

2007 Delaware Trust Conference

November 29, 2007

Mechanics of Changing Trust Situs:
How to Move a Trust to Delaware

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I. What Does It Mean to “Change a Trust’s Situs”?

- A. Unfortunately, the term “trust situs” means different things in different contexts. For example, a trust’s situs for state income tax purpose may be different from the trust’s situs for conflicts of law purposes or for purposes of determining which state’s courts have primary, or perhaps exclusive, jurisdiction over various internal governance matters concerning the trust (such as supervision over surcharge actions).
- B. Even worse, these situs identification issues are sometimes analyzed and decided differently under different state’s laws. It is not unusual for a single trust to have its tax situs in more than one state or at least to have sufficient contacts with various states so that two or more states tax all of the trust’s income pursuant to the laws of the various taxing jurisdictions. Perhaps even more disconcerting, it sometimes happens that more than one state’s laws provide, for conflicts of law purposes, that a particular trust has its situs in that state. As a consequence, multiple states might be of the view that the validity, interpretation and administration of the trust are governed by that state’s laws, that creditor rights with respect to trust assets are determined by the state’s laws, that the court’s of the state have primary or even exclusive jurisdiction over various aspects of the trust’s internal governance and that a variety of other matters of concern to the trust are controlled by the laws and courts of that state.
- C. In order to be confident that the situs of a trust has been moved from one jurisdiction (the “transferor jurisdiction”) to another jurisdiction (“Delaware”), it

is important to (i) first determine, under the laws of the transferor jurisdiction (which might be a state or foreign jurisdiction), what contacts with the transferor jurisdiction are currently causing the trust's situs to be in the transferor jurisdiction for whatever purposes (taxation; governing law; court supervision; creditor rights; administration; etc.) are relevant in the particular case; (ii) then determine how, again under the laws of the transferor jurisdiction, the trust's contacts with the transferor jurisdiction may be severed to the extent necessary so that the trust's situs no longer is in the transferor jurisdiction for relevant purposes; (iii) next determine what contacts, under Delaware law, are necessary to cause Delaware to become the trust's situs for relevant purposes; and (iv) finally determine how, under both the laws of the transferor jurisdiction and Delaware, the requisite contacts with Delaware may be established.

- D. Subject to exceptions and limitations far too numerous to mention, it generally is true under the laws of many transferor jurisdictions for many purposes (with income taxation being a major and frequent exception and testamentary trusts often constituting a second major exception) that the situs of a trust may be moved out of the transferor jurisdiction if the trust's trustees located in the transferor jurisdiction are replaced by trustees located outside the transferor jurisdiction.

However, it frequently is possible to change a trust's situs through less drastic measures (such as adding one or more new trustees, particularly administrative trustees located outside the transferor jurisdiction, or even simply arranging for

the current trustees to administer the trust, or perform some aspects of the trust's administration, outside the transferor jurisdiction).

- E. The Delaware side of the equation almost always is simple and straightforward. Under Delaware law, the situs of a trust is Delaware for all relevant purposes if, at a minimum, the trust has at least one co-trustee in Delaware who alone is responsible for the details of trust administration such as accountings, recordkeeping, tax returns and similar matters. The Delaware administrative trustee need not have any role in the other customary trustee duties, such as investment and distributions decisions. See Lewis v. Hanson, 128 A.2d 819 (Del. 1957), aff'd, sub nom. Hanson v. Denckla, 357 U.S. 235, reh'g denied 358 U.S. 858 (1958); see also Exhibit A (for sample administrative trustee language).

II. How Is The Situs Of A Trust Changed?

- A. It is important to remember that the process for changing a trust's situs is governed in large measure by the law of the transferor jurisdiction as that jurisdiction's law likely govern virtually every aspect of the trust's existence at least until the change of situs project is successfully completed. Furthermore, given the ease with which situs in Delaware may be established under Delaware law, it almost invariably is true that any impediments or complications encountered in the process will be attributable to the laws or courts of the transferor jurisdiction. Therefore, it is critically important that the trust receive expert advice from counsel in the transferor jurisdiction. Delaware counsel can sometimes lend a hand but the burden is on counsel of the transferor jurisdiction to successfully accomplish the change of situs.

