

Choosing Situs for a Trust

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**A KEY ESTATE
PLANNING GUIDE**

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Basics of Trust Situs

- Situs refers to the state or jurisdiction whose law will control matters relating to the trust.
- There is no clear definition.
- You set up a trust in State A and say in the trust instrument that State B law controls legal matters as to the administration of the trust. Depending on State A law (i.e., state where the trust was created) certain aspects of trust administration may remain governed by that State A's laws, and the remaining aspects of administration will be controlled by the State B law designated. It appears, however, that you may, however, need some nexus to the State B whose law you want applied for that law to apply.
- Scott on Trusts stated that powers of a trustee would be determined by the place of the administration of the trust. This would likely be the jurisdiction in which the trust was located. This was the basis for Alaska law, for example, to permit any trust moved to Alaska from another state to adopt the Alaska decanting provisions.

Basics of Trust Situs

- If there is a trustee in a particular state managing the trust, that state may apply its state law to the trust based on the trustee administering the trust in that state.

Why Do You Care About Trust Situs?

- State law from the jurisdiction where the trust is formed or administered (the law is not clear as you need some connection or nexus to the state whose laws are to apply) governs vital aspects of the trust.
 - Can creditors of the grantor or a beneficiary reach the trust assets. For example, only certain states permit a settlor to be a beneficiary of a trust that cannot be reached by that beneficiary's creditors). Asset protection can vary considerably based on state law.
 - Who can be a trustee and what provisions apply for the appointment of a successor.
 - What the trustee fees or commissions are.
 - What court has jurisdiction over the trust.
 - Taxation (but under the Kaestner case it is not fully clear what minimum connections to that state must exist for that state to tax trust income).
 - Rule against perpetuities (how long a trust can last).
 - What is characterized as income versus principal (the principal and income act of the governing state will apply).
 - Requirements for an accounting.

The Situs of Most Trusts Is Determined by Default

- In many cases little or no thought is given to the situs of the state and the trust is just stated to be governed by the home state of where the person creating the trust (settlor) resides and no further consideration is given.
- However, based on the prior slide, the selection of the situs for a trust can have profound implications to the nature of the trust, what goals the trust might achieve, the taxation of the trust and so much more.
- Consideration might be given to first identifying the goals for the trust plan and then evaluating which states may provide better law to achieve that goal.

How Choosing A “Better” Situs Can Achieve Your Trust Goals

- **Example**: You live in a high tax state that assess tax you might create a non-grantor trust (not taxed to you as the settlor) in a no tax state for the purpose of avoiding state income taxes (e.g., on the sale of a valuable business entity). This is complicated and there are considerable differences in how various states impose tax, but the key point is that there may be substantial savings in state income tax by planning where a trust will be formed and administered, and that place may have to be different from your home state.
- **Example**: You are setting up an irrevocable trust to which you will transfer assets for asset protection and to remove those assets from your gross estate (using perhaps temporary or bonus gift and GST exemption before law change in 2026). If you may need access to those asset in future years you may need to set up the trust in one of the approximately 19 states that permit you to be a beneficiary of a trust you create without subject those trust assets to the reach of claimants (which would also put those assets back into your estate for tax purposes).

How Choosing A “Better” Situs Can Achieve Your Trust Goals

- **Example**: You have an old trust you want to “update.” That will require merging or decanting the trust into a new trust. That may not be feasible under the laws of the state in which the trust was formed and administered. You might be able to move the trust to Alaska and then have the broad Alaska decanting rules availed of to effectuate the desired decanting.

Additional information

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