# delaware banker

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## Delaware's New Beneficiary Well-Being Trust Law


As a member of the M&T family, Wilmington Trust understands the value of collaboration and commitment. In our combined team, you'll find a diversity of knowledge, resources, and experience to power your most important endeavors with precision and care.

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# Contents



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# View from the Chair

**Matthew Parks**
**VP, Investments,**
**CRA & Retail Banking**
**Discover Bank**

**Chair**
**Delaware Bankers Association**

*"Delaware's banks and bankers provide convenient, safe and economical serices to the entire community."*

Every autumn for the last 19 years, the Delaware Bankers Association has presented the Delaware Trust Conference. This event has grown from about 250 attendees gathering at the Hotel DuPont to now twice that number at the Chase Center on the Riverfront and throughout the world via live streaming and on-demand sessions. Today the conference is seen as one of the premiere events in the field of wealth management.

But it is not just Delaware's trust companies with their multi-million dollar portfolios who are in the business of wealth mangement. All bankers are practicioners in that field, from the time a child opens his or her first savings account, through to estate planning in retirement years, and every step in between. Here are just a few ways that all bankers are wealth managers...

**Saving:** Unless you're blessed with rich relatives, for most us the building of wealth begins with saving. Historically, savings accounts are the main contact with the public. But, gone are the days when banks only offered two kinds of accounts: checking and saving. Bankers now feature varied wealth-growing options from CDs to money markets, IRAs, HSAs, high-yield savings accounts, investment accounts, automatic saving, direct deposit, on-line accounts, and more. All designed to help the consumer manage wealth.

**Lending:** When a bank lends out money it benefits the entire community, not just the person receiving the loan. Loans to businesses increase the money supply and result in a multiplier effect that ripples throughout the economy. Mortgage loans to homeowners help build equity and weath. Lending generates income resulting in more deposits, more lending, more growth, more wealth.

**Financial Literacy:** Banks help build wealth by educating the community on the most effective ways to manage their financial resources. The DBA does this through several programs. The long-running Teach Children to Save Day lays a strong foundation by showing elementary school children the importance of saving to help secure a financially independent future. More recently the DBA has introduced two series of short videos, *More Money Than Cents,* and *Wizzo the Money Dog*. These programs communicate essential money strategies such as budgeting, credit, and fraud protection in a manner relatable to young adults.

**Estate planning:** You can't take it with you, so it's important to preserve the wealth that you've spent a lifetime accumulating. In additon to our trust industry, bankers can provide valuable services from administering estates, providing estate settlement, working with attorneys and advisors, and other ways to help in the transfer and preservation of hard-earned wealth.

In this internet age Delaware's bankers help their customers manage wealth with a plethora of tools unavailable and even unimaginable just a few years ago. Banks offer apps for budget tracking, balance monitoring, savings strategies, and investing guidance. And let's not forget the many levels of fraud alerts and account monitors that help protect customers and assure that the wealth they're building stays theirs and doesn't fall prey to scammers.

Delaware's banks and bankers provide convenient, safe and economical serices to the entire community. Saving, lending, planning, educating, building, and other features are all part of the wealth managment business, and it's what Delaware's bankers do best.

# President's Report

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

> *"Each presentation featured well-known and highly regarded subject matter experts."*

Where do the city, river, marsh, and 500 of the nation's top trust, legal, and wealth management experts meet? At the 19th annual Delaware Trust Conference, of course! This year's Conference was held at the spacious Chase Center on the Riverfront and was live-streamed. Additional on-demand sessions were included. All sessions were available on-demand through November 30th. Thank you to the almost 500 Conference attendees who brought energy and enthusiasm to the Conference.

The 2024 Delaware Trust Conference Executive Committee was led by Chair Matthew D'Emilio, Esq., Director McCollom D'Emilio Smith Uebler; Co-Chair: Robert Eaddy, President, The Bryn Mawr Trust Company of Delaware; Past-Chair: Elizabeth Luk, Director, Head of Delaware Trust, BNY Mellon Wealth Management; and Executive Members Cynthia Brown, President, Commonwealth Trust Company; and David Diamond, President of The Northern Trust Company of Delaware. Over thirty-five Trust Committee members from Delaware's top trust, legal, and wealth management firms collaborated to select this year's topics and speakers.

Each presentation featured well-known and highly regarded subject matter experts. The Conference kicked off with an update on Delaware Trust Law, including a review of two exciting new trust statutes passed with Trust Act 24, featuring Jocelyn Borowsky, Esq., Partner, Duane Morris LLP; and Gregory J. Weinig, Esq., Partner, Connolly Gallagher LLP. Additional lectures featured a deep dive into the Corporate Transparency Act, Planning with Hard to Value Assets, a Federal Tax Update, Trends in State Income Taxation, Protecting Elders from Financial Abuse, and many others.

A highlight of the Conference was presenting the 2024 Delaware Trust and Wealth Management Lifetime Achievement Award to Thomas M. Forrest, CPA, in grateful recognition of his dedicated service to the First State's Trust Industry. Tom began his career at Wilmington Trust and ended his career at US Trust Company of Delaware, with numerous stops along the way. Tom started two Delaware trust companies, Charles Schwab Trust Company of Delaware and US Trust Company of Delaware. His leadership brought heightened visibility to the First State's trust industry. He traveled the country promoting Delaware as the premier trust jurisdiction. Tom's presentations, complete with magic and jokes, were both memorable and effective.

Tom served as the President of the Bank & Trust Tax Association of Mid-Atlantic States; President of the National Association of Estate Planners & Councils, Chair of the Delaware Bankers Association Board of Directors, and Chair of the Delaware Bankers Association Trust Conference. In addition, Tom has been very active on several charitable boards including Autism Delaware and The Mary Campbell Center Foundation.

Tom has been recognized for his significant contributions to the Trust Industry with numerous awards. These include the Distinguished Accredited Estate Planner Award, induction into the Estate Planning Hall of Fame, The Philadelphia Estate Planning Council's Meritorious Service Award, as well as the Council's Annual Distinguished Estate Planner of the Year Award. Thank you and congratulations, Tom.

Thank you to all the speakers for sharing their subject matter expertise. Thank you to the exhibitors for sharing their various wealth management options and solutions. Thank you to all the sponsors for investing in this year's Trust Conference. With their generous support, all things were possible.

And finally, it takes a tremendous team effort to produce the Delaware Trust Conference. Thank you, Greg Koseluk, Corinne Stayton, Renee Duncan, and Margaret Cregan, for making the 19th annual Delaware Trust Conference one for the record books!

Sarah

# What's New at the DBA

## New Financial Institution Members

**Hebron Savings Bank**
Hebron Savings Bank is a locally owned community bank offering customers a wide range of retail and commercial financial products and services. The Bank currently operates fourteen offices in Wicomico, Dorchester, and Somerset Counties in Maryland and is always looking to expand that footprint to serve additional communities.

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CEO & President
jpoulsen@hebronsavingsbank.com
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**Synchrony Bank**
Synchrony is a federal savings bank that specializes in consumer financial services. We offer private label credit cards, co-branded cards, installment loans, and more through our network of merchants. We also offer a variety of savings products.

Jim Nikolai
Vice President - State Government Affairs
james.nikolai@syf.com
651-356-5142
www.synchrony.com

## New Associate Members

**Baird Mandalas Brockstedt & Federico LLC**
Baird Mandalas Brockstedt & Federico, LLC is a law firm which leverages the unique diversity of its practice areas to provide exceptional value to our clients in Delaware, Maryland and throughout the United States. Our firm combines the expertise of civil litigators who have achieved verdicts and settlements in excess of a billion dollars on behalf of Plaintiffs in complex personal injury matters, including medical malpractice, environmental litigation and other mass tort matters, with a team of attorneys at the top of their respective practice areas representing clients in business litigation, construction law, real estate, estate planning, and corporate law.

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302-327-1100
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**The Nuvo Group, Inc.**
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Tony Barletta
Co-owner and Managing Partner
tony.barletta@thenuvogroup.com
646-368-8033
www.thenuvogroup.com

**SeedcoDE**
SeedcoDE helps businesses get the money they need to start, grow and expand. We are proud that the loan programs we work with promote economic development. Together with economic development partners throughout Pennsylvania and Delaware, we help local businesses grow with federal, state and local loan programs that create and retain jobs while stimulating growth within their communities.

