



HOW TO CREATE A DELAWARE TRUST

Delaware's independent, privately-held boutique trust Company partnering with your existing advisers to provide sophisticated, professional trust administration solutions.

To create a Delaware inter vivos (or lifetime) trust, there are several key components which must be considered. Generally speaking, the trust should include the following:

1. ***One of the initial trustees must be physically located within the state of Delaware*** and perform its role in the administration of the trust with the state of Delaware (using Commonwealth as trustee would satisfy this requirement). It is important that where a trust allows for multiple trustees, that the Delaware trustee be assigned a discrete number of administrative duties which it may perform exclusively pursuant to the terms of the trust document.
2. ***The law governing the trust's validity, construction and administration should be that of the state of Delaware*** and the initial situs of the trust should be stated to be the state of Delaware. When considering which state's laws govern, Delaware courts have consistently considered the following factors: (i) the intention of the settlor, (2) the domicile of the trustee of the trust and (3) the place where the trust is administered.
3. Where there is more than one trustee serving at a time, the ***trust document should clearly state those duties which will be performed exclusively in the state of Delaware***, which list should include a majority of the following:
 - a. Maintain or arrange for the custody of assets;
 - b. Maintain storage of tangible property and evidence of tangible property;
 - c. Keep trust records;
 - d. Provide office for trustee meetings;
 - e. Trust accountings and communications;
 - f. Respond to inquiries;
 - g. Execute documents and authorize trust account transactions;
 - h. Retain advisors in connection with the performance of the administrative trustee duties; and
 - i. Prepare or review trust income tax returns.
4. If the trust is intended to be a self-settled or asset protection trust, it must also comply with 12 Del. C. §3570(11) which requires that the trust document also include:
 - a. A statement that the trust is irrevocable; and
 - b. A statement that the interest of the transferor or other beneficiary in the trust property or income therefrom may not be assigned, pledged or mortgaged, whether voluntarily or involuntary, before the trustee(s) actually distribute the same to the beneficiary (or what is typically referred to as a spendthrift clause).

It is always advisable for an attorney licensed outside of the state of Delaware and not experienced in Delaware trust planning to have their trust document reviewed by Delaware counsel. Commonwealth would be happy to provide a list of qualified Delaware attorneys for your use as well as sample language.

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HOW TO IDENTIFY AN OPPORTUNITY TO UTILIZE DELAWARE TRUST PLANNING

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There are many reasons to consider utilizing a Delaware trust in your client's estate planning; however, below are a few of the common questions which will help you identify these opportunities:

1. ***Is your client in a high risk profession and concerned about protecting his or her assets from future creditors?*** Under Delaware law, a solvent grantor can create a self-settled irrevocable trust, naming him or herself as a potential beneficiary. If properly established, the settlor can protect trust assets from the claims of future creditors while continuing to be a permissible beneficiary of the trust.
2. ***Is your client planning to get married and interested in protecting his or her assets from the possibility of divorce?*** Self-settled trusts can also be used in lieu of a prenuptial agreement so long as the trust is created and funded prior to the date of the marriage. In many instances, this will permit an individual to avoid disclosure requirements imposed by some states upon the creation of a prenuptial agreement.
3. ***Does your client own a closely held business that may substantially appreciate in value and/or which he or she is anticipating the sale of in the next few years?*** Delaware incomplete non-grantor trusts (known as "DINGs") may allow an individual to fund a Delaware trust with a closely held business which is expected to be sold within the next few years. As the state of Delaware does not tax capital gains held within a trust, the grantor can avoid state-level taxation of the gain which can be as high as 6%.
4. ***Is your client interested in preserving his or her wealth for future generations and allowing it to grow without being depleted by state income tax?*** Delaware has abolished the rule against perpetuities so that personal property may remain in trust forever, allowing families to extend gift, estate and generations skipping transfer tax advantages for future generations.
5. ***Does your client have international tax planning needs due to relatives who live both within and outside of the United States?*** Delaware trusts provide a settlor with an easy means of domesticating assets for the use of U.S. beneficiaries. In addition, an international family can create additional flexibility in toggling the trust between U.S. trust status and foreign trust status to adjust for transitory beneficiaries.
6. ***Does your client like the idea of a trust, but, remain uncomfortable with the idea of entrusting someone whom he or she does not know with decisions regarding (1) how to manage the assets and (2) when to make distributions to his or her family?*** Delaware law allows for a complete bifurcation of the typical fiduciary duties, permitting the use of advisors who direct the trustee, thus allowing the decision making as to functions such as distributions and investing to remain with existing family and close advisors.
7. ***Is your client concerned that the beneficiaries of his or her trust will not become productive members of society if they are aware of the trust?*** Delaware law allows a settlor to eliminate the duty of a trustee to notify a beneficiary of the existence of the trust for a period of time. This allows a settlor to both maintain his or her privacy and prevent a beneficiary from becoming dependent upon the trust fund.
8. ***Is your client concerned that after the trust is created, no one will be ensuring that his or her intent is being carried through?*** The Delaware Chancery Court and Delaware legislation are focused on ensuring that above all, trustees administer trust in a manner consistent with the grantor's intent. There are more than 250 years of case law which can be relied upon as precedent.

