The concept of a family office has been around since the sixth century, when royal families employed stewards to manage the family households and wealth. The practice quickly spread amongst members of the aristocracy until the use of stewards was commonplace. In the nineteenth century, a new version of the “steward” came to life. Wealthy families such as the Morgans and Rockefellers established “Houses,” with the goal of centralizing management for the families’ complex portfolios (including both business and financial operations) as well as cohesive family management and wealth planning, in a private setting.

In the modern era, the traditional family “steward” or “House” has evolved into the family office. There are virtual family offices, multi-family offices, single family offices and now private family trust companies. All have the same goal, to support the needs of a specific family or group of families by providing cohesive administrative, legal, accounting, and investment services. The success of the family office is hinged upon caring for the needs of the family as a whole, while maintaining their privacy. Most wealthy families seem to follow the same general path. Initially, the family will work with either a virtual family office or a multi-family office to take care of their day-to-day needs. This is the phase in which the family continues to acquire and accumulate wealth. The family’s focus is on the centralization of wealth management, minimization of on-going expenses, and development of key adviser relationships. Once the family achieves a collective net worth of approximately $100 million, a single family office begins to make economic sense. The single family office is able to support the needs of that specific family group exclusively. During this phase, the family will begin to hire its own team of in-house professionals. The final phase of the family office continuum is typically the creation of a private family trust company, an entity with fiduciary powers, substantially controlled by the family, which can administer the family trusts. This typically happens when a family achieves a collective net worth of approximately $500 million.

While the private family trust company can be a natural final step for many high net worth families, it is often not the most economical alternative, nor is it the only means of achieving consistent family trust administration. Cohesive, professional trust administration and advice is also attainable by utilizing a directed trust structure in coordination with the single family office and many wealthy families are beginning to see this as a very effective alternative.
International Developments Affecting Delaware Trusts

By: Ivan A. Sacks, Withers Bergman LLP and G. Warren Whitaker, Day Pitney, LLP

The most important recent international developments affecting the use of Delaware trusts have not been changes in the tax laws of the United States. Some foreign jurisdictions, notably France and Italy, have made substantial changes affecting the taxation of trusts. But more importantly, there have been significant changes in government access to and exchange of financial information and enforcement of existing laws. Regimes to force disclosure of information by offshore banks and trustees, and exchange of that information among the world’s high tax jurisdictions, have proliferated dramatically in recent years, and promise to expand their actual impact over the next few years. In addition some emerging market jurisdictions, including Russia and several Latin American countries, have adopted or amended anti-deferral regimes to better tax income held by their residents in foreign structures.

As a result, today U.S. citizens, green card holders and other residents who may have acted in a noncompliant manner, such as via an unreported offshore trust structure, must now take steps to regularize their affairs, through the US voluntary disclosure program, and, in some cases, by thereafter surrendering their US citizenship if they have little or no other connection to the US. Going forward, their planning must be in accordance with U.S. requirements. Overall, these developments have been to the benefit of Delaware, by encouraging the use of a compliant onshore trust structure. Internationally, there is a greater understanding that, while such an onshore structure means payment of taxes and reporting, it offers a significant level of privacy as well as legitimate tax savings, and the offshore alternative may mean higher compliance costs, or else the very real possibility of significant civil and criminal sanctions.

The biggest game changer in this regard was the enactment of FATCA in 2010 and its entry into effect in 2014. FATCA is a U.S. law that “encourages” foreign financial institutions to determine which of their clients are U.S. persons, and then to provide the U.S. with information annually about the income earned by these persons through the foreign structure or account. Needless to say, foreign financial institutions were not eager to play the role of tax enforcers for the IRS. To overcome this reluctance, FATCA imposes a strict withholding regime on foreign financial institutions that do not agree to make such reports. For noncompliant institutions, the US requires withholding of 30% on all payments to them from U.S. securities, including interest, dividends and the proceeds of sale of securities. Since every worldwide financial institution of any size invests in some U.S. securities, and since the withholding regime makes it impossible for a financial institution to trade in U.S. securities, compliance with FATCA is a foregone conclusion. U.S. domestic trusts are not subject to FATCA reporting. Of course, they must report and pay income tax on their income from all global sources. Trusts with a U.S. institutional trustee that are foreign for income tax purposes because a foreign person controls one substantial decision are generally Foreign Financial Institutions (FFIs) for FATCA purposes and therefore subject to FATCA reporting.

