THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S
WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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THE SOUTH DAKOTA ISSUE

ROBINS KAPLAN LLP

REWRITING THE ODDS

WELCOME TO THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

– Denise S. Rahne and Steve A. Brand

To learn more about our wealth planning, administration, and disputes attorneys and the services we provide, contact one of our experienced partners:

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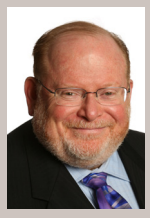

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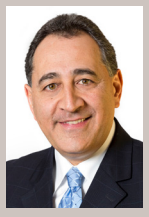

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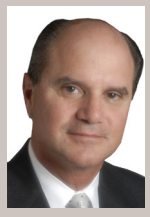

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INSIDE THIS ISSUE

SOUTH DAKOTA 2018 TRUST LAW CHANGES

BY STEVE A. BRAND AND SARAH J. KHOURY

South Dakota is a premier trust jurisdiction in the United States. To maintain its position as an industry leader, South Dakota has established a standing Governor's Task Force on Trust Administration, Review, and Reform. The Task Force makes recommendations to the legislature each year to promote timely adoption of innovations and evolution in the fiduciary services industry and to ensure that South Dakota's trust laws provide the most efficient and effective environment for the administration of trusts.

The 2018 South Dakota legislative session has now adjourned. New trust laws passed in the 2018 session become operative on July 1, 2018, including the following noteworthy developments.

NON-CHARITABLE PURPOSE TRUSTS

House Bill 1072 broadened the availability and eased the regulation of non-charitable purpose trusts. A non-charitable purpose trust is a trust created to benefit a specific purpose rather than for the benefit of named beneficiaries. This bill authorized the creation of purpose trusts for the care of designated animals; the care of other property; and any other lawful non-charitable purpose. A purpose trust may be enforced by a trust enforcer, a fiduciary position separate from the trustee.

The Task Force's enacted recommendations also ease the burden of administration and reporting for purpose trusts. Under the new law, a trustee may terminate a purpose trust when the value of the trust falls under $150,000, and a court may terminate a purpose trust if the value of the trust property is insufficient to justify the costs of administering the trust. In addition, the new law simplifies the reporting required for a purpose trust in that "no filings, reports, periodic accounting, separate maintenance of funds, appointment, or registration" is necessary unless required by a court or the trust instrument itself.

HYBRID PURPOSE TRUSTS

Additionally, House Bill 1072 created a new trust vehicle: a hybrid purpose trust. A hybrid purpose trust has both a designated purpose and beneficiaries. Hybrid purpose trusts may also contain a spendthrift provision, which prevents a creditor from attaching the interest of the beneficiary in the trust prior to its distribution to the beneficiary.

HOUSEKEEPING CHANGES

The 2018 changes included a number of minor revisions that clear up certain ambiguities and change some minor requirements. For example, Section 27 of House Bill 1072 allows a trustee to delegate fiduciary authority with the written approval of either the settlor or, if the settlor is deceased, a majority of the current income or principal beneficiaries. This replaces the previous requirement to obtain the approval of all known beneficiaries of the trust.

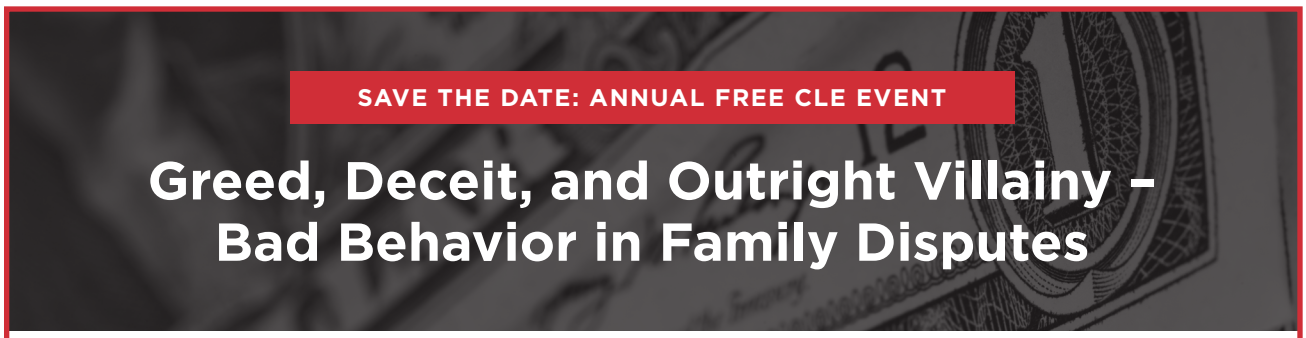
Section 28 now provides for qualified dispositions "without consideration or for less than fair market value," (the previous law allowed qualified distributions "with or without consideration"), and Section 29 clarified that unless the governing instrument says otherwise, each spouse has a 50 percent interest in a special spousal property trust.

