

**TRUST ADVENTURES IN WONDERLAND – FROM THE MEADOW
AND THROUGH THE LOOKING GLASS; SITUS AND GOVERNING LAW**

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TRUST ADVENTURES IN WONDERLAND – FROM THE MEADOW AND THROUGH THE LOOKING GLASS; SITUS AND GOVERNING LAW¹

*...when suddenly a White Rabbit with pink eyes ran by her saying
“Oh dear! Oh dear! I shall be too late.”*

CHAPTER ONE

Down the Rabbit Hole – Changing Trust Situs

- I. What would make Alice change her trust situs? There are many reasons.
 - A. State Income Tax. We all know that states tax trust income differently. Some tax based on where the trustor resided when the trust became irrevocable. Some tax based on where the beneficiaries reside. For those states that tax trust income based on where the trustee resides, it is possible to avoid state income tax by changing the trustee and moving to a state that does not tax trust income. See, Bases of State Income Taxation of Nongrantor Trusts, 2009 Wilmington Trust Corporation on the ACTEC website.
 - B. Directed Trusts. Trusts that are overly concentrated in a single holding, that own and operate family businesses, or that invest in hedge funds, private equity and other non-traditional investments may be precluded from doing so under the prudent investor rule in a particular jurisdiction. Trustees in these states may fear liability for retaining such investments.
 - i. Advisers. Often, the trust can be moved to an affiliated trustee in another jurisdiction that has strong directed trust legislation. This would allow for the appointment of an Investment Direction Adviser or a Special Holdings Direction Adviser who is responsible for directing the trustee with respect to the non-traditional investments thereby relieving the trustee from liability for retaining these investments. The level of protection provided to a directed trustee depends on the law of the state where the trust is administered.
 - ii. For states that adopted the UTC, Section 808(b) of the UTC states:

If the terms of a trust confer upon a person other than the trustee of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power **unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious**

¹ The author acknowledges with gratitude the assistance of his associate, Monique Z. Valbuena, in the preparation of this outline.

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breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. [emphasis added]

- iii. For those states that follow the restatement of trusts, Section 75 of the Third Restatement of Trusts states:

...[I]f the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, **unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.** [emphasis added]

- iv. Finally, some states have enacted statutes providing greater protection to a directed trustee thereby allowing more diverse non-traditional investments to be held in the trust. For example, Delaware provides:

If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then **except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any such act. 12 Del. C. § 3313(b). The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. 12 Del. C. § 3301(g) and 12 Del. C. § 3301(h)(4). [emphasis added]

- C. Trust Remodeling. Virtually all wealthy individuals have established one or more irrevocable trusts. The terms and provisions of the trusts may become stale over time and require modification. The need for liberal standards for the modification of trusts has been recognized by leading trust authority. *Scott and Ascher on Trusts*, section 33.6, “Loosening the Standards for Termination and Modification.” States that have abolished the rule against perpetuity now have “dynasty trusts” which can last forever. Changed circumstances, new investment strategies, and other factors require increased flexibility for the modification of the administrative provisions of trusts. *Id.* See, A Practitioner’s Toolkit for Fixing Broken Trusts, ALI-ABA Sophisticated Estate Planning Techniques, September 8-9, 2011, by Michael M. Gordon.

- i. Common Modifications. Some of the more common modifications of irrevocable trusts include the following:
 - a. Division of a trustee’s responsibilities through the appointment of advisers to direct the trustee with respect to particular functions such as investment decisions and distribution decisions.

