

## 2016 DELAWARE TRUST CONFERENCE

### “STILL THE ONE”—WHY DELAWARE IS STILL THE RIGHT PLACE TO SITUS A TRUST

### A COMPARISON OF DELAWARE, NEVADA, AND SOUTH DAKOTA TRUST LAWS

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# A COMPARISON OF DELAWARE, NEVADA, AND SOUTH DAKOTA TRUST LAWS

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## I. INTRODUCTION

Choosing an appropriate jurisdiction for a client's trusts is a critical part of the estate-planning process. Delaware, Nevada, and South Dakota generally are recognized as leading U.S. personal trust jurisdictions. This paper will compare their trust infrastructures and trust laws.

## II. TRUST INFRASTRUCTURE

### A. Trust Tradition

Delaware has been trust-friendly for longer than Nevada or South Dakota. The following table shows the year in which each state first developed attractive trust laws:

	Delaware	Nevada	South Dakota
Year Became Trust Friendly	1903 <sup>1</sup>	1999 <sup>2</sup>	1983 <sup>3</sup>

Delaware's longstanding leadership in the trust field has been verified empirically. Hence, Professor Robert Sitkoff of Harvard Law School and Professor Max Schanzenbach of Northwestern University School of Law reported in a 2006 empirical study, which analyzed pertinent data beginning in 1969, that, "Delaware was clearly attracting trust funds from out of state in the early 1970s,"<sup>4</sup> and that, "[i]n 1986 Delaware had a disproportionate share of the nation's trust funds."<sup>5</sup>

In 2010, a coalition of Delaware law firms and financial institutions

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<sup>1</sup> Wilmington Trust Company founded by members of du Pont family.

<sup>2</sup> Nevada Spendthrift Trust Act amended to permit self-settled spendthrift trusts (1999 Nev. Laws 299).

<sup>3</sup> South Dakota rule against perpetuities amended to permit perpetual trusts (1983 S.D. Sess. Laws 304).

<sup>4</sup> Schanzenbach & Sitkoff, Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust, 27 Cardozo L. Rev. 2465, 2495-96 (Apr. 2006).

<sup>5</sup> Schanzenbach & Sitkoff, Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust, 27 Cardozo L. Rev. 2465, 2479 (Apr. 2006). See Sitkoff & Schanzenbach, Perpetuities, Taxes, and Asset Protection: An Empirical Assessment of the Jurisdictional Competition for Trust Funds, 42 U. Miami Inst. on Est. Plan. ¶ 1400 (2008); Sitkoff & Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 Yale L.J.356, 375 n.62, 393-94 (Nov. 2005).

commissioned Professor Schanzenbach to assess the impact of personal trusts created by non-Delaware residents on the state’s economy. Professor Schanzenbach’s report,<sup>6</sup> dated May 25, 2011, quantified Delaware’s past and present success in the personal trust field. Highlights of the report include:

- Personal trusts created by nonresidents contributed as much as \$1.1 billion (2% of economic output) to Delaware’s economy annually.
- Such trusts generated at least \$300 million of trustee fees in Delaware each year.
- As much as \$33 million in annual Delaware income tax revenue was attributable to the state’s excess trust business.
- Delaware’s personal trust business had grown substantially over the past decade, taking an increasingly larger share of a growing national market, and the state was well-positioned to continue to grow this business.

Given that South Dakota’s and Nevada’s efforts to attract trust business did not begin until 1983 and 1999, respectively, time will tell whether these efforts will continue.

**B. Financial Condition**

The following table shows the rating agencies’ assessment of Delaware’s, Nevada’s, and South Dakota’s financial condition:

Agency	Delaware	Nevada	South Dakota
Moody’s <sup>7</sup>	Aaa (states 1–15)	Aa2 (states 34–43)	Aaa (states 1–15)
Standard & Poor’s <sup>8</sup>	AAA (states 1–15)	AA (states 30–41)	AAA (states 1–15)

**C. Nearby Population**

As shown by the 2010 census,<sup>9</sup> Delaware can draw on a much larger talent pool for its trust industry than Nevada or South Dakota:

<sup>6</sup> To view Professor Schanzenbach’s report, see [www.leimbergservices.com/docs/report-5-25-11b.pdf](http://www.leimbergservices.com/docs/report-5-25-11b.pdf) (last visited Sept. 23, 2016).

<sup>7</sup> [www.moody.com](http://www.moody.com) (last visited Sept. 23, 2016).

<sup>8</sup> [www.standardandpoors.com](http://www.standardandpoors.com) (last visited Sept. 23, 2016).

<sup>9</sup> 2010 U.S. Census. The population figures for Las Vegas, NV, are 1,992,016 within 50 miles, 2,177,630 within 100 miles, and 2,505,505 within 150 miles.

Population	Wilmington, Delaware	Reno, Nevada	Sioux Falls, South Dakota
Within 50 miles	7,151,472	588,804	335,369
Within 100 miles	20,464,043	1,690,519	908,084
Within 150 miles	40,244,858	4,942,483	1,656,250

Staff members commute to Wilmington from Maryland, New Jersey, and Pennsylvania (including Philadelphia) as well as from Delaware. Many had relevant prior experience in Baltimore, New York City, Philadelphia, Washington, DC, and elsewhere.