- B. Sometimes and for some purposes, the laws of the transferor jurisdiction will require that all of the trustees located in the transferor jurisdiction be replaced by trustees located elsewhere. In some cases, it is only necessary to add a co-trustee (perhaps only as administrative trustee who does not participate in investment or distribution decisions) located outside the transferor jurisdiction. Sometimes, particularly if the trust was created under the will of the decedent who resided in the transferor jurisdiction at the time of death, it is also necessary or advisable to obtain an appropriate order transferring situs from a court in the transferor jurisdiction.
- C. Often, particularly in the case of inter vivos trusts governed by trust agreements that include modern flexible language regarding changes of trust situs and the removal and appointment of trustees, the situs of a trust may be changed to Delaware pursuant to the trust agreement without court involvement or any other supporting actions. See Exhibit B (for sample trust agreement language concerning change of situs and related matters).
- D. On the other hand, in general, if the trust agreement or will creating the trust does not include provisions allowing for change in the composition of the trusteeship, it will be necessary to obtain assistance from the courts in the transferor jurisdiction to effect a change in the trust's situs.
- E. Sometimes, even if it is permissible under the trust's governing instrument and the laws of the transferor jurisdiction to change trustees, it nevertheless will be necessary to obtain an order from the appropriate court in the transferor jurisdiction in order to change the trust's situs. In some cases, in order to obtain

such an order from the transferor jurisdiction's courts, it is necessary to obtain a companion order from the Delaware Chancery Court. See Exhibit C (for sample forms of the companion New York and Delaware orders required in cases where an order of the New York Surrogate's Court is required to change the situs of a New York trust to Delaware); see also, Trust U/W of William Rockefeller, 773 N.Y. S.2d 529 (Surrogate's Court of New York County, December 19, 2003) (the case helps one understand the odd situation in New York law, in which it is possible for a trust's sole trustee to be in Delaware without changing the trust's situs from New York to Delaware). It is particularly likely that assistance from the courts in the transferor jurisdiction will be required or advisable if the trust was created under the will of a decedent who resided in the transferor jurisdiction at the time of death or if the trust is under the ongoing supervision of the courts in the transferor jurisdiction (for example, if the trust is required by the laws of the transferor jurisdiction to file periodic court-reviewed accounts).

- F. In some cases, although an order from a court in the transferor jurisdiction may not be required to change the trust's situs, such an order may be beneficial. For example, some states that generally tax trusts on the basis of the residence of the settlor nevertheless do not tax trusts settled by residents following the entry of a state court order directing a change of situs from the state in which the settlor resided at the time the trust became irrevocable to another jurisdiction. Pennsylvania and Virginia appear to fall into this category. See Pennsylvania Department of Revenue PIT-01-040 (July 27, 2001); Virginia Admin-Rule, VA-Taxrptr § 202-326 (August 26, 1993).

III. Collateral Issues And Post-Change Of Situs Actions.

- A. In many cases, a change of trust situs raises collateral issues such as what state's laws govern various aspects of the trust relationship. In general, the law governing the trust's validity and construction should not change as a result of a change of situs but the law governing various aspects of trust administration may change. See 12 Del. C. § 3322 (unless the governing instrument provides otherwise, Delaware law governs trust administration while the trust situs is Delaware but the law governing validity and construction of the trust does not change by reason of changing the trust's situs to Delaware). This result may be critically important to avoid adverse generation-skipping tax results in some cases. See Treas. Reg. § 26.2601-1(b)(4)(i)(E) Ex. (4).
- B. In order to resolve such issues, or to expressly import beneficial aspects of Delaware law into the trust's governing instrument, or to clarify the extent to which Delaware law governs certain matters pertaining to a trust following the trust's move to Delaware, it may be prudent to obtain instructions from the Delaware Court to Chancery or to reform the trust's governing instrument or, as if often the case, to do both. See Exhibit D (for example of Delaware Order granting instructions and reforming a trust upon change of situs to Delaware).
- C. Such orders from the Delaware Chancery Court may be obtained in an inexpensive and expeditious manner by filing a consent Petition with the Court. See Exhibit E (for a recently issued Court procedure concerning consent Petitions).
- D. Such orders may (i) clarify governing law; (ii) reform the trust's governing instrument (will or trust agreement) to add provisions designed to take advantage

of opportunities afforded by Delaware law (such as adding direction advisers pursuant to 12 Del. C. § 3313; administrative trustee provisions; affiliated investment provisions; and modern investment powers language permitted by 12 Del. C. §3302 and 3303); and (iii) grant other appropriate relief.

- E. Although not expressly required by Delaware law, it is advisable when obtaining Delaware Court orders shortly after a trust changes its situs to Delaware to provide notice of the Delaware Court proceeding to all of those persons who would have received notice of a similar proceeding under the laws of the transferor jurisdiction. See Exhibit D (language in sample order at para. 13).

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