8 Reasons Nevada Is A Leading Trust Situs

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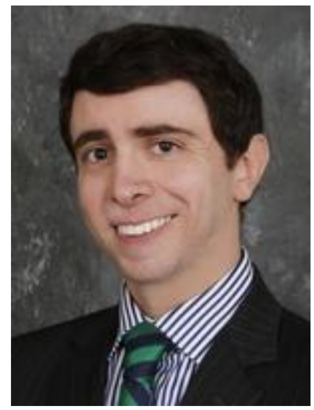
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Nevada has been at the forefront in providing trust, tax and related fiduciary services nationally. To a large extent, this is on account of its favorable trust and asset protection laws, coupled with a legislature consistently committed to enacting cutting-edge provisions and updates. With growing taxes and heightened reporting requirements on both U.S. and non-U.S. trusts, Nevada increasingly has become a leading domestic — as well as global — trust situs. So what precisely are these advantages that Nevada law confers?

1. Dynasty Trusts

Many states, such as California, adhere to the rule against perpetuities as spelled out in the Uniform Statutory Rule Against Perpetuities (USRAP). Under the standard version of USRAP, trusts generally can have a life in the range of 90 years. By way of contrast, a trust administered under Nevada's version of USRAP can last for 365 years. While a good number of wealth holders wish to hold in trust substantial wealth for the benefit of future generations, with the standard 90-year USRAP limit this is severely limited. Furthermore, this shorter term also limits the ability of the trust to accumulate wealth free of federal estate and generation-skipping taxes. For example, suppose spouses collectively transfer $10 million at their deaths to a dynasty trust. There should be no federal estate tax. The assets can then grow in the trust for 365 years, four times longer than the standard USRAP 90 years, with future generations paying no such taxes on their deaths, but receiving distributions along the way as the need arises. The wealth that can be accumulated for the family's benefit freed of federal gift, estate and generation-skipping transfer taxes for 365 years could prove staggering.

2. Directed Trusts

A large number of states, including California, adhere to the traditional view that the investment and distributional functions of a trust cannot be separated, giving sole authority over one function to one trustee and sole authority over the other function to a different trustee or trust adviser. Nevada takes a strikingly different approach. It endorses the concept of the directed trust, whereby a trustee may be required to follow the investment or distribution directions of an investment adviser, distribution adviser or committee comprised of advisers. Under Nevada's statute, the powers exercised by the investment or distribution trust adviser are at the sole discretion of such advisers and are binding on all other persons. The appeal of the directed trust is that family members themselves, or advisers with whom they have had a long-term relationship, can retain control of investment and distribution decisions rather than having to accept the decisions of the trustee.

3. Nevada Asset Protection Trusts

Almost every state recognizes spendthrift trusts to some degree. In the typical spendthrift trust, the creditors of beneficiaries cannot reach the beneficiaries' interests in the trust and the beneficiaries cannot assign their interests voluntarily. But what if the creator of the trust wishes to use it to shelter his or her own assets from future creditors?

More than two-thirds of states do not permit the creator of the trust to establish what is known as a "self-settled" spendthrift trust for his or her own protection from creditors. In sharp contrast, Nevada does. Nevadans, as well as persons from out of state who create Nevada-administered trusts, enjoy a significant benefit in this regard. But Nevada goes one step further. Its law recognizes no exception creditors whatsoever. Almost every other state that has adopted self-settled asset protection trust legislation recognizes certain statutory exceptions, typically for claims for maintenance by current and former spouses and for pre-existing tort creditors. Unlike Nevada, where the self-settled spendthrift trust is even insulated from these potential claimants, the statutes of almost every other asset protection trust state permit exception creditors to pierce the trust, notwithstanding the fact that the applicable statute of limitations period has already expired.

A significant advantage Nevada has over other states that also offer similar asset protection laws is its short two-year statute of limitations. Many of the other asset protection states have a four-year statute of limitations period until the trust assets are protected. While pre-existing creditors can commence an action to challenge a transfer to a Nevada asset protection trust within the later of (1) two years from the date of transfer of the assets or (2) six months after the creditor discovers or reasonably should have discovered the transfer, this potential six-month discovery extension is effectively limited since a creditor is deemed to have discovered a transfer at the time a public record is made of the transfer including, without limitation, the recording of the conveyance of real property or the filing of a financing statement.

As a further restriction on actions against a Nevada asset protection trust, a creditor needs to prove by clear and convincing evidence — even during the two-year seasoning period before the assets are officially protected by statute — that the transfer of property to the spendthrift trust was fraudulent or violates a legal obligation owed to the creditor.

While the Nevada self-settled spendthrift trust must, technically, be irrevocable, Nevada's asset protection laws permit trust creators to retain seemingly broad powers and rights without jeopardizing spendthrift protections. The trust creator can veto a distribution from the Nevada asset protection trust, serve as co-trustee, hold a special lifetime or testamentary power of appointment, and retain the power to direct trust investments, remove and replace a trustee, and execute other managerial powers.

