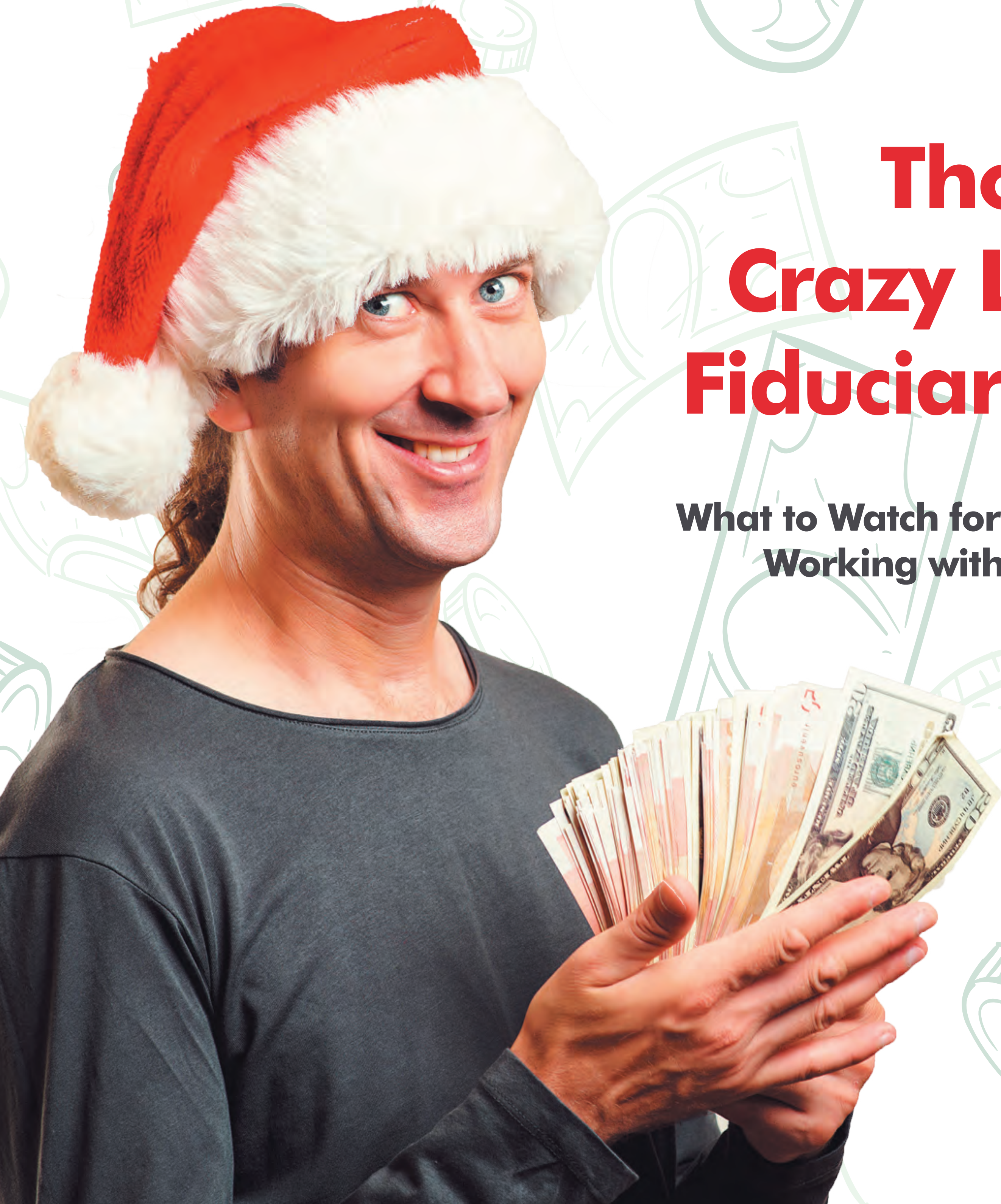
Delaware Banker

Fall 2019
Vol. 15 No. 4

Those Crazy Lay Fiduciaries

What to Watch for When Working with Them



For more than a century, we have helped individuals and families thrive with our comprehensive wealth management solutions. Let's work together to provide your clients with the resources to meet their complex needs.

For more information about how we can help you achieve your goals, call **Nick Adams** at **302.636.6103** or **Tony Lunger** at **302.651.8743**.

A deeper understanding™

WILMINGTON TRUST

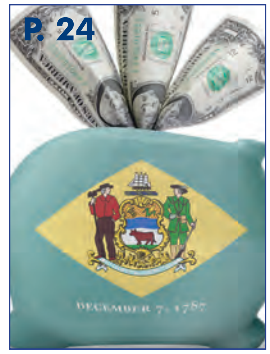
PART OF THE M&T BANK FAMILY

Delaware Bankers Association
The Delaware Bankers Association
P.O. Box 781
Dover, DE 19903-0781
Phone: (302) 678-8600 Fax: (302) 678-5511
www.debankers.com

Delaware Banker

Fall 2019
Vol. 15, No. 4

The Quarterly Publication of the Delaware Bankers Association



Contents

SUBMISSIONS
Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the publication date in accordance with the Association's needs. Direct submissions to Greg Koseluk at greg.koseluk@debankers.com

SUBSCRIPTIONS
Delaware Banker is available free of charge to all officers, executives, management, and key personnel of DBA members. Paid subscriptions to Delaware Banker are available to all others at a rate of $20 per year. To be placed on the subscriber list, please email Greg Koseluk at greg.koseluk@debankers.com.

ADVERTISING
Advertising inquiries should be directed to Greg Koseluk at (302) 382-6467 or greg.koseluk@debankers.com. Rates will be furnished upon request.

View from the Chair

by
Elizabeth D. Albano
Executive Vice President
Artisans' Bank

Chair
Delaware Bankers Association

"The coming year will feature a full schedule of exciting programs."

Remember The Wish Book? If you're under the age of 30, that might sound mystifying to you. If you're under 40, there might be a passing recollection. If you're over 40, The Wish Book should bring back some fond memories. The Wish Book was a special holiday catalog issued each year between 1933 and 2011 by Sears, Roebuck & Company.

In the days before online shopping, the retail mail-order catalog was truly the state-of-the-art marvel of the age, especially for rural residents. Each year the book was filled with an array of gift items to dazzle the readers. At its peak, The Wish Book ran well over 600 pages.

Why am I taking this trip down memory lane? Is it a long-felt yearning for that super mountain bike I saw so many years ago in the Wish Book, but never received? Not at all. I was thinking about the array of programs and services the DBA offers. And while they wouldn't fill a 600-page catalog, they are dazzling in their own right.

Starting 2020 off right, in January we will hold the first Women Connect event of the year. This one will be especially timely as it's an election year, and we've invited many legislators to take part. It's the perfect opportunity to engage, network, and connect, not only with your peers in the financial services industry but with Delaware's lawmakers. The event will be at the Delaware State Agricultural Museum in Dover. Keep an eye out for other Women Connect events in New Castle and Sussex Counties.

Also at the beginning of the year is the first in the 2020 series of Foundations of Delaware Trust courses. We're revamping the series. Previously, the sessions would be held in one month on consecutive Wednesdays. Starting next year, the courses will be spread out through the year, one each quarter. As in previous years, the faculty will feature the top subject matter experts in Delaware Trusts. The Foundations series is a marvelous way to teach your new trust employees and refresh the skills of your staff veterans.

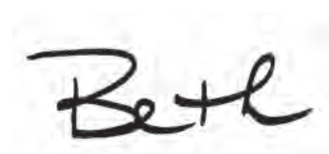
In April, we'll be celebrating our 22nd annual Teach Children to Save Day. Delaware is unique in the nation in regards to providing our bankers with creative and memorable books and lessons. This year will be no exception with another new book in the Great Investo series of money magic adventures.

May, of course, is the time for the DBA's Annual Meeting and Dinner. Mark your calendar now for May 14th, and note the new location: the du Pont Country Club. Our guest speaker will be Erin Arvedlund, financial journalist and author of the book about the rise and fall of Bernard Madoff, "Too Good to Be True." Her newest book, "Open Secret," documents the interest rate rigging scandals that emerged out of the 2008 financial crisis.

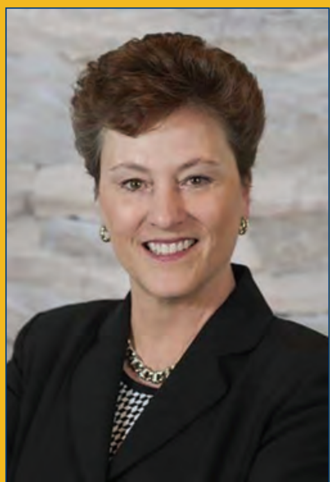
That only takes us through May! You'll also want to watch for the 2020 Delaware Trust Conference, October 19th and 20th at the Chase Center on the Riverfront; the 2020 Regulatory Compliance School; and many other events. The coming year will feature a full schedule of exciting programs. Maybe we do need a larger catalog.

Oh, and just so you know, I finally got that bike. Maybe some rollerblades next...

Wishing You All the best!



President's Report



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

"In the area of wealth management, it takes just the right mix of circumstances to produce quality trust products."

In May of 1933, Walt Disney released the eight-minute cartoon, "The Three Little Pigs." The short was a nationwide phenomenon. It ran for months in theaters when most shorts would run for a week, often billed on marquees above the feature film. The film's message, encapsulated in the hit song "Who's Afraid of the Big Bad Wolf," offered hope and encouragement to audiences wearied by The Great Depression. It went on to win an Academy Award.

I'm sure you've seen "The Three Little Pigs," and how they react differently to the threat of the wolf. The first builds a house of straw, which is quickly huffed and puffed down. The next relies on sticks for shelter, meeting a similar fate at the hands (or lungs) of the wolf. The third, named Practical Pig, wisely decides not to play around like his brothers, and constructs a brick house built to last!

In wealth management, there are plenty of Big Bad Wolves to go around. Taxes, laws, perpetuity issues are just the beginning of the challenges. And like those first two pigs, some states only play at providing safe shelters. Building something trustworthy, dependable, and lasting calls for just the right combination of materials and talent, which over time are perfected to endure. In the area of wealth management, it takes just the right mix of circumstances to produce quality trust products. The right legislative climate, attention to detail in drafting and updating trust laws, skilled professionals to guide clients, and manage assets with prudence and wisdom.

The fourteenth annual Delaware Trust Conference was filled with nationally renowned speakers and industry thought leaders who highlighted the unique advantages provided by Delaware trusts, which are the gold standard in wealth management. Wealth management professionals from across the region, the country, and the world came to the Delaware Trust Conference to learn first-hand the benefits of Delaware trusts, including tax advantages, creditor protection, flexible distribution rules, and others.

This year's conference was held again at the spacious Chase Center on the Riverfront. Over 450 attendees participated in dozens of sessions highlighting the latest information on "hot" trust topics, like working with international clients, elder financial abuse, the future of wealth is female, and the perils of social media, free speech, and online posting in business. A diverse selection of exhibitors perfectly complemented the panel presentations to provide a variety of wealth management options and solutions.

The Delaware Trust Conference Committee, led by Chair Mark Oller; Co-Chair Todd Flubacher; Past Chair Tom Forrest; and Trust Committee Chair Cindy Brown, combined with over twenty five of Delaware's top trust, legal and wealth management professionals to select topics and speakers to highlight many of the unique, time-tested advantages provided by the Delaware product. Each presentation featured subject matter experts on a wide array of topics, from the latest tax updates, to five generations co-existing in the trust and wealth management arena, to a special panel discussion featuring impressions from young professionals - what they have learned and what they are still seeking. We thank all of our committee members, liaisons, and presenters for sharing so freely their craftmanship.

