JURISDICTION, SITUS, AND GOVERNING LAW OF TRUSTS AND ESTATES: Untangling the Knot

RIVERVIEW trust company

RIVERVIEW
trust company

CHRISTOPHER P. CLINE
Riverview Trust Company
900 Washington Street, Suite 900
Vancouver, WA 98660
360.759.2478 | chriscline@riverviewbank.com

The number of "multistate trusts" (that is, trusts with significant contacts or relationships with more than one state) has increased greatly over the last 20 years. This increase has tracked the growth of "specialty" trusts, like domestic asset protection trusts, dynasty trusts, and Alaska community property. However, multistate trusts also can be created more prosaically. For example, an Oregon grantor may want to create a trust, using Oregon law, but using a Washington trustee, or create a trust with beneficiaries or assets in more than one state.

Each state with which the trust has contacts might apply different laws. States may or may not have spousal rights, estate taxes, or income taxes. Rules for pursuing legal actions, giving annual notice, or modifying trusts may be very different. Indeed, a trust that is valid in one state may not be in another, due to execution or formality requirements.

Increased mobility also has made estate administration more challenging. When, for example, can a will be probated in Oregon?

This article will try to untangle the differences between jurisdiction, situs, and governing law, and discuss the implications for trust or estate administration.

I. SOME DEFINITIONS. [1]

Words like "situs," "jurisdiction," and "governing law" have overlapping meanings, and they influence one another. So defining them a little is a helpful place to start.

Before we go there, however, it's important to think about the nature of trust relationships. A "trust" is not a legal entity, like a corporation or partnership is. Instead, it's a set of relationships that more closely resembles a contract or agency relationship. So even though we talk loosely about a court having jurisdiction over a "trust," what we really mean is that it has jurisdiction over the trustee, the beneficiaries, or the trust property. The same applies to an "estate," which also is not a separate entity. It's a subtle distinction, but one that is hard even for attorneys who regularly practice in this area.

A. Domicile. This refers to the state in which the grantor, trustee, or beneficiary maintains his or her permanent home (or principal place of business, in the case of a corporate trustee). Note that the term does not apply to trusts, only to persons. It is not merely the place where a person happens to live at any one time. For instance, if a person is domiciled in Oregon, becomes incapacitated, and then is moved to a relative's home in Washington, the incapacitated person's domicile is still Oregon because he or she never formed the intent to change it to Washington.

B. Situs. This is the state in which trust assets (again, not the trust itself) are physically located. In the case of real property, situs is easy to determine. In the case of intangible personal property (interests in mutual funds, for instance), it is not so easy; as noted in the West case (below), for probate purposes it is the state in which the decedent is domiciled.

C. Jurisdiction. In this context, the term means judicial jurisdiction, which means some kind of minimum contacts between the court and the trust parties or property, such that the court can hear matters pertaining to trust administration or trust assets. As we remember from first-year law school, jurisdiction can be "in personam" (over the person) or "in rem" (over the assets). For instance, a trust created in Oregon, with the settlor, trustee, and all beneficiaries domiciled in Oregon, but which holds real property in Washington, might be subject to the jurisdiction of a Washington court, at least to the extent that the real property is the subject before the court.

D. Governing Law. This is the most challenging to define, because it can mean several things. Determining the law to apply in a given matter means looking to the governing document, the matter being adjudicated, the domicile of the trustee, and the situs of the trust property at issue. And governing law may be different for judicial procedure than for determining identities of beneficiaries or disposition terms (for instance, if the trust was created in Oregon and contains a clause stating that the trust terms are governed by Oregon law, but the trustee is a Washington resident and the assets are located in Washington).

[1] All definitions are taken from Norman M. Abramson et al., Bogert's The Law of Trusts and Trustees § 291, Westlaw (database updated June 2019) (hereinafter "Bogert").

II. PROBATE JURISDICTION IN OREGON.

Adding to the definitional challenges in this area is the way in which statutes are drafted. For example, ORS 111.085 is entitled, "Probate jurisdiction described," but what it actually says is that "[t]he jurisdiction of the probate court includes, but is not limited to:" and then goes on to list the specific authorities the court has, such as appointing personal representatives and determining heirship. So it does not describe the limits of jurisdiction; rather, it lists the stuff that the probate court can do, after it has determined that it has jurisdiction. [2]

Further adding to the confusion is ORS 113.015(1), which provides that the venue for seeking personal representative appointment or probating a will is in the county where the decedent has a domicile, in which the decedent died, or in which the decedent's property was "located." [3] Note that it does not refer to the property's "situs." This statute could be mistakenly read to confer jurisdiction on the probate court for the county in which the decedent lived or died, as well as a county in which he or she had property. Instead, this statute establishes venue, not jurisdiction.

