

Choosing Jurisdiction - A Dialogue regarding Multi-Jurisdictional Practice

Wealthgate Trust Company



Presenters

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- Prior to his T&E practice, Alex clerked for a justice on the Wisconsin Supreme Court and was in private corporate law and litigation practice. He served as corporate counsel for his family's public educational software company, Renaissance Learning. He formed and ran a private trust company for his family before converting it to Wealthgate Trust Company, a retail trust company providing true fiduciary services for families with generational capital.

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- Aaron practiced trust planning and tax planning for HNW and UHNW clients for over a decade before joining Wealthgate. The overwhelming majority of his practice included jurisdiction selection considerations related to non-Nevada families seeking the benefits afforded by that state.

DISCLAIMER

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Agenda

- First, quickly cover the general principles
- Second, frame the legal considerations
- Third, discuss typical case studies
- Fourth and finally, identify key take-aways and implementation principles

What is jurisdiction selection?

Jurisdiction selection is intentionally choosing the applicable or governing law for a legal instrument or legal action based on perceived, potential, or actual advantages offered by the laws of the target jurisdiction.

Why is jurisdiction selection possible?

In a word: Federalism.

Why is this important?

Successful jurisdiction selection planning hinges on developing more significant connections with the preferred state.

Furthermore, the current SCOTUS make-up favors federalism.

Why should an estate planner provide jurisdiction selection?

Our duty to zealously advocate for a client does not end at state lines.

- Model Code of Professional Conduct state that an advocate's "duty to clients ... should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism." *See also Miles v. Illinois Cent. R. Co.*, 315 U.S. 698 (1942) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) in which the court strongly agrees that jurisdiction selection is the natural expansion of a client's desire for the best results and a lawyer's duty to deliver the best result for the client.

Furthermore, our clients increasingly expect us to be multi-jurisdictional.

Lastly, using estate planning documents buttresses jurisdiction selection: it is a clear indication that the client intentionally avails himself or herself of the law of State X.

Is there risk in not presenting jurisdiction selection solutions?

If the law of State X is better for the client than our home State as to a meaningful consideration, does professional responsibility require us to inform the client of this possibility?

Colorado Rules

Colorado Rules of Professional Conduct - Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [1] In determining whether a lawyer employs the requisite knowledge and skill ... relevant factors include ... whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Comment [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. ... A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Comment [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

Comment [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Low Hanging Fruit: Taxation

Consider: What obligation did the trustee to the Kaestner Trust owe the beneficiary? The law of North Carolina clearly imposed taxation and the trustee could have submitted - many others probably did. However, consider that the trustee noticed something with which the Business Court, the North Carolina Court of Appeals, the North Carolina Supreme Court, and a unanimous SCOTUS all agreed: taxation was not permitted.

Taxation Rules by State

States easy to control taxation because it is based on residence of trustee or trust administration:

- AZ, AR, CA, CO, DE, HI, IN, KS, KY, LA, MD, MA, MN, MS, NM, OR, SC, UT, WI

Kaestner States - States that base taxation on residence of beneficiary:

- CA, CT, DC, DE, GA, MO, NC, OH, RI

States that base taxation on residence of grantor:

- AL, CT, DE, DC, IL, LA, ME, MD, MA, MI, MN, MO, NE, NJ, NY, OH, OK, PA, RI, UT, VT, VA, WV, WI

Multi-factor analysis states:

- ID, IA, MT, ND

States that do not impose income tax on trusts:

- AK, FL, NV, NH, SD, TN (as of 1/1/2021), TX, WA, WY

When is jurisdiction selection appropriate? When is it ill-advised?

When the law of State X further your client's goals, such as:

- Asset Protection
- Privacy
- Silent trusts / Next Gen Ed Programs
- Tax savings

When the act of jurisdiction selection does more harm than potential good:

- Fraud
- Flight Clauses
- Overly-aggressive (*Toni 1 Trust v. Wacker* - Alaska Supreme Court ruling on an Alaska law)

Legal Considerations

Jurisdiction

- In Rem over trust assets (*Hanson v. Denckla*, 357 U.S. 235 (1958))
- Personal jx over trustee (*Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Hanson v. Deckla*, 357 U.S. 235 (1958))
- Cases finding action state lacked jx: *In re Ducey*, 787 P.2d 749 (Mont. 1990); *First Am. Bank of Virginia v. Reilly*, 563 N.E.2d 142 (Ind. Ct. App. 1990); *In re Will of Frumkin*, 912 S.W.2d 138 (Tenn. Ct. App. 1995); *Dreher v. Smithson*, 986 P.2d 721 (Or. Ct. App. 1999); *Rose v. Firstar Bank*, 819 A.2d 1247 (R.I. 2003); *Nastro v. D'Onofrio*, 263 F. Supp. 2d 466 (D. Conn. 2003); *Walker v. W. Michigan Nat'l Bank & Tr.*, 324 F. Supp. 2d 529 (D. Del. 2004); *In re Estate of Stisser*, 932 So.2d 400 (Fla. Dist. Ct. App. 2006); *Walker v. N. Tr. Co.*, No. 06-C-4901, 2007 BL 310409, 2007 WL 178392 (N.E. Ill. Jan. 18, 2007); *Fellows v. Colburn*, 34 A.3d 552 (N.H. 2011); *Bernstein v. Stiller*, No. 09-659, 2013 BL 172426, 3013 WL 3305219 (E.D. Pa. June 27, 2013).
- Cases finding action state had jx: *Ohlheiser v. Shepherd*, 228 N.E.2d 210 (Ill. Dist. Ct. 1967); *Johnson v. Witkowski*, 573 N.E.2d 513 (Mass. App. Ct. 1991); *Seijo v. Miller*, 425 F. Supp. 2d 194 (D.P.R. 2006); *Sloan v. Segal*, No. 2319, 2008 BL 662, 2008 WL 81513 (Del. Ch. Jan. 3, 2008); *Emberton v. Rutt*, No. 1:07-cv-01200, 2008 BL 348180, 2008 WL 4093714; *Anglo Irish Bank Corp. PLC v. Superior Court*, 165 Cal. App. 4th 969 (Cal. App. Ct. 2008); *Kloiber v. Daniel Kloiber Dynasty Tr.*, No. 2013-CA-000436, 2014 BL 341661, 2014 WL 6882265 (Ky. Ct. App. Dec 5, 2014); *Queen v. Schmidt*, No. 10-2017, 2015 BL 286543, 2015 WL 5175712 (D.D.C. Sept. 3, 2015); *Weitz v. Weitz*, 2012 WL 1079203 (N.Y. Sup. Ct. Mar. 22, 2012); *Beaubien c. Cambridge Consolidated, Ltd.*, 652 So.2d 936 (Fla. Dist. Ct. App. 1995)
- Subject Matter jx (unlikely an issue, but if so, consider change in venue - *American Dredging Co. v. Miller*, 510 U.S. 443 (1994))

