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Rationalizing the State Income Taxation of Trusts: Chasing Quill Feathers in the Wind

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In *Quill Corp. v. North Dakota*,[1] the U.S. Supreme Court gave the states a two-part test that state income taxes must meet in order to satisfy the requirements of the Due Process Clause. There must be (1) ''some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'' and (2) ''the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.' ''[2]

Because *Quill* involved the due process standard that must be met by a state requiring a non-resident retailer to collect use taxes on sales to resident consumers rather than by a state imposing its income tax, the second prong of the test was not relevant to the decision.[3] In that decision, the Supreme Court actually relaxed the requirements of the first prong of the due process standard. It adopted a standard that equates *in personam* judicial jurisdiction with jurisdiction to impose a tax collection duty on a mail-order house. Contacts with a state ''such that the maintenance of [a] suit [against a non-resident] does not offend 'traditional notions of fair play and substantial justice' '' appear to be all that is needed to satisfy the due process requirements for the imposition of a state's use tax collection obligations.[4] Physical presence is not required. A purposeful direction of commercial activities at state residents will satisfy due process. Quill's annual mailings of 24 tons of catalogs and flyers into North Dakota was enough.

But Quill's purposeful direction of commercial activities was not enough to satisfy the dormant Commerce Clause.[5] In the end, it was the Commerce Clause that saved Quill from the burden of collecting use tax. *Quill* reaffirmed the four-part test for sustaining a state tax against a Commerce Clause challenge articulated by the Court in *Complete Auto Transit*.[6] The Court reaffirmed its earlier conclusion in *Bellas Hess*[7] that the long-standing, substantial nexus requirement of the Commerce Clause, which appeared as the first prong of *Complete Auto's* four-part test, was not satisfied by a mail-order seller whose only contacts with the state are by mail or common carrier (at least when applied in the context of use tax collec-

[*] © 2013 Carlyn S. McCaffrey and John C. McCaffrey. Updated August 15, 2020 by Carlyn S. McCaffrey, John C. McCaffrey, and Toni Ann Kruse, partner at McDermott Will & Emery LLP, with assistance from Haley Bybee, associate at McDermott Will & Emery LLP. An earlier version of this article was the basis for Carlyn McCaffrey's Mortimer H. Hess lecture delivered at the New York City Bar on May 10, 2010.

[1] 504 U.S. 298 (1992).

[2] 504 U.S. at 306.

[3] The due process standard is based on the Due Process Clause of the U.S. Constitution, U.S. Const. amend. V. and amend. XIV, §1, which provides that ''[n]o state shall . . . deprive any person of life, liberty, or property without due process of law. . . .''

[4] *Quill Corp*., 504 U.S. at 307.

[5] The dormant Commerce Clause doctrine is inferred from the power of Congress to regulate commerce conferred on it by U.S. Const. art. I, §8, cl.3. In general, its application limits the powers of states over interstate commerce, particularly the power to take actions that would discriminate against interstate commerce or unduly burden it.

[6] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In order to satisfy the test, the tax must:

> [1] . . . [be] applied to an activity with a substantial nexus with the taxing State, [2] . . . [be] fairly apportioned, [3] . . . not discriminate against interstate commerce, and [4] . . . [be] fairly related to the services provided by the State. *Id,* at 311

[7] *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967).

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tion issues).[8] More recently, in *South Dakota v. Wayfair*, the Supreme Court reversed *Bellas Hess* and partially overturned *Quill* recognizing that *Complete Auto*'s nexus requirement could potentially be satisfied by a seller's out-of-state activity.[9] The *Wayfair* decision, however left *Quill's* income-tax two-part due process test undisturbed.

What do Supreme Court decisions dealing with the ability of a state to force a non-resident retailer to collect use taxes have to do with the power of a state to claim a trust as a resident for income tax purposes when its trustees are all non-residents and its administrative activities are all conducted out of state? The connection is not apparent. Yet, the *Quill* decision has played a surprising and misguided role in the development of the law on this issue, steering it away from the Supreme Court's 1929 pronouncement in *Safe Deposit & Trust Company of Baltimore v. Virginia*.[10] In that case, the Court concluded that a Virginia tax imposed on the value of assets held by a Maryland trustee for the benefit of two residents of Virginia who were not to receive any distributions from the trust unless and until they reached age 25 violated the Fourteenth Amendment.[11]

Five years after *Quill*, in 1997, the District of Columbia Court of Appeals looked at that case's Due Process Clause analysis and concluded that the District of Columbia may, without violating the Due Process Clause, treat, for local income tax purposes, the testamentary trust of a domiciliary as a resident of the District of Columbia with the result that all of the trust's income was subject to the District's local income tax.

> While the Court's previous decisions had suggested that a state could not tax a corporation unless it had some physical presence within the state — such as sales personnel or local retail stores — these decisions had been preempted by general developments in the Court's due process jurisprudence. *See [Quill] at 306-08*. The Court overruled these decisions, noting that "it matters little that such solicitation [of business] is accompanied by a deluge of catalogs rather than a phalanx of drummers. The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Id.* at 308.[12]

A similar decision, again using *Quill's* Due Process analysis and this time expressing doubt that *Safe Deposit & Trust Company of Baltimore v. Virginia* was still good law, was reached by the Connecticut Supreme Court two years later.[13]

The Executive Budget Bill submitted to the New York legislature in 2010 contained a proposal to impose New York's income tax on all testamentary and inter vivos trusts of New York domiciliaries without regard to the location of the trustees or the administration of the trust.[14] The Statement in Support of the proposal acknowledged its inconsistency with a prior New York Court of Appeals decision.[15] The Statement justified the proposal's departure from precedent by referring to recent case law, including the District of Columbia case.[16]

The District of Columbia Court of Appeals, the Connecticut Supreme Court, and the drafters of the New York 2010 Executive Budget Bill all ignored the second prong of the Supreme Court's Due Process Clause test in *Quill*. The second prong of the test is specifically applicable for income tax purposes (as distinguished from sales or use tax collection responsibilities). It requires that "the 'income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.' "[17] This misinterpretation of *Quill* has muddied an area of the law already confounded by the historically inconsistent manner in which states have treated trusts for in-

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[8] *Quill Corp.*, 504 U.S. 298 at 311.

[9] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2084 (2018).

[10] 280 U.S. 83 (1929).

[11] The Court had reached a similar conclusion a year earlier in *Brooke v. Norfolk*, 277 U.S. 27 (1928).

[12] *District of Columbia v. The Chase Manhattan Bank*, 689 A.2d 539, 543 (1997).

[13] *Chase Manhattan Bank. v. Gavin*, 733 A.2d 782 (1999), *cert. denied,* 528 U.S. 965 (1999).

[14] NY A09710, amending NY Tax Law §605(b), introduced on January 19, 2010. The proposal provided some relief for trusts with ascertainable non-resident beneficiaries. The proposal was not enacted. On July 23, 2010, the New York State Department of Taxation and Finance revoked its previous policy and required, effective for years beginning on or after January 1, 2010, that all New York resident trusts (i.e., trusts that were created and funded by New York domiciliaries) to file annual New York State income tax returns even if they were not required to pay New York income taxes. TSB-M-10(5)I.

[15] Present New York law, which exempts New York trusts that were created by New York domiciliaries if certain requirements are satisfied "was enacted in 2003 to codify the rule originally set forth by the New York courts in *Mercantile-Safe Deposit & Trust Company v. Murphy*, 19 [A.D.2d] 765 ([App. Div.] 3d Dep't 1963). *aff'd*[,] 15 [N.Y.2d] 579 (1964)." Statement in Support of the Proposal, 14.

[16] "However, recent state and federal appellate decisions have upheld the constitutionality of taxing a percentage of trust income in cases where the trust grantor is a state resident according to the percentage of trust beneficiaries who are state residents. Many states also tax all of the income from testamentary trusts when the decedent was domiciled in that state, a practice that has also been upheld by state and federal courts." Statement in Support of the Proposal at 14-15.

[17] Note 3, above, at 306 (quoting *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 273 (1978)).

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come tax purposes and by the interstate competition for trust business fueled by financial institutions based in states that impose no tax on trusts with local trustees.[18] The Supreme Court's 2019 confirmation in *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1982 Family Trust*[19] of the continued vitality of *Quill's* two-part due process test may steer future decisions in the right direction.

The taxation of trusts is an important issue for some states.[20] Trusts are a big and growing business, particularly in the economies of smaller states that have developed legal and tax systems with the goal of attracting trust business. Delaware is one of those states. Less than half a percent of the people in the United States live in Delaware.[21] In 2013, fiduciary income tax returns filed by Delaware trustees reported almost seven percent of the income shown on the returns of all complex and simple trusts filed throughout the United States.[22] Those returns showed that Delaware fiduciaries collected almost five percent of the fiduciary fees collected by all trustees of complex and simple trusts in the United States. The fees of Delaware trustees were more than half of the trustee fees collected in each of California, Illinois, and Delaware, states whose populations were at least fourteen times the size of its own.[23]

It is important that the state legislatures get this issue right. A state that extends its taxing jurisdiction too far runs the risk of a possibly successful Constitutional challenge as well as the loss of trust business to out of state trustees with too little contact in the state to give it *in personam* jurisdiction over them. This could result in a substantial loss of trust business by major multi-state financial institutions.[24]

This article examines the Constitutional principles that could limit a state's power to require a trustee to pay income tax on a trust's income when the only connection between the state and the trustee is the residence or domicile of the trust's settlor either alone or combined with the residence of one or more trust beneficiaries. It then suggests an alternate approach that could be a more appropriate method for collecting revenue on income generated by trusts with nonresident trustees. Finally, it suggests a series of steps

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[18] *See*, *e.g.*, the website of the Peak Trust Company https://www.peaktrust.com/the-alaska-advantage/ which lists as one of the reasons to use Peak Trust Company's Alaska services, the fact that Alaska has no state income tax. This means that ''trust beneficiaries can see the earnings in the trust compound-free from state and local income taxes, thereby providing extraordinary year-on-year return.'' Similar claims are made about Delaware on the website of the RBC Trust Company (Delaware) Limited, https://www.rbctrust.com/tax-savings.html.

