The Delaware Trust Advantage: *A Discussion on the Benefits of Using Delaware Jurisdiction for Trust and Estate Planning*

By Erin Markham, CTFA and Garrison duP. Lickle
Chilton Trust

Delaware has been recognized as the leading jurisdiction for trusts for over 200 years. This is because Delaware promotes significant income tax avantages, unique trust planning vehicles and administrative flexibility. It also has one of the most highly regarded Chancery Courts in our country.

Income Tax Advantages

By creating an irrevocable trust in Delaware, a trust can avoid Delaware state taxes on accumulated income or capital gains. First, the trust must have at least one qualified Delaware trustee. So long as there are no Delaware resident beneficiaries there will be no fiduciary income tax on accumulated income or realized capital gains in the trust. If one or more beneficiaries of the trust is a Delaware resident, a tax will be imposed on the pro-rata portion of the trust that is attributable to the resident beneficiary.

Dynasty Trusts

Delaware abolished the rule against perpetuities, which allows for the creation of a Dynasty Trust. Dynasty Trusts are typically created to last in perpetuity for the benefit and protection of multiple generations. One caveat is that real property held in trust continues to be governed by a 110 year limitation; however, you may avoid this limitation by placing real property in a limited liability company or a limited partnership.

Directed Trusts

A Delaware trust can be drafted as a Directed Trust to provide more investment flexibility by bifurcating the responsibility of the investment management and administration. Through proper drafting under the Advisor statute, the directed or administrative trustee is protected from liability for investment decisions made by the investment advisor or directing trustee, as long as the directed trustee does not engage in willful misconduct.

Another way of bifurcating the responsibilities of fiduciaries is via the Excluded Co-Trustee statute. This allows one trustee to direct another trustee over certain trustee powers, such as investments or distributions, and the trustee who is excluded from such powers is explicitly excluded from all liability over the specific power or powers that the trustee is being directed to enact.

Asset Protection Trusts

The Delaware Asset Protection Trust was established as a method for an individual to create a self-settled irrevocable trust, from which the settlor can retain a beneficial interest, and protect their assets from creditors. In order to qualify as an Asset Protection Trust, the trust must contain a spendthrift clause, designate Delaware law to govern the trust, and appoint at least one qualified Delaware trustee. In addition to creditor protection, the Asset Protection Trust provides for significant tax benefits:

- The settlor can use all or some of their gift tax exemption, lowering their potential taxable estate, and still benefit from the funds gifted as a discretionary beneficiary. If the settlor does not retain lifetime and testamentary non-general powers of appointment and a power to veto distributions, the settlor will file a federal gift tax return (IRS form 709) and the Asset Protection Trust will not be includable in the settlor's gross estate.
- If the grantor files a federal gift tax return qualifying the funding of the trust as a completed gift, the settlor may also allocate a generation skipping transfer tax exemption at the creation of the trust.
- An Asset Protection Trust is typically drafted to be a grantor trust for federal tax purposes, which means the settlor is required to pay all taxes incurred. The settlor's payment of income and capital gains taxes incurred as a result of the inclusion of the Asset Protection Trust is not considered an additional gift and the Asset Protection Trust can include a provision that allows the trustee to reimburse the settlor for any taxes paid in connection with the Asset Protection Trust.

Privacy

Delaware allows for a trust to contain a "silent" provision, whereby the trustee is not required to notify a beneficiary or other interested party of the existence of the trust for a stated period of years or until an attained age. Delaware is known to be a proponent of settlor and beneficiary privacy. As such, Delaware does not require the trustee to file trust agreements with a court or public agency, nor does it require the trust to file annual accountings.

The Delaware Chancery Court

Established in 1792, the Delaware Chancery Court has over 200 years in creating a sophisticated trust law infrastructure. The Chancery Court is largely recognized as the nation's leading forum for judicial disputes. Because of the experience and sophistication of the Chancery Court, it is likely for a matter brought before the Court to receive prompt, efficient and consistent relief. In addition, the Delaware Chancery Court regularly reviews and refines its many advantageous statutes to ensure its continued flexibility stays relevant to the current state of the industry.

Erin Markham, CTFA
Vice President &
Senior Trust Officer

Garrison duP. Lickle
Vice Chairman

Erin Markham is a Vice President and Senior Trust Officer *with over 15 years of experience in the financial industry.*

Garrison duP. Lickle is Vice Chairman of Chilton Trust *with over 35 years of experience in the fiduciary wealth management field.*

Chilton Trust, a private, independent Trust Company, *advises and provides wealth management services including fiduciary services and investment solution to high net worth individuals, families and foundations.*

Charlotte, NC | New York, NY | Palm Beach, FL | Stamford, CT | Wilmington, DE
561.598.6330
www.ChiltonTrustCompany.com