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Tax Considerations in Trust Terminations, Modifications, and Decanting: Federal and State Taxes, Planning Strategies

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TAX CONSIDERATIONS IN TRUST TERMINATIONS, MODIFICATIONS, AND DECANTING
Strafford Webinars

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November 2, 2021

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There are various reasons to want to change trust provisions. These include changes in federal tax law, changes in circumstances, or changes in goals of the settlor or trustee.

The federal estate tax exemption (being the same for gift tax and generation-skipping transfer tax) has increased from $1,000,000 in 2001, to $5,000,000 inflation adjusted in 2012, doubling that amount in 2017, to be presently $11,700,000 ($23,400,000 for married couples). It is scheduled to revert back to the $5,000,000 (plus inflation adjustment) for deaths and gifts **after** December 31, 2025 (to be approximately $6,250,000). Currently Congress may legislate an early return to the $5,000,000 (plus inflation adjustment) on January 1, 2022. However, as of October 29, 2021, the House Committee on the Budget's proposal in its latest version of H.R. 5376, BUILD BACK BETTER ACT (the (BBB Bill"), is to shelve estate and gift tax changes. These changes were at one time or another proposed to be (i) reversion of the exemption mentioned above, (ii) inclusion of trust assets in the settlor's estate of assets held in "grantor trusts," and (iii) elimination of valuation discounts for interests in controlled entities, among other things.

The highest income tax rates have changed for both capital gains and ordinary income, including imposition of the net investment income tax ("NII Tax") of 3.8% on passive income for higher income taxpayers. Trusts can reach above a near 50% federal marginal rate alone at around $13,000 in taxable income (prior to 2013 the maximum rate was 35%).

The BBB Bill would also add a special income tax 5% surcharge on trusts and estates with Modified AGI exceeding $200,000, and an additional 3% on Modified AGI over $500,000 (creating a tax rate for trusts of over 50% for federal income tax alone. Smart planning has recognized this and has shifted and placed a greater emphasis (and in most cases, sole tax planning) on income tax planning, as well as asset protection planning. The BBB Bill also imposes the 3.8% NII Tax on active trade or business income for all trusts to the extent income is taxed at the highest rate (approaching $13,000) and individuals having Modified AGI in excess of $400,000 ($500,000 for married joint returns), which had previously been limited to passive income.

The Qualified Business income pass-through deduction of Section 299A is untouched by the BBB Bill as of the time of this writing.

It goes without saying that income tax is reduced when there is less taxable income. One method to reduce taxable income of a trust is to shift it to beneficiaries who are in lower marginal income tax rates. Another means to reduce taxable income is to raise the basis of assets sold by a taxpayer. One way in which that occurs tax-free is when an asset is included in the gross estate of a decedent. The method of doing that without causing trust assets to leave the safety of a trust or exposed to creditors of beneficiaries is to spring the Delaware Tax Trap. Reduction in income tax can be achieved if the Obamacare 3.8% NII Tax (the Net Investment Income Tax or "NII Tax") can be avoided, which is made much more difficult with the BBB Bill.

This outline will discuss some of the income tax issues and consequent planning and drafting of trust related documents that may be available. NO EXAMPLE OF TRUST TEXT IN THIS OUTLINE IS SUITABLE FOR ANY SPECIFIC PURPOSE AND IS ONLY PROVIDED FOR DISCUSSION PURPOSES.

EXAMPLES OF A GIVEN STATE LAW ARE MADE MOSTLY FROM ARIZONA, WHERE I PRACTICE. ARIZONA IS OF ONE OF THE 35 OR SO STATES THAT HAVE ADOPTED THE UNIFORM TRUST CODE ("UTC"). Many UTC states (including Arizona) have made substantial changes to the UTC. In Arizona the new statutes are referred to as the Arizona Trust Code ("ATC"). TRUST INSTRUMENTS GENERALLY CAN BE DRAFTED TO INCORPORATE THE DISCUSSED UTC PROVISIONS DISCUSSED BELOW TO GRANT AUTHORITY TO TRUSTEES AND OTHERS THAT ARE AUTOMATICALLY AUTHORIZED IN THE UTC.

I. INCOME TAX TRUST PROVISIONS.

A. Trust Protector Provisions. A person can be named to act as a special trustee to have unique and potentially very powerful powers. In many states specific legislation has authorized appointment of "Trust Protectors." The provisions establishing the role of Trust Protector are not alone specific provisions that cause a tax consequence. However, the power given to the Trust Protector creates the ability to affect and change tax consequences, as is shown below.

For tax and asset protection reasons the appointment and replacement of the Trust Protector should be removed from the settlor and any current or potential beneficiary who is trustee. If that is not possible, then if there is a power to remove by either the settlor or a beneficiary trustee, at least limit the power to appoint a Trust Protector to those who are not related or subordinate to the appointing settlor or trustee, within the meaning of Code Section 672(c). Restricting the power in this manner creates a safe harbor for settlors:

> Revenue Ruling 95-58: ("[I]f the decedent had possessed the power to remove the trustee and appoint an individual or corporate successor trustee that was not related or subordinate to the decedent (within the meaning of section 672(c)), the decedent would not have retained a trustee's discretionary control over trust income.")

Many private letter rulings, including PLR201434005 and PLR 201436003, hold the same for a beneficiary's power to replace the trustee.

The Arizona Trust Code authorizes the appointment of a Trust Protector. A.R.S. Section 14-10819. Under the statute, the Trust Protector IS NOT A FIDUCIARY and has no liability for acting or failing to act, except as otherwise provided in the trust agreement. The trust agreement then must provide for the appointment of the Trust Protector, and certain of the powers that can be given to that person.

B. Trust Protector or Trustee Power to Define and Distribute Taxable Income. A purpose would be to permit the trustee to make trust distributions that would shift taxable income from the trust to the beneficiaries. The beneficiaries should not have that unilateral power, or such persons would be deemed to have withdrawn and recontributed the income, and become taxable on it.

The income tax brackets of nongrantor trusts are very compressed. That means the marginal tax rate of such trusts climb very quickly, and, above $13,000 of taxable income, the maximum federal tax rates apply. Net Investment Income ("NII") includes nonexempt passive income, as well as capital gain and allocable trade or business income in which the trust is not deemed to materially participate. It does not include income from IRAs or qualified plans. As stated above, it is possible, if the BBB Bill is passed, the overall federal marginal rate may exceed 50%, and when state income tax is added the marginal total can approach 60%. Since the rate may far exceed an individual beneficiary's federal marginal rate (at taxable income of $50,000 an individual is at a 28% marginal federal rate, and, if not a dependent, an individual has no federal income tax if his taxable income before exemptions and standard deduction does not exceed $12,000. To take advantage of this arbitrage, the solution is to give the trustee (other than a trustee who is the settlor or a beneficiary) discretion to distribute to or for the benefit of beneficiaries, so long as it does not satisfy any obligations of support of either the settlor or the trustee, if intended to avoid creditor claims or estate tax inclusion of either.

Typically, discretionary distributions from a trust carry out distributable net income ("DNI") to the beneficiary in the amount distributed. Typically DNI is the fiduciary accounting income of the trust, which may be an amount close to the taxable income of the trust, such that it becomes taxable to the beneficiary distributee, shifting the tax from the trust to the beneficiary. This usually does not apply to taxable capital gain of trust, since it is not treated as fiduciary accounting income. So if there were $112,300 of taxable capital gain, the income could not be

shifted to beneficiaries and the NII Tax would be at least $3,800 on top of the applicable capital gains tax.

However, trust accounting income can be defined to include capital gain in order for it to be part of the DNI of the trust. Then, if $100,000 distributed to the beneficiary who has $100,000 or less in other adjusted gross income that is modified adjusted gross income ("MAGI"), the NII Tax might be avoided, in addition to possibly achieving the benefit of whatever reduced income tax marginal rate reduction is realized. There are many other crosscurrents that affect the decision to make tax mitigation distributions.

Income Tax Mitigation Distribution - Protector clause:

(a) To amend the Trust Agreement to add a trustee who cannot be related or subordinate to the Settlor or Current Income Beneficiaries as described in Code Section 672(c) who has the power distribute to the beneficiary in the absolute discretion of the Trustee, or under such other standard or limitation as the Trust Protector shall determine.

(b) To amend the Trust Agreement to define income of the trust to include capital gains. **[this status likely not be switched on and off.]**

Income Tax Mitigation Distribution - Trustee clause:

The Trustee may, in the Trustee's sole discretion, distribute income to or for the benefit of a Current Income Beneficiary from a trust created pursuant to this instrument to reduce the current combined foreign, federal, state, and local income tax liability to the applicable trust and the beneficiary.

C. Trust Protector Power to Make or Remove Grantor Trust Status by Granting or Removing a Power of Substitution. If the trust is classified as a grantor trust for income tax purposes, then the deemed grantor is treated as the owner of all assets and the borrower of all debts of the trust, and all its income tax items are treated as her income tax items. In many situations grantor trust status may save a substantial amount of income tax. Some situations are described in the preceding section.

If a rich parent settles a trust for her descendants, and the trust is a grantor trust under Code Section 671, et. seq., then she remains taxed on the income of the trust and the trust and its beneficiaries are not, and her payment of her incremental income tax is not a further gift by her, even though the trust and its beneficiaries benefit from grantor trust status. Rev. Rul. 85-13. This is true even during years when distributions are made to the beneficiaries. This is a wonderful method of transferring wealth gift tax free to descendants and others.

Reasons for changing grantor trust status:

(a) Trust income tax rate is higher than the settlor's.

(b) Social Security and Medicare may become means tested.

(c) Interest payments on funds loaned or assets sold between the trust and the settlor are not recognized or reported. Other transactions are also ignored for income tax purposes. Therefore, the settlor can buy low basis assets from the trust for cash, and the asset's basis will be stepped up to fair market value at the settlor's death, and high basis cash is held by the trust.

(d) Avoid the Net Investment Income Tax. If the trust is a grantor trust then the work of the settlor in the relevant activity is considered in order to determine if the material participation test (500 hours/yr.) or significant participation test (100 hrs./yr.) and the real estate professional test (1/2 of person's work is in real estate and more than 750hrs./year is in real estate, and in each case the real estate activity is a trade or business in which the person materially participates) is satisfied to avoid passive activity loss limitations and the NII Tax. Recall that the NII Tax applies to trusts which taxable income exceeds highest bracket threshold, around $13,000, but does not apply to an individual unless MAGI exceeds $200,000 ($250,000 if married). The BBB Bill may change this result to apply the NII Tax to trusts having Modified AGI that exceeds $200,000.

Grantor trust status can arise in intended and unintended situations. One of many situations causing grantor trust status is when the trustee has the power to make premium payments for policies of insurance on the life of a settlor or the settlor's spouse and the trust holds such policies. Even if all other facts that would cause grantor trust status are removed, this problem may remain if the trust owns such policies, unless the trust agreement permits the payment of such premiums only from contributions or corpus.

One commonly used technique to cause grantor trust status is to have the trust agreement provide that a person has the right, held in his or her personal and nonfiduciary capacity, to "reacquire" property of the trust for other property of equivalent value. Code Section 675(4)(C). There is authority that anyone can hold that power to satisfy the requirement. If one who has contributed assets to the trust has the requisite power, then grantor trust status is almost certainly achieved. Two IRS rulings provide some comfort that such power may be held by a settlor of the trust without concern that the retention or acquisition of such powers will cause estate tax inclusion. Rev. Rul. 2008-22 and Rev. Rul. 2011-28. However each ruling does provide some cautionary language that makes it prudent to carefully craft the reimbursement power.

A Trust Protector can be given the power to amend the trust to grant or remove the power of the Settlor or another to have the substitution power to possibly toggle grantor trust status on and off. There is consternation that successive toggling will be attacked by the IRS. Also toggling will not work to the extent the attribute toggled is not the only reason grantor trust status arises.

Caution: If the basis of the trust assets is less than the debt for which the trust has primary liability, taxable gain may be recognized by the grantor if grantor trust status ceases.

