



Modern Trust Laws:
Are Irrevocable Trusts Really Irrevocable?

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- I. Modern trust law concepts, available only in progressive trust law jurisdictions such as South Dakota, including trust protector, directed trust, decanting, reformation, and modification, have revolutionized trust formation and administration in the United States while delivering far more control to settlors of trust, beneficiaries, and advisors than ever before. The proliferation of these modern trust law concepts across the country raises an important and very timely issue; Are Irrevocable Trusts Really Irrevocable?
 - a. The trust protector concept provides for direction or restraint of powers of the trustee and for a great deal of control over the trust.
 - i. There are a number of reasons why a settlor may wish to appoint a protector in relation to a trust:
 1. Protectors allow for a great degree of flexibility when dealing with changes in circumstances, including both factual circumstances (death, premature divorce, previously unknown children) and legal changes (any legal changes, but most frequently changes to applicable revenue laws);
 2. The settlor may be concerned that the trustee may not pay sufficient attention to his wishes;

3. The settlor wishes certain powers to be withheld from the trustees; or
 4. The settlor wishes a third party to act as a main point of contact, between the beneficiaries and the trustees.
- ii. South Dakota's trust protector statute is an example of one of the most robust trust statutes in the nation. See below:

1. Title 55 - FIDUCIARIES AND TRUSTS
Section 55-1B-6 - Powers and discretions of trust protector.

55-1B-6. Powers and discretions of trust protector. The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. Such powers and discretion may include the following:

- (1) Modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;
- (2) Increase or decrease the interests of any beneficiaries to the trust;

(3) Modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;

(4) Remove and appoint a trustee, a fiduciary provided for in the governing trust instrument, trust advisor, investment committee member, or distribution committee member;

(5) Terminate the trust;

(6) Veto or direct trust distributions;

(7) Change situs or governing law of the trust, or both;

(8) Appoint a successor trust protector;

(9) Interpret terms of the trust instrument at the request of the trustee;

(10) Advise the trustee on matters concerning a beneficiary;

(11) Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust; and

(12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13.

The powers referenced in subdivisions (5), (6), and (11) may be granted notwithstanding the provisions of §§ 55-3-24 to 55-3-28, inclusive.

Source: SL 1997, ch 280, § 6; SL 2005, ch 260, § 3; SL 2009, ch 252, § 14; SL 2013, ch 239, § 20.

- iii. The inclusion of a trust protector in an irrevocable trust gives tremendous control to the settlor, beneficiaries, and advisors to modify many important aspects of the trust.
 - iv. CPAs are typically appointed to this role in a trust document.
 - v. The trust protector role effectively gives the settlor, beneficiaries, and advisors tremendous control and power relative to trust administration with regard to irrevocable trusts, once considered rigid, unchangeable, and unmovable.
 - vi. See Appendix A for a New York Times article entitled “Guardians of Trusts” by John F. Wasik dated March 12, 2014.
- b. Directed Trusts, only available in a handful of states across the country, including South Dakota, are drastically changing the trust world by putting control back into the hands of settlors, beneficiaries, and their advisors. Through bifurcating liability, the directed trust model creates a legal framework allowing trustees and beneficiaries to work with asset managers and independent trust companies of their choosing.
- i. Directed trusts provide a family with maximum flexibility and control regarding the trust's asset allocation, diversification, investment management, and distributions. A directed trust allows the client, who appoints an administrative trustee in a directed trust state such as South Dakota, to appoint a trust advisor or an investment trustee/committee, who in turn may select outside

investment advisor(s) and/or manager(s) to manage the trust's investments.

- ii. The directed trust concept unbundles functions (asset management and trust services) that have been and are traditionally bundled by large bank-based corporate trustees.
- iii. Fundamental notions around how irrevocable trusts are handled, particularly with respect to investment manager selection and distribution, have drastically been changed by the directed trust concept, delivering far more control to settlors of trust, beneficiaries, and their advisors than ever before.
- iv. The directed trust model is an ideal vehicle for a settlor who wants to fund an irrevocable trust with a closely held company or a specialized asset, but who also wants to place control of such assets in the hands of a particular individual (or group of individuals) familiar with the company's operations or that type of specialized asset.
- v. See Appendix B for a more detailed explanation of how directed trusts function, including a helpful schematic.
- vi. See Appendix C, "Emerging Directed Trust Company Model" by Joseph F. McDonald, III appearing in February 2012 issue of Trusts & Estates Magazine for a more fascinating explanation as to how directed trusts have changed the trust landscape.

- c. Decanting, appropriately referred to as a “do over”, is essentially distributing assets from an irrevocable trust to a new trust with different, and presumably more desirable and flexible, terms leaving the unwanted terms in the original trust and not binding on the assets.
- i. The concept of decanting has become a very powerful tool for planners to modify irrevocable trusts and has emerged as one of the most progressive planning strategies available in dealing with irrevocable trusts and dynasty planning issues.
 - ii. Distribution of trust principal in further trust allows an irrevocable trust to evolve through decanting to meet a family’s changing needs without court involvement.
 - iii. Decanting also creates a streamlined option for easily transferring a trust from one state jurisdiction to another more favorable jurisdiction.
 - iv. Many states do not have a decanting statute and not all decanting statutes are created equally. It is very important to evaluate the differences among the statutes when selecting proper situs for a trust.
 - v. Below is a chart created by Nevada attorney Steve Oshins that objectively compares decanting statutes.

