Delaware Banker
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Are We Wrongfully Re-Thinking the Need for Estate Planning?
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The Delaware Bankers Association
P.O. Box 781
Dover, DE 19903-0781
Phone: (302) 678-8600 Fax: (302) 678-5511
www.debankers.com

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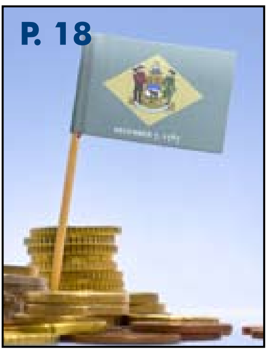

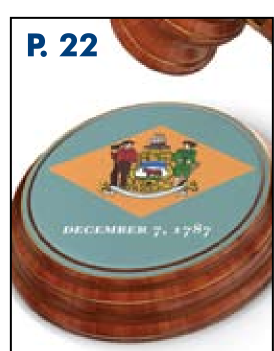

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View from the Chair

by
Rodger Levenson
Executive Vice President & CFO
WSFS Bank

Chairman
Delaware Bankers Association

"Our financial institutions provide the stability that allows for liquidity, risk management, and makes both small and large transactions possible."

Seen any good blockbusters at the movies this summer? How about the superhero film where the villain is threatening life on Earth, until the hero flies in, battling laser beams and giant robots to save the day. You know the hero, the one with the big "B" for "Banker" on his chest. No, huh? Or how about those high-tech spy flicks where the suave hero saunters into the casino bar in his tuxedo, and announces: "Banker, James Banker."

Both those scenarios are ridiculous, and frankly I don't think we'd want our industry trivialized in such a way. Superheroes and sophisticated spies are the stuff of popcorn fantasies. Thankfully in the real world, and of course that includes Delaware, the men and women of the financial services industry are everyday heroes who provide vital services without spandex costumes and fluttering capes.

A sound banking system is the bedrock of our economy. Our financial institutions provide the stability that allows for liquidity, risk management, and makes both small and large transactions possible. This liquidity is the oil for the American economic machine. Without it the machine seizes up and the economy grinds to a halt.

In addition to keeping the current economy moving along, banks facilitate growth. Each of our institutions is part of a larger system that encourages savings. We then efficiently channel those savings into investments. In turn, those investments promote entrepreneurship. These transactions occur on throughout the economy: from the small business person trying to get off the ground with an idea for a new product or service; all the way up to the large company seeking capital to expand their business into untapped fields. Businesses of every size rely on the services of their local bank.

Banks also play an important role in the area of risk management. In the past this mainly meant such things as preventing theft, guarding against forgery, and other common types of fraud. Today, the role of banks has expanded to provide safeguards against electronic fraud, cyber crime, identity theft, and elder financial abuse. By necessity, banks are at the forefront protecting against these threats.

Probably the most visible service our institutions provide is convenience. This can come in the form of our branch networks, the proliferation of our ATMs, our extended hours, the extension of consumer credit, expansion into mobile banking and other new channels of technology which were once seen ground-breaking, but are now common place and indeed essential parts of our economy.

Finally, strong banks provide vital support to the community. I know that every member institution of the DBA does good work in the community, not only through the Community Reinvestment Act, but through dozens of programs, foundations, and grant efforts. These are part of good corporate citizenship. But the greatest service Delware's banks proivde to the community is excuting our basic business functions. We are businesses, one and all, and we best serve the community by conducting the business of banking.

Adam Smith, author of *The Wealth of Nations* correctly pointed out: "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest." To paraphrase this for our industry: It is not from the our foundations, our grants, our volunteerism, as noble as those might be, that our economy grows, but for the providing of stable banking services. And while that might not make for a very exciting summer blockbuster, it does make for a vital industry in which we may all be proud to contribute our skills.

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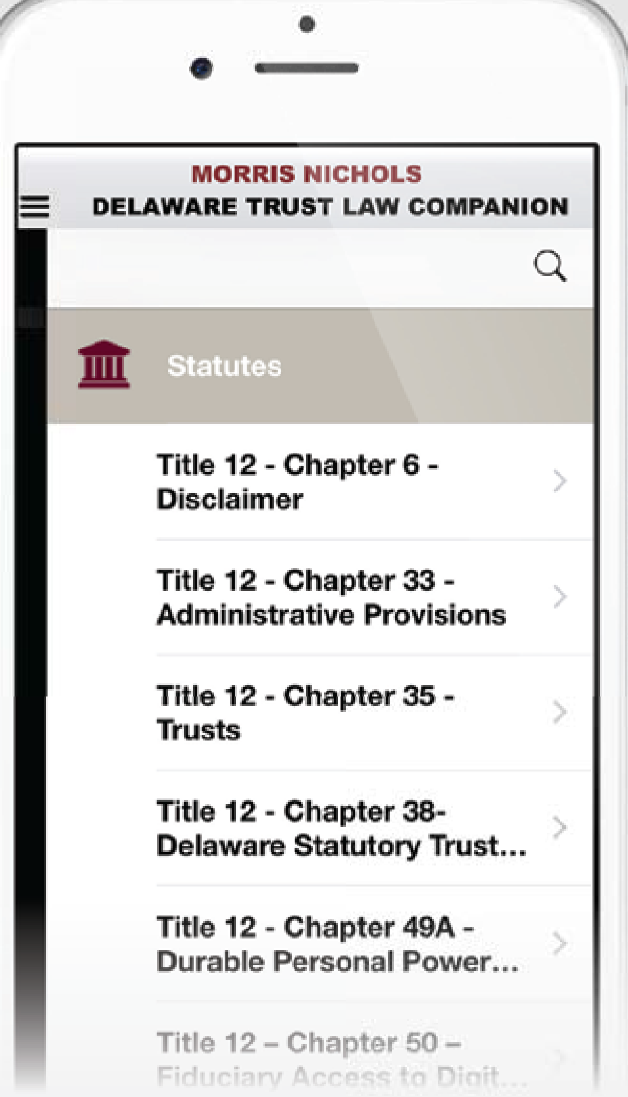

1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899-1347

President's Report

by
Sarah A. Long
President, CEO & Treasurer
Delaware Bankers Association

"The DBA is uniquely positioned to provide the right strategic leadership to the keep the financial services industry relevant in Delaware and at the forefront nationally."

Early one morning several years ago I was in my kitchen, coffee cup in one hand, PowerPoint deck in the other, speaking to the rapt audience of the refrigerator, the sink, and the stove. I was practicing the state of the business update that I would present to over 500 banking leaders later that day. I wanted to infuse each sentence with deep meaning and contageous enthusiasm. Then, just as I was reaching the dramatic crescendo of my speech, my then ten-year-old son walked in.

"Mom," he asked, as he saw I was addressing an empty room, "what are you doing?" I seized the opportunity, as any diligent parent would, and launched into a teachable moment. I explained the reason for my seemingly odd behavior. I was careful to use all the appropriate adages, including: "practice makes perfect," "you never get a second chance to make a good first impression," "fail to prepare, prepare to fail," and the like. I summed it all up with the justification: "and with 500 people looking at me and listening to my every word, the last thing I want is a bad case of the nerves". He looked at me square in the eyes and said, "Mom. You shouldn't be nervous. Only about half of them will be listening." Ahhh… Now that was a teachable moment!

I often think about what my son taught me that day and how hard it is to be an active listener when you have so much you want to say. I find myself squarely in that place now as I embark on this wonderful new role with the Delaware Bankers Association. I want to tell everyone I meet that it is such an honor to represent the collective voices of the 35,000 people who are employed in the financial services industry in Delaware. As a Delaware native, I want others to know what I have experienced firsthand, that Delaware's business friendly environment, along with progressive bank laws and our Chancery Court system provides a foundation that sets our State apart from all others. I want everyone to know that the DBA is uniquely positioned to provide the right strategic leadership to the keep the financial services industry relevant in Delaware and at the forefront nationally. And that the DBA plays a vital role in advocating for our members with state and federal legislators as well as regulatory agencies to ensure that Delaware is a place where banking, our communities and our employees thrive.

Balancing the need to tell all, is the desire to hear more. Over the past few months, I have had the pleasure to meet many of you. I've asked you to share your thoughts about the DBA. What you think about your association. What you believe about the association. What you expect from the association. And you have been gracious with sharing your perspectives and generous with sharing your ideas. With open arms you have welcomed me into the DBA family by sharing your stories and your unique journeys. My personal request of each of you is to keep sharing. As we continue on our journey to build a great association, I want to hear from you. Your thoughts, your suggestions, your aspirations. Equally important is what you think might be getting in our way. What ideas do you have to promote the financial well-being of our members, our communities and the people of Delaware? I invite you to call me at 302-678-8600 or email me at sarah.long@debankers.com and share whatever is on your mind. I'll be listening.