An example of a settlor substitution power (to achieve grantor trust status) following rulings addressing the issue, Rev. Rul. 2008-22 and Rev. Rul. 2011-28:

Substitution Power Trust Provision:

The provisions of this Paragraph apply notwithstanding any other provision of this instrument to the contrary. The Trustee is specifically authorized, but not required, to apply any trust income to the payment of premiums of policies of life insurance on the life of a Settlor or spouse of a Settlor; provided that payments for premiums must first be paid from income of policies of life insurance and from policies of life insurance that is principal but that is treated as income for federal income tax purposes. A Settlor shall have the power, exercisable in a nonfiduciary capacity, to acquire trust assets by substituting property of an equivalent value. A substitution power may be exercised, provided that the power is not exercisable in a manner that can shift benefits among the trust beneficiaries. For purposes of the immediately preceding sentence, a substitution power is deemed not exercisable in a manner that can shift benefits if: (a) the trustee has both the power (under local law or the trust instrument) to reinvest the trust corpus and a duty of impartiality with respect to the trust beneficiaries; or (b) the nature of the trust's investments or the level of income produced by any or all of the trust's investments does not impact the respective interests of the beneficiaries, such as when the trust is administered as a unitrust (under local law or the trust instrument) or when distributions from the trust are limited to discretionary distributions of principal and income. To exercise the power of substitution, the powerholder must certify in writing that the substituted property and the trust property for which it is substituted are of equivalent value. The Settlor, revocably or irrevocably (and if not so stated upon exercise then the exercise of the power described in this sentence is revocable), may exercise a power to prevent any person from exercising the power or powers authorized under this Paragraph.

Substitution Power Trust Provision – Protector clause:

To amend the Trust Agreement to delete [the substitution paragraph] and to amend the Trust Agreement to add [the substitution paragraph] if previously deleted.

D. Power to Reimburse Settlor. One of the effects of grantor trust status is that the settlor remains taxed on the trust income, as described above. There are many benefits that could be obtained from grantor trust status, but the tax liability might either be a deal stopper or at least a great irritant to the settlor, either presently or because there might be a large taxable income or gain down the road. Fortunately there is a remedy in some states. For example, in Arizona it is possible that the trustee can be given the power to reimburse the settlor for tax liability without material adverse estate tax results.

If state law is cooperative, then the settlor may be reimbursed by the trustee for "income tax attributable" to a grantor trust for which the settlor is treated as the grantor. Rev. Rul. 2004-64. The ruling provides that the IRS will not assert that the settlor has retained rights in the trust solely arising from the trustee's power to reimburse that will cause the trust to be treated as part of the gross estate of the settlor upon his death under Code Section 2036(a)(1) if: (1) the trustee, in the trustee's sole discretion, can determine to or not to reimburse the settlor, (2) state law will not cause the creditors of the settlor to reach the assets of the trust solely as a result of the trustee's power or its exercise, and (3) "there is no understanding, express or implied," between the settlor and the trustee regarding the trustee's exercise of discretion.

Arizona trust law, of course, is cooperative. A.R.S. Section 14-10505(A)(2)(a) and (b) provide:

> A creditor of a settlor:
> (a) shall not reach any trust property based on a trustee's, trust protector's or third party's power, whether or not discretionary, to pay or reimburse the settlor for any income tax on trust income or trust principal that is payable by the settlor under the law imposing the tax or to pay the tax directly to any taxing authority.
> (b) is not entitled to any payment or reimbursement that is to be made directly to any taxing authority.

This area is important if there is a trust settled by one for the other, because that is by definition a grantor trust[1] to the settlor spouse so long as the settlor is living and the other spouse remains a permissible current beneficiary.

The power to reimburse the settlor of a GRAT (grantor retained annuity trust) in addition to the required payments does not adversely affect the deemed value of the retained interest tax used to subtract from the value of the transfer.[2]

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[1] Code Sections 672(e) and 677, subject to Code Section 682.
[2] Treas. Reg. § 25.2702-3(b)(1)(iii).

Caution 1: The power of the trustee to reimburse the settlor may disqualify an intervivos QTIP Trust (qualified terminable interest property trust) for the gift tax marital deduction since the only permitted distributee during the life of the spouse is the spouse. Code Section 2523(f).

Caution 2: The trustee having the power to reimburse the settlor can be neither the settlor nor a trustee of the trust, who if appointed by the settlor pursuant to the exercise of a power by the settlor to remove and appoint a trustee, is related or subordinate to the settlor as described in Code Section 672(c). If so then there may be taxable gift and estate tax issues. See Rev. Rul. 95-58. The trustee also should not be a beneficiary of the trust. See PLR201434005 and PLR 201436003.

Here is some sample reimbursement trust language for discussion purposes:

Reimburse Settlor for Income Tax from Grantor Trust Income - Protector clause:

To amend the Trust Agreement to permit the Trustee of a trust created under the Trust Agreement, in the Trustee's sole discretion, to reimburse a Settlor directly or to the applicable taxing authority, for income tax attributable to taxable income of the trust includable in the taxable income of the Settlor to the extent that the possession of such power by the Trustee will not alone (i) cause creditors of the Settlor to have any right to reach the trust for satisfaction of claims against the Settlor or the Settlor's estate, and (ii) cause the assets of the Trust to be includable in the gross estate of the Settlor. For purposes of the immediately preceding sentence the income tax so attributable is the excess of the total income tax liability of the Settlor for a taxable year over and reduced by the total income tax liability of the Settlor for the taxable year determined as if the Settlor were not the owner of the trust for purposes of Code Section 671.

Reimburse Settlor for Income Tax from Grantor Trust Income - Trustee clause:

In the sole discretion of the Trustee, to reimburse the Settlor for income tax attributable to taxable income of the trust includable in the taxable income of the Settlor to the extent possession of such power by the Trustee will not alone (i) cause creditors of the Settlor to have any right to reach the trust for satisfaction of claims against the Settlor or the Settlor's estate and (ii) cause the assets of the Trust to be includable in the gross estate of the Settlor. For purposes of the immediately

preceding sentence the income tax so attributable is the excess of the total income tax liability of the Settlor for a taxable year over and reduced by the total income tax liability of the Settlor for the taxable year determined as if the Settlor was not the owner of the trust for purposes of Code Section 671. To the extent a payment is to be made pursuant to this paragraph, the Trustee may make the payment to the Settlor, or in the sole discretion of the Trustee, directly to the applicable taxing authority.

E. Trust Protector Power to Permit Super Crummey Power to Beneficiary to Shift Taxable Income to the Beneficiary. The purpose is to permit the beneficiary to be deemed the owner of the trust for income tax purposes and taxed on the trust income.

If a beneficiary has the right to withdraw all trust property, the right lapses, and the beneficiary remains a permissible current distributee of the trust, generally the beneficiary will be treated as the grantor of the resulting grantor trust for income tax purposes. Code Section 678(a).[3] The consequences of grantor trust status are described above. However, it is possible that applicable fraudulent transfer acts or the uniform voidable transfer act might apply to permit a creditor to reach the trust assets if the beneficiary was insolvent at the time the power of withdrawal lapses or for other reasons. This alone may cause the trust assets to become includable in the estate of the beneficiary.

If a gift is made to a trust to be distributable to beneficiaries over time, then the gift is "future interest" and it is not subject to the $15,000/yr-donor-donee annual federal gift tax exclusion (to become $16,000 in 2022). If a beneficiary has the right to withdraw the contribution made to a trust then the gift does qualify. This power of a beneficiary is was called a "Crummey Power," because in 1969 the Ninth Circuit ruled in favor of a taxpayer named Crummey and held that the gift to a trust was a present interest qualifying for the gift tax annual exclusion when the beneficiary could immediately withdraw from the trust an amount up the gifted amount it for a limited time.

For estate and gift tax purposes if a power of withdrawal from a trust by a beneficiary lapses, then only the excess of the amount lapsed over the greater of 5% of the trust value or $5,000 is treated as being contributed to the trust by the beneficiary ("5 and 5 Power"). The power to withdraw still could subject the rights of the beneficiary in the trust to the reach of her creditors, even after the lapse, so most states statutorily prevent the lapsed right as being deemed contributed by the beneficiary to the extent of a 5 and 5 Power lapse.

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[3] Note that if the trust is a grantor trust as to the settlor at the time of the beneficiary's right of withdrawal and then lapse, then the trust might not be a grantor to as to the beneficiary, even when the settlor is no longer the grantor thereafter. Code Section 678(b).

Example: Some other states go further to assist tax and asset protection planning. It no longer limits protection of beneficiary from his creditors to a power limited to the 5 and 5 Power. The Arizona Trust Code specifically provides that the beneficiary is not deemed to be the settlor of any portion of the trust after the lapse, regardless of the amount the beneficiary could withdraw. The broad protection has earned the name "Super Crummey Power" (a/k/a Giant Crummey or Jumbo Crummey). However, after the lapse, the trust assets may be subject to estate tax under Internal Revenue Code Section 2036 upon the death of the beneficiary or there may be a taxable gift by the beneficiary when distributions are made to others or the beneficiary's rights change.

A.R.S. Section 14-10505(B) provides:

B. For the purposes of this section:

1. During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

2. <u>On the lapse, release or waiver of a power of withdrawal, the holder is not, by reason of any such power of withdrawal, treated as the settlor of the trust.</u>

There remain at least a few creditor issues. For example, if the beneficiary is insolvent at the time the right of withdrawal lapses, perhaps a fraudulent transfer has been made. Additionally, there is a ten year look back period available to bankruptcy trustees regarding self-settled trusts. 11 U.S.C. Section 548(e).

Anyway, a trust provision that might control the timing of grantor trust status to the beneficiary follows:

<u>Super Crummey Provision – Protector clause:</u>

To amend this Trust Agreement to grant one or more beneficiaries of a trust created pursuant to this Trust Agreement a power to withdraw all or any portion of the assets of the trust for such period as the Trust Protector shall provide, after which the power shall lapse to the extent the power is not exercised. The power may condition exercise of the power on the consent of one or more persons described by the Trust Protector.

F. <u>Spring the Delaware Tax Trap through Exercise of a Power by Trustee, Trust Protector or Beneficiary Having a Power to Create a Power of Appointment, and if Necessary, to Create another Power of Appointment.</u>

Specifically the trust agreement may grant a Trust Protector a power:

To amend this Trust Agreement to grant a person a special power of appointment over some or all of the assets of a trust created pursuant to this Trust Agreement to appoint the property to substantially the same persons who were the beneficiaries prior to such exercise, but in such form or manner as the person shall determine, including the power to grant another a power of appointment; and the Trust Protector may additionally grant such person who was granted the power described above a power to appoint to himself or herself or his or her estate, to the extent appointed, up to one percent (1%) of the value of such trust estate.

1. **Delaware Tax Trap Introduction and Choices**.[4]

Assets are retained in long term trusts for many good reasons. One is asset protection. Another is to avoid inclusion in taxable estates of one or more beneficiaries or generations (so called "generation-skipping" or "dynastic trusts"). The total value of such trusts is growing significantly and continuously. Long hold assets in these trusts are not run periodically through the estate tax wringer as would be the case if they were held individually, and the basis in those assets is not reset ("stepped up") to fair market value free of income tax. The long term consequence is for much greater taxable gain when these assets are sold. Also, the combined state and federal marginal income tax rates are now no less higher than at any time in the last twenty years. The consequence is higher income tax liability.

A more pressing problem may be an irrevocable trust that is a nonexempt trust (a trust that has no GST Exemption allocated to it and which has a 1.0 Inclusion Ratio). Generally, distributions from such a trust to grandchildren (or other skip persons) will create a Generation-Skipping Transfer Tax ("GSTT") of 40% of the distribution.

There is a way to step up the basis of selected assets tax-free in certain of those trusts to reduce the income tax when the assets are sold. There is way to allocate GST Exemption to such trusts or change who is the transferor of those trust for GSTT purposes. It is a newly considered technique because it is founded on the high federal estate tax exemption made permanent this year. It generally requires that a trustee or another have a discretionary power to distribute or appoint assets from the trust.

Outright appointment. One appointment method to step up basis is to appoint the assets directly to a not so wealthy elderly but loyal family member who then is trusted to bequest the property back into trust for the benefit of desired persons. This is not without some risk, both volitionally and creditor-wise. Grantor trust status is also lost.

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[4]This part of this outline is adapted from "'Delaware Tax Trap' Opens Door to Higher Basis for Trust Assets," by Les Raatz, Estate Planning (February 2014 - Volume 41 Number 2), Tax & Accounting business of Thomson Reuters as Publisher.

Granting a general power, and with it some downside. Another method is to grant a general power of appointment to the selected individual that is exercisable upon death. If a trustee without a personal economic interest in the trust so appoints, the Delaware Tax Trap is not implicated, as will be discussed below. The provision of a general power of appointment offers significantly simpler analysis and availability of procedure. However, there is the unavoidable legal consequence of theoretical risk of creditors of the selected general powerholder having potential claims against the assets the subject of the power, even if the consent of nonadverse parties is required to exercise the power,[5] if the power is only exercisable in a Will or otherwise upon death of the powerholder, whether or not the power is exercised.[6] Additionally, the exercise of the general power of appointment causes the trust to no longer remain a grantor trust for income tax purposes. The loss of grantor trust status prevents the tax free substitution of assets between the grantor and the trust.

