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## Trust “Situs” and Why It Matters

Orange County Estate Planning Council  
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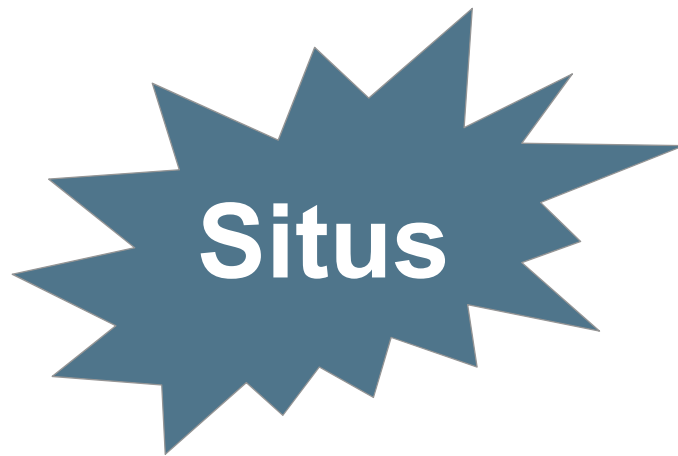
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**"Situs"**

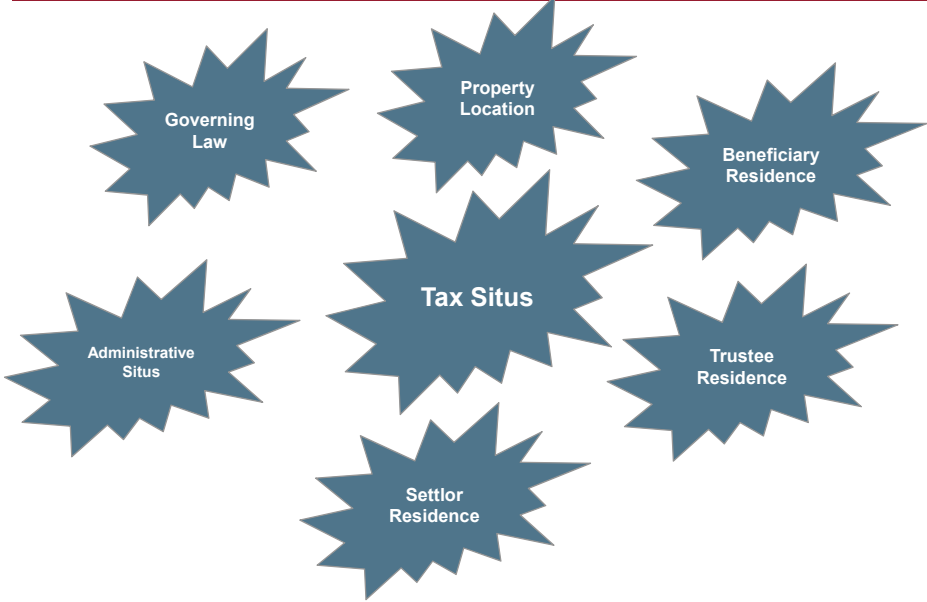
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*From the Latin "situs" meaning position or site.*

**"Situs" Broken Out**

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**Tax Situs – Factors by Jurisdiction**

Factors considered in establishing income tax nexus for trusts:

No Tax	Settlor	Beneficiary	Trustee	Administration	Property
Alaska Florida Nevada New Hampshire South Dakota Texas Washington Wyoming	Alabama* Arkansas* Connecticut Delaware* Idaho* Illinois Louisiana Maine Maryland Massachusetts* Michigan* Minnesota Missouri* Nebraska New Jersey* New York* North Dakota* Ohio* Oklahoma Pennsylvania Rhode Island* Utah Vermont Virginia Washington, D.C. West Virginia Wisconsin	Alabama* California Delaware* Georgia Hawaii* Idaho* Massachusetts* Michigan* North Carolina North Dakota* Ohio* Rhode Island* Tennessee	Alabama* Arkansas* California Delaware* Arizona Hawaii* Idaho* Iowa* Massachusetts* Michigan* New Jersey* New Mexico New York* Oregon	California Colorado Hawaii* Idaho* Indiana Iowa* Kansas Louisiana Maryland Mississippi Montana New Mexico Oregon South Carolina Utah Virginia	California Georgia Idaho* Iowa* Michigan* New Jersey* New York*

\*Multiple factors needed to establish income tax nexus.

Information provided for illustration only. Specific rules of each particular state should be consulted to determine the specific rules resulting in taxation in any state.

Defining "Situs"



### **Governing Law**

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- Often the only reference to a particular state in the trust instrument
- Generally controls construction of instrument
- May control substantive law
- May depend on other factors if not defined in instrument
- Can contribute to administrative ease or complexity
- Generally unconnected to tax situs

### **Administrative Situs**

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- **Location of administrative activity**
- **Provides basis for court jurisdiction**
- **Can therefore influence substantive law and construction of instrument**
- **Can result in tax situs**
  - » For example, a corporate trustee is deemed to be a resident of California if it conducts the "major portion" of an administration in California
- **Deserves close attention!**

### **Trustee Residence**

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- **May not be the administrative situs**
  - » Not all individual trustees actively participate in administration
  - » Corporate trustees may rely on regional offices to perform work
  