House Bill 1072 enacted new protections for incapacitated persons. Specifically, Section 34 protects incapacitated persons from potential abuse by excluding any employee of an assisted living facility, hospital, nursing home, or any other custodial care institution from acting as a representative for that incapacitated person.

The legislature also made a change to the statutory requirements for exempting certain entities from the other requirements of South Dakota's trust statute, chapter 51A-6A. In addition to fulfilling the existing requirements, trust protectors, investment trust advisors, and distribution trust advisors may not use the word "trust" in their names.

CONCLUSION

By expanding the use of purpose trusts and establishing hybrid purpose trusts, South Dakota has demonstrated its commitment to remaining in the forefront of the financial services industry. Practitioners and clients should stay apprised of these developments. An evaluation of clients' current estate plans in light of these changes may be advisable.



SAVE THE DATE: ANNUAL FREE CLE EVENT

Greed, Deceit, and Outright Villainy – Bad Behavior in Family Disputes

Thursday, September 13, 2018 | 1:00 p.m.
Robins Kaplan LLP
800 LaSalle Avenue
Minneapolis, MN 55402

Trust and estate disputes frequently entail a variety of real and perceived wrongdoing, longstanding grudges, and protracted hostility. For the families and individuals involved in these disputes, the experience can be both stressful and life-altering. For the professionals working with these families and individuals, these disputes present an array of professional challenges and dilemmas, which do not often offer easy or obvious solutions.

Mark your calendar for Thursday, September 13, when Robins Kaplan's Wealth Planning, Administration, and Disputes Group will host an afternoon of diverse programming, focused on both the issues and best practices in helping families navigate terrain that is often littered with deep distrust and seemingly irreconcilable family narratives. A networking happy hour will follow the program. CLE credits will be applied for in the state of Minnesota.

DEATH AND TAXES ARE CERTAIN. . .
UNLESS YOU'RE A SOUTH DAKOTA DYNASTY TRUST

BY BRENDAN V. JOHNSON AND JOSHUA B. STROM

The greatest transfer of wealth in the history of the world is underway. According to a study from the consulting firm Accenture, baby boomers are expected to transfer approximately $30 trillion in assets to their heirs over the next 30 to 40 years.

Trusts will inevitably play an important role in many of these significant wealth transfers. Trusts give the settlor more control over the use and distribution of estate funds in the future and may also minimize the taxes one's heirs might have to pay. As described below, estates that use trusts formed under South Dakota law enjoy these benefits and many others. Thus, South Dakota's highly favorable trust laws virtually guarantee that the state will play an increasingly larger role in the greatest wealth transfer the world has ever seen.

UNDERSTANDING SOUTH DAKOTA TRUST LAW

Many states, including Minnesota, still have on the books some version of the arcane "rule against perpetuities." The rule against perpetuities essentially requires that a trust extinguish and funds be distributed within some limited period of time, typically less than 100 years from formation of the trust. In application, the rule has many complexities that increase costs, jeopardize the effectiveness of the trust, and minimize long-term tax-savings that would otherwise exist if the trust could last longer.

