

**Date:** 26-Apr-11  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** **Jim Weller: Nevada as the Situs of a Family Trust Company**

*“In establishing a family trust company, the choice of the situs of the family trust company is arguably the most important decision that wealthy families will have to make. With the enactment of the Family Trust Companies Act, Nevada has placed itself among the states that merit consideration as the situs of a family trust company.”*

Now, **Jim Weller** provides **LISI** members with important commentary on recent developments in Nevada with regard to the establishment of family trust companies.

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Jim has written numerous estate and tax planning articles. His book titled Tax-Smart Wealth Planning was published in 2006, and you can learn more about it at [www.graduategroup.com](http://www.graduategroup.com).

Here is Jim' commentary:

### **EXECUTIVE SUMMARY:**

Family trust companies, also known as private trust companies and exempt trust companies, have become an attractive vehicle for wealthy families to address their multi-faceted trust and wealth management needs. In particular, the primary appeal of a family trust company is that it provides a forum for current and future generations of a family to have a voice in the management of family wealth in irrevocable trusts without forfeiting the tax, asset protection, and other benefits afforded by such trusts. This is accomplished by permitting family members to serve on the investment committee of a family trust company.

New Hampshire, South Dakota, Texas, and Wyoming are examples of states that have created environments that encourage and support the growth of family trust companies. On October 1, 2009, Nevada joined these states by enacting the Family Trust Companies Act, hereinafter referred to as Nevada Revised Statute (NRS) §669A.

### **FACTS:**

Prior to October 1, 2009, family trust companies and retail trust companies were being formed in Nevada under NRS §669. Now, a family trust company, which can be a corporation or a limited liability company, has the option to be formed under NRS §669 or NRS §669A.<sup>[i]</sup> To be a licensed family trust company under NRS §669A, the following requirements must be met: (1) at least one officer is a resident of Nevada; (2) a physical office is maintained in Nevada where original or true copies of all material business records and accounts may be accessed and readily available for examination by the Division of Financial Institutions; (3) a registered agent with an office with a street address in Nevada is appointed; (4) all applicable state and local business licenses and permits have been obtained; and (5) a bank account is opened with a state chartered or national bank that has a principal or branch office in Nevada.<sup>[ii]</sup>

### **Advantages of a Nevada Family Trust Company**

The key advantages of forming a family trust company in Nevada under NRS §669A are the following:

#### **Broad and Comprehensive Definition of a Family Member**

A family trust company is established for the express purpose of providing trust and fiduciary services to family members, and as a result, it is prohibited from transacting business with the general public. Within this context, the key to defining a family member is the “designated relative.”

The “designated relative” of a licensed family trust company in Nevada is the person who is designated as such in the application for a license or in the annual renewal of a license.<sup>[iii]</sup> In that regard, Nevada provides a broad and comprehensive definition of a family member.

A family member in Nevada includes:

- 1) any person within the tenth degree of lineal kinship of the “designated relative”;
- 2) any person within the ninth degree of collateral kinship of the “designated relative”;
- 3) any non-family member who is an individual beneficiary under a will or trust created by a family member specified in (1) and (2) above, including the spouse and issue of that person;
- 4) the spouse and any former spouse of the “designated relative” or any person qualifying as a family member pursuant to (1) and (2) above;
- 5) a person who is a relative of a spouse or former spouse specified in (3) and (4) above who is within the fifth degree of lineal kinship of the spouse or former spouse;
- 6) a family affiliate and the officers, managers, and directors of that family affiliate and their immediate families;
- 7) an inter vivos or testamentary trust established by a family member either individually or jointly with a spouse or third party and any trustee, advisor or other person assisting with the administration of that trust;
- 8) an inter vivos trust or testamentary trust established by a person who is not a family member if the non-charitable beneficiaries of that trust include family members;
- 9) the estate of a family member;

10) the estate of a non-family member if the non-charitable beneficiaries of that estate include family members; and

11) a charitable foundation, a charitable trust or charitable entity of which a family member is an organizer, incorporator, officer, member of the governing board, trustee, major donor or non-charitable beneficiary and the officers, directors, individual trustees and managers of that foundation, trust or entity and their immediate families.[\[iv\]](#)

#### **Low Minimum Capital Requirement**

The minimum capital requirement for a licensed or chartered family trust company varies among the states from \$200,000 to \$1,000,000. The minimum capital requirement for a licensed family trust company in Nevada is \$300,000.[\[v\]](#)

#### **Lighter Regulation than a Public Trust Company**

The legislative intent of NRS §669A openly recognizes that there is no public interest to protect with a family trust company because it provides services to family members rather than the general public.[\[vi\]](#) Consequently, unlike most states which require an examination annually or an examination at other regular intervals, the Banking Commissioner in Nevada is granted the discretion to examine a licensed family trust company.[\[vii\]](#) Indications are that the level of regulatory scrutiny for a licensed family trust company will be less than that of a public trust company as long as statutory requirements are met, and there is no family litigation or complaints present.

