

COMPARISON OF TRUST AND TRUST COMPANY LAWS IN SELECT STATES

2017 DELAWARE TRUST CONFERENCE

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| ISSUE | DELAWARE | NEVADA | NEW HAMPSHIRE | SOUTH DAKOTA |
|--|---|----------------------------------|--|---|
| A. State Taxation | | | | |
| <ul style="list-style-type: none"> Income Tax | No tax imposed on trust income to the extent it is distributed or accumulated for the benefit of Delaware non-residents. 30 Del. C. § 1635-36. Tax imposed on accumulated income of trusts with Delaware resident beneficiaries. Rate ranges from 2.2% to 6.6%. 30 Del. C. §1102 and §1631 | No | No tax imposed on trust income. 5% tax imposed on interest and dividends that are: (1) received by New Hampshire residents, or (2) reported by, and taxed federally as, interest or dividends to a trust beneficiary who is a New Hampshire resident. ¹ RSA 77:10. | No |
| <ul style="list-style-type: none"> Capital Gains Tax | Tax imposed on capital gains of trusts, but only those with Delaware resident beneficiaries | No | No | No |
| <ul style="list-style-type: none"> Sales or Use Tax | No | General sales tax rate of 6.85%. | No (but state imposes 9% tax on meals and rentals) | General sales and use tax rate of 4% (very broad sales tax base, including food for home consumption) |
| <ul style="list-style-type: none"> Estate and Gift Tax | No estate tax after December 31, 2017 (Before repeal, estate tax tied to federal taxable estate on Delaware residents, and imposed on real estate and tangible personal property for non-residents. Highest rate is 16%.) | No | No | |

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| <ul style="list-style-type: none"> Insurance Premium Tax | <p>200 basis points (“bps”) (175 bps per 18 Del. C., §702, and 25 bps per §707)</p> <p>For Private Placement Life Insurance, 200 bps on the first \$100,000 of net premiums, and 0 bps on net premiums exceeding \$100,000. 18 Del. C., §702(c)(3)</p> | <p>350 bps on net direct premiums written and net direct considerations written in Nevada. Nevada Qualified Risk Retention Groups pay a premium tax of 2%. N.R.S. §680B</p> | <p>125 bps, as of 1/1/10; no minimum premium RSA 400-A:32, I (a)(3)</p> | <p>250 bps on the first \$100K of annual premium, and 8 bps for the portion of a policy's annual life premiums exceeding \$100K SDCL §10-44-2(1)(a)</p> |
| <ul style="list-style-type: none"> Business Income Tax | <p>Corporate income tax applied at a rate of 8.7% on Delaware source income, but doesn't apply to banks.</p> <p>Bank franchise tax 5 Del. C. §1101 (8.7% for taxable income of \$20M or less; rate decreases for higher income brackets) (see also 5 Del. C. §1109, exempting trust companies from corporate inc. tax (30 Del. C. §1902))</p> | <p>No, but as of 7/1/15, Nevada imposes a Commerce tax on business entities engaging in business within the state during the tax year, the Nevada-sourced adjusted gross revenue of which exceed \$4 million in such tax year.</p> | <p>Business profits tax (8.2%, scheduled to decrease to 7.9% on 1/1/19; applies only to businesses with gross receipts in excess of \$50,000) and business enterprise tax (0.72%; scheduled to decrease to 0.675% on 1/1/19) RSA 77-A and 77-E</p> | <p>No corporate income tax. Banks pay 6% on net income.</p> |
| B. Perpetuities Reform | | | | |
| <ul style="list-style-type: none"> Repeal of Rule against Perpetuities | <p>Yes, but retains 110 year rule for real property held directly by the trust at the expiration of the 110 year period (but not applicable if real estate is held in or contributed to an LLC owned by the trust). 25 Del. C. § 503</p> | <p>Yes, but 365 years. N.R.S. § 111.1031</p> | <p>Yes - pure, unlimited RSA 564:24 (eff. 1/1/04) and 564-B:4-402A</p> | <p>Yes - pure, unlimited SDCL §43-5-8</p> |
| C. Self-Settled Trust Statute | | | | |
| <ul style="list-style-type: none"> Self-Settled Trust Statute | <p>Yes (1997) 12 Del C. §§3570 – 3576</p> | <p>Yes N.R.S. § 166.010 to 166.170</p> | <p>Yes. Original statute (RSA 564-D) went into effect in Jan. 2009. Statute was repealed and re-enacted in its entirety (RSA 564-B:5-505A), effective Sept. 16, 2017.</p> | <p>Yes (2005) SDCL §§55-16-1 to 55-16-17</p> |

