



LINE OF SIGHT

A Comparison of Various Jurisdictions with Flexible Trust Laws

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The Northern Trust Company of Delaware

The Northern Trust Company of Nevada

(contact information on last page)

A wooden boardwalk with railings leads through a lush green forest. The boardwalk is made of light-colored wooden planks and has a dark shadow cast across it. The forest is dense with various green plants and trees, creating a vibrant and natural setting.

A Comparison of Various Jurisdictions with Flexible Trust Laws

Flexible Jurisdictions for “Specialized Trusts”

The landscape of the personal trust environment continues to evolve. Many states have updated their laws in the recent years to be competitive with the states that are known to be “trust friendly” jurisdictions.

- States frequently considered to have flexible trust laws include **Alaska, Delaware, Nevada, South Dakota, and Wyoming**

The Attributes of a Trust Friendly Jurisdiction

The attributes frequently described as creating a trust friendly jurisdiction are:

The ability to have long term or perpetual trusts

No income tax charged by the state on the trust

Directed trusts

The ability to decant or modify a trust without court involvement

Self settled asset protection trusts (including the DING and the NING)

Creditor protection in general

Private trust companies

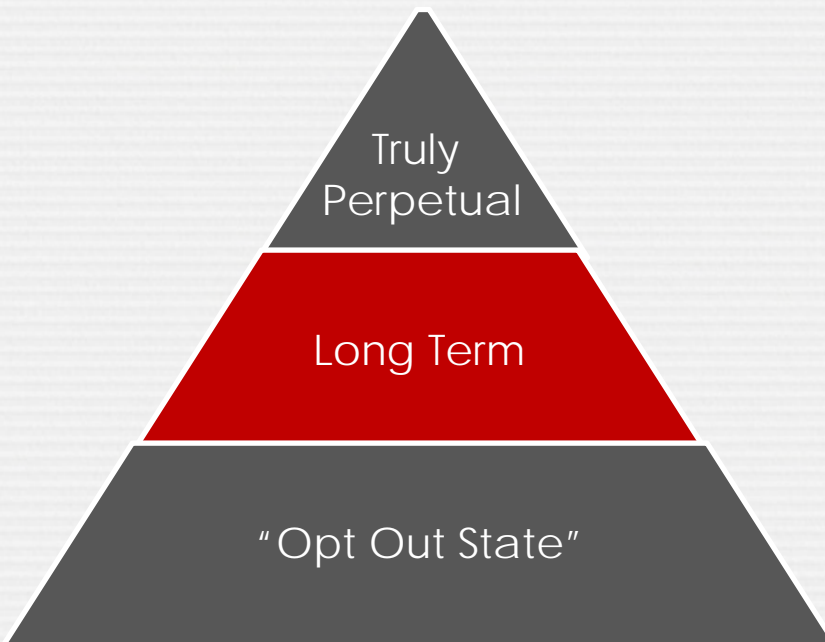
Confidential trusts

Overall trust environment

The Ability to Have Long Term or Perpetual Trusts

This is a fundamental benefit of a jurisdiction that is considered to be advantageous for specialty trusts. The goal is to provide a mechanism for families to pass wealth down successive generations – often times these are referred to as “Dynasty Trusts.”

Three Categories of Dynasty Trusts



- **Alaska, Delaware, and South Dakota** allow perpetual trusts
- **Nevada and Wyoming** allow long term trusts
 - 365 years for Nevada
 - 1,000 years for Wyoming

Limitation of State Income Taxation on the Trust

If you add this benefit to a long term or perpetual trust, the benefit can be substantial savings because the trust will not pay state income tax that it would otherwise pay over many years. The trust would still pay federal income tax.

Sometimes for estate planning reasons the grantor, rather than the trust, might pay the income tax. This is sometimes referred to as a “grantor trust for income tax purposes.” But even if the trust is this type, if it is a long term trust, it in fact will pay income taxes after the grantor dies, so ultimately this can be a very important benefit for dynasty trusts.