#### **Low Application Fee**

Like the minimum capital requirement, the application fee for a license or charter for a family trust company differs from state to state. The fee can range from \$3,000 to \$15,000. The application fee for a license for a family trust company in Nevada is \$3,000.[\[viii\]](#) In addition, there is an annual license fee of \$1,500.[\[ix\]](#)

#### **Leverage Favorable Nevada Trust Laws**

TrustAdvisors.com has ranked Nevada as one of the four top trust states in 2011.[\[x\]](#) In that regard, Nevada permits directed trusts, trust protectors, and trust decanting.[\[xi\]](#) Also, Nevada modified its rule against perpetuities effective October 1, 2005 to allow a trust to have a maximum duration of 365 years.[\[xii\]](#) On October 1, 1999, Nevada enacted domestic asset protection trust (DAPT) legislation.[\[xiii\]](#) Two unique aspects of Nevada's DAPT legislation deserve special mention.

First, Nevada has a short window for a creditor to bring an action with respect to the transfer of assets to a DAPT. For creditors in existence at the time of the transfer to a DAPT, the cause of action must be commenced the later of: (1) 2 years after the transfer or (2) 6 months after the creditor discovers or reasonably should have discovered the transfer.[\[xiv\]](#) For persons who become creditors after the transfer of assets to a DAPT, the cause of action must be commenced within 2 years after the date of the transfer to trust.[\[xv\]](#)

Second, it is important to note that the vast majority of DAPT statutes allow so-called exception creditors to reach trust assets. Typically, these are creditors with child support or alimony claims. The ability of exception creditors to reach trust assets may result in adverse estate tax consequences for the settlor under IRC §2036(a)(1). Nevada avoids this potential estate tax issue by not having any exception

creditors in its statute. Finally, Nevada is one of seven states that do not have a state income tax.

### **No Licensing Requirement**

A family trust company in Nevada is not required to be licensed under either NRS §669 or NRS §669A.[\[xvi\]](#) An unlicensed family trust company is not subject to regulation by the Nevada Division of Financial Institutions, and it has no minimum capital requirement. As a result, an unlicensed family trust company can be formed easily and quickly. For example, an unlicensed family trust company formed as a limited liability company is considered legally organized in Nevada upon the filing of Articles of Organization with the Secretary of State or upon a later date specified in the Articles of Organization.[\[xvii\]](#) A filing fee of \$75 is also required.[\[xviii\]](#) For an additional fee, expedited on-line 1 hour, 2 hour, and 24 hour processing is available.[\[xix\]](#) In addition, a Nevada unlicensed family trust company must designate the “designated relative” in a letter to the Banking Commissioner sent by certified mail with return receipt requested.[\[xx\]](#)

It is important to point out that there are potential drawbacks with unlicensed family trust companies. First, the absence of regulatory supervision of an unlicensed family trust company’s fiduciary activities brings it within the definition of an investment adviser, and as such, it will be subject to SEC registration under the Investment Advisers Act of 1940.[\[xxi\]](#) However, it should be noted that some unlicensed family trust companies may be able to avoid registration by qualifying for the family office exclusion that was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[\[xxii\]](#)

Second, due to its lack of a license and a minimum capital requirement, unlicensed family trust companies may be prevented from serving as successor trustee of certain family trusts. Finally, an unlicensed family trust company may have limitations in its ability to engage in interstate activity.

In addition to Nevada, Massachusetts, Pennsylvania, Virginia, and Wyoming purportedly permit unlicensed or unregulated family trust companies.[\[xxiii\]](#) An argument could be made that Tennessee and New Hampshire are part of this group because they allow a family trust company to apply for exemption from any provision of their banking acts or the rules thereof.[\[xxiv\]](#)

### **Ability to Serve as Successor Trustee in Other States**

It is quite common for wealthy families to have trusts in states other than where the family trust company is located. In those instances, the question becomes whether or not the family trust company can serve as trustee. States that allow an out-of-state trust company, hereinafter referred to as a foreign trust company, to serve as trustee typically have specific requirements that must be met. In that regard, many states require reciprocity.