Conflicts of Law

- Full Faith and Credit Clause - Article IV, Section 1 of U.S. Constitution

Nexus / Connections Considerations

- Residency of Parties
- Location of Activities
- Location of Trust Assets

Spendthrift & Self-Settled

- Is self-settled permitted?
- Is there a history of permitting certain creditors access to the trust assets (e.g. ex-spouses)?

Accountings & Information

- Information is power

Tax Residency

- Income, inheritance, and death tax consequences
- Will this support jx in action state?

Fraudulent Transfer

- Difference in SOL periods
- This is last-ditch effort by creditor to a successful plan/documents

Access to Courts & the Bench

- What is the bench's temperature in upholding the desired benefits?
- E.g. while Delaware provides a distinct trust court, it does not permit the filing of friendly or pre-emptory actions

Case Study #1

Married surgeon, 3 kids, two minors, with \$35mm net worth composed of \$5mm in personal residence, \$8mm in an IRA, \$2mm in cash, and \$10mm in brokerage. Pre-existing revocable trust. Interested in asset protection.

What jurisdictions are a good selection and how does the client decide?

Case Study #2

Old-and-cold legacy trust divided into separate trusts per stirpes. Current separate trusts are for G3, all of which reside in Colorado. Marital relationship of Jane Doe, a G3 beneficiary, has deteriorated significantly. No divorce proceeding or divorce attorney hired, as yet, by either Jane or her husband. Pre-nup exists between Jane and her husband. Trustee is a Colorado resident CPA.

Is jurisdiction selection available for an old-and-cold trust? What should Jane consider doing? What jurisdiction are a good selection and how does the client decide?

Case Study #2 Revisited

Same facts as Case Study #2 used here to illustrate the broad applicability of privacy considerations.

Colorado statutory law and case history support that appreciation to separate property is marital property. CRS 14-10-113(2). A spouse has no property interest (for a divorce action) in a wholly discretionary trust with a spendthrift clause. *In re Marriage of Jones*, 812 P.2d 1152(Colo. 1991); *In re Marriage of Rosenblum*, 602 P.2d 892 (Colo.App. 1979). But the trust is considered an economic substance, which is weighed in equity. *Id* and CRS 14-10-114(3)(c).

Nevada law provides a trustee is not required to account to a beneficiary if the beneficiary's only interest in the trust is discretionary. NRS 165.1207. Only an interested person to whom a trustee is required to account may request a list of trust assets. NRS 165.030. The Nevada Supreme Court strictly enforces statutes prohibiting the disclosure of information. *Matter of William J. Raggio Family Trust*, 460 P.3d 969 (Nev. S.Ct., 2020).

Case Study #3

Entrepreneur, married, 2 minor children, net worth of \$200mm and growing. No estate planning.

What jurisdictions are a good selection and how does the client decide?

This client must consider next generation education programs and family governance. But many states impose duties on the trustee to automatically inform and report, which undermines the family's programs. (Consider C.R.S. section 15-5-813 or California Probate Code sections 15800, 16061, 16062, and 16064 as examples of imposed notification.) Subjecting even the family revocable trust to a state like California will destroy the family's attempt to develop the next generation's maturity.

Case Study #4

\$1B family of descendants ranging from G2 to G4 with 30+ trust agreements, a central investment provider, and a FO in Colorado. They are dissatisfied with trust company options and acknowledge that individuals are a poor choice because of the inherent succession and qualification issues. A close friend of a G2 family member recommends a PTC.

What jurisdictions are available, a good choice, and how does the client decide?

What do we learn from these case studies?

Legally, the most relevant consideration is what law provides the best advantage?

Because jurisdiction selection information is becoming commonplace (indeed, even clients are learning about and asking for it before consulting with us), we need to prepare to respond to those questions and desires?

Practically, geography is not that relevant but accessibility (to the state, city, courts, adequate counsel, etc.) is supreme.

How do I apply this going forward?

- Develop a network of jurisdiction specific attorney (e.g. ACTEC Fellows);
- Remember, you can and should still design the estate plan even if trusts outside of your bar admission are used - you may use local counsel to confirm the local tax issues while you handle the federal tax considerations and family dynamics;
- When it comes to jurisdiction selection, these are the usual suspects: Nevada, South Dakota, and Wyoming
- On the Rise: Tennessee and New Hampshire
- Falling: Alaska and Delaware