The leading case on probate court jurisdiction is West v. White, [4] decided by the Oregon Supreme Court. In this case, the petitioner (the personal representative) filed a probate petition to admit the will in Lane County. The decedent was domiciled and died in Massachusetts; his sole connection to Oregon was a note due from a Lane County resident secured by a trust deed on real property located in Lane County. The respondents (two beneficiaries under another will of the decedent's) asked the court to set aside its order admitting the will to probate in Oregon, alleging that the Oregon court had no jurisdiction because there was no property in Oregon. The petitioner agreed that the presence of Oregon property was required to invoke jurisdiction, but that the promissory note was personal property "in Oregon."

The Supreme Court stated that "[i]t is fundamental that there must be property located in Oregon before its probate courts will accept jurisdiction." While agreeing with that principle, the petitioner argued that Oregon probate law had eliminated the distinction between real and personal property. The Court disagreed, stating that "[w]hether there is property in Oregon upon which probate will operate depends upon the situs of the property; that determination, in turn, hinges on whether the property is real or personal." Because the property to be probated was personal property (the note), "its situs is that of the decedent, Massachusetts, and the law of the decedent's domicile controls its disposition." The fact that it was secured by a trust deed covering Oregon real property was inadequate to change its situs to Oregon.

What the West case and the statutes tell us is the following:

1. The jurisdiction of Oregon courts is in rem only. If there is no property with Oregon situs, no Oregon court has jurisdiction to appoint a personal representative or admit a will to probate.

2. Property has an Oregon situs under two circumstances: (a) it is Oregon real property; or (b) it is personal property and the decedent was domiciled in Oregon at the time of his or her death.

3. Only after jurisdiction has been established do the provisions of ORS 113.015 apply, and a particular county can be chosen in which the probate proceeding can be initiated.

Situations in which Oregon courts do not have jurisdiction include those where a decedent died here (perhaps while incapacitated) but never formally changed domicile and owned no Oregon real property, or where the decedent's sole connection is having personal property physically located in Oregon (as in West).

---

[2] This summary isn't entirely fair; the statute does state that the "distributees of an estate administered in Oregon are subject to the jurisdiction of the courts of Oregon regarding any matter involving the distributees' interests in the estate. By accepting a distribution from an estate, the distributee submits personally to the jurisdiction of the courts of this state regarding any matter involving the estate." ORS 111.085(2). And, less helpfully, "[t]his section does not preclude other methods of obtaining jurisdiction over a person to whom assets are distributed from an estate." ORS 111.085(3).

[3] In 2019, ORS 113.015 was amended by House Bill 3008 to add a fourth possible venue for a probate: the county where a personal injury suit or a wrongful death suit could be maintained.

[4] 307 Or 296 (1988).

III. TRUST JURISDICTION IN OREGON.

In general, "a court has jurisdiction to adjudicate by reason of its relationship to the trust, the trust parties or the trust property which is sufficient to make its decree reasonable and recognized as valid in other states." [5] Oregon, following the Uniform Trust Code, states in ORS 130.055(1) that, "[b]y accepting the trusteeship of a trust having its principal place of administration [6] in Oregon or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction" of Oregon courts regarding any trust matter. Similarly, "beneficiaries of a trust having its principal place of administration in Oregon are subject to the jurisdiction of the courts of Oregon regarding any matter involving the beneficiaries' interest in the trust," and recipients of a distribution from such a trust submit personally to such jurisdiction. ORS 130.055(2). Note, however, that ORS 130.055(3) provides that it "does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary or other person" receiving trust property.

This raises the question of what other ways a trust relationship may be subject to Oregon jurisdiction, particularly if the trust does not have its "principal place of administration" in Oregon. To begin with, ORS 130.055 sets forth only in personam jurisdiction. Another means of obtaining at least partial jurisdiction is to exercise in rem jurisdiction over trust property with an Oregon situs. Oregon real property clearly falls within this category.