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| <ul style="list-style-type: none"> Irrevocable Non-Grantor Incomplete Gift Trust Available for Residents in High Tax States to Avoid State Income Taxation | Yes | Yes | Yes (settlor can retain inter vivos limited POA, and the power to veto distributions) | Yes |
| D. Perpetual “Purpose” Trusts | | | | |
| <ul style="list-style-type: none"> Permitted? | Yes 12 Del. C. § 3555 for trusts for the care of animals and 12 Del. C. § 3556 for all other non-charitable purpose trusts | Yes, but RAP applies N.R.S. § 163.551 (public benefit trusts) N.R.S. § 163.0075 (pet trusts) | Yes RSA 564-B:4-409 (except trusts for the care of an animal cannot be perpetual – RSA 564-B:402A(a) and 4-408) | Yes SDCL §55-1-20 |
| E. “Quiet” Trusts (no rules mandating beneficiary accountings and other disclosures if trust document prohibits them) | | | | |
| <ul style="list-style-type: none"> Permitted? | Yes 12 Del. C. § 3303 Statutory authority under 12 Del. C. §3339 for “Designated Representative” to represent interests of beneficiaries. | Yes N.R.S. § 163.004 (1)(a) Trust terms may expand, restrict, eliminate, or otherwise vary the rights and interests of benes in any manner that isn’t illegal or against public policy, including, without limitation, the right to be informed of a bene’s interest for a period of time. | Yes RSA 564-B:8-813 | Yes |
| F. Private Trust Companies | | | | |
| <ul style="list-style-type: none"> Permitted? | Not specifically. Permits limited purpose trust companies (LPTCs) 7 Del C. §774 | Yes – “Family Trust Companies” N.R.S. § 669A | Yes - “Family Trust Companies” RSA 383-D | Yes |
| <ul style="list-style-type: none"> Minimum Capital Requirements | \$500,000 but as a practical matter, Bank Commissioner requires \$1 million, 2 employees and Class A office space | \$300,000 N.R.S. § 669A.160 | \$200,000 RSA 383-D:6-602 | \$200,000 SDCL §51A-6A-19 |

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| • Liquidation Surety Bond/Asset Pledge Requirement | N/A (paid-surplus equal to no less than \$250K for all LPTCs) | \$1 million stockholders equity N.R.S. § 669.100 \$25,000 fidelity bond N.R.S. § 669.240 | No. A family trust company is <i>exempt</i> from the liquidation pledge requirement of RSA 383-C:5-503, which applies to nondepository trust companies (no less than \$250K and no more than \$1M). RSA 383-D:6-603 (eff. 10/1/15) | \$1M SDCL §51A-6A-19 |
| • Examination Frequency | All banks and LPTCs subject to same reporting and examination requirements | As often as the Comm'r deems necessary N.R.S. § 669.250 | Every 36 months RSA 383-D:11-1101 | Every 36 months, with provisions for off-site audit reports SDCL §51A-6A-31 |
| • Unregulated Private Trust Companies Permitted? | No | Yes N.R.S. § 669A.080 | Yes A New Hampshire (non-charitable) foundation has trust powers as long as the foundation doesn't transaction business with the general public or is a family trust company. RSA 564-E:8-802 (eff. Oct. 1, 2017) | No |
| G. Open Architecture Trust Design Features | | | | |
| • Trust Protectors/Advisors Recognized | Yes | Yes N.R.S. § 163.553 to 163.556 | Yes | Yes SDCL Ch. 55-1B |
| • Directed Trust and Excluded Fiduciary Statute | Yes 12 Del. C. § 3133 | Yes N.R.S. § 163.553 to 163.556 Protected both for direction to act or not to act | Yes RSA 564-B:7-711 | Yes, including investment advisors, distribution advisors and family advisors SDCL Ch. 55-1B |
| • Delegated Trusts | Yes 12 Del. C. § 3322 | N.R.S. § 163.275(2) | Yes RSA 564-B:7-703 (delegation to co-trustees) and 8-807 (delegation in general) | Yes SDCL §55-5-16 |

