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Trusts for Asset Protection in Divorce

Evaluating and Reaching Trust Assets and Ex Parte Trusts;
Anticipating Discovery Tactics to Uncover Marital Assets

WEDNESDAY, AUGUST 8, 2012

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TRUST(S) AND DIVORCE
(when the battle begins)

Supplemental Outline By

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James's primary goal is to provide clients with (i) a non-lawyerly, practical, and cost-effective summary of key issues (ii) relevant information to help clients assess the risk-reward and cost-benefit of taking or foregoing action; and (iii) specific recommendations when clients face issues warranting decisive action.

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TRUST(S) AND DIVORCE
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Marvin L. Solomiany and James M. Kane, attorneys

> **<u>Here is the heart of this Outline</u>**: Being able in a divorce proceeding to tie one spouse to a trust (whether or not that spouse created the trust) requires focused litigation discovery questions. Overly general discovery can be a fast pathway to failure. Litigation Discovery is covered beginning on page 3 of this Outline. Also knowing key points about how a trust might play into the divorce proceeding is essential in charting the discovery efforts and in assessing how the information is best presented to the fact-finder in the case. These six points are included on pages 9-13 of this Outline.

Trusts are used by a broad range of clients for tax planning and asset protection, not just for the super-wealthy. Trusts, therefore, add an important strategic factor in a divorce proceeding that cannot (and must not) be avoided. Well-drafted trusts are also designed in certain instances specifically to fall under the radar during the discovery process. This Outline, therefore, begins with an important discussion about the effective use of focused discovery questions to help find and identify otherwise well-hidden trusts.

These well-hidden trusts also exist in situations where one spouse prior to the divorce transfers property to a trust (whether or not under a pretext of estate planning or asset protection). Often, this spouse – without the other spouse's participation -- will establish Trusts ostensibly for estate planning or asset protection. Realistically that spouse is attempting to transfer funds out of the Marital Estate with the underlying goal of limiting the other spouse's ability to obtain an equitable division of such assets in a subsequent divorce action. This Outline helps find the chink in the armor for these *ex parte* trusts.

The Outline also helps the reader identify relevant questions and factors to determine: (i) what trusts exist, (ii) whether a spouse has any interest in a trust

that can affect alimony and property division, (iii) whether that interest is material enough to pursue, and if so (iv) what attack can be made against the trust. The success of discovery, at a minimum, must be sufficient to enable a party to assess these threshold questions.

A Trust Primer. Finally, for reference purposes this Outline includes a basic primer on trusts (beginning at page 25) with a short summary of key concepts and terms useful for understanding a trust. This primer is intended merely as a resource for future reference if needed. It is not essential for an understanding of the discovery and litigation points in this Outline.

I. In 15 Seconds, What is a Trust?

A trust is not a separate entity, such as a corporation, partnership, or LLC. Rather, it is a relationship between the trustee and the beneficiaries relative to the property in the trust. The trustee holds legal title to the trust property for the beneficial interests of the trust beneficiaries. For most trusts based on a written trust document, this relationship is spelled-out within the trust provisions, affected also by the applicable state law on trusts.

When a trust is a party in litigation, it is the trustee as legal owner of the trust property who is the party. The party is not the trust as an entity, but is the trustee.

The trustee of the Trust will need to be added as a party in the litigation. A trustee of an express trust is the real party in interest. *See* O.C.G.A. § 9-11-17.

The location (or situs) of the trust, generally speaking, is the jurisdiction where the trustee is domiciled. This situs is important when dealing with compelling discovery or adding the trust (vis-à-vis the trustee) as a party to the divorce proceeding.

To help illustrate this no-entity concept, the signature line for a trust is in the trustee's name, not the trust's name. It is not an entity signature:

____
Jane Doe, as Trustee for the John Doe
Irrevocable Trust u/a/d May 4, 2011

By contrast, and as an example, an entity signature is used for a corporation:

Smith Investments, Inc.

By: ____________________________
Name: William Doe
Its: Vice-President

II. Discovery.

Any trust in which a spouse has a direct or indirect interest is potentially an important factor in the divorce. And, even if the spouse has no interest in the trust, a trust to which the spouse has transferred property is potentially important.

Thus, if a spouse can be tied to a trust in any fashion, that trust is potentially relevant to the divorce proceeding, or at a minimum, to discovery

Effective discovery questions in any area of litigation can go a long way in conveying to the opposing party and the court that the requesting party has credibility and expertise in seeking the information. The nature of good questions also suggests, by implication, the importance and need for the answer. Thus, creating an implied answer for well-stated discovery questions helps greatly when faced with discovery objections.

Having a good grasp on the trust concepts included in this Outline also helps expose and identify overstated and conclusory discovery objections, particularly in many instances where the objection does nothing more than beg the question.

Well-settled law in Georgia permits that wide latitude be given under the discovery statute to make complete discovery possible. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284 (1972). Also, O.C.G.A. § 9-11-26 provides:

> [P]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having

knowledge of any discoverable matter.

As such, issues relating to a Trust established during the marriage are inherently relevant to the subject matter of a divorce action and objections to this discovery as to the Trusts are likely to fail.

A. <u>This is a Starting Point.</u>

Getting information about the trust as early as possible in the dispute is essential, particularly directly from the opposing party (the other spouse) if possible.

However, keep in mind that likely most trust documents include express provisions that waive any requirement for the trustee to provide an accounting of the trust to the beneficiaries.

As a result of these typical waivers, the first step is to request the trust information from the spouse / beneficiary with a request that the spouse, as a beneficiary of the trust, obtain the information from the trustee pursuant to the following Georgia statute under Section 53-12-243.

In many instances the spouse will object or will point to the waiver provisions in the trust document. In this situation <u>your next step</u> is to seek the court's assistance with obtaining the information using the last paragraph (e) of this Section 53-12-243 (see below). At the same time, your onslaught of requests can include the additional discovery efforts set forth further below in this Outline.