3 rd Annual Trust Decanting State Rankings Chart											
Rank	State	Has Decanting Statute? (6.0% weight)	Can Decant Trust with Ascertainable Standard? (7.5% weight)	Notice to Beneficiaries Required? (7.5% weight)	Can Decant Trust with Ascertainable Standard into Discretionary Trust? (7.5% weight)	Can Remove Mandatory Income Interest? (2.5% weight)	Allow Power of Appointment in Second Trust to Benefit Non-Beneficiary? (2.5% weight)	Can Accelerate Beneficiary's Interest? (2.5% weight)	Dynasty Trust State Ranking (7.5% weight)	Domestic Asset Protection Trust State Ranking (2.5% weight)	Total Score
1	SD	§§5-2.15-21	Yes	No	Yes	Yes	Yes	Yes	Ranked #1	Ranked #2	99.5
2	NV	§163.556; SB 484, Sec. 57	Yes	No	Yes	Yes	Yes	Yes	Ranked #2	Ranked #1	99
3	TN	§35-15-816(b)(2)(7)	Yes	No	Yes	No	Yes	Silent	Ranked #3	Ranked #3	93
4	NH	§564-B:4-418	Yes	No, except charitable trusts	Yes	No	Yes	Silent	Ranked #8	Ranked #10	91
5	DE	12, §3528	Yes	No	No	Yes	Yes	No	Ranked #6 (tie)	Ranked #5 (tie)	87
6	OH	§5808.18	Yes	Yes	No	Yes	Yes	No	Ranked #6 (tie)	Ranked #4	80
7 (tie)	AK	§13.36.157-159; §13.36.215	Yes	Yes	No, except after first trust would have ended	No	Yes	No	Ranked #4	Ranked #7	77.5
7 (tie)	IL	760 ILCS 5/16.4	Yes	Yes	No	No	Yes	Silent	Ranked #9	Not allowed	77.5
9	IN	§30-4-3-36	Yes	Yes	Yes	No	Silent	Silent	Unranked	Not allowed	75
10 (tie)	MO	§456.4-419	Yes	Yes, only to beneficiaries of second trust	No	Yes	Silent	Yes	Unranked	Ranked #5 (tie)	74.5
10 (tie)	WY	§4-10-816(a)(xxviii) (very short)	Yes	No	Yes	Silent	Silent	Silent	Ranked #5	Ranked #8	74.5
12 (tie)	SC	§62-7-816A	Yes	Yes	No	Yes	Yes	No	Unranked	Not allowed	72.5
12 (tie)	TX	§§112.071 to 112.087	Yes	Yes	No	No	Yes	Yes	Unranked	Not allowed	72.5
14	VA	§64.2-778.1	Yes	Yes	No, except if court approval	No	Yes	No	Unranked	Ranked #13	70.5
15 (tie)	KY	§386.175	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70
15 (tie)	NC	§36C-8-816.1	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70
17	RI	§18-4-31	Yes	Yes	Silent	No	Silent	No	Unranked	Ranked #9	68.5
18 (tie)	AZ	§14-10819 (short)	Yes	No	Yes	No	Silent	Silent	Unranked	Not allowed	67.5
18 (tie)	MI	§700.7820a / §556.115a	No	Yes	No	No	Yes	Silent	Unranked	Not allowed	67.5
18 (tie)	MN	§502.851	Yes	Yes	No, except after first trust would have ended	No	No	No	Unranked	Not allowed	67.5
18 (tie)	NY	§10-6.6	Yes	Yes	No	No	No	No	Unranked	Not allowed	67.5
18 (tie)	WI	§701.0418	Yes	Yes	No	No	Silent	No	Unranked	Not allowed	67.5
23	FL	§736.04117	No	Yes	No	No	Silent	Silent	Ranked #10	Not allowed	63.5

*The Dynasty Trust State Ranking column is based on the 4th Annual Dynasty Trust State Rankings Chart created in October 2015 at http://www.oshins.com/images/Dynasty_Trust_Rankings.pdf.

*The Domestic Asset Protection Trust State Ranking column is based on the 6th Annual Domestic Asset Protection Trust State Rankings Chart created in July 2015 at http://www.oshins.com/images/DAPT_Rankings.pdf.

*This Trust Decanting State Rankings Chart created in January 2016. Original Trust Decanting State Rankings Chart created in January 2014. Copyright © 2014-2016 by Steve Oshins - soshins@oshins.com / www.oshins.com / (702) 341-6000, ext. 2. All rights reserved.

Steve Oshins is a member of the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada. He is rated AV by the *Martindale-Hubbell Law Directory* and is listed in *The Best Lawyers in America*®. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011 and has been named one of the 24 "Elite Estate Planning Attorneys" by *The Trust Advisor* and one of the Top 100 Attorneys in Worth. He can be reached at 702-341-6000, ext. 2 or soshins@oshins.com. His law firm's website is www.oshins.com.

- i. See Appendix D for a Wall Street Journal article entitled "When to Decant a Trust" by Liz Moyer dated January 3, 2014, for a great general discussion on how decanting is impacting the trust landscape.

- d. Modification/Reformation is another tool that progressive trust jurisdictions make available to advisors and their clients that allow them to substantially alter terms of an existing irrevocable trust, often without the need for Court approval.
- i. It is important to note that Reformation and Modification both result in keeping the original trust, whereas decanting results in the transfer of assets from an existing trust to a newly created trust. All of these tools have the potential to significantly change an irrevocable trust.

Conclusion

The above modern trust laws provide more control and flexibility to settlors, beneficiaries, and advisors than ever before and have truly revolutionized the trust industry relative to how trusts are created and administered. These new laws demonstrate a radical and somewhat controversial departure from fundamental notions of how specifically irrevocable trusts are created, altered, and administered, raising the issue as to whether irrevocable trusts can really be considered irrevocable. In light of these modern trust laws, available only in a handful of states, the trust world has become extremely dynamic with many more tools available to the well-versed planner to better serve clients through providing far more control and flexibility in the creation and modification of solid wealth and estate plans now and for generations to come.