Even the federal government is not immune from the allure of tax competition. In 1996, Congress changed the definition of domestic trust for U.S. income tax purposes to exclude all trusts that were either subject to the primary jurisdiction of a non-U.S. court or subject to the control of one or more non-U.S. persons as to one or more types of decisions. For example, a trust created under the will of a resident of New York, with a New York trustee, New York beneficiaries and property in New York, is not a U.S. taxpayer if a decision to remove trustees requires the consent of a non-U.S. person. §7701(a)(30), §7701(a)(31). All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated. One of the principal objectives Treasury sought to achieve by implementing this new definition according to David K. Sutherland, former Associate International Tax Counsel and a principal draftsperson of the new law, was to level the competitive playing field for trust business between U.S. and foreign institutions. Under the former definition, a foreign person who might have preferred to use a U.S. financial institution as trustee was generally reluctant to do so because of the likelihood that the trust would have been taxed as a U.S. domestic trust. Under the new law a foreign person can easily use a U.S. financial institution without creating a domestic trust.

[19] 139 S. Ct. 2213.

[20] Until the Tax Cuts & Jobs Act of 2017 (the ''Act''), Pub. L. No. 115-97, the economic interests of the federal government were aligned with the states that impose no tax on trust income and with those who argue that the only basis for determining a trust's residence should be the residence of its trustees. This was so because, at any given level of trust income, the Treasury would have been likely to collect more revenue from trusts that pay no state income tax and that, therefore, were not entitled to state income tax deductions. Except to the extent that a trust is subject to the alternative minimum tax, it would likely have paid less federal income tax if it were entitled to a deduction for state income taxes. The alignment was weakened by the Act's $10,000 annual limitation on the deduction for state taxes.

[21] http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population.

[22] Statistics derived from the IRS publications, available at https://www.irs.gov/pub/irs-soi/13EstatesAndTrustsOneSheet.pdf and http://www.irs.gov/uac/SOI-Tax-Stats-Fiduciary-Income-and-Deductions-by-State-and-Entity-Type.

[23] Statistics derived from IRS Statistical Tables for the years 2014, available at http://www.irs.gov/uac/SOI-Tax-Stats-Fiduciary-Income-and-Deductions-by-State-and-Entity-Type. The chart in Appendix A shows the details of these statistics for California, Delaware, Illinois, and New York.

[24] The issue of the state residence of a trust is of importance primarily to two kinds of trusts: (1) so-called simple trusts, which must distribute all accounting income currently, do not provide that any amounts are to be used for charity and do not distribute corpus, and (2) so-called complex trusts. The term ''complex trusts'' generally refers to all trusts other than (1) simple trusts, (2) grantor trusts, trusts the income from which is taxed, pursuant to §671-§679, to their grantors or others who have or have had withdrawal rights over trust property and (3) charitable remainder trusts, the income from which is generally, pursuant to §664, either not taxed or taxed to the non-charitable beneficiaries who receive distributions. The issue of state residence is generally not relevant to either grantor or charitable remainder trusts because their income is not subject to federal tax, and most states follow the federal rules for determining the taxable income of trusts. Simple trusts are subjected to federal income tax to the extent of accumulated income attributable to corpus and complex trusts are subjected to federal income tax on all undistributed income.

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that advisors should consider taking to protect trustees from taxation in any states other than those in which the trustees reside.

CONSTITUTIONAL PRINCIPLES

Income Taxation of Individuals

A state may tax an individual's income based on either residency or the source of the income. In the case of its residents, a state's taxation power extends to all of the income of its residents no matter what the source, the Supreme Court has stated:

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.[25]

In the case of non-residents, the Supreme Court has stated that the taxing jurisdiction is limited to income that is derived from sources in the taxing state:

> [J]ust as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein. . . .[26]

These principles do not prevent taxation of the same income by different states. Multiple state taxation could and does occur either because the state of a taxpayer's residence and the states in which some or all of the taxpayer's income is sourced impose an income tax on the same income or because two or more states claim the taxpayer as a resident. Multiple taxation under these circumstances is not barred by the Due Process Clause,[27] but may raise concerns under the Commerce Clause, which requires fair apportionment as well as nondiscrimination against interstate commerce.[28] In order to mitigate this risk, most states allow their residents a credit for income taxes paid to other states on income sourced in those states. But because there is no standard definition of "source" for this purpose, the risk is not always eliminated.[29]

Despite the very broad power a state has to tax the income of its residents, there is no consistent definition of "residence" throughout the states. In the case of individuals, some states equate "residence" with domicile while some focus on the number of days an individual is present within the state during the tax year or the taxpayer's ownership of a permanent place of abode in the state. Individuals with contacts, commercial or otherwise, in multiple states, are potentially exposed to multiple unapportioned taxes on all of their income.

There are three sources of multiple tax exposure. First, more than one state may determine as a factual matter that a person meets the test for residence or domicile even if each state's test provides that an individual can be a resident of or domiciliary of only one state. A determination by the courts of one state that an individual is a resident or domiciliary of that state cannot be effectively challenged in the courts of another state when the courts of both states have reached the same conclusion.[30]

Second, different states may and have adopted different definitions of residence. For example Califor-

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[25] *New York ex rel Cohn v. Graves*, 300 U.S. 308, 312-313 (1937). *See also Oklahoma Tax Commissioner v. Chickasaw Nation*, 515 U.S. 450, 462-463 (1995); *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932).

[26] *Shafer v. Carter*, 252 U.S. 37, 52 (1920).

[27] *See, e.g., Curry v. McCanless*, 307 U.S. 357, 372-374 (1939), permitting both the state of a decedent's domicile and the state in which her trustee did business to impose an inheritance tax on stocks and bonds held in a trust over which the decedent had a general power of appointment at death. "In cases where the owner of intangibles confines his activity to the places of his domicil it has been found convenient to substitute a rule for a reason . . . by saying that his intangibles are taxed at their situs and not elsewhere, or perhaps less artificially, by invoking the maxim, *mobilia sequuntur personam* . . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains. . . ." *Curry*, 307 U.S. at 367.

[28] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *But see Zunamon v. Zehnder*, 308 Ill. App. 3d 69 (Ill. App. 1 Dist. 1999) holding that the "due process clause does not prohibit a state from taxing all of its residents' income, even income earned in another state," *Zunamon*, 308 Ill. App. 3d at 78 and the "commerce clause is not intended to 'protect state residents from their own state taxes.' " *Zunamon*, 308 Ill. App. 3d at 79.

[29] Consider for example, *Sosa v. Bower*, Cook Count Cir. Ct. Dkt No. 02 L 50670 (June 26, 2003) sustaining, against a Commerce Clause challenge, the denial of a credit for income taxes paid to other states on the income sourced in those states because the base of operation of the taxpayer's employer, a baseball team, was in Illinois.

[30] See *Dorrance v. Thayer-Martin*, 13 N.J. Misc. 168 (Sup. Ct. 1935), *aff'd,* 116 NJL 362, *cert. denied,* 298 U.S. 678 (1936); *Dorrance v. Martin*, 12 F. Supp. 746 (D.N.J. 1935), *aff'd sub nom. Hills v. Martin*, 296 U.S. 393 (1935); *New Jersey v. Pennsylvania*, 287 U.S. 580 (1933); *Dorrance's Estate*, 309 Pa. 151 (1932), *cert. denied,* 287 U.S. 660 (1932).

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nia's definition of resident includes all individuals who are in the state for "other than a temporary or transitory purpose" and all domiciliaries who are "outside the state for a temporary or transitory purpose."[31] New York's definition of resident includes (a) all domiciliaries other than those with no permanent place of abode in New York, with a permanent place of abode out of New York who spend no more than 30 days in the New York in the taxable year and (b) all individuals who maintain a permanent place of abode in New York and spend more than 183 days in New York in the taxable year.[32] Under these definitions, a domiciliary of California who is in New York for more than 183 days during a taxable year for a temporary purpose and who has a permanent place of abode in New York will be treated as a resident of both states for income tax purposes.

Finally, many states have adopted what is referred to under the jurisprudence of the Commerce Clause as "internally inconsistent taxing regimes."[33] An internally inconsistent taxing regime is one that, if adopted by more than one state would result in taxpayers with commercial activities in those states being taxed more heavily than those that operate in only one state. The definitions of residence that currently apply in New York, New Jersey, and Connecticut are examples of internally inconsistent taxing regimes. Each state's definition of "resident" is basically the same as New York's definition set forth above.[34] Because both New York and Connecticut have taken the position, with few exceptions, that presence in the state for even a portion of a day will constitute a full day for purposes of the day counting test,[35] it is not unusual for an individual with homes in both jurisdictions to be treated as a resident of both states. For example, an individual with a principal place of residence in Connecticut, and an apartment and job in New York City is likely to be in both states for at least part of more than 183 days in a taxable year. The same problem arises if an individual is treated as a resident of one of the states because of his or her domiciliary status and presence in the state for more than 30 days and as a resident of the other state because of his or her maintenance of a permanent residence and presence in the state for more than 183 days.

Although commentators have suggested that the adoption of internally inconsistent definitions of income could be vulnerable to a Commerce Clause challenge,[36] these challenges have not been successful.[37]

Income Taxation of Corporations

As is the case with the taxation of individuals, a state may tax a corporation's income based on either residency or the source of the income. In the case of its residents, a state's taxation power extends to all income of its residents no matter what the source. A corporation is generally deemed to be domiciled in its state of incorporation.[38] In some cases, particularly in the case of federally chartered corporations, the residence or domicile of the corporation may be its principal office.[39]

Income Taxation of Trustees and Trusts

Nonresident Trusts

There should be no difficulty applying the source based state taxation rules to trustees and trusts. Whatever a trust's residence, it should be subject, just as an individual is, to the income tax regimes of states within which its real estate and tangible personal property is located to the extent of the income generated by this property and of states within which it (or pass-through entities such as partnerships and limited liability companies in which it has investments) have commercial operations.

[31] Cal. Rev. & Tax Code §17014.

[32] N.Y. Tax Law §605(b).

[33] *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983).

[34] Conn. Gen. Stat. §12-701(1); N.J. Stat. §54A:1-2m; NY Tax Law §605(b).

[35] N.Y. Comp. Codes R. & Regs. tit. 20, §105.20(c); Conn. Gen. Stat. §12-711(b)(2)(B). There appears to be no authority in New Jersey dealing with the partial day issue. New York's treatment of a portion of a day as a full day for purposes of the day counting rule has been upheld by the Court of Appeals. *Leach v. Chu*, 150 A.D.2d 842 (1989). For a discussion of these issues, see Personal Income Tax Committee of the Association of the Bar of the City of New York, *Individual Double Taxation in the Tri-State Region,* 93 TNT 68-23 (Mar. 18, 1993).

[36] Jerome R. Hellerstein & Walter Hellerstein, State Taxation §20.03[1] (3d ed. 1998); Seth Goldstein, *"Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation,* 91 Colum. L. Rev. 119 (1991).