- b. Modification of administrative provisions of the trust to allow for the appointment and removal of trustees and advisers and the change of situs and the law governing the administration of the trust from one jurisdiction to the next.
 - c. Modification of the beneficial terms of the trust, such as removing a beneficiary's withdrawal right to protect trust assets for the beneficiary during the beneficiary's lifetime.
 - d. Conversion of grantor trust to non-grantor trust for income tax purposes.
 - e. Division of pot trust into separate share trusts for the benefit of different family lines descending from the grantor of the trust.
 - f. The correction of a mistake or ambiguity in the trust instrument.
 - g. Ratification of the prior administration of the trust without the need for a judicial accounting.
 - h. Changes to the standard of care applicable to the trustee and Investment Direction Adviser where the trust holds non-traditional investments.
 - i. Inclusion of indemnification provisions where the trust is moved to avoid state income tax or non-traditional investments are held by the trust.
 - j. For a retirement plan trust, the elimination of a beneficiary that is not a "designated beneficiary" or the removal of certain older beneficiaries on or before September 30 of the year following the year of the participant's death to achieve a longer deferral of the payout of the retirement benefits. Treas. Reg. §§ 1.401(a)(9)-4, A-4(a) and 1.401(a)(9)-5, A-7(a)(1).
- ii. Methods for Remodeling a Trust. Different states provide different methods for remodeling the provisions of irrevocable trusts.
- a. Decanting. Some states allow the trustee to decant the assets of an old irrevocable trust into a new one. Under the common law of certain jurisdictions, a trustee that has the ability to distribute principal from a trust to or for a beneficiary may instead exercise such authority by distributing the assets in further trust for the beneficiary. Phipps v. Palm Beach Trust Company, 142 Fla. 782 (1940); Widenmayer v. Johnson, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969). In 1992,

New York became the first state to enact a decanting statute. NY Estates, Powers & Trust Law § 10-6.6(b). Other states, such as Delaware, have followed. 12 Del. C. § 3528.

- b. Judicial Intervention. In most states, it is possible to seek a petition for instruction or construction to clarify an ambiguity in the trust instrument or to reform the trust instrument to correct a mistake. The difference between the two is that a modification of the trust is effective prospectively whereas a reformation of a trust corrects a mistake as of the inception of the execution of the trust instrument.
 - c. UTC. For states that adopted the UTC, the UTC allows all of the beneficiaries of a trust to consent to the modification of the terms of the trust instrument so long as the modification is not inconsistent with a material purpose of the trust and the modification is one that a court could have implemented. UTC § 411. Section 111 of the UTC also permits interested persons to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. These include: the interpretation or construction of the terms of the trust, the approval of a trustee's report or accounting, direction to a trustee to refrain from performing a particular act, the grant to a trustee of any desirable or necessary power, the resignation or appointment of a trustee and determination of the trustee's compensation, and the transfer of a trust's principal place of administration.
- D. Asset Protection. Perhaps Alice is considering marrying the Knave of Hearts (who stole the tarts all on a summer's day). She wants to protect her trust in the event of a divorce. Moving the trust situs to a jurisdiction with strong asset protection trust statutes may help Alice. And, if Alice created the trust herself, she may wish to have her trust situs in one of the jurisdictions that now recognize self-settled asset protection trusts.
- i. There are currently fourteen states that recognize self-settled asset protection trusts. These include: Alaska, Colorado, Delaware, Hawaii, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming.
- E. Total Return/Power to Adjust. Alas, poor Alice receives only the net income of her trust – not enough to feed a dormouse. Perhaps her trust should be moved to a state that allows the trustee to convert an income trust to a unitrust with a payout of between 3% and 5% or allows the trustee the power to adjust as between income and principal to more adequately provide for Alice.
- i. Section 643(b) of the Internal Revenue Code of 1986, as amended (“Code”), defines the income of a trust by reference to the governing instrument and state law.