APPENDIX A

Guardians of Trusts

By JOHN F. WASIK

New York Times

MARCH 12, 2014

THE legacy part of [retirement](#) can be unsettling. If you have planned carefully and set up trusts and wills, you still might have some nagging doubts about how your wishes will be carried out after you are gone.

Say you have appointed a trustee you think you can confide in and who understands your intentions. What happens if that trustee turns out to be less trustworthy or dies, or if estate laws change? Then you might need a third party called a “trust protector.”

“A trust protector is like a traffic cop who can write tickets,” said Daniel D. Mielnicki, a partner with Berger Singerman, a Boca Raton, Fla., law firm. Mr. Mielnicki has been a trust protector for several estates. Once a staple of offshore trusts, protectors have been gaining popularity in recent years for use in conventional domestic trusts, a reaction, Mr. Mielnicki said, “to the evolving complexity of trust law.”

Although no one is certain of the number of trust protectors — trusts are largely private documents and the role is relatively new — about half of the states allow for them, although the laws governing them are evolving.

Trust protectors make eminent sense for irrevocable trusts, which are commonly used in [estate planning](#). Once you set them up, though, you, as “the settlor” or “grantor,” are not permitted to change them. But a trust protector can be empowered to tweak a document to track changes in estate and tax laws.

The fundamental reason for having a trust protector is to have an independent adviser who can monitor how your estate is administered and distributed over time. If a dispute arises, the protector may have the power to make changes without going to court.

What if your trustee dislikes one of your beneficiaries and will not distribute assets to that person after your death? You can draft in language that gives a protector power to replace the trustee. You would then have a perpetual watchdog with teeth. You can even include language to have a successor appointed if the original protector dies or cannot fulfill the duties of the job.

Mr. Mielnicki said a trust protector has the ability to supervise how estate assets were invested and remove a trustee if fund management was imprudent.

In addition to monitoring investment decisions, protectors may be able to add beneficiaries such as grandchildren or great-grandchildren or additional assets to the trust — an important role in long-term, intergenerational trusts, particularly in a growing family.

Suppose estate laws change again as they did in 2011. A trust protector could decide on how the trust could be updated to maximize tax benefits and make investment and distribution decisions accordingly. A well-drafted trust agreement would give a protector this power.

You may also need to monitor a special needs trust for a disabled child. A protector can perform that function and keep abreast of changes in public benefits, medical treatment, investments and the needs of the beneficiaries. While relatives are natural first choices for trustees, they may not have adequate knowledge in accounting, taxes, portfolio management or estate laws.

Because the duties of a trust protector are not clearly laid out in many states, you need to work with your estate planner to customize the role to your needs. They can be given a lot of responsibility, or just advise the trustee.

Some protectors may be made “fiduciaries,” giving them a specific, defined legal responsibility over fund assets.

“A trust protector is not always a fiduciary,” noted Lisa R. Feartherngill, a personal financial specialist with Abbot Downing in Winston-Salem, N.C., and a member of the American Institute of Certified Public Accountants. “They may just give personal guidance to the trustee and won’t want fiduciary duty.”

Since a protector’s role can be tailored to the goals of the trust, a variety of roles can be assigned. Say a trust is set up but will not make any distributions for 30 or 40 years. A protector can monitor the investments in the interim. Or the protector could appoint a successor trustee if the trustee dies.

Ray Benton, a certified [financial planner](#) with Lincoln Financial Advisors in Denver, recommends that trust protector provisions be added to virtually all of his clients’ trusts, in part because they can be nimble in dealing with changes in the law.

“We recently helped a same-sex couple set up their estate planning documents with their attorney,” Mr. Benton said. “With the recent Defense of Marriage Act ruling by the Supreme Court — the law was struck down — many of the rules regarding same-sex couples are changing rapidly, particularly at the state level, and having the ability to adjust trust provisions easily is likely to be of benefit.”

He added, “A protector can monitor the trustee’s management of the investments in the interim, and in some cases may be given the power to replace the trustee if circumstances call for it.”

Keep in mind that you need to draft a trust that specifies exactly what a protector may and may not do. Finding a qualified estate planning lawyer is essential (for referrals to elder law lawyers, go to www.nacla.org).

APPENDIX B

Directed Trusts

What is a Directed Trust?

The most appealing aspect of the directed trust model is that a grantor or co-trustee can work with the advisor they choose while the trust administrative function is performed by an independent trust company, such as Bridgeford Trust Company. This approach gives more control back to the client and beneficiaries by allowing them to work with long-time trusted advisors in the trust planning and administration process.

The directed trust model bifurcates liability between an independent trust company and investment advisor by distinguishing between the investment, distribution, and administrative functions of asset management and trust administration. A directed trust statute (only six states in the nation have such statutes) formally defines the separate duties and responsibilities of the trustee and advisor (asset manager) and allows the grantor to appoint both as fiduciaries in a trust agreement. Therefore, the advisor is charged with and held responsible for all investment duties, while the directed trustee is charged with and held responsible for all trust administration duties. The combined fee charged by both entities is comparable to, and often lower than, traditional “bundled” trustees.

How does a Directed Trust Work?

A directed trust generally utilizes the unique statutes of a state, such as South Dakota, to trifurcate the traditional role of a trustee into three distinct functions: 1) an Investment Committee, which is responsible for selecting outside investment advisors and managers to direct the trust’s investments; 2) a Distribution Committee, which is responsible for determining when and how distributions should be made; and 3) an Administrative Trustee, which receives contributions, handles day-to-day responsibilities and the administration of the trust, and is directed by the committees/trustees to make investments and distributions.