A primary example of this is Texas, which permits a foreign trust company to serve as trustee to the extent that the home state of the foreign trust company permits a Texas trust company to serve as trustee in that state.[\[xxv\]](#) Nevada’s Uniform Trusts Act defines a trustee as the person holding property in trust and includes trustees, a corporate as well as a natural person and a successor or substitute trustee.[\[xxvi\]](#) Because this definition has no apparent prohibition or restriction on a foreign trustee serving as trustee, Nevada should meet the reciprocity requirement of states such as Texas.

## **Flexibility**

Families evolve and change over time. Consequently, it is important to have the flexibility to adapt to this evolution and change. A primary example of this is the “designated relative.”

As mentioned above, the “designated relative” is the individual who is the yardstick for determining family members. Unfortunately, the individual originally designated as the “designated relative” may no longer reflect the makeup of the family as time passes.

Nevada appears to address this issue by permitting a licensed family trust company to identify a new “designated relative” upon renewal of its license.<sup>[xxvii]</sup> Likewise, a family that establishes an unlicensed family trust company may find at a later date that the needs and objectives of the family are better met by a licensed family trust company. If that occurs, an unlicensed family trust company in Nevada has the option of applying for a license.

## **COMMENT:**

In establishing a family trust company, the choice of the situs of the family trust company is arguably the most important decision that wealthy families will have to make. As noted earlier, New Hampshire, South Dakota, Texas, and Wyoming are examples of states that have favorable family trust company laws. With the enactment of NRS §669A, Nevada has placed itself among the states that merit consideration as the situs of a family trust company.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Jim Weller*

## **CITE AS:**

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## **CITATIONS:**

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<sup>[ii]</sup> NRS §669.042(1) and NRS §669A.080 (2010).

<sup>[iii]</sup> NRS §669A.140 (2010).

<sup>[iiii]</sup> NRS §669A.050(1) (2010).

<sup>[iv]</sup> NRS §669A.070(1) (2010).

<sup>[v]</sup> NRS §669A.160 (2010).

<sup>[vi]</sup> NRS §669A.010(2) (2010).

<sup>[vii]</sup> NRS §669A.260(1) (2010).

<sup>[viii]</sup> NRS §669A.190(2) (2010).

<sup>[ix]</sup> NRS §669A.210(1) (2010).

<sup>[x]</sup> Scott Martin, *Alaska, Delaware, Nevada, South Dakota Remain Top Trust States*, The Trust Advisors Blog (Feb. 5, 2011), <http://thetrustadvisor.com/tag/best-trust->

states.

[\[xi\]](#) NRS §163.553, §163.5553, and §163.556 (2010).

[\[xii\]](#) NRS §111.1031(1)(b) (2010).

[\[xiii\]](#) NRS §166.01 - §166.170 (2010).

[\[xiv\]](#) NRS §166.170(1)(a)(1) and (2) (2010).

[\[xv\]](#) NRS §166.170(1)(b) (2010).

[\[xvi\]](#) NRS §669A.110(1) (2010).

[\[xvii\]](#) NRS §86.201(1)(a) (2010).

[\[xviii\]](#) NRS §86.201(1)(b) (2010).

[\[xix\]](#) <http://www.nvsos.gov>.

[\[xx\]](#) NRS §669A.050(2) (2010).

[\[xxi\]](#) 15 U.S.C. §80-b-2(a)(11)(A) and §80B-2(a)(2)(C) (2010).

[\[xxii\]](#) H.R. 4173 §409(a), 111<sup>th</sup> Cong. (2010) (Enacted) and SEC Release No. 1A-3098; File No. S7-25-10 (Oct. 12, 2010) at 8.

[\[xxiii\]](#) Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune* (2009), EXPRESS, available at [http://works.bepress.com/iris\\_goodwin/1](http://works.bepress.com/iris_goodwin/1) at 10.

[\[xxiv\]](#) TENN. CODE ANN. §45-2-2001(b) (2010) and N.H. REV. STAT. ANN. §392:B:5(II)(b) (2010).

[\[xxv\]](#) TEX. PROB. CODE §105A(a) (2005).

[\[xxvi\]](#) NRS §163.020(4) (2010).

[\[xxvii\]](#) NRS §669A.210(2) (2010).

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