- ii. The final regulations under this Code section, Treasury Regulation § 1.643(b)-1, confirm that income for trust purposes may be determined by a state statute that defines income to include a unitrust payment of no less than 3% and no more than 5%. The same regulation recognizes that a state statute may permit the trustee to make adjustments between income and principal to fulfill the trustee's duty of impartiality between the income and remainder beneficiary.
- F. Tax Savings/Disabling Statute. Alice's trust was drafted by the law firm of Hare and Hatter. Mad Hatter was the principal draftsman. The trust has many tax problems and Alice is both a beneficiary and the trustee.
- i. If Alice possesses a fiduciary or other power over the trust she should not have for tax purposes, moving the trust to a situs with a tax savings/disabling statute may limit that power to one that is permissible and will not produce adverse tax consequences without requiring Alice to resign as trustee.
 - ii. Among the states that have tax disabling statutes are Florida, Delaware, New York, and Pennsylvania. Fla. Stat. Ann. § 736.0814; 12 Del. C. § 3314; N.Y. Estates, Powers and Trusts Law § 10-10.1; 20 Pa. C.S.A. § 7501.
 - iii. For those states that adopted the UTC, UTC § 814 is a tax savings/disabling statute.
- G. Premortem Validation/In Terrorem Clauses. When Alice awoke from her dream, she found her sister looking through her trust records. The trust had been created by Alice's mother who was concerned that Alice's sister may challenge the trust.
- i. By moving the trust to a jurisdiction that allows the trust to be produced to Alice's sister with a strict time limit on any challenge the sister may wish to make, Alice and her mother can ensure that the trust will be enforced if it is not challenged while both are alive and able to defend it. See, for example, 12 Del. C. § 3546(a).
 - ii. Similarly, by including an in terrorem clause in a trust and moving the trust to a state that enforces in terrorem clauses, Alice may be able to prevent her sister from challenging the trust. . See, for example, 12 Del. C. § 3329(a).
- H. Silent Trusts. Section 813 of the UTC imposes a duty on the trustee to keep a qualified beneficiary reasonably informed about the trust and its administration. Sections 105(b)(8) and (9) of the UTC permit the trustor of a

trust to modify the duty to inform the beneficiary so the beneficiary is not informed until the beneficiary attains the age of 25.

- i. In the case of overly successful GRATs or a trust with unusually successful investments, the trustor may not want the beneficiary of a trust to realize the value of the trust until the beneficiary has attained a higher level of maturity (greater than the age of 25) to avoid discouraging the beneficiary from pursuing educational and career opportunities. In these cases, it is possible to move the trust to a jurisdiction that does not require notification to a beneficiary until a later time, such as the time when the first distribution is made to the beneficiary.

“What!” said the Queen. “You administered my trust for ten years in the Forest state and if you had moved it to the Meadow state we would have saved \$750,000 in state income tax?... off with your head!”

CHAPTER TWO

But, How Do I Get From Here to There?

- II. How can Alice move her trust? It depends.

“However, on the second time round, she came upon a low curtain she had not noticed before, and behind it was a little door about fifteen inches high: she tried the little golden key in the lock, and to her great delight it fitted!”

- A. The Trust Instrument. Just about all modern trusts now include change of situs provisions. These provisions allow a trust to be freely moved from one jurisdiction to another and allow the law governing the administration of the trust to be changed to the place of trust administration. In these cases, changing trust situs to a jurisdiction that addresses a particular beneficiary need is relatively easy to accomplish. The old trustee typically obtains release from the interested parties and makes the transfer to the new trustee without the need for a judicial accounting or judicial approval. The new trustee often signs a receipt and refunding agreement as part of the transaction.
- B. Court Petition. Where the trust is silent on change of situs or where a testamentary trust is involved, it may be necessary for a proceeding in the transferor state permitting the trust to be transferred to the transferee state and for the laws of the transferee state to thereafter govern the administration of the trust. A similar proceeding may also be required in the transferee state to accept jurisdiction over the trust and modify it to accomplish the objectives giving rise to the transfer of situs.

- C. UTC/State Law Change of Situs. The UTC includes flexible provisions for the transfer of trust situs. If all of the beneficiaries agree, the situs of the trust may be changed and the laws of the new situs may thereafter govern the administration of the trust. In addition, many states that have not adopted the UTC have laws allowing a change of situs. Included in the appendix is a chart of all 50 states with the current status of trust situs change legislation.

CHAPTER THREE Validity, Construction and Administration

Alice: "If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?"

- III. What effect does a transfer of situs have on the law governing the validity, construction and administration of Alice's trust?
- A. Overview. The Restatement (Second) of Conflict of Laws (the "Restatement") addresses governing law in terms of a trust's validity, construction and administration, whether the trust is testamentary or inter vivos, and whether the trust is of interests in movables or in land. See, Restatement §§ 268-272, 277-279. If a trust's governing instrument is silent with respect to the law that will apply upon a change of situs, the Restatement provides a framework for a conflict-of-laws analysis, i.e., whether the question at issue involves trust validity, construction, or administration, whether the trust is an inter vivos trust or a testamentary trust, and whether the issue involves personal property or real property. Id. The UTC takes a different approach, addressing governing law in terms of the validity of a trust and the meaning and effect of particular trust terms. UTC §§ 403 (validity) and 107 (meaning and effect). The UTC does not provide separate rules for testamentary and inter vivos trusts or for real and personal property held in trust. Id. In general, under both the Restatement and the UTC, the law designated in a trust instrument, if any, will govern.
- B. Definitions.
- i. Validity. Validity of a trust refers to the existence and enforceability of the trust. Questions relating to the validity of a trust are often classified in terms of the following: formal validity, such as whether the trustor has complied with the formalities necessary for the creation of the trust; substantial validity, such as whether the trust violates the rule against perpetuities or a rule against accumulations; and intrinsic validity, such as questions relating to the competency or capacity of the person creating the trust instrument. See, e.g., Restatement §§ 269, 270 and 278.