Standing: Arthur "Chip" Connolly, Karen Bifferato, Ryan Newell. Seated: Hank Gallagher, Jeff Wisler. Litigators not pictured: Chris Adamopoulos, Mary Akhimien, Matt Boyer, Kelly Conlan, Chris Griffiths, Mike Grandy, Tim Holly, Max Walton, Joe Wolcott.

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1000 West Street; Suite 1400
T 302-757-7300
F 302-757-7299

NEWARK OFFICE
267 East Main Street
T 302-757-7300
F 302-757-7299

Our Attorneys

Christos T. Adamopoulos
Mary I. Akhimien
Karen C. Bifferato
Matthew F. Boyer
John A. Clark III
Kelly M. Conlan
Arthur G. Connolly III
Charles J. Durante
Rachel A. Dwares
Edward F. Eaton
Henry E. Gallagher, Jr.
Michael Grandy
N. Christopher Griffiths
Trisha W. Hall
Timothy M. Holly
Ryan P. Newell
Scott E. Swenson
Christina M. Thompson
Max B. Walton
Gregory J. Weinig
Jeffrey C. Wisler
Josiah R. Wolcott

What's New at the DBA

New Financial Institution Member

Bessemer Trust Company of Delaware, N.A.
George W. Kern, J.D., LL.M., Managing Director
1007 M. Orange Street, Suite 1450
Wilmington, DE 19801
Telephone: 302-230-2684
Fax: 302-984-9526
kern@bessemer.com
www.bessemertrust.com

DBA Annual Meeting

Rodger Levenson, Executive Vice President and Chief Financial Officer, WSFS Bank, was elected to a second consecutive term as the Chairman of the Delaware Bankers Association at the DBA's 120th Annual Meeting in Wilmington. The DBA also elected and installed Mark A. Graham, EVP, Wealth Advisory Services, Wilmington Trust, to the position of Chairman-Elect. Other Members of the DBA Board Of Directors are: Elizabeth D. Albano, Chief Financial Officer, Artisans' Bank; Cynthia D.M. Brown, President, Commonwealth Trust Company; John J. Coane, President, Comenity Bank; David E. Gillan, Chairman of the Board and CEO, County Bank (Past Chairman); Thomas M. Forrest, President, U.S. Trust Company of Delaware; Nicholas M. Marsini, Jr., Regional President, PNC Bank Delaware; Donna G. Mitchell, President & CEO, Deutsche Bank Trust Company Delaware; James Roszkowski, President, Discover Bank; P. Randolph Taylor, President, Fulton Bank, N.A., Delaware National Division, and, William S. Wallace, COO, Chase Consumer & Community Banking. Brad Meltzer, Best-Selling Author of The Inner Circle and Host of the History Channel's Brad Meltzer's Decoded was the evening's guest speaker.

Keys to Financial Success Scholarships

(l. to r.) Mark A. Graham, EVP, Wealth Advisory Services, Wilmington Trust and DBA Chairman-Elect, Keys to Financial Success Scholarship winners Natalie O'Connor and Diandra Coleman, and Jeffrey W. Bullock, Delaware, Secretary of State

The DBA also announced the winners of the 2015 Keys to Financial Success Scholarship Award. The winners were Diandra Coleman, a senior at Caesar Rodney High School, Natalie O'Connor, a senior at Cab Calloway School of the Arts. Both students participated in the Keys to Financial Success course. Each winner receives a $2,500 scholarship.

Keys to Financial Success is a full-semester elective taught in 28 high schools throughout Delaware to over 4,000 students. The course was developed in partnership with the University of Delaware's Center for Economic Education and Entrepreneurship (CEEE), Delaware Bankers Association, Federal Reserve Bank of Philadelphia, and Consumer Credit Counseling Service of Maryland and Delaware. Keys to Financial Success introduces students to the fundamentals of sound money management skills and basic financial planning concepts including Goals and Decision Making, Career Research, Money Management, Consumer Skills, and Risk Protection.

David Bakerian Retirement Reception

DBA Chairman Rodger Levenson presents David with his gift voucher for travel

The Board of Directors of the Delaware Bankers Association honored outgoing President David G. Bakerian on his retirement at a May 28th reception at the Hotel duPont in Wilmington. Over 150 bankers, legislators, associate members, family and friends came together to reminisce and thank David for thirty years of service to the banking industry. United State Senators Tom Carper and Chris Coons, Congressman John Carney and Governor Jack Markell were on hand to express their appreciation to David for his years of service to the banking industry and to the State. Senator Carper presented David with a statement of recognition that was read into the Congressional Record. Rodger Levenson, DBA Chairman and Executive Vice President and Chief Financial Officer, WSFS Bank, presented David with a gift voucher for travel on behalf of the Board of Directors.

2015 Teach Children to Save Day Poster Contest Winner

Victor Ruffolo, 3rd grader at West Park Place Elementary School in Newark was awarded first place in the 2015 Teach Children to Save Day poster contest. Victor received $100, an autographed copy of The Great Investo and the Flourishing Flamingos, and an award certificate. His winning entry, shown above was selected by the Teach Children to Save Day committee from over 300 entries submitted statewide. Second and third place winners were also awarded and each received $50, books and certificates. Ten students received honorable mention certificates along with copies of the book. Victor's entry illustrated the steps in saving toward a goal as a game.

ABA's Doug Johnson Speaks on CyberSecurity

Over twenty security professionals attended the Delaware Bankers Association Professional Development Luncheon April 30th at the University & Whist Club in Wilmington. Doug Johnson, Senior Vice President, Payment and Cybersecurity Policy, American Bankers Association presented a Cybersecurity Potpourri, addressing the latest cyber threats and what the Administration, the Bank Agencies, and Congress want to do about them. The hour-long talk also included a question and answer session. Doug Johnson is involved in a variety of public policy and compliance issues. He currently leads the ABA's cyber and physical security, business continuity and resiliency policy and fraud deterrence efforts. Doug currently serves as Vice Chairman of the Financial Services Sector Coordinating Council, which advises the federal bank regulatory agencies on homeland security and critical infrastructure protection issues. He is also a board member of the Financial Services Information Sharing and Analysis Center, a private corporation that works with government to provide the financial sector with cyber and physical threat and vulnerability information, as part of the nation's homeland security efforts.

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1925 Lovering Avenue
Wilmington, Delaware 19806
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Cover Story

Why Americans Are (Wrongfully) Re-Thinking The Need for Estate Planning

by
Jordon Rosen, CPA. MST, AEP®
Belfint, Lyons & Shuman, P.A.

It wasn't that long ago when the estate tax exclusion was a mere $675,000 and the top estate tax rate was 55% (in 2001 to be exact). Even when the exclusion was $1 million, many Americans with significant value in their retirement plans, personal residence and maybe a vacation home had a need to draft sophisticated estate plans to save estate taxes.

Not so much today. With the basic exclusion amount at $5.43 million and growing, along with portability of a decedent's unused exclusion, most individuals will not have a federal estate tax liability. In addition, many states, such as Delaware, piggyback the federal rules, thereby eliminating all federal and state estate taxes.

The result is that many Americans are re-thinking the need for any estate planning. A married couple in 2001 with a combined $7 million estate would be knocking down our door to meet with us to find ways to save estate taxes, but

not necessarily today, and that is a big mistake. Among other considerations, these same people forget that (1) estate values grow, either naturally or by inheritance and (2) laws change. They also don't think they need to plan because:

1 - They think they are too young to plan their estate
2 - All of their property is jointly held with their spouse
3 - They think estate planning is only for the super-rich
4 - They think it's too expensive
5 - They had wills drawn up when they were married (probably 15-20 years ago)
6 - They don't want to think about it

As estate planning advisors, we need to recognize the various reasons (other than for federal estate taxes) why planning could be critical for our clients (and Americans in general). Below are some of those considerations.

Basic Documents

The starting point is having the proper documents in place. This includes a will, durable power of attorney and medical directive. The will, of course, can address the disposition of real and tangible personal property along with the payment of final expenses, etc. The use of certain types of trusts such as a revocable trust or credit shelter trust can also be a valuable tool for accomplishing the individual's estate planning goals. I am also a great believer that single adult children over the age of 18 should have basic estate planning documents in place, especially a durable power of attorney and medical directive. More sophisticated planning should be considered if the adult child stands to inherit a large sum of money in the near future.

Outdated Documents

Older estate planning documents may have required funding of the credit shelter trust in such amounts as to bring the taxable estate to zero. But with the exclusion now over $5 million, this may leave little or no funds for a marital trust or to be left outright to the surviving spouse, which many not have been the decedent's original intention.

