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Nevada Attorney Creates Chart on State Treatment of Non-Grantor Trusts

Attorney Steven J. Oshins, of the Law Offices of Oshins & Associates, LLC, in Las Vegas, Nevada (www.oshins.com), a nationally recognized firm specializing in estate planning and asset protection, provides our readers with a new chart comparing the state-by-state income tax treatment of non-grantor trusts. Mr. Oshins is listed in The Best Lawyers in America® and was named the Las Vegas Trusts and Estates Lawyer of the Year in 2012 and 2015 and the Las Vegas Tax Law Lawyer of the Year in 2016 by The Best Lawyers in America®. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011.

CCH: In the past we have interviewed you on a variety of subjects, most recently the Nevada incomplete gift non-grantor (NING) trust (see *ESTATE PLANNING REVIEW—THE JOURNAL*, August 20, 2013, p. 150). You have also provided our readers with access to some very helpful comparison charts that you have created including your Annual Domestic Asset Protection State Rankings Chart (http://www.oshins.com/images/DAPT_Rankings.pdf) and the Annual Dynasty Trust State Rankings Chart (http://www.oshins.com/images/Dynasty_Trust_Rankings.pdf). Since those interviews, you have added your Annual Trust Decanting State Rankings Chart (http://www.oshins.com/images/Decanting_Rankings.pdf) and now you have a new chart, the Non-Grantor Trust State Income Tax Chart (http://www.oshins.com/images/State_Income_Tax_Chart.pdf). Before getting into the specific details of the new chart, could you provide our readers with some background regarding where this new state income tax chart fits into the planning?

Mr. Oshins: There must be thousands of non-grantor trusts in existence. This includes credit

shelter trusts after the settlor has died, irrevocable gift trusts including life insurance trusts after the settlor has died, and many irrevocable trusts where the settlor is still living that were specifically designed as non-grantor trusts. Non-grantor trusts are trusts that pay income tax on income that isn't distributed, and where the recipient of a distribution of income pays income tax on the distributed income.

I suspect that many of these trusts are accumulating income that isn't being distributed either because the beneficiaries have sufficient income from other sources or for one or more of many other potential reasons. Many of these trusts are needlessly paying state income taxes simply because the trustees and the advisors aren't aware of the potential ability to avoid these taxes by simply following the rules necessary for the particular state that is taxing the trust.

CCH: Specifically with respect to your new chart, could you describe how it is constructed?

Mr. Oshins: Basically, there are four columns starting with the states and the District of Columbia in alphabetical order in the left column. The next column includes the state statute or other authority used by the state to tax a resident trust. For online users, that column will include a link to the applicable taxing statute or other taxing authority. The third column shows the highest tax rate imposed on trusts in that particular jurisdiction for 2015. And, finally, the fourth column includes a short summary answer to the question of "Under what conditions does the state tax a non-grantor trust?" The chart also includes a caveat that users should not rely solely on the summary for their

particular jurisdiction, but must always consult the statutes.

CCH: Unlike several of your other charts, this one is not centered on state rankings. Why is that so?

Mr. Oshins: The focus of this chart is really on whether a new trust should be established in a particular state or whether an existing trust can be moved to another state so as to save income taxes. The subject doesn't lend itself to the same kind of ranking regimen that other topics have in the past. Just like my other charts, this chart was in large part created in order to give estate planners opportunities to help their clients. I suspect that state income tax planning is overlooked by a lot of people. Hopefully this chart will help change that.

CCH: Looking more closely at the case of an existing trust, what possible issues should practitioners concentrate on?

Mr. Oshins: That will depend on the details of the laws of the particular state(s) involved. For example, there may be a relatively simple path available to move the tax situs of the trust by having the current trustees resign or otherwise be removed and replaced. Another possibility may exist if the parties are dealing with a state that has adopted laws allowing "decanting" (which is a nonjudicial method for modifying an irrevocable trust by allowing the transfer of principal of one irrevocable trust to another with more favorable terms), or if the trust itself contains language on decanting. There may be other nonjudicial avenues for trust transfers available, as well. And, of course, there is always the judicial option as a last resort.

CCH: Let's go through an example. Assume that there is an existing credit shelter trust situated in California with the surviving spouse as the sole trustee with distributions of income and principal for health, education, maintenance or support

and that the surviving spouse has plenty of income and doesn't need any income from the trust, and that the trust agreement allows the trustee to change the situs of the trust. How would you use your chart to save California state income tax?