ii. Construction. Construction is the application of rules that determine a trustor's presumed intent when the settlor's actual intent cannot be ascertained, such as with respect to the identity of beneficiaries, beneficiaries' respective interests, and, in most cases, allocations between principal and income. See, e.g., Restatement §§ 268 comment e, and 277 comment c. Specific matters of construction include:

- With respect to a testamentary trust, whether heirs and next of kin are to be determined at the time of death of the testator or as of the time when their interest vests in possession;
- The effect of a gift over to the heirs or next of kin of a beneficiary;
- Whether the spouse of a beneficiary is to be included among the beneficiary's heirs or next of kin;
- The effect of gifts to classes;
- The circumstances under which the issue of a testator or of a beneficiary take per capita or per stirpes;
- Whether a disposition is vested or contingent;
- The effect of a gift over if a beneficiary should die without issue; and
- With respect to powers of appointment.

See, Restatement § 268 comment e (internal citations omitted). Also, construction and meaning and effect will likely include more modern issues such as:

- Adult adoption, including strategic adult adoptions done solely for inheritance purposes; and
- Whether a partner in a civil union or same sex marriage could take either directly or through the exercise of a power of appointment as a spouse of a trust beneficiary.

iii. Administration. Administration, as used in the Restatement, includes: matters that relate to the management of the trust; the duties owed by the trustee to the beneficiaries, including powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers; liability of the trustee for breach of trust and the trustee's right to indemnity for expenses incurred in the administration of the trust; propriety of trust investments; removal of trustees and appointment of successor trustees; trustee compensation; and termination or modification of trusts. See, e.g., Restatement §§ 268 comment d, and 271 comment a.

Comment a to Section 271 of the Restatement provides that matters of administration include duties owed by the trustee to the beneficiaries,

citing to the Restatement of Trusts (Second) §§ 169-185. Such duties include:

- Duty to Administer the Trust;
- Duty of Loyalty;
- Duty not to Delegate;
- Duty to Keep and Render Accounts;
- Duty to Furnish Information;
- Duty to Exercise Reasonable Care and Skill;
- Duty to Take and Keep Control;
- Duty to Preserve the Trust Property;
- Duty to Enforce Claims;
- Duty to Defend Actions;
- Duty to Keep Trust Property Separate;
- Duty with Respect to Bank Deposits;
- Duty to Make the Trust Property Productive;
- Duty to Pay Income to Beneficiary;
- Duty to Deal Impartially with Beneficiaries;
- Duty with Respect to Co-Trustee; and
- Duty with Respect to Holding Power of Control.

See, Restatement of Trusts (Second) §§ 169-185.

- iv. Meaning and Effect. The Prefatory Note to the UTC states that the UTC was drafted in close coordination with the writing of the Restatement (Third) of Trusts. The introductory note to Volume 1 of the Restatement (Third) of Trusts states that general rules of interpretation and construction are dealt with in the Restatement (Third) of Property (Wills and Other Donative Transfers). Comment b to Section 10.1 of the Restatement (Third) of Property states, “The controlling consideration in determining the meaning of a donative document is the donor’s intention. The controlling consideration in determining whether the donor’s intention is given effect is whether the donor’s intention is allowed by law.” The law governing “meaning and effect” does not include the law governing the validity of the trust, which is covered in UTC §§ 402 and 403, but does include the law governing construction and administration.
- v. Strong Public Policy. The Restatement provides that strong public policy considerations could invalidate choice of law provisions, such as where the trustor creates a revocable trust in a certain state in order to avoid the application of local law giving his surviving spouse a forced share of his estate. See, Restatement §§ 269 comment I, 270 comment b. The UTC references “strong public policy” considerations that could invalidate a trustor’s choice of law but does not specify such public policies, instead stating that they will vary depending on the locale and may change over time. See, Comment to UTC § 107.