Holly Graver
SVP, Business Development Officer
hgraver@deecodelaware.com
302-660-1783
www.seedcodelaware.com

## Women Connect!

Amy Walls discusses entrepreneurship with Nancy Dibert of EPIC Marketing

The Sussex Women Connect event was held on November 7-8 in Rehoboth. Attendees enjoyed an evening at Agave Rehoboth featuring a book reading by the incredible Delia Sullivan, author of "The Story I Told Myself," featured in Deserts to Mountaintops: Choosing our healing through radical self-acceptance by Jessica Buchanan. On Friday, November 8, over 50 attendees kicked off the day with a movement activity guided by Delia, followed by a session on the Art of Listening. The event included a fireside chat with Amy Walls of Discover Bank and Nancy Dibert of EPIC Marketing, discussing Nancy's journey through entrepreneurship and how she navigated professional transitions and growth. The audience formed a Nancy Fan Club, that was highlighted in the final session featuring a panel of women who embody Women allyship and supporting one another. The panel was moderated by James Ambagis with BNY Mellon Trust of Delaware and included Jennifer Fisher and Jennifer McClain from Brown Brothers Harriman Trust Company of Delaware and Isabel Araujo of Charles Schwab Trust Company of Delaware.

The event also featured a vendor showcase of local owned businesses and non-profits including Bloom Daily Planners, Fund for Women, Health Foods for Healthy Kids, Honey Salon, La Nunery Apothecary, LoveLeigh Craft Co, Paul Cullens Wines, and Urban Float Rehoboth. Natalee DeHart with Good Clean Fun Life Productions provided headshots for those interested in expanding their personal brand. The event was sponsored by Wilmington Trust, Delaware Community Foundation, and Pinion.

James Ambagis moderates the panel on Women Allyship with Jennifer Fisher, Jennifer McClain and Isabel Araujo.

Cover Story

# Delaware's New Beneficiary Well-Being Trust Law

## The First State is First Again with a Novel New Trust Law That Helps Prepare a Family for Inherited Wealth

by
**Jeffrey C. Wolken**
**National Director, Delaware Trust Planning**
**Wilmington Trust Emerald Family Office & Advisory®**

Delaware Governor John Carney signed Beneficiary Well-Being Trust legislation into law on August 29, 2024.[1] The new fiduciary powers granted to a trustee in a Beneficiary Well-Being Trust are essential for modern trust planning. Because the "great wealth transfer" is beginning, families are using the historically high $13.61 million per-person exemption from federal estate and gift tax[2] to pass an estimated $84 trillion over the next 20 years from the Silent Generation and Baby Boomers to Gen X and Millennials.[3] The high exemption amounts urge families to plan for the impact of dynastic family wealth and a personal trust is often the preferred solution. Also, beneficiary well-being services allow modern trust tools such as directed trusts, silent trusts, and incentive trusts, to have their greatest impact. Finally, beneficiary well-being programs help business-owning families address the complex dynamics involved with transitioning an active family business through the generations and enhance the likelihood of a successful transition.

### Need for Beneficiary Well-Being Trusts

Historically, the powers and duties of a trustee have focused upon providing the greatest financial impact for the family - i.e., lowest taxes, highest returns, largest value of distributions made to beneficiaries. The traditional powers of a trustee include powers to buy and sell assets, to hire and fire advisors, to determine distributions to beneficiaries, and powers related to tax compliance and tax efficiency. Unfortunately, these powers do not address the impact of the wealth upon the family. Moreover, a trustee's duties are similarly focused on maximizing the value of the assets held in trust and providing financial support to trust beneficiaries pursuant to the standards described in the trust agreement. Duties that require the trustee to be prudent, objective, and fair. These traditional duties only address a beneficiary's financial well-being, not their personal, non-financial well-being.

Fortunately, Delaware's new Beneficiary Well-Being Trust legislation augments the powers of a trustee to prepare the family for the wealth. These beneficiary well-being programs increase the chance of a successful transition of wealth through the generations. Beneficiaries receiving significant inheritances may have limited financial literacy or financial management skills that prevent them from being effective stewards of family wealth. Even with strong financial skills, they may be missing a common purpose or vision for this family legacy or lack effective communication or trust among family members. These typical dysfunctional "family dynamics" may lead to distrust and destructive behavior that is fueled by the significant resources made available to the family through a trust. Beneficiary well-being programs help address these root causes and promote positive family dynamics which allow beneficiaries to flourish.

### Delaware's New Beneficiary Well-Being Law

The 2024 Delaware Trust Act added a new Section 3345 to Title 12 of the Delaware Code which provides for a "Beneficiary Well-Being Trust".[4] If the governing instrument makes express reference to Section 3345, the trust is deemed to include the powers, duties, rights, and interests of the beneficiaries, trustees, and advisers, as provided in Section 3345. "[B]eneficiary well-being programs" are defined to include "seminars, courses, programs, workshops, counselors, personal coaches, short-term university programs, group or 1-on-1 meetings, counseling, family meetings, family retreats, family reunions, and custom programs…".[5] These programs have the purpose of "preparing each generation for inheriting wealth by providing … estate and asset planning, assistance with navigating inter-generational asset transfers, developing wealth management and money skills, financial literacy and acumen, business fundamentals, entrepreneurship, knowledge of family businesses, and philanthropy" … and "[e]ducating beneficiaries about the beneficiaries' family history, the family's values, family governance, family dynamics, family mental health and well-being, and connection among family members."[6] Trustees and advisers of a Beneficiary Well-Being Trust shall provide trust beneficiaries with these programs[7] at the expense of the trust.[8]

Dynastic wealth, especially when held in trusts controlled by independent parties, may become isolating and divisive within a family. Financial independence may lead family members to "go their separate ways". Holding assets in trust may prompt distrust among family members if only select family members are active in trust administration, receive complete information regarding trust assets and administration, or these valuable trust assets are held in a pooled "pot" trust for multiple beneficiaries with distributions controlled by subjective distribution standards. The goal of beneficiary well-being programs is to enhance beneficiary education, engagement and transparency regarding family wealth to provide for a beneficiary's holistic well-being.

The new Beneficiary Well-Being law was effective upon enactment and applies to trusts whenever created. This first-of-its-kind statute adds another tool to Delaware's favorable trust laws. Affluent families located anywhere in the country may create a Beneficiary Well-Being Trust that sets forth powers, duties, rights and interests of the beneficiaries, trustees, and advisers to provide beneficiaries with "beneficiary well-being programs." In addition, the statutory default powers of a trustee were amended to grant trustees of all Delaware trusts, created either before or after enactment of the new law, with the additional power to hire providers of beneficiary well-being services.[9] Whether the trust explicitly requires a trustee to provide Beneficiary Well-Being programs, or the trustee provides these services under its default fiduciary powers, the trustee may pay for such services from the trust estate.[10]

*(continued on p. 12)*

*(continued from p. 11)*

### This One-of-a-Kind Tool Helps Families Capture Historically High Estate and Gift Tax Exemptions as Part of the Great Wealth Transfer

Wealthy families have traditionally focused their estate planning on minimizing taxes and maximizing distributions to family members. During this process, these families may overlook opportunities to develop shared family values, preserve their family's history and heritage, participate in family philanthropy, enhance communication skills, and share their intentions behind this significant transfer of wealth. Instead, beneficiaries may often take their inheritances and go their separate ways while dissipating these sums on their current needs and desires without properly shepherding the family endowment through the generations. This loss of family wealth may be from a lack of understanding and education. A Beneficiary Well-Being Trust may provide the financial resources to fund these educational and personal development activities through multiple generations.

A current motivation to fund a Beneficiary Well-Being Trust comes from the potential reduction in the federal estate and gift tax exemption at the end of 2025 if current law is not changed. The federal estate and gift taxes are a "unified" tax system since these transfer taxes are applied against the value of property passing by gift during lifetime or from an estate upon death. The Internal Revenue Code provides an exemption from the estate and gift tax through application of the Unified Credit. If someone were to die in 2024, their lifetime taxable gifts plus the value of their estate would be totaled upon death, the federal transfer tax calculated, and a unified credit would be applied to offset the tax on the first $13.61 million of value. This credit has changed over time and is currently at its highest value ever – shielding $13.61 million per person. This elevated credit amount is the result of the Tax Cuts and Jobs Act of 2017 (TCJA) doubling the basic exclusion from $5 to $10 million along with indexing for inflation. However, these provisions of the TCJA are set to expire at the end of 2025 with the base amount reverting to $5 million. With inflation adjustments, this exemption value is anticipated to be approximately $7 million in 2026. This unified tax credit may be used either during life to shield gifts from tax or at death to eliminate tax on estate assets, or both.[11] Consequently, the reduction of the exemption at the end of 2025 from approximately $14 million to $7 million makes the difference (the $7 million "bonus" exemption) a use-it-or-lose-it proposition.