Mr. Oshins: This is a great example because you picked the jurisdiction with the highest state income tax rate. California's state income tax rates go as high as 13.3 percent, so as you can imagine, I handle plenty of California clients. If you look at my new chart, it has a link to Cal Rev & Tax Code § 17742 which contains the California income tax rules for taxation of trusts. California taxes a trust by apportioning the tax based on whether there are any California trustees or California non-contingent beneficiaries.

I would first have the trustee elect to change the situs from California to Nevada and would appoint a Nevada co-trustee which is probably a Nevada-based trust company. Next, I would have the Nevada trustee decant the trust to distribute the assets into a new trust that has no California trustees and which is fully discretionary rather than having a health, education maintenance or support distribution standard. Very few decanting jurisdictions allow this particular change which is one reason I'm assuming that we would use Nevada as our situs. With these changes we have likely saved the client tens of thousands of dollars every tax year, depending upon the size of the trust.

CCH: What are your future plans for the chart?

Mr. Oshins: Like my other three charts, I will update the chart once a year. This chart will be updated every July. It's a lot of work to link to the new statutes, but it's my way of helping the industry since it creates a simple way for advisors to help their clients. I personally use my chart a few times a day and have already used it many times to create opportunities for existing and new clients since it gives me the information at my fingertips without having to do substantial research.

1ST ANNUAL NON-GRANTOR TRUST STATE INCOME TAX CHART

| State (alphabetical) | Taxing Statute | Top 2015 Tax Rate | Under What Conditions does the State Tax a Non-Grantor Trust? |
|-------------------------|--|-------------------------|---|
| Alabama | Ala. Code §§40-18-1(33) | 5.00% | If the trust is set up by the Will of an AL resident or settlor was an AL resident at time trust became irrevocable, and an AL resident is a beneficiary or trustee for more than seven months during the tax year |
| Alaska | ***No tax*** | 0% | ***No tax*** |
| Arizona | Ariz. Rev. Stat. §43-1301(5) | 4.54% | If there is at least one AZ trustee |
| Arkansas | Ark. Code Ann. §§26-51-201(a)-(c) | 7.00% | If the trust is set up by the Will of an AR resident or settlor was an AR resident, and there is an AR trustee |
| California | Cal. Rev. & Tax. Code §17742 | 13.30% | If the trust has either a CA trustee or a CA non-contingent beneficiary, tax apportioned based on CA vs. non-CA trustees and beneficiaries |
| Colorado | Colo. Rev. Stat. §39-22-103(10) | 4.63% | If the trust is administered in CO |
| Connecticut | Conn. Gen. Stat. §12-701(a)(4)(C)-(D), (a)(5), (a)(6) | 6.70% | If the trust is set up by the Will of a CT resident or settlor was a CT resident at time property transferred to an irrevocable trust or at the time property transferred to revocable trust that later became irrevocable --- other than for Will transfer, tax is modified fractionally to the extent there are nonresident non-contingent beneficiaries |
| Delaware | 30 Del. C. §1601(8)-(9); 30 Del. C. §1636 | 6.60% | If the trust is set up by the Will of a DE resident, or settlor of trust was a DE resident, or the majority of the trustees are DE trust for more than ½ the year; in all of such cases only if there is a DE beneficiary |
| Florida | ***No tax*** | 0% | ***No tax*** |
| Georgia | O.C.G.A. §48-7-22 | 6.00% | If there is trust property located in GA or if the trustee is "managing funds for the benefit of a resident of" GA |