It is unclear, however, if an Oregon court would have in rem jurisdiction over personal property owned by an Oregon domiciliary-decedent. If a testamentary trust, created by an Oregon domiciliary but administered by a Washington trustee in Washington, held personal property of a decedent, it would seem that the act of the Washington trustee accepting that property would be sufficient to "terminate" its status as having Oregon situs.

Bogert has some helpful guidelines here. According to that treatise, whether a court has at least partial jurisdiction over a trust relationship depends on four circumstances:

> 1. If the trustee and the trust assets are subject to jurisdiction, "the court can adjudicate any controversy relating to beneficial interests in those assets or to the trustee's rights and powers and its duties and liabilities to the beneficiaries." This means that the court can adjudicate the interests of an out-of-state beneficiary without necessarily acquiring personal jurisdiction over that beneficiary. Personal service is not required; notice by mail is sufficient.
>
> 2. If neither the trustee nor trust assets is before the court, jurisdiction exists only if the court has continuing supervision, or has retained jurisdiction over certain matters (like reviewing accountings).
>
> 3. If trust assets have a situs in a state, the state's courts' decrees "may determine or affect all interests in those assets."
>
> 4. If the court has jurisdiction only over the trustee (perhaps because the trustee is domiciled in one state, while the trust's primary place of administration is in another state), it "may grant in personam relief against the trustee even though it is not the court having primary supervision of the trust." In this situation, the court would not be able to rule on trust validity, construction, or administration. [7]

IV. GOVERNING LAW OF TRUSTS.

A discussion of jurisdiction naturally leads to the question, "which law applies?" In Oregon, this question is answered in part by ORS 130.030, which is based on Uniform Trust Code § 107. The Oregon statute provides that

> [t]he meaning and effect of the terms of a trust are determined by:
>
> (1) The law of the state, country or other jurisdiction designated in the terms of the trust unless the designation of the law of that state, country or other jurisdiction is contrary to a strong public policy of the state, country or other jurisdiction having the most significant relationship to the matter at issue; or
>
> (2) In the absence of a controlling designation in the terms of the trust, the law of the state, country or other jurisdiction having the most significant relationship to the matter at issue.

---

[5] Bogert, supra, § 292.

[6] The term "principal place of administration" is mentioned in ORS 130.022. Unfortunately, it isn't especially helpful as a definition, as it only specifies the conditions under which the trust agreement's own definition applies and the ways the principal place of administration can be moved.

[7] Bogert, supra, § 292.

ORS 130.030. Of course, every governing law clause in every trust is different. Some governing law clauses attempt to deal with the construction of the trust, the validity of the trust, the administration of the trust, or the location of any litigation that might come about. Some governing law clauses purport to deal with all of those subjects, or only one or two. Read your governing law clause carefully.

The comments to the Uniform Trust Code provide some (but not complete) additional guidance for interpreting the Oregon statute. According to the comments, "Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime." This provides a great deal of flexibility to the settlor and his or her attorney when creating trust terms.

On the other hand, the comments also observe that Paragraph (1) "does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time." What happens, for instance, if a trust drafted in Oregon, and which contains a provision stating that Oregon law governs the administration of a trust, is later administered in Washington by a Washington trustee? To what extent do Washington laws supersede those of Oregon, due to "strong public policy"?

In the case of trusts without governing law provisions, and that are therefore covered by Paragraph (2) of the statute, the Uniform Trust Code comments state that

> the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. See Restatement (Second) of Conflict of Laws Sections 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. See Restatement (Second) of Conflict of Laws Section 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

Bogert points out that "[w]hen the court must determine the state having the 'most significant relationship to the matter at issue,' there is much room for argument." [8]

V. GOVERNING LAW IN OREGON PROBATES.

There is far less to talk about here. Once an Oregon court establishes that it has jurisdiction, the Oregon process applies. In the case of a will drafted in another state, and which states that that original state's law applies, ORS 111.085(1)(f) gives the Oregon court authority over "[c]onstruction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding." In this case, the court would look to the law of the state in which the will was drafted and would interpret will terms under such law. As to all issues pertaining to the probate process itself, however, Oregon law would apply.

* * * * *

This article has presented a very brief overview of a very challenging set of questions. It has perhaps raised more questions than it has answered. Hopefully, however, it has pointed the reader in the general direction of those answers.

---

[8] Bogert, supra, § 295.

RIVERVIEW
trust company

CHRISTOPHER P. CLINE
Riverview Trust Company
900 Washington Street, Suite 900
Vancouver, WA 98660
360.759.2478 | chriscline@riverviewbank.com