D. Court System

I'm not aware of a national ranking of probate court systems. But, since 2002, the United States Chamber of Commerce has issued 10 rankings of state liability systems. The ratings for Delaware, Nevada, and South Dakota in each of those studies are shown below:<sup>10</sup>

Year	Delaware	Nevada	South Dakota
2015	1	35	9
2012	1	37	11
2010	1	28	10
2008	1	40	12
2007	1	28	11
2006	1	37	7
2005	1	29	8
2004	1	34	17
2003	1	34	4
2002	1	30	9

E. Number of ACTEC Fellows

The American College of Trust and Estate Counsel (“ACTEC”) is known as the leading organization of trusts and estates attorneys. The following table shows the number of ACTEC fellows from Delaware, Nevada, and South Dakota:

<sup>10</sup> [www.instituteforlegalreform.com/states](http://www.instituteforlegalreform.com/states) (last visited Sept. 23, 2016).

	Delaware	Nevada	South Dakota
Population in 2015 <sup>11</sup>	945,934	2,890,845	858,469
Number of ACTEC Fellows <sup>12</sup>	17	7	15

F. Trust Conference

The Delaware Bankers Association is holding its 11th annual Delaware Trust Conference in Wilmington on October 25 and October 26, 2016.<sup>13</sup> This one-of-a-kind program draws almost 400 attendees from throughout the country. The sessions include:

- Recent Developments in Federal Case Law, Regulations, and Delaware Trust Law
- Why Delaware is Still the Right Place to Situs a Trust
- Trust Ethics—Collaboration Across Small and Great Divides: Teamwork, Tensions, and Client-Centered Solutions
- Taking Advantage of the Premium Tax: Reduction/Elimination and Other Life Insurance Strategies
- This v. That: What Can Be Done in Other Jurisdictions
- Decanting: Flexibility and Dangers
- A ‘Hot’ Vehicle for Estate, Tax, Family and Business Planning [Delaware Statutory Trusts]
- Delaware Trust Questions and Answers
- Common Uses of Delaware Trusts for International Clients
- Divided Trusteeship: Differing Perspectives on the Draft Uniform Directed Trust Act
- Regulatory Hot Topics for 2016
- Practical Perspective on the Onboarding Process for New and Transfer Trusts
- State Income Tax Considerations and Current Income Tax Litigation
- By-Products of Death: How to Stay Ahead of the Complications
- Properly Using The Tools Available for Moving and Modifying a Trust
- Directed Trusts and Investments: Managing Expectations and Ensuring Appropriate Controls and Information-Sharing
- Trusts Utilizing Entity Structures: Challenges and Solutions
- The Best Way to Setup a Quiet Trust: Roadmap to Navigating the Issues
- Basis Consistency
- Attorney Client Privilege in the Trust World

<sup>11</sup> [www.census.gov/quickfacts](http://www.census.gov/quickfacts) (last visited Sept. 23, 2016).

<sup>12</sup> [www.actec.org](http://www.actec.org) (last visited Sept. 23, 2016).

<sup>13</sup> [www.debankers.com/2016\\_DE\\_Trust\\_Conf.html](http://www.debankers.com/2016_DE_Trust_Conf.html) (last visited Sept. 23, 2016).

Only 23 of the 62 presenters are from outside Delaware. Fifteen speakers are practicing Delaware attorneys; 24 others are Delaware government officials, Delaware representatives of 13 different trust institutions, and other Delaware personnel. I'm not aware of a similar program in Nevada or South Dakota (let alone one that has been held for the past 11 years) and doubt that either state can match the depth of Delaware's local talent.

Be on the lookout for the 12th Annual Delaware Trust Conference.<sup>14</sup>

G. Academic Program

At this writing, the University of Delaware is instituting the following academic program:<sup>15</sup>

The Delaware Financial Education Alliance and the Lerner College of Business and Economics at the University of Delaware have inaugurated the Trust & Wealth Management Minor. The Trust & Wealth Minor will be an accredited program comprised of up to 13 courses in the curriculum providing students with comprehensive skills grounded in taxation and estate planning. The program will provide a pipeline of experienced candidates for employment by trust companies and law firms in Delaware. The program will be the first accredited trust and wealth management minor in the nation and will provide employment opportunities in well-paying jobs.

Students from throughout the country will be able to come to Delaware for training in the trust field.

H. Summary

Based on what's shown above, one can agree that Delaware's trust infrastructure has a significant advantage over the other states. For these reasons and because Delaware continually strives to modernize its trust laws, a client and his or her advisers should at least consider Delaware in almost every case.

III. A COMPARISON OF DELAWARE AND NEVADA TRUST LAWS

A. Trust Legislation Generally

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<sup>14</sup> See [www.debankers.com](http://www.debankers.com) (last visited Sept. 23, 2016).

<sup>15</sup> Graham, View From The Chair, Del. Banker, Summer 2016, at 4, [www.debankers.com/Assets/Delaware\\_Banker\\_Vol\\_12\\_No\\_3.pdf](http://www.debankers.com/Assets/Delaware_Banker_Vol_12_No_3.pdf) (last visited Sept. 23, 2016).

1. Nevada Advantages

In my view, Nevada offers the following advantages.

a. Proximity

Nevada is adjacent to California. Many Californians own property in Nevada and visit the state with some frequency.

b. Electronic Trusts

Nevada allows settlors (but not testators) to create electronic trusts;<sup>16</sup> Delaware does not have a comparable provision.

c. Spousal Claims

By caselaw, Delaware allows a current—but not a divorced—spouse to reach the assets of a third-party trust for support,<sup>17</sup> but Nevada practitioners often misrepresent this advantage. Typical is the following statement in a January 2016 article:<sup>18</sup>

Delaware provides that spouses who are beneficiaries of discretionary trusts do not receive protection of their trust assets from alimony claims of a divorced spouse.

