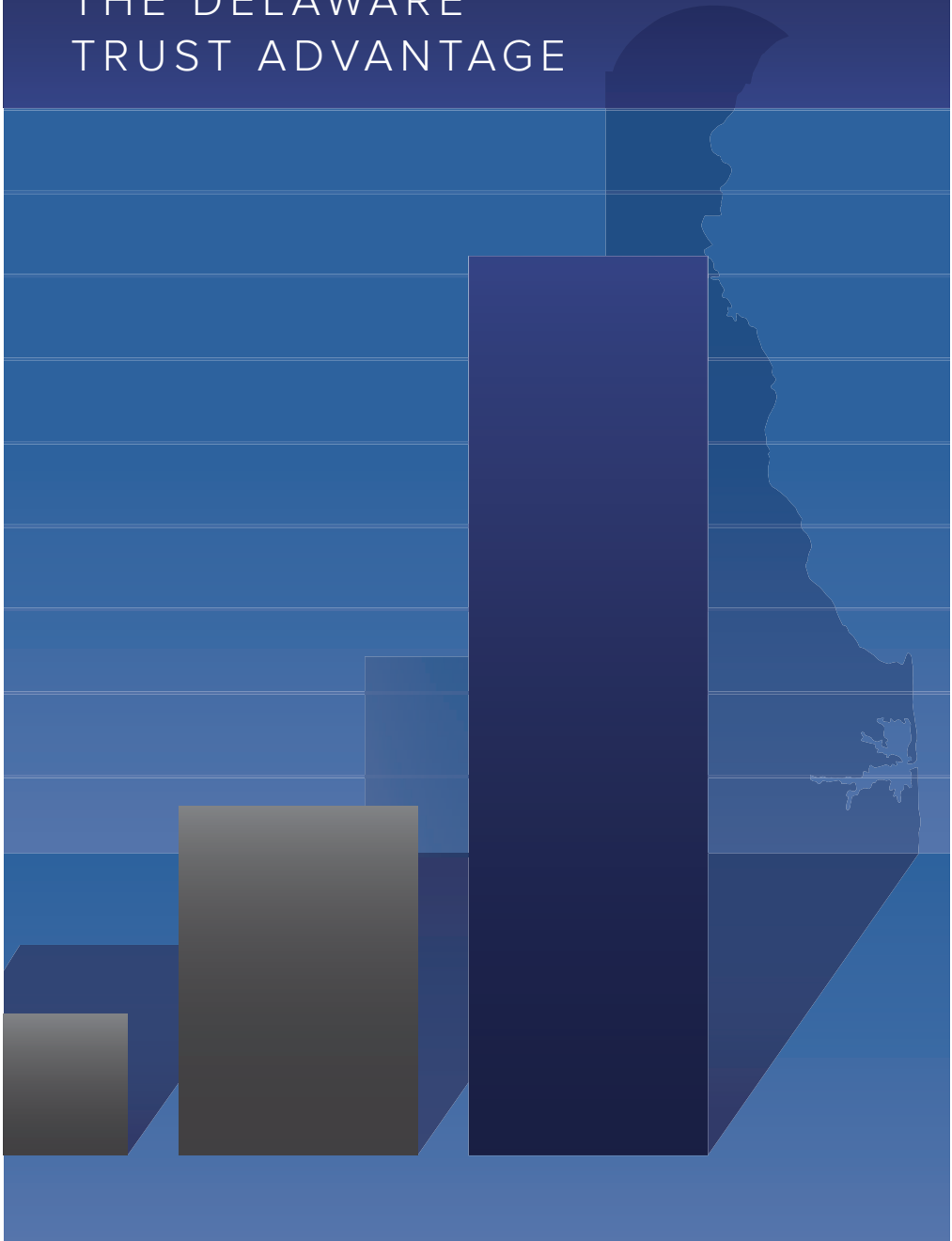


THE DELAWARE TRUST ADVANTAGE



The Delaware Trust Advantage

By Todd A. Flubacher

In the last three decades, Delaware has experienced exponential growth in its trust industry as settlors and their advisers have come to view it as the preeminent jurisdiction for trusts.

In 1996, the State began chartering limited purpose trust companies under new laws that reduced the capital and employee requirements previously applicable to banks and trust companies. This immediately resulted in an influx of Delaware trust company affiliates of major financial institutions seeking to offer their clients the Delaware advantage. In 1997, Delaware enacted the country's second asset protection trust statute (immediately following Alaska). By the end of the late 90's, the stage was set for an expansion of the trust industry. Today, Delaware is widely recognized as the preeminent jurisdiction for trusts in the world.

