trust instrument. Because the trust had substantial contacts with New Jersey and the trustee had already begun a proceeding in New Jersey before the beneficiary filed this petition, the court concluded that the trust situs was New Jersey. Therefore, the court dismissed the petition for improper situs.

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

(a) In Perry, the beneficiaries (one of whom was a Florida resident) brought an action in Florida seeking to remove the trustee, who was an individual residing in Boston. The trust provided that it was to be governed by Florida law (it

is not clear from the case whether the settlor was a Florida resident when he executed the trust). The trustee moved to dismiss pursuant to Florida's version of UPC §7-203, arguing that the principal place of administration (administrative situs) was in Massachusetts and therefore the proper forum was in Massachusetts. The trial court denied the trustee's motion, and the trustee appealed.

(b) The beneficiaries argued that, pursuant to Henderson, Florida retained jurisdiction over the trust. However, the court of appeals noted that Henderson "was a case involving jurisdiction, not venue, and it predated [Florida's version of UPC §7-203] . . . . Therefore, Henderson does not control." The court also noted that although the trust designated Florida as the governing law, such provision "does not designate Florida as the principal place of administration."

(c) Because the trust's principal place of administration (administrative situs) was in Massachusetts, the court of appeals reversed the trial court and remanded the matter to the trial court "to determine whether all interested parties could be bound by litigation in Massachusetts."

(d) For other cases discussing the application of UPC §7-203, especially in the context of Florida, see also Meyer v. Meyer, 931 So. 2d 268 (Fla. Dist. Ct. App. 2006); Covenant Trust Co. v. Guardianship of Ihrman, 45 So. 3d 499 (Fla. Dist. Ct. App. 2010), reh'g denied (Nov. 3, 2010).

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

(a) In Peterson, Laurence and May Peterson, South Dakota residents, each executed a living trust (presumably revocable). Each placed their interest in a family farm in South Dakota in the trust, and each trust gave their son Milton the right to purchase the real property in the trust. Laurence died in 2001 a resident of South Dakota, and Milton exercised his right to purchase the real property in his father's trust.

(b) Following Laurence's death, May moved to Missouri, where two of her daughters lived. One of the daughters took May to a Missouri attorney, who prepared a new will for her and an amendment to her trust. The amendment, *inter alia*, eliminated Milton's option to purchase the real property in the trust, giving that right to three of her other

children, removed Milton as trustee and added a no contest/*in terrorem* clause. May died in 2008 a resident of Missouri. At her death, the trust consisted of Missouri bank accounts and an interest in the South Dakota family farm. In 2009, Milton filed an action in South Dakota Circuit Court challenging the trust amendment on the grounds of undue influence. The South Dakota court dismissed the action, concluding that Missouri was the more appropriate forum, and Milton appealed to the South Dakota Supreme Court.

(c) The South Dakota Supreme Court held that the Circuit Court did not abuse its discretion in finding Missouri the more convenient forum. The court noted that the first question was "whether there is an adequate alternative forum available in which the dispute can be resolved." Because no party disputed that Missouri had jurisdiction to handle the undue influence claim, the court concluded that there was an appropriate alternative forum.

(d) The court then had to consider whether the "private and public interest factors . . . outweigh the deference ordinarily attended to the plaintiff's choice of forum."

(i) The private factors include the following: "[r]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The court concluded that the private factors favored Missouri as the appropriate forum, noting that May was a Missouri resident for the last four years of her life, the amendment was prepared by a Missouri attorney and most of the witnesses lived in Missouri. Although the real estate was located in South Dakota, the court noted that "the fact that the trust assets include the South Dakota farmland does not heavily favor South Dakota as a forum, because the specific property held by the trust has little bearing on the question of undue influence in the execution of the Amendment." (This concept that the issue is about the real estate as a trust asset, rather than a real estate issue, is similar to Trusteeship Created

By the City of Sheridan, Colorado, 593 N.W.2d 702 (Minn. Ct. App. 1999), discussed above.)