(Continued on Page 3)
The main intended effect of FATCA is that fewer families that include U.S. taxpayers will create noncompliant offshore trust structures or accounts. They can have foreign compliant and disclosed foreign structures, but this has become increasingly difficult and costly, given the compliance burdens and liability concerns of the foreign service providers involved. Thus, in many cases they will find that U.S. trust structures are easier to manage as long as they will be fully disclosed in any event. This applies to foreign persons who wish to make large gifts or bequests to their U.S. relatives, foreigners planning to move to the U.S. who wish to do pre-immigration planning, and U.S. residents who want to engage in gift planning or asset protection.

Internationally, there is a greater understanding that, while such an onshore structure means payment of taxes and reporting, it offers a significant level of privacy as well as legitimate tax savings, and the offshore alternative may mean higher compliance costs, or else the very real possibility of significant civil and criminal sanctions.

When FATCA was enacted in 2010, some commentators thought foreign governments would be outraged by this effort to coerce their local banks into providing information to the U.S. Certainly, there was much consternation amongst global banks and service providers at the US’ unilateral action and the costs and complexity of compliance with it. There was talk that these nations might band together to form an alternative market of non-U.S. securities that would be outside the purview of FATCA. However, quite the opposite has occurred. Other countries have accepted FATCA, asking only that the US enter into “Intergovernmental Agreements” (IGAs). IGAs, although varying in models and with particular countries, in general do two important things. One, they allow the individual banks of the country involved in most cases to report FATCA information to their own government, which then exchanges it with the US, simplifying adherence to their local banking systems and in some ways with FATCA itself. Second, IGAs agree to a principle of reciprocity with the US, under which the US agrees to similarly provide, at least in theory, information relevant to the collection of taxes by these other countries on their own residents. At last count, nearly 100 countries had entered into IGAs with the US over FATCA.

FATCA’s shift, via the IGAs, to the concept of reciprocal automatic exchange of tax information, has had a further earth-shaking impact on international wealth planning and those who advise on it, with a number of interesting consequences for the United States and jurisdictions like Delaware. While the first batch of this information was shared with certain other countries in September, 2015, it has become clear that the information collected by the US under its domestic tax rules and FATCA is not in most cases extensive or sufficient enough to provide aid to foreign tax collection. This is primarily because the US designed FATCA solely to identify substantial US owners of foreign asset holding structures in accordance with its domestic tax rules, including its rules for taxation of trusts and beneficiaries.

Almost 100 jurisdictions as of the time of this writing have now agreed to a timetable for implementation of the Common Reporting Standard.

In the meantime, spurred by FATCA, and the usefulness of the overall concept of IGAs, the UK designed its own version of FATCA to collect information, and the OECD has quickly moved to develop a new global standard for Automatic Exchange of Financial Information in Tax Matters, otherwise known as the Common Reporting Standard (CRS). The pace of developments in this regard has been extremely fast.

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Warren is a prolific writer and international speaker. He serves as the US chair of the UK-based Society of Trusts and Estate Practitioners (STEP). To see Warren Whitaker’s full biography, please visit Day Pitney’s website at www.daypitney.com.
The Directed Trustee is the Perfect Family Office Partner

This is also true at the virtual family office or multifamily office stage. By adding a directed trustee to an already highly functional family office team, a family may be able to avoid the additional operational costs of establishing a private family trust company, while maintaining the same level of expertise, privacy, and control. In a directed trust model, a directed corporate trustee is able to provide the family with administrative infrastructure and trust expertise, while allowing the investment and sometimes even the distribution discretion to be held by an individual or entity familiar with the family and its existing goals.

The Fit: Why a Directed Trustee is the Ideal Partner.

