I. INTRODUCTION

Delaware is a trust-friendly state. For more than a century, Delaware has assisted wealthy families in accomplishing objectives such as teaching younger generations about the responsible stewardship of wealth and philanthropy while simultaneously maximizing the investment return on family assets, protecting family wealth from creditors and saving income taxes. See, Richard Nenno, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection*, ALI-ABA Planning Techniques for Large Estates (2010), available at https://www.ali-cle.org/index.cfm?fuseaction=online.library&tab=1&run=1&search_string=nenno&source=2&categoryid=0&Submit.x=0&Submit.y=0

It is for these reasons and the reasons set forth in this outline that almost every major institutional trustee is either based in Delaware or has opened an office to provide trust services there. It is also for these reasons that many wealthy families have established their own trust companies (limited purpose trust companies) in Delaware. A list of institutional trust companies and limited purpose trust companies

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may be found at www.banking.delaware.gov. It should be obvious to the reader that nearly all national institutional trustees are open in Delaware for trust business.

However, it is not the purpose of this outline to deliver a sales pitch for Delaware trust business. Rather, it is the purpose of this outline to explain why so many institutional trustees and family offices have moved trust operations to Delaware and why so many trust attorneys are working with their wealthy clients to change the situs of existing trusts to Delaware. The explanation may lead many to work on trust legislation in their own states. The explanation will also demonstrate that it is not necessary for wealthy trustors to abandon their relationships with local advisers and trust attorneys to avail themselves of the many advantages of Delaware Trust law.

So, why is everyone talking about Delaware trusts?

II. FREEDOM OF DISPOSITION

A. Statutory Provisions

Delaware trust law is based on the premise that a trustor has the legal right to control the investment decisions, management decisions and trust distribution decisions of trusts created by a trustor and funded with the trustor’s assets. This fundamental principle of Delaware trust law allows a trustor to modify the duty to diversify trust investment, and to permit the trustee to hold high-risk portfolios, closely held business interests, and overly concentrated stock positions in the stock of family businesses gone public without fear of liability. It allows for the enforceability of subjective distribution standards in the trust document, including those common in incentive trusts, and the ability of the trustor to determine the trust functions that will be performed by the institutional trustee and those that will be performed by others (trust advisers) so that the administration of the trust will be more economical. Rachel Emma Silverman, How Many Trustees Do You Need? Wall St. J., July 12, 2007, at B5.

1. Trust Instrument Controls. Delaware law gives maximum effect to the wishes of the trustor as expressed in the governing instrument. 12 Del. C. § 3303(a). This specific statutory provision states that the terms of a governing instrument may expand, restrict, eliminate or otherwise define the rights of beneficiaries, including the right of a beneficiary to be informed of the existence of the trust, the grounds for the removal of a fiduciary, and the fiduciary’s powers, duties and standard of care. Id.

§ 3303. Effect of provisions of instrument

(a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary’s interest for a period of time, the grounds for removal of a fiduciary, the circumstances, if any, in which the fiduciary must diversify investments, and a fiduciary’s powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument; provided however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary
for the fiduciary’s own willful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary’s willful misconduct. The rule that statutes in derogation of a common law are to be strictly construed shall have no application to this section. **It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.** [Emphasis added].

The purpose of the statute is plain. The trustor has the freedom to dispose of his or her assets in any way the trustor chooses. Trustor’s intent is paramount.

For example, prior to the enactment of ‘3303, the Delaware Supreme Court upheld a Chancery Court decision removing and surcharging PNC Bank as trustee of a trust for, among other things, failing to inform a person that he was the beneficiary of a trust and rebuffing that person’s attorney in his efforts to obtain information about the trust. *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002). Section 3303 clearly reverses *McNeil* on the issue of notice if the trust document includes language allowing the trustee to hold the trust, and information about the trust, secret for some period of time.