The Investment Committee

The Investment Committee is typically comprised of the client’s family members and/or advisors. The investment committee generally hires experts in the fields of: Investment Management, Insurance, Art, FLPs, LLCs, Real Estate, and Closely-Held Stock for the purpose of maintaining trust assets. The expertise, experience, and diverseness of this group of experts provides exceptional investment advice and asset diversification to the investment committee; which in turn directs the administrative trustee on how the trust will be invested, pursuant to the trust document and an Investment Policy Statement (IPS). The IPS is generally drafted taking into account the investment provisions in the trust document and the family’s goals.

Directed Trusts (cont'd)

The Distribution Committee

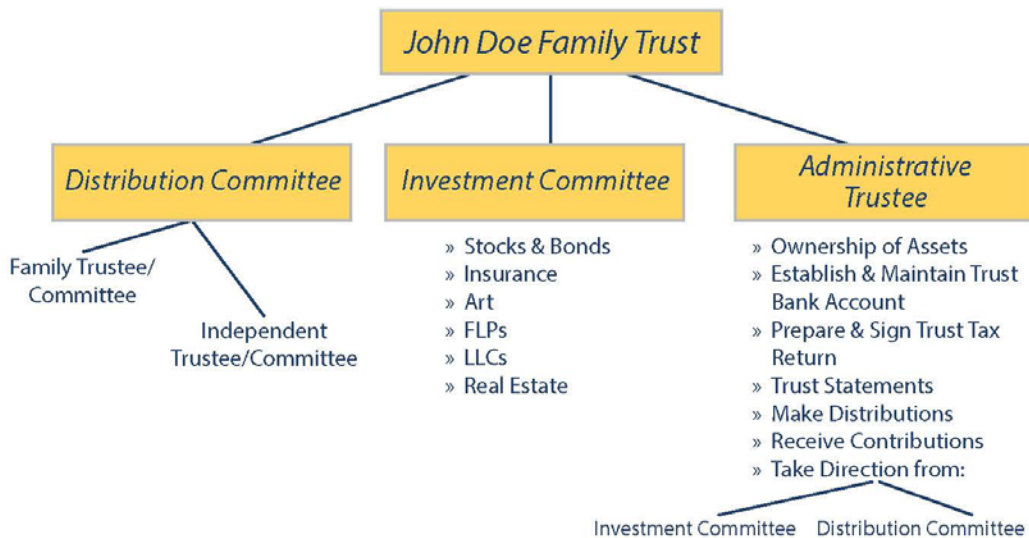
The Distribution Committee determines how and when trust distributions should be made. Typically, family members serve on this committee and determine all distributions of income and principal for "health, education, maintenance, and support" (HEMS). Additional distributions are generally considered tax sensitive and therefore require an independent trustee, advisor, or committee comprised of one or more of the following: CPA, Attorney, or another independent third party. Alternatively, Bridgeford Trust Company can serve this function alone.

The Administrative Trustee:

Bridgeford Trust Company usually assumes the role of Administrative Trustee. The Administrative Trustee's duties may include taking title and ownership of the trust assets, establishing and maintaining a trust bank account, preparing or signing the trust tax returns, preparing and sending trust statements, and making distributions and receiving contributions. The Administrative Trustee is also responsible for ensuring that the trust document is followed with respect to distributions, investment policy, and administration. Typically, the Administrative Trustee can fill in for the any of the committee functions of the Distribution Committee and the Investment Committee, if desired.

The following chart outlines a typical modern directed trust.

Typical Modern "Directed" Trust Structure:



APPENDIX C

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Emerging Directed Trust Company Model

Offering unbundled services provides great flexibility and lower fees for families and their advisors

By Joseph F. McDonald, III

Much has been written about modern "multi-participant trust" governance structures (sometimes called "open-architecture trust designs") and evolving principles of state trust law related to "directed trusts."¹ The directed trust model threatens to undermine the market share and pricing power of traditional bundled trustee service firms.

The emergence in several progressive trust jurisdictions of upstart nondepository public directed trust companies (DTCs) is a disruptive force to be reckoned with. Those trust service providers who recognize and are willing to exploit these opportunities can offer the unbundled services, a la carte pricing and inexpensive access to the progressive states' trust laws that are increasingly coveted in the growing national trust marketplace. Traditional providers of bundled trustee services with unwieldy cost structures and embedded cultures will be challenged to adjust their business models to compete in this new environment. Here are some observations on the opportunities and perils that the DTC model presents to professional fiduciaries, consumers of trust services and their estate-planning advisors.

Defining "Directed Trust"

A traditional bundled professional trustee performs all fiduciary functions for the trusts under its management. These include exercising the important labor-intensive and liability-sensitive discretionary investment management and distribution responsibilities, performing all ministerial administrative responsibilities necessary to implement those exercises of discretion, preparing fiduciary accountings and trust tax returns and otherwise administering its trusts in accordance with the governing instruments and applicable state trust law.

Traditional Bank Trust Departments

A large bank trust department² designed to deliver bundled trust services requires elaborately structured risk management policies and procedures to allow the bank's personnel to perform the multiple fiduciary responsibilities inherent in the role and limit the bank's exposure for claims of breach of fiduciary duty. The directors, officers and support personnel are compensated commensurate with their experience, expertise and level of responsibility. The

department's policy manual describes the roles and responsibilities of various committees of directors and officers, including a trust committee, investment committee, special asset committee, discretionary action committee, audit committee and various subcommittees. Day-to-day trust portfolio management is typically handled by highly compensated investment officers, some of whom possess the certified financial analyst credential. Distributions and operations are the responsibility of trust operations officers, trust administration officers and, in many cases, client-facing relationship managers and marketing officers.