- vi. Most Significant Relationship. In the absence of a designation of the law governing validity of an inter vivos trust, the Restatement states that the governing law will be that of the state to which the trust has its most significant relationship. Restatement § 270(b). Similarly, the UTC looks to the law of the jurisdiction having the most significant relationship to the matter at issue to determine the meaning and effect of trust provisions. UTC § 107. Factors to be considered when determining the jurisdiction having the most significant relationship include: the place of the trust's creation; the location of the trust property; and the domiciles of the settlor, the trustee and the beneficiaries. Comment to UTC § 107 (citing Restatement (Second) of Conflict of Laws §§ 270 comment c and 272 comment d (1971)). With respect to the UTC analysis, the above factors are supplemented by the common law of trusts and principles of equity, so it is important to look to court decisions for the relevance of the factors. UTC § 106.

C. Governing Law in General.

i. Validity.

- 1. Restatement. Under the Restatement, the law governing the validity of a trust for personal property will depend on the trustor's intent and domicile and whether the trust is testamentary or inter vivos. Restatement §§ 269, 270.
 - a. The validity of a will as a testamentary disposition is determined by the law that would be applied to testamentary dispositions by the testator's domicile at the time of death. Restatement § 269(a).
 - b. Matters that affect only the validity of trust provisions are governed by the law of the state designated in the trust instrument, provided that the state has a substantial relation to the trust, unless:
 - i. for trusts created under wills, the trust provision involved is invalid by reason of a strong public policy of the decedent's domicile. Restatement § 269(b)(i).
 - ii. for inter vivos trusts, the designated law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship. Restatement § 270(a).
 - c. If there is no effective governing law designation:

jurisdiction's law was contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue, or, in the absence of a specific designation, by the law of the jurisdiction having the most significant relationship to the matter at issue. UTC § 107. The comment to Section 107 states that the jurisdiction selected to govern the meaning and effect of the terms of the trust need not have any other connection to the trust.

ii. Construction.

1. Restatement. In general, the trustor's intent will govern questions of construction of a trust, regardless of whether the trust is testamentary or inter vivos, and of whether the trust is of an interest in movables or in land.
 - a. The law of the state designated in the trust instrument, if any, will govern the construction of the trust. Restatement §§ 268(1), 277(1). It is not necessary for the designated law to have any other connection with the trust. Restatement §§ 268 comment b, 277 comment b.
 - b. In the absence of a governing law designation:
 - i. a trust of interests in movables will be construed in accordance with the rules of construction of the state that the trustor likely would have desired to apply. Restatement § 268(2)(b).
 - ii. a trust of an interest in land will be construed in accordance with the rules of construction that would be applied by the courts of the situs of the land. Restatement § 277(2).
2. UTC. Section 107 of the UTC addresses governing law in terms of the "meaning and effect" of a trust.
 - a. Governing law will be that designated in the trust, unless the designation of law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. UTC § 107(1). The comment to Section 107 states that the jurisdiction selected to govern the meaning and effect of the terms of the trust need not have any other connection to the trust.
 - b. In absence of a controlling designation, the meaning and effect of trust terms are determined by the law of the

jurisdiction having the most significant relationship to the matter at issue. UTC § 107(2).

iii. Administration.

1. Restatement.

- a. In general, administration of a trust of interests in movables is governed by the law of the state designated in the trust instrument. See, Restatement §§ 271(a), 272(a).
 - i. On public policy grounds, certain matters of administration cannot be controlled by the trust terms, such as an attempt to grant a testamentary trustee exoneration from liability for failure to exercise prudence or for acts of self-dealing, or a power to fix the value of trust assets for all purposes. See, Restatement §§ 271 comment h, 272 comment f.
 - ii. With respect to matters that are subject to a trustor's control, the state whose law is designated to govern administration does not need to have any other relation to the trust. See, Restatement §§ 271 comment a, 272 comment c.
- b. With respect to a trust of interests in movables, if no governing law is designated, administration will be governed as follows :
 - i. for testamentary trusts, by the law of the testator's domicile at death unless the trust is to be administered in another state, in which case that other state's law governs administrative matters. Restatement § 271(b).
 - ii. for inter vivos trusts, by the local law of the state to which administration is most substantially related, often the law of the settlor's domicile or the local law of another state in which the trust is to be administered. Restatement § 272(b).
- c. Administration of a trust of an interest in land is determined by the law that would be applied by the courts of the situs of the land. Restatement § 279.