To build something made to last takes a strong foundation, but also requires the means to sustain it. We thank all of our sponsors for investing in this year's Trust Conference. With their generous support, all things were possible.

Last but not least, please join me in thanking Greg Koseluk, Corinne Stayton, and Renee Rau, the DBA Master Builders, who spent countless hours crafting the 2019 Delaware Trust Conference to perfection.

So, who's afraid of the Big Bad Wolf? Certainly not those who bring their wealth management needs to Delaware. Our trusts are built to last!

What's New at the DBA

New Financial Institution Member

ADP Trust Company, National Association
Miranda Ko
President
302-657-2465
Email: miranda.ko@adp.com
ADP Trust Company acts as trustee for the ADP client trust, a trust established in early 2018. ADP Trust Company is a wholly owned subsidiary of Automatic Data Processing, Inc.

Bank of Ocean City
Reid Tingle
President & CEO
410-542-6144
Email: rtingle@bankofoceancity.com
www.bankofoceancity.com
The mission at Bank of Ocean City is to excel in services and advance the growth of our bank and community. The primary goal is to provide superior customer service while maintaining high standards of safety and soundness with cutting edge technology.

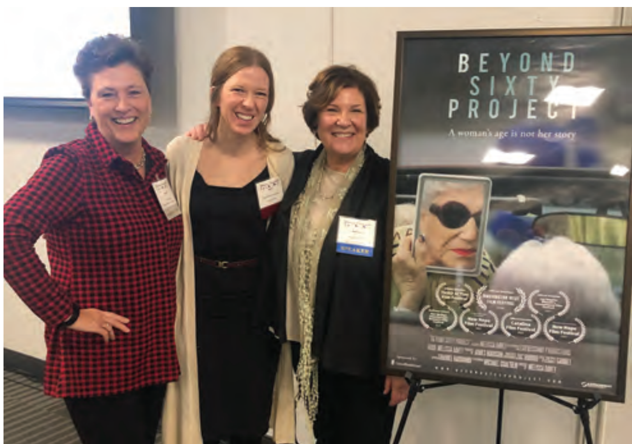
New Associate Member

Albero, Kupferman & Associates, LLC
Renee Villano, CPA
Partner
302-230-7171
Email: rvillano@aka-cpa.com
www.aka-cpa.com
Albero, Kupferman & Associates, LLC (AKA) is a full-service accounting firm located in Wilmington, DE. We offer an array of accounting and consulting services for businesses and individuals. We view our role as an advocate for our client's financial goals and business success. We view every client relationship like a partnership - one where we are their financial advocate. We look beyond the numbers, assess our clients' financial position, and suggest innovative ways to enhance their net worth, improve their profitability and preserve their accumulated wealth. AKA's mission "Thoughtfully serving others with traditional values and innovative ideas" has proven to be the building block for our team's success. We help our clients. We help each other. We help our community.

T21 Trustees, Inc.
George Hubbard
Co-Founder and CEO
212-542-4301
Email: ghubbard@T21trustees.com
www.T21trustees.com
T21 Trustees is a membership organization for independent professional trustees. Our members serve individuals and families looking for greater flexibility and control over their trust arrangements. A T21 Trustee member is an alternative to a bank or family member serving as a trustee or advisor; one who provides tailored solutions to administrative, investment and beneficiary distribution requirements. Its members are located throughout the country.

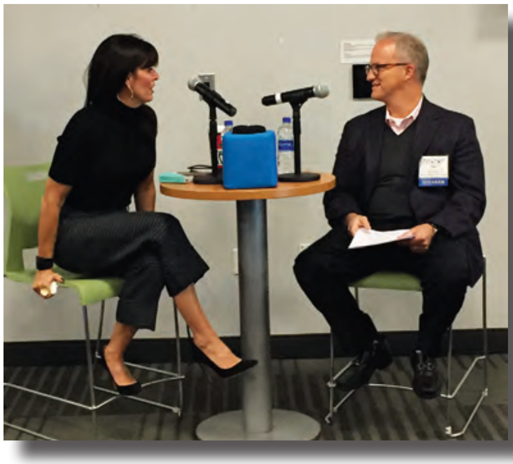
Year Up Wilmington
Brittaney Shade
Development Manager
302-379-4588
Email: bshade@yearup.org
www.yearup.org
Year Up is a one-year, intensive training program that provides talented and motivated, yet under-served young adults, ages 18-24, with a combination of hands-on skills development, coursework eligible for college credit, corporate internships, and wraparound support. For the first six months of the program, students develop technical and professional skills in the classroom. Students then apply those skills during the second six months on an internship at one of Year Up's corporate partners. Students take coursework eligible for college credit, earn an educational stipend, and are supported by staff advisors, professional mentors, dedicated social services staff, and a powerful network of community-based partners. Year Up's mission is to close the Opportunity Divide by ensuring that young adults gain the skills, experiences, and support that will empower them to reach their potential through careers and higher education.

Women Connect



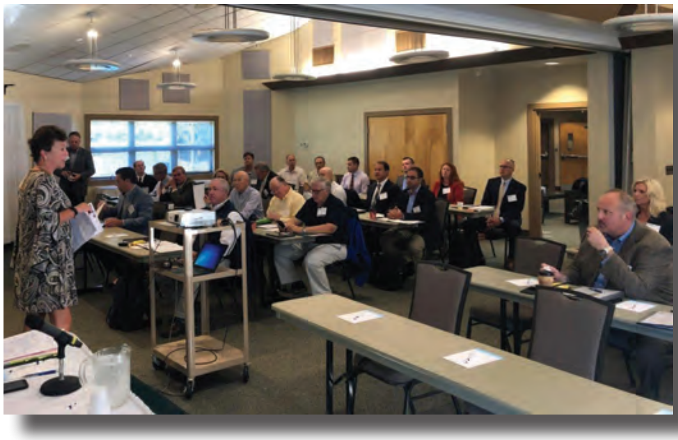
Sarah Long, DBA President; Jenn Walters-Michalec, Community Affairs, Capital One; and Filmmaker Melissa Davey at the Delaware Premiere of Beyond Sixty Project.

DBA's Women Connect convened November 7th and 8th in Lewes, Delaware. Thursday night featured a reception with filmmaker Melissa Davey and special screening of her film *The Beyond Sixty Project*tm," a documentary initiative about women over the age of 60. The next morning featured engaging speakers, including Susan Rocco, founder and host of "Women to Watch" Radio program, and Michelle DiFebo Freeman, the Founder and CEO of the Carl M. Freeman Foundation. Thank you to Platinum Sponsor, Capital One; Silver Sponsor, The Bryn Mawr Trust Company of Delaware; and, Bronze Sponsors: Brown Brothers Harriman; Charles Schwab Trust Company of Delaware; and, County Bank.



Michelle DiFebo Freeman is interviewed by Todd Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP, during the Friday session of Women Connect

FDIC Directors' College



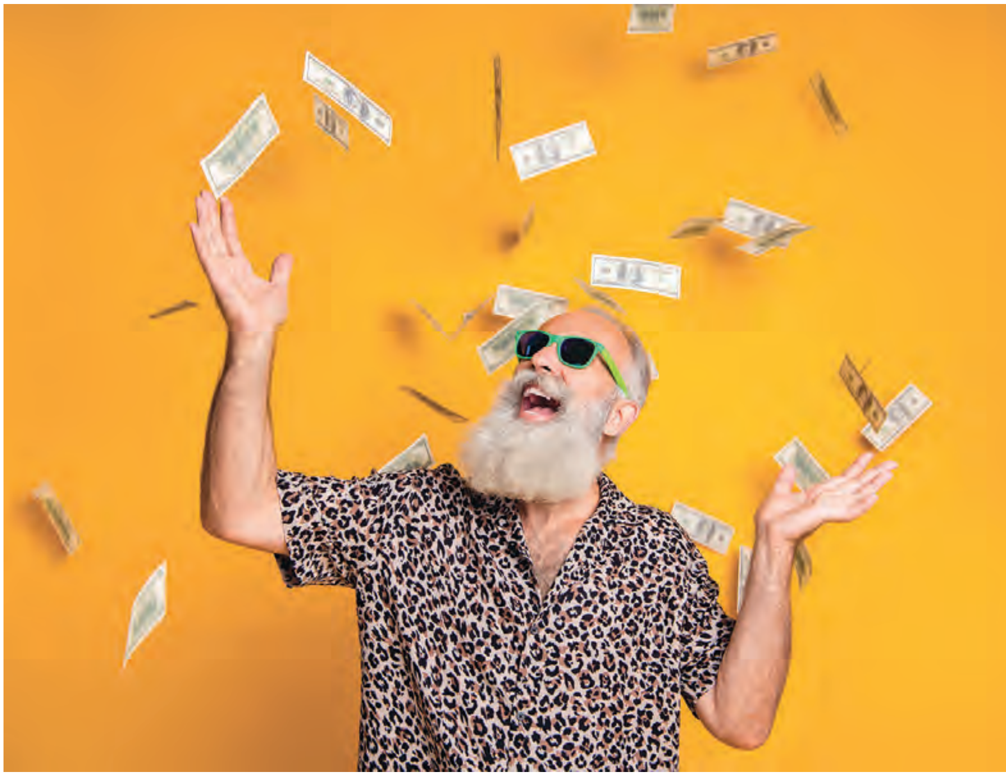
DBA President Sarah Long introduces the first panel at the 2019 FDIC Directors' College

The 2019 FDIC Director's College convened September 27th at the University of Delaware Virden Center, in Lewes. A full house of bank directors, senior officers, and board advisors engaged in the interactive program. This year's agenda included modules on: Conversation with Regulators; Liquidity Management; CRE Stress Scenario Analysis; and, Assessing Fintech Strategies.

Cover Story

Oh, Those Crazy Lay Fiduciaries!

What Professionals Should Watch When Working With Them



by
Gregory J. Weinig
Connolly Gallagher LLP

Your company is the trustee and the deceased grantor's doddering husband is the co-trustee. Or your company is the directed trustee, with Uncle Louie—self-styled venture capitalist and legend in his own mind—as the investment advisor. Or your company is the sole trustee, but the grantor's daughter, ever-fickle, was the questionable choice as trust protector.

But, you and your company are professionals, and you know how to cope with these situations. The trust's governing instrument looked solid to you and your colleagues after careful review, when your company agreed to serve as trustee. Plus, you've got many Delaware statutes aligning with the governing instrument to protect you. You're all set, right?

Yes, legally—but maybe not practically speaking. There are at least two reasons for this. The first is that not only are lay fiduciaries not "professional," but also they often have some personal interest in the trust or a relationship to one or more of its beneficiaries. The second reason is the old wisdom about lawsuits: you can't prevent people from filing them, but you can do your best to minimize that possibility, and to minimize the plaintiffs' possibility of success if they do. One way to do that is to watch out for the foibles of the very human lay fiduciaries who may play a role in the trust your company is administering. Several cases from Delaware and other jurisdictions over the last decade illustrate this.