In the case in question, the Supreme Court of Delaware noted that, “we . . . . consider that, . . . . the record discloses solely that the individual parties are still husband and wife.”<sup>19</sup> The court concluded:<sup>20</sup>

It of course remains to be seen, if the husband appears generally in this litigation and subjects himself to the jurisdiction of the Court of Chancery, whether, on final hearing, his contentions with regard to his Mexican divorce will be ultimately upheld, in which event we assume that the wife

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<sup>16</sup> NRS § 163.0095.

<sup>17</sup> Garretson v. Garretson, 306 A.2d 737 (Del. 1973).

<sup>18</sup> Oshins & Siegel, The Anatomy of the Perfect Modern Trust—Part 1, Est. Plan., Jan. 2016, at 3, 12 (footnote omitted).

<sup>19</sup> Garretson, 306 A.2d at 739.

<sup>20</sup> 306 A.2d at 742.



would lose her status as wife, and there may be an entirely different situation then facing the Chancellor. This question, however, is not before us, and we make no ruling upon the future outcome of the course of the litigation.

d. Private Trust Companies

Very wealthy families sometimes explore creating private trust companies (“PTCs”) to serve as trustees of trusts for family members. Because Nevada imposes modest capital, office-space, and other requirements,<sup>21</sup> some view it as a desirable jurisdiction for these entities. Even though Delaware has higher requirements, PTCs have been formed under Delaware’s limited purpose trust company statutes.<sup>22</sup> PTCs are very expensive to form, involve potential registration with and regulation by the SEC and other state and federal agencies, and are vulnerable to disruption if key personnel depart. By establishing directed trusts with a Delaware corporate fiduciary, such families may avoid that expense and those regulatory headaches. An appropriate corporate fiduciary may offer access to a number of investment, trust, tax, estate-planning, and other officers so that if one of them leaves, the administration of trusts will not be harmed. The appointment of family members as direction investment or distribution advisers will minimize the corporate trustee’s fees and provide the control that is so important to many families. Such families must balance the participation of advisers, committees, and protectors with assurance that trusts will be valid and that Delaware law will apply.

2. Delaware Advantages

To my knowledge, Delaware offers the following advantages.

a. Perpetual Trusts

Since 1933, perpetual trusts have been available in Delaware through the exercise of nongeneral powers of appointment.<sup>23</sup> Since 1995, trust interests in personal property may be perpetual.<sup>24</sup>

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<sup>21</sup> See NRS §§ 669A, 010–669A.320.

<sup>22</sup> See 5 Del. C. §§ 773–779. See also Delaware Financial Institutions (Jan. 5, 2016), [banking.delaware.gov/pdfs/financialinstitutions/DEFInstitutions.pdf](http://banking.delaware.gov/pdfs/financialinstitutions/DEFInstitutions.pdf) (last visited Sept. 23, 2016).

<sup>23</sup> 38 Del. Laws 198 (1933).

<sup>24</sup> 25 Del. C. § 503(a).

Although trust interests in real property must vest within 110 years after creation of the interest,<sup>25</sup> this limitation may be avoided by putting the interest in a family limited partnership (“FLP”), limited-liability company (“LLC”), or other entity.<sup>26</sup>

A Nevada statute has permitted the creation of 365-year trusts since 2005,<sup>27</sup> but the statute might be invalid. This is because Nevada’s constitution contains the following prohibition:<sup>28</sup>

No perpetuities shall be allowed except for eleemosynary purposes.

Moreover, Nevada voters disapproved a ballot initiative to repeal the constitutional prohibition in 2002. Regarding this issue, Professor Sitkoff and a co-author wrote in 2014 that:<sup>29</sup>

[L]egislation authorizing perpetual or long-enduring dynasty trusts is constitutionally suspect in a state with a constitutional prohibition of perpetuities.

A Nevada practitioner contends that a 1941 decision of the Supreme Court of Nevada<sup>30</sup> and a 2015 decision of the same court<sup>31</sup> mean that the constitutional limitation no longer is relevant.

The earlier case was decided long before Nevada adopted a 365-year period for trust interests. Its entire description of the law of perpetuities in Nevada is as follows:<sup>32</sup>

Section 4 of article XV of the constitution of Nevada reads: “No perpetuities shall be

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<sup>25</sup> 25 Del. C. § 503(b).

<sup>26</sup> 25 Del. C. § 503(e).

<sup>27</sup> NRS § 111.1031.

<sup>28</sup> Nev. Const. Art. 15, § 4.

<sup>29</sup> Horowitz & Sitkoff, Unconstitutional Perpetual Trusts, 67 Vand. L. Rev. 1769, 1803 (Nov. 2014). Accord Blattmachr, Gans & Lipkin, What if Perpetual Trusts are Unconstitutional?, LISI Est. Plan. Newsl. #2263 (Dec. 18, 2014), [www.leimbergservices.com](http://www.leimbergservices.com).

<sup>30</sup> Sarrazin v. First Nat’l Bank, 111 P.2d 49 (Nev. 1941). See Oshins, The Rebuttal to Unconstitutional Perpetual Trusts, LISI Est. Plan. Newsl. #2265 (Dec. 22, 2014), [www.leimbergservices.com](http://www.leimbergservices.com).

<sup>31</sup> Bullion Monarch Mining, Inc. v. Barrick Gold Strike Mines, Inc., 345 P.3d 1040 (Nev. 2015). See Oshins, Unconstitutional Perpetual Trusts—Not So Fast Says the Nevada Supreme Court, LISI Est. Plan. Newsl. #2297 (Apr. 6, 2015), [www.leimbergservices.com](http://www.leimbergservices.com).