"Basis" Planning

Income tax and basis planning is now the new norm for smaller estates. The top federal income tax rate is 39.6% and long-term capital gains could be taxed at either 15% or 20% (collectibles at 28%). There is also a 3.8% surtax on investment income for individuals with AGI over $200,000 ($250,000 if married filing a joint return). These high rates can be compounded if the individual lives in a high income tax state such as California or New York. The focus now for the smaller estate owner is whether to give assets away during his or her lifetime or at their death.

Making lifetime gifts results in carryover basis and if the assets have a low basis, the beneficiary could incur a substantial federal and state tax burden when they are sold. Passing the assets at death and obtaining a basis step-up for low basis or hard to value assets might be a better alternative, resulting in little or no tax when the asset is sold. "Basis" planning needs to be done on an asset-by-asset basis. It is important to look at which assets are best to be left in an individual's estate (Roth IRAs, tax-exempt bonds, life insurance and high basis assets) and which are worse, such as traditional IRAs and U.S. EE bonds which are considered income with respect to a decedent and don't get a basis step-up, in addition to creating ordinary income for the beneficiary.

Portability Election

Along the same lines of income tax considerations is whether to make the portability election of any unused exclusion amount of a deceased spouse (DSUE). Porting the unused amount to the surviving spouse (or to a QTIP trust) would qualify the assets for the marital deduction and provide for a second basis step-up upon the death of the surviving spouse. This needs to be weighed against (or in conjunction with) using the assets to fund a credit shelter trust which, while providing many asset protection and control benefits and avoiding the surviving spouse's taxable estate, will not provide for a second basis step-up. Even though an estate under the filing threshold (currently $5.43 million of assets) is not required to file an estate tax return (Form 706), a timely and properly prepared estate tax return needs to be filed by the executor in order to elect portability.

State Inheritance Tax Considerations

Several states such as Maryland and New Jersey have estate tax exclusions well below the federal level, thus consideration should be given to funding a credit shelter trust up to the maximum state exclusion. Pennsylvania on the other hand, imposes an inheritance tax upward of 15% on the first dollar. Consideration here should be on making lifetime gifts (notwithstanding our discussion above on income taxes) with the caveat that all gifts made within one year of death will be added back for PA inheritance tax purposes. This strategy may also have limited applicability in Vermont, which imposes a state-level gift tax.

Need to Provide for a Surviving Spouse and Children:

Does the client want assets left outright or in trust? At what age should heirs inherit? These are questions that need to be answered even for non-taxable estates that still could be worth several million dollars.

Second (or Third, or Fourth) Marriage

Blended families can create their own challenges where, e.g., a husband wants to provide security for his second wife, but wants the remainder of his estate to pass to the children of his first marriage at her death. In such cases, a Qualified Terminable Interest Property (QTIP) trust would be advisable.

Family Dynamics

Every family has them. Consideration and proper planning needs to be done to address heirs with drug or alcohol addictions, unstable relationships, spendthrifts, and those that may otherwise be vulnerable to predatory practices. A will can also provide that the inheritance be held back until the beneficiary has met certain criteria such as completing college, getting married, being drug-free for a stated period of time or attaining a certain age.

Caring for a Special Needs Person

This can generally be accomplished by creating a special needs trust or funding a state program such as the Delaware Care Plan

(continued on p. 12)

(continued from p. 11)

to provide funds to maintain the beneficiary's quality of life without jeopardizing federal or state aid.

Beneficiary Designations

Individuals need to make sure that the beneficiary designations, including contingent beneficiaries, are up to date for IRAs, employer retirement plans, insurance policies and annuities. This is especially important after a divorce, death of a spouse, or any inheritance of IRA/retirement plan assets. It is very hard, if not impossible to change beneficiaries after death and having the wrong beneficiary, including having retirement plan assets payable to one's estate, could ruin an otherwise perfectly good estate plan.

Asset Protection

Creating a trust to protect the beneficiary from predators or even from themselves if they aren't good at handling money is critical.

Closely-Held Business or Farm Operations

In many cases, some but not all children of the business owner will continue in the family-owned business. The challenge here may be creating equal inheritances for all heirs if the value of the business comprises the bulk of the taxpayer's estate (think life insurance). The issue, however, may not just be about equalizing the values to each beneficiary, but rather which of them will have ultimate control over future operations and the potential sale of the business. Consideration should also be given to the possibility that none of the heirs will want the business.

Educational Needs

The individual may be paying the educational cost for their children or grandchildren (or others), which should be done by making the payments directly to the educational institution to avoid any gift tax implications, and wants to make sure that future educational costs are covered after their death. One alternative is to create and fund an education trust. The issue here, however, is that the trust income tax rates are compressed so any undistributed income at the end of the year could be taxed as high as 43.4% in addition to state income taxes. Another alternative is to fund a 529 plan. The rules allow for the funding of up to 5 times the annual exclusion amount to be made at one time to a 529 plan, with an election made on a timely filed gift tax return to "spread" the gift over a 5-year period. Caution should be taken however, for 529 plans created by a grandparent since under current rules, the distribution from such plans in this instance is considered income of the student, which could jeopardize financial aid.

Guardianship for Minors and Incapacitated Persons

The individual's will can express who the decedent wishes to care of their minor children, rather than leaving it up to state law.

Charitable Intent

Even without consideration of the charitable deduction to reduce a taxable estate, most charitable planning techniques can be created either during the individual's lifetime or upon their death by including a charitable clause in the will or trust. This would include outright gifts of cash, securities, or real estate, creating a charitable remainder trust or an endowment.

Hard to Value Assets

Individuals with hard-to-value assets including business interests, artwork, antiques, coin or book collections and certain publically traded partnership investments, should consider obtaining current valuations for estate planning purposes. If the individual created a family partnership, consideration also needs to be given to applicable valuation discounts. Conventional wisdom was to take deep discounts on certain gifts including shares of closely held stock or units of a family partnership. With many estates now falling under the maximum exclusion, aggressive discounting may be more counterproductive compared to getting a step-up in basis for the shares. It may also be a good idea to get certain assets appraised for insurance purposes.

International Considerations

For estate tax purposes, there is no marital deduction for assets left to a non-resident spouse, thus the use of Qualified Domestic Trust (QDOT) is needed to qualify the assets for the marital deduction (the assets will be taxed at the surviving spouse's death). The use of life insurance may be an alternative for providing for the non-resident spouse who may otherwise not have access to the assets in the trust.

Annual gift gifts of up to $147,000 (in 2015) can also be made to provide funds to a non-resident spouse. Other considerations, beyond the scope of this article, need to be considered in the case of non-U.S. citizen spouses owning assets in the U.S. as well as for U.S. citizens owning assets outside of the country.

Pets

Leona Helmsley (the queen of mean), who left $12 million for the care of her dog, Trouble, was not the only person to make provisions for the care of their pets. The issues here are how much, who will care for the pet, who will hold and disperse the funds, and what happens when the pet dies. If the funds are left in trust, who will be the trustee and how is the income taxed (does Fluffy need a Federal ID number?).

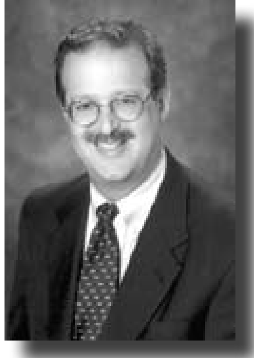
Post Mortem Elections

Just because the estate is not taxable, other elections could provide a benefit to the estate and beneficiaries. Such elections include:

1 - Electing to report U.S. E and EE bond interest on the decedent's final income tax return
2 - Selecting the proper fiscal year for the estate
3 - Making a Section 645 election to combine the estate and revocable trust tax filings
4 - Use of disclaimers
5 - Properly allocating the generation skipping tax exclusion
6 - QTIP election

Conclusion

Individuals cannot ignore the need for basic estate planning merely because their estate is under the federal estate tax threshold and estate planning professionals need to understand the non-tax considerations and challenges and be able to work with the client's other professional advisors to help put together a meaningful estate plan for them.



Jordon Rosen is a CPA and accredited estate planner® at the accounting firm of Belfint, Lyons & Shuman, P.A. in Wilmington, Delaware where he heads the firm's estate and trust section. He is also the president of the National Association of Estate Planners & Councils and chairman of the Delaware State Chamber of Commerce tax committee.

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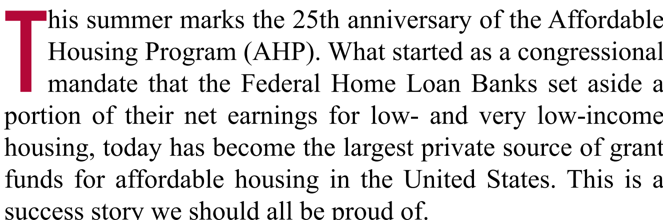
A Valuable Resource

FHLBank's Affordable Housing Program Celebrates 25 Years

by
Glenn R. Brooks
Chief Operating Officer and Senior Vice President
Leon N. Weiner & Associates, Inc.