Certainly, Delaware is a leader with its innovative laws. However, the last several years have produced a wave of jurisdictions (and even Uniform Laws) that are also evolving to replicate what Delaware has done. But the reason why clients and their advisers choose Delaware has as much to do with Delaware's trust infrastructure as it does with the laws on the books. Beyond the innovative solutions found in the black-letter law, the well-developed infrastructure of Delaware's trust industry provides consistency, reliability, flexibility and depth that is not found anywhere else.

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The trust industry has become a vitally important part of Delaware's economy, sustaining hundreds of professionals in the trust management field, including trust officers, fiduciary risk specialists, in-house counsel, tax advisers, accountants, attorneys and other skill positions. It is a mature industry focused on adding those "extra touches" to steady its foundation. Here are just two examples.

First, the Delaware Trust Conference. In collaboration with the industry, the Delaware Bankers Association hosts the annual Delaware Trust Conference at the Chase Riverfront Center, attracting well-known national speakers and boasting more than 500 attendees. There is literally no other Delaware-based conference of its kind that educates and promotes a local industry and attracts out-of-town visitors to our State, including attendees, sponsors and exhibitors, and no other trust jurisdiction has anything like it.

Second, the University of Delaware has an accredited Trust Management Minor program in the Lerner College of Business. This program was made possible by the efforts and resources of a partnership between the University of Delaware, the Delaware Bankers Association, financial institutions, law firms, accounting firms and the State of Delaware.

It provides mentoring and internships within the Delaware trust industry and importantly, will ensure an ongoing supply of well-trained personnel to support the growing industry and ensure that the people providing Delaware trust administration services will be skilled and experienced. More recently, the University of Delaware launched a Trust Certification Program for working professionals who want to sharpen their expertise in the area of trust administration and perhaps change careers to join the trust industry.

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THE COURTS

Of course, Delaware has been the preeminent jurisdiction in the world for businesses to incorporate since the early 1900's. More than one-half of the Fortune 500 companies are incorporated in Delaware and toward the latter half of last century, Delaware also became a favored jurisdiction for alternative entities. Many of the same reasons why businesses have turned to Delaware as their jurisdiction of choice are the same factors that make Delaware so appealing to settlors of trusts.

The Delaware Court of Chancery, the court recognized worldwide for its reputation in corporate and commercial matters, is the same court with primary jurisdiction over Delaware trusts. Matters are presented to sophisticated judges on the Court of Chancery who are appointed (not elected like in many other trust jurisdictions) by the Governor of

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Delaware, at the recommendation of a nominating committee, for 12-year terms. The Chancellor and Vice Chancellors hold the reputation of the Court in the highest regard and are accustomed to routinely deciding cases of national importance. Delaware trust cases are never tried before a jury and cases are appealed directly to the Delaware Supreme Court, also a preeminent court recognized around the world for its thoughtful and

sophisticated decisions. Because of Delaware's sizable and experienced bar, litigants in Delaware are generally represented by lawyers who are knowledgeable about trust law issues. Delaware also has a large and long-standing body of trust-related case law. Many of the decisions cited in the major treatises are Delaware cases. Delaware's well-developed jurisprudence addresses many issues with clarity and assures trustees and trust beneficiaries that they can predict, with a fair degree of certainty, how the Delaware courts likely will rule upon trust law matters.

THE LAW

Answering the needs of trust settlors and beneficiaries, Delaware's trust statutes have gradually developed into a very detailed and clear framework for the body of law that governs trusts. The answers to most questions can be found in Title 12 of the Delaware Code, and if there is an area of uncertainty or concern, it is often addressed with legislative updates. The Estates and Trusts Section of the Delaware State Bar Association maintains a standing legislative drafting committee that produces new legislation annually. The new laws often respond to issues that require clarification, or the needs of settlors and beneficiaries. Delaware's legislature is quick to react to new developments and respond to concerns and has attempted to create flexible trust laws that are best able to effectuate the wishes of trust settlors and meet the needs of trust beneficiaries.