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HOW TO TRANSFER YOUR TRUST TO COMMONWEALTH TRUST COMPANY?

Delaware's independent, privately-held boutique trust Company partnering with your existing advisers to provide sophisticated, professional trust administration solutions.

If your client has an existing trust which is situated in a state other than Delaware, it is usually possible to change the situs of the trust to Delaware and appoint Commonwealth Trust Company as successor Trustee. There are typically three methods of doing this:

1. **Appoint a Delaware Trustee** – if the Trust document has all pertinent language and a portability clause, you can simply appoint a Delaware Trustee as the sole or co-trustee.
2. **Decant** – If the trust document provides a distribution standard that allows for a current distribution of trust assets to an existing beneficiary and the state in which the trust is located has an appropriate decanting statute, then by exercise of its distribution powers, a trustee can distribute assets into a completely new and updated trust. The new trust could then receive distribution of all or substantially all of the assets of the existing trust. If the current situs of the trust does not permit decanting, it may be possible to move the trust to Delaware first and then utilize Delaware's decanting statute. In considering decanting as a method of transfer, one must be certain that doing so will not cause any adverse income tax, estate tax or generation-skipping transfer tax consequences to the trust or its grantor, trustees or beneficiaries.
3. **Court Reformation** - A Delaware attorney can be engaged to file a consent petition in the Chancery Court to "reform" or update the trust with the consent of its beneficiaries.

It is important when considering the transfer of situs from one state to another, that the family first consult with counsel in the home state to determine what, if anything, must be done in the current state prior to moving the trust to ensure all relevant ties with the current jurisdiction are severed appropriately so as to avoid any adverse tax consequences. Where a trust is currently governed by the laws of another state, upon the appointment of a Delaware trustee, absent contrary language in the original trust document, the law governing administration will automatically change to that of Delaware.

In addition to our standard intake requirements (which can be found in our Client Packet provided by the assigned Trust Administrator), Commonwealth will be looking for the following documentation and information prior to accepting a transfer trust:

1. Copy of current list of trust assets and liabilities (with tax lots, acquisition and cost basis);
2. Copy of the current year-to-date accounting as well as an accounting for the prior calendar year;
3. Copy of the most recent three years' trust income tax returns;
4. A statement that there is no pending or anticipated litigation involving the trust or its assets;
5. If a self settled trust, a copy of the original solvency analysis and solvency analysis performed upon the subsequent addition of funds; and
6. If the transfer involves a decanting, a fully executed Receipt, Release and Indemnity Agreement or other agreed upon document.

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3. **Court Modification** - A Delaware attorney can be engaged to file a consent petition in the Chancery Court to “modify” or update the trust with the consent of its beneficiaries.

It is important when considering the transfer of situs from one state to another, that the family first consult with counsel in the home state to determine what, if anything, must be done in the current state prior to moving the trust to ensure all relevant ties with the current jurisdiction are severed appropriately so as to avoid any adverse tax consequences. Where a trust is currently governed by the laws of another state, upon the appointment of a Delaware trustee, absent contrary language in the original trust document, the law governing administration will automatically change to that of Delaware.