This summer marks the 25th anniversary of the Affordable Housing Program (AHP). What started as a congressional mandate that the Federal Home Loan Banks set aside a portion of their net earnings for low- and very low-income housing, today has become the largest private source of grant funds for affordable housing in the United States. This is a success story we should all be proud of.

Over the past 25 years, the FHLBanks across the country together have provided more than $4.7 billion in funding through AHP, all private money, to create 758,000 units of affordable housing. FHLBank Pittsburgh, which serves Delaware, Pennsylvania and West Virginia, has provided $238 million of that total to help make housing affordable for 40,000 households. These are impressive numbers, demonstrating a legacy of community building and improvement.

I believe that the number one reason for AHP's remarkable performance is partnership. As a developer of affordable housing, a past chair of FHLBank Pittsburgh's Affordable Housing Advisory Council (AHAC) and a current member of its Board of Directors, I've experienced AHP from a number of vantage points. There's no question that the constellation of partners – FHLBank members, sponsors, community-based organizations, developers and elected officials, along with FHLBank's board, AHAC, management and staff – has made AHP both significant and successful.

Happy Anniversary, AHP

During its anniversary this summer, it's fitting to pause and reflect on AHP. The $238 million that FHLBank Pittsburgh has provided for AHP is impressive in its own right, reflecting the business that member financial institutions do with the Bank. As a developer, I also think about how that number is leveraged up because total development costs far exceed the amount of the grants themselves. FHLBank Pittsburgh tracks the total development supported by AHP grants, so we know that the $238 million in funding has supported $3.6 billion in development costs, and that's just for the Pittsburgh Bank. This stunning number reflects the costs to construct or rehabilitate the AHP projects: lumber, bricks, roofing, windows, electrical, labor, planning and many more. In addition, there are jobs created and increases to the tax base.

Opposite page and above:
The Village at Eastlake in northwest Wilmington

Congress got it right with AHP. It was a small part of a large piece of legislation: the Financial Institutions Reform, Recovery and Enforcement Act of 1989, often called the savings and loan bailout bill or FIRREA. Yet it's grown to become an important success story because of the many people, in our FHLBank district and across the entire FHLBank System nationwide, who make AHP work and will continue to do so. In our many different roles – whether we've contributed to it, supported it, promoted it or worked directly with it – we've made a lot of housing happen in these past 25 years, and many families and communities are better because of it.

AHP in the First State

Of the 10 AHP awards announced in the very first funding round on July 16, 1990, one was in Delaware: Arbor Place. The sponsor, Interfaith Housing Task Force, worked with WSFS Bank to secure both a grant of $36,372 along with a subsidized loan to help with new construction of 30 townhomes. Today, AHP grants in our state have totaled $20 million in support of more than 2,800 housing units. Each of these units represents an individual or family whose life has been profoundly changed because of AHP and the commitment of many partners.

One of the projects I've been personally involved with is The Village at Eastlake in northwest Wilmington. The company where I work, Leon Weiner & Associates, Inc., sought to improve the neighborhood of Eastlake, which used to be known as "The Bucket" (as in "bottom of the bucket") due to disrepair, violent crime and drugs. Our vision was to raze the 267 dilapidated rental units and build a dignified neighborhood with 70 rental homes, 90 homeownership units and a community center. My job was to help secure the funding to make it happen.

Although Eastlake was a multi-multi-million dollar undertaking, AHP's relatively small dollars were pivotal. We were successful in winning an AHP grant of $490,000, the very first funding of the entire program. Our strategy was to approach Housing and Urban Development with the idea that if FHLBank thinks this project is good, they should too. And they did. We were also able to secure funding from the Delaware State Housing Authority, PNC Bank, HUD HOPE VI funds and others.

As it turned out, the AHP funds were used at the settlement table for down payment and closing cost assistance when individual homebuyers purchased their homes. Some of our homebuyers had incomes at 26 percent of the area median, and therefore had nothing for down payment and settlement costs. Just imagine how gratifying it was to be able to put AHP dollars to work at the exact moment of new homeownership.

Flexible and Transparent

Two of the program's greatest strengths are its flexibility and transparency. Many times AHP serves as gap funding. I recall in our very first use of AHP, we had many sources of funding already in place – tax credits, state housing finance agency, etc. – but still had a gap of $150,000, which AHP was able to fill. We have also used AHP to structure rental housing transactions using tax credits where flexibility is crucial.

Transparency is another key strength both before and after the application process. On the front end, FHLBank publishes all of the scoring criteria so applicants know exactly how the applications will be reviewed and which are the high-point categories. This kind of transparency is very unusual for funders and much appreciated. On the back end, FHLBank will provide technical assistance for unsuccessful applications so sponsors can understand why an application didn't receive funding. As a developer, we've had several experiences where, after a technical review session with the Bank, we were able to modify our application and were successful in a subsequent funding round.

AHP is also reliable. This is due, at least in part, to the fact that the staff is knowledgeable, professional and seasoned. John Bendel, the director of Community Investment who has been at the Bank for 20 years, has a broad and deep understanding of the program and is more than willing to share his expertise with members, sponsors and all stakeholders. John and his team are backed by executive management and a Board of Directors that have identified a strategic imperative to abide not only with the requirements of AHP, but with the spirit behind them as well. In this way, AHP is built into the culture of FHLBank Pittsburgh from top to bottom, and bottom to top.

(continued on p. 16)

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Added Value of FHLBank Membership

As Delaware bankers and FHLBank members, you are the quintessential partners. You apply for AHP funds on behalf of a sponsoring organization in competitive funding rounds. When successful, the money flows from FHLBank to you, and through your bank to the project and community. And lest we forget, it's your money! FHLBank is a co-op, owned by its membership; there is not one cent of taxpayer money involved.

If you're an FHLBank member and have never used AHP, consider this: AHP is a resource for you, part of the value of your membership. Using AHP, you can help to provide affordable housing in your community, build relationships with developers and community groups, gain new business opportunities, shore up your CRA rating and generally be a good corporate citizen. And it's easy. We, the sponsors of the project seeking AHP funding, do the heavy lifting in preparing the application. Your part is to review, answer a few questions and submit the application electronically via AHP Online. If you have questions or need help, call your Relationship Manager or Dave Buches, who works at the Bank and lives here in Delaware; I know they'll be happy to help.

In addition to the business benefits listed above, there are public relations (PR) aspects to AHP that add value as well. FHLBank prepares a news release after each funding round announcing the winners. Frequently, there are ribbon cutting events or presentations of big check replicas that garner news coverage and often a visit from one or both of our Senators or our Representative of Congress. This PR has value on its own, but it is also a source of satisfaction and pride for employees, who feel good to see their employer doing something positive in the community. If you haven't been involved yet, I really encourage you to learn about AHP. This is a true value-added resource – you'd be crazy to leave it on the table!

Glenn R. Brooks is Chief Operating Officer and Senior Vice President at Leon N. Weiner & Associates, Inc., a nationally recognized homebuilder and developer of affordable housing in Wilmington, Del. Mr. Brooks began his first term on FHLBank Pittsburgh's Board of Directors on January 1, 2015 and invites input from FHLBank members at any time.

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Control, Protection, and Privacy:

The Advantages of a Delaware Trust for Business Owners

by Jeffrey C. Wolken, Esq.
Managing Director and Head of
Wealth and Estate Planning
Wilmington Trust Company

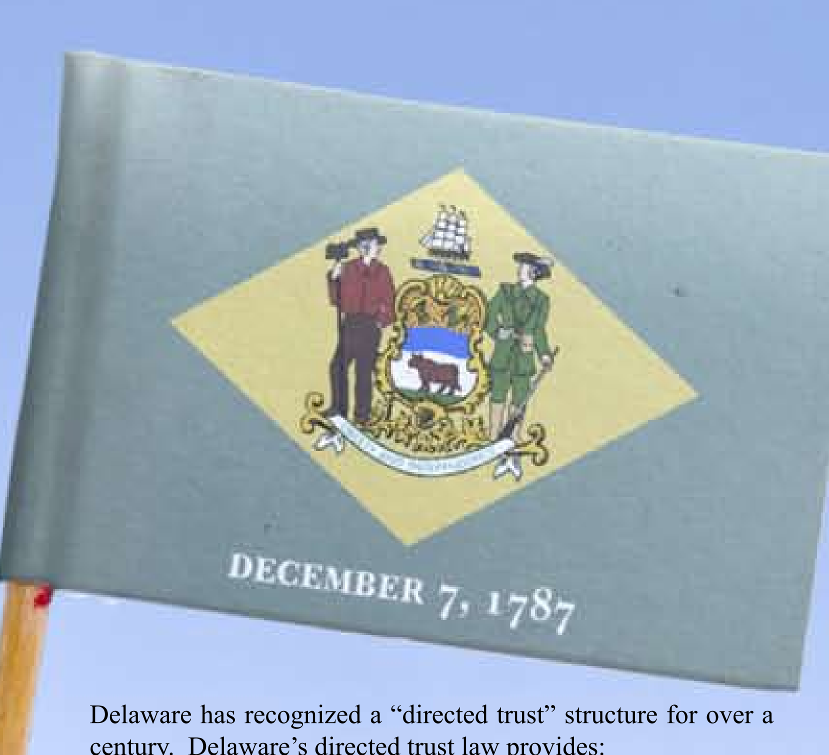
The state of Delaware has long been one of the most favorable places to establish a business. But what many business owners don't recognize is that Delaware is also an excellent place to create a personal trust for estate planning or asset protection purposes, even if neither the business nor the business owner resides in Delaware.