Delaware tax trap. The other method is to spring the Delaware Tax Trap, discussed at length in this writing. With each method, the plan is to intentionally cause selected assets of an irrevocable trust to become subject to the estate tax of a decedent whose taxable estate tax is otherwise is substantially under his available exemption, and whose estate could absorb the trust assets in his or her taxable estate without creating an estate tax liability. By including the asset in the taxable estate, tax-free step up in basis of selected assets could occur. The method is not available in all situations. There must be a power of appointment or trustee discretionary power over the assets desired to be stepped up, or the ability (through court action or otherwise) to establish one. (The BBB Bill does not have a suggested carry over basis provision.)

2. **Overview to Stepping Up Basis**.

The estate tax exemption is at an unprecedented $11,700,000 (inflation adjusted to over $12,000,000 in 2022),[7] which is halved in 2026 (or earlier if legislation so provides), and has never been so high. It is also annually adjusted upward for inflation. Opportunity exists more so now than ever existed before. That opportunity, when available, is to gratuitously cause low basis property in a trust to be included in the gross estate of a volunteer who is less than very wealthy. If the

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[5] A power to appoint to oneself, even if the consent of a nonadverse party is necessary, is a general power of appointment. Restatement of Property, Third, Section 17.3 Comment e and Illustration 6. The power of the trustee or trust protector to change a power into a general power does not make a power a general power except to the extent and when it is then a general power. Comment d.

[6] Restatement Third of Property (Donative Transfers), Section 22.3; Restatement Third of Trusts, Section 56. This reflects a change of the American Law Institute from its prior position enunciated in Restatement of Property 337 and Restatement Property Second, 13.2, which required exercise of a general power to permit creditors to reach the subject property. The holder of presently exercisable power is treated as the owner of the subject assets for such purposes. Section 22.3(a). A creditor of the estate of a decedent who possessed to power exercisable in his Will may reach the assets upon the death of the powerholder. Section 22.3(b).

[7] Section 2010(c)(3); Rev. Proc. 2014-61, 2014-47 IRB 860.

property is included in the volunteer's federal gross estate, then generally the basis the trust has in the property is stepped up to fair market value.[8]

For example, if a person (the volunteer) has a taxable estate of $2,000,000, and has or can be given a special power of appointment over some or all of the trust property, his or her gross estate could soak up over $9,000,000 in additional assets by causing trust property to be treated as part of the estate pursuant to Code Section 2041(a)(3) (the "Delaware Tax Trap") without incurring an estate tax liability. Alternatively, such a person could appoint during lifetime (using her gift tax exemption, also $5,000,000, inflation adjusted) or at death and be deemed the transferor to allocate the necessary portion of his or her GST Exemption (the same amount as the estate tax exemption described above).

The plan to apply the Delaware Tax Trap to step up basis must be in place before the death of the volunteer. The volunteer would be ensconced in the position of a powerholder, if not already one, through the exercise by present powerholder of a special power of appointment by creating another special power of appointment for the volunteer. The first exercise to give the volunteer the power would be exercised so as not to spring the Delaware Tax Trap, but the second exercise by the volunteer would spring the trap if the volunteer so provides in the exercise.

The ability to elect or not elect to spring the trap with respect to a particular trust is not generally dependent in which of the United States the trust is administered or the law of the state that governs the Trust. However some states (Arizona is one such state and will be a reference in this discussion) offer a greater protection against creditors of beneficiaries of the trust and the option to restrict the beneficiaries' control of the assets of the trust, and still obtain the step up in basis.

Many joint revocable living trusts of husbands and wives have matured into A-B Trusts (Decedent's (a/k/a Bypass) Trust – Survivor's Trust) upon the first spouse's death. Typically the deceased spouse's share of the estate was intended to be available to the surviving spouse but designed not to be includable in his or her federal gross estate. When the surviving spouse has an exemption now greater

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[8] Section 1014(b)(9); Reg. 1.1014-1(b)(1)**;** CCA 200937028**.** If the property appointed pursuant to the exercise is a tax partnership interest, then the death of the powerholder, the distribution of the interest in further trust, or both, should implicate Sections 743 and 754. Sections 742, 743 and 761(e)(2)(deeming distributions as exchanges); Reg. 1.742-1; Ltr. Rul. 200019029. The legislative history pertaining to Section 761(e) references distributions by corporations and partnerships, although the code section refers to distributions without any limitation. Cong. Conference Committee Report to P.L. 98-369, Section 75. See also Rev. Rul. 77-402, 1977-2 CB 222, and Rev. Rul. 79-84, 1979-1 CB 223 (tying Section 754 to change in grantor trust status) and CCA 200923024 (not so tying). Rev. Rul. 72-352, 1972-2 C.B. 395 (partnership year closes with respect to the transferor trust). Section 2041(a)(3) (the Delaware Tax Trap) applies in the same manner as Section 2044 (QTIP trust inclusion), so the entitlement to Section 754 treatment should be the same as was applicable to a transfer from a QTIP trust upon death of the spouse in Ltr. Rul. 200019029. Section 1014(b)(10) (enacted in the Technical Corrections Act of 1982 (H.R. 6056, P.L. 97-448, providing for corrections to ERTA, P.L. 97-34), Section 104(a)(1)(A)) "*clarifies* that qualified terminable interest property ('QTIP property') … is eligible for a 'step-up' in basis." (Emphasis added.) S. Rpt. 97-592 at Part II.D.1; H. Rpt. 97-794. The QTIP trust property is treated as is provided for other assets described in Section 1014(b)(9).

than the combined value of the A-B Trust as a whole, and if the basis that the Bypass Trust has in its assets is less than fair market value of the assets, it is a shame that something cannot be done to include it in the surviving spouse's estate for federal estate tax purposes. The springing of the Delaware Tax Trap provides a remedy. When available it can be used to cause the step up in the basis of assets held in an irrevocable trust through exercise of the special power of appointment. The springing of the trap can be utilized in other irrevocable trusts (not just Bypass Trusts) so long as a person has a special power of appointment exercisable at his or her death. There are many aging long term irrevocable trusts out there with assets having many billions of dollars of difference between their respective fair market value and basis.

The technique to spring the Trap is discussed at length below.

Many trusts were created to be available to a spouse or children and other descendants, but designed not to be subject to estate tax when such persons die. That may prove costly if the assets in the trust had increased in value or had been depreciated, depleted, or otherwise expensed and are now worth much more than the basis the trust has in the property. It was generally just accepted that the basis could not be increased without paying the toll in the form of state and federal income tax on the inherent gain. That was the trade off to achieve future avoidance of federal estate tax, formerly at a rate as high as 55%, but which is now 40%.

Now income tax rates can exceed estate tax rates. Presently, lost step up in basis may cost about 28.8% in many circumstances (20% federal capital gain rate and assumed state income tax rate of 5%, plus the Tax on Net Investment Income of 3.8% (the "NII Tax") of the portion of the property attributable to the appreciation. In other circumstances ordinary income tax rates may apply (e.g., depreciation subject to IRC Sections 1245 and 1250 recapture). Therefore presently the combined state and federal income tax rate may exceed 50%, and much more if the BBB Bill is enacted. The federal estate tax rate is now 40%. But the estate tax applies to all property subjected to such tax (both represented by basis and appreciation as well).

As was discussed, the federal estate tax exemption, the generation-skipping transfer tax exemption, and the gift tax exemption have been significantly increased (and will be further increased for inflation, but subject to future reduction). The increases in exemptions and the decrease in the estate tax rate have made the estate tax less of a concern. Correspondingly, the income tax rates have significantly increased. Therefore planning to avoid or reduce income tax is increased in importance, both in absolute terms and relative to transfer taxes. The importance of tax basis of assets is significantly increased. Planning to increase basis now has greater value.

3. **CRITICAL POINT: Trusts that are Candidates**.

The trusts that are ripe for the springing of the Delaware Tax Trap procedure would have certain characteristics:

a. Irrevocable trusts which (i) assets have value materially in excess of basis, or (ii) have a GST Inclusion Ratio of 1.0, or, in any event, significantly greater than 0.0 (sometimes called Non-GST Exempt Trusts) that may or will be distributed to skip persons,

b. Trusts that are not includable in anyone's estate,

c. Trusts in which either: (i) a person has a special power of appointment or (ii) the Trustee has discretion to make distributions (the broader the power to appoint to others, the better), and

d. Trusts that are either not grantor trusts for income tax purposes, or if they are grantor trusts: (i) the grantor cannot or will not exchange other assets for a low basis asset in the trust for which it is desired to step up basis, (ii) the grantor is likely to live for quite some time and basis step in the near term is important, or (iii) if the problem is lack of GST Exemption allocation the grantor cannot or will not allocate sufficient GST Exemption.

Example: Assume Joe and Mary set up a standard A-B trust arrangement in 2001 when the estate tax exemption was $1,000,000 and Joe dies in 2008, and their total net estate then is $4,000,000, equally owned, whether or not community property. All of Joe's property is allocated to the Bypass Trust (a/k/a the Credit Shelter Trust or the Decedent's Trust). And all of Mary's property ends up in the Survivor's Trust. Mary is not doing well in 2015. The Bypass Trust is now worth $4,000,000 - and Mary's estate is $1,000,000, because it had the house and she has spent down the Survivor's Trust and did not deplete the Bypass Trust. Much of the Bypass Trust has appreciated assets – value materially in excess of its basis. The survivor, Mary, has a general power of appointment over the assets in the Survivor's Trust, but she also has a special power to appoint the assets of the Bypass Trust to anyone but her, her creditors, and the creditors of either. The design was to give maximum flexibility, but avoid inclusion of the Bypass Trust in the estate of Mary. But it turns out that the A-B structure is not now necessary to avoid estate taxation. The problem now is that the $2,000,000 in appreciation in the bypass trust assets will not be stepped up to fair market value on Mary's death as it would be if the A-B Trust arrangement had been forgone. If it could be stepped up on Mary's death then taxable gain of $2,000,000 could be avoided when the children sell the assets after Mary's death. Assuming a 30% net marginal tax rate, the tax savings would be $600,000 in after tax dollars. There may be a way to achieve this savings.

4. **General Discussion.**

There is opportunity to use the Delaware Tax Trap to select the assets of the Bypass Trust to be subject to estate tax upon the death of Mary to the extent that there is no tax, so as to permit the basis of the selected estate to be reset to fair market value to reduce future taxable gain or increased depreciation write-offs. However, the opportunity can only be exploited if the spouse, or child beneficiary, or even a poor relative who is not an initial beneficiary of the trust has a right in the trust agreement (or as decanted) to change the beneficiaries of the trust or the method a beneficiary enjoys the property held by the trust.

Joint Trusts of Husband and Wife. The typical trust that most will view as a candidate for step up in basis, if it could be had, is the Bypass Trust (a/k/a Credit Shelter Trust or Decedent's Trust).

Joint revocable living trusts are commonly drafted throughout the United States for married couples. Often the trust document provides that all or a portion of the assets of the first of the couple to pass away is not transferred to the survivor, but is instead held in a trust that is available to the survivor, but is not subject to estate tax when the surviving spouse passes away. This is true even if the surviving spouse has the power to change the beneficiaries if the power is a type called a "special power of appointment."

Such a trust was intended to shelter funds from estate tax of the surviving spouse when the Estate Tax Exemption was $1,000,000 or even when it was higher. But with the current Federal Estate Tax Exemption at $11,700,000, subject to inflation adjustment, all or a significant portion of the Bypass Trust now may not need to be sheltered from the Estate Tax. For example, if the assets owned by the survivor total $2,000,000, and the amount in the Bypass Trust also totals $2,000,000, then even if the assets were all owned by the survivor, there would still be no Estate Tax upon the survivor's death since the total estate would be $4,000,000 and the Estate Tax Exemption is well over that.

Why does this matter? Normally, when a person dies, the tax basis of assets he or she holds is "stepped up" to the fair market value of the assets at the date of death.