Here are the statutory provisions of the above Section 53-12-243:

> **Section 53-12-243. Beneficiary's request for information; accounting furnished to qualified beneficiary.**
>
> (a) On reasonable request by any qualified beneficiary or the guardian or conservator of a qualified beneficiary who is not sui juris, the trustee shall provide the qualified beneficiary with a report of information, to the extent relevant to that beneficiary's interest, about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust, including the trust provisions that describe or affect such beneficiary's interest.
>
> (b) (1) A trustee shall account at least annually, at the termination

of the trust, and upon a change of trustees to each qualified beneficiary of an irrevocable trust to whom income is required or authorized in the trustee's discretion to be distributed currently, and to any person who may revoke the trust. At the termination of the trust, the trustee shall also account to each remainder beneficiary. Upon a change of trustees, the trustee shall also account to the successor trustee. In full satisfaction of this obligation, the trustee may deliver the accounting to the guardian or conservator of any qualified beneficiary who is not sui juris.

(2) An accounting furnished to a qualified beneficiary pursuant to paragraph (1) of this subsection shall contain a statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last accounting to that beneficiary and a statement of the assets and liabilities of the trust as of the end of the accounting period.

(c) A trustee shall not be required to report information or account to a qualified beneficiary who has waived in writing the right to a report or accounting and has not withdrawn that waiver.

(d) Subsections (a) and (b) of this Code section shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee.

(e) Nothing in this Code section shall affect the power of a court to require or excuse an accounting.

HISTORY: Code 1981, § 53-12-243, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

B. Begging the Question Defenses to Discovery.

Don't let the other side simply beg the question by providing discovery objections based on unsubstantiated summary conclusions, such as (i) "this trust was funded with separate property" or (ii) "the spouse has nothing more than a bare expectancy in this trust", and so forth.

In other words, any discovery objection (without supporting documents or testimony) that rests on a conclusion of what is

included in the trust or what the trust provisions provide simply begs the question and is nothing more than a conclusory overstatement. In these situations, the requesting party should persuade the judge – at a minimum – to let the discovery move forward so as to review evidence sufficient to assess the opposing party's summary objections.

C. Ineffective Discovery Requests.

Merely having broad, general discovery requests for trust information is often a sure way to run into a dead-end. Asking wrong or overly simple questions in discovery also highlights that the requesting party has no clear idea of how trusts fit potentially in the case.

The following questions are overly-broad and too simplistic:

- Have you created any trusts?
- Are you the beneficiary of any trust?
- Are you the trustee of any trust?

D. More Focused Discovery Requests.

Well-drafted trusts are often designed purposely in some instances to enable a person to answer "no" to the three simple discovery questions set forth above (have you created any trusts; are you the beneficiary of any trust; and are you the trustee of any trust).

By contrast to the above, asking more focused questions sends the message to the opposing party (and the court, if necessary) that the requesting party knows what he or she is looking for and suggests the potential of a productive answer by the implication created by the question itself.

Asking better, focused questions also helps penetrate well-drafted trusts. That is, those trusts designed in many cases purposely to skirt discovery so that a person can assert that he or she did not create the trust and is neither a beneficiary nor trustee of the trust. These responses -- if not challenged with more in-depth questions – will end further inquiry into the trust.

More focused and effective discovery questions need to take into account a more detailed approach; such as:

- Have you at any time transferred property to a trust, regardless of who created or formed the trust?[1]
- Identify all trusts to which you have transferred property by giving the name and date of the trust.
- Identify each trust to which you at any time transferred property.
- Identify the trustee and the trustee's address for all trusts to which you have transferred property.
- Identify all trusts that give you a power under the terms of a trust to add or include you as a beneficiary of the trust.
- Identify all trusts that give any person a power under the terms of a trust to add or include you as a beneficiary of the trust.
- Name all persons who hold a power under the terms of a trust to add or include you as a beneficiary of the trust and identify the trust.
- Identify all trusts in which any of your descendants are or at any time were beneficiaries.
- Identify all trusts in which your spouse Jane Doe is or at any time was a beneficiary.
- Identify all trusts that provide you with a power of appointment. [page30 of this Outline gives examples.]

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[1] For purposes of this Outline these interrogatories are not intended to be complete as to all possible questions pertaining to these items, and so forth.

- Identify all trusts that provide another person with a power of appointment that can be exercised in your favor with you as an appointee of the power.

- Identify each person with whom you have had any discussion or communication about indirect methods or plans to transfer trust property back to you or for your benefit.

- Describe the date and type of tax return (whether gift tax or income tax) that has been filed, or is pending to e filed, for federal or state purposes as to any trust to which you have transferred property.

- Identify any trust that uses your social security number as the tax identification number for federal or state purposes.

E. The Overused "Bare Expectancy" Discovery Defense.

Be prepared to get the overused "bare expectancy" objection during discovery when dealing with trusts. The objecting parties often cite a number of Georgia cases, such as *Meeks v. Kirkland*, 228 Ga. 607 (1972); *Trammell v. Inman*, 115 Ga. 874 (1902); *Dailey v. Springfield*, 144 Ga. 395 (1915); *Pidcock v. Reid*, 145 Ga. 103 (1916); *Moore v. Segars*, 192 Ga. 190 (1941); *Trammell v. West*, 224 Ga. 365 (1968).

But in the situation where a trust exists, this bare expectancy defense is frequently nothing more than a red herring. Why? The bare expectancy objection should apply only when a potential interest is a yet-to-exist future interest in someone's estate, who has not yet died (as it is most often seen in the objections raised to the production of a Last Will and Testament where a party is a named beneficiary). In other words, no trusts, powers or rights, are yet in place that can give rise to an interest in the property.

Thus, the bare expectancy argument should be narrowly applicable when a spouse seeks, for example, to argue the other spouse will likely obtain a benefit from his parents' estate when they die or from, for another example, a revocable trust.

F. *McGinn v. McGinn* and Overcoming a "Bare Expectancy" Defense.

In virtually any situation where a spouse (i) appears to have an interest in a trust (either direct or indirect) or (ii) has transferred property to the trust, the level of evidence or testimony to assess and determine the interest should be discoverable.

The opinion in *McGinn v. McGinn*, 273 Ga. 292, 293 (2001), is a helpful case overcoming "bare expectancy defenses:

> Although a court cannot base alimony on a bare expectancy or the possibility that a party may obtain an asset in the future, the fact-finder can hear evidence of any currently held asset, even though its value is not fixed or certain at the time of trial.
>
> [Underlining added.]