At first glance, the task might seem easy—just prevent the greedy lay fiduciary from looting the trust. One can only wish there had been a professional fiduciary somewhere in the picture in the tragic *Hardy* case.[1] A sexual abuse victim placed a large cash settlement in trust, naming his sister and nephew as trustee. From an original settlement amount of about $345,000 in late

October 2011, by the end of that November about $160,000 remained in the trust; by the end of December about $98,000 remained; by the end of February 2012 (when suit was filed) about $34,000 remained; and by the end of March 2012, about $3,000 remained. In addition to squandering the trust assets under their charge (spending it on themselves, particularly for cars and various real estate investments), the lay trustees also (among other actions) had the reliant beneficiary sign broad unconscionable prospective waivers, and manufactured records after discovery requests were made.

In our little state alone, though, recent cases illustrate that it isn't just simple greed (as in *Hardy*) that you, the professional fiduciary, should watch out for in your lay counterparts. Their motives can vary as much as human beings themselves. In the *Paradee* case,[2] the decedent's second spouse did her level best to badger the lay fiduciary (her insurance broker) to terminate—and when that didn't work, to render valueless through large loans against the underlying insurance policy's cash value—an insurance trust for the benefit of the decedent's grandson by the decedent's first spouse. After the broker died, she became the trustee. The court found that she "consciously, intentionally, and vengefully refused to take any action to protect or preserve the [underlying insurance policy] because she did not want [the grandson] to benefit." The tricky element here was that she didn't want or need the money she was siphoning out of the trust. In other words, there was no obvious "greed" motive on the part of the lay fiduciary that a professional fiduciary (had one been involved) could have readily spotted. Instead, she simply disliked her husband's grandson, and resented the existence of a trust that would provide financial benefits to him.

As another example, consider the individual trustee in the *Mennen* decision,[3] whose aims the Master in Chancery described thusly:

> [M]ost of the transactions were motivated by something far more amorphous, but much more pervasive: pride. That is, because most of the trustee's personal fortune was out-of-reach in his own trust, the trustee turned to his brother's trust as a piggy bank he readily opened to fund a few private companies in which the trustee had invested his time and on which he had staked a claim that he was uniquely skilled at selecting and advising small fledgling companies that he could turn into the "next big thing." Certain that fortune and acclaim were around the bend, the trustee eschewed the interests of the beneficiaries in favor of subsidizing his self-aggrandized standing as a financier.

Here again, the "deadly sin" involved wasn't greed—it was pride.

Two recent decanting cases from New England have received national attention, and they're also instructive for professionals regarding lay fiduciary motivations. In the *Hodges* case out of New Hampshire,[4] the lay fiduciary (an employee of the grantor's company) would "hop off" as co-trustee so that the grantor's

Continued on p. 12

(continued from p. 11)

lawyer could "hop on" in his place to perform the decanting, after which the grantor's lawyer would "hop off" and the lay fiduciary would "hop back on" again. This happened twice. It's a little unclear whether the other usual trustee (who was also a lawyer) should be considered "lay" or "professional" here. Regardless, there was abundant evidence that the grantor (whose feelings about certain beneficiaries had changed over the years) masterminded the decantings, and that all of the fiduciaries simply rolled over to allow them to happen. Similarly to *Paradee*, the motivation was the grantor's dislike of the beneficiaries. And the twist here is that the lay fiduciaries' collective foible was an inappropriate level of loyalty to the grantor (rather than some negative emotion directed at one or more beneficiaries).

The other recent decanting opinion from east of the Hudson is the *Ferri* decision,[5] involving a Massachusetts decanting amidst a Connecticut divorce. The lay fiduciary (brother and business partner of the beneficiary) decanted his brother's trust when he learned of the brother's pending divorce—even though the beneficiary-brother could withdraw 75%, and later all 100%, of the trust at the time. In upholding the decanting, the Massachusetts high court depended on the Connecticut high court's recitation of (in turn) the Connecticut divorce court's finding that the beneficiary-brother hadn't consented to (or even been informed of) the lay fiduciary's decision to decant. Despite the Connecticut divorce court's "non-collusion" finding, the lay fiduciary's motivation—similar to that in *Hodges*—was loyalty (in this case, to the beneficiary rather than to the grantor). The Massachusetts high court upheld the decanting, but imagine the hesitation a professional fiduciary might have had were it involved in this case in some way.

These cases also demonstrate that often, trust instruments and statutes can only be as protective as those who are implementing them are inclined to be. Institutional limits of professional fiduciaries—regulatory, inherent checks-and-balances of more than one decision-maker, etc.—will usually supply key controls against the mis-exercise of fiduciary powers. But a lay fiduciary won't have those sorts of controls, and therefore might be more susceptible to ignoring fiduciary duties and abusing fiduciary powers.

The most basic example is a fiduciary's simple legal authority over assets. If the sole fiduciary of a trust withdraws money from the trust account, there is nobody to tell him what he can or can't do with the money before the fact. Before malfeasance occurs, one can only hope that the grantor selected the right fiduciary, one who understands her moral and legal obligations. Only after an act has occurred can a beneficiary or a court react. Other authority that a faithless fiduciary might abuse include providing information to beneficiaries, sale and investment powers, and distribution authority. The "hop-on, hop-off" decantings in *Hodges* immediately come to mind. Realizing the scope of the raw power held by a lay fiduciary should give pause to the professionals who are working with that lay fiduciary.

Once on higher alert as to what lay fiduciaries might do and why they might do it, the professional trustee should monitor acts or proposed courses of action of a lay fiduciary that may raise suspicions. Even though a directed trustee, for example, has no obligation to second-guess direction or to monitor or warn beneficiaries,[6] the directed trustee may still sound the alarm if warranted. More succinctly, "has no duty" or "isn't liable" does not mean "shall not."

Some might argue that the duty of a directed trustee to follow investment direction might provide the "shall not." But if you, as a professional trustee, have the deepest concerns about a lay fiduciary's proposed or apparent behavior, should you really stand idly by? There could be situations whereby, in this writer's view, your company's risk of not following direction is surpassed by the risk to the beneficiaries and to your company of following direction. If your team thinks whistleblowing—whether to beneficiaries, a Trust Protector, or even a court—is the best way to protect your company or the beneficiaries, speak up. And don't forget the Delaware statute that is one of a professional fiduciary's best friends, yet isn't even found in Title 12—the petition for instructions statute (10 Del. C. § 6504).[7] Use it to your advantage if you have to. And in the meantime, keep an eye on those lay fiduciaries.

Gregory J. Weinig is a partner practicing in the areas of trusts and estates, including trust and estate planning, trust and estate administration, and trust and estate litigation. He is a Fellow of the American College of Trust and Estate Counsel (ACTEC), serving actively on its Fiduciary Litigation Committee. Greg works with an array of clients with diverse needs in trust and estate planning and administration, bringing his significant experience in trust and estate litigation matters to bear on his planning and administration activities. His trust and estate drafting and administration activities include work for clients across a wide spectrum of needs and complexity, residing both locally and across the country, the latter particularly including dynasty trusts, asset protection trusts, directed trusts, and other trust planning typically associated with a Delaware practice.

Notes:

1- *Hardy v. Hardy*, 2014 WL 3736331 (Del. Ch. July 29, 2014).
2- *Paradee v. Paradee*, 2010 WL 3959604 (Del. Ch. Oct. 5, 2010).
3- *Mennen v. Wilmington Trust Co.*, 2015 WL 1914599 (Del. Ch., April 24, 2015).
4- *Hodges v. Johnson*, 177 A.3d 86 (N.H. 2017).
5- *Ferri v. Powell-Ferri*, 72 N.E.3d 541 (Mass. 2017).
6- *See, e.g.*, 12 *Del.* C. § 3313.
7- *See In re Trust u/a McKinley*, 2002 WL 31934411, at *4 (Del. Ch. Dec. 31, 2002) ("Manifestly, a trustee is entitled to seek judicial instructions on issues that concern the administration of the trust," *citing Scott, The Law of Trusts* § 188.4, n.12).

Tobacco Road Paved with Opportunity and Uncertainty

by
Peter Desmond Hopkins, CPA, MS
Kim Zarett, CPA, MS
Marie Holliday, CPA, MBA
Cover & Rossiter

The U.S. Supreme Court's June 2019 unanimous decision in North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust opens the door to tax refund claims and planning opportunities for many trusts with North Carolina resident beneficiaries. Because the Court's opinion is limited in scope, it raises as many questions as it resolves.

Background

Joseph Lee Rice III, a New York domiciliary, created a pot trust in 1992 for the benefit of his children. The trust was governed by New York law and gave the trustee absolute discretion to make distributions to the beneficiaries in such amounts and proportions as the trustee might from time to time decide. After one beneficiary, Kimberley, moved to North Carolina in 1997, the trustee divided the pot trust into three subtrusts, one of which was the Kimberley Rice Kaestner 1992 Family Trust. Kimberley Rice Kaestner and her children were the only permissible beneficiaries of the new subtrust.

From 2005 through 2008, the years at issue in the case, the trustee was a Connecticut resident. The trust's assets were held by a custodian in Massachusetts. The only in-person contacts between the trustee and Kimberley Rice Kaestner were two meetings held in New York, where the trust's legal documents and records were maintained. The trust had no physical presence in North Carolina, did not make any investments in the state and did not own any real estate there.

No distributions were made from the trust between 2005 and 2008. Nevertheless, North Carolina law taxes trusts on any income that is for the benefit of North Carolina residents. Since all the permissible beneficiaries lived in North Carolina, the Department of Revenue assessed tax on all the trust's income in those four years.

The trustee paid the bill, which exceeded $1.3 million, under protest and sued for a refund.

The trustee successfully argued in the state trial court that the tax violates the Due Process Clause of the Fourteenth Amendment. Appeals by the Department of Revenue to the North Carolina Court of Appeals and the North Carolina Supreme Court both failed. The Department appealed to the U.S. Supreme Court, which granted certiorari.

Supreme Court Opinion

Citing its 1992 opinion in Quill v. North Dakota, the Court mentioned two prongs, both of which must be satisfied, required by the Due Process Clause before a state can assess tax. The first of these, the only one addressed by the Court, requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

The Court described several connections a trust or its income may have with a state, including distributions to a state resident, residence of the trustee, place of administration of the trust, investments in the state and residence of the settlor. Finding that none of these existed between the trust and North Carolina, the Court held that "the presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it."

The Court limited its holding to the facts that were before it. The holding does not imply approval or disapproval of a state tax on trust income premised on the residence of the beneficiaries, if the relationship between those beneficiaries and the trust's assets differs from the facts presented in the Kaestner case.

In analyzing the relationship between a beneficiary and the assets of a trust, the Court focused on the beneficiary's ability to possess, control or enjoy the trust's property and on the rights a beneficiary may have to demand or receive such property. The Court noted that had the Kaestner Trust beneficiaries received any of the trust's income, such income would have been taxable by North Carolina.

The Court mentioned that not only did the trustee have absolute discretion over distributions, but there was explicit authorization to favor one beneficiary over the others in making distributions. Of course, this could have the effect of cutting one or more beneficiaries out of the trust and would, at the very least, reduce the interests of the beneficiaries not receiving such distribution.

The trustee made all investment decisions for the trust. The Court found this fact relevant enough to mention it, implying that a beneficiary with the power to direct investments may be regarded as having control over trust assets.

The Court also mentioned that the trust's spendthrift clause, which prohibited the beneficiaries from assigning any right they might have to the trust property, prevented the beneficiaries' interests from becoming like a source of wealth that was property in their hands.

(continued on p. 16)

(continued from p. 15)

Although the trust was to terminate in 2009, on Kimberley Rice Kaestner's 40th birthday, the trustee had the power to roll the funds into a new trust, and he did so. This led the Court to conclude that the beneficiaries could not count on receiving any specific amount of trust income in the future. The Court noted that it was not addressing whether it would have reached a different conclusion, if the beneficiaries were certain to receive funds in the future.