Business owners face special challenges in structuring estate plans because of their unique need for control, asset protection, and confidentiality regarding their main asset, the family business. Fortunately, Delaware provides some special advantages to business owners who establish personal trusts under its laws. While not all of these advantages are unique to the state of Delaware, utilizing them with a trust located in Delaware affords the business owner access to other benefits that this trust-friendly state has to offer.

Directed Trusts Let Business Owners Maintain Control of Their Greatest Asset: The Business

One of the biggest hurdles for business owners considering estate planning using personal trusts is the fear of giving up control over their most significant asset. After many years of successfully leading their company, they are understandably reluctant to let anyone else make decisions about how it is managed as an asset.

Under most traditional trust structures, the trustee becomes responsible for assets placed in trust. The trustee has to make regular decisions about how to manage these assets—which can be particularly challenging when the primary asset is a closely-held business. Because of its fiduciary duty to diversify the trust's investments, a trustee may decide that a closely-held business is not an appropriate investment for the trust, because it is undiversified and illiquid, and may decide to sell all or part of the ownership interest or manage it in a manner that is contrary to the family's goals. This, obviously, is not what most business owners want. However, these issues can be addressed by establishing a trust with a directed trustee feature. With this feature, the business owner may designate one or more advisors to make investment decisions for the trust that holds the business as its main asset, while having a Delaware administrative trustee perform the remaining duties of a trustee.



Delaware has recognized a “directed trust” structure for over a century. Delaware’s directed trust law provides:

- Freedom to engage in estate planning or asset protection planning using illiquid assets, such as stock in the family business, real estate, or hedge fund/private equity investments, when a trustee may otherwise be reluctant to hold these types of assets
- Flexibility for a trusted advisor or family member to retain control over a trustee’s investment or distribution decisions so that they can do what is best for the family/ beneficiaries

Essentially, the directed trust splits fiduciary responsibilities, allowing the person who establishes the trust, often referred to as the Settlor or Grantor, to name his or her own investment advisor to manage the assets, while the trustee is responsible for other aspects of administering the trust. In many cases, the business owner-Settlor may serve as his or her own investment advisor. The trustee can’t be held liable for the investment advisor’s actions unless the trustee engages in willful misconduct related to the investment process. This structure is particularly beneficial for business owners who do not wish to divest the business interests held in the trust.

The directed trust feature provides significant flexibility since it can be added to virtually any type of trust structure in Delaware. Whether the goal is asset protection or a perpetual trust to save estate taxes, these trusts can be set up with an investment advisor directing the holdings and investment process.

Asset Protection Trusts Offer Security

Another beneficial planning option is the trust structure commonly referred to as an “asset protection trust,” which allows business owners to take some of their winnings off the table and protect them from creditors. In 1997, Delaware was among the first states to allow this type of trust, which enables the person who creates the trust to remain as a beneficiary and to have the trust assets protected from the claims of his or her creditors. Under the terms of an asset protection trust, which is irrevocable, the business owner would place the assets he wants to protect into a trust in the state of Delaware. Within the limits provided by Delaware law, he or his beneficiaries can receive payments of income or principal from the trust. Properly structured and administered, creditors will generally not be able to gain access to these assets.

Another benefit of the asset protection trust is to provide the business owner with a “rainy day” fund. For instance, say that an entrepreneur has successfully taken one company public and plans to use some of the new liquidity to fund another venture. While willing to risk some of the gains, he or she may want to hold some back in case of an unexpected business reversal, an emergency, or for unplanned expenses.

Quiet Trust Provisions Keep Business Interests Confidential

Another aspect of Delaware trust law that can be beneficial to business owners who want to transfer assets to children or grandchildren without disclosing the gift immediately is the so-called “quiet trust” law. Consider a family business owner with grandchildren in their early teens. The business owner worries that if the grandchildren know that they are to inherit several million dollars in business assets, they may not work as hard in school.

In most states, including Delaware, trustees have an obligation to keep beneficiaries informed of their interests in the trust. If there’s an event that affects the beneficiaries’ interests, the trustees have to tell them about it. In fact, many states require regular reporting to beneficiaries including quarterly updates on how much the assets are worth and what is being done to manage them. The trustees also have to inform beneficiaries about when they will receive control of the assets, perhaps at age 21 or on graduation from college or some other life event.

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The Delaware Advantage

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The flexibility in Delaware is that Delaware trusts can contain "quiet" provisions that tailor notice or disclosure provisions to the Settlor's requirements. The Settlor can instruct the trustee to keep the trust confidential until a certain age is attained or a certain milestone occurs. Consequently, the business owner, as Settlor, can transfer assets to a trust for asset protection or estate planning purposes with the comfort that beneficiaries only receive notice or information upon terms set by the business owner. Even if the business owner is a resident of another state or the business is in another state, these Delaware advantages should be available to him or her.

Delaware Is The Pre-Eminent State for Trusts

For the complex estate planning needs of entrepreneurs and multi-generational business owners, Delaware is a trust-friendly state. Directed trusts, asset protection trusts, and quiet trusts are just a few of the ways that Delaware trusts can be used to achieve a business owner's unique goals. In addition, Delaware has more than 100 years of established trust law, provisions for perpetual trusts, favorable tax laws, and flexible distribution rules.

Jeff Wolken is responsible for developing trust planning strategies for wealthy individuals and families throughout the United States and abroad. He works closely with his clients' legal, tax, and investment advisors to construct and implement appropriate trust structures that take advantage of the state of Delaware's unique trust and tax laws. Jeff is admitted to the practice of law in Delaware, Pennsylvania, and New Jersey. He is a member of the Estates and Trusts Section of the Delaware State Bar Association, the Probate and Trust Law Section of the Philadelphia Bar Association, and the Estate Planning Council of Delaware. 302.651.8192. Email: jwolken@wilmingtontrust.com

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For Your Benefit

by
Louis D. Memmolo, GBA, CHRS
Employee Benefits Advisor
Weiner Benefits Group

"How do you develop a long-term employee benefits strategy as a tool to attract and retain the top talent?"

"Engaging and Transformative! " "Cutting Edge, and Relevant?"

Is this how your new recruit would describe your company? What about your faithful, long time employees?

Would they use those same terms after they saw your benefits package and experienced the impact your benefits strategy has had on their lives over their tenure with your firm? Attracting and retaining top talent has always been the challenge. In fact, in recent years, increasing costs, a turbulent regulatory environment along with a more diverse and demanding workforce has made it increasingly difficult.

Recent surveys tell us that employee pay is still the main attractor and with benefits taking an ever increasing share of the total compensation package, employee benefits are more important than ever.

Interestingly enough, while smaller companies respond to increased costs by reducing benefit levels, larger companies continue to expand benefits in order to attract new employees.

So, how do you develop a long-term employee benefits strategy as a tool to attract and retain the top talent you need to fuel the future of your company while maintaining your competitive advantage in the marketplace? And yes, you need to view your benefits strategy as a competitive tool.

Providing traditional benefits the old way is what we all have come to expect. We need and want the traditional benefits; medical, dental, life, disability insurance, and of course a good retirement plan. We dread either the annual ubiquitous pile of paper loaded with incomprehensible forms and figures with a deadline to return to HR or the link to a utilitarian website to make our elections. As they say, doing the same thing over and over again and expecting different results is the definition of insanity!

Why not create a strategy that engages the employee, provides transformative choices that are relevant to their life stage, bundled in a cutting edge experience that truly impacts their lives? Well, that's something new! And it's that emotional connection that will help cultivate the long term loyalty you want from your top talent.