According to Knight Frank Global Wealth Report, there are approximately 290,000 individuals in the United States with a net worth greater than $30 million.[12] These families face a tough choice between shielding their net worth from estate and gift taxes, by capturing this "bonus" exemption through gifts in trust, or retaining full control over their wealth and subjecting it to potential tax upon death. Several strategies using trusts exist whereby a married couple may gift assets in trust for each spouse to retain some level of access and control during their lives. These trusts are often referred to as Spousal Lifetime Access Trusts (or SLATs). As discussed above, trusts have typically focused on financial management until now, with a trustee holding duties to invest as a prudent person and make distributions to beneficiaries based upon the common standards of health, support, maintenance or education. Families facing the difficult choice of whether to capture the "bonus" exemption in trust now have the benefit of Delaware's new law to provide for a beneficiary's well-being.

Moreover, a Beneficiary Well-Being Trust may be only one of many favorable features of a trust administered in Delaware. As noted above, married couples are creating trusts that benefit each other (SLATs) to capture the bonus exemption while retaining access to the trust assets. Because just over $27 million can pass gift tax-free into these trusts, SLATs have become family endowments that may last multiple generations. In Delaware, investments and distributions may be controlled by hand-selected advisers to retain further control over these trusts. Consequently, Beneficiary Well-Being Trusts may be structured as SLATs which are investment and distribution-directed and last in perpetuity.

Beyond the ultra-wealthy who are capturing bonus exemption in multi-million-dollar trusts, a Beneficiary Well-Being Trust can serve any affluent family[13] who wants their heirs to receive more than financial benefits from their wealth. Even if a trust does not last indefinitely, the next generation may benefit greatly from receiving financial literacy education, coaching around inheriting wealth, information about the beneficiaries' family history, family values, family governance, and connection among family members.

### Beneficiary Well-Being Trusts Are Important for Business-Owning Families

Most business-owning families share a common goal of transitioning their business through multiple generations. Moreover, they face the challenge of accommodating the various needs and requirements of future generations regarding active participation in the business, their reliance upon income from the business, and access to information regarding business operations. Not surprisingly, research indicates that approximately 70% of transfers from one generation to the next will fail and 91% of multi-generational wealth transfers are doomed to fail by the third generation.[14]

Additional research reveals the causes of these failures: 60% are due to breakdowns in communication and trust within families, 25% due to heirs who are not prepared for financial responsibility, 10% due to a lack of a common family purpose or mission, and only 5% due to taxes, corporate governance, legal challenges and other business-related obstacles that can be addressed through traditional estate planning, insurance, or other risk mitigation strategies.[15] Surprisingly, only 5% of these breakdowns are due to a failure in preparing the wealth for the family through traditional estate planning, tax planning and business transition planning. However, 95% of the issues causing these failures are due to a lack of preparing the family for the wealth. Beneficiary well-being programs are ideal vehicles for preparing the family members to be proper stewards of the wealth while also receiving the maximum benefit from this family endowment.

In addition to increasing the likelihood of success in transitioning a business among generations, beneficiary well-being programs help transition family values along the way. Beneficiary well-being programs administered through a multi-generational trust help transfer the family's core value system, leadership skills, beliefs, sense of common purpose, and wisdom. Passing along this personal capital facilitates the stewardship of the financial capital held in trust.

### Conclusion

Delaware's novel new Beneficiary Well-Being Trust law is an essential tool for modern trust planning to help affluent families transition family wealth successfully through the generations. Families who have created a family endowment by funding multi-generational trusts using the historically high exemptions from federal estate and gift taxes now have a tool to prepare the family for the wealth and develop the next generation of family leaders, fund personal development activities, and maintain family cohesion through multiple generations. For business-owning families, it may help them beat the odds and successfully transfer the business through multiple generations. The First State continues to pioneer impactful trust laws that unlock the full potential of personal trusts to impact the well-being of trust beneficiaries.[16]

*As part of the Wilmington Trust Emerald Family Office & Advisory® team, Jeff 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 a recipient of the Wilmington Trust Chairman's Club award. He is a member of the Estates and Trusts Section of the Delaware State Bar Association and the Real Property, Trust & Estate Section of the American Bar Association.*

Notes:
1- 84 Del. Laws 391, §§ 5 and 7 (2024)
2- IRC §§ 2010 and 2505
3- The Cerulli Report – U.S. High-Net-Worth and Ultra-High-Net-Worth Markets 2021: Evolving Wealth Demographics (January 20, 2022)
4- 84 Del. Laws 391, § 7 (2024)
5- 12 Del. Code § 3345(b)
6- 12 Del. Code § 3345(b)(1) and (2)
7- 12 Del. Code § 3345(c)
8- 12 Del. Code § 3345(d)
9- 12 Del. Code § 3325(32)
10- 12 Del. Code §§ 3325(32) and 3345(d)
11- IRC §§ 2010 and 2505
12- Knight Frank. The Wealth Report 2020, https://content.knightfrank.com/content/pdfs/global/the-wealth-report-2020.pdf p. 54 (last accessed Nov. 11, 2024)
13- Knight Frank. The Wealth Report 2020, https://content.knightfrank.com/content/pdfs/global/the-wealth-report-2020.pdf p. 54 (last accessed Nov. 11, 2024). Approximately 18.5 million individuals in the US have a net worth greater than $1 million.
14- Roy Orville Williams and Vic Preisser, *Preparing Heirs*: Five steps to a successful transition of family wealth and values (Reid, 2003), p17
15- Roy Orville Williams and Vic Preisser, *Preparing Heirs*: Five steps to a successful transition of family wealth and values (Reid, 2003)
16- Wilmington Trust is a registered service mark used in connection with various fiduciary and nonfiduciary services offered by certain subsidiaries of M&T Bank Corporation. This article is for general information only and is not intended as an offer or solicitation for the sale of any financial product, service, or other professional advice. Professional advice always requires consideration of individual circumstances. Wilmington Trust does not provide tax, legal, or accounting advice. There is no assurance that any investment, financial, or estate planning strategy will be successful. The information in this article has been obtained from sources believed to be reliable, but its accuracy and completeness are not guaranteed. The opinions, estimates, and projections constitute the judgment of Wilmington Trust and are subject to change without notice.

# The SLAT After Divorce


by
Charles J. Durante
Connolly Gallagher LLP

Some couples are planning their 30th or 50th anniversaries differently than their parents did. For these couples, the celebration will last multiple days, with the observance spilling over two years.

The event planner will be their financial planner. The reception will be in their attorney's conference room. Back on their wedding day, when they were young, in love and broke, they received gifts. For this occasion, they will be making gifts.

They will mark their anniversaries by the newest trademark of successful investors' everlasting love, by creating spousal lifetime access trusts. Mindful that political tides can ebb and flow, that the estate tax exemption can change from a crevice within an omnibus package into a campaign rallying point, they will stake a permanent claim to the current exemption by giving away an eight-figure portfolio into a trust whose terms do not permit revocation.

The trust has all the hallmarks of a permanent gift. No distributions are permitted to the grantor. Distributions of principal are only permitted for ascertainable standards. If the donee spouse has a power of appointment, it will be limited to family members. A trust protector will ensure that the trustee faithfully carries out the grantor's intentions.

If you put on your glasses, though, the trust seems less a straitjacket than a nest. Its distribution adviser might be the grantor's accountant, the trust protector his college roommate. Above all, the grantor's spouse is the income beneficiary, someone who played an indispensable role in the grantor's personal growth and accumulation of opulence, but never had an endowment of her own.

In the following year, the spouse may create a SLAT of her own, perhaps after the capital for this second trust was navigated from joint ownership to her own name in the first year, so that she could create and fund the trust with what appear to be her own assets.

Perhaps the document might permit the beneficiary spouse to appoint an income interest to the grantor after the beneficiary spouse dies, as the couple insouciantly sails past Scylla, Charybdis and Grace v. Commissioner, 395 U.S. 316 (1969),which established the reciprocal trust doctrine, the principle by which trusts are to be disregarded if they leave the couple in essentially the same economic position as if they had created trusts naming themselves as life beneficiaries. (In designing a SLAT, never forget that "a transaction between family members is … subjected to heightened scrutiny to ensure that it is not a sham or disguised gift." Bongard v. Commissioner, 124 T.C. 95 (2005).

Each trust will also contain a feature that would seem counterintuitive to couples who prefer to celebrate their anniversaries with a romantic dinner instead of signing trust documents. SLATs typically include a provision by which the grantor voluntarily commits to paying the tax on the trust's income, even though the grantor doesn't receive it.

Grantor trusts were once the poison ivy of the tax code. Regulations adopted 80 years ago, codified in 1954, discouraged grantors from retaining certain powers, by taxing the grantors on the income of such trusts.

Then came the Tax Reform Act of 1986, which stiffened estate and gift tax rules while lowering the top income tax rate to the low 30s. After about a decade, estate planners realized that a grantor trust could be a useful gambit, that the poison ivy could become an herbal remedy.