(ii) The public factors include the following: "[t]administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial ... in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." The court concluded that both South Dakota and Missouri "have an interest in the outcome of the litigation, and the case would not unduly burden either forum or present complex questions of choice laws." Accordingly, the public factors did not favor one jurisdiction over the other.

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

15. Bernstein v. Stiller, No. 09-659, 2013 WL 3305219 (E.D. Pa. June 27, 2013).

(a) In Bernstein, the testator died a resident of Pennsylvania and created two separate trusts for her children under her will. At testator's death, the majority of her assets were in Maryland, and her will was probated there despite her domicile in Pennsylvania. The beneficiaries were residents of New York and New Jersey and the trustees were residents of Maryland, Georgia and Massachusetts.

(b) The beneficiaries filed a petitions to compel accountings and to remove the trustees in the Court of Common Pleas of Philadelphia County, Orphans' Court Division. The trustees removed the matters to federal court in the Eastern District of Pennsylvania on the basis of diversity jurisdiction, and then filed a motion in the Eastern District

to dismiss the matters for lack of personal jurisdiction due to insufficient contacts with the forum.

(c) The trustees argued that the district court lacked both in rem and in personam jurisdiction. They claimed that the court lacked in rem jurisdiction because none of the trust property was in Pennsylvania, the originating accounts were held and administered outside of Pennsylvania, and the testator's Pennsylvania residency at death was insufficient to permit the court to exercise in rem jurisdiction. The trustees further argued that the court lacked specific in personam jurisdiction because the petitioners' claims did not stem from contacts with Pennsylvania and the testator's will was not probated or administered in Pennsylvania. Finally, the trustees argued that the court lacked general in personam jurisdiction because there were no "continuous and systematic contacts" between the trustees and the forum state.

(d) The beneficiaries' argued that the court had in personam jurisdiction as a result of trustees' counsel declaring the trusts "resident trusts" on a 2006 Pennsylvania Fiduciary Income Tax Return. The beneficiaries claimed that such a declaration gave Pennsylvania courts in rem jurisdiction, and therefore pursuant to the Pennsylvania long arm statute, codified at 42 Pa. C.S. §5322(a)(7), that gave the court in personam jurisdiction over the trustees. In opposition, the trustees claimed that the term "resident trust" was a tax classification with no jurisdictional significance.

(e) The court rejected the beneficiaries' argument, noting that they improperly relied on the Pennsylvania long arm statute because the statute only applies to those exercising powers under the authority of Pennsylvania. The trustees, however, were exercising their powers under the authority of Maryland, where the trusts were created, and therefore were not subject to Pennsylvania's long arm statute. The court then looked at the Pennsylvania tax statute's definition of "resident trust." Under the tax statute and relevant case law, there were "insufficient minimum connections to support Pennsylvania's taxation of the trust assets" and, therefore, insufficient minimum contacts for personal jurisdiction. Bernstein, 2013 WL 3305219, at *7. Lastly, the court claimed that "even if [it] were to accept that the trusts themselves are resident in Pennsylvania, the residency of the trust assets would still not be sufficient to

give the Pennsylvania courts personal jurisdiction over [the trustees] in the absence of other minimum contacts between [the trustees] and the forum state." Id. Therefore, the court dismissed the case for lack of personal jurisdiction.

(f) Although the beneficiaries relied solely on their "resident trust" argument, the court addressed additional arguments for Pennsylvania to exercise jurisdiction. The court noted that a prior trustee's residence in Pennsylvania while serving as trustee until his death did not establish sufficient contacts because he was not named as a party in this case and the court would still lack personal jurisdiction over the other respondents. The court also noted that the testator's residence in Pennsylvania at death was insufficient to give Pennsylvania jurisdiction over assets held elsewhere.

