

Welcome To The USA: The Rising Popularity Of US-Situs Trusts - Part Two

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Here, Todd Beutler of the global law firm DLA Piper, and Todd Mayo of Perspecta Trust, outline why international families are increasingly turning to the US for the creation of trusts. This is the second instalment of a two-part feature.

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As ever, Family Wealth Report does not necessarily agree with all of the comments herein, but is delighted to publish them and welcomes reader responses.

Settlor intent

Individuals who create wealth often have specific ideas concerning how that wealth should be managed and expended through succeeding generations. For those individuals, creating a trust in a jurisdiction that respects settlor intent is important. The leading US trust jurisdictions offer best protection of settlor intent.

For example, New Hampshire, which is one of the best US trust jurisdictions, has a strong tradition of protecting settlor intent. New Hampshire's highest court has described settlor intent as "paramount," and it has declared that, probably more than any other state in the US, it upholds settlor intent over any arbitrary rule of law. New Hampshire has codified this tradition, expressly incorporating those principles into its statutes.

For many individuals creating trusts, that commitment to preserving settlor intent is important, because it enables them to have confidence that their wishes will be fulfilled. In contrast, many non-US jurisdictions apply the Saunders rule, which generally allows the beneficiaries to terminate a trust by agreement.

In similar vein, some families wish to avoid the forced inheritance laws of their home countries, and a US-situs trust potentially can help them achieve that goal.

Legal certainty

Within the US, there are a handful of attractive trusts jurisdictions. One hallmark of those jurisdictions is comprehensive statutory laws governing trusts. In contrast, many non-US jurisdictions rely more heavily on common law—i.e., judge-made law. The robust statutory laws of the leading US trust jurisdictions often provides a higher degree of certainty concerning how a trust can be designed and how it will be administered.

In some non-US jurisdictions, there can be more "unwritten rules," because the statutes provide only a limited, general framework. By its nature, that approach leaves more to a judge's discretion. For some families, that leaves too much to fate.

By affording greater certainty, the comprehensive statutory laws of the leading US jurisdictions typically facilitate better trust design and more efficient trust administration. The laws are clearer and more specific. Everyone—settlers, beneficiaries, trustees, trust protectors, creditor, and advisors—therefore is in a position to have a good understanding of how the law will apply in a particular situation.

Selecting a US jurisdiction

Within the US, there are a handful of attractive trusts jurisdictions. Among those states, New Hampshire, South Dakota, and Delaware are leading trust jurisdictions. While each family will weigh them differently, some of the key factors that families consider when selecting a US jurisdiction are:

- Divided trusteeship (directed trusts). The ability to divide trust powers among trustees, trust advisors, and trust protectors permits the design of a trust governance structure tailored to a specific family's needs and better facilitates the efficient management of the family's wealth. New Hampshire, South Dakota, and Delaware have some of the best developed divided trusteeship laws in world. Each of those states allows the division of trust powers and ring-fences the liabilities for a breach of duties, so that a trustee, trust advisor, or trust protector is only liable for duties that the trust deed assigns to that trustee, trust advisor, or trust protector.
- In New Hampshire and South Dakota, the trustee and beneficiaries generally can superimpose a divided trust structure on an existing trust. While Delaware generally is an attractive jurisdiction for creating new trusts with divided trusteeship, it potentially is less attractive for existing trusts. A Delaware court recently stymied a family's effort to modify an existing trust to superimpose a divided trust structure, in which an investment director—not the trustee—would have the power to manage the trust's investments.
- Perpetual trusts. A perpetual trust allows the trust to have a life span that follows a natural course of events, winding up only when appropriate given the settlor's intent and the family's circumstances rather than when dictated by an arbitrary rule of law. New Hampshire and South Dakota allow perpetual trusts. Delaware allows perpetual trusts for personal property, such as residential properties, condominiums, commercial buildings, and undeveloped land, there is a work-around. In the US, some states that are frequently touted as leading trust jurisdictions do not allow truly perpetual trusts, and, more significantly, a cloud of certainty hangs over the validity of those states' laws permitting trusts to last beyond the time allowable under the traditional perpetuities rule.
- Predictable, efficient courts. While families and trustees generally wish to avoid having any trust matter to go to court, it sometimes is inevitable. A court's involvement may be necessary or desirable because the terms of the trust may need to be construed, a trustee's action may warrant judicial review or approval, or there is a dispute. New Hampshire, Delaware, and South Dakota have good courts. Within the US, New Hampshire notably is the only jurisdiction with a dedicated trust court. Moreover, New Hampshire's courts have a well-established tradition of deferring to the state legislature. If the statute is clear, a New Hampshire court will not create an exceptions. Given the state's robust trust statutes, that deference foster predictable resolution of trust matters by New Hampshire's courts.
- Private trust companies. New Hampshire and South Dakota allow families to create private trust companies. New Hampshire recently modernized and simplified its private trust company laws and now offers even more flexibility in designing and administering a private trust company. New Hampshire does not require a physical office within the state or a resident director, although it may be advantageous to having one or both. South Dakota, on the other hand, requires a physical presence and a resident office. Delaware does not allow a true private trust company, although a family could form a limited purpose trust company.
- Geography. For some families, geography plays an important role in selecting a trust jurisdiction. Located in the northeastern US, New Hampshire and Delaware are readily accessible for families who wish to visit the offices where their trusts are administered. With its proximity to Boston, New Hampshire is especially convenient to families who have family members attending educational institutions like Harvard or MIT. While ruggedly beautiful, South Dakota is somewhat less accessible for families from Asia, Europe, and elsewhere.
- Quality trust company. In many cases, the selection of a US jurisdiction comes down to selecting a trust company with which the family already has an established relationship or with which it can build a solid, long-term relationship. To that end, technical competence, attentiveness, responsiveness, and discretion, of course, are musts.

Other factors will influence some families' decisions. A solid understanding a family's values, goals, and wishes, as well as the interpersonal relationships of its members and the nature and source of its financial resources, will inform a thoughtful evaluation and selection of a US trust situs—or, for that matter, any trust situs.

While the US has some of the world's best trust jurisdictions, it incongruously has some undesirable jurisdictions for trusts. For example, despite being centers of commerce and commonly viewed as gateways to the US, New York, Florida, and California are unattractive jurisdictions for trusts. Thankfully, a family need not have its trusts in those states. By using a divided trust structure in a state like New Hampshire, South Dakota, or Delaware, however, a family still can access investment advisors and investment opportunities in places like New York City, Miami, Los Angeles, and San Francisco.

Concluding thoughts

While investment opportunities and tax planning will continue to drive the interest in US-situs trusts, the emergence of US jurisdictions like New Hampshire, South Dakota, and Delaware as top-tier global trust jurisdictions affords wealthy families more options. They have more choices in terms of the laws that may help them better achieve their goals and address their needs. In addition, they have more options in terms of trust institutions with whom to work. With all of that, US-situs trusts will continue to rise in popularity.

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