Refund Opportunities

Most Delaware bankers serve trusts with North Carolina resident beneficiaries. Some of these trusts may be entitled to file refund claims for North Carolina taxes paid in previous years based on the decision in the Kaestner case. In general, a refund claim may be filed within three years of the due date of the return or within two years of payment of the tax, whichever is later. If the trust timely filed a notice of contingent event with the North Carolina Secretary of Revenue, a refund claim may be filed for earlier years.

If a client's fact pattern does not exactly match Kaestner, Delaware trustees should seek the advice of a competent tax adviser. Many trusts with different fact patterns have already filed refund claims, but it is not yet known at the time of this writing how the North Carolina Department of Revenue intends to administer the Kaestner opinion. The Department must weigh its duty to collect the proper amount of state income tax against the risk of further litigation. For example, it is unknown whether the Department would consider a trust lacking a spendthrift clause but otherwise identical to the Kaestner Trust as subject to tax on its income that is for the benefit of North Carolina residents. Of course, the more a trust's fact pattern differs from Kaestner, the more likely the state will seek to tax it. A competent tax adviser can help the trustee make a decision about whether to file a refund claim and what to disclose in that filing.

Uncertainties

Commentators have drawn different conclusions about what the Kaestner decision means regarding North Carolina's ability to tax the income of trusts whose fact patterns differ from that described in the case. The most significant difference is with regard to distributions.

Since the Court limited the application of its decision to the facts of the case, and since the Kaestner Trust made no distributions during the years at issue, it is arguable that North Carolina law remains valid, if a trust makes any distributions. Under such interpretation, a trust reporting $100,000 in ordinary income, all of which was distributed to a North Carolina resident beneficiary, could be taxed on $10 million (or any amount) of undistributed capital gains. In other words, a single drop poisons the entire well.

The authors read the plain language of the Court's holding differently. Specifically, the Court said, "The presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it." Instead of saying that the holding applies to trusts with in-state beneficiaries who have not received distributions, the Court focused on the income that is not distributed or subject to demand. It is well settled that a state may tax trust income received by a beneficiary. However, provided the beneficiaries lack a right to demand income and are uncertain to ever receive it, we believe the Kaestner opinion supports the conclusion that North Carolina cannot tax undistributed income.

Consistent with our reading of the opinion and the Court's statement that had the Kaestner Trust beneficiaries received any of the trust's income, such income would have been taxable by North Carolina, we also believe the Kaestner decision does not necessarily insulate trusts from North Carolina income tax, even if the trust's only connection to the state is a resident beneficiary. For instance, a trust with $100,000 of ordinary income and $1 million in capital gains that distributes $300,000 to a North Carolina resident beneficiary can be taxed by the state on $200,000, the difference between the $300,000 the beneficiary received and the $100,000 on which the beneficiary was taxed. The remaining $800,000 of the trust's federal taxable income comprises income the beneficiary did not possess, control or enjoy and which the beneficiary had no right to demand or receive. To the extent principal is received by a North Carolina resident beneficiary, capital gains realized in the same tax year are possessed and enjoyed by the beneficiary, even if the distribution is made from corpus, and the capital gains are excluded from distributable net income.

The volume of elements mentioned in the Court's opinion means many trusts will vary slightly from the Kaestner fact pattern, and more will differ greatly from it. There is no bright line dividing trusts that are not exact matches between those that may and may not be taxed. It is possible the North Carolina Department of Revenue will take the position that all trusts that are not exact matches may be taxed on all their income that is for the benefit of North Carolina residents.

Monitoring a trust's connections to North Carolina has now become an ongoing process Delaware trustees should adopt. There are several steps Delaware bankers can take to achieve tax efficiency for their trusts with North Carolina beneficiaries. Most important among these is avoiding physical presence in North Carolina. A Delaware trustee should never meet with a settlor or beneficiary in North Carolina. No trust administration should take place in North Carolina, and no trust assets or records should be kept there. Even if the rest of the fact pattern matches Kaestner, physical presence alone establishes a definite link that satisfies the first prong of the Due Process Clause.

A North Carolina resident beneficiary should never make investment decisions, since the beneficiary may be regarded as controlling or enjoying the assets. If the trust owns a single-member limited liability company (SMLLC), the beneficiary controls the assets inside the SMLLC, if the beneficiary is the manager of the entity. Therefore, this should be avoided.

Trustees are advised not to make loans of trust funds to North Carolina resident beneficiaries. Doing so may be regarded as giving the beneficiary enjoyment of the trust assets and thereby subject the trust's income to tax, even if the loans are on arm's length terms.

Investments in North Carolina must be avoided. This includes real estate as well as personal property regularly stored in North Carolina. Investments in passthrough entities that are doing business in North Carolina should be avoided as well, since the characteristic of being engaged in business in the state may attach itself to the trust. If the trust forms an SMLLC, it should be organized in another state like Delaware, so the trust is not regarded as accessing North Carolina's services or protections.

The Kaestner decision has a dramatic impact on how North Carolina taxes trusts. This may mean the state legislature will replace the premise used to determine taxability with something completely different. Delaware trustees should rely on their trusts' tax advisers to monitor developments.

Planning Opportunities

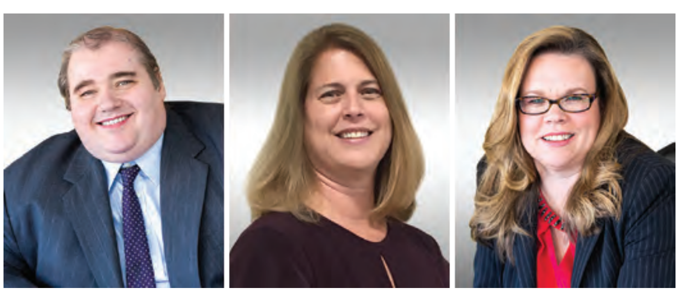
Amendment of governing instruments to make fact patterns more closely match the Kaestner Trust may be helpful to some existing trusts. For instance, a trust without a spendthrift clause may be able to add one to its governing instrument. Delaware trustees should explore these possibilities with their trusts' attorneys.

Making distributions to North Carolina resident beneficiaries in years in which the trust has no capital gains could result in state income tax savings. Consultation with a tax adviser before discretionary distributions are made will help a Delaware trustee make the right choice about the timing.

Conclusion

The Kaestner case provides a roadmap that can be followed in drafting or modifying a trust for the benefit of North Carolina resident beneficiaries. Significant state income tax savings are possible, and Delaware bankers should team up with attorneys and tax advisers to achieve tax efficiency in harmony with terms that reflect the settlor's wishes.

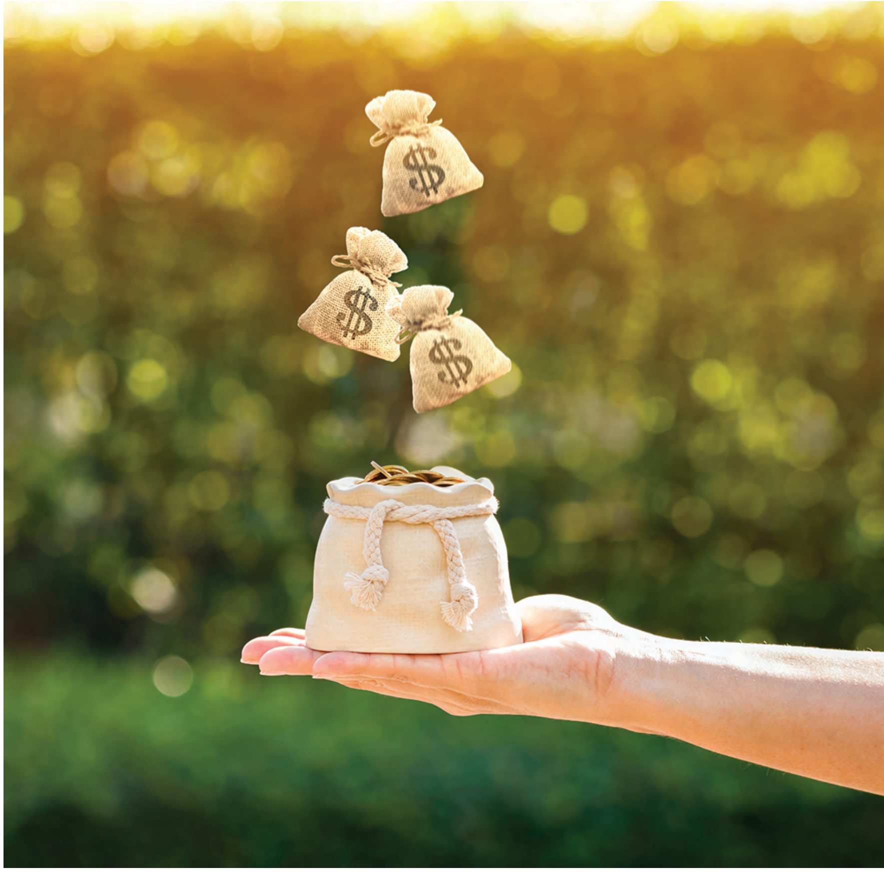
DB



Peter Hopkins is a Tax Manager, Kim Zarett is a Principal of the Firm and Marie Holliday is the Managing Partner at Cover & Rossiter. Cover & Rossiter is a full-service CPA & advisory firm in Delaware, providing tax, audit, trust and accounting services to individuals and families, businesses, nonprofits, and captive insurance companies. The firm was honored with the 2018 Marvin S. Gilman Superstars in Business Award by the Delaware State Chamber of Commerce. The firm recently became certified as a Women Owned Business. It prides itself on being Future-ready.

Charitable Giving

Tax-Advantaged Giving with Maximum Charitable Impact



by
Stuart Comstock-Gay
President and CEO
Delaware Community Foundation

When your clients' financial goals include philanthropy, the Delaware Community Foundation (DCF) can help you make their charitable giving simple, joyful and powerful.

Since 1986, the DCF has worked hand in hand with professional advisors to help clients achieve their charitable goals as part of a holistic approach to financial planning.

Under the DCF's stewardship and management, charitable funds established by generous people grow and channel money into the community, in the form of grants and scholarships that expand opportunity and transform lives, now and in the future.

By working with financial planners, estate attorneys, accountants and other advisors, the DCF provides charitably inclined people with the power to make a lasting impact. From donor advised funds to charitable remainder trusts, we know philanthropy – and we know how to help your clients make the charitable impact to which they aspire.

Earlier this year, Tony Lunger, market manager for Delaware Wilmington Trust Wealth Advisory Services, and his client Bart Dalton, Esq., lead lawyer and director of Dalton and Associates, began working with the DCF to maximize Dalton's philanthropic impact. We sat down with them to talk about their experience with the DCF.

Defining a Strategy for Giving

When Lunger's boss retired in 2004, he took on a number of her relationships, including Bart Dalton and his family, who had been Wilmington Trust clients since the late eighties.

For a long time, Dalton gave to charities as many people do, one donation at a time. Then, as his law firm began to take on more major national cases, he was in a position to think more seriously about philanthropy. He had a conversation, first with his accountant and then with his banker, about increasing his giving and doing it more strategically.

Dalton knew starting a private foundation wasn't going to work for him because of the many administrative requirements. When his accountant and banker both told him about donor advised funds, it seemed like a perfect fit.

"I went to the people I trust," Dalton said, "which were the Wilmington Trust people, to say 'Where should I do this?' They immediately talked about the Delaware Community Foundation, and after doing some due diligence, came back to me and said, 'We really think the DCF is the best place for you to be.' I looked everything over and agreed with them."

