

Why Is Delaware Still the Right Place to Situs A Trust?

Moderator:

Gail E. Cohen, Esq., Fiduciary Trust International

Panelists:

- **Quincy Cotton, Esq., Roberts & Holland LLP**
- **David J. McCabe, Esq., Willkie Farr & Gallagher, LLP**
- **Richard W. Nenno, Esq., Wilmington Trust Company**



Why Delaware for New York Lawyers

The Delaware Banker's Association Annual Meeting

Session 2 – 10:20AM

David J. McCabe, Willkie Farr & Gallagher LLP

Quincy Cotton, Roberts & Holland LLP

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Introduction

- The last thirty-five years have seen a sea change in the way New York lawyers practice. Beginning with the Economic Recovery Tax Act of 1981 and accelerating with the Tax Reform Act of 1986 with the reintroduction of the generation skipping tax, lawyers throughout the country, but especially those in New York, have considered the trusts and estates laws of other states to determine whether planning for their clients would be better served by creating and funding trusts in those states. Many New York lawyers now do lifetime planning for their clients using trusts domiciled in states other than New York. These states include Delaware, South Dakota, Alaska, Nevada and more recently, New Hampshire. However, Delaware has been able to secure much of the work produced by New York lawyers for their clients. The question before us today is how did this develop and how do the Delaware bankers and Delaware Bar continue this trend not only for New York lawyers but for lawyers in other jurisdictions.

New York itself drives some of the work out of state

- The New York courts are underfunded and overburdened and that results in significant delays and costs in working with trusts that will be subject to jurisdiction in New York.
- Until 1997, almost all New Yorkers did their estate planning with Wills as the principal dispositive document because the merger doctrine in New York did not allow a grantor to be the sole trustee of his or her revocable trust. All of that changed in 1997 (EPTL § 7-1.1). Now many New Yorkers use revocable trusts as their primary dispositive documents. These trusts include the power in the trustee to move the trust to another jurisdiction either during the grantor's life or after the grantor's death. This obviates the need to seek the Surrogate's Court's permission to change the jurisdiction of the trust and has led to more mobility for those trusts created in New York.

New York itself drives some of the work out of state

- New York continues to have a confiscatory trust income tax regime. Although a recent change to the New York income tax law now results in a tax on distributions from foreign trusts created by a New York resident to beneficiaries who are New York residents (NY Tax § 612(b)(40)), there is still a benefit to using a non-New York trust for non-New York beneficiaries of New York grantors.
- The New York legislature does not prioritize requests for legislation by the trusts and estates bar and bankers in New York. This is not to say that the New York State Bar and the New York bankers do not have any influence in Albany, but trusts and estates legislation is not a priority for our legislature. Revenue generated by the trust business is not significant enough to influence decisions by the legislature. The NYS budget for 2015 was \$92.2 billion (see attached table).

New York itself drives some of the work out of state

- New York law has not kept up with Delaware and other more aggressive jurisdictions regarding many of the developments in trusts and estates, including the elimination of the rule against perpetuities ("RAP").
- There has been strong opposition among some Surrogates (probate court judges), retired Surrogates and members of the bar to make many of the changes that have been made in Delaware and other jurisdictions. For instance, they have blocked modification or repeal of the RAP and have not acted on "quiet trusts." However, we do have a workable decanting statute.
- New York has a very sophisticated trusts and estates Bar and group of trust bankers. Many of the New York banks have joined the very well regarded Delaware banks to provide enormous resources to support the trust business in Delaware. In addition, the New York Bar is able to rely on the Delaware Bar to act as partners in their planning. This partnership allows our clients to access all that Delaware has to offer as a trust jurisdiction.

What are the advantages of Delaware for New York lawyers and their clients?

- The jurisdiction is familiar to our clients because of its long standing jurisdiction for national and international corporations and the Delaware courts and Bar have excellent reputations (it doesn't sound "gimmicky").
- Delaware has very favorable trusts and estates legislation. The Bankers Association and the Bar Association work closely with the Delaware legislature to continuously address best practices in trusts and estates law. They are also able to address issues raised by Delaware court decisions in real time in order to preserve certain practices.
- Trusts and estates legislation is a priority for the State – from top to bottom – because the trusts and estates business is an important business for Delaware, and particularly for Wilmington. It provides highly paid professional employment at banks, trust companies, law firms, accounting firms and advisory firms.

What are the advantages of Delaware for New York lawyers and their clients?

- Delaware has well-developed trust and fiduciary **case** law (in addition to its statutory law) that provides strong guidance for Delaware and New York lawyers in advising our clients.
- As stated earlier, the Delaware Bar is very sophisticated and provides a strong partnership with New York counsel to provide the best advice to our clients. Many Delaware attorneys are members of ACTEC and other nationally recognized bar associations and contribute to the national discussion on the leading trusts and estates issues of our time. They are not merely "local lawyers" who double check your drafting.
- The Delaware bankers are very sophisticated trust bankers. These are not "nameplate" trust banks but rather are departments with strong infrastructure and institutional knowledge. This includes policies and procedures that support the concept of a nexus with Delaware and lead to compliance with the various fiduciary obligations and duties required of a Delaware trustee.