| Hawaii | Haw. Rev. Stat. §§235-1; Form N-40 Instr. | 11.00% | If there is a HI trustee or if the trust is administered in HI, but only if there's a Hawaii beneficiary |
| Idaho | Idaho Rev. and Tax. §63-3015(2) | 7.40% | If there are three or more of: (1) Grantor is ID resident; (2) Trust governed by ID law; (3) Trust has real or tangible personal property located in ID; (4) Trust has ID trustee; and/or (5) Administration of trust in ID |
| Illinois | 35 Ill. Comp. Stat.5/1501(a)(20)(C)-(D) | 3.75% | If the trust is set up by the Will of an IL resident or settlor was an IL resident at time trust became irrevocable |
| Indiana | Ind. Admin. Code tit. 45, r. 3.1-1-12 | 3.30% | If the trust is administered in IN |
| Iowa | Iowa Admin. Code r. 701-89.3(1)-(2) | 8.98% | Depends on "relevant facts of each case" --- Relevant facts include residence of trustees, location of administration, location of evidence of intangible assets of the trust, etc. --- Must read rules carefully |
| Kansas | Kan. Stat. Ann. §§79-32, 109(d) | 4.60% | If the trust is administered in KS |
| Kentucky | Ky. Rev. Stat. Ann. §386B.1-060; Instr. to Form 741 | 6.00% | If the principal place of administration of the trust is in KY |
| Louisiana | La. Rev. Stat. Ann. §47:300.10(3) | 6.00% | If the trust is set up by the Will of a LA resident; or an inter vivos trust set up by resident of any jurisdiction if trust instrument provides that the trust shall be governed by LA law, or if silent then taxed if administered in LA |
| Maine | Me. Rev. Stat. Ann. Tit. 36, §5102(4)(B)-(C) | 7.95% | If the trust is set up by the Will of a ME resident or settlor was a ME resident |
| Maryland | Md. Code Ann., Tax-Gen. §§10-101(k)(1)(iii) | 5.75% | If the trust is set up by the Will of a MD resident or settlor "is a current resident of" MD or the trust is principally administered in MD --- Also note the 1.25% to 3.20% county tax |
| Massachusetts | Mass Regs. Code tit. 830, §62.10(c); Form 2 Instr. | 5.15% | If the trust is set up by the Will of a MA resident and there is MA beneficiary; Or if settlor was a MA resident at time of creation of inter vivos trust or at any time during year in which income is computed or who died as MA resident and there is MA beneficiary, but only if MA trustee --- Also note the 12.00% tax for short-term capital gains and gains for sales of collectibles |
| Michigan | Mich. Comp. Laws §206.18(1)(c); Form MI-1041 | 4.25% | If the trust is set up by the Will of a MI resident; or settlor was a MI resident at time trust became irrevocable, unless no MI trustee, no MI assets and no MI beneficiary |
| Minnesota | Minn. Stat. §290.01, Subd. 7b | 9.85% | If the trust is set up by the Will of a MN resident that died post-12/31/1995 or trust that became irrevocable post-12/31/1995; or for pre-1/1/1996 irrevocable trusts if the majority of discretionary investment distribution decisions are made in MN or the books or records located in MN |
| Mississippi | Miss. Code Ann. §27-7-5(1); Miss. Form 81-110 Instructions | 5.00% | If the trust is administered in MS |
| Missouri | RSMo §143.331(2)-(3) | 6.00% | If the trust is set up by the Will of a MO resident or settlor was a MO resident at time trust became irrevocable, and a MO resident is a beneficiary on the last day of the tax year |
| Montana | MT Code §72-38-103(14); 2014 MT Form FID-3 at 15 | 6.90% | If principal place of administration is in MT --- Principal place of administration is the usual place where day-to-day activities carried on by the trustee which is generally trustee's residence or usual place of business |
| Nebraska | §77-2714.01(6)(b)-(c) | 6.84% | If the trust is set up by the Will of a NE resident; or if settlor of inter vivos trust was a NE resident at time such person may no longer exercise the power to revest title to the trust property in himself or herself |
| Nevada | ***No tax*** | 0% | ***No tax*** |