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| <ul style="list-style-type: none"> Unregulated Special Purpose LLC (or Other Entity) as Trust Protector/Advisor | Yes (in theory; no specific statute) | Yes, on case by case basis; no specific statute | Yes (RSA 383-C:12-1201 and 1202) A New Hampshire (non-charitable) foundation also can act as a Trust Protector or Trust Advisor (RSA 564-E:8-802) | Yes SDCL §51A-6A-66 |
| <ul style="list-style-type: none"> Change of Trust Situs by Trust Protector/Advisor Permitted | Yes | Yes N.R.S. § 163.5553(1)(h) | Yes RSA 564-B:12-1201(a)(5) | Yes SDCL §55-1B-6(7) |
| H. Accessible, Inexpensive Irrevocable Trust Modification Procedures | | | | |
| <ul style="list-style-type: none"> Liberal Court-Approved Trust Modification/Termination | No | Yes | Yes (under the UTC) | Yes SDCL §55-3-26 |
| <ul style="list-style-type: none"> Modification by Trustee | Modification of trust by consent of all fiduciaries and beneficiaries, while trustor is living 12 Del. C. § 3342 | Yes, if done pursuant to a Notice of Proposed Action process, which enables trustees, advisors and protectors to do any act of trust administration without court authority. | Yes. Trustee may unilaterally modify; no beneficiary notice or consent required, but trustee cannot amend to defeat a material purpose or eliminate a beneficiary's vested interest. RSA 564-B:4-419 | Not unless specific modification power is given to Trustee in the trust instrument. Trust may be modified by consent of all of the beneficiaries if it won't defeat a material purpose. SDCL §55-3-24. |
| <ul style="list-style-type: none"> Trust Decanting | Yes 12 Del. C. § 3528 | Yes N.R.S. § 163.556(1) No requirement that the Trustee must provide notice to beneficiaries, nor does Trustee need to provide copies of pre-existing or proposed new trust to beneficiaries; trustee has decanting power over income interests, as well as principal, and can expand the interest of beneficiaries | Yes RSA 564-B:4-418 (trustee does not need discretion to decant, and is not required to provide notice to beneficiaries) | Yes SDCL §55-2-15 |

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| • Non-Judicial Settlement Agreements | Yes 12 Del. C. § 3338 | Yes N.R.S. § 164.942 | Yes RSA 564-B:1-111 | SDCL does not follow UTC or use the term NJSA <i>But see SDCL §55-3-24 (modification or termination without court approval)</i> |
| • Trust Merger | Yes. Merger cannot result in material change to beneficial interests. Trustees expressly empowered to create a new trust, regardless of funding, for purpose of merging. 12 Del. C. § 3325(29) | Yes. Merger cannot impair the rights of any beneficiary or substantially affect the accomplishment of the purposes of the trust. N.R.S. § 163.025 | Yes. Merger cannot impair rights of a beneficiary or adversely affect achievement of trust purpose. RSA 564-B:4-417 | Yes. Merger cannot impair rights of a beneficiary or adversely affect achievement of trust purpose. SDCL §55-3-29 |
| • Statutory Ability to Choose State's Law as the Governing Law | Delaware law governs administration of all trusts administered in Delaware unless the governing instrument expressly provides that the laws of another jurisdiction govern the administration of the trust and further provides that the laws governing the administration of the trust shall not change on account of a change in the place of administration of the trust. 12 Del. C. § 3332. A trust is administered in the state if it has a Delaware corporate trustee or majority of Delaware resident individual trustees. 12 Del. C. § 3341 | Yes N.R.S. § 164.045 | Yes RSA 564-B:1-107 | Yes SDCL §55-3-39 |
| • Broad Virtual Representation Provisions to Avoid Guardians <i>ad litem</i> | Yes 12 Del. C. § 3547 | Yes N.R.S. § 164.038 | Yes RSA 564-B:3-301, <u>et seq.</u> | Yes SDCL §55-3-35 |
| I. Trust Records Privacy | | | | |