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Delaware has been on the leading edge of evolving the field of trust law to satisfy the needs of settlors and beneficiaries alike. Many of the Delaware statutes enacted over the past two decades have been followed by other jurisdictions throughout the country and the notable developments are too numerous to count. For example, Delaware's directed trust statute is the most successfully implemented directed trust regime in the country and has been copied by many jurisdictions. It is functionally the model for the Uniform Directed Trust Act that is being finalized by the Uniform Laws Commission. Delaware enacted the country's second asset protection trust legislation in 1997, and enacted the first total return unitrust statute in 2000. In 2024, Delaware enacted the first-of-its-kind Beneficiary Well-Being Trust statute.

There are numerous other examples, like Delaware's statutes addressing decanting, merger, non-judicial settlement agreements, pet trusts, purpose trusts, designated representatives, virtual representation, pre-mortem validation, silent trusts, etc.

THE TRUST COMPANIES

Today, Delaware boasts over 60 trust companies, most of which are affiliates of the largest, most recognizable financial institutions in the world. This critical mass of corporate fiduciaries provides plenty of alternatives for clients and ensures that the trust infrastructure remains robust.

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WHY CHOOSE DELAWARE?

There are many scorecards in the form of charts, comparisons and rankings that compare Delaware's laws to other jurisdictions. The following factors are vitally important to consider when choosing among trust jurisdictions.

Factors to Consider When Choosing Trust Situs

- **Responsiveness and efficiency of the jurisdiction's legislature and the quality of updates.**
- **Stability of the trust industry and the reliability of the State's long-term commitment to the industry.**
- **Quality of the court system.**
- **Quality of the judges; how are they appointed/elected and length of term.**
- **Depth, breadth and quality of case law.**
- **History and experience of the trust industry and its professional support infrastructure.**
- **Different drafting styles.**
- **Quality and depth of legal counsel.**
- **Variety of options among trust companies and number and diversity of high-quality options now and in the future.**
- **Availability and stability of experienced, high-quality, well-trained trust officers and other trust professionals.**
- **Different trust administration practices.**
- **Taxation of trusts.**

Advantages of Delaware Trust Law

Types of Trusts

- Directed Trusts
- Dynasty Trusts
- Asset Protection Trusts
- “DING” Trusts
- Purpose Trusts
- Beneficiary Well-Being Trusts

Flexibility

- Decanting Statute
- Consent Modification Statute
- Nonjudicial Settlement Agreements
- Merger Statute
- Excluded Co-Trustee
- Authority to Allocate Trustee Duties Among Multiple Trustees
- Virtual Representation
- Unitrust Statute
- Power to Adjust
- Release of Beneficial Interests by Beneficiaries

Tax Advantages

- Avoiding or Minimizing Income Taxes Imposed by Other States
- Delaware Tax Trap
- Private Placement Life Insurance
- Income Tax Reimbursement or Payment

Protecting Settlor Intent

- Enforceability Statute
- Pre-Mortem Validation of Wills, Trusts and Exercises of Certain Powers of Appointment
- Enforceability of No-Contest Clauses
- Enforcement of Charitable Trusts
- Letters of Wishes

Creditor Protection

- Spendthrift Statute
- Statutory Tenancy by the Entireties Property in Trust

Beneficiary Notice

- Silent Trusts
- Designated Representatives

About the Author

Todd is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and he serves on the Fiduciary Litigation Committee and is the past Chair and member of the Fiduciary Administration Committee. Todd is also a member of the Board of the ACTEC Foundation. He is an Accredited Estate Planner® (AEP®) Distinguished and was inducted into the National Association of Estate Planners & Councils' (NAEPC) Estate Planning Hall of Fame in 2023.



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In his Trusts & Estates practice, Todd represents Delaware trust companies, individuals, and law firms throughout the United States on all aspects of the creation, migration, modification, and administration of Delaware trusts.

His practice primarily emphasizes the unique advantages of Delaware trust law, including directed trusts, dynasty trusts, asset protection trusts, trust modifications, and tax planning. He serves as Delaware trust counsel to many of Delaware's corporate trustees, advising on trust administration and fiduciary risk.

About Morris Nichols' Trusts & Estates/ Private Client Group

Morris Nichols is nationally known for the strength of its [Trusts & Estates/Private Client](#) practice. We advise a broad range of clients in connection with trusts, estate planning and administration, and fiduciary litigation. We also have a market leading practice advising banks and trust companies in the highly specialized area of Delaware trust law. Chambers High Net Worth (HNW) has ranked our practice in Band 1 among Delaware private wealth law firms, with sources touting the group's reputation as "one of the leading firms in Delaware," and the "first point of reference" on Delaware trust law.