

The Delaware Advantage

Top Ten Reasons to Have Your Trust Administered in Delaware

Delaware has earned national renown because of its trust and tax law advantages and its innovative estate planning vehicles.

Delaware has been a trust-friendly jurisdiction for generations. There are numerous reasons why you should consider establishing a new trust in Delaware, and why you should explore moving an existing trust to the First State, even if you don't live in Delaware. Here are just ten.



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REASON ONE

Your trust will always be in a trust-friendly place

No other state can match Delaware's history in, and commitment to, trusts. Starting early in the 20th century, Delaware began to establish a trust infrastructure. Thus, it has a well-thought-out body of trust laws (which it updates on an ongoing basis); an incomparable judiciary; a supportive legislature, executive branch, and legal and banking community; and many institutions that compete for trust business.

Delaware's innovative approach to trusts ensures that Delaware will remain as the premiere home for new or existing trusts.

REASON TWO

Directed Trust: You may continue to manage your trust's investments or involve trusted advisors with distribution decisions

For over a century, Delaware has recognized the "directed trust," in which the trustee makes investment decisions as directed by an advisor named in the trust. Under the law, a trustee will be liable for following the instructions of a direction adviser named in the governing instrument only if it engages in willful misconduct. To recognize this diminished responsibility, Wilmington Trust Company customarily charges less to administer directed trusts than trusts over which we have investment duties.

In addition to investment matters, Delaware's direction law also covers distribution and other decisions, relieves a directed trustee from the duty to monitor the adviser's conduct, and recognizes that a "protector" may be an "adviser." A 2004 Delaware court case sustained the law.

Consequently, the Delaware directed trust might be right for you if you want to fund your trust with stock in a family company, maintain a relationship with a money manager, or involve family members in deciding how much is distributed to your beneficiaries.

REASON THREE

Your trust can be perpetual

Historical trust law in every state imposed a limit on the duration of a trust called a “rule against perpetuities.” In 1986, Delaware abolished the common-law rule against perpetuities. Currently, personal property, including stocks, bonds, other intangible personal property, and tangible assets other than real property, may remain in trust forever. Real property held in trust continues to be governed by a 110-year limitation, but you may avoid this limitation by placing real property in a limited liability company, or family limited partnership, because an interest in one of these entities is personal property under Delaware law.

REASON FOUR

Your trust might avoid state income taxes on accumulated income and capital gains

Because Delaware allows perpetual trusts of personal property, and doesn’t tax trust income in most cases, it’s an excellent place for you to create a long-term, or “dynasty,” trust.

Delaware does impose an income tax on trusts, but the trustee of a Delaware trust may deduct income (including capital gains) set aside for future distribution to nonresident beneficiaries. Given that Delaware has a small population, few Delaware trusts pay Delaware income tax due to a lack of resident beneficiaries. If your trust has no Delaware beneficiaries, the trustee is not required to file a Delaware return. In addition, if you live in California, Massachusetts, New Jersey, New York, or one of a number of other states, your Delaware trust might be exempt from your home state’s income tax so the income may escape state tax entirely.

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REASON FIVE

Your trust can protect assets from your beneficiaries' creditors

A Delaware spendthrift trust provides your beneficiaries substantial protection from creditor claims. So, if your Delaware trust contains a spendthrift clause (a common feature in every irrevocable trust), a beneficiary's interest will generally be shielded in an unlimited amount. A creditor cannot force you, your trustee, or your beneficiary to act in a way that will defeat the law's protections. Plus, your trustee may pay your beneficiary's ongoing personal expenses, even if it knows that there is an existing creditor.

REASON SIX

Your trust can protect assets from your creditors

Delaware is one of the few states where you may create a self-settled or asset-protection trust, in which trust assets are safe even if you get money back from the trust that you created. If you want to guard your assets from future creditors and if you either own substantial assets outright or are engaged in a high-risk profession or activities, you should consider a Delaware asset-protection trust. In addition, an asset-protection trust may be a good vehicle to provide flexibility for estate planning purposes. It is possible that your trust may be structured to be a completed gift for federal gift-tax purposes and be excludable from your gross estate for federal estate-tax purposes.

REASON SEVEN

Your trust can benefit from flexible distribution rules

In recent years, current beneficiaries of irrevocable trusts have seen their distributions decrease for two reasons. First, consistent with their fiduciary duties, trustees generally have been investing more heavily in equities, and equities normally provide less current income than fixed income investments. Second, the interest provided by fixed income investments and the dividends provided by stocks have been falling.

