

# Trust Merger:

## What's Good For The Goose Is Good For The Gander

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**T**he ability to merge trusts can be a very attractive strategy for migrating a trust from another state to Delaware. Of course, in many circumstances it will be possible to simply remove a trustee and appoint a successor in Delaware, and many trust instruments provide flexible provisions that allow for the change of situs and governing law. However, in some instances, when a trust is migrated to Delaware, it may be necessary to modify the choice of law or situs provisions of the trust instrument or make other modifications to the trust, such as converting the trust to a directed trust.

It is important to note that under the laws of many states, these modifications can be accomplished before, or contemporaneous with, the migration of the trust. These options include court orders, non-judicial modification and decanting. Those options are available under the laws of many states. For example, twenty-four States plus the District of Columbia have enacted the Uniform Trust Code which includes provisions for the judicial and non-judicial modification of trusts. As of the date of this piece, those States are: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. In



addition, the Uniform Trust Code was introduced in 2013 in Montana and New Jersey. As of the date of this piece, eighteen states have enacted decanting legislation and at least two other states have proposed statutes. The States that currently have decanting statutes are: New York, Alaska, Delaware, Tennessee, Florida, South Dakota, New Hampshire, Nevada, Arizona, North Carolina, Indiana, Missouri, Ohio, Kentucky, Virginia, Illinois, Rhode Island, and Michigan. The two states where decanting statutes have been proposed are: South Carolina and Colorado.

### **Merger – A Well-Established Concept**

The concept of trust merger is a well-established legal principal. Using merger to transfer an entity from one state to another is also firmly embedded in the corporate and alternative entities laws as well as the tax laws. Non-Delaware corporations routinely re-domesticate in Delaware by merging with and into a newly-created Delaware corporation under Delaware General Corporation Laws Section 252. Indeed this has been such a long-standing and well-settled process, that the Internal Revenue Service provided guidance on the issue 40 years ago, determining that the surviving corporation is treated as the same corporation as the transferor corporation for Federal income tax purposes. See Rev. Rul. 73-526, 1973-2 C.B. 404. Sections 263 and 264 of the Delaware General Corporation Laws allow a partnership or limited liability company to merge with an into a Delaware corporation. There are similar statutes under the alternative entity laws. See Delaware Revised Limited Partnership Act Section 17-211 and Delaware Limited Liability Company Act Section 18-209. Those sections actually include common law trusts among the “entities” that can merge with and into a Delaware limited partnership or limited liability company. These transactions are commonplace in the commercial setting.

### **Delaware’s Trust Merger Law**

Under Section 3325(29) of Title 12 of the Delaware Code, a trustee of a Delaware trust has the power to: “Merge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.” This can be a very useful tool for combining substantially similar trusts to achieve economies of scale. It can also be an effective strategy for migrating an existing non-Delaware trust into Delaware, by merging the existing trust with and into a new Delaware trust. The surviving Delaware trust could be administered under Delaware law and could include some administrative differences from the original trust, such as including a directed trustee provision. This should be possible, even if the original trust is exempt from generation skipping transfer tax because there is a safe harbor in the Treasury Regulations for a trust merger. See Teas. Reg. § 26.2601-1(b)(4)(E) Example 6.

### **Other States’ Statutes**

Section 417 of the Uniform Trust Code provides trustees with the power to merge and combine trusts. It states: “After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.”

Including Delaware, there are 35 states plus the District of Columbia that authorize trust mergers by statute without court approval. Those states are

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|----------------------|----------------|
| Alabama              | New Hampshire  |
| Arizona              | New Mexico     |
| Arkansas             | North Carolina |
| Delaware             | North Dakota   |
| District of Columbia | Ohio           |
| Florida              | Oregon         |
| Illinois             | Pennsylvania   |
| Indiana              | South Carolina |
| Iowa                 | South Dakota   |
| Kansas               | Tennessee      |
| Maine                | Texas          |
| Massachusetts        | Utah           |
| Michigan             | Vermont        |
| Minnesota            | Virginia       |
| Mississippi          | Washington     |
| Missouri             | West Virginia  |
| Nebraska             | Wyoming        |

Additionally, there are 6 other states that allow mergers with some level of court intervention. Those states are California, Colorado, Georgia, Maryland, Montana, Rhode Island.

Generally, the statutes allow a merger with another trust so long as there is no material change in the beneficial interests of the trust beneficiaries. Many trust instruments include express merger provisions and this is also generally true of such provisions. Consequently, it should be possible to merge an existing trust into a new Delaware trust, the administration of which is governed by Delaware law and which includes changes to various administrative provisions, to take advantage of beneficial Delaware laws.

Three states (Connecticut, New York, New Jersey) allow a trustee to hold two or more trusts as a single trust (essentially to merge) in the case of trusts created under the same governing instrument. Those statutes are not helpful with respect to migrating trusts to Delaware. The remaining states (Alaska, Hawaii, Idaho, Kentucky, Louisiana, Nevada, Oklahoma, and Wisconsin) appear to have no statutory merger power available to trustees.

### **The Process**

The process for a trust merger involves several steps. First, one must ensure that the existing trust instrument or current governing law of the original trust enable the trustee to merge the trust. If this can be accomplished, then the trustee of the original trust will need to perform a risk assessment and determine whether it can become comfortable with exercising the discretion to merge the original trust with and into the new Delaware trust. The exercise of discretion will likely be analyzed under an abuse of discretion standard. The trustee of the original trust will also need to consider whether it will require releases from the beneficiaries and how virtual representation may bind the minor and unborn beneficiaries. All of this will generally be analyzed

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## Trusts

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under the laws governing the original trust and will pertain to the non-Delaware trustee. There will also need to be a new valid and existing Delaware trust, governed by Delaware law, which will be the survivor of the merger. The parties will need to consider whether the trust instrument for this new trust will be a declaration of trust or a trust agreement, and who (if anyone) will be the nominal grantor of the new trust). The parties should also consider all income and transfer tax issues. Once each of these steps has been accomplished, the trustee of the original trust will need to merge that trust with and into the new Delaware trust pursuant to some written instrument memorializing the exercise of discretion to merge. The new Delaware trust could be a Delaware directed trust, the administration of which is governed by Delaware law or could take advantage of any of the other advantages of Delaware trust law and the Delaware jurisdiction.



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