Unlike a private foundation, which involves significant start-up costs, annual costs including legal and other miscellaneous fees, full responsibility for managing investment, and a tax of 1-2 percent on net investment income, a donor advised fund is a public charity with more generous tax deduction limits for gifts of cash, stock and real estate.

"There are lots of hurdles to be met with private foundations," Lunger said, "which is why Wilmington Trust has a whole group that does foundation administration. It's complicated, especially the taxes. A donor advised fund seemed to be the best fit for what Bart was trying to accomplish."

A donor advised fund at the DCF includes all record keeping and accounting, various investment options, and access to a wealth of community and grantmaking expertise.

"The DCF is a prominent institution in this community," Lunger said, "I consider the DCF to be synonymous with donor advised funds. We know there are others, but the DCF has been doing this for a long time and has a great reputation."

Community-Powered Giving

Nationwide, community foundations like the DCF are grantmaking public charities dedicated to improving the lives of people in a defined local geographic area. They bring together the financial resources of individuals, families and businesses to support effective nonprofit causes and organizations in their communities.

Community foundations play a key role in identifying and solving community problems. In 2017, community foundations gave an estimated $5.48 billion in the United States to a variety of nonprofit activities in fields that included the arts and education, health and human services, the environment and disaster relief.

The Delaware Community Foundation was conceived in 1985, when Pierre S. duPont III, an active board member of the United Way of Delaware and the Longwood Foundation, realized that the charitable needs of Delaware's nonprofit agencies and institutions were more than existing resources could support. Concerned that most fundraising was for current operating needs and none for endowments to meet future needs, duPont recruited 19 community leaders to create the DCF.

Today, the DCF holds approximately $280 million in charitable assets and is among the largest community foundations in the country.

"What differentiates the DCF from commercial financial institutions offering charitable funds is our community knowledge and relationships," said Joan Hoge-North, DCF vice president for philanthropy. "By offering data and insights into key community issues and facilitating beneficial partnerships, we empower philanthropists to maximize their impact."

A Vision for the Future

Dalton came to the DCF with a strong sense of his philanthropic goals, a deep knowledge of the organizations he makes grants to, and a long-time relationship with his investment advisors.

The donor advised fund Dalton set up at the DCF allows him to support the causes he's most passionate about, education and criminal justice reform, with grants to Nativity Prep, the Ministry of Caring, the Equal Justice Initiative, the Foundation of the American College of Trial Lawyers, the Beau Biden Foundation and others.

When asked what inspires him to give, Dalton said, "I think it starts with the idea that we've been incredibly lucky. For example, people my age say they paid their way through college as if that was some great accomplishment. It was not, it was cheap. When I went to a private Catholic college in Philadelphia, it was $1,400 a year. I could make that working a summer job and a little bit during the year – it was no big deal. And most people I knew were doing the same thing. You can't do that anymore; it's impossible. People are in circumstances where they're making career decisions based on the

(continued on p. 20)

(continued from p. 19)

inability to afford anything else. I can't solve that problem, but I can help some individuals by funding scholarships and organizations."

Dalton's desire to help others reflects the primary reason people give, Lunger said, even outweighing tax deductions.

"First and foremost, philanthropy satisfies a basic human impulse to help and to give back," he said. "There are financial benefits derived from philanthropic strategies that appeal to people, but even in the wake of recent changes to the tax laws that have reduced those benefits for some, we haven't seen a big downturn in giving."

Dalton and Lunger agreed that tax benefits are only part of the motivation for giving. "You could just hand the IRS a check and not have any liability," Dalton said, "but there are so many good people out there who could use just a little bit of help. And it's a wonderful thing if you've been put in a circumstance where you can help things here and there."

Through the donor advised fund, Dalton said, he gets to have a very hands-on approach to helping others. He appreciates the DCF's easy-to-use online donor portal, which makes it simple to incorporate his DCF fund into his broader investment strategies. For donors who want to explore different opportunities to give, beyond their usual favorite charities, the DCF team offers expertise in ways to make a difference in the community, Hoge-North said.

"The DCF can meet investors where they are to provide as much or as little advising as they need," she said. "Many clients are looking for ways to maximize the impact of the charitable dollars they have available to give, and we help them find ways to partner with other donors, identify effective programs in need of funding, and share other opportunities to get the greatest bang for the buck."

Establishing a Legacy of Giving

An important part of giving for Dalton is establishing a legacy for future generations of his family. His goal, he said, is to have his three grandchildren sitting around a table together making decisions about the fund he has set up, still involved in helping the community in an ongoing way and understanding what we all get out of philanthropy.

Wilmington Trust does a lot of work with family governance, Lunger said. "We've always found that philanthropy is one of the best nexuses for families to talk together about finances," he said. "They learn how to communicate about money, and their children aren't talking about money for the first time the day something bad happens."

For clients looking to establish a lasting legacy, an endowed fund is a great option. An endowed fund becomes a permanent, self-sustaining source of funding for nearly any charitable cause or organization your client chooses — in Delaware or around the nation. Many types of endowed funds exist, including donor advised, scholarship and designated funds.

Individuals, families and organizations can start an endowed fund at the DCF with just $15,000 (scholarship funds require $25,000). The DCF Investment Committee is responsible for implementing our investment policy. To manage funds most effectively, the DCF has engaged SEI to serve as our outsourced chief investment officer. This means SEI serves as an extension of the DCF staff and our local Investment Committee, providing world-class investment expertise and constant focus on managing the charitable funds entrusted to us.

Advisors or clients can use the endowment calculator on the DCF website to see how a charitable fund could grow and generate more money for the causes the client cares about.

"The DCF works very closely with clients' advisors," Hoge-North said, "and we often partner for the long term to help create a customized plan to help achieve a client's unique charitable goals, realize tax benefits and maximize impact."

Join the DCF's Charitable Partners Program

To strengthen your charitable giving services even more, join the DCF's renewed Charitable Partners Program, which makes it possible for you to continue managing client relationships and assets while the DCF becomes the charitable arm of your professional team.

The DCF can enhance your client services in a variety of ways:

- Providing community knowledge and relationships to help your clients achieve their charitable goals.
- Creating charitable funds, including donor advised funds.
- Exploring options for impactful philanthropic giving while maximizing tax savings.
- Accepting gifts of real estate, including homes, office buildings and land.
- Establishing life income gifts, including charitable gift annuities and charitable remainder trusts.
- Assisting with bequest language for estate plans to benefit a DCF fund.

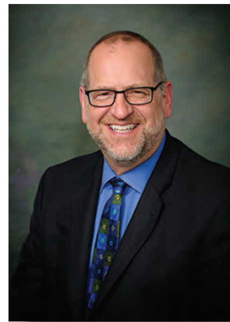
Your clients will appreciate:

- Immediate tax advantages.
- Highly personalized service from people who are passionate about Delaware.
- Access to expertise and relationships to maximize the impact of their charitable giving in Delaware and around the nation.
- A place in our community of givers, including opportunities to learn about community needs and how to help improve the lives of others.
- Continuing to benefit from your trusted advice.

To join the Charitable Partners Program, complete our online application. All members of the Charitable Partners Program are listed on the DCF website, even before they have an active client. Once you have joined, you can:

- Create and name your Partner Pool with a minimum $250,000 donation, from one or more clients. The DCF becomes your client and opens an investment account with you.
- Design an investment strategy for the Partner Pool in alignment with the DCF Investment Policy.
- Manage the assets and earn fees. Investment managers participating in the Charitable Partners Program continue to earn their standard management fees on the assets in the Partner Pool. The DCF handles all administrative requirements of the charitable fund and applies a standard administrative fee.
- Encourage other clients to join your pool. After the initial $250,000 Partner Pool is established, clients may be added to the Pool by giving as little as $15,000 or $25,000, depending on the type of charitable fund they establish. Your clients may even establish legacy funds, which require no immediate financial gift. The DCF will also work with you to produce informational materials to use with your clients.

To learn more about how the DCF can help you enhance your services and maximize your clients' charitable giving, contact Joan Hoge-North at 302.504.5224 or jhoge-north@delcf.org. Visit our website at delcf.org, where you can find resources for professional advisors and an online application for our Charitable Partners Program.



Stuart Comstock-Gay is president and CEO of the Delaware Community Foundation, where he leads the team's work to improve quality of life in Delaware by empowering and growing philanthropy through knowledge and relationships. Comstock-Gay has spent his entire career addressing issues of community, democracy and civil rights, both in philanthropy and civil rights work. Before joining the DCF in 2016, he served as president and CEO of the Vermont Community Foundation and spent seven years in various leadership positions at the New Hampshire Charitable Foundation. He previously led the Democracy Program at Demos in New York, the National Voting Rights Institute in Boston, and the Maryland affiliate of the ACLU.

Special Section

2019 Delaware Trust Conference

Platinum Sponsor

WILMINGTON TRUST

Diamond Sponsor

GLENMEDE
Founded on ideals. Built on ideals.

Gold Sponsors

The Bryn Mawr Trust Company of Delaware
Connolly Gallagher LLP
Gordon, Fournaris & Mammarella, P.A.
McCollom D'Emilio Smith Uebler LLC
Morris, Nichols, Arsht & Tunnell LLP
Richards, Layton & Finger, P.A.
Young Conaway Stargatt & Taylor, LLP

Silver Sponsors

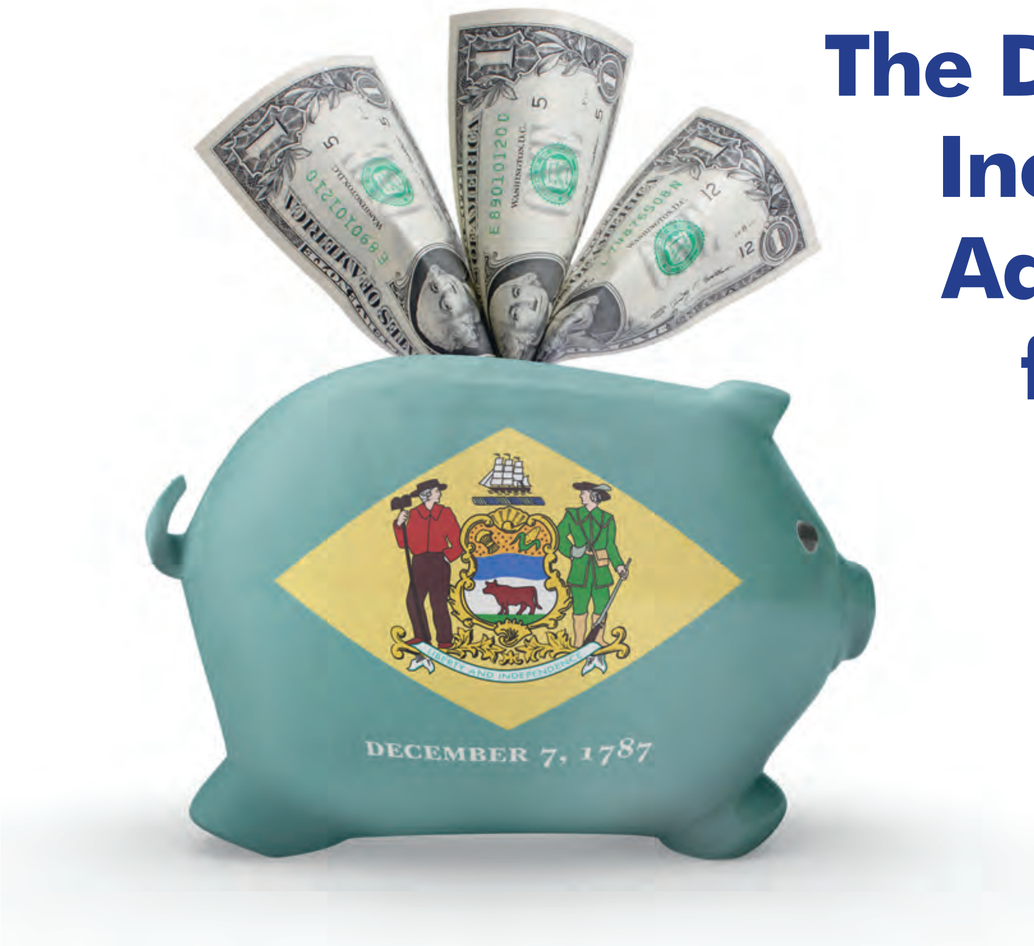
BNY Mellon Wealth Management
Brown Advisory
Charles Schwab Trust Company of Delaware
Citi Private Bank
Commonwealth Trust Company
First State Trust Company
Gawthrop Greenwood, PC
Morris James LLP
New York Private Trust Company, A DE Trust Co.
The Northern Trust Company of Delaware
RBC Trust Company (Delaware) Limited
SunTrust Delaware Trust Company
WSFS Wealth / Christiana Trust