> Example: Assume a person bought an investment property, such as stock or land, for $100,000. Assume at death of the person the property is then worth $1,000,000. If the property were sold when the person was living then there would be taxable gain of $900,000. On the other hand, if the property were sold by the estate of the person immediately after death, then there would be no taxable gain – because the basis increased from $100,000 to $1,000,000. Even if the asset is not sold after death, there may be a great advantage in that basis step up if the asset is, for example, a building or rental property. Depreciation deductions can be reset to reflect the much higher basis resulting from high valuation of the improvement, when

there may have been very little or no basis left to depreciate before the death.

Bypass Trusts. However, if the property was funded into the Bypass Trust of the deceased spouse so as not to be included in the federal gross estate of the surviving spouse, then no step up will occur upon the death of the surviving spouse. This is the result even if it turns out that there would have been no Estate Tax if there had been no Bypass Trust and the assets had been entirely owned by the survivor.

Generation-Skipping Trusts. The same low basis problem exists with so-called "dynasty trusts" or "generation-skipping trusts" that were set up by parents for their children designed to be available to them, but designed to both protect the assets from the creditors of the children and also to avoid being estate taxed on their death. The assets in those trusts may have value today far greater than the basis that the trust has in them. Because the assets are not included in the child's estate at his or her death, the basis of those assets is not increased to fair market value at the child's death. This lost opportunity is true even if the child's estate is much less than federal estate exemption today and it would be an advantage to have the asset included in the child's estate for the tax free step up in basis.

5. **Technique to be Used: Delaware Tax Trap: Overview.**

If assets in the Bypass Trust for a spouse or generation-skipping trust for a child are appointed at that person's death to another trust for others, then the Federal Estate Tax Code can be applied to cause the basis in the selected assets to be "stepped up" to fair market value. Many trusts that do not have such provisions can be successfully modified to permit this application. One important point to remember: The step up in basis technique cannot be applied AFTER the death of the spouse or child. It must be set up while the party is living. Another important point: Elderly family members who expect to have unused federal estate tax exemptions may be selected and their otherwise unused exemptions aggregated in arrangements that cause more assets to be included in their gross estates and thus receive basis step up.

How can one get a step up in basis of assets in irrevocable generation-skipping trusts that will not realize a step up in basis for a long time? The answer is: Find some way to include those assets in the taxable estate of someone. Not just anyone - someone elderly or in poor health whose federal taxable estate will be able to absorb inclusion of the selected trust assets and not incur a federal estate tax or state estate or inheritance tax. But up until 2001 that ability was limited to less than $1,000,000, then slowly ramping up to $3,500,000, became permanent in 2012 at over $5,000,000, and is $11,700,000 in 2021. So now, many more decedents are expected to have taxable estates way under the current exemption. Most spousal Bypass Trusts created when the first spouse passed away years ago do not need to be in place today to save estate taxes when the survivor passes away. The surviving spouse could own the property in that trust and still not incur an estate tax. If property in the Bypass Trust, or even just specific property in the

Bypass Trust, has a fair market value significantly greater than the trust's basis in the assets then it would be great if that asset could become includable in the surviving spouse's estate to obtain that step up in basis pursuant to Code Section 1014(b). If only it could.

There is at least one way. It is by springing the "Delaware Tax Trap."

6. **Understanding the Delaware Tax Trap**.

Few people, even among the estate planning community, understand it. It is generally thought of as something just plain bad. The Delaware Tax Trap is the nickname for Code Section 2041(a)(3) [when it would cause inclusion in the federal gross estate if a power is exercised to create another power at death] and its little brother, Code Section 2514(d) [when it would create a taxable gift if a power is exercised to create another power during life].

In a way the Delaware Tax Trap is like the income tax grantor trust rules of Code Section 671, et.seq., when a creator of a trust may remain taxed on its income even though she cannot benefit from it. The Treasury Department desired the grantor trust tax legislation to prevent abuse by perceived aggressive taxpayers sloughing off taxable income to their then low-taxed children. Later, the next generation of tax planners embraced the grantor trust rules to obtain beneficial tax results. It is the tax equivalence of turning lemons into lemonade. This is now the situation with respect to the Delaware Tax Trap.

Code Section 2041(a)(3) provides that a decedent's gross estate includes:

> **Creation of another power in certain cases.**
> To the extent of any property with respect to which the decedent—
>
> (A) by will, or
>
> (B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037,
>
> exercises a power of appointment created after October 21, 1942, **by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power**.

Code Section 2041(a)(3) will cause certain exercises of a power of appointment by a powerholder to result in inclusion of assets in irrevocable trusts that will not be in the gross estate of a powerholder to become includable in the

estate. A comparable Code Section 2514(d) causes an intervivos exercise of similar effect to be treated as a gift by the powerholder.[9]

These sections are called the Delaware Tax Trap because when the sections were enacted Delaware's Rule Against Perpetuities Statute ("RAP") was different than other states in an important regard. Delaware's RAP allowed a person having a special power of appointment to appoint property to another trust and give another a power to appoint in further trust such that the property did not have to vest in someone's absolute ownership within the RAP period beginning when the trust first became irrevocable. Mechanically this was accomplished because then Delaware's RAP by default caused the RAP period to begin again upon the exercise of the power, on the "creation" of the nonvested interest or new power. Congress perceived this as abusive because it permitted avoidance of federal estate taxes by floating the ownership for potentially hundreds of years. It was a tax "trap" because someone could exercise a power over a Delaware trust and thereby incur and estate or gift tax liability without any intent to do so. So if there was a resetting of the RAP clock on the exercise of the first power creating the new power or nonvested interest, the person exercising the power effective on his death, then the property the subject of the exercise would be included in the estate of the powerholder so exercising. One consequence is that the bases of most appointed assets are then stepped up to their fair market value that will, among other benefits, reduce subsequent gain on sale and permit greater depreciation and other deductions.

Another consequence is that if assets are included in the gross estate of a person for any reason, then that decedent is the transferor for GSTT purposes and the prior GSTT Inclusion Ratio is lost. That is not always necessarily a bad thing, because thereafter the beneficiaries are skip persons only if they are two or more generations down from the decedent, and are otherwise nonskip persons. Also the powerholder may have more than enough unused GST Exemption to "re-Exempt" the trust with a 0.0 Inclusion Ratio, obviating any concerns.

7. **Exercise of Special Power of Appointment to create General Power of Appointment ("GPA")**. (Half a loaf could be better than none.)

To spring the Delaware Tax Trap, it is necessary to exercise a special power of appointment to create another power of appointment. Is there a preferable kind of power of appointment to create? There are two fundamental types of powers of appointment that can be granted to spring the trap to step up trust assets bases: a

[9] The lifetime springing of the Delaware Tax Trap is not without the potential for great benefit, even though there is no step up in basis upon exercise. The exercising powerholder who springs the trap becomes the new transferor of the appointed assets for Gift Tax and GSTT purposes, and can allocate his or her unused GST Exemption to the trust. Subsequent distributions by the trust that would have been taxable distributions to skip persons that would incur a 40% GSTT are now tested to see if those persons are skip persons of the powerholder. Even if the beneficiaries remain skip persons as to the powerholder, if the powerholder allocates a sufficient amount if his remaining portion of his 2015 $5,430,000 GST Exemption, the GST Exemption allocation may make the Inclusion Ratio of the trust 0.0, thereby eliminating the potential for the GSTT.

general power of appointment ("GPA") and a special power of appointment ("SPA"). A GPA permits the powerholder to appoint the trust assets to any one or more persons, including the powerholder. An SPA permits the powerholder to appoint to any one or more persons, outright or in trust, but not directly or indirectly to or for the powerholder. The difference is important. For reasons discussed below, the preferable type is an SPA. It is generally preferable for at least three reasons: (1) it continues to permit protection of trust property from the creditors of all beneficiaries, (2) trust property does not have to be made available for the immediate taking by any beneficiary or other person, and (3) it will not require the trust assets to be included in new powerholder's estate for estate tax purposes or treated as a gift if appointed during his lifetime in whole or in part to others.

Unfortunately, in almost all states there is no choice, and the Delaware Tax Trap can only be sprung by creation of a presently exercisable GPA. Under the common law and the law of most states the creation date for purposes of measuring the RAP period when an SPA is exercised creating another power of appointment remains the date of funding of the irrevocable trust. So, the exercise creating an SPA would not spring the Delaware Tax Trap, and the assets would not be included in the powerholder's estate and the appointed asset bases would not be stepped up. There is an exception when the new power created is a power given to someone who can immediately take the assets out of the trust, a presently exercisable GPA. In that case, under the common law and in all states, the date of creation of the new GPA is date of exercise of the initial power creating the new GPA.[10] Under Kentucky or Wisconsin law, the creation of a general power of appointment exercisable at death will also start a new perpetuities period and therefore spring the Trap.[11] Consequently, the appointed asset will be includable in the gross estate of the powerholder potentially subject to federal estate tax, and the basis of the asset will be stepped up. However, when the only means to spring the Trap is to create a presently exercisable GPA, the price paid for basis step up is exposure of the assets to the sole control of the person granted the power, and to his creditors, as well as inclusion in his estate upon his death for estate tax purposes.[12]

8. **Exercise of Special Power of Appointment to create another Special Power of Appointment ("SPA")**. (The best of all worlds.)

Fortunately, ***in Arizona,*** the Delaware Tax Trap can be sprung and the bases of appointed assets can be stepped up when the new power created is an SPA. In other words, the creation date of the new special power of appointment is

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[10] Comment c. to Restatement of Property, Section 373; Restatement of Property, Section 391; Comment d., and Reporter's Note 5, to Restatement (Second) of Property (Donative Transfers), Section 1.2.

[11] Zaritsky, *The Rule Against Perpetuities: A Survey of State (and D.C.) Law* (2012), http://www.actec.org/public/Documents/Studies/Zaritsky_RAP_Survey_03_2012.pdf. This tome is a handy resource, and useful for this article.

[12] This is a second inclusion in an estate or transfer tax base, and would not have to occur as a consequence to springing the trap if a new SPA could have been created in a state where date of creation of the new SPA for RAP purpose is the date of exercise of the first power.

the date of the exercise of the power creating the power. Arizona is such a state. Under the law of Arizona the Trap can be sprung by exercising the initial SPA to create a second SPA, and the exercising powerholder can provide that the date commencing the RAP period for the second SPA is the date of exercise of the first SPA, i.e., the creation date of the second SPA. As stated above, this is neither the common law[13] nor the rule in almost all states. (Just so we don't forget, at common law the creation date for purposes of measuring the permissible duration of an SPA created from exercise of the original SPA is the date of the creation of the original trust, preventing the springing of the Trap.) Arizona is one state in which one can decide whether to spring the Trap by exercise of an SPA and do it by either giving another person an SPA or a GPA. Other states that have abolished their RAP might (or might not) permit the springing of the Trap (e.g., Delaware, Pennsylvania, and Rhode Island).

So in Arizona, where the Trap can be sprung with either a GPA or an SPA, what is better? The answer is almost always: appoint to create another SPA, not a GPA. The appointment of an unvested interest with an SPA can avoid the vesting of the trust estate for another generation or more, both for asset protection from creditors of the beneficiary and, if desired, from the beneficiary's control and to avoid estate tax inclusion in the beneficiary's taxable estate. Having said that, the creation of an SPA means that, in addition to the powerholder's having sufficient estate tax exemption, there must be allocation of sufficient GST Exemption by the powerholder's estate so distributions to skip persons from that new trust do not trigger the GSTT. Obviously, if there is no GST Exemption available, then an unvested interest with SPA should be avoided if a skip person (of the powerholder, not the settlor) could receive distributions before the Delaware Tax Trap is sprung by a nonskip person. Even if the powerholder has no GST Exemption, skip persons of the trust after exercise of the power are determined from the powerholder's generation and not the settlor's generation.

The exercise could be able to be made in the form of a formula clause to exactly soak up the remaining Estate Tax Exemption (or GST Exemption, if desired) of the powerholder, like a marital deduction clause or charitable deduction clause. The exercise could be to appoint specific property having low basis in further trust with an SPA. Only then would the property be included in the estate of the powerholder in order to achieve basis step up. If a formula clause is used without more, it is possible the IRS might assert that the specific property selected by the trustee was not the property that is includable in the gross estate, but that a proration of all assets is what is includable. Therefore, the subsequent specific transfer could be a post-transfer taxable exchange, subject to grantor trust protection, if available.

9. **What if a General Power of Appointment at Death of Powerholder is what you have?**

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[13] Restatement of Property, Section 392; Comment d., and its Illustration 11, to Restatement (Second) of Property (Donative Transfers), Section 1.2.