The classic regulated corporate trustee collects from each of its trusts annual fees of between 50 and 120 basis points, depending on the value of the trust's principal. These fees have historically been adequate to cover the trust department's extensive overhead and provide a comfortable and relatively stable profit margin to supplement the bank's more cyclical net interest and other operating income from its commercial and retail banking operations. Before directed trusts became popular, the high costs of operating in a regulated industry with significant barriers to entry for alternative business models gave the incumbent bundled service providers significant pricing power and created an almost infinitely elastic demand for their services.

Modern DTC

Unlike this comprehensive trust service model, a directed trust arrangement involves a co-trustee or a non-trustee fiduciary, typically a "trust protector" or "trust advisor," empowered to direct the trustee holding legal title to the trust assets to execute the empowered party's directions concerning the critical discretionary investment or trust distribution powers, or both. The independent DTC is relegated to implementing those directions and often performing other administrative functions such as recordkeeping, maintaining principal and income accounts and preparing and filing trust tax returns. This is why DTCs functioning in a completely directed trustee capacity are often referred to as "administrative trustees."

DTCs can operate lean and mean in inexpensive, highly utilitarian, Class B office space, with more manageable risk management policies and procedures, less high-priced management personnel, no investment professionals and an appropriate number of administrative personnel to handle their accounts. As nondepository institutions typically operating under hospitable state regulatory regimes, they can benefit from lower capitalization and bonding requirements and less onerous supervision, reducing operating overhead.³ DTCs generally charge a relatively modest annual fee for services commensurate with the DTC's correspondingly lower levels of risk, responsibility and overhead. This allows any other co-fiduciaries handling more labor-intensive, higher risk investment and distribution functions to profitably charge a reasonable fee for their services. Thus, the total fees paid to the DTC and the other compensated participants can be comparable (in some cases lower) to the single annual fee paid to a traditional bundled provider.⁴

Demographic Trends

Several demographic, industry and legal trends have coalesced to drive the increasing demand for directed trusts and the DTCs that serve them.

Unlike in previous generations, when wealthy families were generally more conservative

investors and looked to the institutional stability of banks as their trustee and investment advisor/manager of choice, today's affluent prefer a specialized approach that gives them the flexibility to choose their own investment professionals. They increasingly reject the notion that a jack-of-all-trades can be a master of any. That's particularly the case in the modern world of complex dynasty trust administration involving layers of discretionary distribution powers and wide-open trust investment standards.⁵ The new directed trust structures offer the promise of the best of both worlds. On one hand, the settlor and trust beneficiaries have the comfort and stability of a local, state-regulated and adequately capitalized financial institution to serve as administrative trustee, hold legal title to the trust assets and charge a reasonable fee for those services. On the other hand, in a prudent investor environment, they avail themselves of the broader benefits of being able to choose from a wide-open universe of non-trustee distribution directors and investment specialists with extensive research capabilities, contrasting investment styles and access to alternative investment classes. These governance structures can also accommodate those families looking to play a direct role in investment management and distribution decisionmaking through committees that can empower settlors and beneficiaries to control or influence all but "tax sensitive" discretionary powers.

Six Progressive States

The evolution of the legal and regulatory environments in all but a handful of progressive trust states hasn't, however, kept pace with the increasing demand for these open-architecture governance structures. The few states that have taken up the directed trust gauntlet have recognized that creating a hospitable legal, regulatory and tax environment will foster the development of a thriving trust services industry within their borders and provide all of the incidental economic development benefits of white collar jobs, tax revenues and ancillary service providers. The progressive trust states that are on this short list are: Alaska, Delaware, Nevada, New Hampshire, South Dakota and Wyoming. Each of the six has, to one degree or another, built sufficient legal infrastructure in the three critical areas necessary to sustain a competitive local directed trust industry.

These progressive states recognize that the popularity of long-term (even perpetual) trusts as wealth management, asset protection and wealth transfer tax avoidance structures, combined with tremendous concentrations of fungible financial wealth, liberal choice and conflict-of-law principles, as well as the relaxation of interstate banking restrictions, have created a national marketplace for directed trust services. A family living in a regressive trust state needn't move to a progressive state to secure the benefits of a directed trust established and administered in that jurisdiction. They need only enter into a trust agreement with a DTC domiciled in a preferred state that will own and administer the trust's intangible personal property.

Directed Trustee Statutes

Each of the progressive states has codified directed trust principles that meet three critical requirements. First, they specifically recognize the classes of non-trustee participants that can perform trustee functions. Most of the six progressive states' statutes identify "trust advisors" and "trust protectors" to serve in these roles.⁶ Although it's not necessary, some jurisdictions helpfully provide an exclusive or a non-exclusive listing of the powers and responsibilities that each of them may assume. Second, these statutes provide as a default rule that each empowered party, whether a trustee or non-trustee, performing a trust function will do so in a

fiduciary capacity with direct accountability to the trust beneficiaries and submission to the jurisdiction of the preferred state's local courts. Finally, each of the six states' laws protects a disempowered directed fiduciary from liability for following the directions of the empowered party, except to the extent that the directed fiduciary, negligently or in bad faith, fails to execute the directions. Most of them satisfy this third and most critical requirement by defining a directed trustee as an "excluded fiduciary" with no duties to: (1) question whether the empowered party is acting within the scope of that party's authority, (2) intervene to prevent or redress a breach, or (3) warn the beneficiaries that any given direction exceeds the empowered party's authority or otherwise constitutes a breach.⁷

Being governed by a clear and comprehensive directed trust statute will enable a DTC domiciled in a progressive trust state to price the administrative services it provides without a fiduciary surcharge premium or to cover the costs of exercising due diligence responsibilities on the empowered party's directions that would be appropriate in the absence of the "excluded fiduciary" exoneration provision. Moreover, it will send a clear signal to any court, in surcharge litigation initiated against the DTC, that the state's legislature has declared as a matter of public policy that the DTC will be liable only for bad faith or negligent execution. No such assurances can be given to a DTC operating in a state with no directed trust legislation or a statute that doesn't satisfy each of the three critical elements described above.