[37] *Chamberlain v. N.Y. Dep't Tax & Fin.*, 166 A.D.3d 112 (3rd Dep't 2018), *appeal dismissed* 32 N.Y.3d 1216, No. 2018-1236, 2019 N.Y. slip op. 66247 (Mar. 26, 2019), *cert. denied*, 589 U.S. Order No. 18-1569 (Oct. 7, 2019); *Edelman v. N.Y. Dep't Tax & Fin.*, 162 A.D.3d 574 (1st Dept 2018), *appeal dismissed* 32 N.Y.3d 1216, No. 2018-1236, 2019 N.Y. slip op. 66249 (Mar. 26, 2019), *cert. denied* 589 U.S. Order No. 18-1570 (Oct. 7, 2019); *Luther v. Commissioner of Revenue*, 588 N.W.2d 502 (Minn. 1999), *cert. denied,* 528 U.S. 821 (1999); *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530 (1998), *cert. denied*, 525 U.S. 931 (1998).

[38] *Cream of Wheat Company v. County of Grand Forks*, 253 U.S. 325 (1920).

[39] *Lehman Brothers Bank, FSB v. State Bank Commissioner*, 937 A.2d 95 (2007).

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Determining the Residence of a Trust

The difficulty arises when attempting to define the residence of a trust. Residence or domiciliary status is necessary to give a state the power to tax all of a trust's income without regard to source.

Neither Congress nor the Supreme Court has established any guidelines for determining the state residence of a trust. In fact, the Supreme Court has shown a decided lack of interest in achieving a resolution of this issue. Each time in recent years that it has been given the opportunity to rule on state residence issues, whether for individuals or trusts, it has declined to do so or has narrowly tailored its opinion to the facts of the case.[40]

Individuals generally have actual physical places of residence where they spend time. Juridical entities such as corporations, limited liability companies and limited partnerships which owe their existence to a filing or registration under the laws of a particular jurisdiction have the kind of connection with these jurisdictions that has traditionally justified subjecting them to the jurisdiction's tax regimes.

A common law trust, of course, is neither a physical being nor a juridical entity.[41] It is not a person or entity for state law purposes.[42] It has no physical location. It is a creature of the common law and, although a particular trust instrument may provide that a trust is to be governed by the laws of a particular state, it does not owe its existence to the laws of that state.[43] A trust is a ''fiduciary relationship with respect to property.''[44] It confers on a trustee legal title to property while imposing a set of equitable duties with respect to the property. It also confers on one or more other persons, the beneficiary or beneficiaries, a beneficial interest in and a set of rights with respect to the property. The nature of the equitable duties and the rights of the beneficiaries are dependent upon a combination of the terms of the instrument that creates the fiduciary relationship and the laws applicable to the trust.

Because a trust is not a person, one point of view is that it cannot have a residence. Only its settlor, trustees, and beneficiaries can have residences within a state sufficient to justify the imposition of state income tax on the basis of residence.[45]

Yet, we often speak of a trust having a ''situs.'' The factors that go into a determination of situs could be relevant in determining a trust's residence for state income tax purposes. A reference to a trust's situs is generally understood to mean its connection with a particular state or nation depending on such factors as:

1. the state where individual trustees live or where corporate trustees are organized or maintain their principal place of business;
2. the state where the trust is administered;
3. the state whose laws govern the validity, administration, and construction of the trust;
4. the settlor's domicile at the time of death in the case of a testamentary trust; and
5. the settlor's domicile or residence at the time of creation or funding of an irrevocable inter vi-

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[40] *Chamberlain v. N.Y. Dep't Tax & Fin.*, 166 A.D.3d 112 (3rd Dep't 2018), *appeal dismissed* 32 N.Y.3d 1216, No. 2018-1236, 2019 N.Y. slip op. 66247 (Mar. 26, 2019), *cert. denied*, 589 U.S. Order No. 18-1569, October 7, 2019 (residence of an individual); *Edelman v. N.Y. Dep't Tax & Fin.*, 162 A.D.3d 574 (1st Dep't 2018), *appeal dismissed* 32 N.Y.3d 1216, No. 2018-1236, 2019 N.Y. slip op. 66249 (Mar. 26, 2019), *cert. denied* 589 U.S. Order No. 18-1570 (Oct. 7, 2019) (residence of an individual); *N.C. Dep't of Rev. v. Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019) (residence of a trust); *Fielding v. Commissioner of Revenue*, 916 N.W.2d 323 (Minn. 2018), *cert. denied*, 139 S. Ct. 2773 (2019); *Chase Manhattan Bank, Trustee, et al. v. Gene Gavin*, 733 A.2d 782 (1999), *cert. denied,* 528 U.S. 965 (1999) (residence of a trust); *Luther v. Commissioner of Revenue*, 588 N.W.2d 502 (Minn. 1999), *cert. denied,* 528 U.S. 821 (1999) (residence of an individual); *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530 (1998), *cert. denied*, 525 U.S. 931 (1998) (residence of an individual).

[41] The focus of this article is on common law trusts, not on so-called ''Statutory Trusts'' formed under the laws of certain states. *See, e.g.,* Del. Code §3801-§3862 and Md Code §8-101(c). These trusts, which are used primarily for financing transactions and other investment and commercial purposes, are separate legal entities, more closely related to corporations than to common law trusts. The Supreme Court recently discussed the differences between common law trusts and trusts that are treated under state law as separate legal entities. *Americold Realty Trust v. ConAgra Foods, Inc*., 136 S. Ct. 1012 (2016), and concluded that the latter should be treated as separate entities for federal purposes as well.

[42] A trust, for example, cannot sue or be sued. Only its trustee can sue or be sued. Restatement (Third) Of Trusts §107 (2012). The characterization in §7701(a) of a trust as a ''person'' and a separate tax paying entity is a tax fiction that provides a convenient way of describing the manner in which income generated by trust assets is to be taxed. Despite the fact that the I.R.C. refers to a trust as a ''person,'' the regulations recognize its true nature. Reg. §301.7701-4(a) provides that ''[I]n general, the term 'trust' refers to an arrangement created either by a will or by an inter vivos trust declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts.''

[43] The U.S. Supreme Court's apparent disagreement with this principal in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950) should probably be limited to those particular species of trusts that are specifically authorized by statute, such as the common trust funds authorized by New York's common trust fund legislation, which were the subject of the litigation in the *Mullane* case.

[44] Restatement (Third) of Trusts §2 (2003).

[45] Joseph W. Blackburn, *Constitutional Limits on State Taxation of a Nonresident Trustee: Gavin Misinterprets and Misapplies Both Quill and McCulloch*, 76 Miss. L. J. 1 (2006).

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vos trust or at the time a revocable inter vivos trust becomes irrevocable.

The residence of a trust's beneficiaries as well as each of the factors listed above, either alone or in combination with one or more of the others, have been held to justify a conclusion that trusts are residents of a particular state.[46] The case law dealing with the validity of these various factors as determinatives of state residence for income tax purposes is discussed below.

THE STATE OF THE BENEFICIARY'S DOMICILE OR RESIDENCE

Two states, North Carolina and California, impose their income taxes on trusts that have beneficiaries who are state residents. Section 105-160.2 of the North Carolina statutes imposes the state's income tax on a trust that receives and retains income that is for the benefit of a North Carolina resident.[47] California imposes its income tax on the income of a trust if the beneficiary has a non-contingent interest and is a California resident.[48] Tennessee's income tax law, which is scheduled to be repealed in 2021,[49] is similar to North Carolina's. It imposes its income tax on the dividends and interest income of trustees who receive income for the benefit of a resident of Tennessee.[50] The instructions to the current version of the Tennessee income tax return, however, seem to limit the application of the tax to Tennessee fiduciaries.[51]

In 2019, the Supreme Court, relying on the due process principles of *Quill*, ruled in *North Carolina v. The Kimberley Rice Kaestner 1992 Family Trust*,[52] that the imposition of North Carolina's income tax law on a trust that had no contacts with the state other than the residence of its beneficiaries violates the Due Process Clause. The only connection the *Kaestner* trust had with North Carolina was the in-state residence of its discretionary beneficiaries. The trust was created by a New York resident, was governed by New York law, had a Connecticut trustee, and had no direct investments in the state of North Carolina. The beneficiaries had never received distributions from the trust and had no right to mandatory distributions, to assign their interests in the trust, or to direct investment decisions.

The Court's decision, consistent with traditional notions of judicial restraint that discourage courts from formulating "a rule of constitutional law broader than is required by the precise facts to which it is to be applied,"[53] is narrow. It concludes that a state tax based on the residence of a beneficiary alone will not survive a due process challenge unless the resident has "some degree of possession, control, or enjoyment of the trust property or a right to receive that property. . . ."[54] The decision's rejection of North Carolina's claim that the Court's earlier decision in *Safe Deposit & Trust Company v. Virginia*[55] was no longer good law,[56] suggests that the required degree of possession, control, or enjoyment requires more than the mere possibility that trust property will be distributed to an in-state resident if he or she lives until a particular age.

Even though the North Carolina statue provides no basis for imposing its tax on trusts other than the residence of trust beneficiaries, the Court did not strike down the statute. Instead, its ruling was limited to the application of the statute to the Kaestner Trust itself and, presumably, to any other trust from which a resident beneficiary "receives no trust income, has no right to demand that income, and is uncertain necessarily to receive a specific share of that income."[57] It specifically declined to suggest how it would rule if the beneficiaries had the right to receive future distributions.[58] As a result, §105-§160.2 of the North Carolina statute remains in effect. The North Carolina Department of Revenue instructs trustees to examine

[46] This inconsistency among the states in their treatment of trusts has been characterized by tax journalist David Cay Johnston as ". . . a riot of uncoordinated rules that some can exploit — a fact that is celebrated by a few as a benefit because of supposed tax competition." David Cay Johnston, *Getting Dinged by the DING*, 2010 TNT 59-8 (Mar. 29, 2010).

[47] N.C. Gen. Stat. Ann. §105-§160.2 (2017), imposing North Carolina income tax on any trust income that "is for the benefit of a North Carolina resident."

[48] Cal. Rev. & Tax Code Ann. §17742(a), imposing California income tax on the income of a trust "if the beneficiary (other than a beneficiary whose interest in the trust is contingent) is a California resident."

[49] Tenn. H.B. 534, 110th Gen. Assem. Reg. Sess.

[50] Tenn. Code Ann. §67-2-110 (a) (2013).

[51] Tenn. Form RV-0003501 (INC 250) (Rev. 12-19).

[52] 139 S. Ct. 2213 (2019).

[53] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[54] *Kaestner*, 139 S. Ct. at 2222.

[55] 280 U.S. 83 (1929).