III. Where Does the Trust Potentially Fit Within the Divorce Proceeding?

Determining as early as possible in the divorce proceeding whether a particular trust will be fruitful is essential. To help begin this analysis, the following seven points provide a series of factors to consider:

A. Reaching the Trust Assets.

Can you get your hands on the trust assets? This is the ideal and most aggressive attack against a trust. However, whether this result is possible depends on the particular circumstances of the trust arrangement and the terms of the trust, [2]

In many states (including Georgia) there are only a limited number of published judicial opinions dealing with trusts and divorce. *See, for example, Avera v. Avera*, 253 Ga. 16 (1984)(a divorce case; trustee

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[2] The fine-points of the technical distinctions as to a particular trust are beyond the scope of this Outline. Generally, however, these are the distinctions that affect whether, and how, a third-party can reach the trust assets depending on many complex factors such as the trust distribution provisions instructing the trustee as to distributions of trust income or corpus, the nature of interests in the trust for a beneficiary, such as contingent or vested interests, defeasible interests, spendthrift clauses, interests subject to divestment, etc.

did not have power to invade trust with unlimited discretion); *Speed v. Speed*, 263 Ga. 166 (1993)(a divorce case; a self-settled trust with the husband as sole beneficiary subject to wife's claim for alimony and property distribution); *McGinn v. McGinn, supra* (2001).

The question of reaching the trust assets in a divorce is analogous to the task a bankruptcy trustee faces when dealing with a debtor who has an interest in a trust, or who has transferred property to a trust. Thus, the body of bankruptcy law applying Georgia law is a useful source of information in a divorce context.

An excellent bankruptcy case is *In re Phillips*, 411 B.R. 467 (S. D. Georgia 2008). This bankruptcy decision includes discussion of the material concepts under Georgia law as to a third-party's potential reach into the trust (in this case the third-party is the bankruptcy trustee).

Other examples of Georgia bankruptcy cases with good discussions of trust factors are: *In re Greenberg*, No. 01-42188, 2003 WL 21919441 (Bkrtcy. S.D. Ga. 2003); *In re Herndon*, 102 B.R. 893, M.D. Ga. 1989); *In re Herndon*, 24 B.R. 962, N.D. Ga. 1982); *In re McLoughlin*, 507 F.2d 177 (5th Cir. 1975).

B. Getting the Trust in Front of the Fact-Finder.

In the divorce context the minimum goal for any trust that is material to the proceeding is to get (i) the value of the trust and (ii) the history of the trust distributions in front of the fact-finder. This is a goal even if the trust assets themselves are not reachable.

At least getting the value and history of distributions to the judge and/or jury can make the spouse who has the connection to the trust appear to be a well-funded, lawyer-protected, trust fund child.

See *McGinn v. McGinn* discussed above on this point; *see also Rooks v. Rooks*, 252 Ga. 11 (1984); *Mosely v. Mosely*, 214 Ga. 137 (1958); *Fried v. Fried*, 211 Ga. 149 (1954).

C. Using the Doctrine of a Confidential Relationship.

Under this doctrine one spouse arguably cannot transfer property to a trust or in any manner *ex parte* outside of the marriage without

the other spouse's informed consent. Red flags for violations of this duty exist particularly where a spouse has obtained legal counsel alone for purposes of creating or funding trusts or other transfers of property outside the reach of the other spouse.

This confidential relationship is a strong argument that goes to the fairness and candor elements in a marriage. Although there are few judicial opinions in Georgia applying this doctrine, the confidential relationship cases can be cited to the court -- particularly during discovery -- as a means of protecting the excluded spouse who otherwise is unable to get sufficient information about these trusts created unilaterally by the other spouse. *See, for example, Adair v. Adair*, 220 Ga. 852 (1965); *Cain v. Ligon*, 71 Ga. 692 (1883).

This doctrine is a particularly strong sword in the situation where -- <u>during the marriage</u> -- one spouse obtains trust or estate planning alone without the informed consent of the other spouse. The goal in applying this doctrine in the divorce case is to set aside the transfers to the trust and bring the property back into the hands of the spouses (for determining alimony, property division, etc.). *See, for example, Papson v. Papson*, No. 10065-1997, 1998 WL 1177948 (N.Y. Sup. Ct. 1998)(husband transferred funds to a trust without wife's knowledge; court held the transfer violated public policy and ordered the husband to terminate the trust and return the money).

In addition, when considering this doctrine, ask during discovery whether the married couple previously met together with their joint attorney for preparing their respective Last Will and Testaments or other estate planning. This will provide an effective contrasting backdrop against the one spouse who thereafter -- alone -– created or transferred property to trusts ostensibly for estate planning or asset protection purposes.

An unreported Florida divorce in *Westrate v. Westrate* received a great deal of attention and was featured in an ABA Journal piece (Debra Baker, *Island Castaway*, A.B.A.J., Oct. 1998, at 55). This case involved the husband's transfer by the husband of the bulk of marital assets to a Cook Islands trust four months after he first consulted with a divorce attorney. This case settled after

apparently the court found sufficient facts to invoke the crime-fraud exception to the attorney-client privilege between the husband and his lawyers and ordered those lawyers to answer interrogatories.

This confidential relationship argument is not limited to transfers to trusts. It can apply in any *ex parte* transfer of assets by one spouse without knowledge of the other spouse. This argument should apply whether or not the transfer was of separate or marital property.

D. An Essential Interrogatory.

An essential interrogatory at the onset of the divorce proceeding is to ask whether a spouse has transferred property to any trust (regardless of whether that spouse created the trust) during the marriage and whether the other spouse was informed sufficiently about the *ex parte* transfer of property.

E. Fraudulent Transfers.

A fraudulent transfer argument is a potential in situations where a spouse transfers property to a third party beyond the reach of the other spouse. The question is whether the trust can be disregarded and set-aside as a fraudulent transfer. More on this below at page 21.

F. *Lerching* a Trust.

This is an argument under *Lerch v. Lerch*, 278 Ga. 885 (Ga. 2005). The focus of the argument is to assert that a spouse's transfer of separate property to a trust in which some or all members of the family are beneficiaries is *Lerched* and results in the property losing its character as separate property, and thus arguably becoming marital property. The essence to this assertion is not to focus on what is the character of the property after the transfer, but rather to overcome arguments from the transferor spouse that he or she transferred separate property, thus out of the reach of the divorce proceeding (this again, is often an overstated, conclusory defense, particularly in discovery).