<sup>32</sup> Sarrazin, 111 P.2d at 51 (citation omitted; emphasis added).

allowed except for eleemosynary purposes.” There is no Nevada statute defining the rule against perpetuities. The common-law rule is usually stated thus: “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” **Other than the constitutional provision above quoted, there have not been called to our attention any other provisions, either constitutional or statutory, invalidating interests which vest too remotely, or forbidding restraints on alienation.**

The above emphasized sentence is dictum at best because the court concluded that all interests in the trust in question would vest within the common-law rule against perpetuities period.<sup>33</sup>

The later case involved the applicability of Nevada’s rule against perpetuities to “commercial mining agreements for the payment of area-of-interest royalties.”<sup>34</sup> Not surprisingly, the court held that it did not.<sup>35</sup> In the course of the opinion, the court discussed a 1974 case as endorsing statutes that depart from the common law.<sup>36</sup> Nevertheless, the 1974 case, which dealt with the “old common-law rule of interspousal immunity,”<sup>37</sup> did not involve a common-law rule that had been codified in Nevada’s constitution.

A decision of the Supreme Court of Nevada validating 365-year trusts might be helpful. It has been suggested that the court would uphold the statute in the interest of supporting Nevada’s business-development efforts. That would be a regrettable basis for such a decision if the law is to the contrary.

The best way to resolve the issue would be for the voters to repeal the constitutional prohibition.

b. Delaware Tax Trap

In Nevada, a donee of a nongeneral power of appointment cannot

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<sup>33</sup> 111 P.2d at 53.

<sup>34</sup> Bullion Monarch Mining, 345 P.3d at 1041.

<sup>35</sup> 345 P.3d at 1044.

<sup>36</sup> Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974).

<sup>37</sup> Bullion Monarch Mining, 345 P.3d at 1042.

exercise the power to trigger the so-called “Delaware tax trap.”<sup>38</sup> In Delaware, the donee of such a power may exercise it either to spring the trap or not to spring it.<sup>39</sup> Having the option to trigger the trap and thereby to cause estate-tax inclusion and to get a stepped-up income-tax basis is important given the recent increase in federal transfer-tax exemptions and income-tax rates. A legislative change will be needed to make this planning option available in Nevada. Given that the Nevada Legislature does not meet in 2016, this will not happen before next year.

c. Directed Trusts

Under long-standing Delaware practice/statute,<sup>40</sup> which has been upheld by the Delaware Court of Chancery,<sup>41</sup> a trust instrument can bifurcate the trustee’s duties. The Nevada statute<sup>42</sup> is relatively new and untested.

d. Silent Trusts

Delaware and Nevada statutes allow a trust instrument to postpone the sharing of information with trust beneficiaries for a period of time.<sup>43</sup> The Delaware statute is more comprehensive, though, because it lists examples of permissible periods (such as until a beneficiary reaches a specified age or the settlor dies) and allows a designated representative to receive information.

e. Lifetime Validation of Trusts

Under a Delaware statute, which was upheld by the Delaware Supreme Court,<sup>44</sup> a trust beneficiary must object to the creation of a revocable trust, an amendment to a revocable trust, or an irrevocable trust within 120 days after receiving notice from the trustee. The Nevada statute<sup>45</sup> is relatively new and untested.

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<sup>38</sup> NRS § 111.1031(3).

<sup>39</sup> 25 Del. C. §§ 501–505. See Nenno, Getting a Stepped-Up Income-Tax Basis and More by Springing—or Not Springing—The Delaware Tax Trap the Old-Fashioned Way, 40 Tax Mgmt. Est., Gifts & Tr. J. 215 (Sept. 10, 2015).

<sup>40</sup> 12 Del. C. § 3313. See Nenno, Good Directions Needed When Using Directed Trusts, Est. Plan., Dec. 2015, at 12.

<sup>41</sup> Duemler v. Wilmington Trust Co., 2004 WL 5383927 (Del. Ch. 2004).

<sup>42</sup> NRS § 163.5549.

<sup>43</sup> 12 Del. C. §§ 3303, 3339; NRS §§ 163.004(1)(a), 165.160(1)(a).

<sup>44</sup> 12 Del. C. § 3546; Ravet v. Northern Trust Co., 2015 WL 631588 (Del. 2015).

<sup>45</sup> NRS § 164.021(4).

f. Court Systems

The highly regarded Delaware courts address trust matters promptly and efficiently. They decided important trust cases decades ago<sup>46</sup> and in more recent years.<sup>47</sup> To date, Nevada courts have not rendered comparable decisions.

g. New Unitrusts

A Delaware statute allows the creation of a new trust as a unitrust.<sup>48</sup> Nevada doesn't have a comparable statute.

h. Noncharitable Purpose Trusts

Delaware permits a perpetual trust for any noncharitable purpose.<sup>49</sup> Nevada legislation covers trusts for animals only.<sup>50</sup>

i. Trust Legislation

Delaware has state-of-the-art trust laws, which it refines almost every year. Because the Nevada legislature ordinarily meets only in odd years, Nevada cannot enact badly needed legislation in 2016 and other even years. In addition, Nevada has not passed certain key provisions until long after its competitors. For example, it did not enact a directed trust or decanting statute until 2009.<sup>51</sup>

B. Asset-Protection Trust Legislation

1. Nevada Advantages

The Nevada asset-protection trust (“APT”) legislation (“Nevada Act”) supposedly has the following advantages.

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<sup>46</sup> See, e.g., Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (Del. 1942) (applicability of Delaware law); Lewis v. Hanson, 128 A.2d 819 (Del. 1957), aff'd, 357 U.S. 235 (1958) (same); Gibson v. Speegle, 184 Del. Ch. Lexis 475 (Del. Ch. 1984) (spendthrift trust).