- **Alaska, Nevada, South Dakota** and **Wyoming** do not have a state income tax on trusts
- **Delaware** only imposes a state income tax on a trust to the extent any of the beneficiaries live in the state

Limitation of State Income Taxation on the Trust (continued)

- Even if the state governing the laws of the trust does not impose an income tax, the state where the grantor, the beneficiaries, co-trustees and any other advisors live may still impose a state level tax
- For example, if a client who lives in Connecticut establishes a trust in any of these jurisdictions, although the other jurisdiction will not impose a state income tax on the trust, Connecticut will impose a state income tax on the trust
- For example, in 2014 New York enacted a statute that under certain circumstances will subject a Delaware or Nevada trust created by a New York resident to New York income tax when distributions are made to a New York beneficiary

Directed Trusts

- This has become perhaps the most sought after benefit by people considering a new trust
 - The client may want to name Northern as trustee to manage the trust assets, except for a **holding of an illiquid asset** on which the trustee would be directed
 - This has become very common as clients often create wealth from illiquid assets or business ventures. If the trustee can be protected from liability for following the directions of the grantor or another party, then the grantor is able to fund the trust with assets that no trustee might hold otherwise
 - Or the client may want to name Northern as trustee but direct Northern on **distribution matters**, or other matters
- A directed trust statute can also enable the appointment of a **trust protector** to direct the trustee on certain items if ever needed – such as amending the trust, appointment and removal of fiduciaries, and change of situs and/or governing law

Directed Trusts (continued)

- **Delaware** has a comprehensive statute and relevant case law exists (the Duemler case in 2004)
 - The statute is the oldest, dating back to 1986
 - Very flexible in that it does not limit the type of directions that can be given to the trustee
- **Alaska, Nevada, South Dakota** and **Wyoming** have directed trust statutes, but no significant case law on point

The Ability to Modify a Trust Without Court Involvement

The need to change the administrative terms, or other provisions of a trust, has received more attention with the advent of dynasty trusts and directed trusts. This is generally done in one of three ways:

Decanting of
assets from one
trust to another

Merger of two
trusts together

Non-judicial
Settlement
Agreement
and/or Non-
judicial
Modification
Statute

Decanting

Alaska, Delaware, South Dakota, Nevada, and Wyoming have decanting statutes.

- **Wyoming**'s statute is the newest, becoming effective July 1, 2013
- A benefit of the **Nevada** decanting statute is that it permits the trustee to seek court approval or utilize a non-judicial notice process for approval before the decanting
 - This might make the trustee more comfortable with decanting, which in turn could be useful to the beneficiaries
- **South Dakota** is recognized as having a very flexible decanting statute because it has more liberal provisions regarding who can be a beneficiary of the second trust

Merging Two Trusts

Merger statutes historically were not thought of as a way to change trusts, but increasingly they are being used to change administrative provisions of a trust.

Delaware

- Has merger statute
- Combination cannot result in a material change of beneficial interest
- Court approval is not required
- Notice to beneficiaries is not required*

* As a general industry practice, most trustees require consents, release and indemnification from interested parties

Wyoming

- Has merger statute
- Cannot impair rights of a beneficiary or adversely affect achievement of trust purposes
- Court approval is not required
- Notice must be provided to qualified beneficiaries

South Dakota

- Has a merger statute
- Cannot impair rights of a beneficiary or substantially affect accomplishment of trust purpose
- Court approval is not required
- Statute is silent regarding notice provisions*

Note: Nevada and Alaska do not have merger statutes

Non-judicial Settlement Agreements (NJSA) / Non-judicial Modification

- **Non-judicial settlement agreement**
 - Many states have statutes that permit a NJSA
 - Such an agreement allows all of the interested parties (grantor, fiduciaries, adult beneficiaries) to agree to do certain things including directing the trustee to take an action or refrain from a specified act, to approve the accounting of a trustee, and the agreement can be used to clarify ambiguities in the trust instrument
 - However, a non-judicial settlement agreement cannot violate a material purpose of the trust, and must include terms and conditions that could be properly approved by the court
- **Non-judicial modification**
 - Many states have statutes that permit the interested parties to a trust to modify the trust without going to court
 - This is different from a NJSA in that the trust instrument is actually modified as a result of the action

Non-judicial Settlement Agreements (NJSA) / Non-judicial Modification

Alaska

- Does not have a NJSA statute
- Does not have a modification statute

Delaware

- Has a NJSA statute
 - It is not entirely clear whether using Delaware's NJSA statute to modify a trust would "violate a material purpose of the trust"
 - However, the NJSA statute is used to modify the trust terms in certain instances, including when the grantor is alive and signs a "non-objection" to the NJSA
- Does not have a trust modification statute