This is not an issue, because the trust estate will be included in the gross estate of the powerholder regardless of whether or how the power is exercised.

10. **Arizona's Rule Against Perpetuities**.

As stated above, Arizona law authorize a powerholder to exercise an SPA to create another SPA to step up basis in trust assets. Arizona has the same creation date rule as Delaware's RAP formerly had for irrevocable trusts, and with respect to creation of new powers of appointment resulting from exercises of powers under pre-1995 trusts.[14]

Arizona's creation date rule. Arizona's operative statute expressly permits the powerholder to determine whether to spring the Trap when exercising a special power of appointment creating another special power of appointment. There is a decent argument that Delaware's 2000 changes in its RAP by adding a new Section 504 in Title 25, Delaware Code does nothing to prevent the Delaware Tax Trap from applying on every exercise of any power of appointment of a trust governed under Delaware law. This is because in the Delaware RAP there is no limitation on the length of time interests in property other than realty can remain unvested or powers to appoint such exercisable. Therefore, even though the creation date of a second power over a GST exempt trust is deemed (pursuant to Section 504) to be the date the first power arose, all subsequent powers of appointment created are validly exercisable under "applicable local law" for periods that can be determined "without regard to the date of the creation of the first power," since they are always valid, regardless of when created.[15]

A.R.S. Section 14-2902(A) provides: "Except as provided in subsections B and C of this section and section 14-2905, subsection C, the time of creation of a nonvested property interest or a power of appointment is determined under general

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[14] Both the Model Uniform Statutory Rule Against Perpetuities ("USRAP," now Part 9, Subpart 1 of the Uniform Probate Code, which codification numbering is used herein) Section 2-905(a) and A.R.S. Section 14-2901(C) cause application of the USRAP statutory regime to powers created after the effective date of the USRAP. Arizona's modified USRAP ("AZRAP") was changed as part of Arizona's 2008 enactment of the Arizona Trust Code (HB 2806) to provide that date of exercise of a special power under a trust to create another power became the creation date of the new power for all purposes of AZRAP, and not just to apply AZRAP to post-1994 trusts. The result was to create the Delaware Tax Trap opportunity in Arizona for all such exercises after 1994, regardless of when the trust became irrevocable.

[15] This issue was pointed out in an excellent discussion of the Delaware Tax Trap. Stephen E. Greer, The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities, 28 EST. PLAN. 68 at 74 (2001). An in depth article followed in which the author concluded that the trap is always sprung in no RAP states upon creation of another interest or power. James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute is Too Clever by Half (of Infinity)*, 43 Real Property, Trust and Estate Law Journal 673 (Winter 2009). See Topic below: "Designing Future Irrevocable Trust Agreements to Permit Basis Step Up" for a possible solution. But one commentator posits the opposite conclusion than Spica: the Delaware Tax Trap statutory language requires that the appointment create another power of appointment that can be exercised to validly "postpone" the vesting date, which literally cannot be done under the Delaware RAP because there is no limitation initially. Jerold I. Horn, Memorandum dated May 21, 2011, Limitation of Duration, Savings Clauses, Exercises of Powers of Appointment, and the Delaware Tax Trap, at 23, expanded from Chapter 13 of Flexible Trusts and Estates for Uncertain Times, 4th Edition (ALI-ABA 2010).

principles of property law." A.R.S. Section 14-2905(A) provides: "Except as otherwise provided, this *article* applies to a nonvested property interest or a power of appointment that is created on or after December 31, 1994." (Emphasis added.) Together A.R.S. Section 14-2902(A) and A.R.S. Section 14-2905(C) have the effect of applying the Delaware "exercise is creation date" rule to post-1994 trusts. Furthermore, those provisions also have the effect of applying the Delaware "exercise is creation date" rule to exercises of pre-1995 trust powers creating new powers.

In addition, the Arizona decanting statute, A.R.S. Section 14-10819, permits modification of trusts to have a different RAP than the original trust so long as the recipient trust "[d]oes not violate the limitations on validity under sections 14-2901 and 14-2905." There is no mention of any requirement or limitation upon decanting that would require the recipient trust to comply with the pre-1994 Arizona rule against perpetuities, which was the common law rule, or the pre-2009 Arizona rule against perpetuities. Arizona also has a unique set of provisions (A.R.S. Sections 14-2901(A)(3), (B)(3), and (C)(3)) that are relevant only to trusts initially governed under Arizona law, and for the reasons below should not affect the springing of the Trap. The provisions cause the Arizona RAP periods not to apply to an interest under a trust (or to a power with respect to that interest), if the interest could be terminated at one or more times after its creation by persons living at the creation, and the trustee has the expressed or implied power to sell trust assets.

These provisions should not apply solely because the trust was a typical revocable living trust. This is because A.R.S. Section 14-2905(C) (from USRAP Section 2-905(a)) by its terms prevents a trust from being deemed created until the trust is no longer revocable by the settlor. Most trusts do not both grant persons unfettered powers to terminate a trust interest (or an interest subject to a power) and mandate that persons be living when the trust is created, which are conditions to the application of the provisions.

Additionally, many trust agreements also set forth the RAP rule applicable when more than one regime is available under the RAP statutes, and that selection forecloses application of these provisions. (At least that seems to be a good idea in Arizona.) If deemed prudent, when appointing under either an existing power or a decanting statute, the exercise creating the appointment can confirm that the Arizona RAP period is applicable to limit duration of the successive power. Finally, under the most prevalent belief, the absence of a RAP period will cause the creation of a second power through exercise of a first power to spring the Trap (but see footnote 12).

Statutory language. To really see how the Arizona statutory framework operates, A.R.S. Section 14-2901, Section 14-2902, and Section 14-2905 have to be read together:

A.R.S. Sec. 14-2901. Nonvested property interest; general power of appointment; validity; exception

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C. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless at least one of the following is true:

1. At the time the power is created it is certain to be irrevocably exercised or otherwise to terminate not later than twenty-one years after the death of a person who is then alive.

2. The power is irrevocably exercised or otherwise terminates within five hundred years after its creation.

3. The power is with respect to an interest under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest.

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A.R.S. 14-2902. <u>Nonvested property interest or power of appointment; creation</u>

A. Except as provided in subsections B and C of this section and section 14-2905, subsection C,[16] the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

B. If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of a nonvested property interest or a property interest subject to a power of appointment described in section 14-2901, subsection B or C, the nonvested property interest or power of appointment is created when that person's power to become the unqualified beneficial owner terminates. A joint power with respect to community property or to marital property held by a married couple is a power exercisable by one person alone.

C. A nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or any other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

[16] Amended by Laws 2013, Ch. 112, Sec. 1, effective September 13, 2013. Formerly referenced subsection A of A.R.S. Section 14-2905.

A.R.S. Sec. 14-2905. Nonvested property interest or power of appointment; creation; effective date; judicial reformation

A. Except as otherwise provided, this article applies to a nonvested property interest or a power of appointment that is created on or after December 31, 1994.

B. If a nonvested property interest or a power of appointment is determined in a judicial proceeding to violate this state's rule against perpetuities as that rule existed when the nonvested property interest or power of appointment was created, a court on the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and that is within the limits of the requirements of section 14-2901.

C. For the purposes of this article, if the person who exercises a power of appointment so provides in the exercise, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.[17]

Under Arizona's RAP, specifically A.R.S. Section 14-2905(C), when read with either A.R.S. Section 2901(B) or (C), the exercise of a special power of appointment to either: (i) create either a general or special power of appointment or (ii) postpone vesting (e.g., creating a series of life estates, generation to generation), can reset the RAP period, thereby Springing the Trap. This can be easily avoided by either not referencing A.R.S. Section 14-2905(C) or specifying in the exercise that the RAP period will be measured from the date of the creation of the first power.[18]

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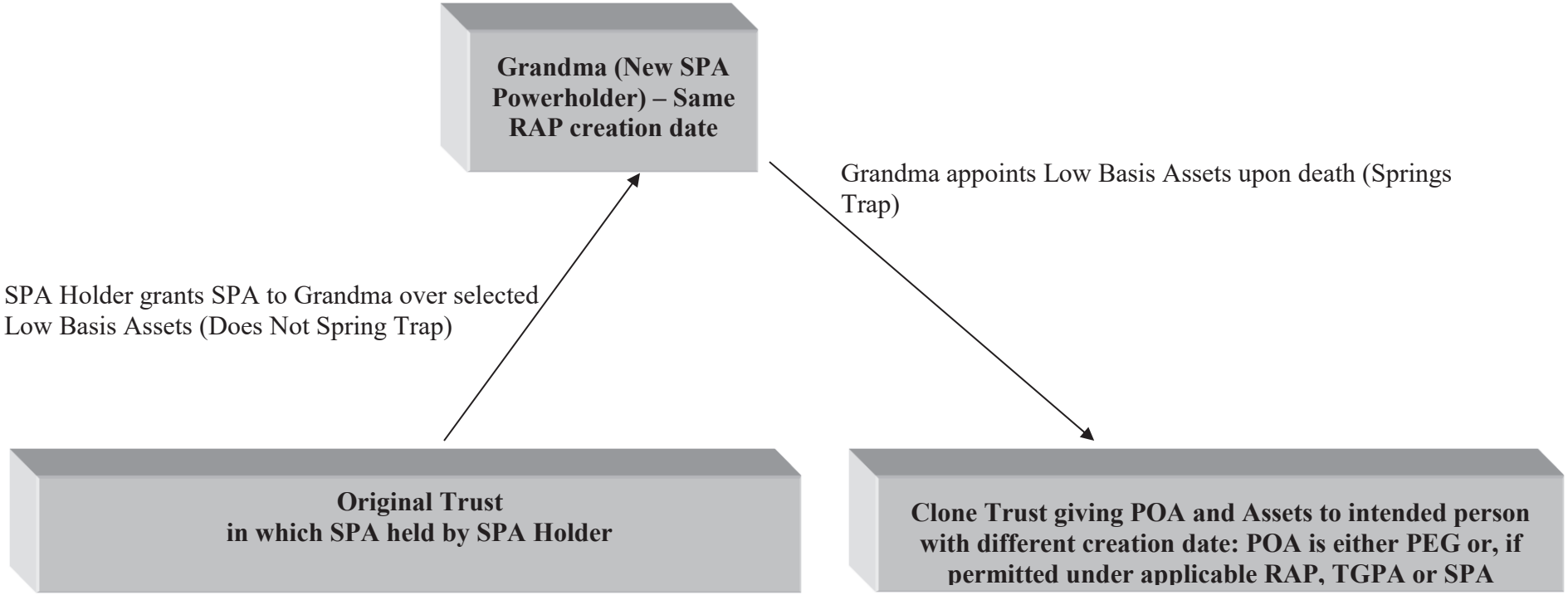
[17] Amended by Laws 2013, Ch. 112, Sec.2, effective September 13, 2013. Formerly, A.R.S. Section 14-2905(C) read as follows:

> For purposes of this article, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

[18] PLR 200124006; PLR 200219034; PLR 200243048.

11. **Springing the Delaware Tax Trap: Graphic Example**



Notes:

- PEG = Presently Exercisable General Power of Appointment
- TGPA = Testamentary General Power of Appointment (e.g., Kentucky and Wisconsin)
- SPA = Special Power of Appointment (Arizona and USRAP states)
- Grandma's taxable estate can include appointed assets without increasing her estate tax

12. **Surprise Trap When Appointing to Existing Trust – Additional Method to Create SPA and Still Spring the Trap in Every USRAP State**

USRAP Section 2-902(c) [A.R.S. Section 14-2902(C)] provides another method to spring the Trap. This provision permits any holder of an SPA in a typical USRAP state to cause inclusion of trust property in his or her gross estate for federal estate tax purposes:

> C. A nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or any other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

The purpose of Subsection C is to relieve the trustee of the recipient trust from the duty to keep separate record of the property subject to different RAP periods when the power of appointment over the property in the recipient trust has a different creation date than the creation date of the power exercised over the transferor trust.[19] It also provides an opportunity to truly become a Trap for the unwary. Someone desiring to spring the Trap can create and then fund an irrevocable trust T2 that grants person A an SPA. Thereafter, the powerholder of another irrevocable trust T1 (who may be the settlor of the new trust) appoints trust property to the newly settled trust T2 to the extent so empowered. The statute causes the T2 SPA to retain the T2 SPA creation date even if the property appointed from T1 to a new Trust T3 having identical terms as T2 would retain the T1 creation date instead of the T2 creation date. This by definition will spring the Trap since the permissible vesting period is determined without regard to the vesting period applicable to the power exercised. This opportunity/trap may arise regardless of state law, so long as the state has enacted USRAP with its Section 2-902 unchanged.

