A REVIEW OF
NATIONAL VS. STATE-CHARTERED TRUST COMPANIES

Choosing a trustee is one of the most important decisions people make when they decide to create a trust. Who they select depends on a variety of factors, including the purpose and complexity of the trust, how long it's designed to last and the powers they plan to give to the trustee. Most affluent households utilize trusts to protect, preserve and manage family assets across multiple generations.

For most, the threshold question is whether to appoint an institutional trustee, individual trustee or both. Institutional trustee services are generally available through banks and independent trust companies. Colony Trust Company is an independent trustee exclusive to families that are looking for an alternative to a large bank trust department. Individual trustees can be family members or people who are unrelated to the grantor, including business associates, close friends or professional advisors such as lawyers and accountants. The best trustees have fiduciary experience, investment knowledge and the diplomatic skills to negotiate complex family dynamics. Above all, they should have practical judgment and time to give the trust as much attention as it requires.

Two alternative forms of trust company charters are currently available for institutional trustees:

- *State-Chartered Trust Company*. The laws of most states, including North Carolina, allow the establishment of a stand-alone trust company that is not otherwise regulated by the FDIC because it does not accept deposits or make commercial loans and is not affiliated with a bank.

- *National Trust Company*. The Office of the Comptroller of the Currency ("OCC"), which charters and regulates national banks, may authorize the creation of a "national trust company," i.e., a bank that offers trustee services directly or through an affiliate.

Principal Place of Administration Matters

Whether an institutional trustee has a national or state trust charter is no longer a material consideration in choosing an institutional trustee (unless of course the trust beneficiaries simply prefer to visit a local branch office where they reside). However, given the emergence of online banking, account access and other technology tools, local trust office branches appear to be less necessary. The distinction is even less clear now that many large banks have decided to centralize their trust operations to locations far removed from local branch offices. Moreover, many large commercial banks that have trust departments are focused on cutting costs, including closing many of their physical branch locations that are expensive to operate and

maintain. The internet has changed the face of banking and, in particular, the delivery of trust services. This trend will only magnify as time goes by, given the increased mobility of our general population.

While nationally chartered trust companies are able to offer corporate trustee services in all 50 states, state-chartered trust companies, by comparison, may offer trustee services to beneficiaries that reside in all 50 states only as long as the principal place of administration of its trust activities occurs within its home state's borders. In practical terms, whether an institutional trustee has a national or state charter doesn't create as much of a geographical limitation as one might initially think. This is true regardless of whether the trust beneficiaries are residents of other states or whether the trust instrument itself requires that another state's law be considered the governing law of the trust.

Moreover, banks that have national trust powers with significant contacts and operations in certain states may have an additional evidentiary hurdle to overcome if they desire to take a fiduciary tax return position that a trust is administered in another state and not subject to that state's income tax. This is especially true in those states that base "tax nexus" on whether the trustee is located within the state or the trust itself is principally administered within its borders. For example, the state's department of revenue could argue that the national bank's in-state operations and other activity are so significant that the trust itself will be deemed to be considered principally administered within the state and, therefore, susceptible to state income taxation. In contrast, this issue is moot for independent trust companies that have no other contact or presence within the applicable state and clearly are administering the trust in a foreign state's jurisdiction.

Reciprocity and Interstate Principal Place of Administration

A majority of states have enacted statutes recognizing the general trend toward promoting interstate trust activities, including the ability of a state-chartered trust company to principally administer a trust outside its home state. For example, an exception to the general rule exists if a state-chartered trust company desires to open a physical branch office in another state. It will be permitted to do so as long as the two states have a reciprocal agreement with one another by statute.

Even though it is not necessary, as mentioned above, state-chartered trust companies will nevertheless be permitted to principally administer a trust outside its home state if two conditions are satisfied. First, it must be willing to open a physical office in the foreign state. Second, the foreign state must recognize reciprocity with the home state. To illustrate this point, consider the reciprocal relationship between North Carolina and Tennessee as an example. North Carolina and Tennessee have enacted statutes with one another that provide, in effect, that if a North Carolina chartered trust company desires to operate in Tennessee by opening a physical office in Tennessee, it will be permitted to do so as long as North Carolina allows a Tennessee chartered trust company to do the same in North Carolina. If both elements above are met, the North Carolina state-chartered trust company will be permitted to principally administer trusts in Tennessee without a Tennessee trust charter. The same will be permitted for Tennessee trust companies operating in North Carolina without a North Carolina trust charter. The fact that the trust may designate North Carolina

or Tennessee law as the governing law of the trust is irrelevant, and it will be the responsibility of the state-chartered trust company to make sure it is abreast of the applicable governing law.

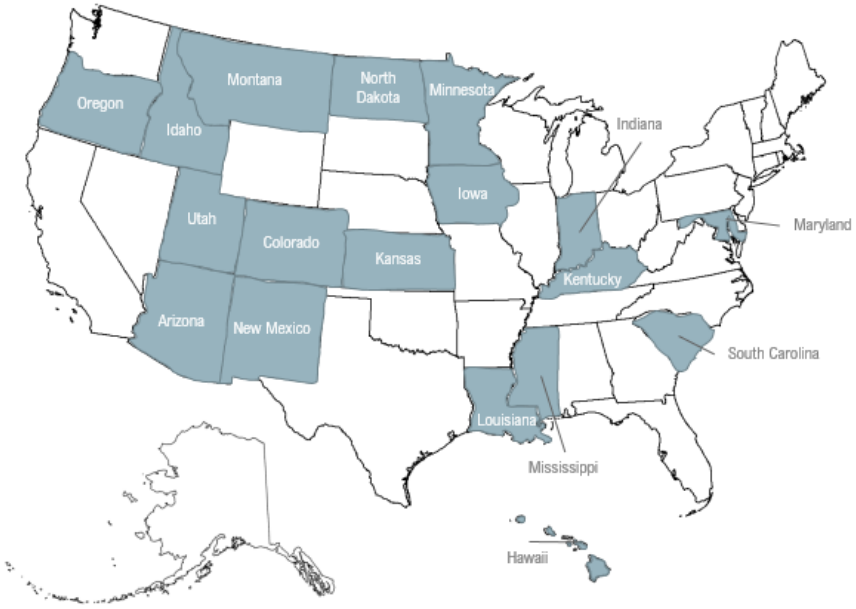
North Carolina Jurisdictional Advantages

North Carolina, like other trust-friendly states, such as Delaware, South Dakota, Alaska, Nevada, New Hampshire and Tennessee, enjoys the following distinct, non-tax advantages for trust administration:

- Uniform Trust Code with Prudent Investor Act;
- Abolition of the common-law rule against perpetuities and the rule against accumulations;
- Progressive trust decanting statute;
- Progressive statutes for unitrust conversions;
- Progressive directed trustee legislation for unbundling responsibilities among an administrative trustee, investment advisor and distribution advisor
- "Silent Trustee" provisions are permissible to accommodate limits on information to beneficiaries

Trusts currently administered in the states highlighted below may move their principal place of administration to North Carolina and potentially generate significant state income tax savings.

In addition, any US domestic trust that decides to move its principal place of administration to North Carolina, at worst, will have a neutral impact for state income tax purposes.



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