For example, the directed trust statute in a state adopting the Model Uniform Trust Code (UTC) won't protect a DTC operating in that state from liability for executing directions if the DTC's administrative personnel knew that doing so would constitute a "material breach" of the empowered party's fiduciary duties or would be "manifestly contrary to the terms of the trust."⁸ These vague standards leave the door open wide for a disgruntled beneficiary or a results-oriented court to mine the deep pockets of the DTC if, for example, it implements a direction that results in loss or damage to the trust principal. A DTC operating in a state without bulletproof directed trust laws would face diminished prospects for a successful appeal of a surcharge order based on the deferential standard of appellate review for questions of fact and mixed questions of law and fact. Even some non-UTC states with statutes that attempt to go beyond the UTC protections could leave a DTC vulnerable.⁹ Reaching that result would have been difficult for any court applying the statute of a progressive trust state that clearly negates any such duty to warn on the part of a directed trustee.¹⁰

Trust Modification Opportunities

Each of the six preferred trust states offer liberal opportunities for non-resident situs seekers to "retrofit" their existing irrevocable trusts' governance structures from the bundled trusts to the directed trust format and change their principal place of administration from a regressive trust state by facilitating the appointment of a directed trustee in the preferred jurisdiction. These opportunities include (without limitation) decanting, accessible trust modification standards (particularly related to administrative provisions), nonjudicial settlement agreements and virtual representation.

Lighter Touch Level of Oversight

All of the progressive states also have enacted special banking act provisions for the chartering and supervision of public nondepository public DTCs or limited purpose trust

companies that can't accept deposits or make loans. These relaxed requirements recognize that a lighter touch regulatory regime is appropriate, given the diminished risk of public harm and receivership costs in the event of the failure or misconduct of a nondepository institution, when compared to the trust department of a traditional state or federally regulated institution that also takes deposits and makes loans. The relaxed requirements are generally reflected in lower initial capital requirements, lesser fidelity and liquidation insurance and bonding requirements, more liberal options for investing statutory capital, less frequent examinations and relaxed (or no) requirements for resident directors and bricks and mortar in the chartering state or some combination of those attributes.

Among the six states, Delaware's regulatory regime is regarded as cutting the least slack for their limited purpose trust companies and South Dakota is regarded as having the most accessible and least costly chartering and supervision requirements.¹¹

Regulator Sophistication

Implicit in each of the progressive state's trust and banking codes is the legislature's policy value judgment about how hospitable it wishes to be as a domicile of choice for nondepository DTCs and trusts that might migrate from other states. Some of these six states have erected higher regulatory barriers to entry and operation for DTCs than others. They've done so presumably because they wish to keep out nefarious, undercapitalized providers without solid backing or well considered business plans and discourage "rent-a-charter" interlopers who plan to conduct all or a majority of their business outside the state.

In reviewing a DTC's charter application and examining existing DTCs, each state's bank commissioner will take his cues from the tenor of that state's banking code's chartering and supervision requirements applicable to DTCs. The regulator has a mandate to be conscientious in his review of a bank or trust company candidate's charter application and the banking department's examination and enforcement activities to guard against consumer harm, maintain the integrity of the state's banking and trust industry and preserve the regulator's limited resources available to cover the costs of receivership and liquidation. A banking commission operating under a special light touch statutory regime applicable to DTCs must balance that prophylactic purpose with the legislature's mandate that the regulator not be so heavy handed as to discourage responsible charter applicants and impose unmanageable regulatory burdens and compliance costs on any given DTC with a sustainable business plan and operating in a responsible fashion. To do so would prevent the progressive state's directed trust providers from charging competitive fees and attracting sufficient business to compete on a national scale, thereby frustrating the policy goal of the progressive state's trust and banking law reforms.

Some banking departments in the preferred trust jurisdictions have done a better job than others in striking a reasonable balance among these competing considerations.¹² All of them, however, remain competitive relative to the more regressive trust law jurisdictions that have one-size-fits-all, full-bore regulatory regimes applicable to both depository and nondepository institutions.

State Trust Income Tax Environment

Finally, many trust situs-seekers and migrators reside or maintain their non-grantor trusts' current situs in states that impose high trust tax rates on accumulated income and capital gains. They may be seeking a state income tax shelter if: (1) the laws defining their home or trust situs states' trust tax jurisdiction are drawn narrowly enough to allow them to achieve that result, and (2) the destination state won't tax the trust after the move.

Here again, all of the six progressive states aren't created equally. Some don't tax trust income and capital gains at all. Others will prorate the trust's taxable income based on the percentage of beneficiaries who live in the destination state, exempting from state taxation all trusts having exclusively non-resident beneficiaries.

Disruptive Business Model

The process of creative disruption has transformed many an industry as traditional business models are forced to adapt to upstarts that offer a compelling alternative value proposition.¹³ For families and their advisors who are willing to do their homework on prospective new DTCs and the open-architecture trust governance alternatives available to them in the progressive trust jurisdictions, as well as for traditional providers willing to consider serving in directed trustee roles, the new unbundled trust governance model offers the promise of vastly greater choice and many attractive possible permutations that can deliver best-in-class trust service across all trustee functions at a reasonable overall cost.