2. Trustee’s Reliance on Trust Instrument. The trustor’s statutory right to “expand, restrict, eliminate or otherwise vary... a fiduciary’s powers, duties [and] standard of care” by the express terms of the governing instrument, subject only to the fiduciary’s duty not to engage in “willful misconduct” would have little meaning were it not for the trustee’s statutory right to rely on the terms of the trust instrument. In this regard, 12 Del. C. 3586 states:

**§ 3586. Reliance on trust instrument**

A trustee who acted in good faith reliance on the terms of a written trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance. 12 Del. C. § 3586.

Similarly, 12 Del. C. § 3302(e) states:

**§ 3302. Degree of care; authorized investments**

(e) Any fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from that instrument for breach of fiduciary duty for the fiduciary’s good faith reliance on the express provisions of such instrument. The standards set forth in this section may be expanded, restricted or eliminated by express provisions in a governing instrument.

It is the trustee’s right to rely on the express terms of the trust instrument that allows the trustee to administer a trust without fear of retribution by disgruntled beneficiaries.

**B. Trustee Protection**

To ensure the enforceability of the provisions of the trust agreement, Delaware enacted legislation to protect a trustee acting in accordance with the trust instrument. Key parts of the legislation include
a shortened claims period limiting the time during which a Delaware trustee may be sued and an extension of the “virtual representation doctrine” so that those with a future interest in the trust may be bound by others with an identical preceding interest.

1. Contesting the Trust

Delaware law provides that a judicial proceeding to contest whether a trust was validly created may not be initiated later than the first to occur of: (i) 120 days after the date the trustee notified the potential claimant of the existence of the trust, the trustee’s name and address, whether the person is a beneficiary and the time allowed for initiating the judicial proceeding to contest the trust (the foregoing provision allows the trustor of a revocable trust to confront a potential contestant during the trustor’s lifetime); (ii) two years after the trustor’s death; (iii) if the trust was revocable at the trustor’s death and the trust is specifically referred to in the trustor’s Will, the time in which a petition for review of the Will could be filed in Delaware; and (iv) the date the potential claimant’s right to contest was otherwise precluded by adjudication, consent or other limitation under Delaware law. 12 Del. C. § 3546(a). Under Delaware law, the period of time during which a trustor’s Will may be contested is generally six months after the filing of the Will in the Register of Wills Office for purposes of subsection (iii) above. 12 Del. C. § 1309(a).

a. The concept of “pre-mortem validation” has gained popularity in recent years. The idea that a person should be permitted to defend an estate plan while alive and mentally alert, rather than relying upon attorneys to defend it after death, is just good sense. Delaware has permitted the form of pre-mortem validation set forth in subsection (i) of the above quoted statute since 2003.

b. Delaware also accepts the validity of “no contest” clauses in trust instruments. 12 Del. C. § 3329(a). Coupling the pre-mortem validation provision with a no contest clause in a trust is an effective way to avoid litigation after the trustor’s death over the validity and effectiveness of the trust instrument.

2. Limitation on Actions against a Trustee

Delaware law provides that a beneficiary may not initiate a proceeding against the trustee for breach of trust after the first to occur of: (i) two years following the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim or (ii) the date the proceeding was otherwise precluded by adjudication, release, consent or other limitation under Delaware law. 12 Del. C. § 3585(a). The two-year claims period applies to minor, incapacitated and unborn persons and persons whose identity or location is unknown whose interest is represented under Delaware’s virtual representation statute. 12 Del. C. § 3547. In 2008, 12 Del. C. § 3585 was amended by the Delaware legislature to add a new five year statute of repose for breach of trust actions. In cases where the two-year limitation period does not apply, the new limitations period absolutely bars breach of trust claims five years following the first to occur of (i) the removal, resignation or death of the trustee; (ii) the termination of the beneficiary’s interest in the trust; or (iii) the termination of the trust.

3. Beneficiary’s Consent

Delaware law provides that a beneficiary may not hold a trustee liable for a breach of trust if the