When discussing the benefits of a directed corporate trustee partner, family offices typically have four main areas of focus: (1) efficiency, (2) expertise, (3) alignment with the family goals, and (4) ensuring the continued effectiveness of the family's tax planning.

EFFICIENCY. When operating a family office, there are regular cost-benefit analyses conducted with regard to the value of partnering with a third party versus hiring full time internal staff. It is for this reason that even fully operational family offices consider it more prudent to outsource various aspects of their services, especially those which involve constantly evolving, highly technical areas such as tax and legal advice, compliance and regulatory advice, risk management and insurance, and trustee services. It is this analysis that typically leads a family office to discuss the directed corporate trustee option. In addition to the obvious benefit of providing trustee services at a more reasonable price point, a directed corporate trustee can add value and provide efficiencies to the family office in some unexpected areas. First, families are often quite concerned with ensuring that all members of the family are treated fairly and impartially, which often requires the exercise of truly independent and objective decision making. A corporate trustee can provide this independent decision making in areas like distribution decision making while remaining accountable to the family for ensuring that it exercise any discretionary decision making in a manner that is neither arbitrary nor capricious. Subject to ongoing compliance and regulatory review, a corporate trustee will have in place regular processes for objectively analyzing and acting upon distribution requests. In cases where the distribution decision making is made by another adviser, the directed trustee is able to ensure the efficient coordination of distribution approval with the adviser, the raising of funds, payment of the request and documentation of the same in trust records. The directed trustee is also able to ensure that the distribution has been considered from a tax and estate planning perspective as well.

With regard to investment discretion, a directed trustee is able to provide a family office with the maximum amount of flexibility. Companies like Commonwealth, who are truly independent trustees, are not limited by a particular bank's investment products or risk profile, instead being open to whatever investments the family directs, limited only by the trust document. Family offices can continue to work with their existing advisers, keeping in place existing relationships and benefit from the growing number of investment professionals who specialize in this type of partnership. A directed corporate trustee is also able to provide coordination and consolidation of information relevant to varied trust holdings through its accounting and tax preparation.
New Delaware Legislation is Making Noise in the World of Quiet Trusts

By: Peter J. Bietz, Trust Counsel Commonwealth Trust Company

Delaware has a long history of making numerous advantages available to trust settlors that they will not find in many other jurisdictions. One such advantage comes from Delaware’s authorization of quiet trusts. As the name implies, a quiet trust maintains secrecy of its existence from the trust’s beneficiaries. Most jurisdictions require that a trust’s beneficiaries receive notification of its existence, so the availability of a quiet trust represents a significant benefit to a settlor who, for whatever reason, does not wish for the trust’s beneficiaries to learn about the trust’s existence.

The quiet trust has existed in Delaware for a number of years thanks to 12 Del.C. §3303 which provides, in part, that a trust agreement may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries, including but not limited to, the right to be informed of the beneficiary’s interest for a period of time. By relying upon this provision, settlors frequently establish Delaware trusts that maintain the level of confidentiality that they desire.

While the availability of quiet trusts provides a useful and frequently used tool for Delaware trusts, their use in the past has not come without some potential drawbacks. The first of these drawbacks lay within the language of the statute itself, specifically the phrase “period of time.” Practitioners establishing a quiet trust have wrestled with the question of what constituted a period of time and whether or not their trust met the requirements to establish a quiet trust. Most quiet trusts were drafted utilizing one of several generally accepted time frames such as the grantor’s lifetime or a beneficiary attaining a specified age, but other than the general consensus among practitioners, there was little in the way of guidance, thus leaving practitioners questioning the length of time for which they could utilize a quiet trust.

The second potential problem was for trustees of quiet trusts. Under normal circumstances if there is a trust matter that a trustee wishes to resolve they can do so via an agreement among the trust’s interested parties or by petitioning the Court of Chancery, both of which require the beneficiaries’ participation. This begged the question - how could a trustee of a quiet trust effectively settle matters concerning the trust?

