

The Top Eight Trust Jurisdictions If There Was a Jurisdictional Super Bowl

By Steven J. Oshins, Esq., AEP (Distinguished)

The jurisdictional competition for state trust law supremacy is similar to the National Football League's biggest annual event --- the Super Bowl.

Every year there are changes to state statutes that create more and more competition among the most proactive trust jurisdictions. The adrenaline and effort put forth by the trust promoters often equals or exceeds that of an NFL football player. If there were Jurisdictional Playoffs ending in a big game called the Jurisdictional Super Bowl, the question is, "Who would win the big game?"

The Competitors

Alaska, Delaware, Nevada and South Dakota (in alphabetical order) are the leading candidates to win this fictional big game. These four states are the ones that seem to get most of the ink. However, if the Jurisdictional Playoffs were expanded to include eight "teams", then New Hampshire, Ohio, Tennessee and Wyoming (in alphabetical order) might be the other four teams to qualify, at least in this author's opinion, and could pull an upset.

The Seeding and Matchups: #1 Through #8

If the seeding were based on the amount of out-of-state trust business each of these jurisdiction receives, then solely based on assumptions made by this author, the seeding would be as follows: #1 Delaware, #2 Nevada, #3 South Dakota, #4 Alaska, #5 Wyoming, #6 New Hampshire, #7 Tennessee, #8 Ohio.

- Game #1: #1 Delaware vs. #8 Ohio
- Game #2: #2 Nevada vs. #7 Tennessee
- Game #3: #3 South Dakota vs. #6 New Hampshire
- Game #4: #4 Alaska vs. #5 Wyoming



Playoffs: #1 Delaware vs. #8 Ohio

This game would be closer than many think. These two jurisdictions are nearly identical in most of the more important estate planning considerations. They are neck-and-neck as far as dynasty trust rules and creditor protection for spendthrift trusts set up by a third-party. Both have lengthy perpetuity periods, both have the same flaw in that they allow divorcing spouses to pierce through a so-called support trust, but yet both jurisdictions are great other than the divorcing spouse issue --- which can be avoided with certain advanced drafting. Ohio is likely a slightly better domestic asset protection trust jurisdiction than Delaware since it has a much shorter statute of limitations period (1.5 years vs. 4 years) regarding the time period for a creditor to attack a transfer to the trust, and Ohio doesn't allow preexisting tort creditors to break through the trust like Delaware does. Both jurisdictions have strong decanting statutes, although Delaware gets the nod because it is one of the few states that doesn't require notice to be given to the beneficiaries.

Delaware squeaks by and wins this matchup, but not by much. Ohio gets the moral victory and sends a message to the other jurisdictions that it deserves to be mentioned along with the top states.

Playoffs: #2 Nevada vs. #7 Tennessee

This game is also closer than many people may suspect. Nevada is one of the top dynasty trust states with its only flaw being that it only allows a trust to continue for 365 years, assuming that is considered a flaw. So Tennessee has an uphill battle in this regard. Tennessee's only dynasty trust flaws are that it allows a 360-year dynasty trust (assuming that 360 years is a flaw) and it taxes dividends and interest if there is a Tennessee beneficiary. Nevada is known as the leading jurisdiction for domestic asset protection trust purposes, so Tennessee doesn't have a chance in this head-to-head feature. But Tennessee is still one of the very best and most underrated domestic asset protection trust jurisdictions, although it does allow divorcing spouses, alimony creditors and child support creditors to access its domestic asset protection trusts, not to mention its statutory requirement that a new affidavit of solvency be created for each and every new transfer to the trust. Nevada is one of the top one or two decanting jurisdictions, but this author would put Tennessee at #3 in decanting.

Nevada wins this battle by a somewhat comfortable margin, but Tennessee surprises many people by holding its own and losing only because it went up against such a leading state. Had Tennessee been seeded differently and faced Delaware, who knows what the outcome might have been? Tennessee is clearly underrated and has proven that it should be mentioned along with the leading jurisdictions.

