SIOUX FALLS ESTATE PLANNING COUNCIL – FEBRUARY 15TH, 2024:

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*"

SPEAKER:

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The Main Generations in the U.S Today:

- **<u>The Greatest Generation</u>** – born 1901-1927 (Age 123 to 97)
- **<u>The Silent Generation</u>** – born 1928-1945 (Age 96 to 79)
- **<u>The Baby Boom Generation</u>** – born 1946-1964 (Age 78 to 60)
- **<u>Generation X</u>** – born 1965-1980 (Age 59 to 44)
- **<u>Millennial Generation</u>** – born 1981 – 1996 (Age 43 to 28)
- **<u>Generation Z</u>** – born 1997 – 2012 (Age 27 to 12)
- **<u>Generation Alpha</u>** – born 2013 – 2025 (Age 11 to 0)

<u>Source</u>: *Care Givers of America*, "2022 Generations Named Explained"

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*"

- $140 trillion wealth in U.S.
- $84 trillion inheritance expected to pass through 2045:
  - From **Baby Boomers** and **Silent Generation**
  - To **Millennials** and **Generation X**
  - **Mainly** from **Baby Boomers** to **Millennials**
  - **Millennials** will go from **holding** (next 10 – 20 years)
    - **3%** of **wealth**

      to

    - **60%** of **wealth**
  - **$12 trillion** to **charities**

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*" (cont'd):

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

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*" (cont'd):

- **Parents Concerns: Protect**
  - **Family values** (promote fiscal & social responsibility)
  - **Family wealth**
  - **Governance**

- **Future Uncertainties: Protect**
  - **Economic/Investments**
  - **Political**
  - **Lawsuits**
  - **Divorce**
  - **Taxes**

- **Answer/Solution: Modern trust laws** and **structures**

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*" (cont'd):

- **"Giving While Living"**
- **Heirs increasingly do not have to wait** for **passing** of **elders** to **benefit** from **family assets:** popularity of **"Giving While Living"**
- **Reasons** for **"Giving While Living"**
  - **Baby Boomers** benefited: **financial** [and] **housing markets**
    - Average price of **U.S. home: 500% increase since 1983**
    - **S&P 500 2,800% growth since 1983**
  - **$13.6 million estate, gift** and **generation skipping exemptions**
    - Due to **sunset** to **$5 million (indexed)** by **12/31/25**
  - **Modern directed trust laws** and **structures**
- **Result: 12.5% gifts** to **trust 1995 (currently 40%)**

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*" (cont'd):

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- **Modern trust laws** and **structures:**
  - **Directed trust**
    - **Family** & **family advisor involvement (collaboration)**
    - **Flexibility** & **control** – regarding **investments** and **distributions**
      - **Ability** to **mentor family**
      - **Preserve family values** (fiscal & social responsibility)
  - **Asset protection**
  - **Family divorce protection**
  - **Tax savings**
  - **Privacy** (not secrecy)
    - Court proceedings
    - Beneficiary quiet (Keeping trust silent)
  - **Private Family Trust Company**

"Important Population Trends That Influence Powerful Trust Strategies – *Inheritance is a Process Not an Event*" (cont'd):

Inheritance is a **process** **not** an **event!**

Types of Trusts:

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

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

Self-Settled Trusts:

- **Self-Settled Trusts**:
  - **Irrevocable trust** established so the **grantor**/settlor can be a **permissible discretionary beneficiary** of the trust
- **Gift/GST Exemption**: **$13,610,000**
  - Due to high exemptions client may want to be a permissible discretionary beneficiary of a trust
- **Asset Protection:** **creditors cannot** otherwise **reach** the **trust** assets to **satisfy legal obligations** to the **settlor** unless:

  Exception creditors – varies by state

  (or)

  Fraudulent conveyance – typically 2-4 years (depending upon state)

Self-Settled/Domestic Asset Protection Trusts –

4 Levels of Protection:

Domestic Asset Protection Trust

Two Self-Settled Options:

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

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

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

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

- Also sole member LLC statute so trust sole owner

Level 3 – Discretionary Interest Protection

- Not a property or enforceable right

Level 4 – Spendthrift Provision

Please see: Al W. King III, "Tips from the pros: Defend Against Attacks on DAPTs" *Trusts & Estates* magazine, October 2014.

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Other Miscellaneous Statutes Helpful to Maximize DAPT's Benefits:

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

Modern Directed Trusts:

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

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Flexible Modern Directed Trust:

Directed Trust (Trifurcated Fiduciary Structure):

Investment Advisor or Committee

Directs trustee regarding investments

Distribution Advisor or Committee

Directs trustee regarding distributions

Directed Administrative Trustee

Exercise authority and power at the direction of the investment & distribution committees

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

Traditional Trust Investing [Versus] Flexible Modern Directed Trust:

