



ESTATE PLANNING

NEVADA LAWS PROVIDE TOP TRUST SITUS

BY DAVID M. GRANT, ESQ. & JEREMY K. COOPER, ESQ.

Nevada historically has been considered a favorable jurisdiction for forming and maintaining a trust. As one of the first states to pass legislation permitting the self-settled spendthrift trust, or domestic asset protection trust (DAPT) as it is sometimes identified, Nevada offers cutting-edge laws in the areas of trust formation and

administration. These progressive laws, coupled with an income-tax-free environment and relatively generous execution exemptions, have allowed the state to make its way onto the short list of go-to states for estate planning and asset protection.¹

To increase the flexibility of forming and administering a trust, as well as to enhance and legitimize the asset protection features of Nevada laws, the legislature made significant revisions and additions to its trust laws in the most recent regular legislative session.² The codification of these laws has catapulted Nevada into the limelight of the trust industry anew, where it is again recognized on a national level as a top-tier state in which to structure and administer a trust.³

In an effort to highlight the basis of this recent attention, the following is a brief overview of the more notable laws and features that form the impetus for Nevada's growing notoriety in the area of trust jurisprudence.

Rule Against Perpetuities

In 2005, Nevada passed legislation that all but revoked the rule against perpetuities. As a reminder, besides being the bane of all first-year law school students, the rule against perpetuities limits the duration of a non-vested property interest, including those interests left in trust, so as to prevent dead-hand control by individuals establishing such interests. The time period applicable to Nevada's rule against perpetuities is 365 years.⁴

Attorneys often use trusts to help clients shield inter-generational transfers of assets from transfer taxes (i.e., the federal gift, estate and generation-skipping transfer taxes) as part of a family's estate plan. These tax benefits continue for as long as the trust remains in existence. Because Nevada law allows interests in trust to exist for up to 365 years, assets held through a Nevada-domiciled trust agreement can experience ongoing transfer-tax-free growth. As one of the 24 jurisdictions that has either repealed its rule against perpetuities or extended the statutory period into near perpetuity, Nevada has created an ideal environment for preserving property through long-term inter-generational asset transfers.⁵

Virtual Representation

In the event a trust contains provisions for unascertainable beneficiaries (e.g., unborn children), virtual representation statutes permit a court to allow for these rights to be represented without the need for appointment of an attorney or guardian ad litem. In essence, Nevada law allows the interests of such unknown or minor beneficiaries to be represented by other beneficiaries whose interests are substantially similar and who have no material conflict of interest. NRS 155.140 has provided for virtual representation in probate estates for years, but the 2009 legislature added a similar provision applicable to trust administration. Nevada is among the minority of jurisdictions statutorily providing for virtual representation.⁶

Trust Protector Statute

The trust protector, or trust consultant as it is sometimes called, is a party to the trust agreement who is appointed by the settlor to act as a check-and-balance alongside the trustee. Trust protectors frequently are given

| The Best States for Trusts | | | | | | | |
|----------------------------|-------------------------------|------------------|------------------------|------------------------|-----------------------|----------------------|---------------------|
| Tier | State* | State Income Tax | Directed Trust Statute | Asset Protection Trust | Dynasty Trust Ability | Number of Trust Cos. | Time Zone (from NY) |
| 1 | Alaska | No | Yes | Yes | 1000 yrs. | 3 | (-) 4 |
| 1 | Delaware | Residents | Yes | Yes | Perpetual | 32 | (-) 0 |
| 1 | Nevada | No | Yes | Yes | 365 yrs. | 26 | (-) 3 |
| 1 | South Dakota | No | Yes | Yes | Perpetual | 39 | (-) 1 / 2 |
| 2 | Florida | No | Yes | No | 360 yrs. | 9 | (-) 0 |
| 2 | New Hampshire | Residents | Yes | Yes | Perpetual | 19 | (-) 0 |
| 2 | Wyoming | No | Yes | Yes | 1000 yrs. | 2 | (-) 2 |
| 3 | Colorado | Yes | Yes | Yes | 1000 yrs. | 7 | (-) 2 |
| 3 | Idaho | Yes | No | No | Perpetual | 3 | (-) 2 |
| 3 | Ohio | Residents | Yes | No | Perpetual | 2 | (-) 0 |
| 3 | Utah | Yes | Yes | Yes | 1000 yrs. | 2 | (-) 2 |
| 3 | Wisconsin | Residents | No | No | Perpetual | 4 | (-) 1 |