Bronze Sponsors

Bank of America, Private Bank
Belfint Lyons & Shuman, CPAs
BMO Delaware Trust Company
Brown Brothers Harriman Trust Company of Delaware, N.A.
CIBC Private Wealth Management
Comerica
Cover & Rossiter, P.A.
Duane Morris LLP
Evercore Trust Company, N.A.
K&L Gates LLP
PNC Delaware Trust Company
Santora CPA Group

Exhibitors

American Bankers Association
Arden Trust Company
Comerica
Delaware Depository
Deutsche Bank Trust Compnay Delaware
First Republic Wealth Management
Heritage Auctions
National Care Advisors
Reich & Tang
Santora CPA Group
T21 Trustees, Inc.
UD Lerner College of Business & Economics
Weiner Benefits Group



The Delaware Income Tax Advantage for Trusts

by
Jeffrey C. Wolken
National Director of Fiduciary Strategies
Wilmington Trust, N.A.

The Tax Cuts and Jobs Act passed in late 2017 made significant changes to many areas of federal tax law and highlighted the importance of income tax planning. Personal trusts, where individuals establish trusts for their own benefit or the benefit of other individuals, have been used most commonly as estate and gift tax planning vehicles. However, some of the changes under the new federal law have increased the importance of personal trusts as tools for minimizing a family's federal and state income tax liability. Holding family wealth inside a personal trust may limit the ability of your home state to tax the trust's income, and provides flexibility in customizing the income tax cost basis step-up upon death. Your family's asset "location" (where your assets are held in trust) instead of asset "allocation" (how your assets are invested) is now a primary driver of wealth by reducing or eliminating the drag of income taxes. The following strategies may provide opportunities for your family to minimize income taxes by making the First State the home state for your assets.

State Income Tax Minimization Using Personal Trusts

Delaware has a state fiduciary income tax on income accumulated in a non-grantor trust where the trust itself, and not the grantor, is taxed on income earned by the trust. However, there is a full exemption from this tax if the income is accumulated for beneficiaries who are not current Delaware residents. Due to the low population of Delaware and the fact that many trusts coming into Delaware have no other ties to the state, most trusts administered in Delaware are not subject to Delaware income tax. Consequently, using Delaware as a personal trust planning jurisdiction is similar to using states that don't have any income tax.

As state income taxes become a more significant percentage of your overall tax burden, if you live in a high-tax state there may be opportunities to reduce or eliminate state taxes on some of your income. Regardless of your state of residence, you may create a new trust in Delaware and most existing irrevocable trusts may be moved into Delaware for ongoing administration. Personal trusts offer many tools to shield certain assets from income taxation in your home state. A few of these tools are:

Changing your trustee to escape state taxes. If you live in a high-tax state and created a trust, or you are the beneficiary of a trust, it may be as simple as changing from a trustee located in your home state to one in a low or zero-tax state in order to reduce the trust's state income tax burden. Each state has unique laws regarding how the state taxes (i) a trust established by its residents, (ii) a trust with resident beneficiaries, or (iii) a trust administered in the state. For convenience or cost savings, most trusts use an individual family member, trusted advisor, or local financial institution as the initial trustee to get the structure up and running. Consequently, you may not have considered the state tax burden that the trustee's location has on the trust's ongoing administration. In many cases, changing the location of the trustee to Delaware may be sufficient for the trust to eliminate or defer paying state taxes on income accumulated in the trust.

Appoint a successor trustee in a tax-friendly jurisdiction. During your lifetime, some trusts are best administered by you or other family members. Common examples are an irrevocable life insurance trust (ILIT) used to remove a life insurance policy's death benefit from the taxable estate, or a revocable lifetime trust used to avoid the probate process at death. These are generally "grantor" trusts where the trust's income is taxed to the person who created the trust, so the location of the trustee has no impact on the tax burden. However, these trusts generally become their own taxpayer (or a non-grantor trust) following the grantor's death. At this same time, the trust may receive significant value from the death benefit of a life insurance policy or significant, complex assets requiring ongoing administration following settlement of the estate. Appointing a successor corporate trustee in a tax-friendly state like Delaware will offer professional management of these assets at the same time state taxes may be eliminated or deferred on income accumulated in the trust.

Turn off grantor trust status. When making a gift into an irrevocable trust, it is common for the trust to be structured as a grantor trust so you continue to make tax-free gifts by paying the income tax burden on the trust for the benefit of your heirs.

(continued on p. 26)

The Delaware Advantage

(continued from p. 25)

Although the gift into trust is complete for gift tax purposes so the assets are outside of your estate, the trust is structured so you are still the owner for income tax purposes. This allows the trust's assets to grow income tax-free since you, as the grantor, are picking up the tax bill. However, the grantor trust feature can generally be turned off so the trust becomes its own taxpayer. If the trust is administered in a tax-friendly state such as Delaware, it may be possible to turn off payment of state taxes on the trust's income by simply making the trust responsible for the taxes instead of you, as the grantor, who resides in a high-tax state. When the estate tax exemption was lower, paying your trust's tax bill helped reduce the amount of your family's wealth ultimately subject to death taxes. However, with some of the pressure on estate minimization relieved under the new federal tax law (the exemption more than doubled to $11,400,000 per person in 2019), turning off grantor trust status to avoid state taxes may be appealing in many situations.

Delaware incomplete gift non-grantor (DING) trusts. A trust structure offered in Delaware is the DING trust, where you retain ownership of the trust's assets for gift tax purposes while the trust owns the assets for income tax purposes. The trust is its own taxpayer for income tax purposes, so this allows you to shift income out of your home state into a state where the trust will not pay a state income tax. A DING trust helps minimize state income taxes without incurring a federal gift tax. The structure of a DING trust must be tailored to the specific trust tax nexus rules of your home state, but can often result in a substantial income tax savings to you and your heirs. This tax savings is not available for earned income, income from real estate, or some other types of income treated as "source" income in your home state. However, a DING trust is a very effective tool to consider prior to the sale of a business or concentrated stock position that will incur a large capital gain. In addition, it is a nice way to minimize the tax burden on an invested portfolio that generates significant income.

Maximizing the step-up of income tax cost basis upon death using the Delaware tax trap (opportunity). With estate tax exemptions more than doubling under the new federal law, many trust beneficiaries may die with unused estate tax exemption while significant low-basis trust assets are held for their benefit. If the trust grants you a limited power of appointment (common in most irrevocable trusts), you can exercise the power in a way to select which trust assets should be included in your estate for tax purposes while the same assets continue in trust for asset protection and estate tax purposes. The assets that are deemed to be included in your estate should receive a step-up in their income tax cost basis, which will reduce the future capital gain incurred when they are eventually sold. This basis step up would help reduce both federal and, in most cases, state income taxes. Your ability to exercise a limited power of appointment in this manner is unique to trusts administered in Delaware and not available in other trust-friendly states such as Nevada, South Dakota, or Alaska. Moreover, virtually any trust may be administered in Delaware regardless of where it was created or administered previously. If you are the beneficiary of a trust holding low-basis assets and will not be able to use all of your estate tax exemption, you may want to work with the trustee to add a Delaware trustee to make this basis step-up tool available to you.

Managing Your Trust And Its Assets

With the increased use of Delaware trusts to meet income tax planning goals, it is important to understand the additional estate planning benefits and flexible administrative tools that can be incorporated into your trust structure. Some of the trust features available to you under Delaware law are the ability to: (i) create a perpetual trust that serves as a family endowment through multiple generations, (ii) protect trust assets from your creditors and your beneficiaries' creditors, (iii) determine when or how beneficiaries receive information regarding their interests in the trust by making your trust a "quiet trust," and (iv) retain control over investment or distribution decisions through a directed trustee structure.

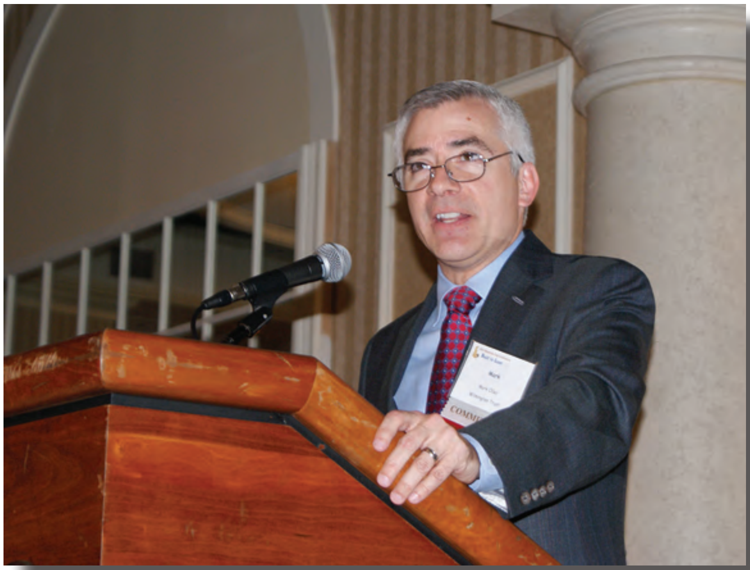
The directed trustee feature is one of the most flexible tools available under Delaware law. Delaware law provides the ability for you to name trust advisors who may direct the trust's investments, distributions from the trust, or other discretionary actions of the trust so you and your family remain in control. Delaware has recognized a "directed trust" structure for over a century.

A "quiet trust" is the common description for a trust that puts restrictions on a trustee's duty and ability to inform trust beneficiaries regarding their interests in the trust. Every state, including Delaware, imposes a default duty upon trustees to inform beneficiaries of their interests in the trust. This may be problematic as beneficiaries of large trusts become adults, or during the planning phase when you don't believe the timing is right to disclose the trust's asset information to your descendants. Delaware law allows you to place limits on when or how the beneficiaries receive this information and allows for a "designated representative" who represents their interests while the trust remains quiet. The trust's resources remain available to your descendants even if they are not actively receiving information regarding the trust.