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

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

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

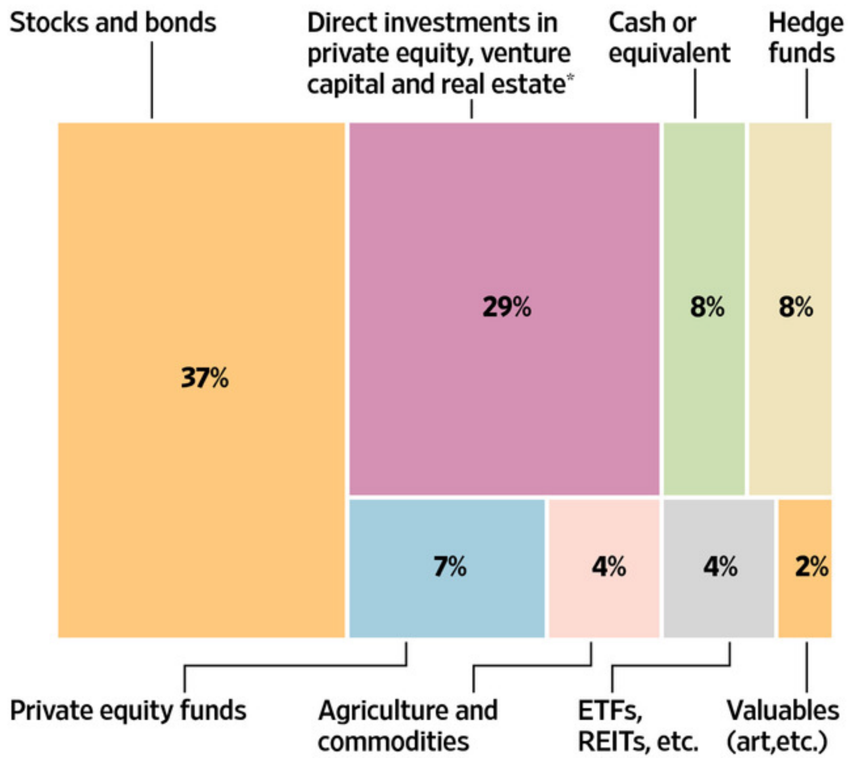
    - size of portfolio
    - nature and likely duration of trust
    - liquidity and distribution requirements
    - general economic conditions – inflation/deflation
    - tax consequences of investment/distribution decisions
    - Expected total return
    - Role of individual investments in portfolio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

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

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

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

Model Family Office Portfolio:



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

THE WALL STREET JOURNAL.

Please see: Al W. King III and Pierce H. McDowell III, "Selecting Modern Trust Structures Based on a Family's Assets" *Trusts & Estates* Magazine, August 2017.

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Flexible Modern Directed Trust
With Investment Management LLC:

Investment Advisor or Committee

Directs trustee regarding investments

Directs trustee to hold Investment Management LLC

Directed Administrative Trustee

(Administrative trustee) as directed administrative trustee

Distribution Advisor or Committee

Directs trustee regarding distributions

Investment Management LLC

- Manager/family or family advisor
- Sole member owner/SDTC

Investment Management LLC:

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

Investment Management LLC (IMLLC)

- Owns trust assets
- Assets titled to IMLLC which is titled to the trust
  - Sole member

- Investment committee directs
  - SDTC to hold Investment Management LLC (IMLLC)

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Flexible Modern Directed Trust with Investment Management LLC:

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

Trust Protector (Vary by State Statute):

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

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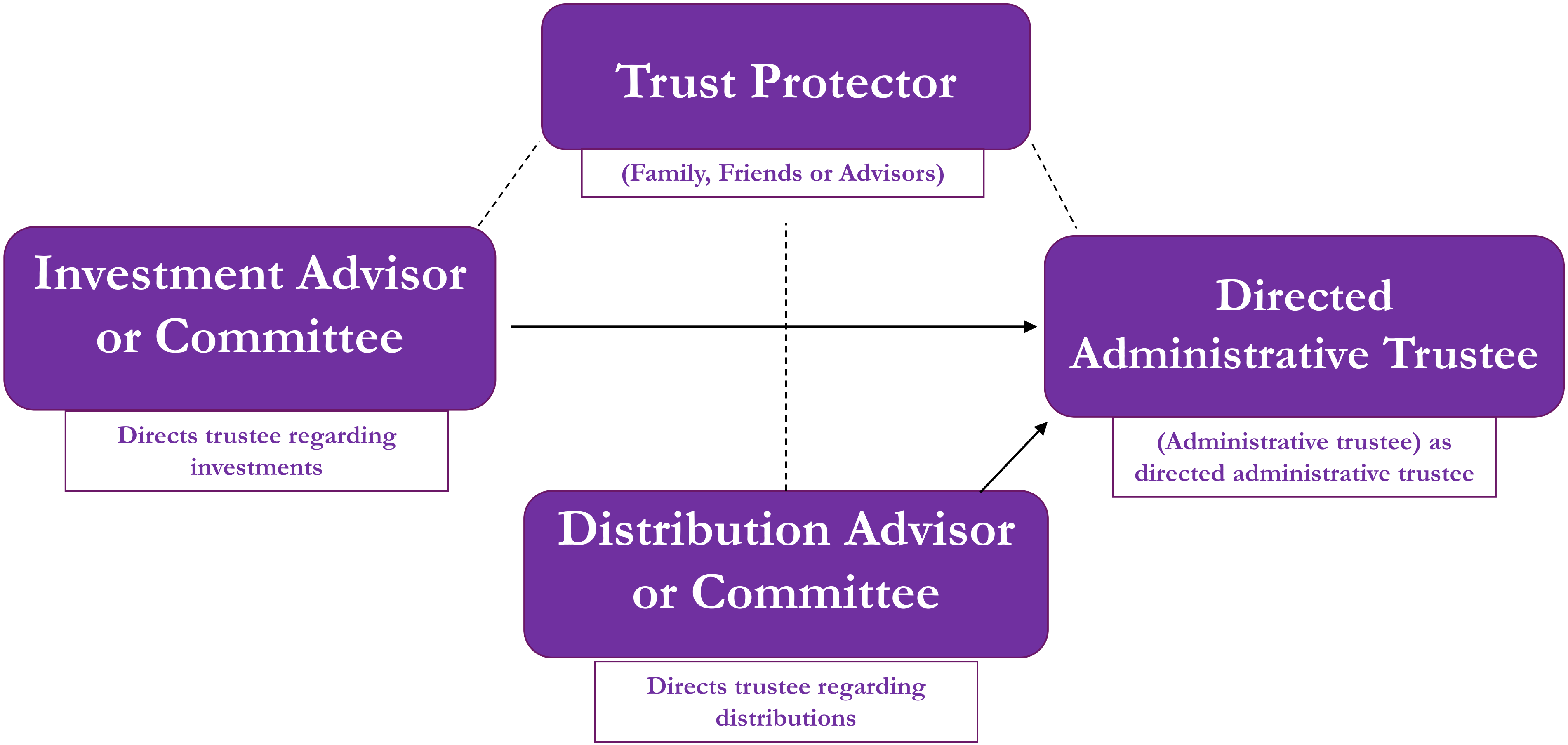
Grantor Appoints a Trust Protector With Following Powers:
(Vary by State Statute)