<sup>47</sup> See, e.g., Ravet v. Northern Trust Co., 2015 WL 631588 (Del. 2015) (lifetime validation of trust); In re Peierls Family Testamentary Trusts, 77 A.3d 223 (Del. 2013) (applicability of Delaware law); In re Peierls Charitable Lead Unitrust, 77 A.3d 232 (Del. 2013) (same); In re Peierls Family Inter Vivos Trusts, 77 A.3d 249 (Del. 2013) (same); Duemler v. Wilmington Trust Co., 2004 WL 5383927 (Del. Ch. 2004) (directed trusts).

<sup>48</sup> 12 Del. C. § 61-107.

<sup>49</sup> 12 Del. C. § 3556, 25 Del. C. § 503(a).

<sup>50</sup> NRS §§ 163.006(4), 163.0075.

<sup>51</sup> 2009 Nev. Stat. 215, §§ 20–35 (directed trust) (2009); 2009 Nev. Stat. 215, § 37 (decanting) (2009).

a. Limitations Periods

The limitations periods for bringing actions to contest APTs are half as long under the Nevada Act as under the Delaware Act. Specifically, Nevada requires present creditors to sue within two years of a transfer or six months after the date on which a transfer was discovered or reasonably should have been discovered, whichever is later, while future creditors must sue within two years of a transfer.<sup>52</sup> Delaware's time spans are double that (four years/one year for present creditors, four years for future creditors).<sup>53</sup> Thus, the difference is the “added time” available to plaintiffs under Delaware law. This “advantage” is more apparent than real for the following reasons.

- (1) Given that the determination as to whether the creation of an APT is a fraudulent transfer is made as of the time the trust was created not when a creditor brings a challenge, the statute of limitations really doesn't matter. If an APT is properly constructed at the outset, then a creditor will lose no matter when he or she brings suit.
- (2) If a settlor really is concerned about statutes of limitations, he or she will not go to Nevada. Instead, he or she will go to an offshore jurisdiction where limitations periods are even shorter and claims are even harder to prove.
- (3) Nevada's limitations periods will not apply if the debtor ends up in bankruptcy.<sup>54</sup>
- (4) Conflict-of-laws rules will allow courts of other states to apply their longer limitations periods in many instances.

b. Family Claims

Unlike the Delaware APT legislation (“Delaware Act”),<sup>55</sup> the Nevada Act contains no specific exception for claims by spouses, former spouses, and minor children related to separation or divorce proceedings. It should be noted, however, that Delaware's exception for spousal claims is far narrower than might appear

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<sup>52</sup> NRS § 166.170(1).

<sup>53</sup> 12 Del. C. § 3572(b), 6 Del. C § 1309.

<sup>54</sup> 11 U.S.C. § 548(e).

<sup>55</sup> 12 Del. C. § 3573(1).

because it does not extend to future spouses and because it limits the rights of current and former spouses.<sup>56</sup> Moreover, this Nevada “advantage” might not exist at all for the following reasons.

(1) A Nevada statute,<sup>57</sup> as amended in 2011,<sup>58</sup> provides:

A creditor may not bring an action with respect to transfer of property to a spendthrift trust unless a creditor can prove by clear and convincing evidence that the transfer of property was a fraudulent transfer pursuant to chapter 112 of NRS or that **the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor.**

It certainly appears that the emphasized language will give spouses with alimony and child-support claims an opportunity to reach the assets of Nevada APTs.

- (2) Federal law might enable persons with child support claims to reach the assets of Nevada APTs.<sup>59</sup>
- (3) Even if these exceptions are not already in the Nevada Act, Nevada courts might add them. In cases decided before and after the passage of the Nevada Act,<sup>60</sup> the Supreme Court of Nevada has demonstrated a propensity to establish nonstatutory exceptions to the state's homestead exception,<sup>61</sup> another state-created protection from creditor claims. Therefore, in sympathetic cases, Nevada courts might extend this judicial activism to Nevada APTs as well.
- (4) This “advantage” is not important to clients. In a January 2014 article, two commentators, neither of whom practices

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<sup>56</sup> 12 Del. C. § 3570(9), 12 Del. C. § 3573, flush language at end.

<sup>57</sup> NRS § 166.170(3) (emphasis added).

<sup>58</sup> 2011 Nev. Stat. 270, § 206 (2011).

<sup>59</sup> 28 U.S.C. § 1738B.

<sup>60</sup> Breedlove v. Breedlove, 691 P.2d 426, 428 (1984); Phillips v. Morrow, 760 P.2d 115, 116–17 (1988); Maki v. Chong, 75 P.3d 376, 379 (2003).

<sup>61</sup> NRS §§ 115.005–115.090.

in Nevada or Delaware, observe:<sup>62</sup>

In an article we wrote in January 2013 for this journal, we also discussed that the existence of exception creditors, such as child support or maintenance, did little to weaken the asset protection of a DAPT. From a practical standpoint, we've never come across a situation in which a client was proposing to create a DAPT with the objective of shirking a child support obligation.

c. Tort Claims

Nevada does not have Delaware's exception for tort claims that predate a transfer into an APT,<sup>63</sup> but the holder of such a claim might fall within the highlighted exception in the Nevada statute, quoted above.

2. Delaware Advantages

In my view, the Delaware Act<sup>64</sup> offers the following advantages.

a. Spendthrift Protection

Unlike the Delaware Act,<sup>65</sup> the Nevada Act does not require an APT to have any particular spendthrift clause and does not provide that a spendthrift trust is to fall within the trust exclusion under the federal bankruptcy code, which might expose trust assets to creditor claims in poorly drafted instruments, particularly if, as is permitted by the Nevada Act,<sup>66</sup> the trustee has minimal ties to the state.

b. Automatic Removal

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<sup>62</sup> Worthington & Merric, Which Trust Situs is Best in 2014?, Tr. & Est., Jan. 2015, at 53, 61–62 (footnote omitted).

