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The Strange Case of Dr. Jekyll and Mr. Oshins: Nevada vs. Delaware Dynasty Trusts

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Testing his theory that in every man dwells a good and an evil force, the reserved Dr. Jekyll develops a formula that separates the two, turning him into an argumentative estate planning attorney named Mr. Oshins who tells it like it is. Dr. Jekyll soon realizes he is becoming addicted to his darker self as he unleashes his opinions on the estate planning industry.



In this article, Dr. Jekyll tackles the issue of which trust jurisdiction is superior for Dynasty Trusts, Nevada or Delaware. As expected, Mr. Oshins will provide a different view of the issue than that of Dr. Jekyll.

DR. JEKYLL'S VIEW: DELAWARE IS SUPERIOR

I have read the evil Mr. Oshins' articles over the years and therefore can anticipate his arguments. Mr. Oshins overreacts to the *Garretson v. Garretson* case from 1973 which held that a marital support claimant was not considered a creditor for purposes of spendthrift trust protection of a



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although admittedly it is likely that there are a number of settlements that never made it through the court.

Also, Mr. Oshins tends not to mention that a skilled draftsman can draft around this case by making the trust fully discretionary with an independent trustee serving as the distribution trustee. Had the *Garretson* trust been drafted with an independent trustee having full discretion over distributions of income and principal, the Delaware court would have ruled that the trust assets were protected. Mr. Oshins conveniently fails to mention this when he's providing his analysis.

I do want to point out that Delaware allows perpetual Dynasty Trusts, whereas Nevada limits Dynasty Trusts to 365 years. Delaware only allows real estate in Dynasty Trusts for 110 years, but this can be drafted around by transferring the real estate to a business entity such as an LLC.

MR. OSHINS' VIEW: NEVADA IS SUPERIOR

Delaware is a second-tier Dynasty Trust jurisdiction. Period!

It has many of the same qualifications as the first-tier states except that it has a few holes that move it down to the second tier. Specifically, Delaware has gone more than 40 years with the well-known *Garretson v. Garretson* case on its books. The *Garretson* case held that a divorcing spouse is not considered a creditor for purposes of a support claim against a third-party spendthrift trust.

The *Garretson* case was magnified twice over the past few years. First, in the *Kloiber* divorce case, Beth Kloiber was able to use the *Garretson* case to successfully access part of Daniel Kloiber's Delaware Dynasty Trust via a very large settlement whereby a separate trust was broken off for her benefit.



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spendthrift provision versus the *Mennen* fact pattern where the holders of a judgment tried to convince the Court to create a “persistent wrongdoer” exception to the spendthrift protection of a Delaware trust (but the Court refused to do so). Overall, the *Mennen* case was an excellent case for Delaware trusts, but the Court chose not to create a precedent of overriding the *Garretson* decision.

Although Dr. Jekyll claims that I never mention this, I do want to note that it is very easy to draft a Delaware Dynasty Trust as a fully discretionary trust which avoids the *Garretson* issues. So a skilled attorney can draft that type of trust in Delaware in such a way that the trust is definitely of “first-tier” quality, along with Nevada. However, most trusts are NOT drafted as fully discretionary trusts and therefore pull Delaware down to the second tier. In other words, it can depend upon the drafting attorney. If 95% (or whatever the percentage is) of drafting attorneys draft trusts as support trusts rather than discretionary trusts, then that means that at least these 95% of the trusts would be better off situated in Nevada.

Delaware Dynasty Trust proponents often brag that Delaware is superior because of its larger body of case law. Well, read *Garretson*, *Kloiber* and *Mennen* (although *Mennen* overall has a lot of good in it!). I rest my case.

I agree with Dr. Jekyll that Delaware has strong laws allowing perpetual Dynasty Trusts, however, Nevada’s 365 years are as good as “forever” to most of us, and Nevada doesn’t carve out a 110-year limitation for real estate. In my opinion, there is no reason to have to worry about real estate when you can so easily get 365 years using Nevada’s Dynasty Trust statute.

And with that, Mr. Oshins transformed back into Dr. Jekyll.

Summary



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Mr. Oshins is argumentative and feisty. However, it's difficult to agree with Dr. Jekyll here when Mr. Oshins so clearly described some of the issues that have existed with Delaware law. Nevada simply doesn't have those issues which is why it arguably has become the leading Dynasty Trust jurisdiction.

The claims made by both Dr. Jekyll and Mr. Oshins are opinions only and each of them is entitled to his own opinion, even if the other doesn't agree.

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