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## Situs Your Trust in a First-Tier Trust Jurisdiction

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Not all jurisdictions have favorable trust laws. In fact, most jurisdictions' trust laws are inferior in comparison to those of the first-tier trust jurisdictions.

Despite the limitations found in most trust jurisdictions laws, estate planners generally limit their planning to the client's home jurisdiction. This article will provide multiple reasons not to do so and will explain some of the opportunities that are lost by failing to consider a top trust jurisdiction.

### COMMON REASONS TO SITUS A TRUST IN A TOP-TIER TRUST JURISDICTION

Following are some of the common reasons to situs an irrevocable trust in a different jurisdiction:

**State Income Tax Savings:** There is almost never a good reason to maintain an irrevocable trust in a jurisdiction that has a state income tax on trusts at any point in which the trust is a non-grantor trust for income tax purposes. Such trusts should almost always be moved to a state that has no fiduciary state income tax on undistributed income. This is especially important when a lot of the trust income will not be distributed to the beneficiaries either because the beneficiaries are in a high income tax bracket, where the beneficiaries should not receive large distributions and/or where the beneficiaries have creditor issues and therefore should not receive large distributions for that reason.

**Creditor Protection:** Many trusts are drafted to give the trustee the power to make distributions to the beneficiaries for their health, education, maintenance and support. These trusts are often called "support trusts" for creditor purposes. Depending upon state statutes and case law, support trusts are often available to certain classes of creditors, including divorcing spouses. A discretionary trust, on the other hand, gives the trustee absolute discretion over distri-



butions and thus generally protects the assets from all classes of creditors. [The only exception to this date is the 2013 Florida case, *Berlinger v. Casselberry*, where the Court ruled that a discretionary trust domiciled in Florida is subject to a writ of garnishment for unpaid alimony.] However, when the trust has been drafted as a support trust, it is imperative that the trust be domiciled in a state that protects the trust assets from various exception creditors.

**Decanting:** Many jurisdictions have a decanting statute. A decanting statute allows the trustee to distribute the trust assets into a different trust with different provisions for one or more of the beneficiaries of the prior trust. This flexibility can become very important when there is a drafting error, a change of circumstances or an enhancement that the family would like built into the trust, such as an ability to save taxes or to enhance the creditor and divorce protection. The failure to consider using one of these jurisdictions (or at least allowing the trustee or trust protector to move the trust to a favorable decanting jurisdiction) could mean that the desired changes cannot be made.

Domestic Asset Protection Trusts: Domestic Asset Protection Trusts have become one of the most popular and widely-used asset protection techniques. Only certain jurisdictions have favorable statutes allowing the settlor to set up a Domestic Asset Protection Trust. Although many attorneys are taking advantage of this, many others are not. Some have failed to use this technique because of the uncertainty about whether it will work for a resident of a state that doesn't have a Domestic Asset Protection Trust statute. There will not be a 100% success rate, but in almost all situations, this technique will help the client negotiate a favorable settlement. To enhance the results, instead of using a regular Domestic Asset Protection Trust, the planner can create a Hybrid Domestic Asset Protection Trust which is actually third-party trust that can be turned into a Domestic Asset Protection Trust. This is the go-to technique for a client who's a resident of a jurisdiction that doesn't have a Domestic Asset Protection Trust statute.

Dynasty Trusts: Dynasty Trusts aren't just estate tax savings vehicles. They are also used to provide asset protection and divorce protection for the beneficiaries for as many generations as applicable state law allows. Just as attorneys should use lifetime trusts to protect assets from estate taxes, creditors and divorcing spouses for the first generation, the same concepts apply to more remote generations as well. There is no reason not to protect the assets for grandchildren, great-grandchildren and other beneficiaries. Thus, it is important for the estate planner to consider situsing the irrevocable trust in a state with strong Dynasty Trust statutes.

## CONCLUSION

There are many reasons not to simply use the local state trust laws. Just because nearly every estate planner relies solely on the client's local state laws doesn't mean that the more advanced estate planner should follow suit. It can cost the client's family a significant amount of money in unnecessary taxes, expose assets to creditors that could easily have been avoided and cause the family to miss opportunities for enhanced flexibility.

Should you, as an estate planner, wish to set yourself apart from your competitors and offer trust enhancements that aren't available locally, consider situsing the trust in a top-tier trust jurisdiction.

Link to: <https://ultimateestateplanner.com/2020/12/02/situs-your-trust-in-a-first-tier-trust-jurisdiction/>

## ABOUT THE AUTHORS



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