16. In re Peierls Family Testamentary Trusts, 77 A.3d 223 (Del. 2013).

(a) In Peierls, three related testators created seven testamentary trusts for the benefit of the appellants. The facts regarding each testator's trusts are as follows:

(i) The first testator died a resident of New Jersey and created two testamentary trusts for the benefit of his two sons. Testator's two sons and a Delaware corporation were serving as trustees at the time of litigation. Testator's will did not include any choice of law provision regarding the trusts. Testator's sons claimed that "New Jersey has been the situs of the trusts and that New Jersey law has governed the administration of the trusts since their inception" (locational and administrative situs). Peierls, 77 A.3d at 225. A 2001 court order approving an intermediate accounting of the trusts from the Superior Court of New Jersey proved that that the trusts were subject to that court's jurisdiction (jurisdictional situs).

(ii) The second testator died a resident of New York and created two testamentary trusts for the benefit of her two grandsons. One of testator's sons, another individual, and a New York corporation were the original trustees. Testator's will did not include any choice of law provision regarding the trusts. Testator's grandchildren claimed that New York was the original locational, administrative, and jurisdictional situs of the trust; however, a

Texas Probate Court accepted jurisdiction over the trusts, moved their situs to Texas, and approved the removal of the New York corporation as trustee and appointment of a Texas corporation in its place. After obtaining the Texas court's order, the testator's grandsons returned to the New York court and "obtained an order officially transferring the trusts' situs from New York to Texas and approving the new corporate trustee." Id. Subsequently, the Texas court "issued an order declaring that Texas law govern[ed] the administration of the trusts while New York law continue[d] to govern the validity and construction of the trusts." Id.

(iii) The third testator was believed to have died a resident of Texas and created three trusts: two for the benefit of her husband and one for the benefit of her husband and children. The testator's will included a specific choice of law provision, declaring that "[u]nless the situs of any trust is changed, the laws of the State of Texas shall control the administration and validity of any trust." Id. at 226. Another section of the will declared Texas as the fixed situs of the trust, but that section included an exception: "[I]f the Trustee shall be or become a resident of or have principal place of business in a state other than Texas, the situs of the trust may be changed to the place of residence of an individual Trustee who is serving alone as sole Trustee or to the place of business of a corporate trustee if one is serving as sole or Co-Trustee." Id.

(b) The beneficiaries of these seven trusts filed several petitions, which all amount to appointing a Delaware corporation as trustee and changing the locational, administrative, and jurisdictional situs of the trusts to Delaware. The Court of Chancery denied the petitions for various reasons, including lack of jurisdiction. The petitioners subsequently appealed to the Supreme Court of Delaware.

(c) In determining if the lower court properly declined to exercise its jurisdiction and properly abstained from ruling on the petitions, the Supreme Court of Delaware first considered whether the Court of Chancery had jurisdiction over the trusts. The court clarified that all of petitioners' requests related to matters of administration and therefore

was solely addressing "which courts have jurisdiction over administration of those Trusts." Id. at 227. The court relied on the Restatement (Second) of Conflict of Law in concluding that the Court of Chancery had jurisdiction over the trusts, noting that a court had jurisdiction to decide administrative issues relating to a trust when it has jurisdiction over the trustees. Because all trustees and interested parties consented to the court's jurisdiction, the Court of Chancery had jurisdiction over the trusts, at least for administrative issues.

(d) The Supreme Court of Delaware then addressed whether the Court of Chancery should have exercised its jurisdiction to rule on the petitions, noting that the court with "primary supervision" over the trusts should exercise jurisdiction over administrative issues. A court has primary supervision if "the trustee is required to render regular accountings in the court in which he has qualified." Id. at 228 (quoting Restatement (Second) of Conflict of Laws § 267 cmt. e). However, if the court where the trustee has qualified does not actively exercise jurisdiction over the administration of the trust, "then the court of the place of administration 'may exercise primary supervision'" (thus allowing the court in the trust's administrative situs to assume jurisdictional situs). Id. In determining this issue, the court addressed the trusts of each testator separately.

(i) The court concluded that the Court of Chancery acted properly in refusing to exercise jurisdiction over the first testator's trusts because New Jersey was the place of primary supervision. The beneficiaries argued that by approving the appointment of a Delaware corporation as a trustee, the New Jersey court provided for a change in the place of administration (administrative situs). The court rejected this argument, noting the many factors that prove New Jersey is the trusts' administrative situs, including the trusts' numerous interactions with that court through four accountings.