Enter South Dakota trust law. In 1983, South Dakota abolished the rule against perpetuities. South Dakota is one of the few states that permit perpetual trusts in the manner approved by the IRS. This allows for the creation of a true dynasty trust, a trust that lasts in perpetuity. Properly implemented, a South Dakota dynasty trust is among the most powerful estate planning tools available today. In addition to perpetual duration, several other distinct advantages of the state's dynasty trusts—when taken as a whole—position South Dakota trust law, year after year, as one of the country's most favorable for trust creation.

TAX ADVANTAGES OF SOUTH DAKOTA DYNASTY TRUSTS

Of all the states that allow for true perpetual trusts, South Dakota is the only one that does not impose any type of tax on trust assets. Specifically, South Dakota has no state income tax, no capital gains tax, and no estate tax. Coupled with the federal estate tax exemption and Generation Skipping Tax (GST) exemption—$11.2 million for individuals and $22.4 million for married couples in 2018—South Dakota's tax climate creates what many feel to be an ideal environment for investments to grow and wealth to accumulate in a way that will provide for many generations to come. For actively managed trusts that routinely buy and sell assets, or for trusts that are funded with low-cost-basis assets, avoiding state income tax on gains is a significant benefit.

LITIGATION BENEFITS

Disagreements sometimes arise regarding trust issues, and this can lead to litigation. South Dakota courts provide a strong forum to resolve these disputes. Access to the courts is better in South Dakota than most other locations, and parties can usually predict a reliable pace for litigation. In addition, South Dakota dynasty trust litigation comes with added assurances of privacy and confidentiality because of specific protections offered by South Dakota law.

As a general rule, court filings are a matter of public record and are accessible to the public. But in South Dakota, the court is required to seal filings and orders relating to trust actions if requested by a living trustor or by any fiduciary or beneficiary. Once sealed, the documents are generally protected indefinitely and will not be made available to the public. This is in contrast to other jurisdictions, many of which do not permit sealed filings at all. Even Delaware, another state with favorable sealing laws, permits sealing of filed documents for only three years. This ability to perpetually seal estate planning documents and resulting disputes is a differentiating factor that has led many trustors to form their trusts under South Dakota law.

ADDITIONAL SOUTH DAKOTA DYNASTY TRUST BENEFITS

South Dakota offers numerous other benefits to anyone looking to establish a trust. Its modern trust laws provide for very effective and flexible trust administration. Its decanting, modification, and reformation statutes are regarded as some of the best in the country. As a result, funds under management by South Dakota trustees have skyrocketed in recent years as wealthy out-of-state trustors routinely incorporate South Dakota dynasty trusts into their estate plans.

CONCLUSION

As the baby boomer generation transfers its significant wealth to the next generation over the next 10 to 15 years, South Dakota dynasty trusts will remain a preferred tool to facilitate that passage. If one is looking to minimize tax obligations or provide for one's heirs while maintaining an increased level of control over the spending of future generations, all while protecting an estate from future creditors, a South Dakota dynasty trust can do all this, and more.

DOMESTIC ASSET PROTECTION TRUSTS AND FRAUDULENT TRANSFER JURISDICTION

BY JAMES P. MENTON, JR.

The common law rule is that self-settled spendthrift trusts may be reached by creditors. Over the years, several domestic jurisdictions, including South Dakota, Nevada, and Alaska, have enacted statutory provisions to protect self-settled spendthrift trusts from creditors. These trusts, often called "domestic asset protection trusts" (DAPTs), may come under attack, however, and may ultimately not shield assets from creditors (and thus from bankruptcy trustees). In particular, a DAPT may not insulate a settlor from a claim that assets were fraudulently transferred into the trust. In *Toni 1 Trust v. Wacker,* 2018 Alas LEXIS 27 (Alaska March 2, 2018), the Alaska Supreme Court considered the issue of whether Alaska could prevent other state and federal courts from exercising subject-matter jurisdiction over fraudulent transfer claims against an Alaska DAPT. The court said no.

TONI 1 TRUST V. WACKER

After a Montana state court issued a series of judgments against Donald Tangwall, his wife, Barbara, and mother-in-law, Toni Bertran, Barbara and Toni transferred Montana real property to the Toni 1 Trust ("Trust"), a DAPT allegedly created under Alaska law. The judgment creditors filed a fraudulent transfer action under Montana law in Montana state court, alleging that the transfers were made to avoid the judgments. The Montana court entered default judgments against the Trust, Barbara, and Toni.