Delaware adopted two laws to address the problems caused by declining income yields: the obligation of trustees to invest for total return, and the need to balance the interests of current and future beneficiaries. First, Delaware law allows a trustee to pay a percentage of the value of the trust between 3% and 5% as a “unitrust amount,” rather than payment of the trust’s “income” to the current beneficiary. Second, Delaware enacted the “power to adjust” that permits a trustee to allocate income

to principal, or principal to income, if the trustee otherwise is unable to administer a trust impartially between the current and remainder beneficiaries.

Delaware’s unitrust and power to adjust laws take full advantage of safe harbors provided by Internal Revenue Service regulations and are predicated on the idea that trusts will be moved to Delaware to take advantage of those laws.

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REASON EIGHT

Your trust can benefit from Delaware's unmatched judicial system

If it becomes necessary for a trust matter to be addressed by a court (e.g., when the meaning of the trust instrument is unclear or it is believed that a trustee has acted improperly), prompt and efficient relief is available in the Delaware Court of Chancery and, if necessary, the Delaware Supreme Court. The Chancellor and the Vice-Chancellors of the Delaware Court of Chancery and the justices of the Delaware Supreme Court (the courts that handle corporate as well as trust matters in Delaware) are not elected. Instead, the Delaware Constitution requires that they be appointed by the Governor with the consent of a majority of the members of the Senate and that all Delaware judges come as equally as possible from the two major political parties. For this and other reasons, Delaware's liability system is consistently ranked as the best in the country in a survey conducted annually by the U.S. Chamber of Commerce.

All petitions involving trusts in Delaware (e.g., to reform a trust) must be filed electronically. Those petitions often have a sealed record, and under Delaware law, they do not have to be accompanied by a court accounting. Delaware's streamlined court procedures have allowed petitions to reform trusts (even trusts moving into Delaware from other states) to be carefully reviewed and approved by the Delaware Court of Chancery within a few days or weeks if these petitions are accompanied by all requisite consents. We believe this practice will continue.

No other jurisdiction can match the quality, timeliness, and tradition of Delaware's judicial system.

REASON NINE

Your trust will carry out your objectives

Delaware law traditionally has stressed the importance of carrying out the intent of the person who created the trust. Hence, in Delaware, the terms of your trust will be carried out regardless of other statutes or laws. Trust terms that will be respected include, but are not limited to: (1) the deferral of when your trust beneficiaries learn of their interests until a time that you determine, such as when they reach a “responsible” age; (2) the grounds for removal of your trustee; and (3) the circumstances, if any, under which your trustee must diversify investments.

Delaware also has mechanisms to help ensure that your wishes cannot be undone once you are gone.

REASON TEN

Accounts at Delaware financial institutions receive extra creditor protection due to protective attachment laws

If you want to get more creditor protection for yourself or for your beneficiaries, you should consider creating a checking or savings account, an investment account, a revocable trust, or an irrevocable trust in Delaware even if you don't live in the state. This is because, since 1871, subject to certain exceptions, creditors have not been allowed to attach assets in accounts at Delaware financial institutions and because, over the years, Delaware courts have read the protection broadly.

The Delaware Supreme Court did say that the law did not extend to a wife's claim for separate maintenance, but, in the nonmarital context, you might obtain substantial protection from creditors by placing funds in an account at a Delaware institution. Even in the marital context, you might benefit because the Court said that the law's protections might apply in the case of divorce. Further, if you are a beneficiary of a Delaware or non-Delaware trust, distributions from your trust into an account in a Delaware bank or trust company typically will insulate the funds from many creditor claims.

Wilmington Trust's professionals have been closely involved in the development of all of the benefits summarized above. Our current generation of experts stand ready to discuss how Delaware trusts can benefit you and your family.

A tradition of personalized service.

Successful individuals and families have chosen to establish relationships with Wilmington Trust that have spanned multiple generations. Why? Because of the level of personalized service and attention we devote to helping them achieve their financial goals.

Even before a trust is established, we work with each individual or family, and their advisors, to analyze and assess their unique situation and needs. A personalized plan is then developed, and complemented with our broad array of trust, estate planning, and investment management alternatives. Perhaps most important, all clients and their advisors receive the personal dedication of a team of responsive and trained professionals who offer intelligent financial solutions for even the most unusual situations. Our strong heritage of wealth management expertise is reflected not only in the exceptional quality of our services, but in the exceptional skills of our trust, planning, and investment professionals.

We invite you to learn more about the Delaware Advantage. Please call us at 800.441.7120 or 302.651.1318 or visit our website at www.wilmingtontrust.com

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