<sup>63</sup> 12 Del. C. § 3573(2).

<sup>64</sup> 12 Del. C. §§ 3570–3576. See Nenno, A Practitioner-Friendly Guide to the Delaware Asset-Protection Trust, Prob. & Prop., Jan./Feb. 2016, at 53 (Jan./Feb. 2016).

<sup>65</sup> 12 Del. C. § 3570(11)(c).

<sup>66</sup> NRS § 166.015(2).



Unlike the Nevada Act, the Delaware Act<sup>67</sup> provides that the trustee of an APT will cease to act if a court determines that Delaware law does not govern the trust or the effect of its spendthrift clause.

c. Consequences of Successful Attack

Unlike the Nevada Act, the Delaware Act<sup>68</sup> describes the implications for the trust, the trustee, and the beneficiaries if a creditor brings a claim that may be paid from the trust. The inclusion of these provisions in the Delaware Act greatly increases its asset-protection effectiveness.<sup>69</sup>

d. Additional Distribution Options

A Delaware APT gives the settlor additional distribution options. Thus, a settlor may obtain creditor protection if he or she creates a self-settled trust that is a grantor-retained income trust (“GRIT”) that meets the requirements of the Delaware Act.<sup>70</sup> A Delaware APT also may provide for the payment of debts, expenses, and taxes following the settlor's death.<sup>71</sup> This latter option might be particularly helpful when the settlor structures the APT as an incomplete gift and the APT's value appreciates relative to the size of the settlor's gross estate.

e. Tenancy-by-the-Entireties Property

Delaware law offers protection to tenancy-by-the-entireties personal property contributed to a Delaware APT.<sup>72</sup>

f. Public Policy

The Delaware Act is less “aggressive” than the Nevada Act. A court in a state that does not have domestic APT legislation that is adjudicating the ability of a creditor to reach the assets of a domestic APT therefore might be less likely to disregard Delaware law than Nevada law.

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<sup>67</sup> 12 Del. C. § 3572(g).

<sup>68</sup> 12 Del. C. § 3574.

<sup>69</sup> Sullivan, III, Gutting the Rule Against Self-Settled Trusts, 23 Del. J. Corp. L. 423, 464, 475 (1998).

<sup>70</sup> 12 Del. C. § 3570(11)(b).

<sup>71</sup> 12 Del. C. § 3570(11)(b)(10).

<sup>72</sup> 12 Del. C. § 3574(f).

g. Lifetime Trusts

Unlike Nevada, Delaware does not permit creditors to reach a settlor's contingent interest in a lifetime marital-deduction trust, credit-shelter trust, or other trust.<sup>73</sup>

h. Court System

In 2015, the Delaware Court of Chancery held creditors' claims that transfers to Delaware APTs were fraudulent transfers to be time-barred.<sup>74</sup> Nevada courts have not yet rendered decisions involving Nevada APTs.

i. Trust Legislation

Delaware revises its APT legislation frequently. As noted above, the Nevada legislature generally convenes only in odd years. Moreover, Nevada did not add crucial provisions to its APT legislation until 2009 or even 2011,<sup>75</sup> long after other states.

IV. A COMPARISON OF SOUTH DAKOTA AND DELAWARE TRUST LAWS

A. Trust Legislation Generally

1. South Dakota Advantages

In my opinion, South Dakota's principal "advantage" over Delaware is its legislation for PTCs. Some wealthy families view South Dakota as a favorable jurisdiction for PTCs due to its minimal formation and other requirements.<sup>76</sup> As noted above regarding Nevada, PTCs may be formed under Delaware law and the venerable Delaware directed trust offers a viable alternative.

2. Delaware Advantages

a. Directed Trusts

Under long-standing Delaware practice/statute,<sup>77</sup> which was

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<sup>73</sup> 12 Del. C. § 3536(c)(1).

<sup>74</sup> TrustCo v. Mathews, 2015 WL 295373 (Del. Ch. 2015).

<sup>75</sup> 2009 Nev. Stat. 215, §§ 58–60 (2009); 2011 Nev. Stat. 270, §§ 201–206 (2011).

<sup>76</sup> See S.D. Codified Laws §§ 51A-6A-1–51A-6A-66. See also Trust Companies Licensed to Do Business in South Dakota (July, 2016), [www.dlr.gov/banking/trusts/documents/state\\_chartered\\_trust\\_companies.pdf](http://www.dlr.gov/banking/trusts/documents/state_chartered_trust_companies.pdf) (last visited Sept. 23, 2016).