After all, if grandpa paid tax at 33 to 39 percent, which was lower than the estate tax rate of 40 to 55 percent, and the kids received their distributions without a K-1, grandpa's estate would be reduced by the tax payment and more wealth could be transferred to younger generations free of estate tax. After internal controversy, the Internal Revenue Service ruled in 2004 that grandpa's payment of the income tax is not a gift to the beneficiaries (although the trust would be included in grandpa's estate if the trust instrument oafishly requires that he be reimbursed for the tax payment).

Thus, spousal lifetime access trusts are often structured as grantor trusts. In case the grantor later tires of paying the tax, a well-drafted SLAT would authorize its grantor to escape the tax liability in future years by electing to shed the retained powers that made it a grantor trust.

SLATs were exotic innovations 15 years ago, when a temporarily heightened estate tax exemption was scheduled to end on December 31, 2012, and revert to the $1 million set in the previous century. The figure was obviously out of date, but a permanent fix proposed in 2009 by Tom Carper and several Senate colleagues was blocked by legislators hoping for full repeal of estate tax. When President Obama was reelected, those legislators acceded to the current tax structure, with a basic exemption of $5 million, indexed from 2011, with portability to surviving spouses.

Many of the pioneering SLATs of 2011-12 have encountered a fact of modern domestic life. Couples divorce. Grandpa may be less accepting of paying the tax on income distributed to his ex-wife. Is there a recourse?

*(continued on p. 16)*

(continued from p. 15)

If the governing instrument gave the ability the power to substitute assets of equivalent power – the kind of retained power that causes the grantor to be taxed – and permitted the grantor to waive the power, would the tax liability then fall to the grantor's ex-spouse?

In this respect, as in the Book of Job, the 2017 Tax Act giveth and taketh away. It requires that the SLAT's income continue to be taxed to the grantor, even if he waives the substitution power.

That's because the substitution power was not the only element that makes a SLAT a grantor trust. The tax code provides that "a grantor of a trust is treated as holding any power or interest in such trust held by any individual who was the spouse of the grantor at the time of the creation of such power or interest." § 672(e)(1)(A).

This provision, often described as the spousal unity rule, means that all income of a trust that was a grantor trust at the outset will be taxed to the grantor even after divorce. For generations, however, another provision of the Code, Section 682(b), protected the grantor from being liable for tax on trust income that was paid to his ex-spouse after divorce, by providing (in antique language) that the ex-spouse is taxed on "the income of any trust which such wife is entitled to receive and which, except for this section, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of this subtitle, be includible in the gross income of such husband."

This provision protected a spouse who would otherwise be taxed on trust income under the grantor trust rules to the extent the income was payable to his former spouse. It provided that the recipient spouse was to be considered as the beneficiary under the general rules of trust taxation. If a taxpayer created a grantor trust for the benefit of his spouse and later got divorced, then all future distributions would be taxed directly to the ex-spouse. In this way, section 682 provided an exception to the grantor trust rules.

Section 682, however, was repealed in the 2017 Tax Act, as part of a broad elimination of traditional rules governing taxation after divorce. Thus, if a grantor who created a trust for his spouse got divorced after 2018, he would remain liable for all taxes of the trust, no matter when the trust was created.

The spousal unity rule therefore makes the SLAT a grantor trust even if the grantor renounces the substitution power. How to deal with this problem?

- One approach would be for the ex-spouse to agree to pay the tax on distributions to her. This approach, easy to define, may prove difficult to administer, involving sharing of tax data, waiting on extended filing and other complications.

- Another would be for all parties to agree to terminate the trust, with a portion going to the ex-spouse and the rest to the children. This approach would be resisted in many cases, as it, however, would reduce the corpus that generates income for the ex-spouse (while increasing her gross estate).

- A third option might involve decanting into a newly drafted trust with identical provisions (other than the substitution power) except that the parties are no longer married when the new trust is created. This strategy would be a rich target on audit, since the new trust is effectively the same trust, the only difference being the parties' changed marital status.

- A fourth gambit might be to decant into a trust that requires a remainder beneficiary to approve any distributions to the ex-spouse. A trust that makes distributions to the grantor's spouse is not taxable to the grantor if distributions can only be made with the approval of an adverse party. § 677(a). This path might beckon when the remainder beneficiary is on good terms with the ex-spouse. Yet, Chief Counsel Advice 202352018, concluding that the acquiescence by a trust beneficiary to a modification that disadvantages her interests constitutes a taxable gift, would loom ominously.

A spousal lifetime access trust truly lasts until death do the parties part.

*Chuck Durante, a partner at Connolly Gallagher LLP, is a fellow of the American College of Trust and Estate Counsel and past president of the Delaware State Bar Association.*

# Our Fiduciary Duty to Protect Elders from Financial Exploitation

By Jared Ong, CFP®

A few years ago, I ran into an old friend. He was single at the time and I asked him how his dating life was going. He was upbeat, as there were a couple of long distance relationships that seemed to be blossoming. As he started going into detail, he mentioned that one of his potential paramours had gotten him involved with a new cryptocurrency trade. A bit concerned, I asked if what he was investing in was legitimate and if the woman he was communicating with was even real.

He assured me that he'd done much due diligence. He'd asked her what she was doing or eating, and the friend was always speedy in replying. He'd tested the cryptocurrency brokerage multiple times with various amounts to verify it was a legitimate platform and that he was able to deposit and withdraw money without issue. Everything looked on the up and up.

A few months later, I ran into him again. He told me that the whole thing had been a scam, and he had lost quite a bit of money. The cryptocurrency platform ended up being fake. Because he was able to transfer small amounts back and forth, he eventually decided to put a large sum for investment. That's when his assets disappeared and his friend stopped communicating with him.

Hearing his story prompted me to do more research, for I found it hard to believe that my intelligent and cautious friend could have been defrauded so easily. I discovered that this type of scam, known as pig-butchering, was more common than I'd realized. In fact these scams in many cases originate within boiler rooms where fraudsters armed with detailed scripts play the long game to hook their victim. My friend was defrauded more than 5 years ago, and since then pig-butchering scams have received national attention, with articles in major newspapers and news broadcasts warning consumers of the danger.

Pig-butchering and other types of scams, such as romance scams, investment scams, or technical support scams, will often target the elderly or vulnerable adult, who are more susceptible to these types of scams because of age or cognitive decline. The FBI, through its Internet Crime Complaint Center (IC3) database, reported that the total losses for complainants over 60 reached $3.4 billion just within 2023 alone. That year saw over 101,000 elderly victims file complaints with the center. And certainly these numbers are sure to be higher, as they include only those complaints that were reported to the database.

Sadly, an even cursory glance of the IC3 statistics over the last few years shows that the elderly community is being targeted at a higher rate. Between 2018 to 2023, the number of reported victims over 60 rose from 60,000 to 101,000 and the reported dollar amounts rose from just over $500,000 to $3.4 billion.

### What is Financial Exploitation?

With financial exploitation on the rise, it's important for banks and other financial institutions to be aware of the potential signs and understand their fiduciary duty to protect and report. Crime and fraud will continue to increase, but our institutions and employees have the ability to stop the illegal flow of money to these fraudsters.

Financial exploitation of the elderly is actually defined in Delaware Code Title 31 § 3902(12) specifically as "illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the elderly person or the vulnerable adult by any person or entity for any person's or entity's profit or advantage".

The code also further states that financial exploitation includes, but is not limited to,

a) the use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence
b) a breach of fiduciary duty, particularly related to the misuse of power of attorney, trust, or guardianship appointment, and
c) the obtaining or usage of assets without lawful authority by a person or entity who clearly knows that the elderly lacks capacity to consent to release

From a law enforcement's perspective, however, financial exploitation is given a broader, more easy to understand definition. The Elder Justice Initiative by the US Department Department of Justice defines financial exploitation as falling into two types:

**Financial fraud:** Defined as financial crimes committed by someone unknown by the victim.

*(Continued on p . 20)*

## Financial Elder Abuse

*(continued from p. 19)*

**Financial abuse:** Defined as financial crimes committed by a perpetrator known by the victim. This might be a friend, family, or trusted loved one.

I would postulate that the DOJ's definition can be more helpful than Delaware's legal definition because it helps differentiate between financial crimes committed by strangers, such as technical support, phishing, or lottery/sweepstakes scams, and those that are committed under a relationship of trust. For financial institutions, it may be easier to identify situations of financial fraud, as the risk department will flag wires or transfers to unknown parties, especially when the dollar amounts are high. Financial abuse, on the other hand, can be harder to detect due to long-standing relationships between the victim and the abuser.