- **May provide basis for court jurisdiction, and therefore influence substantive law and construction of instrument**
  
- **Can result in tax situs**
  - » Need to review rules in each state of residence of a trustee
  
- **May change over time with individuals**

Defining "Situs"



### **Beneficiary Residence**

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- **Can result in tax situs**
  - » Need to review rules in each state of residence of current beneficiaries
  - » Should also review and consider for contingent beneficiaries
  
- **Determines individual income tax results to beneficiary**
  
- **Typically will change over time**



Defining "Situs"



### **Settlor Residence**

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- Can result in tax situs
- Can result in continuing court jurisdiction (potentially, in addition to others)
- Doesn't change

Defining "Situs"



**Property location**

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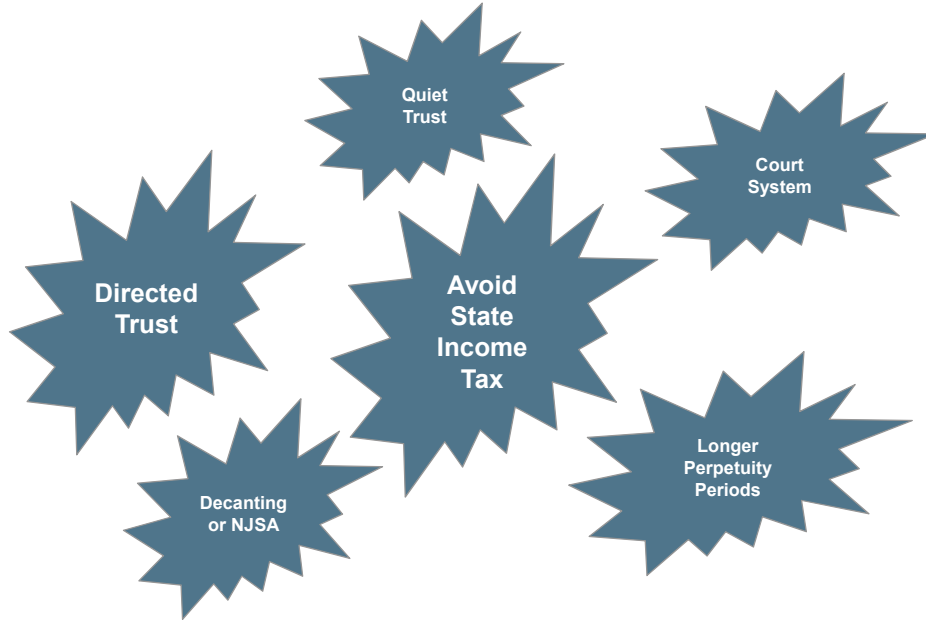
- Generally results in location-source income
- Can result in court jurisdiction
- Need to evaluate in relation to other factors

**California Income Taxation of Trusts**

<b>Property</b>	<b>Trustee Residence</b>	<b>Beneficiary Residence</b>
California-source income results in California reporting	<p>If all of the trustees are California residents, all of the trust income is to be reported in California</p> <p>If some of the trustees are California residents, a proportionate amount of the trust income is to be reported in California</p> <p>Corporate trustee residence is determined under "major portion" rule</p> <p>Individual trustee residence is determined under normal rules</p>	<p>If all non-contingent beneficiaries are California residents, all of the trust income is to be reported in California</p> <p>If some of the non-contingent beneficiaries are California, a proportionate amount of the trust income is to be reported in California</p> <p>Throwback rules apply</p> <p>Contingent beneficiary is subject to a condition precedent before distribution</p> <p>Upon distribution, contingent beneficiary becomes non-contingent</p>

**Why not California?**

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### **How to Leave California?**

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- **Appoint a trustee resident in another jurisdiction**
- **Evaluate impact and options related to beneficiary residence**
- **Evaluate impact and options related to property location**
- **Change trust terms**
  - » Modification under California law
  - » Decanting under terms of trust instrument
  - » Decanting or modification under law of new administrative jurisdiction

## Planning

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- **"Situs" is a choice**
  - » Approach the creation of a trust as you would creation of a business entity
  
- **Evaluate as a fiduciary required to achieve the best result for the beneficiaries**
  - » Can you fulfill your fiduciary duties in the current jurisdiction?
  - » Can you better fulfill those duties in another jurisdiction?
  - » What is the cost to make a change?
  - » What is the cost of maintaining the current jurisdiction?
  
- **Draft with flexibility**
  - » Trusteeship
  - » Governing law and administrative situs
  - » Modification and distribution

**Conclusion**

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Thank you!

Q & A

## Presenter's Biography

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**Bryan D. Kirk**, *Managing Director and Trust Counsel*, is a senior trusts and estates advisor for Fiduciary Trust, where he provides guidance on all aspects of estate planning and trust and estate administration. Mr. Kirk has broad experience in multi-generational asset management and transfer planning, including estate, gift, generation-skipping transfer and income tax planning, charitable giving, philanthropy, real property matters and complex assets, such as private equity and debt. He also serves as Chief Fiduciary Officer of Fiduciary Trust International of California. Before joining Fiduciary Trust, he was a partner with Botton Law Group LLP in San Francisco where he worked for nine years. Mr. Kirk earned his law degree from University of California, Berkeley, and graduated *cum laude* from Claremont McKenna College with a Bachelor of Arts degree in literature and government.





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