[56] *Kaestner*, 139 S. Ct. 2213 at fn. 6.. Justice Alito wrote a concurring opinion, in which he was joined by Chief Justice Roberts and Justice Gorsuch, to make it clear that "the opinion merely applies . . . existing precedent , , , and does not open for reconsideration any points resolved by our prior decisions." *Kaestner*, 139 S. Ct. at 2226 (J. Alito concurring). The prior decisions referred to included *Safe Deposit & Trust Co. of Baltimore v. Virginia*, 280 U.S. 83 (1929), and *Brooke v. Norfolk*, 277 U.S. 27 (1928).

[57] *Kaestner*, 139 S. Ct. at 2226. A conclusion that a future right of a state resident to receive a distribution of trust income would be a permissible basis on which to base a state income tax would be consistent with the *Safe Deposit & Trust Co*. case. In that case, the beneficiaries would not receive accumulated income unless they lived to age 25.

[58] *Kaestner*, 139 S. Ct. 2213 at fn. 10 (2019).

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their trusts' connections with North Carolina to determine whether these connections are sufficient to enable North Carolina to tax the trust's income under the Due Process Clause.[59]

It is unclear from the *Kaestner* decision whether the Court would have reached a different result if the trust or its trustees had actually had other connections with North Carolina. Other connections that might have produced a different result include, for example, the residence of one or more trustees, the occurrence of trust administrative activities in the state, direct investments in the state, the occurrence of trustee-beneficiary meetings in the state, and the in-state location of trust records. The decision's reference to previous opinions upholding a state tax based on a trustee's residence in the state[60] and a state tax based on in-state trust administration[61] does not tell us that the presence of either of these factors would have validated a tax similar to North Carolina's, the statutory basis of which is the residence of a beneficiary. But, it does suggest that the state statues that are based on those factors would survive a Due Process Clause challenge.

PLACE OF RESIDENCE OR DOMICILE OF TRUSTEES AND PLACE OF ADMINISTRATION

At least 14 states treat trusts as residents for income tax purposes if one or more of the trustees are residents or domiciliaries of the state or if the trust is administered within the state.[62] At least eight more states treat trusts as residents based on the residence or domicile of the trustee or the place of administration combined either with the residence or domicile of the settlor or the residence or domicile of a beneficiary or both. These approaches to establishing trust residence are likely to be impervious to any Constitutional attack.[63] But, as Roger Traynor observed more than 70 years ago, these approaches are likely to be self-defeating.[64] The response to these rules by tax-motivated settlors and those who advise them is easily predictable. They will likely select trustees that are not residents of states that impose trust income tax based on trustee residence and that will administer the trust in states that do not impose state income tax based on in-state administration.

The chart below lists these states in four different categories.[65] The tax motivated settlor would be likely to avoid using trustees from states listed in the first portion of the chart because using such a trustee would expose their trusts to state income tax even if there were no other contacts with the state. If the tax motivated settlor is a resident of a state listed in the second portion of the chart, he or she would probably avoid the use of a trustee in the settlor's place of residence because that too would expose the trust to state income tax. If a trust has or is likely to have a beneficiary resident in a state listed in the third portion of the chart, a trustee from that state would probably not be selected. Finally, if a trust has a resident settlor and has or is likely to have a beneficiary residing in Massachusetts or unborn or unascertained beneficiaries, trustees that have offices in Massachusetts are likely to be avoided.[66]

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[59] *Estate Trusts, General Information*, North Carolina Dep't of Revenue, available at: https://www.ncdor.gov/taxes/estate-trusts/general-information.

[60] *Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947).

[61] *Hanson v. Denkla*, 357 U.S. 235 (1958).

[62] This article does not attempt to provide a description of all of the various approaches used by the different states in imposing their income taxes on trusts.

[63] *See Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947) (confirming Rhode Island's power to impose an ad valorem tax on half of the value of a trust created by a non-resident and administered outside of Rhode Island when one of two trustees was a Rhode Island resident); *Harvard Trust Company v. Commissioner*, 284 Mass. 225 (1933) (confirming Massachusetts's power to tax the income of a trust created by the will of a Vermont resident when the trustee was a Massachusetts resident); and *Pabst v. Wisc. Dep't of Taxation*, 19 Wis. 2d. 313 (1963) (confirming Wisconsin's power to impose its income tax on out-of-state trustees who administered a trust in Wisconsin).

[64] Roger John Traynor, *State Taxation of Trust Income,* 22 Iowa L. Rev. 268 (1936). See discussion at Note 112, below.

[65] This chart shows those states that will impose their income tax on a trust on account of the residence of the trustee or place of administration, either for this reason alone or when combined with the residence of the settlor or a beneficiary. It should not be relied on for a conclusion that the selection of a nonresident trustee would be sufficient to avoid that state's tax. Before reaching this conclusion, careful consideration should be given to each state's other criteria for determining tax residence. Appendix B contains citations to the applicable statutes and includes further descriptions of their scope.

[66] The Massachusetts Supreme Judicial Court has approved the treatment of Bank of America, N.A., a national bank with a commercial domicile and principal place of business in North Carolina, as an inhabitant of Massachusetts for purposes of subjecting the trusts of which it is trustee to the Massachusetts income tax because the bank has permanent offices in Massachusetts and performs some trustee services relating to the trusts in Massachusetts. *Bank of America, N.A. v. Commissioner of Revenue*, 474 Mass. 702 (2016).

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	State	Resident Trustee	Administered in State	Resident Trustee + Resident Settlor	Resident Trustee + Resident Beneficiary	Administered in State Resident Beneficiary
States That Tax Trusts Based on Residence of Trustee or Place of Administration Alone						
1	Arizona[67]	✓	✓			
2	California[68]	✓				
3	Colorado		✓			
4	Indiana		✓			
5	Kansas		✓			
6	Kentucky					
7	Louisiana[69]		✓			
8	Maryland		✓			
9	Mississippi		✓			
10	New Mexico	✓	✓			
11	North Dakota[70]	✓	✓			
12	Oregon	✓	✓			
13	South Carolina		✓			
States That Require the Additional Contact of a Resident Settlor						
1	Alabama[71]			✓		
2	Michigan			✓		
3	New Jersey			✓		
4	New York			✓		
States That Require the Additional Contact of a Resident Beneficiary						
1	Delaware				✓	
2	Hawaii				✓	✓
3	Ohio				✓	
State That Requires the Additional Contact of a Resident Settlor and Resident Beneficiary						
1	Massachusetts[72]			✓	✓	

[67] If a corporate trustee is engaged in interstate trust administration or is a co-trustee with a nonresident, then the trust is a resident trust if the corporate trustee conducts administration in the state. Ariz. Rev. Stat. §43-1301(5).

[68] A trust is subject to California income tax on all of its income if the trustee is a resident of California *or* if all non-contingent beneficiaries are residents of California. Cal. Rev. & Tax Code §17742. If there are resident and non-resident trustees and resident and non-resident noncontingent beneficiaries, the income subject to California income tax will be apportioned among them. Cal. Rev. & Tax Code §17743 and §17744.

[69] If the trust instrument does not include a governing law designation, then the trust is considered a Louisiana resident trust if it is administered in Louisiana. La. Stat. Ann. §47:300.10(3).

[70] A trust is a resident trust when its relationship or contacts with North Dakota are sufficient to create a ‘‘nexus.’’ These contacts include, but are not limited to: resident beneficiaries, resident trustees, assets having situs in the state, trust administration within the state, and the terms of the trust. N.D. Admin. Code §81-03-02.1-04.

[71] If a trust is created by the will of a decedent who was an Alabama resident at death or by a person who was an Alabama resident at the time the trust became irrevocable, the trust is considered a ‘‘resident trust’’ if either a fiduciary of the trust *or* a beneficiary of the trust to whom distributions currently may be made resides in or is domiciled in Alabama for more than seven months during the taxable year. Ala. Code §40-18-1(33).

[72] Massachusetts treats trust income accumulated for ‘‘unborn or unascertained persons’’ or ‘‘persons with uncertain interests’’ (even if such persons are actually nonresidents of Massachusetts) as if accumulated for the benefit of a Massachusetts resident. Mass. Gen. Laws ch. 62, §10.

STATE WHOSE LAWS GOVERN THE VALIDITY, ADMINISTRATION, AND CONSTRUCTION OF THE TRUST

One state, Louisiana, treats a trust as a resident of Louisiana for income tax purposes if ‘‘the trust instrument provides that the trust shall be governed by the laws of the state of Louisiana.’’[73] If no provision is made as to the governing law of the trust, the trust

[73] La. Stat. Ann. §47:300.10(3)(b).

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will be treated as a Louisiana resident only if the trust is actually administered in Louisiana.[74]

It is not clear that a governing law provision, without more, is sufficient to justify claiming a trust as a state resident. But those settlors who are trying to avoid subjecting their trusts to Louisiana income tax can easily protect their trustees from the necessity of challenging this provision by the simple expediency of choosing another state's governing law.

THE SETTLOR'S STATE OF DOMICILE AT THE TIME OF DEATH IN THE CASE OF A TESTAMENTARY TRUST

Fifteen states and the District of Columbia treat a trust as a state resident if the trust is a testamentary trust created under the will of a domiciliary whether or not the trust has any additional contacts with the state.[75] The case law that considers the automatic classification by a state of a domiciliary's testamentary trust as a resident is sparse but, on balance, favors permitting it.

The earliest case to consider the validity of imposing a state tax on out of state trustees of a testamentary trust with no ties (other than the historical tie of probate) to the taxing state seems to have been the 1898 decision of the Supreme Court of Maine in *City of Augusta v. Kimball*.[76] The tax in issue was a personal property tax. The tax assessors for Augusta attempted to collect from nonresident trustees a tax allocated to the portion of the trust held for the purpose of paying annuities to two residents of Augusta. The Maine Supreme Court rejected the attempt, concluding that:

> [T]he taxing power of the state necessarily stops at the state boundary lines. It cannot reach over into any other jurisdiction to seize upon persons or property for the purposes of taxation. Apart from the source of their title and authority as trustees, these defendants could not be made in any way amenable to the taxing powers of this state, since neither they nor any of their property were within the state or subject to its jurisdiction.[77]

18 years later, the Wisconsin Supreme Court reached a similar conclusion as to the application of its income tax law to a nonresident trustee of the testamentary trust of a Wisconsin domiciliary in *Bayfield County v. Pishon*.[78] This decision, however, was based on the court's reading of the term ''resident'' in Wisconsin's taxing statute to exclude nonresident trustees from the term ''person residing within the state,'' rather than on any constitutional principles.