While some may view this *Lerch* argument as overreaching, based

on its progeny and the recent tendency of courts to focus on how property is titled, it is an additional argument that can be made in the pursuit of bringing property transferred to a Trust back to the marital estate.

These trust transfers are often into a trust prior to a divorce action ostensibly for gift or estate tax planning purposes. The trust will include the other spouse and the descendants as beneficiaries. However, the trust often will also include a self-serving definition that kicks the beneficiary spouse out of the trust upon separation of the spouses or upon the filing of an action for divorce.

Again, and as an alternative argument, if the above trust is created by one spouse without the informed consent of the other spouse, the confidential relationship and fraudulent transfer arguments are potentially available for the attack.

However, if both spouses participated in the trust planning, and both were sufficiently informed of the above "spouse" definition provisions, etc., the spouse who later tries to apply the above arguments may potentially be estopped by reason of his or her own actions.

IV. Examples of Actual Trust Discovery Objections.

An effective way to respond to overstated discovery objections is to frame the disputed discovery within one or more of the six points discussed immediately above. In other words, argue that you need a reasonable level of discovery simply in order to evaluate whether the trust potentially falls within any one of these six points.

By grounding your discovery requests on one or more of these points, you can better persuade judge to allow at least a minimal level of discovery. Keeping in mind the above six points, here are a few actual examples of overstated and conclusory discovery objections:

> "Husband John Doe transferred all the income-earning stock shares he acquired through gifts from his father into irrevocable trusts for the benefit of other parties before the husband was aware of wife Jane Doe's intention to file for divorce."

"These transfers were made for reasons of estate planning and to protect these assets from potential personal liability arising from husband's capacity as officer of ABC, Inc."

"Any ownership interest husband transferred to trust is not and never was marital property subject to equitable division or support claims."

"Husband currently holds no interest in the trust created by his father, but holds only a "bare expectancy or possibly" of an interest. The trustees are not at liberty to make distribution to husband from the trust created by his father, because to do so would expose them to claims for breach of fiduciary duty and conversion."

"Husband is not a trustee of the trust that he created and therefore has no control over it. He is also not a beneficiary of the trust. The beneficiaries are the descendants and spouse of husband. However, pursuant to section 7.4 of the trust document, husband's wife, who is the plaintiff in this action, is no longer defined as the "spouse" of husband and thus is no longer a beneficiary."

"Husband contributed the proceeds from the sale of his company stock to the ABC trust, an irrevocable trust formed by his father. Husband is not a trustee or beneficiary of the ABC trust and receives no income from it."

In view of the general range of responses set forth above, one key focus of this outline is to arm the reader with awareness of factors that can be used to dissect and potentially overcome the above overly broad, and in most cases, pointless, arguments.

V. Digging into the Trust Analysis.

The following analysis is applicable particularly when the trust is purposely designed to escape discovery.

A. Who Transferred Property to the Trust?

In the strict technical sense "who created the trust" in most cases will be the name of the person shown on the first page of the trust document as either the "grantor" or "settlor". But this will not indicate who transferred property to the trust. Here is a typical first page reference to a "settlor" as it appears in the trust document:

The Jeff Doe Irrevocable Trust

I, **Jeff Doe**, as Settlor, transfer to myself, as Trustee, Ten Dollars ($10.00) and other valuable consideration for the purpose of creating this trust in accordance with all the provisions set forth below, this ______ day of January, 2011.

In this example, the named Settlor transfers to the trust nothing more than the legal fiction of $10.00. Thus, this reference to the grantor or settlor can be misleading, in that it does not indicate necessarily who transferred the property (or *res*) into the trust.

Keep in mind that virtually anyone can be named as the grantor or settlor, regardless of who thereafter will transfer property to the trust.

This naming of a third-party as grantor or settlor is sometimes used as a purposeful method of maintaining anonymity of the actual person who transfers property to the trust. For example, a spouse will transfer property to a trust with his father ostensibly named as the creator of the trust (the father as settler or grantor).

Thus, be careful that the objecting party during discovery does not place a red herring in the pathway of the discovery by trying to keep all eyes only on the person named as the settlor or grantor of the trust, rather than who transferred property to the trust.

For example, the objecting party may try to support keep the focus

only on the <u>named</u> Settlor by referring to O.C.G.A. §52-12-2(11). This statute defines 'settlor' as the person who creates the trust, including a testator in the case of a testamentary trust.

There is virtually no Georgia case law that addresses directly a dispute where the settlor is merely a nominee and another person substantively funds the trust. However, opinions in other jurisdictions have dealt clearly in expressing that the substantive "settlor" is the person who provides the consideration or property to the trust, as compared to the nominee settlor. For example, *Osherow v. Porras* (*In re Porras*), 312 B.R. 81, 130 (Bankr. W.D. Tex., 2004), states:

> [T]here is ample case law in Texas that "[T]he person who provides the consideration for a trust is the settlor even if another person or entity nominally creates the trust.

In re Brooks, 84 F.2d 258, 263 (5th Cir.1988), also illustrates a similar point, in stating:

> The mold in which the transaction is cast does not determine who is the settlor of a trust. . . . Neither Texas courts, nor federal courts that follow Texas law, ought to follow a purely paper trail. We look instead to the reality that lies behind.

B. <u>Is the Trust Irrevocable or Revocable?</u>

Another important point in analyzing a trust is whether a trust is revocable or irrevocable. A revocable trust is one that a person can revoke, amend, change, and revise. It is essentially an alter-ego for the person who has these powers.

Because the person can revoke and end the trust at any time, a revocable trust is potentially fruitful in the divorce proceeding by arguing the spouse has the power to revoke the trust and bring the assets into the divorce arena. This argument applies even if another third-party is the trustee of the spouse's revocable trust.

By contrast, an irrevocable trust is one that a person cannot revoke or amend. The rights and powers are set forth under the terms of the trust in a more permanent manner than a revocable trust.