*States: links to State Trust Statutes
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continued on page 22

NEVADA PROVIDES TOP TRUST SITUS

continued from page 21

the authority to remove and replace trustees, but the inclusion of such authority is solely dependent upon how the relevant trust agreement is drafted. Trust protectors may also have certain limited powers to amend a trust's terms. The use of trust protectors is not a new development; however, Nevada recently enacted legislation that recognizes the legitimacy and authority of the trust protector office.⁷ While the 2009 legislature recognizes the position of a trust protector, and even suggests some powers a trust protector might have, it leaves the specifics regarding scope of power and authority to the complete discretion of the settlor. Having a statutory provision recognizing trust protectors and establishing roles in which they may act allows the settlors of a trust to have the flexibility necessary to ensure the trust's proper administration and deal with unforeseen circumstances.

Decanting Provisions

Decanting is a statutorily-enabled action that allows a trustee of a trust to appoint assets from one trust to another trust. Currently, only eight states, including Nevada, have decanting statutes.⁸ Some of the requirements for decanting under Nevada's statute are that the new trust into which assets are appointed must not include beneficiaries who are not beneficiaries of the original trust, and the beneficial rights and property interests of the beneficiaries under the original trust cannot be reduced.⁹

Trustees can decant to a trust in order to modernize antiquated trust provisions or deal with unforeseen changes in law. Other reasons a trustee may decide to decant trust assets to a new trust include: improving

administrative provisions, consolidating or separating out trust property, correcting drafting errors and migrating a trust to a new jurisdiction better suited to providing for the beneficiaries. Trust migration, or redomiciliation as it is sometimes called, typically occurs when a trustee desires to take advantage of the laws of a different jurisdiction. Trust migration can be done for tax and asset-preservation purposes and can be carried out on either a domestic or international level. Having the ability to change a trust's situs or update provisions if ever necessary is likely to be an important consideration for individuals hoping to achieve maximum flexibility and asset preservation within their trust agreements.

Self-Settled Spendthrift Trust Statute

More than 10 years ago, Nevada became one of the first states to pass legislation allowing for the formation of self-settled spendthrift trusts.

Since the inception of the Nevada DAPT, other states have followed suit.¹⁰ In general, NRS 166 permits individuals to protect assets from the reach of their personal creditors and still derive personal benefit from such assets by transferring them into a trust where at least one of the trustees is a Nevada resident, Nevada bank or Nevada trust company, and where the settlors are not authorized to make distributions back to themselves.¹¹ Assets are then shielded from the reach of the settlor's personal creditors once a specific seasoning period has run (discussed below), provided the trust conveyance is not deemed to be a fraudulent transfer or wrongful to the creditor.¹²

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continued on page 24

NEVADA PROVIDES TOP TRUST SITUS

continued from page 22

discussion of the moral or ethical implications of allowing an individual to form a trust and then benefit from the trust's property while receiving protection from his or her creditors is beyond the scope of this article, it is important to note that the growing trend in states passing self-settled spendthrift trust legislation indicates a potential shift in public policy.