### A Superstar's Story of Financial Abuse

One example of financial abuse recently in the news is the story of baseball superstar Shohei Ohtani and his interpreter and translator Ippei Mizuhara. Ippei first met Shohei in 2013, many years before Shohei became a two-way MVP in the major leagues. At the time, Ippei was interpreting for the Hokkaido Nippon-Ham Fighters, where Shohei started his career. The two became fast friends and when Ohtani moved to the US to further his career with the Los Angeles Angels, Mizuhara was also hired by the Angels to assist him. Ohtani and Mizuhara were so close that Mizuhara would be seen outside of traditional interpreting situations, such as catching Ohtani's warm-up pitches.

With this close association, Mizuhara began to abuse Ohtani's trust. When Ohtani went to open a new bank account in the United States in 2018 after signing with the Angels, Mizuhara was there to translate for his friend. In fact, all of Shohei's salary was deposited to that account, but Shohei's financial advisors and bookkeepers did not have access to the account and did not receive any statements. Between 2021 and January 2024, according to court affidavits, Ippei started using the account for his own personal gain. He impersonated Shohei, transferred as much as $16 million to an illegal sports bookie, and even used the account to buy sports memorabilia. Shohei, who is famous for being an ascetic who focuses solely on baseball, was aware of none of this until the FBI began an investigation into the illegal bookie's operations and a reporter started asking questions.

In fact, Shohei only started to suspect something was going on after Ippei answered the reporter's questions for him in English. Ippei's statement to an ESPN reporter, who asked about Shohei's potential involvement in the sports gambling scandal, was merely that Shohei was paying off Mizuhara's debts as a friend. Following the press conference, Shohei confronted Ippei and that was when the fraud began to be discovered.

Ippei ended up pleading guilty to fraud charges in June 2024 and admitted to stealing almost $17 million from Shohei. Ippei Mizuhara faces a maximum sentence of 33 years, with sentencing scheduled for December 20, 2024.

Although Shohei is in his prime and not considered an elderly adult, he would certainly be considered a vulnerable adult due to his lack of command of the English language. I cite this story because the circumstances between Shohei Ohtani and Ippei Mizuhara include many telltale signs of financial abuse that financial professionals can draw upon as a reference. These include:

1. A new "best friend" accompanying the vulnerable adult to the bank and being involved with the transaction
2. The best friend suddenly conducting financial transactions on behalf of the vulnerable person without proper documentation
3. Signs of suspicious signatures, impersonation, or forgery
4. Uncharacteristic attempts to wire large sums of money
5. Unusual activity, including large, frequent, or unexplained withdrawals
6. Withdrawals that the vulnerable adult is unable to explain
7. Bank statements inaccessible by the vulnerable adult

Many of these signs may have been caught by the financial institutions involved. And in actuality, there were times when Ippei failed in his impersonation attempts to transfer money for a "car loan", and the bank froze the online transactions. Despite these obstacles, Ippei was successful in continuing the fraud for many years. The takeaway from all of this is that financial professionals must be on the lookout for patterns in transactions or signs that something could be amiss. The American Bankers Association has provided a helpful reference of potential signs of elder financial abuse. Many of the signs on the list were present in Ippei's on-going fraud.

### Guidelines to Reporting

For financial institutions that have identified potential situations of financial exploitation, the Delaware Code also provides guidance as to next steps. According to Delaware Title 31 § 3910 (c), the employee of the financial institution needs to follow the institution's internal written policies, with a report to be made the earlier of five business days or when the financial institution completes the investigation of the suspicious transaction. Thankfully the code provides the reporting individual immunity if the employee reports in good faith.

The code also empowers the financial institution with the right to place a hold on a suspicious transaction for 10 business days following the filing of a fraud report. From there, the transaction can actually be held for as long as 30 business days if the financial institution is waiting to hear from the Delaware Department of Justice or Department of Adult Protective Services, or if there is a request from federal or state agencies to investigate further.

When following this process of reporting, it is important that financial institutions make a referral to Adult Protective Services and use the Report of Suspected Financial Exploitation Form.

If an individual suspects financial exploitation of an elderly adult, the process is slightly different. The individual should call Adult Protective Services within 24 hours using their hotline 1-888-277-4302 (1-888-APS-4302). There is also an Adult Protective Services Online Submission Form, which is different from the financial exploitation form used by banks and other financial institutions.

### Stay Vigilant

With the help of our compliance and risk departments, institutions and professionals can have the right procedures and processes in place to identify and report financial exploitation. However, none of us will be able to stand still. With the rise of new technologies, there will need to be continued vigilance. A recent scam reported by the Salt Lake City police in late October 2024 stated that citizens were receiving emails with deep fake videos of the police chief ordering potential victims to send money. Generative AI's ability to recreate realistic video or voice, will make it even more critical for financial professionals to be trained to properly spot fraud or abuse. The old adage to "know your customer" will take on a higher meaning, as no longer will "knowing your customer" be needed to make a sale, but to combat financial exploitation. In essence, customers may end up needing to rely on us to protect them, and it will be our fiduciary duty as institutions and professionals who control the flow of money, and are the last line of defense, to identify and report potential elder fraud and abuse.

*Jared Ong oversees portfolio management, trading and technology for Prudent Investors. He has more than 15 years of experience working in the financial services industry and holds a Series 65 license. Before joining Prudent in 2010, Jared previously worked at Capital Group as a business systems analyst where he was integral in improving the trade operations group's equity, fixed income, and foreign exchange trade processes.*

*Jared specializes in working with private trustees and professional fiduciaries and co-authored the guide Decoding the Uniform Prudent Investor Act. He is an active speaker and has presented to the American College of Trust and Estate Counsel (ACTEC), the Delaware Trust Conference, the Professional Fiduciaries Association of California (PFAC), the Probate Attorneys of San Diego (PASD), and various Estate Planning Councils. A graduate from Brigham Young University, Jared holds a Bachelors in Music and has obtained his CFP® certification. In his spare time, he enjoys composing and arranging music.*

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# 19th Annual Delaware Trust Conference

A record number of attendees fill the Wilmington Hall of the Chase Center on the Riverfront

Robert W. Eaddy, President, The Bryn Mawr Trust Company of Delaware, Co-Chair of the DBA Trust Committee, and Chair Matthew P. D'Emilio, Director, McCollom D'Emilio Smith Uebler LLC, welcom attendees to the 2024 Delaware Trust Conference.

Over 460 Trust Professionals, Portfolio Managers, Financial Advisors, Attorneys, CPAs, CTFAs, Wealth & Asset Management Services Executives, Executive Trust Officers, Investment Officers, Investment Managers, and Trust Department Managers flocked to the Chase Center on the Riverfront, October 28 and 29 for the 2024 Delaware Trust Conference. The conference was also available as a live-stream through the conference app, as well as being posted for on-demand viewing through November. Thank you to all our sponsors, exhibitors, speakers, planners, and all those who continue to make the Delaware Trust Conference a premiere wealth management event.

Sarah A. Long, President, Delaware Bankers Association, addresses the attendees during lunch.

Delaware Trust Conference

# Thomas M. Forrest Receives Delaware Trust and Wealth Management Lifetime Achievement Award

Conference chair, Matt D'Emilio presents the 2024 Delaware Trust and Wealth Management Lifetime Achievement Award to Tom Forrest

Thomas M. Forrest, capped off an unparallelled 45-year career in the trust industry by receiving the 3rd Annual Delaware Trust and Wealth Management Lifetime Achievement Award presented by the Delaware Bankers Association at the 2024 Delaware Trust Conference. The award recognizes an individual who has made a significant impact on the Delaware Trust & Estate field. Nominations for the award were made by members of the DBA Trust Committee and reviewed by the Delaware Trust Conference executive committee.

Tom Forrest began his career at Wilmington Trust in 1977 and ended in 2022 at US Trust Company of Delaware, with numerous stops along the way. Tom started two Delaware trust companies, Charles Schwab Trust Company of Delaware and US Trust Company of Delaware. His leadership brought heightened visibility to the First State's trust industry. He has traveled the county promoting Delaware as the premier trust jurisdiction. Tom's presentations, complete with magic and jokes, were both memorable and effective.

Current and past Conference chairs congratulate Tom Forrest. (l to r) Matt D'Emilio, Elizabeth Luk, Todd Flubacher, Tom Forrest, Twiggy Forrest, Mark Oller, and Sarah Long.

Tom served as the President of the Bank & Trust Tax Association of Mid-Atlantic States; President of the National Association of Estate Planners & Councils and is a past chair of the Delaware Bankers Association. He also served on numerous boards both industry-related and charitable.

Tom has been recognized with numerous awards. These include the Distinguished Accredited Estate Planner Award, induction into the Estate Planning Hall of Fame, The Philadelphia Estate Planning Council's Meritorious Service Award, as well as the Council's Annual Distinguished Estate Planner of the Year Award.