Fortunately, the Delaware legislature appears to have heard the pleas for clarification and has enacted recent legislation that addresses both the question of what constitutes a period of time and how a trustee could settle matters concerning the trust. §3303 has been amended to include a framework of what may constitute a period of time, and the newly created §3339 has established the “designated representative” role for silent trusts.

(Continued on Page 8)
International Developments Affecting Delaware Trusts

After five European nations announced their intention to develop a pilot for multilateral tax information exchange based on the first “Model 1” IGA Agreement, in May 2013 the European Council endorsed efforts by the G8, G20 and OECD to develop a global standard approach. By February 2014, the G20 Finance Ministers and Central Bank Governors had endorsed the Common Reporting Standard, and by May 2014 over 60 jurisdictions had committed to swiftly implement it.

For US Trustees and advisors these international dynamics are providing both an attractive opportunity and also something to be wary of, as many non-US wealthy persons concerned about their privacy and cost-effective and consistent reporting obligations are seeking advice on moving their accounts or planning structures, including trusts, to the US. So long as the US sticks to its approach to continue to implement FATCA and not participate in CRS, this will be a very live subject. Unlike FATCA, which bases its reporting obligations on income information relevant to “substantial US owners”, the IGAs concluded with the US replaced that term with “Controlling Persons”. That term is now central to the reporting obligations under CRS but has been widened in its meaning to capture virtually everyone associated with a trust, regardless of whether they would properly owe tax or report under a participating nations tax laws. In the case of trusts, the CRS commentary defines it to include “the settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries... regardless of whether or not any of them exercise control over the trust.” As a result in part of this internally inconsistent definition, CRS dramatically expands the relationships associated with trusts that will be reported, as well as the types of financial information that will be reported, as compared to FATCA. That combined with the fact this information will be reported to nations where there is less faith in the rule of law and privacy of information filed with governments, is driving significant concern with the impact of CRS on fundamental rights of privacy and personal security, especially in emerging market countries.

U.S. trusts, whether they are domestic or foreign for U.S. income tax purposes are not subject to CRS. However, if they have foreign investments, those investments may be required to satisfy the requirements of CRS in the places where the investment accounts are held, or where foreign holding companies or so-called Controlling Persons are located.

The rules for CRS are exceedingly complex, as is FATCA, and there are still many questions about how it will be interpreted and implemented.

Almost 100 jurisdictions as of the time of this writing have now agreed to a timetable for implementation of the Standard, and the number is still growing. Those that are in the ‘early adopter’ group, will be exchanging financial information from 2016 with other early adopters in 2017. Those in the late-adopter group, will begin exchanging 2017 financial information with other participating countries in 2018.

The rules for CRS are exceedingly complex, as is FATCA, and there are still many questions about how it will be interpreted and implemented. However, one thing that is important for US trustees and advisors to be aware of is that the apparent similarities and professed modeling of CRS on IGA FATCA mask some very important differences.

The Directed Trustee is the Perfect Family Office Partner

EXPERTISE. As professional trustees are held to the highest standard of care at either equity or law when executing their fiduciary duties, family offices can expect expert trust administration from a directed corporate trustee. This includes careful consideration and enforcement of the terms of the trust, impartial treatment of beneficiaries, professional record keeping and tax preparation, and oversight of the trust’s administration. A professional directed trustee is accustomed to working with a variety of families and their advisers, all with different goals and unique dynamics. In addition to professional trust administrators, professional trust companies typically also have attorneys, accountants, compliance officers, and other subject matter experts on staff, available to the family office in the administration of the trusts. These in-house experts are able to offer family offices a wealth of expertise, especially as it relates to providing alternatives and “outside of the box” thinking when unique situations occur, something that only comes with time and experience administering trusts.
The Directed Trustee is the Perfect Family Office Partner

Often, this sharing of experience can help the family office to avoid problems without having to experience them. In addition, many corporate trustees offer families educational opportunities through webinars and articles on specific administrative topics to help provide families with a better understanding of what a trust is and how it can work for the family.

**FAMILY ALIGNMENT:**

It is in the context of concerns regarding the loss of control associated with utilizing a professional trustee that a directed trustee structure can be most beneficial.