The nonresident trustees in the next case to consider this issue, *First National Bank of Boston v. Harvey*,[79] lost to Vermont's state tax collector. Again, a testamentary trust was involved. The only trustee was a Massachusetts institution that administered the trust outside of Vermont. The Vermont Supreme Court concluded that the Vermont legislature had the power to control ''the acquirement of property by descent or by will'' and that this power included the power to provide that ''the intangible personal property of a resident testator whose will has been allowed by the probate court, shall be within the jurisdiction of that court for all purposes of administration [including taxation], no matter in what jurisdiction a trustee named in such will may reside, or where the property is kept.''[80]

41 years later, in 1981, the pendulum swung back in favor of the trustees. In *Taylor v. State Tax Commissioner*,[81] the Appellate Division of the New York State Supreme Court concluded that Florida resident trustees holding title to Florida real estate under the will of a New York domiciliary were not required to pay New York income tax on gain from the sale of the Florida real estate. The Florida trustees were appointed by a Florida court because, under Florida law, the trustee appointed under the will, a New York corporation, was prohibited from holding title to Florida real estate. New York Tax Law §601, §605, and §618

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[74] La. Stat. Ann. §47:300.10(3)(b).

[75] These states are Connecticut (Conn. Gen. Stat. §12-701), Illinois (35 Ill. Comp. Stat. §5/1501(a)(20), Louisiana (La. Stat. Ann. §47:300.10(3)(b), Maine (Me. Rev. Stat. Ann. tit. 36, §5102(4)(B)), Maryland (MD. CODE ANN., TAX—GEN. §10-101(k)(1)(ii)), Michigan (Mich. Comp. Laws §206.18(1)(c)), Minnesota (Minn. Stat. §290.01 Subd. 7b(a)(1)), Nebraska (Neb. Rev. Stat. §77-2714.01(6)(a)), Ohio (Ohio Rev. Code Ann. §5747.01(I)(3)), Oklahoma (Okla. Stat. tit. 68, §2353(6)(a)), Pennsylvania (72 Pa. Cons. Stat. §7301(s)(1)), Vermont (Vt. Stat. Ann. tit. 32, §5811(11)(B)(i)), Virginia (Va. Code Ann. §58.1-302)), West Virginia (W. Va. Code §11-21-7(c)(1)), and Wisconsin (Wis. Stat. §71.14(2)). The District of Columbia's position may be found at D.C. Code §47-1809.01.

[76] 91 Me. 605 (1898).

[77] 91 Me. at 607. The decision cites a series of U. S. Supreme Court decisions in support of its conclusion, including, *Railroad v. Jackson*, 74 U.S. 262 (1868), and *Foreign-held Bonds Tax Case*, 82 U.S. 300 (1872).

[78] 162 Wis. 466 (1916).

[79] 111 Vt. 281 (1940).

[80] 111 Vt. at 296, relying, in part, on *Harrison v. Commissioner*, 272 Mass. 422 (1930), a case in which the Massachusetts Supreme Court determined that Massachusetts lacked jurisdiction to impose its income tax on the Massachusetts resident trustees of a New York resident trust because New York had the power to ''establish situs for purposes of taxation over a testamentary trust fund created by its deceased residents in intangible personal property being administered by appointees of its own court . . . . [leaving] no room for a situs of the same property for taxation within this Commonwealth.''

[81] 85 A.D.2d 821 (1981).

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treated all testamentary trusts of New York domiciliaries as New York residents. In the view of the court, the historical domicile of the testator was insufficient to establish a basis for jurisdiction over the trustees.

In 1983, the Tax Court of New Jersey in *Pennoyer v. Taxation Division Director*[82] concluded that the creation of a trust in New Jersey, the New Jersey probate proceeding and the continued availability of the New Jersey courts to the non-resident trustees and beneficiaries is not sufficient to satisfy the due process requirements of the United States Constitution. In the words of the New Jersey Tax Court:

> Constitutional due process requires a minimal link between the taxing state and the individual, property or transaction it seeks to tax, and also requires that a state grant some benefit to the taxpayer in return for the tax imposed.[83]

The Missouri Supreme Court in *Swift v. Director of Revenue*,[84] also concluded that the creation of a trust under the will of a Missouri domiciliary, without more, does not provide Missouri with sufficient nexus to justify its continued tax jurisdiction over the trust. In that court's view, contemporary benefits and protections are needed. It suggested that a court should consider six points of contact in determining whether sufficient nexus existed:

> (1) the domicile of the settlor, (2) the state in which the trust is created, (3) the location of trust property, (4) the domicile of the beneficiaries, (5) the domicile of the trustees, and (6) the location of the administration of the trust. For purposes of supporting an income tax, the first two of these factors require the ongoing protection or benefit of state law only to the extent that one or more of the other four factors is present.[85]

It is unclear from the opinion whether any one of the contacts listed in (3) through (6) would be sufficient or whether it would be necessary to show the presence of either of the contacts in (1) and (2).[86]

The significance of the *Swift* opinion's contacts requirement was somewhat diminished four years later when the Missouri Supreme Court concluded that a testamentary trust was subject to Missouri's income tax jurisdiction as to all of its income by reason of a small real estate investment in Missouri.[87]

The three most recent chapters that have been written in the testamentary trust judicial saga were delivered by the District Columbia Court of Appeals in 1997, by the Connecticut Supreme Court in 1999, and by the Tax Court of New Jersey in 2013. The first two courts decided against the testamentary trustees; the New Jersey Tax Court decided in favor of the testamentary trustee.

The District of Columbia's decision, *District of Columbia v. The Chase Manhattan Bank*,[88] upheld the validity, against a Due Process challenge, of a statute that characterized a domiciliary's testamentary trust as a tax resident trust despite the fact that the trustee was a nonresident and administered the trust in New York. The court first decided that it had jurisdiction to tax the trust because, based on *Quill*, the trust's physical presence in the District of Columbia was not required. All that was required was sufficient contact to make it reasonable for the District to exercise jurisdiction. It then observed that a state may tax the entire income of its residents without regard to the source of its income. And finally, it determined that it was constitutionally reasonable to treat the trust as a tax resident because (1) ''in the context of individuals and corporations. . . the concept of residence, if established by reference to sufficient minimum contacts, carries significant legal weight'' and because (2) ''the Supreme Court has equated a state's power to exercise jurisdiction over an entity and the state's power to tax that entity.''[89] In the view of the court, ''sufficient minimum contacts'' were established by the ''District's continuing, supervisory jurisdiction over the entire trust'' and by the fact that:

> A testamentary trust, like a corporation, is a creature of the laws of the state where it is created and owes its very existence to those laws. . . . ''[A corporation] must dwell in the place of its creation, and cannot migrate to another sovereignty. The fact that its property and business were entirely in another state did not make it any less subject to taxation in the state of its domicile.''[90]

This conclusion is based on a flawed reading of *Quill*. *Quill*'s focus was on a state's power to require a non-resident, not a resident, to collect a tax which had a reasonable relationship to the non-resident's activities that were directed to state residents. It gave no

[82] 5 N.J. Tax 386 (1983). *See also Potter v. Taxation Div. Dir.*, 5 N.J. Tax 399, 404-05 (1983).

[83] 5 N.J. Tax at 392-93.

[84] 727 S.W.2d 880 (Mo. 1987).

[85] *Swift*, 727 S.W.2d at 882.

[86] As discussed above, the Supreme Court has indicated that the domicile of contingent beneficiaries alone is not sufficient to establish sufficient nexus for Due Process Clause purposes, but may be when combined with other points of contact with the state.

[87] *Westfall v. Dir. of Revenue*, 812 S.W.2d 513 (1991).

[88] 689 A.2d 539 (D.C. Ct. of App. 1997).

[89] *Chase Manhattan*, 689 A.2d at 544.

[90] *Chase Manhattan*, 689 A.2d at 545 (quoting *Cream of Wheat Co.*, 253 U.S. 325 (1920)).

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consideration at all to the factors that should be taken into account in determining whether a taxpayer was a resident because the taxpayer's residency was not an issue.

The Connecticut Supreme Court's approach to this issue in *Chase Manhattan Bank v. Gavin*[91] was similar to the District of Columbia Court of Appeal's approach. Its analysis starts by drawing the same puzzling connection between the due process nexus requirements for taxing nonresidents and the due process requirements for establishing residence.[92] The court's due process analysis, however, may not be relevant, because its ultimate basis for upholding the Connecticut residence status of the testamentary trusts involved was the benefits Connecticut provided them including the assurance under its laws of the continued existence of the trusts, as well as legal and administrative oversight. The court stated that:

> We conclude that this panoply of legal benefits and opportunities is comparable to those general legal benefits and opportunities that justify the imposition of taxes on the income of individual domiciliaries of the state. Just as the vitality of the trust as an economic entity is inextricably intertwined with the administration of the trust assets by a trustee located in New York, the viability of the trust as a legal entity is inextricably intertwined with the benefits and opportunities provided by the legal and judicial systems of Connecticut, and its legal viability is inextricably intertwined with its economic vitality. Neither its economic vitality nor its legal viability trumps the other for purposes of due process and taxation.[93]

The Connecticut Supreme Court also discussed a dormant Commerce Clause challenge. The trustees' argument was not that the Commerce Clause potentially applied to protect the trusts themselves. Trusts, of course, are not generally engaged in interstate commerce. Instead, the argument was that the Commerce Clause should be applied in order to protect the interstate market for trustee services. If testamentary trusts are automatically treated as residents of the domicile of their testators, the trustees argued that testators will be incentivized to select only resident trustees. To do otherwise would be to run the risk of multiple taxation because the state of the residence of the trustees would be able to impose its tax on their trusts. The court rejected the argument on the ground that it was not qualified to make a determination that the prospect of ''multiple taxation of some portion of the trust's future income'' would have a significant impact on ''such a multifaceted decision as the choice of a trustee is likely to be made.''[94]

The District of Columbia's and Connecticut's success in upholding the classification of all testamentary trustees as taxpaying state residents, no matter what their present connection with the state of origin, may be a pyrrhic victory. Advisors who are drafting testamentary plans for current clients will likely make provisions in their documents for a pour-over of assets that pass under a will to the trustees under an inter vivos trust instrument rather than to testamentary trustees. Once the unique link that exists between a testamentary trust and the probate court of the jurisdiction in which the will was probated is broken, the underpinnings of both of the *Chase* decisions, in so far as they apply to testamentary trusts, will collapse. The probate courts will become the repository of the poorly funded and poorly planned testamentary trusts, siphoning judicial recourses while adding comparatively little to the state fiscal situation.