Unlike the laws of recent entrants to the DAPT arena, Nevada's self-settled spendthrift trust laws have been on the books for over a decade. Furthermore, the legislation has been favorably amended in two separate legislative sessions.¹³ The most recent round of statutory development not only signifies renewed approval by the state's lawmakers, but demonstrates a growing commitment to creating a legal environment that is conducive to progressive asset protection planning. Some of the more notable features of NRS 166 are as follows:

- Two-year statutory seasoning period: Nevada has one of the shortest vesting periods of any DAPT jurisdiction (just two years). Once the two-year period has passed, the assets held in trust are protected from creditor reach. Creditors also have six months from the time of discovery or reasonable discovery to bring legal action against a transfer into trust; however, NRS 166 now provides that creditors shall be deemed to have discovered the transfer once the

transferor publicly records the transfer with the county recorder or files a financing statement with the Secretary of State.¹⁴

- Settlor can serve as trustee: Prior to the most recent legislative changes to NRS 166, there was much debate among the members of the estate planning community as to whether the settlor of a Nevada DAPT could also serve as a trustee of the same trust. Many thought having a settlor serve as trustee would defeat the trust's ability to protect assets where the settlor was also a beneficiary. Now, however, with the passage of SB 287, the law makes clear that not only can a settlor of a self-settled spendthrift trust serve as a trustee, but it also explicitly provides that a settlor-trustee can hold and exercise any other power under the trust, including the power to remove and replace a trustee, direct trust investments and execute other management powers. Moreover, the new language in the statute seems to allow a settlor-trustee to even make a distribution to himself, provided another person consents to such distribution.¹⁵
- Fraudulent transfer requirement: Under the new language of NRS 166, for a creditor to bring an action against a transfer of property to a Nevada self-settled spendthrift trust, the creditor must prove the transfer was either a fraudulent transfer or "otherwise wrongful as to the creditor."¹⁶ Furthermore, if a creditor proves the transfer of a certain asset to be fraudulent, that proof does not provide blanket evidence as to all other transfers or for all other creditors. Each creditor must make his own case for each asset.¹⁷
- Adviser protection: Accountants, attorneys, investment advisers and other similar advisers to the trustee of a self-settled spendthrift trust are protected from legal claims by third parties, provided there is no "clear and convincing" evidence that the adviser "acted knowingly and in bad faith" in violation of state law and that such actions "directly caused" the damages suffered by the third party.¹⁸

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No State Taxes on Income, Estates or Inheritances

Although the absence of state income, estate and inheritance taxes in Nevada is not a recent development, from a trust perspective it is one of the most appealing

aspects of doing trust business in the Silver State. Accordingly, the allure of a tax-free environment for trusts and other income-earning or asset-transferring entities does not require an exhaustive explanation, except to say that Nevada is one of a small minority of jurisdictions that does not levy these types of state taxes.

Charging Orders, State Exemptions and Other Related Laws

In addition to trust laws, Nevada has many laws not directly aimed at trusts which not only facilitate holistic estate and asset protection planning, but bolster overall trust-settling opportunities. For example, Nevada law provides for certain charging-order-protected entities such as the limited partnership (LP), limited-liability company (LLC), and closely-held corporation. Nevada law protects the owners of such state-recognized entities from all forms of judicial remedies except that of the charging order.

The charging order is a remedy which allows a personal judgment creditor to attach nothing more than an individual debtor's distributional interest in the relevant entity. As such, a personal creditor is not able to attach the owner's proportionate share of the entity's assets, nor is such creditor afforded managerial or voting rights in the entity. Thus, with respect to the entity's assets, the owner's personal creditor is essentially forced to wait for the entity to make distributions to the debtor in order to satisfy any judgments.

Charging orders are intended to protect an entity's non-debtor owners from being forced to accept the debtor's creditor as a new partner. Many states have charging order laws, but not all such laws are created equally. Unlike Nevada, a large number of states do not limit a creditor's remedial options to the charging order, in that they allow judicial liquidations, constructive trusts and other similar remedies. Furthermore, Nevada is the only state to extend charging order protection beyond the realm of LPs and LLCs so as to include corporations that qualify as closely-held companies pursuant to NRS 21.090 and 78.746.¹⁹

In addition to charging order protection, Nevada law provides for various favorable property exemptions from creditor attachment. Homestead and other statutory exemptions are some of the most protective of any jurisdiction. For instance, Nevada's homestead exemption shields up to \$550,000 of equity in a personal residence,²⁰ and state exemptions protect up to \$500,000 of money held in IRAs and qualified retirement plans and life insurance benefits to the extent premiums don't exceed \$15,000 a year.²¹

The authors would be remiss not to mention that the laws of Nevada also provide for discretionary trusts, unitrust conversions, limited powers of appointment, private trust companies and directed trusts. Each of these statutory features provides added tools for better carrying out the intent of trust settlors.