In this structure, a family can appoint both investment advisers and distribution advisers with authority to actually direct the trustee with regard to fiduciary activities within the terms of the trust document. These advisers can be comprised of members of the family, the family office, or other professional advisers, allowing someone close and more intimately familiar with the family’s overall financial and estate plan to take an active role in the trust’s administration while leaving the day-to-day administration in the trustee’s hands. When properly structured, this allows a unique family office partnership with a professional trustee, often in a favorable tax jurisdiction not otherwise available to the family.

The professional trustee is able to focus on its role as trustee while allowing the family office to ensure compliance with its goals and the flexibility to adjust the same over time.

The alignment of family goals between the family office and the trustee can be magnified when a family begins working with the directed trustee at an early stage in its family office development.

**Utilizing an established directed trust company partner is a great way to ensure that the family remains in control of decisions involving the trust’s investments, has a voice in the distribution decision making, and is still able to ensure the proper administration of the trust in the desired jurisdiction over time.**

**ENSURING THE CONTINUED EFFECTIVENESS OF THE FAMILY’S TAX PLANNING.**

In looking for a directed trustee partner, it is important to find a company with a long track record of expertise in the industry and in the particular, jurisdiction that the family desires to utilize. Family offices are looking for the most efficient and effective partner. This means a partner whose focus is on providing the family with professional directed trustee services, not cross-selling.

Family offices are typically looking for a directed trustee partner that is (1) located in and can provide access to a particular jurisdiction’s statutory regime and court system; (2) can provide independent and professional trust administration; (3) staffed with professionals able to provide a full depth of knowledge and experience in trust administration gleaned from working with a variety of families and planners over time; (4) an independent, unconflicted, third party decision maker, and (5) able to provide resources and education for family members. Of these qualifications, one that is often over looked, but, critically important, is securing the family’s access to a particular jurisdiction. This means ensuring that the trust is adequately administered in the desired state, and that the directed trustee is performing key activities within that state. While there is a long list of trustee responsibilities which should be performed within the forum state, a few of the key duties are the maintenance of trust records and accounting, the initiation and coordination of trust activities, performance of annual reviews of the trust, and ongoing trust communication. Ensuring the trust’s secured situs will avoid challenges by other states or jurisdictions to favorable tax treatment and the application of other favorable planning laws.

**The Practice: What Does Partnering with a Directed Trustee Look Like?**

The next logical question for family offices is typically, “what does this look like in practice?” It looks much like any other professional partnering relationship that a family office might have with other advisers. The family engages the trust company to serve as trustee pursuant to the terms of a trust document drawn up by their attorney. The trust company performs the administrative functions such as maintaining the trust’s accounting, preparing tax returns, and coordinating trust activities. In many cases, the trustee is involved in making discretionary distribution decisions; however, as previously mentioned it is possible to retain this power within the family or its existing team of advisers. As mentioned above, by adding the professional trustee to the family’s team, the family is able to access the laws of a unique jurisdiction and its court system. In states like Delaware, this can be a significant advantage.
New Delaware Legislation is Making Noise in the World of Quiet Trusts

New subsection (c) of §3303 now provides that the terms of a governing instrument may expand, restrict, eliminate or otherwise vary the right of a beneficiary to be informed of their interest in a trust for a period of time, “including but not limited to: (1) A period of time related to the age of a beneficiary. (2) A period of time related to the lifetime of each trustor and/or spouse of a trustor. (3) A period of time related to a term of years or specific date; and/or (4) a period of time related to a specific event that is certain to occur.” This new language provides certainty to practitioners that their quiet trust will be effective so long as they utilize one of the specified periods. It also still retains a great deal of flexibility (albeit without as much certainty) as the list is inclusive, not exclusive. This means that practitioners can continue to utilize any other period of time that they wish, just with less certainty as to its effectiveness.