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

Typical Flexible Modern Directed Trust *with Trust Protector:*



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

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

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

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

Common Reasons for Silence:

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

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

Inheritance & Divorce:

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

<u>Source</u>: Al W. King III, "An Update on Third-Party Discretionary Trusts With Spendthrift Provisions" *Trusts & Estates Magazine*, October 2019

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Inheritance & Divorce (cont'd):

- *Berlinger v. Casselberry*, 38 Fla. L. Weekly D 2482 (Fla. Dist. Ct. App., Nov. 27, 2013)

- Father set up third party trust for family (i.e., Son)

- Florida Trust Code interpreted so former spouse of son could access trust assets to satisfy alimony:

  - **Florida Spendthrift Clause exception creditor: Alimony**

- Court held - Florida state law allows court to order writ of garnishment against Florida discretionary trust

- **Solution: Flexible Modern Directed Trust states – Discretionary Interest statutes prevent garnishment**

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

- Beneficiary does not have right to distribution

- Beneficiary does not have property interest

- No creditor may attach [or] force distribution from the trust

- Reason no enforceable right

  - Discretionary Interest statute (Restatement 2nd) in many Flexible Modern Directed Trust states

Inheritance & Divorce (cont'd):

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

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

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

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Advantages of Non-Judicial Validation Statutes:

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

Non-Judicial Validation Statute:

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

- Generally, 60 to 90 day statute of limitations period

Modern Trusts:

- **Traditional trust** – "How soon can we get the assets out of a trust?"

[versus]

- **Modern trust** – "How long can we leave assets in a trust?
  - **Dynasty Trust** – **perpetual** or **long term**
  - **Flexibility** to deal with **future uncertainties**
  - **Control** – **family** and **family advisor** fiduciary involvement
  - Powerful **trust**, **tax**, **asset protection** and **privacy** laws

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Selected Popular Directed Trust States with No State Income Tax:

Alaska
Delaware
Nevada
New Hampshire
South Dakota
Tennessee
Wyoming

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

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Year Dynasty Trust Statute Enacted:

- South Dakota (1983)
- Delaware (1995)
- Alaska (1997)
- Florida (2001)
- Wyoming (2003)
- Nevada (2005)
- New Hampshire (2006)
- Tennessee (2007)

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

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

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

NY Will

Pour Over at Death

Nominally Funded Revocable Living Trust (Dynasty Provisions)

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

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

NY Will

Inter-vivos Dynasty Trust

- Utilizing $13.61 MM Gift Exemption ($27.22 MM per married couple)
- $13.61 MM of GST Exemption per spouse

NY Marital Trust

NY Estate Tax Exemption Trust

Scenario #3- Dynasty Trust ILIT (Nominal set-up fee and $2,500 - $3,000 annual fee)

Dynasty Trust ILIT

QUESTIONS?

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Al W. King III is the Co-Founder, Co-Chairman and Co-Chief Executive Officer of South Dakota Trust Company LLC (SDTC) and SDTC Related Companies with offices in South Dakota, New York, Wyoming, Nevada and Westport, CT. SDTC is a national trust boutique serving wealthy families from 54 countries and 47 states. SDTC currently has more than $140 billion in assets under administration.

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

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

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

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

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