Presenting a combination of your traditional benefits with a custom selection of targeted nontraditional benefits along with creative wellness initiatives in this fresh new way, will not only help you be more competitive, you may even begin to transform the way your employees consume healthcare, eventually impacting the long term costs.

But before you go offering a smorgasbord of nontraditional benefits, take some time to develop a strategic plan. Consider which programs will have the biggest impact on your employees and how those benefits will affect the company as a whole. Create custom packages that are relevant to the way your employees live their lives.

Benchmarking is important. Find out what your competition offers and what is relevant to your ideal employee.

And finally, present this custom marketplace in a beautiful and engaging operating system that is ready for use on your handheld devices. With experienced consulting, a thoughtful strategic plan, relevant benefits and state of the art technology, an engaging, transformative, employee benefits package that attracts and retains top talent is absolutely possible.

In Declining to Modify a Trust, Chancery Court Reaffirms that a Settlor's Intent Is Paramount

by
Matthew P. D'Emilio, director
Thomas A. Uebler, associate
Cooch and Taylor, P.A.

In *In re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek*, C.A. No. 10593-VCL (Del. Ch. June 17, 2015), Vice Chancellor Laster of the Delaware Court of Chancery denied the unopposed petition of a current income beneficiary to modify a trust from a traditional, trustee-managed trust to a directed trust. Although the decision rested on the terms of the trust at issue, *Flint* provides helpful guidance regarding how a settlor's stated intent will affect modification efforts and refocuses practitioners on the nonjudicial modification methods available under Delaware law.

Background

Wallace B. Flint ("Wallace"), the brother of the founder of IBM, established a detailed estate plan in his Last Will and Testament dated December 12, 1934 (the "Will"). The Will created a testamentary trust that would receive the residue of Wallace's estate (the "Trust").

The purpose of the Trust was to provide lifetime income for Wallace's wife. Upon her death, the Trust was to continue for the benefit of Wallace's daughter, Katherine Frances Flint ("Katherine"). Under the plain language of the Trust,

"Wallace expected his trustees to determine how to invest the corpus of the Trust."

Wallace created two opportunities for Katherine to invade the Trust corpus, one-fourth at age 35 and another one-fourth at age 40 (totaling 44 percent of the corpus). "Notably, Wallace did not permit Katherine to access the entire corpus, nor did he otherwise authorize her to direct how the corpus of the Trust would be invested."

The initial co-trustees of the Trust were three individual trustees (including Wallace's wife) and Chemical Bank and Trust Company, a New York corporate trustee ("Chemical Bank"). After Wallace and the initial individual co-trustees died, Katherine and Chemical Bank became co-trustees.

In 2001 Katherine and Chemical Bank obtained an order from the Court that provisionally moved the situs of the Trust to Delaware, and in 2002 they obtained a second order from the Court that moved the situs of the Trust to Delaware and replaced Chemical Bank with J.P. Morgan Trust Company of Delaware ("JP Morgan") as corporate co-trustee.

Approximately 81 percent of the Trust corpus is IBM stock. JP Morgan recommended diversifying. Katherine and her children opposed that recommendation, and JP Morgan acceded to their wishes. The Trust permits the trustees to continue to hold investments that Wallace held (*i.e.*, IBM stock), but it "does not say that the trustees can retain an investment that Wallace held even if they believe that it would be in the best interests of the Trust to sell it."

In recent years, after the disagreement regarding the Trust's concentrated position in IBM stock, Katherine and JP Morgan, with the consent of Katherine's adult children and their descendants, delegated to two of Katherine's adult children (the "investment managers") "all duties and powers in connection with the investment of the assets of the Trust." Katherine and her adult children entered into consent, release, and indemnification agreements with JP Morgan and the investment managers to approve and consent to the concentrated position in IBM stock and release and indemnify JP Morgan and the investment managers.

In October 2014, Katherine petitioned the Court to modify the terms of the Trust to, among other things, "formalize the current investment management structure." The petition sought approval of a modified and restated Will, which modified the Trust from a trustee-managed trust to a directed trust by creating the new position of Investment Advisor and granting Katherine and her adult children the power to appoint the Investment Advisor.

The Court's Decision

The Court clarified that the petition sought modification, not reformation, of the Trust through the adoption of the modified and restated Will. The problem with Katherine's modification approach, the Court opined, was that it conflicted with Wallace's intent, as reflected in the original Will.

In "his actual Will, Wallace placed the trustees in charge of investing the Trust's corpus," and the "original Will did not contemplate the position of Investment Advisor or the concept of a directed trust, nor did it incorporate statutory language post-dating Wallace's death." In other words, "Wallace contemplated that the trustees would exercise judgment and discretion, not act as marionettes for the Investment Advisor." Moreover, Katherine was limited in her ability to invade the Trust corpus. Simply put, Wallace "plainly intended for the Trust to benefit from the involvement of a corporate trustee that actually would fulfill a trustee's traditional role."

The Court explained that whether "the wishes of living beneficiaries should prevail over the wishes of a dead settlor is a contestable issue where reasonable minds can disagree." While English law has long made the wishes of beneficiaries paramount, the majority rule in the United States—including in Delaware—makes a settlor's intent paramount. The majority rule applied in *Flint*.

While Delaware law permits a settlor to create a trust with all the features Katherine's petition sought to implement, the Court would not permit beneficiaries to modify an existing trust to incorporate features that are inconsistent with the settlor's intent, as reflected in the original Will. The Court also declined to

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modify its 2002 order to impose a contingent choice-of-law scheme, because the proposed language was "too vague and uncertain to be implemented."

The Future of Consent Petitions

In the decision, the Court cast doubt on the continuing viability of consent petitions as a means of modifying trust instruments without a living settlor to confirm his or her intent. Before 2011, petitions to modify trusts were routinely granted by the Court if all beneficiaries consented. Trustees and beneficiaries favored consent petitions over nonjudicial modification because judicial approval provided certainty and limited (or eliminated) potential liability. The consent-petition process became more difficult following the *Peierls* decisions and the adoption of Chancery Court Rules 100 to 104.

The Court explained in *Flint* that consent petitions were routinely granted "without independently testing whether there was a live dispute or similar basis for jurisdiction and without examining carefully whether there were adequate grounds for the relief requested." Flint makes clear, however, that the Court will no longer grant petitions for modification based solely on the agreement of trustees and beneficiaries.

Flint also clouds the traditional practice of trustees petitioning the Court for instructions regarding questions of trust administration. Similar to *Peierls*, *Flint* held "that a petition seeking consensual declarations that do not require judicial implementation does not give rise to an actual controversy supporting declaratory relief." In other words, if a petition does not contain a live dispute, a prophylactic stamp of approval from the Court is no longer likely.

Nonjudicial Methods for Modifying Trusts

As judicial modification of trusts has become more difficult during the past four years, nonjudicial methods for modifying trusts, including merger, decanting, and nonjudicial settlement agreements, have become more refined and efficient. As a result, individual and corporate trustees have comfort utilizing these nonjudicial tools to modify trusts in appropriate circumstances, especially when combined with releases from trust beneficiaries pursuant to 12 *Del*. C. § 3588.

Although merger has been available for decades, it has only recently become a go-to method for modifying trusts. Merger, pursuant to 12 *Del*. C. § 3325(29), involves the trustee combining an existing trust into a new trust governed by a new instrument created by the trustee. The new governing instrument contains all the desired provisions, so the result is a modified trust. There is only one statutory requirement, which is that the merger must "not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust."

Some practitioners and trustees have disfavored mergers because of a concern that Section 3325(29) did not authorize the trustee to create the new trust into which the old trust is merged. However, Trust Act 2015 (H.B. 164), which passed the General Assembly and awaits the Governor's signature, alleviates that concern. Trust Act 2015 makes clear that (1) the trustee of the original trust may create the new trust; (2) the new trust need not be funded prior to the merger; and (3) as of the date of merger, the original trust ceases and the new trust governs the trust property.

Delaware's decanting statute, 12 *Del*. C. § 3528, has existed for more than a dozen years, and has been tweaked almost annually to make it one of the best in the country. Decanting involves the trustee pouring the assets of an existing trust into a new trust created by the trustee that contains the desired provisions. While decanting has more statutory conditions than merger, it is generally available as long as the trustee has the authority to invade the principal of the original trust. Trust Act 2015 provides several technical, but useful, revisions to the statute.

In 2013 the General Assembly authorized the use of nonjudicial settlement agreements. Under 12 *Del*. C. § 3338, parties may use a nonjudicial settlement agreement to resolve certain issues as long as the agreement does not violate a material purpose of the trust and the terms and conditions of the agreement could be properly approved by the Chancery Court. Trust Act 2015 clarifies the existing statute by identifying the "interested persons" whose execution is required to achieve a binding settlement.