Congratulations, Tom, and thank you for your service to the Delaware trust industry!

# Great Sessions! Great Speakers!

Samuel A. Donaldson, Professor of Law, Georgia State University, provided an entertaining and informative update on Federal Tax cases and regulations from the past 12 months, along with an analysis of what may be coming in the next year.

Gregory J. Weinig, Partner, Connolly Gallagher LLP, and Jocelyn Borowsky, Partner, Duane Morris LLP delved into the two new trusts statutes passed in Delaware, along with updates on pertinent case law in *Trust Act 24 & More!*

Richard W. Nenno, Senior Counsel, Young Conaway Stargatt & Taylor, LLP, and Robert H. Sitkoff, Austin Wakeman Scott Professor of Law, John L. Gray Professor of Law, Harvard Law School examined what makes the Delaware Advantage work, and what endangers its future in *Conflicts Of Law*.

*Protection, Perch, or Pillory - How Drafters and Trustees Can Support the Well-Being of the Next Generation* was the topic examined by (l to r) Ronald Templeton, Jr., Senior Trust Officer, Team Lead, The Bryn Mawr Trust Company of Delaware, Todd A. Flubacher, Partner, Morris, Nichols, Arsht & Tunnell LLP, and, Kristin Keffeler, MSM, MAPP, Chief Learning Officer, Johnson Financial Group.

Jeremy Lau, CEO, Prudent Investors, and Jared Ong, Principal, Prudent Investors, detailed the various ways criminals are exploiting seniors and the role wealth managers have in helping prevent this abuse in their ethics session entitled Our Fiduciary Duty to Protect Elders from Financial Abuse. Read the full article on p. 18.

Isabel R. Araújo, Senior Manager, Trust Services Consulting, Charles Schwab Trust Company of Delaware, Theresa L. Hughes, Professional Individual Trustee, and, Mark Lingerfield, Manging Director, MPI, tackle the intricacies of *Planning with Hard to Value Assests in 2025, Lessons from 2012.*

Dana G. Fitzsimons, Jr., Managing Director, Senior Fiduciary Counsel, Bessemer Trust, provides his annual *Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases.*

*Back-End SLAT's, Estate Taxes and Asset Protection: The Perfect 2025 Planning Technique or Planning Frought with Terror?* That was the question posed and answered by George Karibjanian, Member, Franklin Karibjanian & Law, PLLC


Delaware Trust Conference

# Meanwhile, In the Hall...

While the Delaware Trust Conference sessions take place in the cavernous Wilmington Hall, the exhibitors, the reception and the networking in the Governor's Hall are an integral part of the Delaware Trust Conference experience.

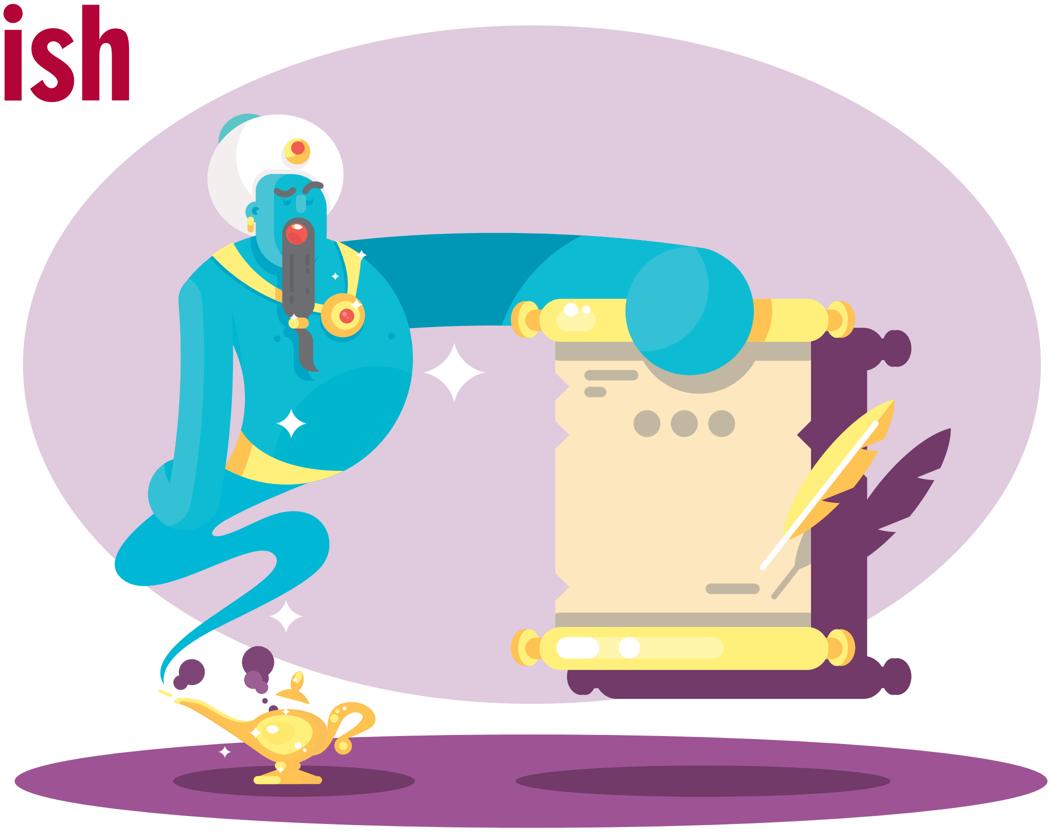


# Everyone's a Winner!

Thank you to all the sponsors and exhibitors who donated door prizes: American Bankers Association; Bank of America, Private Bank/ US Trust Company; Duane Morris;Gordon Fournaris & Mammerella; Greenleaf Trust Delaware; JTC Group; Koplin Consulting; National Care Advisors; Pinion; Richard Layton & Finger; Santora CPA Group; TEAM; The Nuvo Group; and, Weiner Benefits Group.

Below are just a few of the winners...

# Make a Wish



## § 3315 Codifies Standards for Considering Letter of Wishes

by
Jacob Borowsky
McCollom D'Emilio Smith Uebler LLC

In August, the governor of the State of Delaware adopted Senate Bill 268, amending Title 12 of the Delaware Code relating to Delaware's trust law. Among those changes is an amendment to 12 *Del. C.* § 3315, which codifies the standards a trustee is subject to when considering a letter of wishes in connection with the exercise of its discretionary powers.

### The Letter of Wishes and Settlor Intent

The "cardinal rule" of Delaware trust law is the principle that settlors in Delaware have significant freedom of disposition. When the governing instrument makes clear what the settlor wants, the settlor's intent controls. However, more often than not, what a settlor wants regarding the trust's administration and disposition is not fully captured in the trust's governing instrument. This may be especially true when a trustee is granted broad discretion over distributions from the trust.

By using a letter of wishes, settlors can leave further instructions, context, or explanations of their desires to the trustee, to use in the trustee's interpretation of a governing instrument. In the context of discretionary powers, a letter of wishes can help clarify how the settlor might have wanted the discretionary powers to be exercised depending on the circumstances.

### The Basic Standards for a Letter of Wishes

The amended statute clarifies when and how trustees may consider a letter of wishes. To begin, the statute codifies what is required for a letter of wishes to be valid. The letter must be delivered to the trustee by or on behalf of the settlor; the letter must reflect the settlor's intent contemporaneous with the date of execution of the governing instrument; and the letter must not be inconsistent with any provision of the governing instrument.[1]

The statute gives trustees wide latitude in considering letters of wishes.[2] The standard of review pertaining to a trustee's discretionary actions, however, remain subject to the Restatement (Second) of Trusts and Delaware case law.[3] This means that a trustee still must act with "skill, care, diligence, and prudence" in utilizing its discretion.[4] Moreover, a court will not upset the trustee's judgment in exercising its discretion unless the trustee acted "in bad faith or in an arbitrary or unreasonable manner," such as acting dishonestly or with an improper motive.[5] The statute clarifies that these trustee standards, which apply in other contexts under § 3315(a), also apply when considering a letter of wishes.