> Example: Person A desires to spring the Delaware Tax Trap as to a $1,000,000 trust (T1). Person A has an SPA to appoint the T1 trust property to anyone but himself, his estate or the creditors of either. A contributes $10,000 to a new trust (T2), in which he has a special power of appointment to anyone but himself, his estate or the creditors of either. A then appoints the property of T1 to T2. Pursuant to IRC Section 2514(d), if A appoints while living, or IRC Section 2041(a)(3), if A appoints T1 property effective upon his death, A has made either a taxable gift or has caused the $1,000,000 of T1 property to be includable in his gross estate for federal estate tax purposes. If the appointment is effective upon death, then the basis of T1 property is stepped up to the fair market value of the property, whether or not a federal estate tax is due.[20]

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[19] Comment to subsection(c) of USRAP Section 2-902: "This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable inter vivos trust."

[20] From 1990 comment regarding subsection (c) to pre-UPC USRAP Section 2: "Example (5) -- Series of Transfers Case. In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of

13. **Powerholder with an Interest.**

An important fact to note is that the powerholder holding a personal nonfiduciary power who can attract estate inclusion or incur a taxable gift initially might not have a connection with, right in, power over, or significant beneficial interest in the trust other than the power to appoint into another trust.[21] Modern legal analysis of this issue minimizes – no, dismisses – any difference in legal consequence between the existence of a power in which the holder had an interest in the appointive asset (a power in gross) as opposed to one in which the holder did not possess an interest (a collateral power).[22]

To ameliorate any concern that a naked powerholder cannot spring the Trap, a person who is granted an SPA could, if possible be, or be made, a beneficiary of the trust to some extent. A few states permit a trust to be decanted to grant one not already a beneficiary a beneficial interest in the trust.[23] Also, the Uniform Trust Code may offer a remedy. (See discussion "**What if the Trust does not Qualify for Decanting?"** below.)

14. **What if there is no Special Power of Appointment?: Decant.**

If there is no SPA held by anyone in a low basis high value trust or in a 1.0 Inclusion Ratio trust that will eventually distribute to skip persons, then how can a Delaware Tax Trap be sprung to do one or more of (i) step up basis in selected trust assets, (ii) bless a trust with GST Exemption, or (iii) otherwise mitigate a GST Tax? Answer: Decant – unless not permitted. Decanting is the exercise by the trustee of a power of appointment granted to or held by the trustee to vest in another trust IF the relevant condition to permit appointment are present. Many states have granted this power by operation of law, even though there is no express power provided in the trust agreement. It is commonly referred to as "decanting."

For instance, in Arizona, an irrevocable trust can be appointed by trustee to another trust, either currently existing or declared by the trustee decanted by the trustee **if the trustee has the discretion under its terms to make distributions**. See A.R.S.

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the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000.

"Were it not for subsection (c), the permissible vesting period under the Statutory Rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of subsection (c) is that the permissible vesting period under the Statutory Rule starts running only once -- in Year One -- with respect to the entire trust."

[21] However, *see* S. Rep't 382, 82d Cong., 1st Sess., 1951 U.S. Code Cong. & Ad. Serv., Vol. 2 Legislative History, 1535, discussing trustee discretionary powers as not being powers of appointment for purposes of the Trap.

[22] "The terms collateral power and power in gross are descriptive only, and carry no legal consequences." - RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. f. In accord, *Mettoy Pension Trustees Ltd. v. Evans*, [1990] 1 W.L.R. 1587 (Ch.) at 1613. This trend, and the cited authorities, were noted with disapproval by Charles C. Rounds, *OLD DOCTRINE MISUNDERSTOOD, NEW DOCTRINE MISCONCEIVED: DECONSTRUCTING THE NEWLY-MINTED RESTATEMENT (THIRD) OF PROPERTY'S POWER OF APPOINTMENT SECTIONS,* 26 Quinnipiac Probate Law Journal 240, 262 (2013).

[23] SDCL Section 55-2-15 (South Dakota).

Section 14-10819. In such case, the trustee can appoint the trust assets, but also subject to the following additional conditions: (i) fixed income, annuity or unitrust payments must continue to be made, (ii) the trust must continue to be "for the benefit of the beneficiaries," (iii) the Arizona RAP must be followed, (iv) there is no adverse tax effect to the trust, trustee, settlor or beneficiaries, and (v) if the trustee is a beneficiary, she cannot liberalize the standards for distribution to herself. Otherwise, the statute provides no other limits to the changes that can be made.

The Uniform Trust Decanting Act, drafted by the Uniform Law Commission in 2015 and enacted in 12 states, does not require that the trust have discretion regarding distributions, but does limit the power to alter the vested beneficial interests of beneficiaries. So changing trustees and administrative changes may be made even if there is little discretion regarding distributions.

One of the requirements to decant in Arizona is that there is no adverse tax effect to a trustee, settlor, or beneficiary. The granting of a Delaware Tax Trap power does not adversely affect anyone's taxation. It is the exercise thereafter that could do so. So it appears to be within the parameters of A.R.S. Section 14-10819(A)5 to create such a power. To address the concern of whether a volunteer's exercise of a naked power of appointment can invoke the Delaware Tax Trap, the trustee's decanting of the trust to grant a modest beneficial interest to a volunteer might well be "for the benefit of the beneficiaries," within the scope of the section. A.R.S. Section 14-10819(D) provides the ability to confirm the effectiveness of the decanting action.[24]

If the trust may be decanted under Arizona law it can be changed to apply the Arizona RAP, if that does not by itself cause adverse tax results to the beneficiaries, such as loss of GST grandfathering or GST Exemption 0.0 Inclusion Ratio to those trusts possibly affected.[25] Having an Arizona RAP using 500 years suggested above would permit a Delaware Tax Trap exercise if the volunteer holds a power of appointment or can acquire it through one or more of the methods described in this article.

15. **Examples for Decanting to Create an SPA:**

Example 1. If the trustee may make distributions to a beneficiary in the trustee's discretion, logic would dictate that it can be decanted to grant the beneficiary a special power to appoint trust assets under whatever conditions trustee determines, since that is within a subset of the powers and rights the trustee could grant to the beneficiary. See *Phipps v. Palm Beach Trust Co*., 196 So. 299 (Fla. 1940); Restatement (Third) of Trusts,

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[24] "The trustee, in the trustee's sole discretion, before or after the exercise of the trustee's discretion under this section, may request the court to approve the exercise."

[25] To the knowledge of the author, no ruling has held one way or the other on whether a non-grandfathered 0.0 Inclusion Ratio trust would become a nonexempt trust because the RAP period changed, although the IRS has specifically refused to address the issue on more than one occasion. The relevant regulation that would cause a trust to lose GST grandfathering literally does not extend to trusts created after October 21, 1986 for which GST Exemption was allocated. Treas. Reg. Section 26.2601-1(b)(4)(i). See Jonathan G. Blattmachr, Jerold I. Horn, and Diana S.C. Zeydal, *An Analysis of the Tax Effects of Decanting*, 47 Real Prop. Tr. & Est. L.J. 141, 168-170 (Spring 2012), wherein they cite PLR 200839025.

Section 10(d), Comment f; Restatement (Second) of Trusts, Section 17, Comments, including f; Restatement of Property, Sections 358 and 359.

Example 2. The trust agreement provides that the trustee is to distribute to the beneficiary amounts for the health, education, maintenance and support of the beneficiary, and after death to trust for the beneficiary's descendants under the same provision for generation after generation. The trustee decanted the trust to restate the trust with identical provisions, EXCEPT that beneficiary is given an SPA exercisable at death to appoint the trust property to an identical trust, with the unvested interest duration for Arizona 500 year RAP purposes to be measured from the exercise date. Then the beneficiary so exercises the power of appointment. Substantively there is no material change of beneficial interests. Technically the Trap is sprung as the condition described in Code Section 2041(a)(3) has occurred.

Example 3. Same as Example 2, EXCEPT Grandma having no net worth, instead of beneficiary, is given the SPA exercisable at death. She is intended to attract the estate tax inclusion.[26]

II. MODIFYING AND CHANGING TRUSTS.

There are now many ways to amend, terminate, and even revoke, unamendable irrevocable trusts. However, tax concerns may make the use of certain techniques ill-advised.

For example, if irrevocable life insurance trust distribution provisions as to one beneficiary should be changed because of creditor concerns, use of common law modification involving the settlor should be avoided. This is to avoid highlighting the possible application of estate tax rules that may cause estate taxation in the settlor's estate of the trust and its life insurance policy or proceeds.

As another example, if the trust is generation-skipping, the beneficiaries should not participate under the common law or A.R.S. Section 14-10411(A) to avoid the issue of whether they have de facto control to distribute property of the trust to themselves and cause inclusion of some or all of the trust in their respective federal gross estates.

It may be prudent to use multiple techniques that may be redundant to mitigate against the possibility that one of the methods is not effective. For example, it may be likely but not certain, that Decanting, the Common Law, and a Nonjudicial Settlement Agreement are all available, but there is a risk that a taxing authority, creditor or a beneficiary, or their respective successors may contest the effectiveness of the action. In addition, the parties could attempt to obtain a court order confirming the result.

[26] But see S. Rep't 382, 1535, and note 21, supra.

The following is a summary of various modification techniques and their ramifications.

A. <u>Trustee Acts Alone: Example Under Arizona Law: A.R.S. Section 14-10819: Trust Decanting Statute</u>. A Great Tax-Friendly Power. This useful to avoid actions on the part of the settlor or beneficiaries that might cause adverse estate tax inclusion, taxable gifts or attract income taxation.

1. Description. The trustee of an irrevocable trust can appoint some or all of the trust assets to another trust ("decanting"). The Trustee may ask for court approval either before or after the decanting. This section applies to a trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state. A trust can be decanted in Arizona if the trust is irrevocable and:

(i) The Trustee "has the discretion to make distributions…for the benefit of a beneficiary;"
(ii) The decanting does not reduce any fixed nondiscretionary income payment;
(iii) Does not alter any nondiscretionary annuity or unitrust payment to a beneficiary;
(iv) Results in any ascertainable standard applicable for distributions from the trust being the same or more restrictive standard applicable for distributions from the recipient trust when the trustee exercising the power described in this subsection is a possible beneficiary under the standard;
(v) Does not adversely affect the tax treatment of the trust, the trustee, the settlor or the beneficiaries;
(vi) Does not violate the applicable rule against perpetuities; and
(vii) Is in favor of the beneficiaries of the trust.

There are apparently no restrictions, outside of the above stated criteria, limiting the decanting, except to the extent the governing instrument provides otherwise. UTC Section 105(a)[A.R.S. Section 14-10105(A)]. Therefore, for example, on its face, the decanting may do the following:

(i) change the trustees;
(ii) add trust protectors to hire and fire trustees and add and remove other provisions;
(iii) reduce or enhance discretionary distributions;
(iv) prohibit nonjudicial settlements;
(v) require mandatory arbitration; and
(vi) reduce or expand notice requirements.

2. Decant by Restating Trusts. Some states permit the trustee to exercise the decanting power over all of the property of the trust by restating the trust. This is a very useful power. The provision assists in avoiding technical transfers of title that can potentially void title policy coverage and breach contractual restrictions against transfer, as well as the necessity of formal assignments of property, rights, and interests. Also,

since there is no transfer, trustees who are limited partners and LLC members avoid possible loss of admitted partner or member status.

3. **When Decanting is Useful**. Use the decanting statute to fix irrevocable trusts (including ILITs).
   1. Change successor trustees
   2. Make a non GST Exempt trust generation skip and allocate the increased GST Exemption
   3. Make a trust more "asset protected"
   4. Make distributions more restrictive for "problem" descendants
   5. Divide common "pot trusts" for descendants into separate trusts for each descendant
   6. Add Trust Protectors and powers for them or change Trust Protectors
   7. Broaden or narrow investment discretion of trustees
   8. Make future trustees' responsibility and liability for activity greater or lesser
   9. Change future trustee's fees

4. Use When Settlor Should Not Participate. The huge advantage of the Decanting Statute is its usefulness with estate tax sensitive trusts. The settlor does not participate in the process; therefore there is no issue of acquisition or retention of control by the settlor implicating Internal Revenue Code Sections 2036 or 2038. The beneficiaries also do not participate, which virtually eliminates gift tax and estate tax issues for them arising from the trust modification process.