Because an irrevocable trust cannot be revoked, more work and effort is required to find out what rights and benefits a spouse has under the irrevocable trust. These rights and benefits are called "interests" in the trust. It is, therefore, these trust interests that can potentially be valued for alimony or property division in the divorce proceeding.

Bottom line: You can assume that any trust with a material value, revocable or irrevocable where a spouse has any power, rights or benefits (thus, any interest in the trust), is arguably discoverable as part of the divorce proceeding.

C. Is the Trustee a "Friendly Trustee"?

Most individuals simply do not wish to give up control over their property, even if it is in trust. For this reason, these individuals – while they are alive -- often will not put into place a corporate trustee (such as a bank trust department). Instead, they will use a friendly trustee with whom they have a family or friendship relationship. The individual indirectly maintains a stronger voice over the trust. This often means the friendly trustee will be a sibling, lawyer, or close friend of the spouse.

Although the friendly trustee is not by itself a controlling factor, it helps add to the balance of factors in building an argument (especially during discovery) the trust is not fully an arms' length arrangement.

D. Does the Spouse Have any Interest in the Trust – either Direct or Indirect?[3]

A spouse can have direct or indirect, or both, interests under a trust document. The direct interests are generally easily recognizable from reading the trust document. That is, the spouse is a beneficiary and is entitled to the manner of distributions or other benefits set forth under the terms of the trust. Not much hidden here.

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[3] See footnote 2 to this Outline.

However, indirect powers are much more stealth. An excellent trust drafter can confuse the layout and operation of the trust in a way that makes a spouse's indirect interests hidden. Unless you know what to look for.

The entire topic of what interest someone has in a trust is the pointy-headed and technical aspect of trusts that most law school students hated, and dreaded for the bar exam. That is, finding and naming the interest a person has in a trust is about as varied as the imagination of the person who drafted the trust. This variation arises most typically based on what particular bells and whistles the trust drafter places within the provisions of the trust document.

This technical trust area gets also into the questions about whether a person's interest in a trust is contingent or vested, defeasible, subject to divestment, a term, life or remainder interest, and so forth.

As already listed above at pages 9-10, there is an abundance of case law in the bankruptcy arena that gets into the specifics of these various trust interests. A bankruptcy trustee, when faced with a debtor who has interests in a trust, must determine whether any of the interests are reachable as part of the bankruptcy estate, and what the value of such interests is.

Thus, these bankruptcy cases deal with a fundamental question, namely "Does the bankrupt debtor have an interest in the trust that can be reached and at what value?" By analogy, what interest in a trust does a spouse have and what it its value in the divorce?

Important Point: Divorces cases involve one additional factor not in bankruptcy cases. That is, in a divorce even if a trust is designed so that the other spouse cannot successfully reach the trust assets, information amount the trust, including its value, history of distributions, are arguably relevant to the fact-finder for computing the alimony and property division even though such alimony or property division may not come out of the trust assets. This can be fruitful in the divorce context. It also can help characterize one spouse as a trust-fund child, and so forth.

1. Indirect Interests in a Trust

The primary tools used for indirect interests in a trust are (i) giving a third party the power to add an individual later as a beneficiary; (ii) power to "decant" a new trust by making a distribution in further trust (page 30 of this Outline); and (iii) powers of appointment (page 30 of this Outline).

Important Point: The three powers in the preceding paragraph can create a veiled, indirect pathway to a person obtaining benefits from the trust. Below are some real trust provisions that surfaced during discovery in a Georgia divorce (with the names changed):

> ***Example 1*** -- A written irrevocable trust document exists that states it was created by spouse John Doe's father Jeff Doe, as the settlor of the trust. John Doe is not described as a beneficiary of the trust. John Doe objects to a discovery request on the basis that he is not named as a beneficiary or trustee of the trust.

The objecting party objects to discovery and argues the trust was created by spouse John Doe's father and that John Doe is neither a beneficiary nor trustee of the trust.

What <u>the objecting party does not bring to the court's attention</u> is that (i) the father ostensibly created the trust document, but it was spouse John Doe who funded the trust with a transfer of his property to the trust and (ii) based on the following "limited power of appointment" John Doe's father has the express power to get the trust property back into the hands of John Doe by exercising the power in John Doe's favor:

> Each grantor of this trust [remember father Jeff Doe is the grantor], upon his death, may appoint any portion, up to all, of that portion of the Trust for which such grantor is the grantor to, or for the benefit of, any one or more of the

> descendants of the parents of such grantor or the descendants of the parents of the spouse of such grantor; provided, however, that at no time shall such grantor, his estate or any creditor of such grantor be permissible beneficiaries of this power of appointment.

Example 2 -- A written irrevocable trust document exists that states it was created by spouse John Doe's father Jeff Doe without spouse John Doe being named as a beneficiary or trustee under the terms of the trust.

But, the trust also includes the following two provisions that indirectly, and when combined, enable the trustee to place the entire trust property back into the hands of spouse John Doe:

Here is the first provision that gives the trustee full, unfettered discretion to distribute the property to any beneficiary, without limit:

> The Trustee may, at any time and from time to time, distribute to, or for the benefit of, any one or more of the beneficiaries of the trust so much of the net income, the principal, or both, of the trust as the Trustee, in the Trustee's sole and absolute discretion, deems to be in such beneficiaries' respective best interests. [Underlining added.]

But, didn't we say the spouse John Doe is not a beneficiary? He is not. By contrast, under the following provision spouse John Doe's maternal grandmother has the ability under the following trust provision to add spouse John Doe into the trust as a beneficiary:

> 8.9 Naming of Additional Beneficiaries. Notwithstanding anything in Article I to

> the contrary, the Trustees shall have the power to name an additional beneficiaries to the trust administered pursuant to Article III hereof any direct descendant of Deborah Smith.

Bingo. By combination of both of the above provisions, a friendly trustee combined with the maternal grandmother Deborah Smith's addition of her grandson spouse John Doe will allow the trustees to distribute the entire trust property back to John Doe. In this case the use of the maternal grandmother eliminates having to use a powerholder with the same last name as the spouse John Doe. This helps potentially deflect attention from this provision.

VI. Fraudulent Transfers.

A fraudulent transfer argument is not mutually exclusive to the confidential relationship argument (page 10 of this Outline). The difference is that a fraudulent transfer requires a showing that the transfer was intended to delay or defraud creditors and resulted in the transferring party becoming insolvent as a result of the transfer. The confidential relationship argument does not require the insolvency element.