### Timing of Letters of Wishes

The amended statute also provides requirements for the timing of the letter of wishes. Specifically, the statute provides that the letter of wishes may be created at any time, but it must reflect the settlor's intent as of the date of the trust's creation. The letter may reflect the settlor's intent with "facts and circumstances known to the [settlor], or not known to or anticipated by the [settlor]" at the time of execution.[6] This allows the settlor to draft a letter of wishes *after* executing the governing instrument and to include facts in the letter that were unknown to the settlor when creating the trust, so long as the wishes remain consistent with the settlor's original intent.[7]

### Impact on Trustee Discretion

The statute then provides a common sense approach for interpreting the settlor's intent: if the governing instrument is clear, then a trustee may ignore the letter of wishes. But if the governing instrument is ambiguous, then a trustee may consider a letter of wishes as long as the letter is not inconsistent with the governing instrument (and as long as the letter meets the other requirements of the statute).[8] The statute therefore conforms with existing case law by applying the same approach taken by Delaware courts with

*(continued on p. 36)*

(continued from p. 35)

regard to the use of extrinsic evidence a trustee may use extrinsic evidence to discern a settlor's intent when it's not clear from the language of the governing instrument.[9] Further, unlike an incorporation by reference, a trustee is not bound by, and has no duty to follow, a letter of wishes.[10]

However, the new statute is distinguishable from some existing case law. For example, in *Bishop v. McNeil*, the court refused to consider extrinsic evidence of the settlor's intent.[11] In that case, an income beneficiary sued the trustees of a trust when they refused to make a discretionary distribution requested by the beneficiary. The beneficiary attempted to present evidence of a letter, written by the settlor to the beneficiary *after* the trust was created, to establish that the distribution was consistent with the settlor's intent. The court held that the letter was inadmissible because the trust instrument, by its terms, gave the trustees absolute discretion regarding distributions; the terms of the trust were unambiguous; and the *post-hoc* letter would be inconsistent with such terms.

The statute is distinguishable from *Bishop* because it affirms that trustees may use letters of wishes as *non-binding* statements of settlor's intent at the time of execution.[12] Whereas, in *Bishop*, the letter did not reflect the settlor's intent at the time of execution, the new statute will allow trustees to consider such letters so long as they are not inconsistent with the settlor's original intent. Further, whereas the beneficiary in *Bishop* attempted to use the letter to compel the trustees to make a distribution, the new statute clearly provides that such letters are not binding on the trustee.

## Other Common Situations

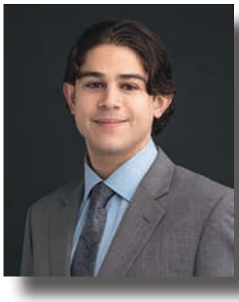
Consider the following situation: in a governing instrument, a settlor provides that the trustee may distribute income and principal for education in order to enable the beneficiary to have a successful career. In a letter of wishes, the settlor writes that the only permissible educational expenses are textbooks and school supplies; tuition and room and board for college and/or post-graduate studies; any expenses of studying abroad during college and/or post-grad; study aid or tutoring services; and any other expenses directly related to education at an accredited institution of higher learning. If a beneficiary tells the trustee that he wants to pursue a career in basketball and requests a distribution so that he can purchase Steph Curry's Masterclass on how to shoot three-pointers, how should the trustee proceed?[13]

While the trust agreement may have been ambiguous on this point, the letter of wishes provides the trustee with ample grounds to deny the request. While the class is maybe educational, it is inconsistent with the letter of wishes because it is not part of a college or post-graduate program, and is not offered by an accredited institution. The trustee can justifiably rely on the letter to guide its discretion here because it both reflects and serves to inform the settlor's intent with respect to the education distribution standard.

Consider another situation: suppose the settlor creates an irrevocable trust for the benefit of his three grandchildren which does not state whether the distributions should be made equally among them. Later, the settlor learns that one of his grandchildren has autism, and will require vastly disproportionate distributions from the trust. In this case, the settlor could draft a letter of wishes explaining that, although he did not know his grandson had autism at the time of drafting, if he had, he would have expressly permitted the trustee to make unequal distributions for the benefit of his grandson. Thus, the settlor can use the letter of wishes, which is not inconsistent with the trust instrument, to clarify his intent at the time of drafting.

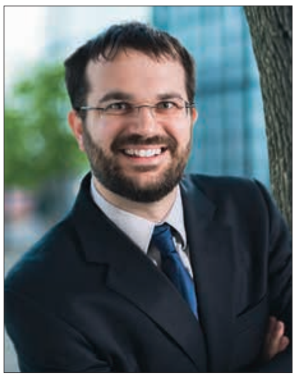
***

Overall, the amendment to § 3315 codifies standards for a practice that was already commonplace: settlors leaving letters to elaborate on or clarify their intention after they've already established a formal estate plan. The statute will help settlors by allowing them an informal avenue to provide greater detail about their intent or wishes. It will also help trustees by providing standards and protection for their consideration of such letters.



*Jacob Borowsky is an associate in firm of McCollom D'Emilio Smith Uebler LLC. Jacob practices in the areas of estate planning, trust and estate administration, and wealth preservation. Jacob attended Temple University Beasley School of Law, where he was a Beasley Scholar, earning a full-tuition merit scholarship for academic performance. At Temple, Jacob was a Research Editor for the Temple International and Comparative Law Journal. In addition, Jacob also earned the Kohn Prize for excellence in the ITS course.*

Notes:
1- 12 *Del.* C. § 3315(c)(1).
2- 12 *Del.* C. § 3315(c).
3- 12 *Del.* C. § 3315(a); RESTATEMENT (SECOND) OF TRUSTS § 187.
4- Lynch v. Barba, 2018 WL 1613834, at *4 (Del. Ch. Apr. 3, 2018), *adopted*, 2018 WL 1894700 (Del. Ch. Apr. 19, 2018).
5- *Couch*, 723 A.2d at 382–83; RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. i.
6- *Id.*
7- This approach affirms prior case law pertaining to the timing of settlor's intent. See *Hammond*, 2016 WL 359088, at *4 ("A settlor's intent at the time a trust is established is the controlling inquiry; an intent developed after creating a trust is irrelevant for purposes of construing the trust."); *see* Matter of Jeremy Paradise Dynasty Tr., 2023 WL 1241903 (Del. Ch. Jan. 31, 2023) (considering settlor's intent at the time of execution).
8- 12 *Del.* C. § 3315(c)(2)–(c)(4).
9- *See* Hammond Irrevocable Tr. Agreement, 2016 WL 359088, at *4 (holding that the court cannot consider extrinsic evidence to construe settlor's intent when the language of the Trust instrument is unambiguous); see Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997) (holding that where a trust instrument's language is "fairly susceptible of different interpretations or may have two or more meanings," there is ambiguity, and the court may look to extrinsic sources to ascertain the settlor's intent); *distinguishable from Bishop*, 1999 WL 743489, at *18 (holding that the court cannot consider extrinsic evidence to vary provisions of a trust agreement that are unambiguous).
10- 12 *Del. C.* § 3315(c)(5).
11- *Bishop*, 1999 WL 743489, at *18.
12- See the draft synopsis of Senate Bill 268.
13- Steph Curry actually does offer a Masterclass on shooting, ballhandling, and scoring, starting at $10/month. https://www.masterclass.com/classes/stephen-curry-teaches-shooting-ball-handling-and-scoring.



**Karly Laughlin, CPA, AEP**
**and**
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*"For business owners with substantial assets, the potential tax savings from acting before the TCJA sunsets could be significant."*

# Guiding Clients Through the TCJA Sunset: Gifting a Business for Tax Savings

As the key provisions of the Tax Cuts and Jobs Act (TCJA) approach their sunset on December 31, 2025, business owners face a critical planning opportunity to transfer wealth to family members while minimizing tax burdens. One of the most impactful strategies for high-net-worth individuals is gifting a business to the next generation of family members. Bankers, working alongside Certified Public Accountants (CPAs), Certified Valuation Analysts (CVAs), and estate planning attorneys, can play a pivotal role in guiding clients through this complex process.

## The TCJA Sunset: What It Means for Clients

The TCJA, enacted in 2017, temporarily doubled the federal estate and gift tax exemption, allowing individuals to transfer up to $13.61 million (or $27.22 million for married couples) without triggering federal estate or gift taxes. However, this increased exemption is set to expire at the end of 2025. When the TCJA sunsets, the exemption will revert to its pre-2018 level—around $6 million per individual, adjusted for inflation.

This change presents a limited opportunity for business owners to gift their business, or a portion of their business, to family members under the enhanced tax exemption. After 2025, any gifts exceeding the lowered exemption could be subject to a 40% federal estate and gift tax rate.

For business owners with substantial assets, the potential tax savings from acting before the TCJA sunsets could be significant.

## Why Gifting a Business is an Effective Strategy

Gifting any portion of a business to family members before the TCJA sunsets can be a powerful way to minimize estate and gift taxes. With the current exemption levels, business owners can transfer substantial assets without triggering federal taxes, preserving wealth for future generations.

For example, consider a business valued at $10 million. If the business is gifted to family members now, under the current exemption, no federal gift tax would be due. If the same transfer occurs after 2025, when the exemption drops to $6 million, the remaining $4 million would be subject to the 40% gift tax rate, resulting in a tax liability of $1.6 million.

This strategy not only offers immediate estate tax savings but also allows the transfer of ownership in a business to the next generation to aid in ensuring a smooth transition and continued family ownership.