(ii) The court concluded that that the Court of Chancery erred in not exercising its jurisdiction over the second testator's trusts; however, the court did not remand this issue because petitioners' likelihood of relief was minimal. Although petitioners obtained court orders confirming that Texas was trusts' situs,

the court found that the trusts' contacts with Texas courts was limited to those necessary to obtain an official transfer of situs. Because Texas courts did not exercise active control over the trusts, no state's courts had primary supervision. Therefore, the Court of Chancery could have exercised its jurisdiction because it had personal jurisdiction over the trustees. Despite this conclusion, the court did not remand this issue because any claim for reformation of the trusts would be a matter of Texas law and petitioners did not set forth such arguments.

(iii) The court affirmed the Court of Chancery's declination to exercise jurisdiction over the third testator's trusts because the petitioners failed to address them in their briefs and arguments.

17. Benson v. Rosenthal, No. 15-782 (E.D. La., July 8, 2015):

(a) In Benson, the settlor, who was the owner of the New Orleans Saints and the New Orleans Pelicans sports franchises, created three trusts while he was a Texas resident. The trusts were governed by Texas law and administered by a Texas individual trustee, who was an attorney. The trusts, through entities, owned interests in certain Louisiana assets, including the Saints, the Pelicans, certain Louisiana real estate and New Orleans television affiliates.

(b) Pursuant to the terms of the trusts, the settlor had the right to swap assets for equivalent value. The settlor sent a notice to the trustee to exchange certain assets of the trusts in exchange for promissory notes of equivalent value. The trustee refused to make the exchange, stating that the promissory note was not an "appropriate trust investment" and that the trustee had to make his own independent verification of the value of the assets to be exchanged.

(c) The settlor filed a petition in federal court in the Eastern District of Louisiana (where he and one of the beneficiaries then resided) to declare the asset swap effective, and the trustee filed a motion to dismiss due to lack of in personam jurisdiction.

(d) In arguing that the court lacked jurisdiction, the trustee pointed to the fact that he was a Texas resident, the settlor was a Texas resident when the trusts were created, the

trusts were subject to Texas law, the trusts owned several Texas companies and the trustee rejected the exchange in Texas.

(e) The settlor argued that the trusts owned interests in entities that owned Louisiana properties, which made up the bulk of the trusts' assets, and that the trustee administered the Louisiana assets as trustee, attended monthly meetings in Louisiana with the beneficiaries (one of whom was a Louisiana resident) and participated in transactions involving Louisiana real property and businesses. The settlor also argued that the New Orleans Saints paid the trustee's law firm a monthly retainer of $20,000 (which increased to $25,000), which included compensation to the trustee for his administration of the trusts.

(f) The court noted that there will be sufficient minimum contacts to exert in personam jurisdiction if a party "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." In arguing that such Louisiana contacts did not exist, the trustee relied on Hanson v. Denckla (discussed above), stating that, as in Hanson, the trustee had no property or office in the forum state, and the trusts were executed in another state when the settlor was a resident of that state. The court distinguished this, stating that, unlike in Hanson, many of the trusts' assets were located in Louisiana. In addition, the nature of the trusts' assets (i.e., Louisiana real estate and ongoing Louisiana businesses), meant that the trustee "purposefully availed himself of the benefits of the state of Louisiana" and that there would need to be "continuing and wide-reaching contracts" with the state of Louisiana as a result of such assets. Thus, the Court held that the trustee had sufficient minimum contacts with Louisiana for the court to exercise personal jurisdiction over the trustee.

(g) The court then considered whether the cause of action arose out of or related to the trustee's contacts with Louisiana. Noting that there were "three schools of thought regarding what 'arising out of or related to' means in the context of specific jurisdiction" among the various circuits, the Court concluded that the Fifth Circuit would adhere to a "but for" test – that is, the "standard is satisfied when the plaintiff's claim would not have arisen in the absence of the defendant's contacts," which "ensures that the defendant's contacts with the forum have at least a minimal link to the

plaintiff's cause of action, without requiring that the defendant's contacts directly cause or give rise to the plaintiff's claims."