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HOW TO WORK WITH A DIRECTED TRUSTEE (COMMONWEALTH TRUST COMPANY)

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When establishing a trust with a directed trustee, it is important to understand what duties must remain with the directed trustee in order to properly maintain the desired jurisdiction as the situs of the trust. Within the state of Delaware, the standard list of minimum duties which must be performed by the Delaware trustee is as follows:

1. **Maintain or arrange for custody of assets:** Accounts can continue to be custodied with a local broker/dealer; however, the new trust accounts should be opened with Commonwealth's address as the account's primary address. All Advisory Agreements will be signed by Commonwealth at the direction of the Co-Trustee (or Investment Advisor) with authority over investments; however, Commonwealth does not need to be involved in the day-to-day trading of the account pursuant to the terms of the Advisory Agreement. Commonwealth will need to execute any investment documents for partnerships or hedge fund type investments requiring additional documentation in the same manner as any trustee.
2. **Maintain storage of tangible property and evidence of tangible property.**
3. **Keep trust records:** Commonwealth will download information from the broker/dealer's online access service and maintain a "shadow accounting" for the trust to satisfy the requirements of the OSBC. If Commonwealth is acting with a co-trustee with authority over investment and/or distribution decisions, all documentation as to transactions and distribution requests (which Commonwealth is not already a party to) must be forwarded to Commonwealth for its records. This is to ensure that Commonwealth's records are complete as they are the official books and records of the trust.
4. **Provide office for trustee meetings.**
5. **Trust accountings and communications:** Commonwealth will need to receive regular statements from the custodial bank so that it's accounting and downloads can be reviewed on a regular basis against those maintained by the custodian. Commonwealth should be included in all communications regarding the trust.
6. **Respond to inquiries.**
7. **Execute documents and authorize trust account transactions:** If there is a Co-Trustee charged with investment and/or distribution authority, it will provide Commonwealth with a written direction as to what actions will be taken where it too must sign, or if there is simply an Investment or Distribution Adviser it will provide Commonwealth with the written direction. Some examples of when the directions will be required are:
 1. Executing advisory agreements to open trust accounts;
 2. Executing closely held entity documents;
 3. Executing partnership documents or private equity documents;
 4. Authorizing distributions from the trust's accounts; and
 5. Paying trust expenses.

If Commonwealth is not participating in a transaction, it should be provided with the relevant paperwork for record keeping purposes. Entity co-trustees will need to update Commonwealth's records on a regular basis as to signing authority granted for all transactions so as to evidence that the signatory on the direction letter has the appropriate authority.

8. **Retain advisors in connection with the performance of the administrative trustee duties.**
9. **Prepare or review trust income tax returns:** The client's current accountants can continue to prepare the trust's income tax returns, if that is the client's preference, so long as that professional has sufficient experience in preparing fiduciary income tax returns. Once drafted, copies of the draft income tax returns must be sent to Commonwealth for review and comment. Upon approval, Commonwealth or an authorized Co-trustee can then sign and e-file the returns.

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1. Contact a member of our Business Development Group, including: Jimmy Harty, David Riebe or Kristen Powers once an opportunity has presented itself to discuss the trust and its anticipated administration so that an initial fee quote can be determined.
2. Once the fee quote has been approved by the client and an initial draft of the trust is ready, it can be forwarded to Commonwealth for review by one of our internal trust counsel. Commonwealth's internal trust counsel will provide specific comments or recommended changes upon completion of the internal review. In addition, Commonwealth's internal trust counsel can provide the drafting attorney with sample language and the names of Delaware attorneys should the drafting attorney wish to have the document reviewed.
3. A Commonwealth Trust Administrator will be assigned to the trust who will send our "Client Packet" to you for completion and execution by your client. The Trust Administrator will be your key point of contact for the trust going forward.
4. Commonwealth can execute the trust once:
 - a. The trust has been approved by all parties;
 - b. The executed Commonwealth Client Packet has been returned;
 - c. The necessary compliance checks have been run and approved; and
 - d. CTC's setup and first year annual fees have been paid (subsequent annual fees will be paid on the anniversary date of the trust's signing on a prospective basis).
5. Commonwealth will then assist with asset transfers and re-titling.
6. All investment decisions must be directed in writing by the Investment Adviser of the trust. Commonwealth can draft the necessary direction letters for your review.
7. For distributions from the trust, Commonwealth will need the following:
 - a. If there is a Distribution Adviser, a written direction signed by the authorized Adviser to make the distribution to a particular beneficiary which includes (1) the fact that a request has been made, (2) the amount of the distribution, (3) the reason for the distribution and (4) the relevant wiring instructions; or
 - b. If there is not a Distribution Adviser to the trust, a distribution request in writing, signed by the beneficiary, which includes: (1) the amount of the request, (2) the reason for the request (i.e. living expenses, tuition, etc.) and (3) the relevant wiring instructions.
8. All expense payments should be submitted to Commonwealth as trustee for payment, with the exception of:
 - a. Contractual advisory fees pursuant to a signed Advisory Agreement; or
 - b. Fees authorized by another Trustee pursuant to the terms of the trust agreement.

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