Endnotes

1. See, e.g., David A. Diamond and Todd A. Flubacher, "The Trustee's Role in Directed Trusts," *Trusts & Estates* (December 2010) at p. 24; Mary Clarke and Diana S.C. Zeydel, "Directed Trusts: The Statutory Approaches to Authority and Liability," www.flprobatelitigation.com/uploads/file/DirectedTrusts.pdf. Attorney John P.C. Duncan coined the term "multi-participant trust." See John P.C. Duncan and Anita M. Sarafa, "Multi-Participant Trusts Need a Coordinator," *Trusts & Estates* (November 2008) at p. 32. "Open-architecture trust" refers to a multi-participant governance structure first described in this magazine by John H. Lahey in "Open-Architecture Trusts: The Wiser Choice," *Trusts & Estates* (August 2003) at p. 44.
2. Although this article refers to bank trust departments in discussing the attributes of a bundled trust service provider, the discussion applies to any regulated trust institution (bank-affiliated or nondepository) that isn't directed as to the investments of the trusts it administers. For purposes of this article, a "bundled trust service provider" will mean any regulated (state or federal chartered and supervised) institution possessing trust powers that manages investments in-house or outsources the investment management functions (through agency arrangements, separately managed accounts or unified management accounts), but retains non-excluded fiduciary status for the investments of some or all of the trusts that it manages, as described in note 7, *infra*, and the accompanying text.
3. States with one-size-fits-all regulatory regimes that make no concessions to nondepository trust companies are a vestige of the days when only bank-affiliated trust companies provided fiduciary services. There's obviously a significantly greater risk to the public welfare and costs associated with the failure and receivership of a bank that collects deposits and makes loans, versus a nondepository directed trust company (DTC) that takes mere custody of trust assets. This is discussed in more detail in note

- 11, *infra*, and the accompanying text.
4. It's important at this juncture to distinguish between a "directed trust" and the ability of a trustee to "delegate" investment responsibility. A trustee possessing its investment responsibility and delegating all or a portion of that responsibility to a compensated agent is held to similar standards of fiduciary responsibility (and liability) that would apply if the trustee directly manages the investments. See generally Diamond and Flubacher, *supra* note 1, at pp. 25-26 (discussing how unlike directed trusts, delegated trusts don't achieve true "bifurcation" of investment risks and responsibilities and will therefore require the delegating trustee to extend more effort, assume more risk and presumably charge more of a fee than a directed trustee); Al W. King III and Pierce H. McDowell, "Delegated vs. Directed Trusts," *Trusts & Estates* (July 2006) at p. 26.
 5. There's an old adage: "How do you make a small fortune? Give a bank a large one to manage in trust." Jesse Dukeminier and James E. Krier, "The Rise of the Perpetual Trust," 50 *CLA L. Rev.* 1303, 1335 (2003). In defense of the banks, this bias is perhaps most attributable to historically restrictive fiduciary investment laws ("legal lists" and prudent men) that hamstrung bank trust investment personnel. There's empirical evidence that the more prudent investor standards and total return regulation have freed institutional trustees to better compete with other compensated professionals investing non-trust assets. See Max M. Schonzenbach and Robert H. Sitkoff, "The Prudent Investor Rule and Trust Asset Allocation An Empirical Analysis," 35 *ACTEC Journal* 314 (2010). Also, many corporate trustees (particularly the largest ones) have complemented their in-house investment capabilities with best-in-class open-architecture platforms or embraced open architecture completely. Still, the prejudice persists and will create serious headwinds for corporate trustees attempting to market their proprietary investments.
 6. For a complete discussion of the directed trust statutes of some of the proposed jurisdictions, see Clarke and Zeydel, *supra* note 1.
 7. For a discussion of some of these statutes and some important substantive differences among them, see Diamond and Flubacher, *supra* note 1, at pp. 26-27.
 8. Uniform Trust Code Section 808(b).
 9. For example, despite the superficially clear directed trustee exoneration language of the Virginia directed trust statute that was reviewed by a Virginia appellate court, the court nonetheless vacated and remanded a lower court's dismissal of an action against a directed trustee for a determination of whether that trustee violated its "duty to warn" the trust's beneficiaries of an investment director's decisions that went wrong. See *Rollins v. Branch Banking & Trust Co. of Va.*, 56 Va. Cir. 147 (Va. Cir. Ct. April 30, 2001).
 10. See *Duemler v. Wilmington Trust Co., Del. Ch.*, C.A. 20033 NC, 2004, Strine, V.C. (Nov. 24, 2004). A more detailed discussion of both *Rollins*, *ibid*, *Duemler* and their implications appear in Diamond and Flubacher, *supra* note 1, at pp. 27-28, and Clarke and Zeydel, *supra* note 1, at pp. 17-18.
 11. For example, South Dakota requires minimum capital of \$200,000 for start-up public DTCs and imposes only minimal requirements for South Dakota resident officers and directors and presence (office space and personnel). Delaware, by contrast, requires \$1 million of minimum capital and scales its resident employee and office space requirements to the trust company's assets under management. South Dakota's statute prescribing the capital requirements for nondepository trust companies specifically "... recognizes that [South Dakota's] capital requirements ... are [not intended to] be judged by the same standards as banks" and that the basic protection for fiduciary clients is provided through bonding and insurance, not capital. See "South Dakota Sets Record for New Trust Companies," *The Trust Advisor Blog* (May 15, 2010) (*Trust Advisor*),

- www.thetrustadvisor.com/news/sd-record.
12. South Dakota's Division of Banking recorded a record number of public DTC charter applications in 2010. See *Trust Advisor*, *ibid*. In addition to the favorable statutory chartering requirements, the blog quotes the Division's then-legal counsel (now director) as contrasting South Dakota's "business friendly" system for manageable costs for DTC "startups" to Delaware's rules that "... only really allow for big companies." Because in every state the DTC pays the tab for the regulator's examinations, many DTCs that are seeking the lowest ongoing supervision cost are encouraged by the efficiency of the Division's well-trained examiners, several of whom hold the Conference of State Bank Supervisors' "qualified trust examiner" credential and specialize in examining nondepository DTCs.
 13. Disruptive innovation in an industry has been described as follows:

...a dynamic form of industry change that unlocks tremendous gains in economic and social welfare. Disruption is the mechanism that ignites the true power of capitalism in two ways. First, it is the engine behind creative destruction... Disruption allows relatively efficient producers to blossom and forces relatively inefficient producers to wither. This destruction, and the subsequent reallocation of resources, allows for the cycle of construction and destruction to begin anew, enhancing productivity, lowering consumer prices, and greatly increasing economic welfare.