The most recent decision on this issue is the New Jersey Tax Court's decision in *Residuary Trust A. v. Director*.[95] It was a victory for the taxpayer. Mr. Kassner died in 1998, a domiciliary of New Jersey. His will created a trust. The trustee of the trust was a resident of New York and administered the trust outside of New Jersey.

The Director of the New Jersey Division of Taxation took the position that the trust was subject to New Jersey income tax on all of its income because it was a testamentary trust of a deceased New Jersey domiciliary, regardless of the fact that it had no connection with New Jersey other than the historical domicile of its deceased settlor. He based his decision on the authority of *District of Columbia v. Chase Manhattan Bank* and *Chase Manhattan Bank v. Gavin*, claiming that the law on this issue had evolved since the earlier New Jersey decisions in *Pennoyer* and *Potter*. The New Jersey Tax Court rejected this position. The decision points out that neither case has any precedential value in New Jersey, and that the Director had not produced any compelling reasons why the New Jersey courts should disregard their own federal Due Process Clause based decisions to bar state in-

[91] 733 A.2d 782 (1999), *cert. denied,* 528 U.S. 965 (1999).

[92] The opinion observes that neither party raised the second part of the due process requirement — that the income attributed to the state must be rationally related to values connected with the taxing state. As a result, the court did not discuss it. Arguably, the second prong of the test is no more relevant than the first one. Neither prong applies to a resident or plays any role in the determination of a taxpayer's status as a resident. *Gavin*, 733 A.2d 782 at 800.

[93] *Gavin*, 733 A.2d at 799-800.

[94] *Gavin*, 733 A.2d at 806.

[95] 27 N.J. Tax 68 (2013), *aff'd*, 28 N.J. Tax 541 (N.J. Super. Ct. App. Div. 2015).

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come taxation of those trusts which had no current connections to the state.

The Director also argued that the Supreme Court's ruling in *Quill* created a basis for departing from the earlier cases' requirement of a presence in New Jersey. The New Jersey Tax Court rejected this argument because, unlike the Quill Corporation, the trust did not carry on a business targeted at state residents and because *Quill* involved the imposition of a use tax rather than an income tax.

THE STATE OF THE SETTLOR'S DOMICILE OR RESIDENCE AT THE TIME OF CREATION OR FUNDING OF AN IRREVOCABLE INTERVIVOS TRUST OR AT THE TIME A REVOCABLE INTER VIVOS TRUST BECOMES IRREVOCABLE

Eight states[96] and the District of Columbia[97] treat an inter vivos trust as a state resident if the settlor was a resident or domiciliary of the state at the time he or she funded the trust or, if the trust was initially revocable, at the time the trust became irrevocable, whether or not the trust has any additional contacts with the state. Five states will do so only if the trust also has resident beneficiaries.[98]

The seminal case relying on the Due Process Clause to strike down a state law that treated an inter vivos trust as a state resident because its settlor was a domiciliary is *Mercantile-Safe Deposit & Trust Company v. Murphy*.[99] The case focused on a trust established by a New York domiciliary. The trust became irrevocable at the settlor's death and received additional assets from his residuary estate. After his death, his wife and children, all of whom were New York residents, were the beneficiaries. The trustee was a Maryland corporation. It held the trust assets in Maryland and administered the trust in that state. Under §605 of New York's Tax Law, the trust was treated as a tax resident of New York because of the settlor's domiciliary status at the time of his death, when the trust first became irrevocable. The New York Court of Appeals affirmed the Appellate Division's conclusion that New York's imposition of an income tax on the trust's undistributed income would conflict with the Fourteenth Amendment's Due Process Clause.[100]

Both opinions relied on the Supreme Court's 1929 decision in *Safe Deposit & Trust Co. v. Virginia*.[101] This 1929 opinion held that the imposition of a tax by Virginia, the state where the trust beneficiaries lived, on property in the possession of nonresident trustees when the beneficiaries have no present right to control or possession, violates the Due Process Clause. No consideration was given to the significance of the settlor's domicile at the time when the trust became irrevocable. This is not surprising because once a trust becomes irrevocable, its settlor (or the settlor's estate, after his or her death), in the absence of specifically retained powers over the trust, has neither standing to involve himself or herself in its administration nor standing to object to the manner in which it is being administered. As a result, there is little rational basis for the settlor's domicile to play a role in determining where a trust should pay tax.

In *Chase Manhattan Bank v. Gavin*, the case earlier discussed in connection with testamentary trusts, the Connecticut Supreme Court refused to follow either *Safe Deposit & Trust* or *Mercantile-Safe Deposit*.[102] The opinion dealing with this issue focused on an inter vivos trust created by a Connecticut resident for the primary benefit of a single Connecticut resident. The court expressed doubt as to the continued validity of *Safe Deposit & Trust* because of the statement in the decision that to permit the beneficiaries' state of residence to tax the trust would permit "double taxation, both unjust and oppressive,"[103] noting that the Supreme Court reversed its prohibition against double tax in *Curry v. McCanless*.[104] But, as the New York Court of Appeals stated in *Mercantile*, the "lack of power of New York to tax in this instance stems not from the possibility of double tax but from the inability of a State to levy taxes beyond its border."[105] The Supreme Court affirmed the continued vitality of the *Safe Deposit & Trust* case in its recent *Kaestner* decision.

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[96] These states are Illinois, Maine, Maryland, Nebraska, Oklahoma, Vermont, Virginia, and West Virginia. Appendix C contains citations to the applicable statutes and includes further descriptions of their scope.

[97] D.C. Code §47-1809.01.

[98] These states are Connecticut, Delaware, Missouri, Ohio, and Rhode Island. Appendix C contains citations to the applicable statutes and includes further descriptions of their scope.

[99] 19 A.D.2d 765 (1963), *aff'd*, 15 N.Y.2d 579 (1964). Similar decisions were reached in *Blue v. Mich. Dep't of Treasury*, 185 Mich. App. 406 (1990), and *Potter v. Taxation Division Director*, 5 N.J. Tax 399 (1983).

[100] As a result of this decision, New York eventually amended its tax law to provide that resident trusts would not be subject to New York income tax unless they had one or more trustees resident in New York, New York source income, or real estate or tangible personal property located in New York. Ny Tax Law §605(b)(3)(D). Rather than amend its statute after the New Jersey Tax Court reached similar conclusions in *Potter* and *Pennoyer*, New Jersey simply amended the instructions to its fiduciary income tax return.

[101] 280 U.S. 83 (1929).

[102] See text accompanying Notes 68-71, above.

[103] *Safe Deposit & Trust Co.*, 280 U.S. 83, 93 (1929).

[104] 307 U.S. 357, 372-374 (1939).

[105] 15 N.Y.2d 579, 581 (1964).

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Even with its rejection of *Mercantile*, the Connecticut Supreme Court found it difficult to uphold the statute. It conceded that the connection between Connecticut and the trust was more attenuated than in the case of a testamentary trust. In the end it concluded that taxing the trust was justified because the beneficiary's right to eventual receipt of the accumulated trust income will continue to be protected by Connecticut so long as she is a domiciliary.[106] The beneficiary of the trust had substantial rights and controls over it. She was to receive all of the trust property if she reached the age of 48 and, if she died before then, had a power of appointment over the trust property. It is not clear that the court would have reached the same conclusion if the beneficiary's rights were less substantial.

In the 2013 case of *Linn v. Department of Revenue*, the Illinois Appellate Court limited the state's power to tax trusts on a "once subject to tax, forever subject to tax" regime as a violation of due process.[107] The *Linn* case involved an irrevocable trust created by an Illinois resident. The trust had no other ties to Illinois. The court, relying on *Mercantile* and *Blue v. Michigan Department of Treasury*,[108] a Michigan case that followed *Mercantile*, found that a grantor's residence at the time of a trust's creation is not alone sufficient to satisfy due process.[109]

The most recent decision on this issue is the Minnesota Supreme Court's decision in *Fielding v. Commissioner of Revenue*.[110] *Fielding* involved four grantor trusts, created by a domiciliary of Minnesota. Each trust was funded with nonvoting shares of common stock in a Minnesota S corporation. A few years later, the grantor relinquished his power to substitute trust assets, and the trusts became irrevocable "resident trusts" under Minnesota Statute §290.01, subd. 7b(a). Subsequently, a nonresident of Minnesota became the sole trustee for the trusts and all shareholders of the S corporation sold their stock. As resident trusts, Minnesota claimed that the trusts were taxable in Minnesota on their worldwide income including the income tax from the sale of the S corporation stock.

The Minnesota Supreme Court determined that imposition of Minnesota income tax on the trusts violated the Due Process Clause of the federal and Minnesota state constitutions. The Fielding trustees had argued that the statute was unconstitutional on its face because it imposed tax based on the single factor of the grantor's domicile when the trusts became irrevocable. The court's decision was more narrow. It held that the statute was unconstitutional when applied to this particular case because there were insufficient additional contacts between the trust and the state to satisfy the "minimum contacts" and "rational relationship" elements of Due Process. The trusts did not own any physical property located within Minnesota, the grantor's domicile was no longer relevant after the trusts became irrevocable, and the fact that the trust instruments were prepared and retained by Minnesota attorneys, designated Minnesota law, and included a Minnesota resident as a primary beneficiary of one of the trusts were also irrelevant. The Minnesota Department of Revenue's petition to the U.S. Supreme Court for *writ of certiorari* was denied on June 28, 2019.

The *Gavin* decision stands alone. No other decision by a state court has concluded that the residence of the settlor and beneficiary of a trust, without additional contacts, is sufficient to overcome the Due Process Clause barriers to the state's imposition of an income tax on its trustee. Whatever precedential value of *Gavin* decision had was significantly eroded by the analysis in the majority opinion in *Kaestner* of the Court's prior decisions permitting state taxation based on the residence of a trust's settlor. The opinion suggests that the fact that the settlor had retained significant power over the assets held in the trust was critical to its decision to permit state taxation based on the historical residence of the settlor.[111]

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[106] The court placed partial reliance on the California Supreme Court's decision in *McCulloch v. Franchise Tax Board*, 61 Cal.2d 186 (1964). This reliance is misplaced. Although the California court seemed to uphold the validity of a statute that taxed a trust because of the California residence of its beneficiary, the specific question before it was whether California could tax the resident beneficiary when she received a distribution from the trust of previously untaxed income.

[107] 2 N.E.3d 1203 (Ill. App. Ct. 2013).

[108] *Blue v. Mich. Dep't of Treasury*, 185 Mich. App. 406 (1990).