2. UTC.

- a. As stated above, Section 107 of the UTC addresses governing law in terms of the “meaning and effect” of a trust.
 - i. Governing law will be that designated in the trust for administration, unless the designation of law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. UTC § 107(1). The comment to Section 107 states that the jurisdiction selected to govern the meaning and effect of the terms of the trust need not have any other connection to the trust.
 - ii. The comment to Section 107 provides for designation of a “principal place of administration” of the trust and states, “[u]sually, the law of the trust’s principal place of administration will govern administrative matters...”
 - iii. In the absence of a controlling governing law designation, the meaning and effect of trust terms are determined by the law of the jurisdiction having the most significant relationship to the matter at issue. UTC § 107(2).

D. Governing Law After a Transfer of Situs of a Trust.

- i. Validity and Construction. Based on the above principles, the law governing the validity and construction of a trust and of trust terms should not change as a result of a change in the situs of the trust.
- ii. Administration.
 1. Restatement.
 - a. Testamentary Trusts. Upon changing the place of administration of a testamentary trust, the trust will be governed by the local law of the new jurisdiction if this is in accordance with the intention of the testator, express or implied.
 - i. The trust may implicitly authorize a change in the law governing administration when the trust instrument “contains a power to appoint a new trustee and the new trustee appointed is domiciled

or does business in another state.” Restatement § 271 comment g.

- ii. If the testator expressly or impliedly provides in the will that the administration of the trust should be governed by the local law of the state of his domicile at death, even though the place of administration should subsequently be changed, the law governing administration will not change absent a court order or change to the trust instrument. Restatement § 271 comment g.

b. Inter Vivos Trusts. When an inter vivos trust is not subject to the control of a particular court, a change in the place of the trust’s administration will change the law governing the administration of the trust, provided that such change is authorized by the terms of the trust, either express or implied.

- i. The trust may contain an express authorization that administration will be governed by the law of the state of the trustee’s principal place of business or that the trustee may change the situs of the trust and thereafter the law of the new state shall govern administration.
- ii. The trust may implicitly authorize a change in law governing administration “when the trust instrument contains a power to appoint a new trustee in another state, or simply a power to appoint a new trustee if this is construed to include the power to appoint a trustee in another state.” Restatement § 272 comment e.
- iii. The power to appoint a successor trustee may be construed to include a power to appoint a trust company or individual in another state, in which case the law governing administration of the trust thereafter is the local law of the other state and not the local law of the state of original jurisdiction. Restatement § 272 comment e.
- iv. If terms of a trust show the trustor’s intention that the trust is always to be administered under the local law of the original state, the mere fact that the trustee acquires a domicile in another state or that a successor trustee is appointed who is domiciled in

another state does not result in a change of the law applicable to administration. Restatement § 272 comment e.

2. UTC.

- a. Generally, a change in the place of the trust's administration will change the law governing the administration of the trust. The comment to Section 107 states that usually the law of the trust's principal place of administration will govern administrative matters.
- b. In addition to the governing law rules of Section 107, under the UTC, "interested persons" may enter into a binding nonjudicial settlement agreement with respect to transfer of a trust's principal place of administration. UTC § 111.
- c. A trustee, in furtherance of its duty to administer a trust at a place appropriate to its purposes, its administration and the interests of the beneficiaries, may transfer a trust's principal place of administration to another State or to a jurisdiction outside of the United States upon notice to the "qualified beneficiaries" not less than 60 days before initiating the transfer. UTC § 108.