Delaware personal trusts have historically been powerful tools for gift and estate planning, asset protection planning, and for flexible administration. However, the recent changes in the federal tax laws have provided a renewed focus on state income taxes and strategies available to minimize these taxes. Delaware trusts offer a number of solutions ranging from simply moving a trust into Delaware by changing trustees to more sophisticated options allowing family wealth to be "exported" to Delaware via a DING trust so state tax on accumulated income may be deferred or eliminated.

Jeffrey C. Wolken is national director of fiduciary strategies at Wilmington Trust, N.A. He 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.

Building Another Great Conference!



Mark A. Oller, CTFA, President - Family Wealth Delaware, Wilmington Trust Company, and Chair of the Delaware Trust Conference Planning Committee addresses the conference at Wednesday's luncheon.

Wealth management professional gathered October 22nd and 23rd at the Chase Center on the Riverfront for the 14^{th} annual Delaware Trust Conference. This year's conference, Delaware Trusts: Built to Last, highlighted the solid, dependable, enduring qualities of Delaware trusts.

The Delaware Bankers Association thanks the members of the trust conference planning committee who helped make the 2019 Delaware Trust Conference a success:

Executive Committee - Chair: Mark A. Oller, CTFA, President - Family Wealth Delaware, Wilmington Trust Company; Co-Chair: Todd A. Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP; Past Chairs: Thomas M. Forrest, CPA, President & CEO, U.S. Trust Company of Delaware; Cynthia D.M. Brown, Esq., President, Commonwealth Trust Company - Trust Committee Chair

Committee At-Large - Lisa K. Berry, Managing Director, PGB Trust & Investments of Delaware; Bridget Boyd, MBA, CTFA, SVP & Senior Trust Officer, Citi Trust Delaware; Anne Booth Brockett, President, BMO Delaware Trust Company; Timothy Carroll, Esq., COO, New York Private Trust; Jennifer A. Cuva, Sr. Manager, Trust Administration, Charles Schwab Trust Company of Delaware*; Matthew P. D'Emilio, Esq., Director, McCollom D'Emilio Smith Uebler LLC; William Dugdale, Senior Advisor, Brown Advisory; Charles J. Durante, Partner, Connolly Gallagher LLP; Robert W. Eaddy, President & CEO, The Bryn Mawr Trust Company of Delaware; Paul Y. Emata, CFA, CFP, Managing Director, Wealth Manager, First Republic Investment Management; Francis Hazeldine, Managing Director, Charles Schwab Trust Company of Delaware; Adam C. Gerber, Vice President and Senior Relationship Strategist, Hawthorn, PNC Family Wealth; Daniel F. Hayward, Esq., Director, Gordon, Fournaris & Mammarella, P.A.; Gregg Homan, JD, Senior Vice President, National Sales Executive, Arden Trust Company; George W. Kern, Esq., Managing Director, Bessemer Trust Company of Delaware, N.A.; Elizabeth King, President of Brown Brothers Harriman Trust Company of Delaware, N.A.; Elizabeth Luk, Executive Director & Trust Team Leader, JPMorgan Chase & Co.; Jamie McGinley, Vice President, Trust Administration, Commonwealth Trust Company*; Darlene M. Marchesani, J.D., LL.M., Chief Trust Officer & Trust Counsel, Evercore Trust Co., N.A.; Mark V. Purpura, Esq., Director, Richards, Layton & Finger, P.A.; Isabel A. Pryor, CEO & Director, Key National Trust Company of Delaware; Jordon Rosen, CPA, AEP®, Director – Estates & Trusts, Belfint Lyons & Shuman, P.A.; Nicole M. St. Amand, CTFA, Assistant Vice President, Wilmington Trust Company; Vincent C. Thomas, Esq., Partner, Young Conaway Stargatt & Taylor, LLP*; Kalimah Z. White, Vice President, TD Bank*; Jill Williams, Vice President, The Northern Trust Company of Delaware*; Kevin A. Worsh, Senior Wealth Director, BNY Mellon Wealth Management;

**Trust Conference Panel Liaison*

Additional Conference Liaisons - Tara Bolinski, Trust Administrator, Santora CPA Group; Theresa Hughes, EVP, Personal Trust Services, Santora CPA Group; Nicole Krajewski, Assistant Vice President, Wilmington Trust Company; Carlo Lombardi, Administrative Vice President, Wilmington Trust Company; Brian McLean, CTFA, Vice President, Trust Officer II, U.S. Trust Company of Delaware; Jessica D. Mojica, CTFA, Assistant Vice President & Trust Officer, Christiana Trust.

A Special Thank You to our 2019 Delaware Trust Conference Ambassadors: Anne Booth Brockett, President, BMO Delaware Trust Company; Cindy Brown, President, Commonwealth Trust Company, DBA Past Chair; Mark Oller, Group Vice President, Wilmington Trust Company, Delaware Trust Conference Chair; and Tom Forrest, President & Chief Executive Officer, U.S. Trust Company of Delaware; DBA Director.

First Time Conference Attendees and New Members were welcomed at Tuesday Night's Conference Reception by Delaware Trust Conference Ambassadors. Ambassadors introduced New Member and First Time Attendees to fellow attendees and answered any questions they had regarding Delaware Trust Conference and Delaware Bankers Association. If you have any questions about the Delaware Bankers Association or the Ambassador Program, please contact the DBA at 302-678-8600 or email Margaret.Cregan@debankers.com

Margaret E.W. Sager, Partner, Heckscher Teilion Terrill & Sager, P.C. speaks on the Top 10 Challenges for Changing Situs on Tuesday morning.

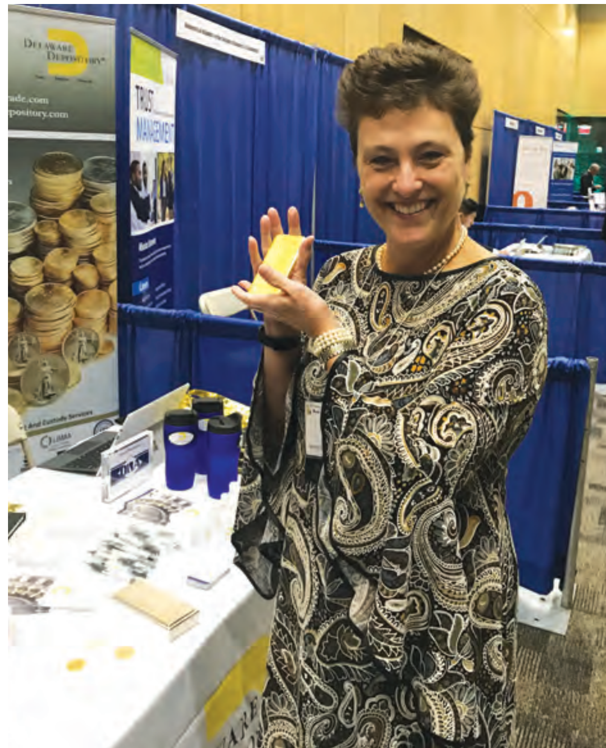
Robert Sitkoff, John L. Gray Professor of Law, Harvard Law School, and Max Schanzenbach, Seigle Family Professor of Law, Northwestern University School of Law, discuss Reconciling Fiduciary Duty and Social Conscience

Another Winner! This year's conference featured multiple drawings of prizes donated by sponsors and exhibitors. Above, Charles Durante, Partner, Connolly Gallagher LLP, presents a Delaware gift bundle to Darlene Marchesani, Chief Trust Officer & Trust Counsel, Evercore Trust Company, N.A.

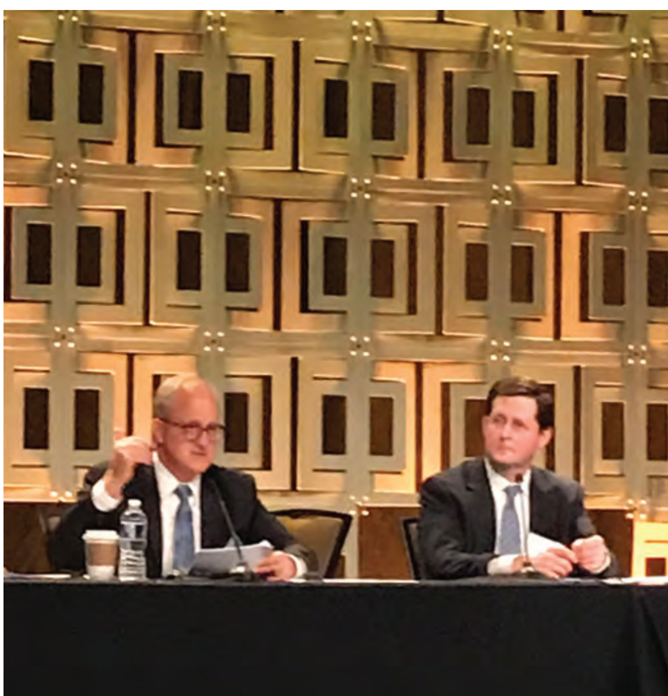
Samuel A. Donaldson, Professor of Law, Georgia State University, provides an informative update of changes in Federal Taxes

Ambassadors Assemble! DBA Ambassadors meet with new member ADP Trust Company, NA. (l to r) Margaret Cregan, DBA VP, Membership; Cynthia D.M. Brown, President, Commonwealth Trust Company; Robert Laiacona, CFO ADP Trust Co.; Miranda Ko, President, ADP Trust Co., Sarah Long, DBA President; and, Mark A. Oller, CTFA, President - Family Wealth Delaware, Wilmington Trust Company

Dana Fitzsimons, Jr., Principal, Fiduciary Counsel, Bessemer Trust reviews the past year's most significant fiduciary cases during Wednesday morning's session

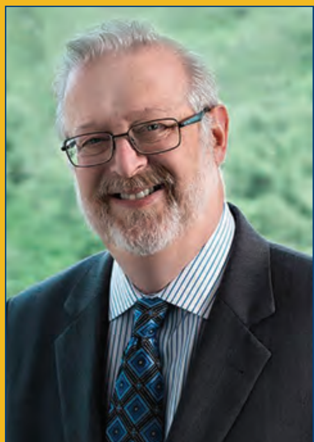


Sarah Long, DBA President, visits exhibitor Delaware Depository and holds the gold bar on display (value: approximately $48,000)



Why Delaware? Todd A. Flubacher, Partner, Morris, Nichols, Arsht & Tunnell LLP, and Jeffrey Wolken, National Director of Fiduciary Strategies, Wilmington Trust, provide a point-by-point review of Delaware trusts versus those of other states.

Accounting for Success



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

"How does a DAF work and why is it a good idea?"

Bunching Charitable Contributions Using a Donor Advised Fund

In the aftermath of the Tax Cuts and Jobs Act (TCJA), many taxpayers who used to be able to itemize deductions prior to 2018, now find themselves not being able to itemize and claiming the standard deduction. For 2019, the standard deduction is $24,400 for a married couple and $12,200 for a single filer. This simply means that if the total of your allowable itemized deductions is less than these amounts, the government will give you the higher standard deduction on your tax return and you don't have to save all of those receipts or fill out Schedule A as part of your tax return.

Example: In 2019 a married couple has a total of $23,000 of deductions, comprised of $8,000 mortgage interest, $10,000 state and local taxes, and $5,000 charitable contributions. For 2019, they will claim the higher $24,400 standard deduction. Assuming the same numbers for 2020 and 2021, the total standard deduction over the 3-year period will be $73,000 (not accounting for indexing in 2020 and 2021).

