

## CHOOSING TRUST SITUS

*To Meet Client Objectives*

### **The Wealth Strategies Group**

at Atlantic Trust integrates estate, financial and investment planning through sophisticated assessment of goals with the objective of multigenerational capital preservation, family business continuity and strategic philanthropic objectives.

When creating an estate planning structure to meet a client's needs, advisors often consider the advantages that jurisdictional choices can offer in selecting trust situs. Many advisors turn to Delaware as the jurisdiction of choice because of its well known reputation for favorable trust laws.

However, in recent years, many states have enacted legislation that places them at a level of parity with Delaware regarding desirable trust characteristics. Atlantic Trust has full trust offices in ten jurisdictions, two of which, Illinois and the District of Columbia, offer trust planning advantages similar to those available in Delaware. Presented below is a summary of considerations in choosing trust situs and a chart that illustrates which of those characteristics is available in Delaware, Illinois and the District of Columbia.

### **Perpetuities Period**

The ability to create trusts that last beyond the common law Rule Against Perpetuities (lives in being plus 21 years) is a frequent reason that client advisors choose Delaware for dynasty trusts. Delaware was early in repealing the Rule Against Perpetuities, allowing trusts to run as long as clients choose, thereby effectively removing family wealth from the transfer tax system, and allowing assets to appreciate without an estate tax imposed at each generation. More recently, other states have repealed or modified the common law rule. Illinois and the District of Columbia are among the states that have repealed the Rule Against Perpetuities, permitting clients to create trusts to provide benefits for their descendants for many generations, even perpetually.

### **Taxation of Trust Income**

Rules for taxing income earned in trusts vary from state to state. Establishing a trust in a jurisdiction that does not impose a fiduciary income tax can provide a significant economic advantage to the trust beneficiaries. Illinois and the District of Columbia do not impose a state income tax on income earned in irrevocable trusts if the creator

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of the trust was not a resident of the state when the trust was established. Delaware offers a similar rule, but has the additional requirement that no beneficiaries of the trust may be Delaware residents for the trust to be exempt from state income taxation. Illinois and D.C. do not impose the resident beneficiary requirement.

### **Investment Flexibility**

Most states have adopted the Uniform Prudent Investor Act (UPIA). This legislation replaces the restrictive common law rules of fiduciary investing with a standard providing that an asset that might otherwise be deemed imprudent on its own may, in the context of the portfolio as a whole, be permissible if it meets a beneficiary's desired income or capital gains objectives. No special language authorizing specific non-fiduciary investments is required. Illinois and the District of Columbia have adopted the UPIA. Delaware also employs a "Prudent Investor" standard for fiduciary investments.

### **Administrative Flexibility**

In addition to the UPIA, the Commission on Uniform Laws has presented other trust legislation for enactment in all states. Both the Uniform Trust Code and the Uniform Principal and Income Act provide a consistent and flexible body of trust administrative law and have been enacted in numerous states. The uniform nature of these laws is particularly beneficial to estate planners who advise clients residing in jurisdictions outside of their own, particularly in the context of multigenerational planning for families that live in diverse areas of the country. Although local counsel should always be consulted in cross-jurisdictional practice, the consistency of the Uniform Laws is helpful in facilitating collaboration among professional advisors. These laws are default provisions, which generally may be overridden by document terms, if desired. Portions of the Uniform Principal and Income Act have been adopted in Illinois, the District of Columbia and Delaware. Additionally, the District of Columbia has adopted the Uniform Trust Code.

### **Asset Protection**

Traditionally, in all jurisdictions, one of the most beneficial features of discretionary irrevocable trusts is the protection from creditors that they provide to trust beneficiaries. Where distribution authority is placed in the discretion of an independent trustee of an irrevocable trust, trust assets are protected from the claims of a beneficiary's creditors. In addition to the traditional asset protection provided by irrevocable trusts, Delaware is among a group of states that has enacted legislation which provides that a settlor of a trust may protect the assets which he places in the trust from the claims of his own creditors. These are known as Self-Settled Asset Protection Trusts. However, the effectiveness of these laws has yet to be tested. The "Full Faith and Credit" provision of the United States Constitution will be at issue when a judgment rendered in the courts of one state is presented as a claim against trusts assets in one of the states establishing asset protection trusts. ■

Establishing a trust in a jurisdiction that does not impose a fiduciary income tax can provide a significant economic advantage to the trust beneficiaries.

## 529 Plan - Comparison of Top State Plans

	Illinois	District of Columbia	Delaware
Repeal of Rule Against Perpetuities	Yes 765 ILCS 305/1-305/6	Yes D.C Code Ann.19-904(10)	Yes Del. Code Ann. 25-503
State Taxation of Trust Income	No 35 ILCS 5/1501(20); Ill. Admin. Code 86-100.3020(a); IL-1041 p. 3	No D.C. Code Ann. 47-1809.01; D.C. D-41 p.6	No Del. Code Ann. 30-1601(8), 1636; Del. 400-1 p.2
Prudent Investor Standard	Yes UPIA 760 ILCS 5/5(a)	Yes UPIA D.C. Code Ann. 19-309.01 et seq.	Yes Del. Code Ann. 12-3302
Uniform Principal and Income Act	Yes Unitrust Conversion 760 ILCS 5/5.3	Yes Power to Adjust D.C. Code 28-4801.04	Yes Power to Adjust Unitrust Conversion Del. Code Ann. 12-6113, 12-3527
Uniform Trust Code	No	Yes D.C. Code Ann. 19-1301.01, et seq.	No
Asset Protection	Common law	Common law	State law Del. Code Ann. 12-3570-3576

Source: Atlantic Trust Company and "Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust," 2005.

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