Conclusion

The overall framework of Nevada trust law is catching the attention of the estate planning community on a national level with renowned estate planners consistently ranking Nevada in the top tier as a trust situs.²² Indeed, those persons who establish, administer and benefit from trusts agreements governed by the Nevada law enjoy superior flexibility and protection. ■



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- 1 Mark Merric and Daniel G. Worthington, *Which Situs is Best?* 149 *Tr. & Est.* 54 (Jan. 2010).
- 2 S.B. 287, 75th Leg., (Nev. 2009), signed into law on May 26, 2009 and effective as of Oct. 1, 2009.
- 3 LSI Estate Planning Newsletter #1596 (Feb. 2, 2010).
- 4 NRS 111.1031.
- 5 Following is a list of perpetual and near-perpetual states: Alaska-1,000 yrs. (Ak Stat. §34.27.051); Arizona-no RAP (Ariz. Rev. Stat. §14-2901A); Colorado-1,000 yrs. (Col. Rev. Stat. 15-11-1102.5); District of Columbia-no RAP (D.C. Code Ann. §19-904(10)); Delaware-no RAP (25 Del. C. §503); Florida-360 yrs. (Fl. Stat. 689.225); Idaho-no RAP (Id. Stat. 689.225); Illinois-no RAP (765 Ill. Comp. Stat. Ann. §§ 305/1-305/6); Maine-no RAP (Me. Rev. Stat. Ann. tit. 33. § 101-A); Maryland-no RAP (Md. Code Ann., Est. & Trusts § 11-102); Missouri-no RAP (Mo. Rev. Stat. § 456.025); Nebraska-no RAP (Neb. Rev. Stat. § 76-2005(9)); Nevada-365 yrs. (Supra note 5); New Hampshire-no RAP (N.H. Rev. Stat. Ann. § 564:24); New Jersey-no RAP (N.J. Stat. §§ 46:2F-9-46:2F-11); Ohio-no RAP (Ohio Rev. Code Ann. § 2131.09); Pennsylvania-no RAP (PSA § 6107.1); Rhode Island-no RAP (R.I. Gen. Laws § 34-11-38); South Dakota-no RAP (SD Stat. 55-1-23); Utah-1,000 yrs. (Ut. Code Ann. 75-2-1203(1)); Virginia-no RAP (Va. Code Ann. § 55-13.3); Washington-150 yrs. (Wash. Rev. Code § 11.98.130); Wisconsin-no RAP (Wis. Stat. § 700.16); Wyoming-1,000 yrs. (Wyo. Stat. Ann. 34-1-139(b)).
- 6 Supra note 3, at § 45.4, pg. 18.
- 7 Supra note 3, at § 33, pgs. 9-10.
- 8 Supra note 2.
- 9 Supra note 3 at § 37, pgs. 11-14.
- 10 See David G. Shafel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 *ACTEC JOURNAL* 293 (2009).
- 11 NRS 166.
- 12 NRS 112.
- 13 See generally supra note 3; and S.B. 420, 74th Leg., (Nev. 2007).
- 14 NRS 166.170.
- 15 Supra note 3, at § 58.3, pg. 27.
- 16 Supra note 3, at § 36, pg. 11.
- 17 *Id.*
- 18 Supra note 3, at § 60, pgs. 28-29.
- 19 See generally Cooper, Jeremy K. and Grant, David M., *Nevada Takes the Lead: Charging Order Protection is Now Available for Small Corporations*, 30 *Communique* (2009)28.
- 20 NRS 115.
- 21 NRS 21.090(1)(k) and (r).
- 22 See Supra note 4.