Playoffs: #3 South Dakota vs. #6 New Hampshire

This game is a blowout. South Dakota arguably has the best dynasty trust laws and is nearly equivalent to Nevada in its domestic asset protection trust rules. South Dakota and Nevada compete for the best decanting statutes. New Hampshire third-party spendthrift trusts do not protect the assets from divorcing spouses or child support, so the dynasty trust flexibilities, except when a skilled attorney drafts around this problem, do not quite match up with those of South Dakota. New Hampshire also has a longer statute of limitations than South Dakota (4 years versus 2 years) for domestic asset protection trusts, not to mention exception creditors for divorce, alimony, child support and preexisting torts. Although South Dakota has exception creditors for divorce, alimony and child support, they only apply if the settlor of the trust was indebted at the time of transfer. New Hampshire has spectacular decanting statutes, in fact some of

the best; however they are up against South Dakota here which, in this author's opinion, are the best or the second best.

South Dakota wins decisively. New Hampshire is a better jurisdiction than it is showing here, but it was up against a goliath of a jurisdiction and just isn't quite on par with South Dakota. It's still a very good jurisdiction though.

Playoffs: #4 Alaska vs. #5 Wyoming

Alaska is arguably a little stronger than Wyoming as a dynasty trust jurisdiction. Wyoming allows child support creditors to pierce through a third-party spendthrift trust, but certainly, as noted above with respect to other jurisdictions, a skilled attorney can draft around this. The very small nod goes to Alaska in this area with both jurisdictions arguably low first-tier dynasty trust jurisdictions. Alaska and Wyoming are neck-and-neck as domestic asset protection trust jurisdictions. Neither is top-notch in comparison to the very best since both jurisdictions have a long four-year statute of limitations and certain exception creditor statutes. Alaska has divorcing spouses as an exception creditor, whereas Wyoming has child support and certain property listed on an application to obtain credit (but only as to that particular lender) as exception creditors. And both jurisdictions require new affidavits of solvency for each and every transfer to the trust which isn't as user-friendly as some other jurisdictions. Although Alaska's decanting statutes aren't quite as flexible as many others, they are more flexible than Wyoming's, in large part because Wyoming's decanting statute is so short and therefore is silent as to exactly what can and cannot be done.

Alaska wins this battle, but primarily because of the decanting differences. Wyoming makes a great showing in other areas and should feel good about its overall performance and has many first-tier attributes.

Jurisdictional Playoffs: Reseeding the Teams for the Second Round

The teams have been reseeded for purposes of the second round based on performance in the first round. The matchups are now:

#1 South Dakota vs. #4 Delaware

#2 Nevada vs. #3 Alaska

Second Round Playoffs: #1 South Dakota vs. #4 Delaware

This game is a blowout. South Dakota is a dominant

jurisdiction. Its impeccable dynasty trust laws, near-best domestic asset protection trust laws and dominant decanting laws win out here. Delaware makes a reasonably good showing for its dynasty trusts and domestic asset protection trusts, and a near-miss with its very flexible decanting statutes, but South Dakota takes this game from the opening whistle and wins by a wide margin, earning a berth to the Jurisdictional Super Bowl.

Second Round Playoffs: #2 Nevada vs. #3 Alaska

This game was delayed by nearly sixty minutes as the referees found Alaska using deflated trusts. After order was restored, Nevada took immediate control and the game was a blowout. Like South Dakota, Nevada is also a dominant jurisdiction. As a top dynasty trust jurisdiction, with the leading domestic asset protection trust laws and decanting statutes that are on par with South Dakota's, Alaska doesn't stand a chance in this matchup. Alaska makes a strong showing with excellent dynasty trust laws, some of the better, but not the best, domestic asset protection trust laws and reasonably good decanting statutes, although lacking in a few respects, most notably with their notice requirements. Nevada scores on the first play and never looks back, and like South Dakota earns a berth to the Jurisdictional Super Bowl.

Jurisdictional Super Bowl: #1 South Dakota vs. #2 Nevada

South Dakota squeaks by Nevada for dynasty trust purposes because perpetual is longer than 365 years, Nevada squeaks by South Dakota for purposes of its superior domestic asset protection trust laws, and South Dakota and Nevada tie in all respects related to their flexible decanting statutes.

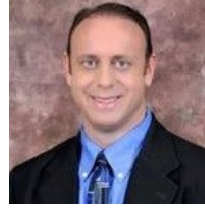
In the closest game in the history of the Super Bowl, this match-up is so close that the referees do the unexpected. The score is tied at the end of regulation and they bypass the traditional overtime rules and declare that there are two winners: South Dakota and Nevada! Congratulations to both states!

Conclusion

These matchups were purely fictional. Congratulations to all eight jurisdictions for being mentioned in the top eight. The premise of this article is that the reader should understand and appreciate some of the differences among the leading trust jurisdictions.

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