IV. What is the Trust's Principal Place of Administration?

*"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master -- that's all."*

- A. The UTC. The UTC does not define "principal place of administration"; however, the comment to Section 108 states that a "trust's principal place of administration ordinarily will be the place where the trustee is located."
- B. The Restatement. The Restatement does not rely on the concept of a trust's principal place of administration. The Restatement (Third) of Trusts provides that a trustee has a duty to administer a trust at a location that is "reasonably suitable" to the purpose of the trust, its sound and efficient administration, and the interests of its beneficiaries. Restatement (Third) of Trusts § 76 comment b(2) (2007).
 - i. Section 76 of the Restatement (Third) of Trusts provides that in administering the trust, the trustee's responsibilities include: (i) ascertaining the duties and powers of the trusteeship, and the beneficiaries

and purposes of the trust; (ii) collecting and protecting trust property; (iii) managing the trust estate to provide returns or other benefits from trust property; and (iv) applying or distributing trust income and principal during the administration of the trust and upon its termination. Restatement (Third) of Trusts § 76(2).

- ii. The Reporter's Notes to Comment b(2) to Section 76 of the Restatement (Third) of Trusts discuss factors justifying a change in the place of administration of a trust, stating that such factors "include the nature and location (and particularly changes in the location) of assets under the trustee's management, relocation of beneficiaries or significant changes in their needs and circumstances, and opportunities to obtain more favorable tax or other treatment in another state or country."

C. Directed Trusts. A directed trust is a trust that removes one or more powers or discretions traditionally held by the trustee and vests that power or discretion in a person who is either a special trustee or not a trustee at all. The power or discretion can relate to investment decisions, management decisions, distributions decisions and any other decisions affecting the administration of the trusts. In the case of a corporate trustee, a directed trustee is often "an irrevocable trust in which a co-trustee, adviser, committee, or protector directs the corporate trustee on investment and/or distribution decisions." Richard W. Nenko, Directed Trusts: Can Directed Trustees Limit Their Liability?, March 27, 2007. For a more complete discussion of directed trusts, see, Section I.B., *supra*, and the sources cited therein.

- i. Example: Alice's trust holds interests in a closely-held LLC and stock in the family's business. Because the family does not wish to diversify these investments, the family's trusted business manager has been appointed as Investment Adviser to direct the corporate trustee with respect to the investment and management of the LLC and business assets, specifically whether to hold or diversify these assets. The trust also provides the trustee with broad discretion to make distributions of income and principal. Because the trustee does not have a longstanding relationship with the family and is not familiar with the individual beneficiaries' needs, a Distribution Adviser has been appointed, in accordance with the terms of the trust, to direct the trustee with respect to discretionary distributions. The family is also considering the appointment of a trust protector. The trustee is to handle the investment of the publicly traded stocks and bonds. Currently, the trust is administered under the law of the state where the trustee has its principal place of business.
- ii. Question: Is the trust still "administered" in the state where the corporate trustee has its principal place of business?

*“But I don’t want to go among mad people,” Alice remarked.
“Oh, you can’t help that,” said the Cat: “we’re all mad here.
I’m mad. You’re mad.”
“How do you know I’m mad?” said Alice.
“You must be,” said the Cat, “or you wouldn’t have come here.”*

- D. Principal Place of Administration for Directed Trusts. In *Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), aff’d, sub nom. *Hanson v. Denckla*, 357 U.S. 235, reh’g denied 258 U.S. 858 (1958) a Pennsylvania resident created a Delaware trust with a Delaware corporate fiduciary. The trust was revocable and the trustor retained the right to control distribution decisions. Moreover, the trustee could only exercise investment authority upon the written direction or consent of a trust adviser. The grantor and the trust adviser were both residing in Florida at the relevant time. The Supreme Court of Delaware found that the trust was administered in the state of Delaware (and not Florida) where the trustee was domiciled. This decision was affirmed by the Supreme Court of the United States.
- E. Relevant Factors. The following factors could be relevant to determine where Alice’s trust is principally administered:
- i. Location of trust’s various accounts, tangible personal property and documents evidencing ownership of trust property;
 - ii. Location where trust records are maintained;
 - iii. Location of trustee’s offices responsible for the administration of the trust and where trustee’s trust committee meetings and trust reviews occur;
 - iv. Location where the trust reviews and trust account administrative transactions occur;
 - v. Location where trust accountings, reports, and other communications with the settlor, beneficiaries and unrelated third parties are prepared and reviewed and to which trust account inquiries are directed;
 - vi. Location of trust officer(s) responsible for the administration of the trust at the time of performance of such administration;
 - vii. Location from which correspondence and other communications concerning the trust with the settlor, beneficiaries and unrelated third parties originate;
 - viii. Location where documents relating to the trust are executed on behalf of the trust;
 - ix. Location at which trust income and contributions are received and from which trust expenditures and distributions are authorized and disbursed;