[109] The Pennsylvania Commonwealth Court reached a similar conclusion in *McNeil v. Commonwealth*, 67 A.3d 185 (Pa. Commw. Ct. 2013), but based it on the dormant Commerce Clause rather than the Due Process Clause. It held that the Pennsylvania statutory definition of a resident trust based on the single factor of the residency of a trust's grantor was unconstitutional. Although the grantor was a resident of Pennsylvania at the time of the trusts' creation, the trusts were administered in Delaware, governed by Delaware law, and the trustees and trust assets were in Delaware. The only other connection with Pennsylvania was the residence of the discretionary beneficiaries. Relying on *Quill* and *Complete Auto Transit*, the court held that the residence of discretionary trust beneficiaries was insufficient nexus, even when coupled with the historical residence of the settlor to satisfy the dormant Commerce Clause. In light of the Supreme Court's decision in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), that an in-state physical connection is not necessary to satisfy the dormant Commerce Clause, if the Pennsylvania court is faced with this issue again, it might use the Due Process Clause rather than the dormant Commerce Clause to reach its decision.

[110] 916 N.W.2d 323 (Minn. 2018), *cert. denied,* 139 S. Ct. 2773 (2019).

[111] *Kaestner*, 139 S. Ct. at 2222, referring to the Court's earlier decisions in *Graves v. Elliott*, 307 U.S. 383 (1939), which involved a trust revocable by its settlor, and *Curry v. McCanless*,

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LEGISLATIVE OPTIONS

The power of states to keep trusts created by their residents tethered to their taxing jurisdictions has become more difficult to exercise as trusts and trustees become increasingly mobile. Although there have been victories by some states, over time, particularly in light of the *Kaestner* decision, it is likely that trusts and trustees will continue to migrate away from taxing jurisdictions.

In 1936 Roger Traynor foresaw this problem and posed at least a partial solution to it.[112] His proposed solution, while not perfect and certainly not simple, would go a long way toward preventing some of the revenue loss states sustain when trusts that accumulate income for future distributions to the states' residents do so in another state, generally one that imposes no state income tax.

As then Professor Traynor pointed out, the persons who ultimately enjoy trust income are not the trust or the trustees, but the beneficiaries. As the ultimate recipients, they are the appropriate persons to bear the tax burden. In the case of many trusts, it is impossible to determine with accuracy which individuals will ultimately receive income accumulated for future distribution. In some cases, individual beneficiaries must live until a particular age or outlive another beneficiary in order to receive a distribution of accumulated income. In other cases, trust distributions are within the discretion of a trustee.

As *Kaestner* indicated, until the identity of the recipient is known and the recipient's interests are not contingent, imposing current taxation on them is likely to violate the Due Process Clause. But once income is distributed to a resident of the state, there can be no further objection to state taxation.

What is suggested here is consideration of a backup system of trust taxation similar to those of California and New York.[113] Both California and New York have tax systems that impose a tax, commonly referred to as a ''throw-back tax,'' under certain circumstances on a resident beneficiary who receives trust income accumulated in a prior year. For example, California provides for current taxation of a trust with California residents with non-contingent interests. When accumulated income is ultimately distributed to a California resident, to the extent California income tax has not been paid, the recipient, whether or not he or she had a non-contingent interest, must pay income tax on the amount received. New York enacted a similar taxation system that applies to distributions of income (which was not previously subject to New York tax) from an exempt resident trust to a New York beneficiary after June 1, 2014. Although the beneficiaries under this type of system may enjoy a period of state-tax free deferral, in the end the state will collect. The amount collected is likely not to be as substantial as it could have collected if it could sustain a system of current taxation based on the residence of the settlor or the beneficiaries. But this system is one that is more likely to enjoy continued viability and less likely to be avoided by movements of assets and trustees to states with little or no state income tax.[114]

PLANNING THOUGHTS

The inconsistencies in approaches to the state taxation of trusts present both planning challenges and opportunities. If the minimization of state taxation is an important client goal, the tax advisor should keep the following considerations in mind:

1. ***Initial Trustees:*** Select trustees that are not residents of a state that imposes an income tax based on the residence of its trustees. Because it is not always clear what state an entity resides in, if an entity-trustee is used, the entity selected should be one that is not organized in and does not have a place of business in a state that imposes its income tax on trusts based on the residence of the trust's trustees. Some trusts have trustees who are directed as to certain trustee functions, such as investments and distributions, by advisors. Because advisors may be characterized as trustees, make sure that the advisors are not residents of states that impose income tax based on trustee residence.[115]

2. ***Removing and Replacing Trustees:*** Provide a mechanism for removing and replacing trustees and include as a factor to consider in exercising the power to remove and replace whether the residence of a trustee or proposed trustee would cause the trust to be subject to state income tax.

3. ***Selection of Governing Law:*** Select the governing law of a state that does not impose a state income tax. A successful future challenge to a

307 U.S. 357 (1939), which involved a trust that paid income to its settlor for life and the property of which was to be disposed of at the settlor's death by her will.

[112] Roger John Traynor, *State Taxation of Trust Income,* 22 Iowa L. Rev. 268 (1936).

[113] Cal. Rev. & Tax Code §17743; N.Y. Tax Law §612(b)(40).

[114] The suggested approach is similar to the one used by the federal government to tax income accumulated in foreign trusts. *See* §665-§668. The federal system imposes an interest factor that in some cases will eliminate the advantage of the tax deferral. States could adopt a similar approach.

[115] *See,* N.Y. TSB-A-04(7)I at 1 (Nov. 12, 2004), (holding that members of a trustee advisory committee should be treated as trustees for purpose of determining whether any trustees are residents of New York).

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state's attempt to impose an income tax could treat the selected governing law as a relevant contact with that state.

4. ***Provide a Mechanism for Changing the Governing Law and Place of Administration:*** If the initial state selected becomes a taxing jurisdiction, it may be desirable to change the trust's governing law and the place where the trust is administered.

5. ***Avoid Testamentary Trusts:*** Avoid the use of testamentary trusts whether or not the client is domiciled in a jurisdiction that treats such trusts as resident taxpayers. The constitutionality of a state income tax on domiciliary testamentary trusts may well be upheld. The constitutionality of a state income tax on the inter vivos trusts of its domiciliaries is less likely to be upheld. A state that does not tax its domiciliaries' testamentary trusts today, may do so tomorrow. Once the trust has been set up under a will and subject to a local probate court, it may be difficult to remove the trust from the jurisdiction of the probate court.

Testamentary trusts can generally be avoided by funding a revocable trust during the client's lifetime with all or virtually all of his or her assets or by creating a minimally funded inter vivos trust that will be the recipient of assets passing under the will.

6. ***Avoid Giving Fixed Interests to Beneficiaries:*** Avoid giving fixed interests in trusts to beneficiaries who live in states with rules similar to California's that tax a trust based on the existence of beneficiaries with non-contingent interests or states with rules similar to North Carolina, which taxes trusts that hold income for the benefit of North Carolina resident. *Kaestner* might have been decided differently if the trust beneficiaries had held noncontingent interests in the trust.

7. ***Provide a Mechanism for Adding Beneficiaries With Non-Contingent Interests:*** Some states will subject a trust to income tax if the trust was created by a state resident and there are no nonresident beneficiaries with non-contingent interests. A mechanism to add nonresident beneficiaries under appropriate circumstances could be useful.

8. ***Provide Decanting Provisions:*** A decanting provision that permits trustees to move assets out of one trust into another in another jurisdiction could prove invaluable if the tax laws of the original jurisdiction change.

9. ***Minimize Contacts***: Settlors who reside in states that impose income tax on trusts based on the residence of the settlor should try to eliminate all other contacts between their state of residence and their trusts and also minimize any retained powers over their trusts.

APPENDIX A - 2014 FIDUCIARY INCOME TAX RETURNS

	California	Delaware	Illinois	New York	Texas	United States**
Number of Returns	261,151	16,831	172,322	125,208	157,161	2,105,659
Top Income Tax Bracket for 2014*	13.30%	0.0%	5.00%	8.82%	0%	
% of Total Returns	12.4%	0.8%	8.2%	6%	7.5%	
Income on Returns	$13,437,586,000	$3,285,380,000	$12,368,898,000	$10,875,542,000	$13,617,825,000	$119,913,695,000
% of Total Income	11.2%	2.7%	10.3%	9.07%	11.4%	
Fiduciary Fees	$363,848,000	$134,759,000	$566,048,000	$321,922,000	$294,054,000	$4,243,457,000
% of Total Fiduciary Fees	8.6%	3.2%	13.3%	7.6%	6.93%	
Attorney & Accountant Fees	$563,228,000	$30,814,000	$196,167,000	$197,650,000	$181,978,000	$2,615,072,000
% of Total Attorney & Accountant Fees	21.5%	1.18%	7.5%	7.6%	6.96%	
Population	38,596,972	932,487	12,884,493	19,651,049	26,964,333	318,301,008
% of Total Population	12.1%	0.3%	4.1%	6.2%	8.5%	

* The Delaware tax rate is effectively zero for trusts that do not accumulate income for Delaware residents.

** Missing data for North Carolina.

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APPENDIX B - STATES THAT TAX TRUSTS BASED ON RESIDENCE OF TRUSTEES OR PLACE OF ADMINISTRATION ALONE