See Clayton M. Christensen, Sally Aaron and William Clark, "Disruption in Education," www.educause.edu/Resources/DisruptioninEducation/158712. Harvard Business School Professor Clayton M. Christensen is considered to be the dean of "disruption theory," first identified in Joseph L. Bower and Clayton M. Christensen, "Disruptive Technologies: Catching the Wave" (*Harvard Business Review* 1995). Perhaps the forces of creative disruption will operate to transform traditional bundled trust service providers in the same manner as it did for closed-architecture investment management firms in the 1990s, as aptly described by Greycourt & Co., Inc.'s chairman Gregory Curtis in Greycourt White Paper No. 38, "Open Architecture as a Disruptive Business Model," www.greycourt.com/white_papers.html. Curtis discusses application of the principles of creative disruption on trust design in Greycourt White Paper No. 48, "Best Practices Trusts," www.greycourt.com/white_papers.html.

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SPOT LIGHT

Ski Patrol

"Winter Sports in the French Alps," (40 in. by 25 in.) by Roger Broders sold for \$8,000 at Swann Auction Galleries' "The Complete Poster Works of Roger Broders" sale in New York City on Dec. 15, 2011. The French Alps feature 200 ski resorts spread across 15 locations and serviced by 2,382 ski lifts. If placed end to end, the ski lifts would stretch from Lyon to Cairo, some 1789 miles.

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APPENDIX D

When to 'Decant' a Trust

It's getting easier to tinker with irrevocable trusts. Here's how it works.

By
Liz Moyer
Wall Street Journal
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It is getting easier to tinker with irrevocable trusts, thanks to a process known as "trust decanting."

Such trusts used to be difficult and costly to alter even if the trustee thought a change could be in the beneficiary's best interest. But decanting lets trustees change certain terms by figuratively pouring the assets from an old trust into a new one.



Brian De Young

A group of trust lawyers and academics currently is drafting a model law that could serve as a template for states that want to allow decanting. So far, 21 states have adopted decanting laws, with Wyoming the most recent to do so, in July.

"I expect that certain states that already have decanting statutes will modify their statutes to reflect the uniform statute, or portions of it," says Amy Heller, a New York tax and estate lawyer at McDermott Will & Emery and an adviser to the drafting committee. "And states that do not already have decanting statutes may seek to adopt a version of the uniform statute."

Many families use irrevocable trusts to pass wealth to their children and others because the trusts carry certain tax advantages. Other types of trusts are easier to change, but don't offer the same protection from taxes.

There are limits on what decanting can do. For instance, trustees can't change a beneficiary's already-vested interests in a trust.

But a trustee can, for example, push back the age at which the beneficiary receives a payout or move the trust to a state that offers greater flexibility regarding taxes or administrative roles within the trust. If the trustee wants to retire, decanting also can make it easier to name a new trustee.

Decanting can "breathe new life" into a trust, says Stephen Adamson Jr., an estate lawyer at Gonnella Adamson in Jackson, Wyo.

In the past, changing an irrevocable trust involved a lengthy and potentially costly trip to court, not to mention the publicity that may accompany such proceedings, lawyers say. Decanting is done outside of court, making it less expensive—with costs ranging from \$2,500 to \$10,000 versus tens of thousands of dollars for court proceedings—and more private.

Joe McDonald, an estate lawyer at McDonald & Kanyuk in Concord, N.H., says he recently decanted a trust set up 25 years ago by a software executive for his three children. The original trust held \$50,000 of shares in the executive's then-private company. More than a decade after the trust was created, the company had an initial public offering and the value of the trust assets soared to \$150 million.

The software executive didn't want his children to get a big financial windfall at too young an age. The trustee agreed to decant it to a new trust that wouldn't pay out until the kids were older, Mr. McDonald says.

The trustee doesn't have to get approval from the beneficiaries to decant. The trustee just needs to give notice it will happen. But many lawyers say they get cooperation from all the parties involved to smooth the process.

Some states that allow decanting also permit the trustee's role to be divided among multiple people, including someone to manage the investments, one to handle payments to the beneficiaries and one to deal with the trust paperwork.

In these states, which include South Dakota, Wyoming, New Hampshire and Delaware, trustees can move an old trust with one trustee managing all three roles to a new one with split roles where a family member can become the investment manager and keep a tighter rein on the family's investment holdings.

One murky area: taxation. Some families use decanting to move a trust to a state with more favorable taxes, such as one that doesn't have a levy on accumulated investment income. Not every state works the same way, however.

A New York trust that gets decanted to another state isn't necessarily getting out from under New York taxes, lawyers say. If the new trust still holds income-generating real estate located in New York decanted from the old trust, for example, the state still will tax it.

Federal tax questions, such as the implications for gift and income taxes and generation-skipping transfer taxes, also remain unresolved.

The Internal Revenue Service has been taking comments about trust decanting for two years but still hasn't put out guidelines on federal tax issues related to the practice. Lawyers say those guidelines could come out in early 2014.