- x. Location of trust officer meetings concerning the trust;
 - xi. Location where tax reports are prepared and reviewed and tax compliance reviews and audits are performed and reviewed;
 - xii. Location where trust instrument is executed by the trustee;
 - xiii. Location where decisions are made concerning when to make discretionary distributions and the amounts of such distributions.
- F. Regulatory Authority. Consideration should be given to regulatory authority over the trustee. State chartered corporate fiduciaries are regulated by the state agency where the charter is granted. Corporate fiduciaries that are National Associations conduct business throughout the United States and are regulated by the Office of the Comptroller of the Currency. In most cases, direction advisers are individuals who are not regulated in any respect. The principal place of administration would therefore appear to be the place where the trustee is located and subject to regulatory authority.

CHAPTER FOUR Back Through the Looking Glass

- V. Alice has chosen Cheshire Cat Trust Company (“Cheshire Cat”), a somewhat fading trust company, to serve in her home state as trustee. But, Cheshire Cat is only licensed in Wonderland. Can Cheshire Cat return with Alice through the looking glass to serve as her trustee?
- A. Regulatory Authority. As noted, corporate fiduciaries are generally regulated by the state in which they are chartered or, if they conduct business nationally, by the Office of the Comptroller of the Currency. The question arises, may a state chartered trust company serve as trustee for one of its clients in a state where it does not have a charter. This issue often arises in the following circumstances:
- i. Testamentary Trust. When a person has designated a local trustee to serve as trustee of a testamentary trust and later moves but continues the designation of the same trustee who is not chartered in the new state.
 - ii. Inter Vivos Trust. When a trust beneficiary with the power to remove and replace trustees wishes to have a corporate fiduciary, with whom the beneficiary has an existing financial relationship, serve as trustee for the beneficiary in the beneficiary’s state where the corporate trustee does not have a charter.
- B. Reciprocity. Most states (“Accepting States”) allow a bank or trust company chartered in another state to serve as trustee in the Accepting State provided the

laws where the foreign trust company is chartered would permit a bank or trust company chartered in the Accepting State to serve.

- i. Conditions. The foregoing rule of reciprocity often comes with certain conditions such as the requirement that the foreign trustee designate a state officer or resident as agent for the service of process in the Accepting State or require the filing of a bond.
 - ii. In states that have adopted the Uniform Probate Code, local qualification by a foreign trustee is not required for the trustee to receive a distribution from a local estate or hold or invest and manage property located there.
- C. Prohibition. Other states simply prohibit a foreign bank or trust company from administering a trust in that state.
- D. Chart. Included in the appendix is a chart of all 50 states showing which states authorize a foreign bank or trust company to administer trusts within the state and conditions that are imposed as well as those states that prohibit a foreign bank or trust company from engaging in business in that state.

CHAPTER FIVE Should Alice Go Down the Rabbit Hole?

VI. Conclusion.

*“Would you tell me, please, which way I ought to walk from here?”
“That depends a good deal on where you want to get to,” said the cat.
“I don’t much care where –” said Alice.
“Then it doesn’t matter which way you walk,” said the cat.*

- A. Validity and Construction. A change in trust situs should not affect the validity or construction (effect and meaning) of the trust. These will continue to be governed by the law designated in the trust instrument absent some other action on the part of the trustee and the trust beneficiaries.
- B. Administration. Changing the trustee to a trustee with its principal place of business in another state will likely change the administration of the trust so that the law of the trustee’s jurisdiction will thereafter govern the administration of the trust.
- C. Significance. Whether it really matters if the trustee conducts business in one state or another depends upon the circumstances of a particular trust. This outline should guide in the considerations for choosing an appropriate state for the administration of a trust.