

# THE Delaware ADVANTAGE

Delaware enjoys international renown for its trust and tax law advantages and its innovative estate planning vehicles.

## Top Ten Reasons to Have Your Trust Administered in Delaware

Delaware has been a trust-friendly jurisdiction for generations. Even if you don't live in Delaware, 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.

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### Your trust will have a trust-friendly home

No other state can match Delaware's trust history. 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); a supportive legislature, executive branch, and legal and banking community; and many institutions that compete for trust business within the state.

Delaware's innovative approach to trusts helps Delaware maintain its position as the premier home for new or existing trusts.

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### Directed Trusts: You may continue to control 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 an adviser named in the governing instrument only if it engages in wilful misconduct. To recognize this diminished responsibility, Wilmington Trust Company customarily

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charges less to administer directed trusts than trusts over which we have investment duties.

In addition to investment matters, Delaware's directed trust law also covers distribution and other decisions, relieves a directed trustee from the duty to monitor the advisor's conduct, and recognizes that a "protector" may be an "advisor." 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.

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### **Your trust can be perpetual**

Historical trust law in every state imposed a "rule against perpetuities" that limited the duration of a trust. 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.

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### **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, but the trustee of a Delaware trust may deduct income (including capital gains) accumulated for future distribution to non-resident beneficiaries. Given that Delaware has a small population and that it determines the residences of future beneficiaries in a favorable way, few Delaware trusts created by non-residents pay Delaware income tax. 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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### **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 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.

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## Your trust can protect assets from your creditors

Delaware is one of a growing number of 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 activity, 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 to be excludable from your gross estate for federal estate-tax purposes.

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## Your trust can benefit from flexible distribution rules

In recent years, income 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 has 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 distributing trust “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.

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## Your trust can benefit from Delaware’s excellent 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, the modification of a trust is desirable for efficient administration, 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 courts are consistently ranked as the best in the country in a survey of state court liability systems conducted regularly by the U.S. Chamber of Commerce.

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## Your trust will carry out your objectives

Delaware law has traditionally 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 pre- and post-death mechanisms to help ensure that your wishes cannot be undone once you are gone. The statute providing for the lifetime validation of trusts has been upheld by the Delaware courts.

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## Your estate plan will benefit from favorable limited partnership/limited liability company laws

Practitioners agree that a leading trust jurisdiction should have favorable limited partnership/limited liability company statutes because these entities are often held in trusts as part of an overall estate or asset protection plan. Specifically, those statutes should provide that a charging order is a creditor's sole remedy and that other remedies, particularly foreclosure, are not available. Delaware's laws satisfy these requirements, as has been confirmed by Delaware and non-Delaware caselaw.

## 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 its advisors, to analyze and assess specific situations and needs. A personalized plan is then developed, and complemented by 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.

## Wilmington Trust's professionals

**have been closely involved in the development of all of the benefits summarized above. Our current generation of experts stands ready to discuss how Delaware trusts can benefit you and your family.**

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*Note that a few states, including Delaware, have special trust advantages that may not be available under the laws of your state of residence, including asset protection trusts and directed trusts.*