<sup>77</sup> 12 Del. C. §§ 3301(g), 3313, 3317.

upheld by the Delaware Court of Chancery,<sup>78</sup> a trust instrument can bifurcate a trustee's duties. South Dakota's statute<sup>79</sup> is relatively new and untested.

b. Delaware Tax Trap

In South Dakota, the donee of a nongeneral power of appointment cannot exercise the power to trigger the Delaware tax trap.<sup>80</sup> In Delaware, the donee of such a power may exercise it either to spring the trap or not to spring it.<sup>81</sup> As noted above, recent federal tax law changes make it important to have the option to spring the trap in certain circumstances to get a stepped-up income-tax basis. South Dakota will have to make a legislative change to offer this option. Such a change was not in the legislation passed earlier this year.<sup>82</sup>

c. Silent Trusts

Delaware and South Dakota allow a trust instrument to postpone the sharing of information with beneficiaries for a period of time.<sup>83</sup> Delaware's legislation is more comprehensive because it lists specific periods (such as until a beneficiary reaches a certain age or until the settlor's death) and allows a designated representative to receive information.<sup>84</sup>

d. Judicial and Nonjudicial Trust Modifications

The trustee and other interested persons as well as beneficiaries must consent to the modification of a trust in Delaware.<sup>85</sup> Beneficiaries alone may modify or terminate a trust in South Dakota so that a testator's/settlor's wishes might be defeated.<sup>86</sup> A prime example of how poor trust design can defeat intent is the ongoing litigation involving the Wellin Family 2009 Irrevocable Trust, which the settlor, Keith Wellin, intended to be a South

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<sup>78</sup> Duemler v. Wilmington Trust Co., 2004 WL 5383927 (Del. Ch. 2004).

<sup>79</sup> S.D. Codified Laws §§ 55-1B-1–55-1B-11, 55-2-13.

<sup>80</sup> S.D. Codified Laws § 43-5-5.

<sup>81</sup> 25 Del. C. §§ 501–505

<sup>82</sup> 2016 S.D. Laws 231.

<sup>83</sup> 12 Del. C. §§ 3303, 3339; S.D. Codified Laws § 55-2-13.

<sup>84</sup> 12 Del. C. §§ 3303, 3339.

<sup>85</sup> 12 Del. C. § 3338.

<sup>86</sup> S.D. Codified Laws § 55-3-24.

Dakota dynasty trust. In January of 2016, Judge Norton of the United States District Court for the District of South Carolina summarized the sad saga as follows:<sup>87</sup>

On November 2, 2009, Keith Wellin (“Keith”) created the Wellin Family 2009 Irrevocable Trust (the “Trust”) for the benefit of his children and grandchildren. In late 2013, defendants Peter J. Wellin, Cynthia W. Plum, and Marjorie W. King (the “Wellin children”), acting as co-trustees, liquidated and distributed over \$95.6 million of the Trust’s estimated \$154 million in assets to themselves. On December 17, 2013, then-plaintiff Schwartz, acting as trust protector, initiated the present action, claiming that the Wellin children’s liquidation of the Trust assets was both tortious and in violation of the Trust. The action also seeks to remove the Wellin children from their positions as co-trustees. Notably, at the time Schwartz was hired by Keith as trust protector, and at all times since, Keith has pursued a separate action—Wellin v. Wellin et. al.—seeking to declare the Trust void ab initio. Recognizing this conflict, Keith released any claims he may have against Schwartz for reimbursement of Schwartz’s fees and attorney fees in the event Keith’s separate action is successful.

In May 2014, after this court found that Schwartz did not qualify as a real party in interest and dismissed the instant action, Schwartz exercised his powers under the Trust and appointed McDevitt as an additional trustee. McDevitt quickly ratified the commencement of this action. On October 10, 2014, McDevitt filed a new complaint seeking actual and punitive damages from the Wellin children and asserting a cause of action for the recovery of attorney’s fees. The Wellin children counterclaimed that Schwartz was not properly appointed trust protector because Keith lacked capacity at the time of his appointment, and that Schwarz was “subordinate” to Keith in violation of the Trust requirements.

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<sup>87</sup> McDevitt v. Wellin, 2016 WL 199626, at \*1–2 (D.S.C. 2016) (citations omitted).

The Wellin children also seek to have the trust plaintiffs removed from their fiduciary positions based on various actions taken in bad faith and against the best interests of the Trust.

The Wellin children are currently holding the distributed Trust assets in certain UBS accounts, and have used millions of dollars in Trust assets to pay their own attorneys, experts, and consultants in this litigation. The trust plaintiffs and their attorneys have not been paid or reimbursed by the Trust. However, the trust plaintiffs and their attorneys are being paid, pursuant to letter agreements between Keith and the trust plaintiffs, which provide that Keith will pay the trust plaintiffs' fees and expenses, and their attorneys' fees. The letter agreements further state that these advances must only be repaid to the extent the trust plaintiffs are able to recover such fees from the Trust assets or the Wellin children.

Hence, the salient facts are:

- The settlor created an enormous dynasty trust for his children and their issue in 2009.
- Four years later, the children, as cotrustees, sold the bulk of the trust assets and distributed the proceeds to themselves.
- The trustor, apparently in ill health, spent the last few years of his life suing his children to restore or revoke the trust.
- The children are paying their litigation costs from the proceeds of the trust assets; the trustor and his widow are bearing the litigation costs of the protector and the trustee appointed by the protector.

Both states allow trusts to be modified by merger<sup>88</sup> and decanting.<sup>89</sup>

e. Trust Provisions

Since 2003, regardless of the common law or other statute, a Delaware governing instrument may expand, restrict, eliminate, or otherwise vary the rights and interests of the beneficiary. Specifically, the trust may negate the duty to diversify investments

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<sup>88</sup> 12 Del. C. § 3325(29); S.D. Codified Laws § 55-3-29.

<sup>89</sup> 12 Del. C. § 3528; S.D. Codified Laws §§ 55-2-15–55-2-21.

or defer the age at which a trustee must notify a beneficiary of a trust interest.<sup>90</sup> South Dakota's statute is less comprehensive.<sup>91</sup>

f. Court System

Over many decades, Delaware courts have rendered leading trust decisions,<sup>92</sup> whereas South Dakota courts have yet to display such leadership.

g. Trust Laws

Delaware updates its trust laws more promptly than South Dakota. South Dakota often copies Delaware's legislation.