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| • Information Provided to State Banking Commission by Trust Company Is Confidential | No | Yes N.R.S. § 669A.310 | Yes Family trust company information is confidential, and is not subject to subpoena or public disclosure. RSA 383-D:1-105. | Yes SDCL §51A-6A-39 (some of the record is public but the applicant may request confidential treatment of sensitive information) |
| • Court Filing of Trust Document Required | No | No | No | No |
| • Sealing Trust Litigation Records | 3 Years | Upon court order: (a) Any trust instruments; (b) Any inventories; (c) Any accounts; (d) Any statements filed by a fiduciary; (e) Any annual reports of a fiduciary; (f) Any final reports of a fiduciary; (g) All petitions, exhibits, objections, pleadings and motions relevant to the trust or its administration; and (h) All court orders. N.R.S. § 669A.256 | No limit (except constitutional open judicial records principles – see Petition of Keene Sentinel, 136 NH 121 (1992)) | No limit (sealed upon petition with records available to the court, to the trustor, to any fiduciary, to any beneficiary, to their attorneys, and to such other interested persons as the court may order upon a showing of the need) SDCL §15-15A-7(3)(w) and §21-22-28 |
| J. Total Return Trust Legislation | | | | |
| • Unitrust Conversion Statute | Yes (3 to 5% in trustee's discretion) 12 Del. C. §61-106 Also express unitrusts permitted. 12 Del. C. § 61-107 | Yes (3 to 5% in trustee's discretion; beneficiary or trustee can petition court to select different payout percentage) N.R.S. § 164.796 (protects trustee from surcharge for converting or not) | Yes (3 to 5% in trustee's discretion; beneficiary or trustee can petition court to select different payout percentage) RSA 564-C:1-106 | Yes (min. of 3%, no maximum %) SDCL §55-15-6 |

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| • Equitable Principal and Income Adjustment Statute | Yes 12 Del. C. §61-104 | Yes N.R.S. § 164.795 | Yes RSA 564-C:1-104 (and protects trustee from surcharge for adjusting) | Yes SDCL §55-13A-104 |
| K. Judiciary | | | | |
| • Courts of Limited Jurisdiction to Hear Trust Matters | Yes - Chancery Court | No -- District Courts (11 statewide with 82 judges) Probate courts have some concurrent jurisdiction | Yes – Dedicated trust docket for complex trust litigation exists within the Probate Division of Circuit Courts | Circuit Courts (7 statewide) are courts of general jurisdiction, although the Second Judicial Circuit, Minnehaha County, typically has 3 Circuit Court Judges assigned to a dedicated docket for probate and trust matters. |
| • Manner of Selecting Judges with Jurisdiction to Hear Trust Matters | Appointed for 12 year terms | Elected | Appointed | Elected or Appointed (hybrid method) |
| • Single Appellate Court | Yes - Delaware Supreme Court | Yes—Supreme Court of Nevada, although can assign to 3 member Court of Appeals | Yes – New Hampshire Supreme Court | Yes - Supreme Court of South Dakota |
| • Interlocutory Appeal of Trust Matters/Certification of Questions of Law | Yes | | Yes (RSA 567-A) | No |
| • Tradition of Supreme Court Giving Judicial Deference to: | | | | |
| ▪ Settlor's Desires/Freedom of Disposition | Yes | Yes | Yes | Yes |
| ▪ Legislature's Policy Choices Reflected in Trust Statutes | Yes | Yes | Yes | Yes |
| ▪ Tax-Friendly Construction of Trust Documents | Yes | Yes | Yes | Yes |
| • Jury Trial in Trust Matters | No | Has not been addressed in Nevada | No ² | Yes, as to questions of fact if requested by a party. |

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| • Punitive Damages in Litigated Matters Allowed | No | Yes, if tort | No | Yes, if fraud is proven by clear and convincing evidence. |
| • ADR (Mediation/Arbitration) for Trust Matters Available/Encouraged | Yes | Yes Nevada recognizes arbitration clauses in trusts to resolve disputes, except those related to validity of trust instrument | Yes If the terms of a trust require trust disputes to be resolved exclusively by reasonable nonjudicial procedures (mediation or arbitration), then the interested parties must resolve a dispute in accordance with the terms of the trust. RSA 564-B:1-111A (7/1/14). | Yes |
| • Probate Supervision of Inter Vivos Trusts | Only as invoked | Only as invoked | Only as invoked | Only as invoked |
| L. Legislature | | | | |
| • Proactive Multi-Disciplinary Trust Law Drafting/Review Committee | Yes | Yes | Yes | Yes |
| • Receptive Legislature | Yes | Yes | Yes | Yes |

¹ Since distributions from S corporations, LLCs and partnerships generally are not taxed as federally as dividends, distributions from a non-grantor trust to a New Hampshire resident beneficiary that are attributable to distributions from an S corporation, LLC or partnerships should not be subject to the interest and dividends tax.

² The right to request a jury trial in probate matters is purely statutory and may be granted or limited as the legislature sees fit. The right is not constitutionally guaranteed. Petition of Atkins, 493 A.2d 1203 (1985). The New Hampshire legislature has granted no right to a jury trial in probate court.