4. Nevada LLCs

Since 2001, the charging order has been a judgment creditor's exclusive remedy in actions against debtors' interests in Nevada limited liability companies. A charging order only permits the judgment creditor to assume the role of an assignee and await distributions intended for the debtor from the charging order protected entity. Accordingly, a further step that can be taken in Nevada so as to add yet another level of protection is coupling the asset protection trust with a Nevada LLC, which is owned principally by the trust and with a small interest owned by the creator of the trust. The result is an edifice that presents a daunting challenge for any creditor or other claimant to breach — a trust protected by a statute with no exception creditors and a limited liability entity that denies the creditor or other claimant all relief other than a charging order, a type of lien that does not guarantee any payment at all.

5. Trust Protectors

Nevada has an especially detailed statute with respect to trust protectors. Few other states can make that claim. Especially when persons are establishing dynasty trusts to last for generations, a trust protector is appointed. Since the trust will continue long after its creator and immediate members are deceased, the creator would like to know there will continue to be someone looking over the trustee's shoulder. The person who fulfills this function is typically the trust protector. But without a clear-cut statute, many questions arise regarding the authority of the trust protector, the duty of the trustee to obey the trust protector and the liability of the trustee for the acts of the trust protector, just to name a few. Accordingly, wealth holders and their advisers desire a statute that responds to these issues precisely and without ambiguity, and so do trustees.

Nevada offers that to an extent that few other states do. Under Nevada's statute, the powers exercised by the trust protector are at the sole discretion of the protector and are binding on all other persons. Nevada provides that a trust protector may be given powers, including, among others, to remove and appoint a trustee or trust adviser, direct or veto distributions from the trust, modify or amend the trust to achieve a more favorable tax status, change the location or governing law of the trust, and modify the terms of any power of appointment.

6. Tax-Free Trusts

Nevada has no income tax as well as no gift or death taxes. Specifically, a trust that is administered in Nevada by a Nevada fiduciary will not incur income taxes. In this regard, Nevadans enjoy a huge advantage over residents of many other states when employing trusts. But even non-Nevada residents who use a Nevada trustee to administer their trusts can enjoy the same tax-free environment with respect to investment income, if the trust is designed properly. For example, with California tax exceeding 13 percent in the case of the wealthiest individuals, the tax savings available through use of a particular type of Nevada trust, the Nevada incomplete nongrantor trust (NING), can be quite striking. At its core, the NING is a trust designed to minimize or eliminate state income tax by having the trust domiciled in a state that will not tax the accumulated income and capital gains, and the NING has received much attention since the IRS issued a favorable ruling in March 2013 involving a New Jersey domiciliary settlor and a Nevada trust.

7. Decanting

One problem with dynasty trusts, in particular, is that circumstances inevitably change over time. Since even the standard revocable trust becomes irrevocable once the creator and, possibly, his or her spouse has died, there is real appeal in having a statutory method whereby alterations can be made to the trust in order to address the changed circumstances without, for example, jeopardizing its favorable tax benefits. Nevada is one of several states with a decanting statute under which the trustee is empowered to decant. Much like with wine, the trust assets are poured out into a new trust that incorporates desired changes. While there are certain limits on what the trustee can do, such as completely change the beneficiaries, the trustee can introduce other changes and without having to establish that this is consistent with the intent of the creator of the trust.

Recently, Nevada has enacted changes to its laws that have further made its decanting statute one of the most appealing in the country. Provisions in Nevada Senate Bill 484, which took effect on Oct. 1, 2015, confirmed that Nevada's decanting statute applies to a trust governed by, sitused in or administered under the laws of Nevada, even if the governing law, situs or administration of the trust is moved to Nevada from another state or foreign jurisdiction. While no new beneficiaries can be added by decanting, the recent Nevada bill also clarified that a permissible appointee of a power of appointment exercised by a beneficiary of the second trust is not deemed a beneficiary of the second trust.

8. Nonjudicial Settlement Agreements

In addition to addressing and bolstering Nevada's decanting statute, Senate Bill 484 also included provisions allowing for another way for alterations to be made to a trust: nonjudicial settlement agreements. Pursuant to these provisions, some of the matters that can be resolved by a nonjudicial settlement agreement include the addition, deletion or modification of a trust term, the resignation or appointment of a trustee, the designation or transfer of the trust's principal place of administration, and the termination of the trust. However, while decanting does not mandate notice to beneficiaries under Nevada law, a nonjudicial settlement agreement needs to be executed by all indispensable parties for it to be effective. It is also worth noting that Nevada has a broad virtual representation statute.

As the foregoing demonstrates, there are tangible benefits a Nevada trust can provide to Nevadans, as well as wealth holders who reside in other states or outside of the country. These benefits can have dramatic and positive effects on the accumulation of wealth, its preservation and its availability to benefit family members for generations to come.

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