What features of Delaware law are persuasive to New York clients considering Delaware trusts?

LONG-TERM TRUSTS

- The ability to avoid a rule against perpetuities and create perpetual multi-generational trusts is highly desirable to many clients.
 - Important for maximizing the benefits of the GST exemption
 - Important for maintaining family wealth
 - Important for maintaining and centralizing investment control



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ASSET PROTECTION

- Asset protection is an important consideration for many clients.
 - Flexibility for the grantor to be a beneficiary of the trust
 - Continued asset protection for beneficiaries down through the generations
 - Protection for the child or grandchild who won't enter into a Prenuptial Agreement (provides good protection even if there is a Prenuptial Agreement)
- Compared with other states, Delaware's asset protection law is detailed and well developed.
 - Other states have been changing their laws, but they are still mostly untested.
 - New York advisors are comfortable with Delaware.
 - Delaware has decided cases and continually updates its laws.

What features of Delaware law are persuasive to New York clients considering Delaware trusts?

DIVIDED TRUSTEE FUNCTIONS

- Divided trustee functions are key – the flexibility to appoint different trustees to control different trustee functions is extremely valuable.
 - Investment trustee (or investment advisor)
 - Distribution trustee (or distribution committee)
 - Administrative trustee
- Delaware has long allowed the division of trustee functions. The statute has been tested and validated by the Delaware Court of Chancery and clients have a high degree of comfort that the directed trust structure will work for the long term.
- Provides flexibility to maintain a concentrated (often illiquid) investment.
- Allows a family member or trusted family advisor to control trustee discretion.
- Protector language is explicitly included in the Delaware statute.
- Divided trustee flexibility is lacking in New York.
 - Limited function fiduciary takes his chances under New York law.
 - Directed trusts have been the subject of legislative proposals in New York, so far without result. Even if enacted, it will be hard to compete with Delaware's long history and well-developed law.

What features of Delaware law are persuasive to New York clients considering Delaware trusts?

INCOME TAX LAWS

- Delaware's favorable income tax rules are a major consideration.
- New York taxes New York resident trusts, but does not tax nonresident trusts that have no New York source income.
- Similar rules for the other states in our "tri-state" area (Connecticut and New Jersey).
- In 2014, the New York income tax law was changed to impose a tax on an accumulated income distribution to a New York beneficiary (a "throwback" tax).
- The now more onerous income tax rules (under the throwback tax) generally have not had a significant impact on client choice of state law for a trust.
 - Society is highly mobile and beneficiaries move around
 - Delaware has many other benefits compared to New York, as this presentation demonstrates

What features of Delaware law are persuasive to New York clients considering Delaware trusts?

TRUST ADMINISTRATION

- Favorable rules for trust administration are an important feature that we advisors more and more find ourselves explaining to our clients, who would not otherwise know how extremely difficult it can be to deal with administration issues under New York law and through the New York courts.
 - Speed and ease of dealing with Delaware could not be more different from the process in New York.
 - Perspective of New York advisors: Delaware strives to make itself a jurisdiction where issues can be dealt with and resolved.
- Powers to adjust (and the like): New York's law provides many powers, but disputes and issues that arise in implementation can be difficult and time consuming to resolve in New York.
- Duty to diversify can be a significant problem; the directed trust structure is very helpful.

What features of Delaware law are persuasive to New York clients considering Delaware trusts?

QUIET TRUSTS

- The duty to inform beneficiaries is frequently a client concern.
- Delaware allows the governing instrument to restrict a beneficiary's right to information for certain periods, such as during the life of the grantor, until the beneficiary reaches a certain age, or until a specific date or event occurs.
- New York law imposes a duty to inform beneficiaries of a trust's existence and provide other relevant information; for example, the nature and amount of trust property. This is a significant issue for many clients, concerned about potentially disincentivizing their children and other descendants from working (among other issues), if they become aware of their (future) inheritance.

Comparison With Other States

	Delaware	Alaska	Arizona	Florida	Illinois	Maryland
Perpetual	Yes	Yes			Yes	Yes
Long Term			500 years	360 years		
State income tax (nonresident grantor, nongrantor trust)	No	No	Yes if resident trustee	No	No	Yes - administered in MD
Division of Trustee Duties (Directed Trusts)	Yes	Yes	Yes	Yes (trustee protection not as broad)	Yes	Yes
Self-settled asset protection	Yes	Yes	No	No	No	No statute

	Nevada	New Hampshire	Ohio	South Dakota	Tennessee
Perpetual		Yes	Yes	Yes	
Long Term	365 Years				360 Years
State income tax (nonresident grantor, nongrantor trust)	No	No	No	No	No
Division of Trustee Duties (Directed Trusts)	Yes	Yes	Yes	Yes	Yes
Self-settled asset protection	Yes	No	No	Yes	Yes