5. Tax Limitations. In some states, a limitation of the decanting statute is that it cannot be used if it will adversely affect the tax treatment of the trust, the trustee, the settlor or the beneficiaries. This limitation might not be as far reaching as it appears. For example, decanting to cause a nongrantor trust for income tax purposes to become a grantor trust would seem to adversely affect the settlor. But this is not necessarily so. For example, if the trust assets generate losses the trust cannot utilize, then neither the settlor nor the trust is adversely affected. If the settlor or, preferably, the settlor's spouse, borrows the trust assets (or borrows merely all of the income of the trust) and did not repay the advance before the beginning of the taxable year, the trust then becomes a grantor trust for that year if either (i) the trustee is related or subordinate to the grantor or (ii) loan did not have either adequate interest or adequate security. During that period, decanting to make the trust a grantor trust would not adversely affect either the settlor or the trust.

Correspondingly, is the trust adversely affected if it is decanted to turn off grantor trust status? This is less likely to be an issue, since the settlor may be able to waive certain rights or powers unilaterally to attain such result.

Query: If the trustee receives a statement or affidavit from the settlor to the affect that the settlor would not be adversely affected by decanting to cause grantor trust status, can the trustee rely upon the affidavit alone to so decant the trust?

6. Trust Provisions Authorizing Decanting. The trust agreement can authorize decanting in broader circumstances than the default statutory provision. This is effectively merely the granting of broader distribution powers to the trustee. Tax consequences need to be carefully considered when drafting such provisions.

7. Decanting an Out of State Trust. A trust's beneficiaries cannot benefit from Arizona law unless the trust law applicable is that of Arizona. If a trust has transferred its governing jurisdiction to Arizona, then the trustee can decant a "decantable" trust under the ATC. A.R.S. Section 14-10819.B. A trust is subject to the jurisdiction of this state as specified by A.R.S. Section 14-10202. One of the ways a trustee, and therefore a trust, becomes subject to the jurisdiction of Arizona courts is declaring that the trust is subject to the jurisdiction of the courts of this state. A.R.S. Section 14-10202.A.[27] Since this is a minimal connection, other connections should be established with Arizona, if practicable, such as possible co-trusteeship, administration, or assets or beneficiaries located or domiciled in Arizona.[28]

B. Settlors and Beneficiaries May Act to do Anything without Trustee at Common Law.

American common law (the "Claflin Rule") has long authorized irrevocable trusts to be modified or terminated if all of the settlors and beneficiaries consented. It is well established that with all settlors and beneficiaries consenting, court participation is not required. Some have stated that the enactment of the Arizona Trust Code ("ATC") has changed the law. That belief is likely incorrect.

Prior to UTC enactment (and ATC enactment) most experts would agree that either or both RESTATEMENT (SECOND) OF TRUSTS, Section 338 and RESTATEMENT (THIRD) OF TRUSTS, Section 65 would permit such modification, and, pursuant to the literal reading of those restatement sections, without the necessity of court approval. Because the ATC omitted a specific provision of the Uniform Trust Code ("UTC") proffered by the National Conference of Commissioners of Uniform State Laws ("NCCUSL") that would have codified the power of all of the beneficiaries and the settlors to modify an irrevocable trust, some are of the belief that after enactment of the ATC, either such modification cannot be made, or if permissible, only with court approval. However, following the reasoning set forth in the next paragraph, the law in Arizona continues to permit all of the beneficiaries and the settlors to modify an irrevocable trust:

The fact that the ATC omitted Model UTC Section 411(a) (codifying the express power of the settlor and the beneficiaries to modify an irrevocable trust) does not

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[27] 14-10202. Jurisdiction over trustee and beneficiary

A. By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, or until otherwise declared by the trustee if a proceeding regarding a matter involving the trust is not pending in a court of this state, **by declaring that the trust is subject to the jurisdiction of the courts of this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust**.

[28] Arizona income taxation attaches to a trust if a trustee is resident in Arizona. A.R.S. Section 43-1301(5).

necessarily result in the loss of the common law right to do so. A.R.S. § 14-10106 provides that the common law of trusts will supplement the ATC, except to the extent modified by it. NCCUSL's comments to the 2004 amendments to the Uniform Trust Code provide that omission of Model UTC Section 411(a) "mean[s] that the state's prior law would control on this issue." Unless the courts find that the Legislature intended to implicitly negate existing Arizona law by its omission of now optional Model UTC § 411(a), the common law of trusts, evidenced by either of the Restatements, still permits modification. *See* RESTATEMENT (SECOND) OF TRUSTS, Section 338; RESTATEMENT (THIRD) OF TRUSTS, Section 65; A.R.S. § 14-10106(A). Arizona follows the Restatements. *Olivas v. Board of National Missions of the Presbyterian Church*, 1 Ariz. App. 543, 548; 405 P.2d 481, 486 (App. 1965); *In re: Estate of Moore*, 97 P.3d 103 (Ariz. Ct. App. 2004). *See also, e.g., Zilles v. American Legion (Estate of Zilles),* 219 Ariz. 527, 534, 200 P.3d 1024, 1031 (Ct. App. 2008)(follows RESTATEMENT (THIRD) OF TRUSTS).

Adult beneficiaries and parents may represent minor beneficiaries, unborn beneficiaries and contingent beneficiaries to avoid costs and effort required to appoint attorneys ad litem. UTC ARTICLE 3 - Section 301, et. seq., [Example Arizona A.R.S. Sections 14-1405, 14-1406, 14-1407 and **Part F** below.]

This method is risky if the trust estate is not intended to be includable in the estates of the settlor or the beneficiaries. Nonetheless, there is some authority that the participation by a settlor in the modification of an irrevocable trust might not alone cause inclusion of the trust in the settlor's gross estate. PLRs 200247037, 200303016, 200919008, 200919009, 200919010 and 201233008 are signs that the government may not assert that powers held by a settlor under RESTATEMENT (SECOND) OF TRUSTS, Section 338(1), RESTATEMENT (THIRD) OF TRUSTS, Section 65, and, although not adopted in the ATC, Model UTC Section 411(a) are subject to the claws of IRC Sections 2036 and 2038.

C. <u>Beneficiaries Act with Court if does not Violate a Material Purpose</u>. UTC Section 411(b)[A.R.S. Section 14-10411.A.] and Common Law.

Under common law, if not all settlors are living, or if their participation might raise an estate tax concern, then the Claflin Rule modification is not available. All is not lost in the common law arena however. The common law (RESTATEMENT (THIRD) OF TRUSTS, § 65) will still permit all beneficiaries to modify or terminate a trust IF: "the modification or termination would not be inconsistent with a material purpose of the trust." This is now codified as A.R.S. Section 14-10411.A, although the provision requires court participation**.** Nonetheless, if the interested parties enter into a nonjudicial settlement agreement permitted under the UTC as described below, court participation may be avoided.

This method is risky if the trust estate is not intended to be includable in the estates of the beneficiaries.

D. <u>Beneficiaries Act with Court when would Violate a Material Purpose</u>. Statutory Array under ATC.

If all the settlors cannot participate, and there is a concern that the modification or termination would be inconsistent with a material purpose of the trust, the common law still permits such if the court "determines that the reason(s) for the termination or modification outweigh the material purpose." This general trust law doctrine is now codified in the UTC with varying tests and criteria as UTC Sections 411 through 416 [A.R.S. Sections 14-10411 through 14-10416].

E. <u>Nonjudicial Settlement Agreement</u>.

This approach is useful when the beneficiaries and the settlor want to effect changes, even when resisted by the trustee. This theory is in addition to the common law permitting all beneficiaries and the settlor to agree to trust changes for any reason or no reason.

The UTC includes Section 111 [A.R.S. Section 14-10111], authorizing Nonjudicial Settlement Agreements. The provision authorizes **interested persons** to agree to changes in a trust so long as the changes do not violate a material purpose of the trust and that a court could so approve the change if asked to do so. Corporate fiduciaries are comfortable with this Uniform Trust Code provision. It is advisable to recite that the agreement does not violate a material purpose of the trust. If at all possible the settlor(s) should provide written representation that is the case.

Who is an interested person is not always clear. Interested Persons are described in the Uniform Probate Code to encompass a broad range of persons:

[Ex: Arizona A.R.S. 14-1201.26:

> "Interested person" includes 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 key provision is the highlighted last sentence of the subsection, which adds common sense to the application of the term. Common sense would also dictate that the sentence would apply to NJS Agreements as well as proceedings because A.R.S. Section 14-1201 definitions apply generally to all of Title 14 of the Arizona Revised Statutes. The settlors, per se, are not interested persons and therefore would generally not be parties, as such, to NJS Agreements. However, if the settlor or settlors are beneficiaries or trustees, then use of this technique would raise the risk of either or both estate tax inclusion of trust assets or possible exposure to the settlor's creditors, if one or both would not have occurred otherwise.

Adult beneficiaries and parents may represent minor beneficiaries, unborn beneficiaries and contingent beneficiaries to bind them under NJS Agreements. See UTC Section 301, et. seq. [A.R.S. Sections 14-1405, 14-1406, 14-1407], and **Part F** below.

An interested person may ask the court to approve the NJS Agreement. In Arizona a court is prohibited from disapproving or denying the effectiveness of the agreement, unless the interested person requests such. If the court does not approve the agreement pursuant to this subsection, the failure to approve is not any prejudice against the effectiveness of the agreement and is not a final judgment or judicial precedent with respect to the agreement or subsequent agreements pursuant to the section. UTC Section 111 [A.R.S. Section 14-10111(D) and (E)].

This method must be carefully navigated if the trust estate is not intended to be includable in the federal gross estates of the beneficiaries, and the settlor, if a trustee or beneficiary.

It has been posited that the must be a bona fide dispute in order for the NJS Agreement to be effective. There is nothing in that statute (or in the comment for that matter) that so limits UTC Section 111 (the source of A.R.S. Section 14-10111) to disputes and prohibits settlement agreements that are modifications. In fact Section 111 is intended to be effective when a court could have ordered the result. In addition, UTC Section 111(c) expressly permits avoidance of court participation otherwise required, and expressly mentions the condition of approval of a court under this [Code]or other applicable law. [see below]. In other words, UTC Section 411(b) requires court approval, but Section 111 anticipates this, and permits court avoidance anyway. This is not an end around the right to access the courts, because an NJS Agreement is available only if all interested persons will to play ball. So it follows from the above that Section 411 was not intended to pre-empt the field. It is all internally consistent. In short, apparently the belief in the existence of a requirement that there be a dispute to activate Section 111 is inference from a nonexclusive example from the comment. The comments are the only official agreed gloss to the statutes, barring case authority or a particular state's other comment equivalents interpreting that state's application of the law. There is a laundry list of situations enumerated in the UTC that permit modification of trust (UTC Sections 410 through 416), regardless of whether there was a dispute. One could say an example of the efficacy of the above analysis is that Michigan's legislature felt the need to limit the scope of Section 111 to foreclose nonjudicial modification otherwise authorized.

F. <u>Family Settlement Agreement – Perhaps Available to Modify Trusts</u>.

The Uniform Probate Code has long had means to compromise bona fide claims regarding an estate – the so called "Family Settlement Agreement." A.R.S. Section 14-3951[29] (and its procedural companion A.R.S. Section 14-3952). A court proceeding is necessary. However, it literally did not apply to trusts not established under a will. Nonetheless, a later NCCUSL comment to the source Uniform Probate Code section states the intent of the drafters was that the provision was not intended to apply only to

[29] This Section is derived from Uniform Probate Code Section 3-1101.

wills.[30] An important condition to apply a family settlement agreement under the above cited statutes is that there is a **bona fide controversy** that the court must find to be in good faith.[31] The statutory requirements of such agreement and the procedures to implement it must be strictly followed.[32]

G. Private Settlement Agreement –A Stretch (and a Bed Idea) to Use to Modify Trusts.

Another statute permits estate beneficiaries to agree to alter distributions from probate estate (but not expressly from trusts) *without court participation*. A.R.S. Section 14-3912, "Private agreements among successors to decedent binding on personal representative." The Comment to UPC Section 3-912 (the source of A.R.S. Section 14-3912) provides:

> It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct.