B. Asset-Protection Trust Legislation

Both South Dakota's APT statute ("South Dakota Act") and the Delaware Act are attractive laws. It is not surprising that South Dakota's laws are favorable because it essentially copied Delaware's provisions.

1. South Dakota Advantages

In my view, South Dakota offers the following advantages.

a. Future Claims

Whereas the general limitations rule in Delaware is four years,<sup>93</sup> South Dakota's general limitations rule is two years and specifies methods to commence the date-of-discovery period.<sup>94</sup> For reasons discussed above for the Nevada Act, this "advantage" might be more apparent than real.

b. Existing Claims

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<sup>90</sup> 12 Del. C. § 3303(a).

<sup>91</sup> S.D. Codified Laws § 55-1-53.

<sup>92</sup> See, e.g., Ravet v. Northern Trust Co., 2015 WL 631588 (Del. 2015) (lifetime validation of trust); In re Peierls Family Testamentary Trusts, 77 A.3d 223 (Del. 2013) (applicability of Delaware law); In re Peierls Charitable Lead Unitrust, 77 A.3d 232 (Del. 2013) (same); In re Peierls Family Inter Vivos Trusts, 77 A.3d 249 (Del. 2013) (same); Lewis v. Hanson, 128 A.2d 819 (1957), aff'd, 357 U.S. 235 (1958) (applicability of Delaware law); Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (same); Duemler v. Wilmington Trust Company, 2004 WL 5383927 (Del. Ch. 2004) (directed trusts); Gibson v. Speegle, 1984 Del. Ch. Lexis 475 (Del. Ch. 1984) (spendthrift trust).

<sup>93</sup> 12 Del. C. § 3572, 6 Del. C. § 1309.

<sup>94</sup> S.D. Codified Laws § 55-16-10.

Delaware's "date-of-discovery" rule, which extends the limitations period for certain existing creditors, requires that plaintiffs file suit within one year of the time they discovered or should have discovered a claim against the APT.<sup>95</sup> South Dakota's six-month date of discovery rule also imposes on plaintiffs a duty to file suit on the underlying claims within certain time periods and specifies methods to commence the date-of-discovery period.<sup>96</sup> Further, Delaware requires that future creditors prove an intent to defraud, and does not allow future creditors to prevail based on showings of intent to hinder or delay. However, existing creditors can still prevail by proving an intent to hinder or delay.<sup>97</sup> South Dakota, however, has eliminated the "hinder or delay" theory for all creditors.<sup>98</sup>

c. Tort Claims

Unlike South Dakota, Delaware permits a person who has a tort claim against the settlor when the settlor creates a Delaware APT to reach the assets of the trust at any time.<sup>99</sup> Nevertheless, creditors availing themselves of this exception in Delaware's law almost always will pursue their claims within the time limits imposed by the South Dakota Act for pre-existing claims, i.e., within two years after the trust was created or, if later, within six months after the creditor discovered (or should have discovered) the trust.

2. Delaware Advantages

In my view, Delaware offers the following advantages.

a. GRAT/GRUT

In Delaware,<sup>100</sup> a settlor may keep an interest in a grantor-retained annuity trust ("GRAT") or grantor-retained unitrust ("GRUT") but, in South Dakota, a settlor may retain only up to a 5% interest in such a trust.<sup>101</sup>

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<sup>95</sup> 12 Del. C. § 3572(b)(1).

<sup>96</sup> S.D. Codified Laws § 55-16-10.

<sup>97</sup> 12 Del. C. § 3572(a), 6 Del. C. §§ 1304–1305.

<sup>98</sup> S.D. Codified Laws § 55-16-9.

<sup>99</sup> 12 Del. C. § 3573(2).

<sup>100</sup> 12 Del. C. § 3570(11)(b)(5).

<sup>101</sup> S.D. Codified Laws § 55-16-2(2)(f).

b. Spousal Claims

In Delaware,<sup>102</sup> but not in South Dakota,<sup>103</sup> a spouse or former spouse may reach the assets of an APT for property division, etc., only if it is “incident to a judicial proceeding with respect to a separation or divorce.”

c. Right of Election

In South Dakota,<sup>104</sup> but not in Delaware,<sup>105</sup> a surviving spouse may reach the assets of a South Dakota APT by electing against the Will of a South Dakota resident or nonresident decedent.

d. Tenancy-by-the-Entireties Property

Unlike South Dakota, Delaware provides protection for tenancy-by-the-entireties personal property contributed to an APT.<sup>106</sup>

e. Lifetime Trusts

Delaware allows creditor protection for a donor’s contingent interest in a lifetime marital-deduction trust, credit-shelter trust, or other trust.<sup>107</sup> To date, South Dakota does not have such legislation.

f. Court System

In 2015, the Delaware Court of Chancery held creditors’ claims that transfers to Delaware APTs were fraudulent transfers to be time-barred.<sup>108</sup> South Dakota courts have not yet ruled on the viability of South Dakota APTs.

g. Trust Legislation

Delaware updates its APT legislation more promptly than South Dakota.

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<sup>102</sup> 12 Del. C. § 3573(1).

<sup>103</sup> S.D. Codified Laws § 55-16-15(1).

<sup>104</sup> S.D. Codified Laws §§ 29A-2-202(d), 29A-2-205(2)(i).

<sup>105</sup> 12 Del. C. § 3573, flush language at end.

<sup>106</sup> 12 Del. C. § 3574(f).

<sup>107</sup> 12 Del. C. § 3536(c)(1).

<sup>108</sup> TrustCo v. Mathews, 2015 WL 295373 (Del. Ch. 2015).