The newly created §3339 establishes the new position of designated representative of a trust. Under the statute a person must meet two requirements in order to qualify as a designated representative. First they must receive authorization to act in that capacity by being (i) expressly appointed under a governing instrument as a designated representative or reference to §3339; (ii) authorized or directed under the terms of a governing instrument to represent or bind one or more beneficiaries in connection with a judicial or non-judicial matter; (iii) a person appointed by one or more persons who are expressly authorized by a governing instrument to appoint a designated representative; (iv) a person appointed by a beneficiary to act as their designated representative; or (v) a person appointed by the trustor to act as designated representative for one or more beneficiaries. Second, they must deliver to the trustee their written acceptance of the office of designated representative. To date, most drafters of quiet trusts have already utilized one or more methods of designating a designated representative (albeit without that title) so obtaining a written acceptance is the only additional step that the statute requires.

While the new legislation has provided a specific framework that can be followed in order to ensure that one may create a quiet trust that can be effectively administered, one of the hallmarks of Delaware’s trust law has been flexibility, and this new legislation is no different. The legislation added a new provision to §3303 that specifically states that a designated representative will represent and bind beneficiaries who do not know about the trust “unless otherwise provided in the governing instrument.” This means that the use of a designated representative is a default provision, but drafters may rely upon other methods to bind beneficiaries that they may have used in the past and with which they may have a greater level of comfort.

Delaware is, and has for years, been a state that provides trust practitioners with an expansive set of tools to utilize. This new legislation has added another such tool in the form of a designated representative while at the same time retaining the flexibility for which Delaware is known. Practitioners should take a careful look at these new statutes, as well as the existing ones, and see for themselves the advantages that Delaware has to offer.
In practice, a directed trust’s administration looks much like the diagram below.

**The Application: Why it Works.**

Utilizing an established directed trust company partner is a great way to ensure that the family remains in control of decisions involving the trust’s investments, has a voice in the distribution decision making, and is still able to ensure the proper administration of the trust in the desired jurisdiction over time. From a financial perspective, a directed trustee partner can be the perfect complement to a family office by providing a significant depth of expertise and professional experience in trust administration without the high operational costs of opening a private family trust company. If the directed trustee is brought in as a partner early on in the family office development process, this benefit can be magnified. Concentrating on service and not cross selling or promoting proprietary products, a directed trustee partner will remain focused on the administration of the trust and able to provide objective and independent decision making where needed. They are able to partner with the family office and provide resources and perspective gained from working with other families to achieve unique goals and educate families. A directed trustee can be the perfect, flexible partner for the growing family office.
## Comparison of Top Trust Jurisdictions