Section 3338 includes a non-exhaustive list of issues that may be resolved by nonjudicial settlement: (1) interpretation or construction of the terms of the trust; (2) approval of a trustee's report or accounting; (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; (4) resignation or appointment of a trustee and determination of a trustee's compensation; (5) transfer of a trust's principal place of administration; and (6) liability of a trustee for an action relating to the trust. Nonjudicial settlement is an efficient alternative to traditional petitions for instructions.

While most Delaware practitioners believe that trust modification is permitted by nonjudicial settlement agreement, the issue has been debated since the statute was enacted. The statute requires a nonjudicial settlement to include "terms and conditions that could be properly approved by the Court." After *Flint*, if a settlor is deceased, it is questionable whether a nonjudicial settlement can be used to modify a trust to include directed trust provisions, unless the settlor's intent to permit such modification can be ascertained from the trust instrument.

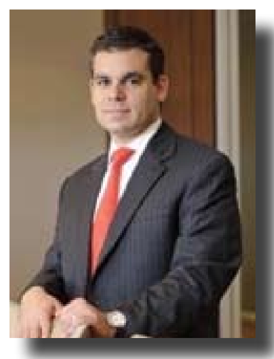
Lessons from *Flint*

Flint reaffirmed that under Delaware law, a settlor's intent is paramount, regardless of changed circumstances or the current wishes of trustees and beneficiaries. In drafting trust instruments, therefore, practitioners must, at a minimum, ensure that the terms of the trust instrument accurately reflect the settlor's intent, because the trust instrument itself, absent ambiguity, will be used to ascertain the settlor's intent.

Drafters might also attempt to anticipate, to the extent possible, future changed circumstances or legal developments that could affect a trust's administration, and include terms

in the trust instrument to guide a court or interested parties regarding the settlor's intent. While changed circumstances and legal developments cannot specifically be anticipated and addressed at the outset, a settlor can clearly delineate the scope of powers, responsibilities, and discretion of his or her trustees and beneficiaries. At a minimum, drafters should discuss with settlors the likelihood of changed circumstances, and, if desired by the settlor, include provisions in the trust instrument permitting modification by trustees, beneficiaries, or other identified persons.

Finally, *Flint* reminds practitioners that while the Chancery Court's practice regarding consent petitions has changed, there remain several nonjudicial methods for modifying trusts, including merger, decanting, and nonjudicial settlement agreements. The popularity of these methods is growing because the governing statutes are regularly updated and refined, nonjudicial modification is typically more efficient than judicial modification, and, when used in conjunction with releases, nonjudicial modification can provide trustees and beneficiaries certainty and protection from liability.



Matthew P. D'Emilio and Thomas A. Uebler are attorneys in the Trusts, Estates and Tax Group at Cooch and Taylor, P.A. Mr. D'Emilio and Mr. Uebler practice in the areas of estate planning and wealth transfer, estate and trust litigation, estate and trust administration, and tax law. They routinely counsel both individual and corporate trustees in all matters related to estates and trusts, including providing representation in the Delaware Court of Chancery and the Pennsylvania Orphans' Court. In addition, they are regularly involved in a variety of other trust matters including trust modifications, terminations, mergers, decantings, nonjudicial settlements, and trust situs changes.

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FFIEC Cybersecurity Assessment

by
Andrew C. Kim
Director, Technology Risk Management – Cybersecurity
Fidelity Information Services, LLC ~ FIS

"Cybersecurity is a boardroom business issue, not a back-office technology problem."

The latest headlines on the theft of personal information, credit cards and healthcare records continue unabated – in and out of the industry –about whether financial institutions are doing enough to protect consumers' critical information and their assets. Just a few months ago, the U.S. Office of Personnel Management (OPM) reported that over 21 million government personnel files were illegally accessed, reportedly by Chinese cyber attackers. Fewer than ten days prior to the OPM breach, the Internal Revenue Service (IRS) reported that the personal information of nearly 100,000 taxpayers was obtained by a Russian cybercriminal syndicate.

Lastly, in the biggest cybersecurity breach of the year, the health records of more than 80 million Anthem Healthcare customers were stolen by cybercriminals. As these incidents illustrate, the sheer number and scale of cybersecurity breaches is accelerating at an alarming rate. One would think that by now, a methodical and effective strategy for defending information against these threats must exist. Unfortunately, it's been a mixed bag of regulatory guidance – until now.

On June 30, 2015, the FFIEC, published a Cybersecurity Assessment Tool, which is profiled in depth within this brief. Among the various assessment methods available today, it is the most specific guidance available on performing a cybersecurity risk assessment at a financial institution.

While any organization could perform a full-court press of the assessment from start to finish, it is clear from the assessment itself that the FFIEC is implying an order of importance amongst the various aspects of the assessment. It is our assertion that knowing the order of importance is critical for any organization to quickly, efficiently and successfully complete the assessment to effectively protect the enterprise and stay ahead of the risks.

Before we dive into the new assessment, let's look briefly at how we got here. In response to increasing cybersecurity risk, government agencies, private companies and non-profit organizations alike needed to react quickly. Due to the shared risk presented by cybersecurity challenges, public and private-sector entities collaborated to publish guidance on cybersecurity assessments.

The NIST Cybersecurity Framework is an early example of these initiatives; however, it suffered from being too high level. It answered the question: "What is everything we need to do to address cybersecurity risks?" without answering the questions, "Where are we now?" and "Where do we need to be?"

As a result, the FFIEC started a working group to study the specific impact of cybersecurity issues for financial institutions. This work culminated in the Cybersecurity examination pilot program pilot during the summer of 2014, with the goal of evaluating the state of cybersecurity preparedness and mitigating cyberattacks across 500 financial institutions.

To address these concerns, the FFIEC, on behalf of its members, released a Cybersecurity Assessment Tool to provide very specific guidance to C-level management, Boards of Directors and other users of the tool. Drawing upon some of the research already conducted by the Institute of Internal Auditors and Information Systems Audit Control Association, the FFIEC makes clear that CEOs and Boards of Directors have the responsibility to:

- Plan the Assessment
- Lead and Facilitate Timely Responses Across the Institution
- Set Target Dates
- Review, Approve, and Support a Plan to Address Weaknesses
- Analyze and Present Results
- Remain Agile in Areas of Emerging Cybersecurity Risk
- Oversee Changes that are Necessary to Increase Cybersecurity Preparedness

The FFIEC Cybersecurity Assessment Tool will have a significant impact on financial institutions large and small. Examiners will start using the Cybersecurity Assessment in future exams. There is a clear regulatory expectation that every single institution should use the Cybersecurity Assessment and periodically make updates based on changes to their risk profiles. It is a comprehensive, risk-based approach that is tailored to the cybersecurity risks faced by financial institutions today. To stay ahead of cybersecurity risks as well as examiner scrutiny, there is an order of importance that is implied in the Assessment itself, which will help organizations prioritize what areas they should consider first using the finite resources available to quickly achieve desired outcomes.

5:30am - 9:00am

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DBA Calendar of Events

For more information on these and other programs visit **www.debankers.com**, or phone the DBA at 302-678-8600, or email: debankers@debankers.com

September - October 2015

Foundation of Delaware Trusts
University & Whist Club, Wilmington, Delaware
The DBA/FEA presents a new series for entry-level trust employees conveniently scheduled in two-hour sessions on five consecutive Wednesdays starting September 16th. Sessions include: Reading and Interpreting a Trust Document (9/16); Basic Income, Estate, Gift and GST Tax (9/23); Discretionary Decision-Making (9/30); Division of Labor in Trust Administration (10/7); and, BSA and PATRIOT Act Best Practices (10/14). Pick and choose, or attend all five sessions and save. Each session will also be available on an audio/slide CD for review and in-house training. Visit www.debankers.com for registration information.

October 2015

Vintage Wealth Planning... Aged to Perfection

October 26th & 27th – 2015 Delaware Trust Conference,
Chase Center on the Riverfront, Wilmington, Delaware
Don't miss the tenth annual edition of this premiere trust event that will highlight the advantages of the Delaware Trust product. This year's theme is: Vintage Wealth Planning, Aged to Perfection! Indeed, like a fine wine, the Delaware Trust product has been carefully nurtured and meticulously crafted to become the premiere of the industry. Join dozens of expert panelists from the trust, legal, and accounting fields to learn the latest Delaware Exclusive information. Sponsorships and exhibition spaces are available.

November 2015

November 17th, 18th, 19th – 2015 Regulatory Compliance School
Wilmington/Christiana Hilton, Newark, Delaware
The Delaware Bankers Association and FIS Enterprise Governance, Risk & Compliance (EGRC) Solutions present the 2015 Regulatory Compliance School offering a comprehensive review of federal laws and regulations affecting the financial services industry. Keep current on the important changes in the Regs you deal with every day on the job, and earn CPE, CRCM, DE and PA CLE continuing education credit!