(h) The court held that the "but for" test was satisfied here: "*but for* [the trustee's] agreement to serve as the trustee of [the settlor's] trusts, this dispute would not have occurred. If [the trustee] had neither agreed to administer nor actively administered the trusts and their Louisiana assets, [the settlor] would not be seeking a declaratory judgment against him for his instant failure to administer the trusts as [the settlor] requested" (emphasis in original). Accordingly, the Court held that the settlor's cause of action arose out of the trustee's contacts with the forum state.

(i) Finally, the court considered whether the exercise of jurisdiction over the trustee would be fair and reasonable. In concluding that it was, the Court noted that the trustee "traveled to Louisiana on several occasions to attend meetings regarding trust assets. He cannot now say that he would be unduly burdened by traveling here for the purpose of defending himself in this litigation. In addition, it cannot be disputed that Louisiana, the forum state, has a significant interest in litigating the issues presented in this case – namely, the ownership of substantial property within its bounds." Thus, the Court held that it could exert personal jurisdiction over the trustee.

18. Abromats v. Abromats, Case 16-cv-60653-BLOOM/Valle, 2016 WL 4366480 (S.D. Fla., August 16, 2016):

(a) In Abromats, settlor, while a resident of Broward County, Florida, executed an inter vivos trust with "Florida choice-of-law provisions," naming her son Clifford (a New York resident) as trustee and her sons Clifford and Philip (a Wyoming resident) as beneficiaries. Settlor, while still a resident of Broward County, executed subsequent amendments to the trust that benefited Philip, which Clifford alleged were the product of undue influence. Clifford filed in the Circuit Court of Broward County a pleading seeking approval of a trust accounting and to invalidate the subsequent trust amendments. Philip removed the matter to federal court in the Southern District of Florida based on diversity jurisdiction and then filed a motion to dismiss for lack of in rem and in personam jurisdiction. Prior to Clifford's filing in the Broward County, Philip filed an action in the Western District of New York against Clifford concerning the trust, making similar allegations against Clifford that Clifford made against Philip. The judge in New York ordered the matter transferred to the Southern District of Florida (it is not clear whether the transfer was made by motion or *sua sponte*).

(b) With the matter then before the Southern District of Florida:

(i) With respect to in rem jurisdiction, Philip argued that because Clifford's domicile was in New York, that moved the place of administration to New York. The court noted that while settlor's domicile was not dispositive, neither was the fact that Clifford lived in New York. The court noted that the trust consisted of certain funds and securities in accounts that remained in Florida. In addition, Clifford maintained a Florida condominium, which he testified he maintained in part so that he could carry out his duties as trustee, and that he has relied on Florida professionals to advise him with respect to the administration of the trust. He also testified that the majority of the trust's records were located in Florida. In addition, the court noted that "under Florida law, a trustee must prescribe notice before transferring a trust's place of administration to a jurisdiction outside of Florida, which Clifford has

never done."[10] Thus, the court concluded that the trust's principal place of administration was in Florida and therefore it had in rem jurisdiction over the dispute.

(ii) With respect to in personam jurisdiction, Florida, like UTC §202, provides that a court has personal jurisdiction over beneficiaries receiving distributions from a trust having its principal place of administration in Florida. For the reasons addressed above concerning in rem jurisdiction, the court had already concluded that the trust's principal place of administration was Florida. The court also undertook a Fourteenth Amendment due process test to determine whether personal jurisdiction was appropriate, and concluded that it was.[11] Accordingly, the court held that it had in personam jurisdiction and denied the motion to dismiss.

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

[10] Notice of a situs change is a requirement under UTC §108 and is retained by many states, including Pennsylvania (20 Pa. C.S. §7708), Florida (Fla. Stat. §736.108) and Arizona (A.R.S. § 14-10108).

[11] This due process analysis is beyond the scope of this outline.