The implication is that beneficiaries have historically have had the right to alter the distributions among themselves. The question is whether this concept should be applied to trust beneficiaries. It is not appropriate. Trusts are not thought to be solely transitory, in contrast to estates. Permitting estate beneficiaries to agree to alter, or settle disputes concerning, distributions from estates is merely expedient. After all, upon distribution, the estate beneficiaries could thereafter transfer the property among one another. Therefore why make them go through the trouble. Possible issues of claims by creditors of estate beneficiaries aside, there is no benefit to prohibiting such agreements. This is not the case with trusts. Beneficiaries whose rights are limited should not be able to increase their rights and powers solely by agreement with other beneficiaries. The means to do so have been limited, and today are addressed in the Arizona Trust Code, primarily, but not exclusively, through codification.

The vicarious representation statutes literally apply to this procedure to the extent that it is otherwise applicable.

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[30] In 1993 NCCUSL amended the Section to expand its application to trusts by substituting "governing instrument" for "probated will." In the Comment to the Section, NCCUSL states: "1993 technical amendments to this and the following section [UPC Section 3-1102, A.R.S. 14-3952] clarified original intention that that the described procedure would be available to resolve controversies other than those concerning a will." However, the Comment to the 1969 UPC mentions only estates, except for one reference to personal representatives and trustees fees as possibly creating a conflict in carrying out the intent of the "testator." The 1969 UPC procedural companion Section 3-1102 mentions both personal representatives and trustees.

[31] *In re Estate of Ward*, 23 P.3d 108 (Ariz. App. Div.1 2001)

[32] *In re Estate of Riley*, 266 P.3d 1078 (Ariz. App. Div.2 2011).

H. Vicarious Representation.

Historically, the common law required ALL beneficiaries to consent, including minors, incompetents, unborn and contingent beneficiaries. The courts recognized that attorneys ad litem could represent the nonexistent and legally incapacitated to satisfy this requirement. Today it is clear that the interests of such persons now can be represented by parents or those who have "substantially identical interests," "but only to the extent there is no material conflict of interest between the representative and the person represented with respect to the particular question or dispute." Also the holder of a general power of appointment can bind all those who can be vested or divested by the powerholder. Interestingly, UTC Section 302 [A.R.S. Section 14-1405] uses the phrase "may represent and bind" such persons, leaving open the possibility that a release from the powerholder might not bind takers under the power in certain circumstances. See also UTC Section 303 and 304 [A.R.S. Sections 14-1406 and 14-1407]. These rules are generally applicable to all of the UTC [in Arizona, all of A.R.S. Title 14]. So they should apply to statutory modification sections (e.g., UTC Section 411 – 416 [A.R.S. Sections 14-10410 through 14-10416)], NJS Agreements (UTC Section111 [A.R.S. Section 14-10111]), and common law modification,[33] enhanced through the interplay of UTC Section 106 [A.R.S. Section 14-10106], which specifies that the common law supplements the UTC, except to the extent modified by statute.

From NCCUSL Comment to UTC Section 304, source of A.R.S. Section 14-1407:

> Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest.

I. Trust Protector or Trustee Powers.

A way to streamline the ability to make trust agreement changes is to provide for the appointment of a trust protector to make specified changes in the trust agreement, by amendment or otherwise. In at least two states, Alaska and Arizona, a trust protector is not a fiduciary, although the trust agreement can state otherwise. Ex: Arizona: A.R.S. Section 14-10818. The trust protector provisions may be provided in the original trust agreement, or could have been added when modification was made with one or more of the methods described above. Typical trust protector powers include the power to amend the trust agreement to change the distribution rights of beneficiaries, to change the trustees or successor trustees, to cause the trust to become or cease being a grantor trust for federal income tax purposes, and to permit trust agreement changes through agreement of identified parties.

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[33] Comment b. to RESTATEMENT (THIRD) OF TRUSTS, § 65(1), as further discussed in the Reporter's Notes to the comment acknowledges the application of "vicarious representation," both judicial and, importantly, nonjudicial to save time and money. The Notes specifically mention Connecticut legislation authorizing same.

The use of a trust protector has the advantage of avoiding issues of estate tax inclusion, while at the same time avoiding issues of breach of fiduciary duty and jurisdiction of courts even though trustees made be parties to a judicial proceeding.

EXHIBIT "A"

Selected Arizona Statutes:

A.R.S. Section 14-10410. Modification or termination of trust; proceedings for approval or disapproval

A. In addition to the methods of termination prescribed by sections 14-10411, 14-10412, 14-10413 and 14-10414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved or the purposes of the trust have become unlawful, contrary to public policy or impossible to achieve.

B. A proceeding to approve or disapprove a proposed modification or termination under sections 14-10411, 14-10412, 14-10413, 14-10414, 14-10415 and 14-10416, or trust combination or division under section 14-10417, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under section 14-10413.

A.R.S. Section 14-10411. Modification or termination of noncharitable irrevocable trust by consent

A. A noncharitable irrevocable trust may be terminated on consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified on consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

B. On termination of a trust under subsection a, the trustee shall distribute the trust property as agreed by the beneficiaries.

C. If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection a, the modification or termination may be approved by the court if the court is satisfied that:

1. if all of the beneficiaries had consented, the trust could have been modified or terminated under this section.
2. the interests of a beneficiary who does not consent will be adequately protected.

A.R.S. Section 14-10412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively

A. The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

B. The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or would impair the trust's administration.

C. On termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

A.R.S. Section 14-10413. Cy pres

A. except as otherwise provided in subsection b, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve or wasteful:

1. the trust does not fail in whole or in part.
2. the trust property does not revert to the settlor or the settlor's successors in interest.

3. the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed in whole or in part in a manner consistent with the settlor's charitable purposes.
B. A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection a to apply cy pres to modify or terminate the trust only if, when the provision takes effect:
1. the trust property is to revert to the settlor and the settlor is still living.
2. fewer than twenty-one years have elapsed since the date of the trust's creation.

A.R.S. Section 14-10414. Modification or termination of uneconomic trust
A. After notice to the qualified beneficiaries, the trustee of a trust that consists of trust property having a total value of less than one hundred thousand dollars or that is uneconomic to administer may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. This subsection does not apply to an interested trustee as defined in section 14-11014.
B. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
C. On termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.
D. This section does not apply to an easement for conservation or preservation.

A.R.S. Section 14-10415. Reformation to correct mistakes
The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

A.R.S. Section 14-10416. Modification to achieve settlor's tax objectives
To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect

A.R.S. Section 14-10819. Trustee's special power to appoint to other trust.
A. Unless the terms of the instrument expressly provide otherwise, a trustee who has the discretion under the terms of a testamentary instrument or irrevocable inter vivos agreement to make distributions, regardless of whether a standard is provided in the instrument or agreement, for the benefit of a beneficiary of the trust may exercise without prior court approval the trustee's discretion by appointing part or all of the estate trust in favor of a trustee of another trust if the exercise of this discretion:
1. does not reduce any fixed nondiscretionary income payment to a beneficiary.
2. does not alter any nondiscretionary annuity or unitrust payment to a beneficiary.
3. is in favor of the beneficiaries of the trust.
4. results in any ascertainable standard applicable for distributions from the trust being the same or more restrictive standard applicable for distributions from the recipient trust when the trustee exercising the power described in this subsection is a possible beneficiary under the standard.
5. does not adversely affect the tax treatment of the trust, the trustee, the settlor or the beneficiaries.

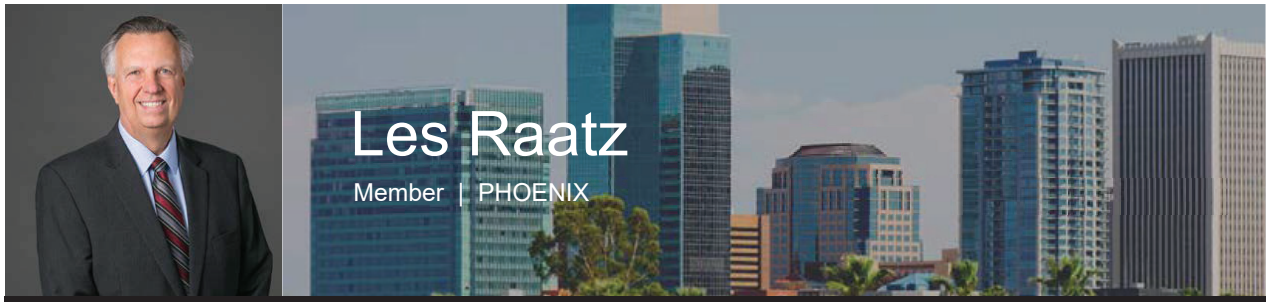
6. does not violate the limitations on validity under sections 14-2901 and 14-2905.

B. This section applies to a trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state.

C. The exercise of the power to invade the principal of a trust under subsection a of this section is considered to be the exercise of a special power of appointment.

D. The trustee, in the trustee's sole discretion, before or after the exercise of the trustee's discretion under this section, may request the court to approve the exercise.

E. The trustee may exercise the discretion to appoint all of the trust estate pursuant to this section by restating the trust.



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Les Raatz is a member of the law firm of Dickinson Wright PLLC in Phoenix. He is listed as *Best Lawyers* "Lawyer of the Year – Trust and Estates" in Phoenix for 2016, 2018 and 2020. He is also listed in *Southwest Superlawyers* in the fields of Tax, Estate Planning & Probate, Estate & Trust Litigation and Listed in Chambers and Partners - High Net Worth field.

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- Member, Taxation and Probate and Real Property Sections of the State Bar of Arizona
- Former Member, Probate Rules Committee of the Arizona Supreme Court

Recent and Upcoming Publications and Presentations

- STATE BAR OF ARIZONA PROBATE TRACK Chair of CLE by the SEA, “Advanced Techniques to Improve Your Estate Planning and Probate Practice,” July 14-17, 2019, and presenting on the following: “The New Tax Act Overview;” “Need a Step Up in Basis – it’s a Blood Sport;” and A.R.S. Sections 14-10504 and 14-10505.

- “INCLUDING ALL TRUSTS IN THE SETTLOR'S ESTATE – THE SKINNY ON HELMHOLZ AND SECTIONS 2036 AND 2038 RECALLING THE TALE: THE EMPEROR'S NEW CLOTHES,” 11 Est. Plan. & Community Prop. L.J. 279 (2019);
- “SECTION 199A, SIMPLIFY PASS-THROUGH DEDUCTION INTRICACY,” Estate Planning Magazine, April 2018 (45 EPTL 4);
- “STATE CONSTITUTION PERPETUITIES PROVISIONS: DERIVATION, MEANING, AND APPLICATION,” 48 Ariz. St. L.J. 803 (2017);
- “USRAP SURPRISE DELAWARE TAX TRAP WHEN APPOINTING TO AN EXISTING TRUST,” Estate Planning magazine, May 2016;
- “‘DELAWARE TAX TRAP’ OPENS DOOR TO HIGHER BASIS FOR TRUST ASSETS,” Estate Planning magazine, Feb. 2014 (41 ETPL 3); and
- “STRUCTURING BUSINESS OWNERSHIP, OPERATION AND SALE TO MITIGATE THE 3.8% OBAMACARE TAX, SECA TAX AND FICA TAX,” Practical Tax Strategies magazine (June 2014), Tax & Accounting business of Thomson Reuters as Publisher.

Tax Considerations in Trust Terminations, Combinations and Decanting: Federal and State Taxes, Planning Strategies

Presented by: Lawrence M. Lipoff
On Behalf of Strafford Publications
November 2, 2021

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COMMON SITUATIONS

- Coordinating for the final income tax year of an estate or trust.
- Decanting from one state to the next – governing law may change but what about income taxes? How about Principal & Income Acts?
- If situation not cured, §684 implications when a domestic grantor trust becomes a foreign nongrantor trust.
- Domestic grantor trust becomes a foreign grantor or nongrantor trust – 1040 into 1040NR, 3520, 3520-A (?).
- Inbound decanting – UNI and Revenue Ruling 91-6.

COMMON SITUATIONS

- "Hop Scotch Rules" – if trust is split between beneficiaries, might beneficiaries that as a group that did not have to pick up and report impact of PFICs, Subpart F Income of CFCs, etc. now have to?
- Can Civil Law Foundations be replicated in the United States?
- Do fiduciaries have the technical expertise and experience to address the plethora of issues and are they willing to work with family advisors?

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- Chapter 14 of the Internal Revenue Code and particularly its impact on carried interest planning for private Equity and hedge fund principals
- Nonresident alien investments in United States real estate
- Fiduciary income tax for domestic and international maters including throwback and attribution to beneficiary rules
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- Asset protection planning.

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- Society of Trusts & Estate Practitioners, STEP USA, Former Treasurer
- The Estate Planning Council of Rockland County, Former President