<table>
<thead>
<tr>
<th>ATTRIBUTE</th>
<th>ALASKA</th>
<th>DELAWARE</th>
<th>NEVADA</th>
<th>SOUTH DAKOTA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial and Legislative</strong></td>
<td><strong>Environment</strong></td>
<td>Recognized as the leader; Delaware has (i) the longest history of innovative trust laws; (ii) the most court precedent in the area of trusts; and (iii) a highly respected court of equity; the Chancery Court</td>
<td>Good</td>
<td>Good</td>
</tr>
<tr>
<td><strong>Long Term or Perpetual</strong></td>
<td><strong>Trusts</strong></td>
<td>Perpetual (real estate is 110 year but, by placing the same in an LLC or other entity, the term can instead be perpetual)</td>
<td>365 years</td>
<td>Perpetual</td>
</tr>
<tr>
<td><strong>Directed Trusts</strong></td>
<td>Effective statute</td>
<td>Effective statute, supported by case law – Duemler v. Wilmington Trust Co.)</td>
<td>Effective statute</td>
<td>Effective statute</td>
</tr>
<tr>
<td><strong>Self-Settled Asset</strong></td>
<td><strong>Protection Trusts</strong></td>
<td>Four-year look back period Exception for child support payments due from the settlor pursuant to a court judgment or order, but only if such a payment is 30 or more days late at the time of the transfer to the trust</td>
<td>Two-year look back period</td>
<td>Two-year look back period</td>
</tr>
<tr>
<td><strong>Third Party Asset</strong></td>
<td><strong>Protection Trusts</strong></td>
<td>Statute specifies that a discretionary interest is not a “property interest” owned by the beneficiary and thus not property that a creditor of the beneficiary can attach</td>
<td>Statute provides extensive protection from creditors of beneficiaries</td>
<td>Statute specifies that a beneficiary who has a discretionary interest does not have an enforceable right to a distribution from the trust, and thus a creditor of the beneficiary cannot force a distribution from the trust</td>
</tr>
<tr>
<td><strong>Decanting</strong></td>
<td>Flexible statute</td>
<td>The Trustee is not required to give notice</td>
<td>The Trustee is not required to give notice</td>
<td>Flexible statute</td>
</tr>
<tr>
<td><strong>Merger</strong></td>
<td>No statute</td>
<td>Merger statute is extremely broad; court approval is not required • Allows partial and full mergers • A trust may be merged into another trust that was created specifically for that purpose • Merger is available even if the surviving trust is not funded prior to the merger • Merger is not allowed if it would result in a material change in the beneficial interests of the beneficiaries</td>
<td>No statute</td>
<td>Mergers statute is broad; court approval is not required • Does not specify that a partial merger is allowed • Merger is not allowed if it would impair the rights of any beneficiary or substantially affect the accomplishment of a purpose of the trust</td>
</tr>
<tr>
<td><strong>Non-Judicial Settlement</strong></td>
<td>Agreement (NJSA)</td>
<td>NJSA statute</td>
<td>NJSA statute</td>
<td>NJSA statute</td>
</tr>
<tr>
<td><strong>Beneficiary Tax on Trusts</strong></td>
<td>No state income tax</td>
<td>No state income tax, provided that no beneficiary of the trust is a Delaware resident</td>
<td>No state income tax</td>
<td>No state income tax</td>
</tr>
<tr>
<td><strong>Beneficiary Notification</strong></td>
<td>“Silent Trusts”</td>
<td>The trustee is required to give a notice to certain beneficiaries within 30 days However, the settlor may provide otherwise in the trust document or a later writing Even if the settlor provides otherwise, a notice must be given to certain beneficiaries at the settlor’s death (or when the settlor is judicially determined to be incapacitated)</td>
<td>The trustee is required to give a notice to certain beneficiaries (no particular timeframe specified) However, the settlor may provide otherwise in the trust document The trust document may delay the notice requirement “for a period of time”</td>
<td>The trustee is required to provide an accounting at least once per year to current beneficiaries, and upon request, to remainder beneficiaries However, the settlor may provide otherwise in the trust document</td>
</tr>
<tr>
<td><strong>Privacy – Court Actions</strong></td>
<td>Under Seal</td>
<td>Limited privacy</td>
<td>Allowed in civil actions</td>
<td>Court has the option to keep an action under seal</td>
</tr>
<tr>
<td><strong>Statutory Insurable Interest in the Trustee of an ILIT</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Non-charitable Purpose Trusts</strong></td>
<td>Permitted; broader authority</td>
<td>Permitted; but only for certain specifically declared purposes</td>
<td>Permitted, but only for certain specifically declared purposes</td>
<td>Permitted, but the statute provides that (i) the trust may last no more than 21 years and (ii) a court may reduce the amount transferred to the trust under certain circumstances</td>
</tr>
</tbody>
</table>
Delaware Case Law Update

*Mennen v. Wilmington Trust Company*, C.A. No. 8432-ML (April 24, 2015). Final Reports of Master LeGrow, recommending that the Chancery Court (1) enter a judgment in favor of beneficiaries of a trust against the individual trustee of the trust due to investment decisions that such trustee (“Jeff”) made in bad faith and with willful misconduct over a two-decade period and (2) with respect to a claim by those beneficiaries to satisfy that judgment against Jeff from a different trust (of which Jeff was a beneficiary), grant a motion for summary judgment filed by the trustees of that trust. Master LeGrow recommended the grant of summary judgment because she found no applicable exception that would override the spendthrift clause in the trust of which Jeff was a beneficiary, thus protecting that trust’s assets against Jeff’s creditors.