If instead, the couple set up a donor advised fund (DAF) and contributed 3 years' worth of contributions in 2019 (total of $15,000), they would have a total of $33,000 of deductions in 2019 ($8,000 + $10,000 + $15,000) and would be able to itemize the deduction for the year. They would make few, if any, additional contributions in 2020 and 2021 and would claim the $24,400 standard deduction in those years; for a total of $81,800 over the 3-year period. This is an added $8,800 of deductions over the 3-year period, which could translate into significant federal and state tax savings.

So how does a DAF work and why is it a good idea? First, a DAF is a tax exempt 501(c)(3) entity sponsored by either a community foundation or a charity, therefore your upfront contribution to the fund is fully tax deductible (subject to annual limits based on adjusted gross income, with a 5-year carryover provision for excess deductions). Setting up the fund is relatively easy as the sponsoring organization will generally provide the paperwork. In addition, there are no IRS applications, annual tax filings, or required distribution rules as would be the case if you instead created an endowment.

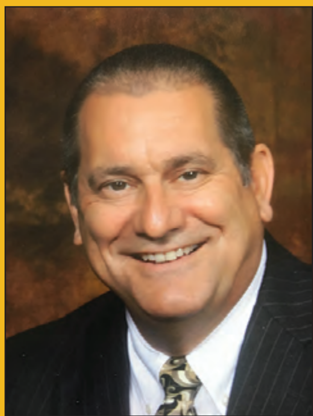
Second, to fund your DAF, you can contribute either cash or appreciated securities (which will avoid being subject to the capital gains tax). Like any other charitable contribution, once made, you no longer have use of the funds.

Third, assuming you fund the DAF in 2019, you don't have to immediately decide where the funds should be directed. Each year, until the funds are exhausted, you can advise the sponsoring organization (thus the term "donor advised" fund) how much of the earnings and principal you want to send to one or more charitable organizations, although you don't get a second charitable deduction when the funds are disbursed. In short, a DAF allows you to get an upfront deduction and decide later where you want to contribute the funds.

Some families set up donor advised funds with significant amounts to benefit a particular cause or field of interest, while some use it to fund various religious, educational and civic organizations. Since the fund is perpetual, many families use it as a way to involve children and grandchildren in philanthropic decision making, thus creating a family legacy.

For further information on this or other tax or charitable planning ideas, please contact Jordon Rosen at jrosen@belfint.com or at www.belfint.com.

Compliance Focus



by
Scott D. Ramsey
Cyber Strategist
CAPCO

"As a society, we focus more on the ease of access than the protection and securing of our identities and information. "

Identity Access Management: "Who's in Your Electronic Wallet?"

Originally, identity and access management (IAM) started out requiring username and password for authentication and authorization. As the technology footprint began to expand providing users with continuous access through remote connectivity via laptops, hand-held devices, and now the Internet of Things (IoT); this simple combination had to evolve into more complex techniques and technologies to ensure proper validation of the user. Complex algorithms using multi-factor authentication (MFA), biometrics (fingerprints, retina scan), vocal patterns, and facial recognition have and are being developed and used. However, many people continue to ignore the risks and liabilities of not protecting their identities. Companies trade off on security and confidentiality for the convenience and ease of use of non-invasive immediate access. For the 'convenience' of their employee's many organizations institute bring your own device (BYOD) policies that allow personnel to access corporate email and networks utilizing their personal devices, which now combines both personal and corporate information. Breaching these devices puts both the end user and company at risk. Today, you can unlock a mobile phone by simply placing your thumbprint on the 'home button' or unlock a laptop or tablet with your face, granting access to all the devices' contents. Both access methods are easily 'fooled' putting all of the information and data on these devices at risk. On your next visit to a restaurant, see if you can determine if the mobile device that has been given to a toddler to 'amuse them' is a personal or corporate device. Can you guess how that device was activated and do you suppose any restrictions are limiting what the toddler can access?

Today, 'smart devices' have invaded our homes, including TVs, appliances, thermostats, security cameras, digital assistants (i.e., Alexa, Google, Echo, etc.), sound systems and more. People connect all of these devices to their home wireless networks that desktop systems, printers, laptops, tablets, mobile phones, and IP phones are using. By doing this, they increase their exposure to identity theft and the compromising of information (i.e., photos, videos, contact lists, shopping patterns, conversations, health information, etc.) on these devices. To make matters worse, the vast majority of homes where these devices have been installed, the default passwords/ passcodes from the manufacturer have not been changed by the homeowner.

Intelligent vending machines are cropping up in employee breakrooms and public areas across the globe. These machines not only accept good old fashion cash but also accept payment from electronic wallets on mobile phones and credit cards, which require the machines to be connected to the internet through either wired or wireless networking. How are these devices being secured, or are they? Have they been placed on a segmented network or just added to the corporate backbone or hot spot as another device? What information are they providing back to the distribution center other than their inventory and who else might they be providing information too?

Now, what has all of this got to do with IAM? In my opinion, everything! We have become a society of on-demand and convenience. We shop online and have purchases delivered to our front doors; we expect our house to be at the perfect temperature before we return from work; we rely on our appliances to tell us we need more eggs and milk and that we need to set the dishes to wash. As a society, we focus more on the ease of access than the protection and securing of our identities and information. The weakest link in the security chain is the end user. By not being vigilant in protecting our identifies and data in the use of technologies, we are exposing ourselves to fraud, theft, misuse, and misrepresentation. Convenience cannot be the primary requirement for accessing technology. The value of the information stored, processed, and/or transmitted by the technology should be the driving factor in how users are authenticated and authorized for use. This holds true for both corporate and personal devices. If you are storing credit card, frequent flyer, access codes, personal information on your devices, you need to take appropriate measures to secure it. Ask yourself this question, "If my device is compromised, what are my potential impacts and liabilities?" Then look at how you are securing and protecting the information on those devices and see if you are comfortable with the access measures in place.

IAM alone will not secure the data on your devices, whether personal or corporate. IAM should be combined with additional security measures to obscure sensitive information. Incorporate MFA, requiring you to have something and know something. The 'have something' is your finger and the 'know something' is the passcode or passphrase (i.e. on your mobile phone, use the biometric feature on the home button in combination with a passcode or passphrase). Also, it never hurts to consider encrypting the hard drive of your mobile computing devices in conjunction with your access method.

Remember, your devices and data are only as secure as you make them.

Contact:

Matthew P. D'Emilio
(302) 468-5958
mdemilio@mdsulaw.com

Jennifer E. Smith
(302) 468-5968
jsmith@mdsulaw.com

Little Falls Centre Two
2751 Centerville Road, Suite 401
Wilmington, DE 19808

For Your Benefit

by
Louis D. Memmolo, AIF, GBA, CHRS
Weiner Benefits Group, LLC

A Holistic Approach to Financial Well Being Provides Security and Peace of Mind

When it comes to employee benefits the overriding concern is typically the over all cost. In fact, it's true that one of the largest expenses for an employer is the cost of providing employee benefits like health, vision, and dental insurance. It's hard to ignore the bottom line. Only the cost of payroll exceeds these huge investments.

However, a holistic approach to a thoughtfully designed employee benefits program broadens the perspective to one that attracts and retains a more productive and happier employee, increases loyalty and redefines the company culture.

A holistic approach with a focus on financial well being provides security and peace of mind that impacts the bottom line in a positive way transcending the traditional view.

"Central to these comprehensive programs are intelligently engineered plans that consider and connect all aspects of physical and financial care."

Central to these comprehensive programs are intelligently engineered plans that consider and connect all aspects of physical and financial care. They take into account both the mind and the body, are well communicated, and delivered on sophisticated and integrated mobile systems.

The traditional health and welfare programs reduce the fear of physical and financial catastrophe by providing relief for unexpected medical bills, loss of income due to an inability to work or even a loss of a loved one's life.

The traditional retirement plan provides opportunities to save for your retirement needs.

When you view these sets of benefits holistically you include the use of Health Savings Accounts to integrate the idea of paying for current and future medical costs with the idea of tax deferred savings for retirement. Utilizing the latest vendor resources, you can provide tools that marry these concepts into a single thought process.

Incorporating Student Loan Repayment programs into this mind set is a relatively new concept but is one the emerging work force is seeking from employers in an increasingly big way. Offering a solution to reduce this burden as an employee benefit attracts a broader spectrum of employee and also relieves a huge amount of stress for current employees.

Employee Assistance Programs provide around the clock, seven day a week, private counseling services that include financial counseling, budgeting assistance and debt reduction services. They also provide services for legal, mental health, depression, dependency and relationship counseling over the phone or through face to face visits. This benefit has become a very valuable offering for employers to address a unique set of needs.

Virtual Medicine is now being offered on most group benefit plans. This innovative service provides the services of board-certified physicians through face time and the internet. Virtual office visits that fit into the unique lifestyle of today's workers allow an employee to immediately address a health concern, saving time and reducing distractions.

Employers with their fingers on the pulse of the modern workforce are seeking the latest integrated and holistic programs that address the needs and concerns of their employees. These innovative and unique programs provide the security and peace of mind that allows an employee to concentrate on their work, reduce stress and anxiety and provide an overall sense of physical and financial wellbeing.

Lending Law Update

by
Stephanie L. Hansen
Young Conaway Stargatt & Taylor, LLP

"DNREC has begun issuing Conditional COCR's and these Conditional COCR's are becoming the norm."

Does a Certificate of Completion of Remedy Really Mean that the Remedy is Complete?

The buying and selling of property that is, or was, environmentally contaminated just got a little trickier. It used to be that at the end of the investigation and cleanup process, the environmental agency (DNREC) would issue a Certificate of Completion of Remedy (COCR) which stated broadly that no further investigation or cleanup was necessary. This was sometimes referred to as "the Golden Ticket" for a landowner and was often the desired endpoint leading to the transfer or sale of the property. The concept of the COCR as being the green light for the transfer of property without the tail of lingering environmental liability or responsibility was fairly well understood.

But as time has progressed and more than 300 properties have made their way into and through the DNREC Brownfields and Voluntary Cleanup Programs, this clear COCR endpoint has become less clear. In some cases, the investigation is done, the cleanup occurs, and there is nothing left to monitor and no conditions placed on the property for its future use. But those cases are becoming quite rare. Instead, after the cleanup occurs, there is more often the need for continued monitoring of some remedial measure such as the asphalt or building cap, the groundwater monitoring wells, or some other measure specific to the property. In these cases, DNREC has begun issuing Conditional COCR's and these Conditional COCR's are becoming the norm.

Why does this matter? It matters because activities required by the Conditional COCR in order to maintain the environmental liability protection going forward often cost money. Someone is going to have to pay for the activities, someone is going to have to perform the activities, and if the activities are not performed correctly, there will likely be liability consequences for somebody. So, is the answer to require a pure, unconditional COCR in your sales agreements going forward? Probably not. If that was the case, properties could take years to bring to closing, if ever. For instance, if a building and an asphalt parking lot are constructed in such a way as to be the protective cap over otherwise contaminated material, then it is likely that a Conditional COCR will be issued and it will require continuous annual monitoring of the cap for as long as the building and asphalt parking lot are serving as the cap. If there are monitoring wells on the property, then the Conditional COCR will likely require periodic well testing and DNREC review. This could go on for years until some concentration level of contaminants is reached.

The smart way to handle these transactions is to recognize early in the negotiation process that a Conditional COCR is a possibility and plan for who will cover the future costs. In addition, understand that the conditions imposed in a Conditional COCR may affect the future use of the property, so analyzing the actual document before you are locked into the agreement is imperative.

Delaware Bankers Association
8 West Loockerman Street
Dover, DE 19903-0781

PRSRT STD
US POSTAGE
PAID
WILMINGTON, DE
PERMIT #751