By contrast, the confidential relationship is a strong fairness argument and goes to the candor, forthrightness, and repose that marriage presumes under this doctrine.

Thus, in many situations a spouse can take a double-barreled approach (if supporting facts exist) and assert both the confidential relationship and fraudulent transfer doctrines.

A. A General Notion of Asset Transfers and Fraudulent Transfers

Clients should have the freedom to insulate themselves from tomorrow's liabilities, including future new theories of liability. Therefore, in this context there realistically must be a limit to a client's obligation to consider the rights of future plaintiffs.

The balance for these considerations arguably requires a client to contemplate and plan for reasonably foreseeable future liabilities

only. The client is not obligated to take into account for future debts that are not reasonably foreseeable at present.

Keeping the above framework in mind, a fraudulent transfer is generally the situation where a person transfers assets out of reach of known creditors, or creditor whom the person reasonably should have known exist.

B. Transfer Must Be Before Claims Arise.

It is crucial that asset protection be implemented before claims arise. Practitioners have seen far too many individuals – who failing to plan for asset protection – frantically seek out legal assistance only after the claim has surfaced. The insolvency problem discussed immediately below is the crux of these after-the-fact transfers.

C. Potentially Allowable Transfers Must Not Create Insolvency.

A transfer can be made even when claims are known, however, only to the extent the transfer does not render the transferor insolvent.

The following Georgia statute under the Official Code of Georgia (O.C.G.A.) § 18-2-71 defines insolvent. For the practitioner, a key portion of this statute is the paragraph (a) reference to "at fair valuation". This gives rise to the inevitable need to determine what the fair value of both assets and liabilities is. As to liabilities, for example, this fair value is an extremely important question when dealing with a personal guarantee. The Georgia statute follows:

O.C.G.A. § 18-2-72 "Insolvent" defined

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.

(b) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this Code section if the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets, at a fair valuation, and

the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this Code section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this article.

(e) Debts under this Code section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

HISTORY: Code 1981, § 18-2-72, enacted by Ga. L. 2002, p. 141, § 3.

D. The Transferee No Longer Must Have Actual or Constructive Knowledge.

The current Georgia law under O.C.G.A. Section 18-2-74 has moved away from an earlier requirement that the transferee (recipient) had to have actual or constructive knowledge of the fraudulent transfer.

In some circumstances the prior Georgia law under O.C.G.A. § 18-2-22 required a showing that the recipient of property in a fraudulent transfer situation had actual or constructive knowledge of the transferor's fraudulent intent. *See, for example, Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981).

E. Burden Shifts for Husband / Wife Transfers.

When a transfer of property between a husband and wife is attacked as a fraudulent transfer, the burden shifts to the husband and wife to show the transaction was fair. *See, for example,* O.C.G.A. § 19-3-10 (Georgia); *In re Greenberg*, 01-42188, 2003 WL 21919441 (Bankr. S.D. Ga. May 13, 2003).

F. A Written Solvency Affidavit.

If asset protection planning involves a client's transfer of property to another owner (including to a trust), practitioners will typically require the client to sign a Solvency Affidavit before moving forward with implementing asset protection planning. This affidavit is, thereafter, held in the client's file and provides

contemporaneous evidence of the client's financial position prior to making any transfers of property for asset protection purposes.

The Solvency Affidavit helps force clients and practitioners to take a moment and comprehend the importance of not making asset transfers that create insolvency. It also forces the client to be open and forthright with their lawyers about their assets and known or potential claims so that no underpinning of the asset protection is grounded otherwise on a fraudulent transfer situation.

G. <u>An Award of Damages for a Fraudulent Transfer</u>.

Courts in some instances have little tolerance for fraudulent transfers and will allow a tort claim of fraud in certain fraudulent transfer situation. Thus, a good faith effort to avoid running into this thicket is essential as a practitioner. *See, for example, In re Ramirez*, No. 09-70051, 2011 WL 30973 (Bankr. S.D. Tex. Jan. 5, 2011). This case involved exemplary damages over and above the transfer value of the property at issue in the fraudulent transfer.

The bankruptcy court in *Ramirez* imposed exemplary damages of $2.2 million against the defendants. The court concluded the defendants acted with actual fraud in transferring approximately $450,000 of cash and additional real property to family members, and awarded exemplary damages on the basis that defendants knew or should have known that depriving [the victim and his family] of the judgment money would result in . . . severe economic difficulty. *Id.* at 2011 WL 30973, at * 25.

Georgia law allows an award of damages (both actual and punitive) upon the finding against the transferor of a fraudulent transfer. However, an award of damages against the *transferee* is not allowable, unless there is a showing of bad faith, actual fraud, or conspiracy on the *transferee's* part. *Kesler v. Veal*, 257 Ga. 677 (1987).

H. <u>Targeting the Practitioner in a Fraudulent Transfer Situation</u>.

Whether the practitioner who advised the client for a matter that later becomes a fraudulent transfer issue can be targeted – successfully – should center on two important points.

One, is the lawyer the transferee by virtue of holding title to the transferred property, such as the lawyer acting as trustee or co-trustee. If yes, the lawyer in most cases loses the attorney-client defense and will be treated in the matter as any other transferee (*see* the above discussion regarding Georgia law and damages).

Two, did the practitioner engage in any actions that could be deemed fraudulent (false records, false financial statements, *etc.*, facilitated a transfer that under any reasonable view can be deemed to have been purposely to avoid a creditor. In other words, merely being the practitioner who reasonably and in good faith represents the transferor, and who reasonably makes and documents an effort to make a fair valuation of both assets and liabilities so as to maintain the client's solvency should not be the target of a successful claim.

Beyond the scope of this Outline is an excellent discussion of issues dealing with a practitioner under the Florida Uniform Fraudulent Transfer Act (Georgia uses the Uniform Fraudulent Transfer Act) that appeared in the June 2004 Florida bar Journal, Denis Kleinfeld & Jonathan Alper, *The Florida Supreme Court Finds No Liability for Aiding and Abetting a Fraudulent Transfer,* Fl. Bar. J. (June 2004), *available at* http://www.alperlaw.com/florida_bar_2004.html.

