



Considering the Wealth-Friendly Advantages of Delaware

By: Thomas M. Forrest, CPA



The small state of Delaware can offer big opportunities for clients looking to establish a new trust or to move an existing trust. Over the past 30 years, Delaware has largely led the charge toward developing “trust friendly” legislation. Today, Delaware’s legislative initiatives and its Court of Chancery continue to benefit trust professionals and their clients.¹

The Delaware Advantage

Compared with other states, Delaware offers advantages on many fronts. For example, it offers your clients greater investment flexibility and higher levels of confidentiality as well as the potential for unlimited trust duration. Here are some of the reasons why Delaware can be attractive to so many people establishing trusts.

Freedom to choose an investment advisor

Delaware is one of few states to offer administrative trusts, also known as directed trusts. With these trusts, the administrative function is separate from the investment function, and the fiduciary duties of each function are bifurcated. Thus, trust clients may use their own investment advisor to invest their trust assets. The investment advisor can serve as a local point of contact for the family, while the trustee performs the administrative functions and exercises noninvestment discretion.

Tax benefits²

If your clients are exploring ways to manage fiduciary income tax on capital gains or accumulated income of a trust and the beneficiaries are nonresidents of Delaware, they may well benefit by establishing a trust in Delaware. Delaware does not impose a fiduciary income tax on irrevocable trusts that accumulate income and/or capital gains for future distribution to nonresident beneficiaries. Tax-free accumulation can be

a particular advantage for perpetual or “dynasty” trusts that may continue for many generations.

Protection of Trust Assets—Delaware is one of only 12 states that allows for a self-settled trust that protects trust assets from claims by creditors. Delaware allows the grantor to protect an interest in the trust income and principal while maintaining certain powers over the trust without exposing the trust’s assets to creditor claims.

In addition to obtaining asset protection, grantors can also create self-settled trusts which are not subject to income taxation by the grantor’s home state. A Delaware asset protection trust designed as a nongrantor - incomplete gift trust can be a powerful tax and asset protection planning tool for an individual who lives in a state that imposes a material income tax on investment income. The grantor would possess a testamentary limited power of appointment over all the trust property to avoid making a completed gift for federal gift tax purposes.

Unlimited Duration of Trusts—Many states limit the duration of a trust. In 1995, Delaware was one of the first states to repeal the “rule against perpetuities,” which in most other states limits the duration of a trust to a finite period. Under Delaware law clients can have their assets pass through a generation-skipping tax-exempt trust, from generation to generation, essentially without end and without incurring additional gift, estate or transfer taxes. The potential growth of assets can become larger with each generation.

Total Return Trusts—In 2001, Delaware became the first state to adopt unitrust legislation permitting the conversion of traditional net income trusts to total return unitrusts. Total return unitrusts are flexible vehicles that often help eliminate tension between current trust beneficiaries and future trust remaindermen over how the trust assets should be allocated.

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Confidentiality—For clients who place a premium on confidentiality, unless specifically required by the provisions of a trust or court order, Delaware requires no court filings, annual meetings of beneficiaries, public registration or court accountings. And when a trust dispute goes to the Delaware Court of Chancery, the parties can often have the record sealed.

If you have clients with estate or financial planning needs that include the use of personal trusts, they may benefit from a closer look at the benefits Delaware has to offer. It is easy to establish a new trust in Delaware, and the process of moving an existing trust to Delaware where it can be “reformed” according to Delaware law is relatively straightforward, provided the current trust instrument contains language for removing and appointing trustees.

To learn more about the Delaware advantage, please attend my session “Creative Strategies with Irrevocable Trust Planning and Asset Protection—Why Delaware?” at the Planning for the Generations Symposium, August 5–7, in Chicago, Illinois.

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¹ The benefits or types of accounts described in this article may not be appropriate for all clients.

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