Nevada

- Does not have a NJSA statute
- Does not have a trust modification

South Dakota

- Does not have a NJSA statute
- Has a trust modification statute

Wyoming

- Has a NJSA statute
- Has a trust modification statute

Self-Settled Asset Protection Trusts

- As of February 2015, fifteen states have statutes that permit a person to establish a trust and be a permissible beneficiary of it, without the assets of the trust being subject to the claims of that person's creditors
- Each state has a period of time during which a creditor can argue that the person who established the trust was attempting to defraud his or her creditors
 - After that time, claims are "time barred" meaning they can no longer be brought against the trust. This has been referred to as the "claims period"
- Most states have certain creditors that are never time barred. These have been referred to as "exception creditors"
- All of the states in this comparison have such a statute
 - **Nevada** and **South Dakota** have a shorter claims period – 2 years
 - **Alaska, Delaware, and Wyoming** have a longer claims period – 4 years

Self-Settled Asset Protection Trusts

- **Nevada** and **Alaska** are the only states that do not have any “exception creditors”
- All of the other states have some creditors that are allowed to bring claims against the trust, even after the claims period
 - **Delaware** has no statute of limitation for claims for marital relations such as alimony and child support if the claims arose prior to the assets being transferred to the trust
 - **South Dakota** allows claims for alimony or child support to the extent of the debt outstanding at the time assets are transferred to the trust
 - **Delaware** and **Wyoming** have no statute of limitations for various types of tort claims if the claim arose prior to the assets being transferred into the trust
- A variation of this type of trust is the DING (Delaware Incomplete Non Grantor) trust and the NING (Nevada Incomplete Non Grantor) trust*
 - These self-settled asset protection trusts are designed to add the benefit of allowing beneficial income tax and gift tax results
 - Of these two, only the NING has received rulings from the Internal Revenue Service confirming the expected tax results

* Not available to residents of New York

Confidential Trusts

- Often times the grantor does not want his or her children or other beneficiaries to know until sometime in the future, that they are beneficiaries of a large trust
- Some states permit what have become known as “quiet trusts” or what we refer to as “confidential trusts” where the trustee is not required to provide notice, including statements, to a beneficiary of a trust for a period of time
- **Alaska, Delaware, South Dakota, and Wyoming** have statutes specifically permitting quiet trusts

Private Trust Companies (PTCs)

- Private trust companies are generally utilized only by “ultra high net worth” families
- Private trust companies can be regulated or unregulated
 - Regulated private trust companies are subject to similar or the same rules and examinations as public trust companies in the given state
 - Unregulated private trust companies are allowed to operate without the same amount of oversight by the given state.
 - Most commentators believe it is better to have a regulated private trust company rather than an unregulated one for two reasons:
 - Being a regulated PTC most likely avoids the danger of adverse transfer tax consequences
 - A regulated PTC is generally exempt from registration as an investment advisor with the Securities and Exchange Commission

Private Trust Companies (PTCs)

Nevada

- Recognized as leader among the jurisdictions for PTCs
- Low capital requirement: \$300,000
- Does not require the PTC to have physical office space or employees in the state, rather they can use office services of a provider in the state
- Permits both regulated and unregulated private trust companies

South Dakota

- Recognized as leader among the jurisdictions for PTCs
- Low capital requirement: \$200,000
- Does not require the PTC to have physical office space or employees in the state, rather they can use office services of a provider in the state

Delaware

- Has statute providing for regulated PTCs
- Not recognized as leader for PTC due to a high capital requirements (\$1 million) plus requirement for physical office space and employment of personnel in Delaware

Wyoming

- Also known as a jurisdiction for PTCs, but not at the same level as Nevada and South Dakota

Alaska

- Not known as favorable jurisdiction for PTCs

Putting It All Together

Delaware

- Continuously recognized as the leader in innovative trust laws
- Legislative process remains among the most flexible and nimble
- Delaware Court of Chancery is recognized as a leader in determining trust case law
- No state income tax on trusts as long as there are no Delaware beneficiaries
- The recent Peierls decision in the Delaware Supreme Court provides a comprehensive road map for conflict of laws issues and for moving existing trusts to Delaware