Web and CD Seminars

For more information, or to register, please visit the Web Seminar link at www.debankers.com. The DBA has introduced an improved web seminar catalog featuring an easy to view, searchable listing. There is no log-in required to view the catalog. The checkout function has also been improved and includes itemized receipts.

August - September 2015

August 19 - BSA/AML Compliance: Recent Developments & Common Errors

August 20 - Consumer Construction Loans

August 24 - Commercial Construction Loans

August 25 - Understanding Loan Documents, Part 1

August 26 - Same Day ACH: The Future Is Here!

August 26 - Best Ever Consumer Compliance Checklists

August 27 - Understanding Real Estate Loan Documents, Part 2

August 28 - Are You Diversifying Your Loan Portfolio Appropriately?

August 31 - New Proposed Overtime Rules: Implications for Community Banks

September 2 - Flood Insurance: Recent Revisions & Update

September 2 - Bank Secrecy Act Staff Training

September 3 - Lending Essentials: Business Entities

September 8 - The FDCPA, the CFPB & You

September 11 - Tackling the ACH Audit & Risk Assessment

September 14 - Negotiation Skill Building for Bankers

September 22 - Your Compliance Management System: No Cookie Cutters Allowed

September 24 - Compliance Training: One Size Does NOT Fit All

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by
Eugene A. DiPrinzio, Esq.
Young Conaway Stargatt & Taylor, LLP

"Preparing a land use analysis is essential at the forefront of the transaction. "

Real Estate Collateral and Land Use Implications – Who Cares?

Commercial mortgage lenders and those who require real estate collateral for credit facilities often overlook the land use implications of applicable laws that govern the utilization, development and taxation of the land and buildings that are the primary source of security for the loans. Lenders typically rely upon the due diligence provided by an appraiser when analyzing the zoning, a separate zoning analysis from a third party vendor or a certification from a governmental authority that has jurisdiction over the property. Most lenders expect a loan to be repaid and do not anticipate getting a property back on foreclosure or through a deed-in-lieu of foreclosure. Nevertheless, the return of real estate collateral should be analyzed thoroughly at the beginning of the underwriting process. Certain assumptions need to be made as to the continued use and occupancy of a property. Land use laws are fluid and can fundamentally impact the continued use and operation of a property, especially if there is a gap in its customary use. Zoning, land use, subdivision, variances, special exceptions, brownfield developments, taxing districts and enterprise zones can all have a substantial effect on what a lender might be able to do on a disposition of real estate that becomes owned or recovered in a troubled loan situation.

Who Cares?

The future marketability of a given property is not considered in order to determine whether it will have broad or limited sales appeal. For example, a custom or "build to suit" facility may not have multiple uses because of the limitations provided under its zoning classification or the land use regulations that govern it. During the last recession, numerous lenders were surprised, and distinctly disadvantaged, to learn (1) that their real estate collateral would be unable to be subdivided or developed because the subdivision plan process or land development approvals had sunsetted under existing legislation, or (2) that insufficient development work had been done on the property to warrant a completion of the project. In some instances, required variances were not received and special tax treatment was not available because the improvements were incomplete or missing.

A lender might also discover the nonconforming use of a property, which by virtue of being grandfathered in its pre-existing operation, no longer fits into the applicable zoning category. In the event of a fire or other casualty loss, a nonconforming property may, in fact, not be restored or rebuilt to the same or similar size specifications that existed prior to the casualty event. A special exception or variance that is not continually used or does not run with the land, may be unavailable for a new or substitute purchaser of the property. Moreover, in enterprise zones or special taxing districts, a property developer's or owner's failure to comply with certain covenants may require a lender to either refund certain tax benefits or require that abated amounts be paid back to the taxing authority before the property can be used.

Proper Due Diligence

Obtaining a zoning certification and determining whether a property has appurtenant land use approvals is paramount. Lenders should determine if a nonconforming property can be restored to its current size and location and whether its current use, under pre-existing zoning or land use, is operating on borrowed time. Engaging a land use attorney and an engineer who are familiar with the zoning laws of a specific location at the initial stages of a loan are critical components to making sure the real estate collateral has a broader range of uses and is marketable for other purposes. All too often, an appraiser's analysis of the property does not delve into specific attributes that make a property valuable to a broader array of potential purchasers. This analysis should be conducted before the loan closes and copies of all applicable licenses and land use approvals should be placed in the credit file so that upon asset recovery, a determination will already have been made whether the property, if returned to the lender, can be disposed of quickly and efficiently.

In conclusion, preparing a land use analysis is essential at the forefront of the transaction. By doing so, lenders alleviate the risk that the intended use and value of a property are significantly diminished or impaired by virtue of land use law implications.

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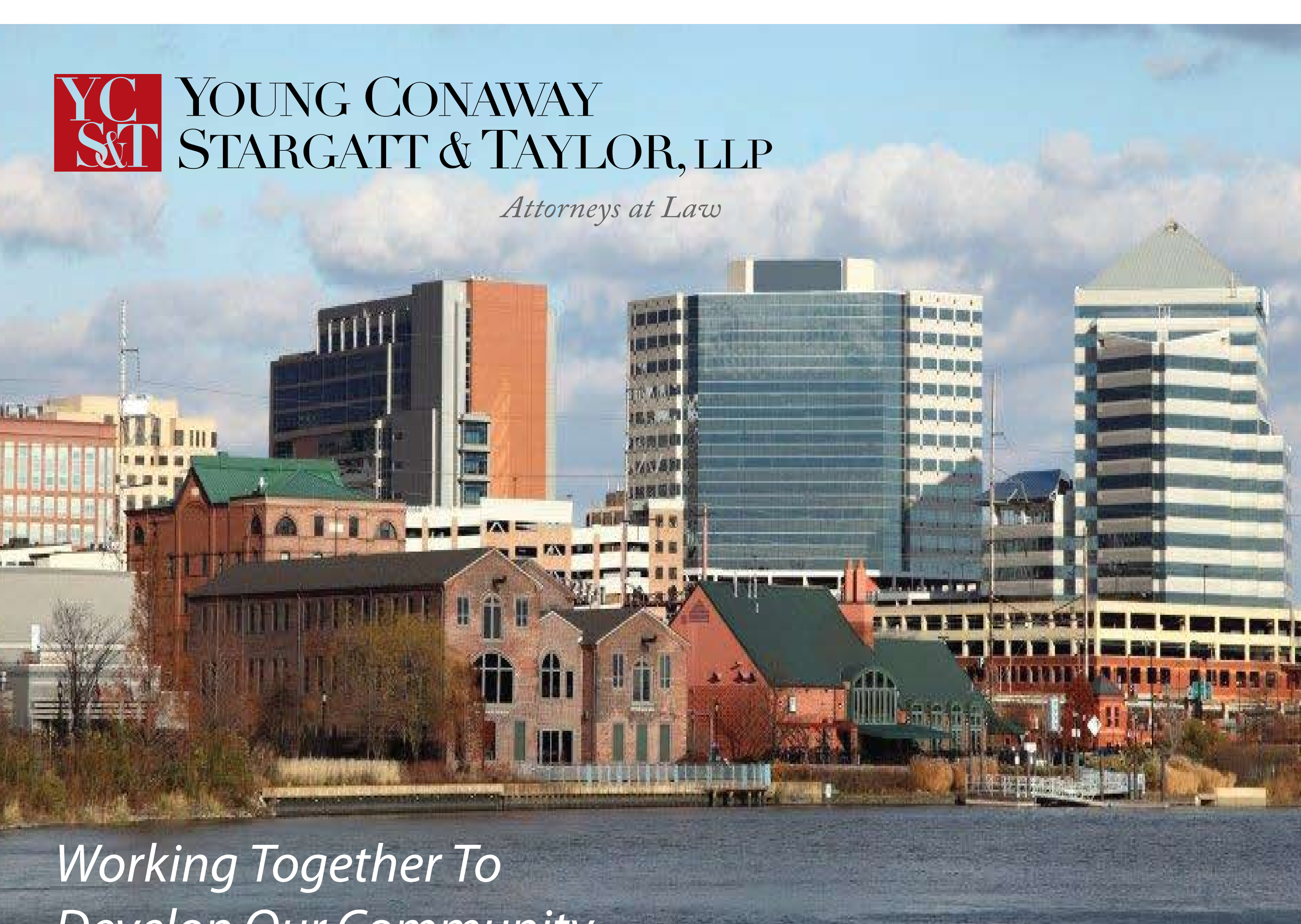

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