*IMO Ravet Family Trust*, C.A. No. 7743-VCG (June 4, 2014). The Petitioner contested the validity of a trust created by his mother, alleging that his sister exerted undue influence over their mother. The Chancery Court, applying Delaware’s pre-mortem trust validation statute, 12 Del. C. § 3546, dismissed the claim as untimely filed. The trustee of the trust chose to utilize Delaware’s pre-mortem trust validation statute to start a 120-day claims period. The court found that because the trustee followed the requirements of the statute and the Petitioner received the required notice more than 120 days before filing his petition, he could not contest the validity of the trust. On February 12, 2015, the Delaware Supreme Court affirmed the Chancery Court’s decision.

*TrustCo Bank v. Mathews*, C.A. No. 8374-VCP (January 22, 2015). Plaintiffs claimed that certain transfers to three Delaware asset protection trusts were fraudulent transfers. The Chancery Court did not decide the merits of those claims, instead dismissing them because they were not brought within the applicable statute of limitations. In reaching its decision, the court engaged in a choice of law analysis. Under that analysis, the court found that the applicable statute of limitations was Florida’s because it had the most significant relationship to the Plaintiff’s claims. The court declined to resolve the question of whether Delaware’s Qualified Dispositions in Trust Act – which provides that a creditor’s fraudulent transfer claim will be extinguished unless it is brought within the time constraints of Delaware’s statute of limitations for fraudulent transfers – controlled because the court was able to dispose of the claims under a conventional choice of law analysis.

*In re Trust under Will of Wallace B. Flint*, C.A. No. 10593-VCL (June 17, 2015). The current income beneficiary filed a petition requesting the Chancery Court to modify the trust to make it a directed trust as to investments. In denying the petition, the Chancery Court cited the principles of settlor’s intent, freedom of disposition, and the enforceability of governing instruments. The court found that the plain language of the trust clearly indicated an expectation that the trustees would decide how to invest the trust rather than take directions regarding investments.

*IMO Thomas Lawrence Reeves Irrevocable Trust*, C.A. No. 8071-ML (April 29, 2015). Beginning in 2004, beneficiaries of a trust (who were also the individual trustees of the trust) frequently complained to the corporate trustee about (1) the corporate trustee making investments in the trust without the consent of the individual trustees; (2) the lack of an investment strategy for the trust; and (3) excessive fees charged by the corporate trustee. However, the beneficiaries did not raise those issues in a judicial proceeding until 2013. The Master who heard the case determined that the claims of the beneficiaries over those matters were time barred because they (1) had actual and constructive knowledge of the alleged wrongdoing many years before bringing their claims and (2) had no plausible explanation for waiting so long before seeking a remedy in court.

1. The amount of the recommended judgment was nearly $100 million (plus pre-judgment interest at 7.75% compounded quarterly, accruing from the date of each wrongful investment until the date of judgment)

2. The court stated that Florida and Delaware have essentially identical statutes of limitations for claims of fraudulent transfers -- the later of four years after the transfer was made or one year after the transfer was or reasonably could have been discovered by the claimant.
## Delaware: The Trust Friendly State

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<tbody>
<tr>
<td>Early 20th century</td>
<td>Residents only</td>
<td>Yes (since 1986)</td>
<td>Yes (since 2008)</td>
<td>Yes (since 1997)</td>
<td>Yes (since 1995)*</td>
<td>Yes (since 2003)**</td>
<td>Yes (since 2003)</td>
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<tr>
<td>Yes (since 2007)</td>
<td>Modified Prudent Investor Rule (1986)</td>
<td>Directions in governing instrument or from IA not to diversified respected</td>
<td>Yes (since 1998)</td>
<td>Trust income and principal not subject to voluntary or involuntary transfer1</td>
<td>No (since 2007)</td>
<td>Yes (since 2003)</td>
<td>1</td>
</tr>
</tbody>
</table>

*possible without statute since 1933

**restricted by trust instrument only

1 except that, by case law, income may be reached for separate maintenance of a spouse.

2 based upon data from the U.S. Chamber of Commerce survey (June 19, 2012).

SEE Cindy Brown’s Article, “Achieving Situs” in the December 2015 issue of WealthManagement.com’s *Trusts & Estates*. 