Nevada

- With comprehensive revisions to trust laws in 2005 Nevada became a jurisdiction with all the frequently cited benefits of these jurisdictions
- Self-settled trust legislation has a shorter claims period and does not allow exceptions to the rules barring creditor's claims
- Recognized as one of the most favorable jurisdiction for private trust companies
- Flexible decanting statute
- No state income tax on trusts

South Dakota

- Lowest insurance premium tax, which may be important if a trust is purchasing insurance with large premiums
- Flexible decanting statute (similar to Nevada's)
- South Dakota and Nevada are both known for strong private trust company jurisdiction
- Provides the ability to keep a trust court proceeding under seal
- No state income tax on trusts

ATTRIBUTE	DELAWARE	NEVADA	SOUTH DAKOTA	ALASKA	WYOMING
Long Term or Perpetual Trusts (good jurisdiction for Dynasty Trusts)	Perpetual (real estate is 110 years, but can be held in LLC and be perpetual)	365 years	Perpetual	Perpetual	1000 years
State Income Tax on Trusts	No Delaware income tax assuming no Delaware beneficiaries	No state income tax	No state income tax	No state income tax	No state income tax
Directed Trusts	Statute is most developed and supported by case law	Effective statute	Effective statute	Directed trust statute doesn't clearly provide full protection for trustee	Effective statute
Decanting	Flexible statute	Very flexible statute	Very flexible statute	Less flexible statute	Less flexible statute
Merger	Cannot result in material change in the beneficial interests of beneficiaries / court approval not required / notice not required*	No merger statute	Cannot impair rights of a beneficiary or substantially affect accomplishment of trust purpose / court approval not required / statute silent regarding notice requirement*	No merger statute	Cannot impair rights of a beneficiary or adversely affect achievement of trust purposes / court approval not required / notice must be provided to qualified beneficiaries
Trust Modification Statute / Non-Judicial Settlement Agreement ("NJSA") Statute	Only NJSA statute	No trust modification statute / no NJSA statute	Only Trust modification statute	No trust modification statute / no NJSA statute	Trust modification statute and NJSA statute
Self-Settled Asset Protection Trusts	4 year look back period / exceptions for marital claims that arose before assets transferred into the trust and tort claims that arose before assets transferred into the trust	2 year look back period / no exceptions	2 year look back period / exceptions for marital claims and child support to extent of debt outstanding at time of transfer	4 year look back period / no exceptions	4 year look back period / exceptions for marital claims that arose before assets transferred into the trust and tort claims that arose before assets transferred into the trust
Asset Protection - Third Party Trusts	Statute provides no creditor can receive distributions from a trust unless that creditor is a beneficiary named in the trust, AND provides that distributions can be made on behalf of a beneficiary as well as directly to a beneficiary	Standard spendthrift provisions	Statute specifies discretionary interest is not a "property interest" owned by the beneficiary, and therefore not property that a creditor could try to attach	Statute specifies discretionary interest is not a "property interest" owned by the beneficiary, and therefore not property that a creditor could try to attach	Statute specifies discretionary interest is not a "property interest" owned by the beneficiary, and therefore not property that a creditor could try to attach
Privacy - Court Action Under Seal	Allowed in civil actions	Court has option to keep action under seal	Can be under seal indefinitely	Limited privacy	Not permitted
Privacy - Notice to Beneficiaries	Notice not required to be given to beneficiaries for a period of time	No provisions required regarding ability to restrict notice to beneficiaries	Notice not required to be given to beneficiaries	Notice not required to be given to beneficiaries	Notice not required to be given to beneficiaries
Insurance Premium Tax	200 basis points	350 basis points	8 basis points	10 basis points	75 basis points
Private Trust Companies	Permitted by statute, but higher barriers to entry due to requirements of the statute	Statute permits both regulated and unregulated private trust companies / statute has low barriers to entry	Statute permits regulated private trust companies / statute has low barriers to entry	Not a popular state for private trust companies	Not a popular state for private trust companies
Judicial and Legislative Environment	Recognized as the leader in this category, having the longest history and most case law regarding flexible and progressive trust environment	Concentrated focus on flexible trust laws, and has received rulings (PLRs) regarding Nevada trusts	Recently enacted the "Governor's Task Force" to promote flexible and progressive trust environment	Fewer trust companies and smaller numbers of attorneys specializing in trusts & estates	Fewer trust companies and smaller numbers of attorneys specializing in trusts & estates

* As a general industry practice, most trustees require consents, release and indemnification from interested parties.

Disclosures

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