

David vs. Goliath: How Nevada Became a Leading Trust Jurisdiction

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

"Always remember...Goliath was a 40-point favorite over David."

-Shug Jordan (1910-1980)
athlete and football and basketball coach

Many years ago, Delaware was considered the go-to trust jurisdiction. However, other jurisdictions enhanced their trust laws through the years, and the consensus now is that Nevada, South Dakota, Alaska and Delaware are the first-tier jurisdictions, at least in the minds of most trust practitioners.

Delaware has always been the Goliath in the trust industry, whereas the other jurisdictions have served the role of David. But Delaware has made less material enhancements to its trust laws in recent times as compared to the significant enhancements made by Nevada, South Dakota and Alaska. These modifications have substantially altered the trust situs landscape.

In an independent poll conducted by The Trust Advisor in 2014, more than 150,000 email subscribers were asked which state was best for trusts. The only options were Nevada, South Dakota, Alaska and Delaware. Nevada won the poll with a resounding 64% of the votes. This article will focus on Nevada and specifically how Nevada has come so far so fast in the jurisdictional race after not even being a blip on the radar just twenty years ago.

Domestic Asset Protection Trusts

Nevada enacted its Domestic Asset Protection Trust ("DAPT") legislation in 1999. DAPTs are irrevocable trusts in which the settlor is a beneficiary of his or her own asset protection trust.



Nevada is unique in that it has no so-called "exception creditors" who can access the trust assets despite the protective statutes, and it has a short two-year statute of limitations period between the date assets are transferred to the trust and the date when a future creditor can no longer sue the trust.

Delaware enacted its DAPT legislation in 1997, but, as opposed to Nevada law, Delaware law allows divorcing spouses and alimony, child support and pre-existing tort creditors to access the trust assets, and it has a much longer four-year statute of limitations period between the date assets are transferred to the trust and the date when a future creditor can no longer sue the trust.

Thus, David has slayed Goliath here.

Dynasty Trusts and other Third-Party Trust Divorce Protection

Nevada's Dynasty Trust statute was extended to 365 years in 2005. A Dynasty Trust is a long-term trust that continues for

as long as applicable state law allows without the trust assets being subject to estate tax. From a historical perspective, 2005 marked the year that Nevada jumped into the discussion of best trust jurisdictions since, when combined with its DAPT legislation, it became a top trust situs.

Delaware’s rule against perpetuities was repealed in 1995, but only for personal property. Real estate held in a Delaware trust is limited to 110 years without an estate tax. However, this can be circumvented by owning the real estate in a business entity. Still, there is no reason to take the 110-year risk when other states, like Nevada, don’t single out real estate for a special perpetuities limitation.

With respect to divorce protection, Nevada law protects all third-party trusts from divorcing spouses of the beneficiaries. However, Delaware has a well-known case, *Garretson v. Garretson*, 306 A.2d 737 (1973), that subjects Delaware third-party spendthrift trusts to divorcing spouses of the trust beneficiaries. Although the sophisticated estate planning attorney can draft around this by using a discretionary trust rather than a trust with a “health, education, maintenance and support” standard, many trusts are not drafted this way and thus aren’t protected.

Thus, David has slayed Goliath here.

Trust Decanting

Nevada’s Decanting statute was enacted in 2009. Trust Decanting is the act of distributing the trust assets from one trust into another trust for one or more beneficiaries of the first trust, but with different provisions. This is often done to fix an error, to take advantage of a tax or creditor protection opportunity or to make just about any other change, so long as it complies with the statutes setting the rules in the applicable jurisdiction.

Nevada and South Dakota are the cream of the crop of the Decanting jurisdictions, at least in this author’s opinion. Both of those states appear to have every flexibility available. Delaware has one of the top Decanting statutes too. It was first enacted in 2003. However, Delaware’s Decanting statute falls just short of Nevada’s for two reasons.

First, Delaware does not allow a Decanting to change a health, education, maintenance and support trust into a fully discretionary trust (i.e., to enhance the creditor protection). Especially given the *Garretson v. Garretson* case noted above, this is a big drawback in Delaware. Second, Delaware doesn’t allow the Decanting to accelerate the interest of a remainder beneficiary. This takes away some income-shifting opportunities. This is not intended to demean Delaware’s

Decanting statute, which is one of the best, but rather simply to note that it does, in fact, fall short of Nevada’s flexibilities.

Thus, David has slayed Goliath here.

Conclusion

| | David (Nevada) | Goliath (Delaware) |
|------------------------------------|----------------|--------------------|
| DAPT | ✓ | |
| Dynasty Trust | ✓ | |
| 3rd-Party Trust Divorce Protection | ✓ | |
| Trust Decanting | ✓ | |

Nevada, along with South Dakota and Alaska, have continued to play the role of David in taking market share from Delaware, the historical Goliath in the trust industry. Indeed, it appears that the smaller, weaker jurisdictions faced off against a much bigger, stronger adversary and found a way to win.

About the Author:

Steven J. Oshins, Esq., AEP (Distinguished) is an attorney at the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada, with clients throughout the United States. He is listed in *The Best Lawyers in America*®. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011 and was named one of the 24 Elite Estate Planning Attorneys in America by the Trust Advisor. He has authored many of the most valuable estate planning and asset protection laws that have been enacted in Nevada. He can be reached at 702-341-6000, ext. 2, at soshins@oshins.com or at his firm’s website, www.oshins.com.



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