1ST ANNUAL NON-GRANTOR TRUST STATE INCOME TAX CHART

| State (alphabetical) | Taxing Statute | Top 2015 Tax Rate | Under What Conditions does the State Tax a Non-Grantor Trust? |
|-------------------------|--|------------------------------|---|
| New Hampshire | ***No tax*** | 0% | ***No tax*** |
| New Jersey | NJSA §54A:1-2(o)-(p); Form NJ-1041 | 8.97% | If the trust is set up by Will of NJ resident, or if settlor of a trust was a NJ resident at time of transfer to irrev. trust or at time a rev. trust became irrevocable, but not if no NJ assets, no NJ source income and no NJ resident trustee |
| New Mexico | NM Stat. Ann. §§7-2-2(l), (S); NM Tax. & Rev. Dept. | 4.90% | If the trustee is a NM resident; or if the principal place from which the trust is managed or administered is in NM |
| New York | N.Y. Tax Law §605(b)(3)-(4) | 8.82% | If the trust is set up by the Will of a NY resident or settlor was a NY resident at time trust became irrevocable or when transfer made to trust, but foregoing doesn't apply if no NY trustees, all corpus outside of NY and all income non-NY sourced; Also, no Incomplete Gift Non-grantor Trusts |
| New York City | N.Y. Tax Law §1305 | 3.876% | If the trust is set up by the Will of a NY City resident; or if settlor was a NY City resident at time trust became irrevocable or when transfer made to trust; also, no Incomplete Gift Non-grantor Trusts |
| North Carolina | N.C. Gen. Stat. §105-160.2 | 5.75% | If there is a NC beneficiary |
| North Dakota | N.D. Admin. Code §81-03-02.1-04(2) | 3.22% | If the trust "has a relationship to the state sufficient to create nexus" --- This includes, but is not limited to: (1) If there is a ND beneficiary; (2) If there is a ND trustee; (3) If there are ND situs assets; (4) If there is administration in ND; and/or (5) If the "laws of this state are made applicable to the trust" |
| Ohio | Ohio Rev. Code Ann. §5747.01(l)(3) | 5.33% | If the trust is set up by the Will of OH resident; or if settlor of an inter vivos trust was an OH resident at time trust became irrevocable and at least one of the trust's "qualifying beneficiaries" is an OH resident during all or some portion of taxable year |
| Oklahoma | Okla. Stat. tit. 68, §2353.6 | 5.25% | If the trust is set up by the Will of an OK resident; or settlor of inter vivos trust was an OK resident at time such trust irrevocable; or when person may no longer exercise the power to revest title to the trust property in himself |
| Oregon | Or. Rev. Stat. Ann. §316.282(1)(d) | 9.90% | If there is an OR trustee; or if the trust is administered in OR |
| Pennsylvania | 72 P.S., tit. 61, Sec. 101.1 | 3.07% | If the trust is set up by the Will of a PA resident; or if settlor of inter vivos trust was a PA resident at time of creation of trust or at time of transfer to trust |
| Rhode Island | R.I. Gen. Laws §§44-30-5(c) (2)-(5) | 5.99% | If the trust is set up by the Will of a RI resident; or a RI settlor of a revocable trust upon becoming irrevocable; or a settlor of an irrevocable trust if the settlor was a RI resident at time of creation of trust or at time of transfer to trust, but in each of these situations only to the extent that the beneficiaries are RI residents |
| South Carolina | S.C. Code Ann. §12-6-30(5) | 7.00% | If the trust is administered in SC |
| South Dakota | ***No tax*** | 0% | ***No tax*** |
| Tennessee | Tenn. Code Ann. §67-2-110(a) | 6.00% (int./div. only) | If there is a TN beneficiary |
| Texas | ***No tax*** | 0% | ***No tax*** |
| Utah | Utah Code Ann. §75-7-103(1) (i)(ii)-(iii) | 5.00% | If the trust is set up by the Will of a UT resident; or if a trust is administered in UT |
| Vermont | 32 V.S.A. §5811(11)(B) | 8.95% | If the trust is set up by the Will of a VT resident; or if settlor of a trust was a VT resident at time of transfer to irrevocable trust or was a VT resident at the time a revocable trust became irrevocable |
| Virginia | Va. Code Ann. §58.1-302 | 5.75% | If the trust is set up by the Will of a VA resident; or if a trust was created by a settlor who was a VA resident; or a trust which is being administered in VA |
| Washington | ***No tax*** | 0% | ***No tax*** |
| Washington, D.C. | D.C. Code §47-1809.01; 1809.2 | 8.95% | If the trust is set up by the Will of a D.C. resident; or if a trust was created by a settlor who was a D.C. resident |
| West Virginia | W. Va. Code §11-21-7(c) | 6.50% | If the trust is set up by the Will of a WV resident; or if a trust was created by a settlor who was a WV resident |
| Wisconsin | Wis. Stat. §71.14(2), (3), (3m) | 7.65% | If the trust is set up by the Will of a WI resident; or if settlor of a post-10/28/1999 inter vivos trust was a WI resident at time trust became irrevocable; or if irrevocable inter vivos trust administered in WI pre-10/29/1999 |
| Wyoming | ***No tax*** | 0% | ***No tax*** |

*This Non-Grantor Trust State Income Tax Chart created in July 2015. For informational purposes only. Do not rely solely on the short summary. Always read the statute. Copyright © 2015 by Steve Oshins - soshins@oshins.com / www.oshins.com / (702) 341-6000, ext. 2. All rights reserved.

Steve Oshins is a member of the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada. He is rated AV by the *Martindale-Hubbell Law Directory* and is listed in *The Best Lawyers in America*®. He was inducted into the NAEP Estate Planning Hall of Fame® in 2011 and has been named one of the 24 "Elite Estate Planning Attorneys" by *The Trust Advisor* and one of the Top 100 Attorneys in *Worth*. He can be reached at 702-341-6000, ext. 2 or soshins@oshins.com. His law firm's website is www.oshins.com.