

Top Five Reasons to Situs Your Irrevocable Trust in a Different Jurisdiction

By Steven J. Oshins Esq., AEP (Distinguished)

Most estate planners automatically situs their clients' irrevocable trusts in the jurisdiction in which the client resides without considering the possibility of using a different jurisdiction. This is often done for no reason other than the fact that it is customary to do so. However, in many situations this decision causes a loss of potential benefits that may have been obtained by exploring the use of a different trust situs.

Following are some of the common reasons to situs an irrevocable trust in a different jurisdiction:

1. **State Income Tax Savings:** There is almost never a good reason to maintain an irrevocable trust in a jurisdiction that has a state income tax on trusts. Such trusts should almost always be moved to a state that has no fiduciary state income tax on undistributed income. This is especially important when a lot of the trust income will not be distributed to the beneficiaries either because the beneficiaries are in a high income tax bracket, where the beneficiaries should not receive large distributions and/or where the beneficiaries have creditor issues and therefore should not receive large distributions for that reason.
2. **Creditor Protection:** Many trusts are drafted to give the trustee the power to make distributions to the beneficiaries for their health, education, maintenance and support. These trusts are often called support trusts for creditor purposes. Depending upon state statutes and case law, support trusts are often available to certain classes of creditors, including divorcing spouses. A discretionary trust, on the other hand, gives the trustee absolute discretion over distributions and thus generally protects the assets from all classes of creditors. [The only exception to this date is the 2013 Florida case, *Berlinger v. Casselberry*, where the Court ruled that a discretionary trust domiciled in Florida is subject to a writ of garnishment for unpaid alimony.] However, when the trust has been drafted as a support trust, it is imperative that the trust be domiciled in a state that protects the trust assets from various exception creditors.
3. **Decanting:** There are currently 22 jurisdictions that have decanting statutes. A decanting statute allows the trustee to distribute the trust assets into a different trust with different provisions for one or more of the beneficiaries of the prior trust. This flexibility can become very important when there is a drafting error, a change of circumstances or an enhancement that the family would like built into the trust. The failure to consider using one of these jurisdictions (or at least allowing the trustee or trust protector to move the trust to a favorable decanting jurisdiction) could mean that the desired changes cannot be made.
4. **Domestic Asset Protection Trusts:** Domestic Asset Protection Trusts have become one of the most popular and widely-used asset protection techniques. Only a handful of jurisdictions have favorable statutes allowing the settlor to set up a Domestic Asset Protection Trust. Although many attorneys are taking advantage of this, many others are not. Some have failed to use this technique because of the uncertainty about whether it will work. This is often based upon a misunderstanding about the objectives of an asset protection structure. The goal is to put the client into a better position than



the client was in without the structure. There is one bad case (*In re Huber*) and one good case (*Dahl v. Dahl*), as well as countless other disputes where the debtor was able to successfully use the structure to negotiate a favorable settlement. Thus, there will not be a 100% success rate, but in almost all situations, this technique will help the client significantly.

5. **Dynasty Trusts:** Dynasty Trusts aren't just estate tax savings vehicles. They are also used to provide asset protection and divorce protection for the beneficiaries for as many generations as applicable state law allows. Just as attorneys should use lifetime trusts to protect assets from estate taxes, creditors and divorcing spouses for the first generation, the same concepts apply to more remote generations as well. There is no reason not to protect the assets for grandchildren, great-grandchildren and other beneficiaries. Thus, it is important for the estate planner to consider situsing the irrevocable trust in a state with strong Dynasty Trust statutes.

Thus, there are many reasons not to simply use the local state trust laws. Just because nearly every estate planner relies solely on the client's local state laws doesn't mean that the more advanced estate planner should follow suit. It can cost the client's family a significant amount of money in unnecessary taxes, expose assets to creditors that could easily have been avoided and cause the family to miss opportunities for enhanced flexibility.

Should you, as an estate planner, wish to set yourself apart from your competitors and offer trust enhancements that aren't available locally, consider situsing the trust in a better jurisdiction.

RELATED EDUCATION & RESOURCES

Below you will find some related resources that (available on www.ultimateestateplanner.com):

- Trust Decanting State Rankings Chart by Steven J. Oshins, J.D., AEP (Distinguished)
- Everything You Need to Know About Decanting an Irrevocable Trust – 2-Part Series with Robert S. Keebler, CPA/PFS, MST, AEP (Distinguished), CGMA and Steven J. Oshins, J.D., AEP (Distinguished)
- How to Explain & Sell More Dynasty Trusts by Steven J. Oshins, J.D., AEP (Distinguished)
- Dynasty Trust Jurisdiction State Rankings Chart by Steven J. Oshins, J.D., AEP (Distinguished)

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