## How Bankers Can Support Clients Through the Process

Bankers are uniquely positioned to help clients navigate these complex tax and estate planning decisions. To do this effectively, they must work closely with a client's broader advisory team, including CPAs, CVAs, and estate planning attorneys. Here's how bankers can help:

**1. Educate Clients on the TCJA Sunset**
Many clients may not be fully aware of the tax implications of the TCJA sunset. Bankers should be proactive in informing clients about the changes to the estate and gift tax exemption and how the reduced exemption after 2025 could result in significantly higher tax liabilities.

By explaining the financial impact of these changes, bankers can help clients understand the urgency of making decisions now. Time is of the essence, and acting before the TCJA sunsets can mean the difference between saving millions in taxes and facing hefty tax bills down the road.

**2. Collaborate with CPAs for Tax Planning**
Bankers should work hand in hand with CPAs to help clients structure gifts in a way that minimizes tax burdens while aligning with broader financial goals. CPAs provide essential insights into a client's overall

financial situation, ensuring that the gifting strategy complements the client's long-term financial plans.

Working together, bankers and CPAs can ensure that clients maximize their use of the current gift and estate tax exemptions, structuring transfers in the most tax-efficient way possible.

**3. Partner with CVAs for Accurate Business Valuations**
An accurate valuation of the business is critical to ensuring the gift is structured correctly and defensibly from a tax perspective. Certified Valuation Analysts (CVAs) can provide reliable, defensible business valuations that help avoid disputes with the IRS over the value of the transfer.

Bankers should encourage clients to work with a CVA to establish the fair market value of their business before gifting it. This ensures that the gift is properly valued and reported, reducing the risk of audit or additional taxes later on.

**4. Involve Estate Planning Attorneys for Legal Structure**
Gifting a business is not just about taxes—it also involves legal considerations that must be carefully structured. Estate planning attorneys play a vital role in ensuring the transfer of the business is legally sound and aligned with the client's broader estate plan. Attorneys can help set up trusts, family limited partnerships, or other structures that provide additional tax benefits or protections for the business and the family. Bankers should collaborate closely with attorneys to ensure all aspects of the business transfer are handled appropriately.

### The Importance of Acting Now

The countdown to the TCJA sunset is on, and the time to act is now. Gifting a business and taking advantage of the current, higher estate and gift tax exemption requires careful planning and collaboration between a client's team of advisors.

Bankers should emphasize the importance of beginning this process early. Complex estate plans involving large businesses take time to finalize, and waiting until the last minute could result in missed opportunities or rushed decisions that aren't fully optimized for tax savings.

The clock is ticking on this limited-time opportunity, and bankers who help their clients act now will strengthen their relationships and add significant value to their clients' financial futures.

# For Your Benefit

## Qualified Charitable Distributions

**Louis D. Memmolo, AIF, GBA, NQPA**
**Weiner Benefits Group, LLC**

*"...Staying updated on the annual cap is important, as it can influence your donation strategy"*

Considering how to leverage charitable contributions can be a fulfilling endeavor when considering how to build a legacy. Qualified Charitable Distributions (QCDs) can offer an opportunity to support your favorite causes and manage your retirement income. Here are some factors to consider with QCDs and how they've changed based on recent legislation, such as the SECURE Act.

### What Is a Qualified Charitable Distribution (QCD)?

A Qualified Charitable Distribution allows individuals aged 70½ or older to donate directly from specific retirement accounts to qualified charities without recognizing the distribution as taxable income. Such distributions can help you manage your required minimum distributions (RMDs). Additionally, the SECURE Act 2.0 changed the age of RMDs to 73.

### Age and Account Requirements

You must be at least 70½ years old to qualify for a QCD. The distribution can be made from an IRA. You can use SEP IRAs or SIMPLE IRAs so long as they are inactive, meaning that you've made no contributions to the account in the year the QCD is taken. However, keep in mind that 401(k)s and other non-IRA retirement vehicles do not qualify for QCDs.

Once you reach age 73, you must begin taking RMDs from a traditional IRA, SEP IRA, or SIMPLE IRA in most circumstances. Withdrawals from traditional IRAs are taxed as ordinary income and, if taken before age 59½, may be subject to a 10% federal income tax penalty.

To qualify for the tax- and penalty-free withdrawal of earnings, Roth IRA distributions must meet a 5-year holding requirement and occur after age 59½. Tax-free and penalty-free withdrawals can also be taken under certain other circumstances, such as the owner's death. The original Roth IRA owner is not required to take minimum annual withdrawals.[1]

### Limits and Adjustments

The maximum annual limit for QCDs is currently set at $100,000 for 2024, an amount that adjusts for inflation yearly. Therefore, staying updated on the annual cap is important, as it can influence your donation strategy.[1]

### Financial Advantages

In addition to helping you support a charity, a QCD may also offer to help you manage your tax situation. IRA withdrawals are generally taxable, but QCDs are excluded from taxable income, meaning they do not increase your adjusted gross income (AGI). For some, this may be an opportunity to consider when balancing supporting a charitable organization and managing taxes.

Additionally, QCDs enable you to satisfy your RMD requirements. You also benefit from the fact that you do not need to itemize deductions to take advantage of a QCD, allowing you to use the standard deduction.[1]

### Charity and RMD Considerations

QCDs are versatile in that there is no restriction on the number of charities you can support, provided they qualify under IRS guidelines. However, the donation must go directly from your IRA to the charity to be a QCD. Gifts made as QCDs can fulfill all or part of your annual RMD requirement. It is worth noting that if you donate over your RMD amount, the excess cannot be rolled over to the next year's RMD.

### Final Key Details

It's prudent to confirm the status of your chosen charity through the IRS Online Search Tool or by consulting with a professional who can speak to the tax status of the organization. If you withdraw and then donate the funds, it does not count as a QCD and becomes taxable.

We encourage you to consult with your tax, legal, and accounting professionals before modifying your retirement income strategy.

1. IRS.gov, 2024

*This article is not intended to be exhaustive. There are many factors to consider when determining if a QCD is right for you. The summarized information comes directly from our resource libraries, FMG Suite, Legislative Update Newsletters, and Zywave partnerships. Please contact us for all sources and/or complete articles. If you want to be added to our email list or schedule a consultation, contact the WBG Team.*

# Lending Law Update

## Mortgage Lenders: Don't Forget the Personal Property

**Brent C. Shaffer**
**Young Conaway Stargatt & Taylor, LLP**

*"Recently banks have been instructing lawyers to remove all collateral from mortgages except the real property and fixtures..."*

The different treatment under Delaware law of grants to secure loans of interests in real property (primarily through mortgages governed by Delaware common law) and interests in personal property (primarily governed by the Uniform Commercial Code) is something banks have always had to deal with. Historically, lending lawyers drafted mortgages granting banks security in a broad spectrum of collateral, including real property, fixtures, personal property, and numerous other rights in connection with the real estate -- even for loans to borrowers that exist only to hold title to real estate. However, recently banks have been instructing lawyers to remove all collateral from mortgages except the real property and fixtures, thereby eliminating all security interests in personal property. The reason for this is heightened scrutiny by bank regulators of compliance with federal flood insurance requirements. Under federal regulations, if personal property is located on real estate in a special flood hazard zone, then the bank must require flood contents insurance for such personal property, as well as for the buildings, which can be very expensive for the borrower. 12 C.F.R. § 208.25.

This policy is short-sighted in nearly every commercial real estate loan situation. All bank commercial real estate loan approvals should require, in addition to the mortgage, a blanket security interest in personal property, which can either be granted in the mortgage or, if the bank prefers, in a separate security agreement. The reasons for this are as follows: first, banks always want real estate fixtures as part of the collateral, but under Delaware law whether an item is a real property fixture or instead personal property is a question of intent of the party that installs the item. See *Wilmington Housing Authority v. Parcel of Land*, 59 Del. 278 (Del. Sup. Ct. 1966). A bank that foregoes the personal property security interest might not have any claim to expensive equipment in the building if a court determines there was no intention for the machinery to be permanent. Second, think about what a bank needs if it forecloses under its mortgage and takes over the operation of the real property. The bank will want to have books, records, contracts, and documentation regarding the mortgaged property; but without a security interest in these items, it has no leverage to demand that the defaulting borrower produce them. The situation is even more critical in the case of a construction loan, where it is essential that the bank be able to obtain rights to construction materials delivered to the site but not yet installed.

Finally, consider that the personal property contents insurance is only required if the real property is actually in a special flood hazard zone. A bank's policy that personal property should never be taken as collateral should not exist because of a mere possibility that the real property is located in a special flood hazard zone; in most cases this will not be the case.

# PROBLEM SOLVERS

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