VII. A Primer on Trusts.

The following information is a primer on trust to provide the reader with a basic understanding of trusts:

A. A Trust is Not a Separate Thing.

See discussion on page 2 of this Outline on the point that a trust is not an entity, such as is a corporation, partnership, LLC.

B. It's All in the Document.

Even if the trust is not triggered until later when the client dies, the instructions for how the trustee is to hold and administer the trust property typically is included in the client's Last Will and Testament or other estate planning or trust document. The trustee will look to the Will or other trust document for these instructions. Generally no new trust document is crafted later when the trust

provisions take effect.

C. A Trustee Becomes the Legal Owner.

The way a person puts property into a trust is to transfer the ownership of the property into the name of the trustee, with reference to the specific trust document. For example, Jane Doe, as Trustee for the John Doe Irrevocable Trust u/a/d May 4, 2011 [u/a/d means under agreement dated]. The trustee becomes the legal owner of the property. This is the case even if the settlor/grantor of the trust is also the trustee.

This legal ownership applies whether or not the settlor/grantor has the power to revoke the trust (a revocable trust compared to an irrevocable trust). More on this distinction further below.

Correspondingly, the beneficiaries of the trust do not own the trust property and have no legal title to the property. But, the beneficiaries do have what is called a beneficial interest in the trust depending on what benefits and powers the trust provisions allow.

D. Trusts Exist on a Spectrum.

Trusts fall on a spectrum. On one end is bullet-proof asset protection; at the other is unbounded control or access to the property by either or both (i) the settlor or grantor (the person who creates the trust) and (ii) the beneficiaries of the trust.

This point on the spectrum is a function of the provisions in the trust document. This point also directly affects both the tax treatment of the trust (for income, estate, and gift tax purposes) as well as the asset protection available for the trust property.

Less control generally operates to obtain the greatest tax planning and asset protection benefits.

Giving the beneficiaries no control is an option, for instance, if the beneficiaries are spendthrifts, have no head for saving money, or simply should have no hand in the control of the trust.

If, on the other hand, control is so broad that it puts the trust beneficiary virtually in the same position as outright ownership, then the IRS will disregard the trust as will creditors who are

seeking to force a distribution of the trust property to satisfy a claim against the beneficiary.

Or, if the settlor has too much control the trust will similarly be disregarded for tax and asset protection purposes. The settlor/grantor also can have no control, if desired.

E. Missing Trust Provisions and Gaps.

A trust document can be as short as one page and still be a valid trust. However, dealing with what is not included in the one pager will be a time-consuming and costly effort.

The precision and breadth of the trust language are attempts to have no provisions or gaps that create ambiguities or lend themselves to different meanings and inferences, thus requiring court involvement to resolve the issue. This can be an expensive and time-consuming burden.

The goal of preventing these problems is one reason trust documents frequently give the appearance of being much too longwinded.

F. Revocable vs. Irrevocable.

As already stated above in this Outline, the person who creates a revocable trust has the power to revoke or alter the trust in any manner without restrictions. As a result of the unfettered control, the revocable trust, generally speaking, gives that person no tax benefit or asset protection for the trust property.

The primary purpose of a revocable trust is to place the legal ownership of the property in the hands of the trustee, and the successor trustees if necessary.

This trustee ownership also has an effect on where the trust property is deemed to be owned for jurisdictional purposes. For example, the trustee may be situated in a desired jurisdiction so as to keep the property from being subject to the probate procedure in another state or in the home state of the person who creates the trust.

By contrast, an irrevocable trust is permanent. This is because the

person creating the trust generally cannot revoke or alter the trust. Depending on the particular design of an irrevocable trust, there can be a high degree of asset protection for the trust property. For tax purposes, a transfer of property to an irrevocable trust (if the settlor is not a beneficiary of the trust) generally is a gift for gift tax purposes.

G. Self-Settled vs. Third-Party Trusts.

A self-settled trust is where the person who creates the trust (the settlor or grantor) transfers property to the trust and is also a beneficiary of the trust.

A third-party trust is where the trust is funded by a third party (third relative to the trustee and beneficiaries) and the third party is not a beneficiary of the trust.

H. Trustee Power to Make Distributions.

A trust document can provide any manner of instructions for the trustee in determining to whom, how much, and when distributions are to be made from the trust. This is an essential part of the design of the trust and affects the point-on-the-spectrum discussed above as to the tax treatment and asset protection features of the trust.

The directions for how the trustee can make distributions are designed depending on the particular situation for the beneficiaries and will affect the tax and asset protection features of the trust.

Two common designs are as follows:

1. Ascertainable Standards ("HEMS").

The term ascertainable standards applies to a method of instruction to the trustee as to what authority he or she has to make distributions from the trust to the trust beneficiaries. Typically, the written trust provisions authorize the trustee to make distributions for the ascertainable standards for the health, education, maintenance, and support of the trust beneficiary (HEMS, for short).

The popularity of using these HEMS standards stems from

the tax law requirement that mandates the HEMS ascertainable standards in situations where a family member or beneficiary is serving as the trustee (thus, a non-independent trustee). For tax purposes, the HEMS standard keeps the trust beneficiary, who is also a trustee, from being deemed to hold a general power of appointment over the trust property. In short, a general power of appointment can cause the trust property to be valued as property of the beneficiary-trustee for estate and gift tax purposes.

2. Fully Discretionary Trust.

A discretionary trust is a trust where the trustee has absolute discretion as to the payment of trust principal and income to the beneficiaries. *See Henderson v. Collins*, 245 Ga. 776, 779 (1980); Restatement, Second, Trusts § 155 (1959). There are no objectively ascertainable HEMS standards for health, education, maintenance, or support, nor any other standard applicable to the trustee. The trustee has absolute discretion over whether, when, and how much a distribution should be to a beneficiary and provides the greatest amount of asset protection for the trust property.

I. <u>The Scope of Interested Parties.</u>

The design of the trust and how the trustee powers are defined can cause non-beneficiaries in certain instances to be classified under the law as interested parties in relation to the trust.

An interested party can, for example, compel the trustee to provide an accounting, can sue the trust to pursue a claim against one of the trust beneficiaries, or file a declaratory action in court against the trust, etc.