State and Cite	Comments
Arizona: Ariz. Rev. Stat. §43-1301(5)	A resident trust is a trust with a resident fiduciary. If a corporate fiduciary engaged in interstate trust administration is the sole fiduciary, or is a co-fiduciary with a nonresident, the trust is a resident trust only if the corporate fiduciary conducts the administration of the trust in Arizona.
California: Cal. Rev. & Tax. Code §17742	The entire income of a trust is subject to California tax if the fiduciary or beneficiary (other than a contingent beneficiary) is a resident, regardless of the residence of the settlor. The residence of a corporate fiduciary is where the corporation transacts the major portion of its administration of the trust.
Colorado: Colo. Rev. Stat. §39-22-103(10)	A resident trust is a trust administered in Colorado.
Indiana: 45 Ind. Admin. Code Rule 3.1-1-12	The residence of a trust is where it is administered.
Kansas: Kan. Stat. Ann. §79-32,109(d)	Resident trust means a trust which is administered in Kansas. A trust will not be deemed to be administered in Kansas solely because it is subject to the jurisdiction of a district court within Kansas.
Kentucky: Ky. Rev. Stat. Ann. §141.030(17)	A resident is a domiciliary or one who maintains abode and spends more than 183 days of the tax year in state. "The tax imposed by *KRS141.020* upon individuals shall apply to estates and trusts and to all fiduciaries." (Referring to 25(g), defining "doing business in this state"). "Nothing in this subsection shall be interpreted in a manner that goes beyond the limitations imposed and protections provided by the United States Constitution or Pub. L. No. 86-272."
Louisiana: La. Rev. Stat. Ann. §47:300.10(3)	Resident trust means a trust or a portion of a trust created by will of a domiciled decedent or if the trust is governed by the laws of Louisiana. If the trust instrument is silent with regard to governing law, then the trust shall be considered a resident rust only if the trust is administered in Louisiana.
Maryland: Md. Code Ann., Tax-Gen. §10-101(k)(l)(iii)	The trustee of a trust must pay Maryland income tax if (1) the trust is made by or consists of property transferred by will of domiciled decedent or by an individual currently resident in Maryland, or (2) the trust is principally administered in Maryland.
Mississippi: 2019 Miss. Form 81-100	A resident trust is any trust administered in Mississippi. A trust administered outside Mississippi will not be considered a resident merely because the governing instrument or a law requires that the laws of Mississippi be followed with respect to interpretation or administration of the trust.
New Mexico: N.M. Stat. Ann. §7-2-2(S); §46A-1-108; 1012 Instructions for Fiduciary Income Tax Instructions Form FID-1	"A trust is domiciled in New Mexico if the trustee is a resident of New Mexico or if the principal place from which the trust is managed or administered is in New Mexico." "The fiduciary must file a tax return if . . . [t]he trust is a resident of New Mexico." Non-resident trusts must also file a return if the trust has income from New Mexico sources.
North Dakota: N.D. Admin. Code §81-03-02.1-04(2)	A trust is a resident when it has a relationship to North Dakota sufficient to create nexus, which includes any of: a resident or domiciliary beneficiary or trustee; any trust assets with in state situs; any of the administration or income production of the trust takes place within North Dakota; or the laws of North Dakota are specifically made applicable to the trust or to the opposite parties with respect to their fiduciary relationship.
Oregon: Or. Rev. Stat. §316.282(1)(d)	A trust is a resident trust if the fiduciary is a resident of Oregon or if the administration is in Oregon. A corporate fiduciary engaged in interstate trust administration, resides and administers a trust in the place where the majority of fiduciary decisions are made in administering the trust.
South Carolina: S.C. Code Ann. §12-6-30(5)	Resident trust means a trust administered in South Carolina.
States That Require the Additional Contact of a Resident Settlor	
Alabama: Ala. Code §40-18-1(33)	Resident Trust is both created by will of resident decedent or by a resident at the time such trust became irrevocable and for more than seven months of the tax year, either a fiduciary or a beneficiary to whom distributions currently may be made either resides in or is domiciled in state.
Michigan: Mich. Comp. Laws §206.18(1)(c)	Resident is a trust created by will of a domiciled decedent and any trust created by, or consisting of property of, a person domiciled in Michigan, at the time the trust becomes irrevocable.
New Jersey: N.J. Rev. Stat. §54A:1-20. N.J. 1041 Instructions page 1	A trust is a resident trust to extent it consists of property transferred by will of a New Jersey domiciliary or by a New Jersey domiciliary during his or her lifetime or to the extent it consists of property transferred to a revocable trust by a person who was a New Jersey domiciliary at the time the trust became irrevocable. If a resident trust has no New Jersey assets, no New Jersey source income and no New Jersey trustees, it is not subject to New Jersey income tax.

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State and Cite	Comments
New York: N.Y. Tax Law §605(b)(3)	A trust is a resident trust to extent it consists of property transferred by will of a New York domiciliary or by a New York domiciliary during his or her lifetime or to the extent it consists of property transferred to a revocable trust by a person who was a New York domiciliary at the time the trust became irrevocable. If a resident trust has no New York assets, no New York source income and New York, NY trustees, it is not subject to New York income tax.
States That Require the Additional Contact of a Resident Beneficiary	
Delaware: 30 Del. C. §1601(8), §1635, §1636	Resident includes a trust, or portion of trust, consisting of property transferred by domiciled decedent's will, trust, or portion of trust, made by or consisting of the property of domiciliary, or if for more than six months of tax year (1) trust has only a single resident trustee or (2) a corporate trustee which has an office in state for the conduct of trust business or (3) half or more individual trustees are resident. A Delaware resident trust receives a deduction for amounts accumulated for future distribution to non-Delaware residents.
Hawaii: Haw. Rev. Stat. §235-1; §235-4.5	A resident trust is a trust the fiduciary of which is a resident of Hawaii or the administration of which is carried on in Hawaii.
Ohio: Ohio Rev. Code Ann. §5747.01(I)(3)	A trust is resident that, in whole or part, has assets transferred by (1) a person, court or governmental entity or instrumentality as a result of a domiciliary's death; or (2) either domiciliary transferor to an irrevocable trust, or a settlor was domiciled in state when trust became irrevocable but only if at least one of the trust's qualifying beneficiaries is a resident domiciled in Ohio during all or some portion of the trust's current taxable year.
State That Requires the Additional Contact of a Resident Settlor and Resident Beneficiary	
Massachusetts: Mass. Gen. Laws ch. 62 §10(c)	Income will be taxed to trustees under the will of a person who died an inhabitant of Massachusetts, and to trustees under a trust created by a person or persons, any one of whom was an inhabitant of Massachusetts at the time of the creation of the trust or at any time during the year for which the income is computed, or who died an inhabitant of Massachusetts, any one of which trustees or other fiduciaries is an inhabitant of Massachusetts.

APPENDIX C

State and Cite	Comments
Connecticut: Conn. Gen. Stat. §12-701(a)(4)	Resident trust or estate: (1) the estate of a resident decedent (2) the estate of a person who, at the time of commencement of a [Bankruptcy] case was a resident of Connecticut, (3) a trust, or a portion of a trust, consisting of property transferred by will of a resident decedent and (4) a trust, or a portion of a trust, consisting of the property of (a) a resident of Connecticut at the time the property was transferred to the trust if the trust was then irrevocable, (b) if the trust was revocable at the time the property was transferred to the trust, and has not subsequently become irrevocable, was a resident when property was transferred to trust or (c) if the trust was revocable when the property was transferred to the trust but the trust has subsequently become irrevocable, was a resident when the trust became irrevocable.
Delaware: Del. Code Ann. tit. 30 §1601(8), §1636	Resident trust means a trust: (1) created by the will of a decedent who at death was domiciled in Delaware; (2) created by, or consisting of property of, a person domiciled in Delaware; or (3) with respect to which the conditions of one of the following paragraphs are met during more than one-half of any taxable year: (A) The trust has only one trustee who or which is: (i) a resident individual of Delaware, or (ii) a corporation, partnership, or other entity having an office for the conduct of trust business in Delaware; (B) the trust has more than one trustee, and one of such trustees is a corporation, partnership, or other entity having an office for the conduct of trust business in Delaware; or (C) the trust has more than one trustee, all of whom are individuals and one-half or more of whom are resident individuals of Delaware. Del Code Ann. tit. 30 §1636 provides a deduction against taxable income for future distributions to nonresident beneficiaries.
Illinois: 35 Ill. Comp. Stat. §5/1501(a)(20)	Resident means a trust by will of a domiciled decedent and an irrevocable trust, the grantor of which was domiciled in Illinois at the time such trust became irrevocable.
Maine: Me. Rev. Stat. Ann. tit. 36 §5102(4))	Resident trust shall mean trust created by will of a domiciled decedent who at death or was or created by, or consisting of property of, a person domiciled in Maine.
Maryland: Md. Code Ann., Tax Gen. §10-101(k)(l)(iii)	The trustee of a trust must pay Maryland income tax if (1) the trust is made by or consists of property transferred by will of domiciled decedent or by an individual currently resident in Maryland, or (2) the trust is principally administered in Maryland.
Missouri: Mo. Stat. Ann. §143.331	A resident trust is a trust created by will of a domiciled decedent; if it has at least one income beneficiary who, on the last day of the taxable year, was a resident of Missouri; or a trust that was created by, or consists of property of, a domiciliary on the date the trust or portion of the trust became irrevocable; and if it has at least one income beneficiary who, on the last day of the taxable year, was a resident of Missouri.
Nebraska: Neb. Rev. Stat. §77-2714.01(6)	Resident trust means a trust or portion of a trust consisting of property transferred by the will of a domiciled decedent or a trust or portion of a trust consisting of the property of domiciliary at the time such individual may no longer exercise the power to revest title to such property.

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State and Cite	Comments
Ohio: Ohio Rev. Code Ann. §5747.01(1)(3)	A trust is resident that, in whole or part, has assets transferred by (1) an entity as a result of a domiciliary's death; or (2) either domiciliary transferor to an irrevocable trust, or a settlor was domiciled in Ohio when trust became irrevocable but only if at least one of the trust's qualifying beneficiaries is a resident domiciled in Ohio for the purposes of this chapter during all or some portion of the trust's current taxable year.
Oklahoma: Okla. Stat. §2353(6)(a)	Resident trust means a trust, or a portion of a trust, consisting of property transferred by will of a domiciled decedent; or a revocable trust, or a portion hereof, consisting of the property of a domiciliary, and a trust, or portion of such trust, consisting of property of a domiciliary at the time such property was transferred to the trust if such trust or portion was then irrevocable or a domiciliary at the time such trust or portion became irrevocable. A trust, or portion of a trust, is irrevocable if it is not subject to a power exercisable solely by the transferor of such property, at any time, to revest title in the transferor.
Rhode Island: RI Gen Laws §44-30-5	A resident trust is a trust that has at least one Rhode Island resident beneficiary if it was created by the will of a Rhode Island resident or if it was a revocable trust that became irrevocable at a time when the person with the right to revoke was a Rhode Island resident or if it was an irrevocable trust created by or consisting of the property contributed by a person who was a Rhode Island resident at the time the trust was created or became irrevocable but only so long as the person continues to be a Rhode Island resident or, if he or she is no longer living, if he or she was a Rhode Island resident at death.
Vermont: 32 Vt. Stat. Ann. §5811(1)(l)(B)(i)	A trust is resident if it has property: (1) transferred by will of or by a domiciled decedent; or (2) of: (i) a domiciliary at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or (ii) a domiciliary at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable. A trust or a portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.
Virginia: Va. Code Ann. §58.1-302	Resident estate or trust means: (1) the estate of a decedent who at his death was domiciled in Virginia; (2) a trust created by a will of a decedent who at his death was domiciled in Virginia; or a trust created by or consisting of property of a person domiciled in Virginia.
West Virginia: W. Va. Code §11-21-7(c)	A resident trust means: A trust created by will of a domiciled decedent, or a trust created by, or consisting of property of, a person domiciled in West Virginia.

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