After the fraudulent transfer judgments were issued, the judgment creditors purchased Barbara's 50 percent interest in a parcel of property at a sheriff's sale. Before the judgment creditors could purchase Toni's remaining 50 percent interest in the parcel, Toni filed Chapter 7 bankruptcy in Alaska, resulting in her interest

in the parcel becoming subject to jurisdiction of the bankruptcy court. The Chapter 7 trustee later brought a fraudulent transfer claim under Bankruptcy Code against Donald as trustee of the Trust and obtained a default judgment against him.

Donald, as trustee of the Trust, then filed a complaint in Alaska state court, arguing the state and federal judgments were void for lack of subject-matter jurisdiction because Alaska state courts have exclusive jurisdiction over fraudulent transfer claims against the Trust under Alaska Statute ("AS") 34.40.110(k). AS 34.40.110(b)(1) creates a limited cause of action for fraudulent transfers, and AS 34.40.110(k) purports to grant Alaska courts exclusive jurisdiction over fraudulent transfer claims against Alaska self-settled spendthrift trusts, stating: "A court of this state has exclusive jurisdiction over an action brought under a cause of action or claim for relief that is based on a transfer of property to a trust that is the subject of this section."

Donald sought a declaratory judgment that all judgments against the Trust from other jurisdictions were void and that no future actions could be maintained against the Trust because the statute of limitations had run. The trial court dismissed the complaint. The Alaska Supreme Court affirmed.

In affirming, the Alaska Supreme Court determined that the full faith and credit clause of the United States Constitution does not compel states to acquiesce to another state's attempt to circumscribe their jurisdiction even though that state created the right of action. The Court concluded: "The basic principle articulated in *Tennessee Coal* has not changed in the last century. As applied to this case, it means that AS 34.40.110(k)'s assertion of exclusive jurisdiction does not render a fraudulent transfer judgment against an Alaska trust from a Montana court void for lack of subject matter jurisdiction."

The Alaska Supreme Court also found that AS 34.40.110(k) cannot limit the scope of a federal court's jurisdiction because a state cannot restrict federal courts' jurisdiction even though the state created the right of action. The Alaska Supreme Court also noted that AS 34.40.110(k), if attempting to limit federal jurisdiction, likely runs afoul of the Supremacy Clause of the U.S. Constitution.

PRACTICAL CONSIDERATIONS

Toni 1 Trust makes the important point that you cannot necessarily rely on a DAPT state statute to establish jurisdiction in situations involving fraudulent transfer actions in a non-DAPT state. As a result, another state's fraudulent transfer law and/or the Bankruptcy Code may be able to be used to reach assets in a DAPT. Further, providing for applicable law in a trust document may not prevent it from being disregarded. For example, in *Waldron v. Huber (In re Huber)*, 493 B.R. 798 (Bankr. W.D. Wash. 2013), the bankruptcy court sitting in Washington (a non-DAPT state) disregarding the settlor's choice of Alaska law and applied Washington State law and found that the settlor's transfers of assets to an Alaska trust were fraudulent under Bankruptcy Code section 548 and Washington State fraudulent transfer law.

Practitioners would be well served to consider the implications of these decisions when advising clients on wealth transfer strategies, design plans keeping fraudulent transfer laws in mind, and stay current on legal developments.

MEET OUR ISSUE EDITOR:

TIM BILLION

As a member of Robins Kaplan LLP's Wealth Planning, Administration, and Disputes Group, Tim Billion represents fiduciaries in a variety of disputes, including litigation, mediation, and investigations. Tim also practices in Robins Kaplan LLP's business litigation group where he represents individuals and large and small businesses. Regardless of the type of case, Tim uses the litigation process to maximize the client's strategic advantage while staying focused on the client's goals. Tim is based out of the firm's Sioux Falls, South Dakota office and can be reached at TBillion@RobinsKaplan.com.

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