In most cases the design of the trust should be directed at reducing the scope of interested parties. The greatest reduction exists with a fully discretionary trust.

An excellent discussion of what is an interested party under Georgia law is in the majority and dissenting opinions in *Richards v. Richards*, 281 Ga. 285 (2006).

J. Decanting Power.

This is a power included in the trust document that allows a trustee essentially to hatch another new trust from the existing trust, sometimes referred to as a distribution-in-further-trust power. Thus, the trustee can create a completely new trust as an offshoot of the initial trust and fund the new trust by moving property out of the initial trust. This decanting power and the following limited power of appointment are two substantial provisions that can give a trust a great deal of flexibility to address future unanticipated changes in events.

K. Limited Powers of Appointment.

The difficulty of explaining a 'power of appointment' is that the topic is very complex, but also is one of the most important options in the design of a trust.

This is an express power under the terms of the trust document where one or more persons are named to hold a 'power of appointment'. The person who is given this power can effectively change and reroute to whom the trust property is to be distributed or can use the power to create a completely new subtrust.

> **The person who creates the power defines the terms and scope of the power and for whose benefit the power can be exercised.**

The following examples provide some illustrations of the mechanics of how powers of appointment can operate. In this example – a person's surviving spouse and his children will hold powers of appointment with the option as to whether or not to trigger these powers. If not triggered, the powers will have no effect on how your property otherwise is to be distributed under the terms of the trust (as if these powers were nonexistent).

Below are some examples of how the above powers might play out in a family situation:

Example 1

Assume Child A develops significant health problems

and the other Child B is in good health and financially well-off. The surviving spouse (their mother) in this example can trigger her power of appointment (called an "exercise" of the power) over the first-to-die spouse's by-pass trust property by directing that ultimately ¾ of the trust property will be held in a special needs medical trust for Child A, with any remaining trust property in this special needs trust passing to Child B upon Child A's death. The other ¼ in this example remains for Child B.

<u>Example 2</u>

Or, Child A might end up facing a very costly divorce. The surviving spouse (the mother of Child A) may decide to exercise her power of appointment so as to implement much stricter trust provisions for Child A. The stricter provisions can help insulate the trust property from the divorce action. This is an example where the surviving spouse is technically exercising her power of appointment as a distribution in further trust as to Child A's share of the trust property.

<u>Example 3</u>

A child (who, for example has no children) can exercise a power to direct a portion or all of the trust property (trust income or principal) to the child's spouse, if the child so chooses. Thus, these powers of appointment are very important in allowing the power holders – if they so choose – to include spouses of the descendants within the benefit of a trust.

Finally, the person who holds a limited power of appointment cannot exercise the power to increase his or her own share of the trust property. This is why the power is more accurately called a limited power of appointment, as compared to a <u>general</u> power of appointment. "General" means the power holder can increase his or her own share to the exclusion of other trust beneficiaries.

L. **What Local Law Applies to a Trust.**

A trust document is not required to include a choice-of-law mandate in the trust document. The absence of a mandate affords the greatest level of flexibility if circumstances develop where the state law of another jurisdiction might be more desirable.

In the absence of designating a mandate as to which law applies to the trust, the general rule is that the trust will be governed by the law where the trustee resides. There are also instances where co-trustees are be located in different state jurisdictions, requiring some conclusion by the parties or by a court that a balancing of factors will apply in determining which state law controls.

The balancing of factors might include a review of where the trust property is located, where the beneficiaries are located, where the settlor is, or was, located when he or she created the trust, and various other factors. However, the actual location of where one or more of the trustees reside (if either a sole trustee or co-trustees) is typically the trump card in these situations, absent a specific mandate in the trust document of the controlling law.

Keep in mind the written designation of law is not always controlling, as a mandate of a particular state law is not effective if the trust has no connections (or nexus) in that state.

M. **Spendthrift Clause.**

A spendthrift clause is a written provision typically included in a trust document. It prevents a trust beneficiary from depending on the future value or future distributions from the trust. More specifically, a trust beneficiary cannot anticipate, assign, pledge or transfer a future-interest in the trust income or trust principal.

For example, a child cannot purchase a new automobile by promising the seller that the seller will receive whatever future payments the child expects to receive from the trust. This also generally prevents the seller in this example from suing the trustee to compel payment to satisfy these types of future promises from a beneficiary.

By statute, Georgia law under O.C.G.A. § 53-12-28 states that "the

interest of the beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee" (underlining added).

The Georgia exception to a spendthrift clause is by statute under O.C.G.A. § 53-12-28(c). This statute allows a claimant to garnish trust distributions to the beneficiary in order for the garnishment to satisfy (i) tort judgments, (ii) taxes, (iii) governmental claims, (iv) alimony, (v) child support, or (vi) a judgment for necessities that were not voluntarily provided by the claimant.

N. Rule of Perpetuities.

The rule of perpetuities is a legal term as to how long a trust may operate before the law requires that the trust terminate. Historically, there has been a limitation by law on the duration of a trust, so as to avoid the amassing of centralized great wealth under a trust arrangement that never ends or that runs for a significant number of years. As a general rule, most states allow a trust to operate for 90 years from the date of creation of the trust. This 90-year duration is often referred to as a rule of perpetuities period for the trust.

In an effort to expand beyond 90 years, there is a current trend among some states to change their laws to allow significantly longer allowable periods for the trust, and in some cases place no limit on the duration of the trust.

From an academic perspective the notion of an expanded rule of perpetuities period that allows, for example, a 360 year or 1,000 year trust, might be appealing at first glance. But in reality, a client should consider the following effect of these extended periods for trusts from a practical perspective.

The National Conference of Commissioners on Uniform State Laws published a press release in 2000 stating that the average married couple will have 2.1 children. Under this assumption, a person who creates a trust today will likely have more than 100 descendants (who are beneficiaries of the trust) 150 years after the trust is created, around 2,500 beneficiaries 250 years after the trust is created, and 45,000 beneficiaries 350 years after the trust is

created. Five hundred years after the trust is created, the number of living beneficiaries could increase to 3.4 million. The internet site for additional information on these statistics is www.nccusl.org/nccusl/pressreleases/pr1-00-7.asp