

CHAPTER 149  
FORMERLY  
HOUSE BILL NO. 169

AN ACT TO AMEND TITLES 12,25 AND 30 OF THE DELAWARE CODE RELATING TO DECEDENTS' ESTATES AND FIDUCIARY RELATIONS, PROPERTY AND STATE TAXES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 33, Title 12 of the Delaware Code by making insertions as shown by underline and deletions shown by strikethrough as follows and by redesignating accordingly:

§ 3301 Application of chapter; definitions [For application of this section, see 79 Del. Laws, c. 172, § 6]

(b) The term "agents" shall mean custodians (other than those acting under the Uniform Transfers to Minors Act, Chapter 45 of this title), escrow agents, managing agents, all persons defined as agents by the general law of agency and ~~other~~ persons holding, other than in the capacity of a fiduciary as defined in this section, property belonging to another person whether that other person is a fiduciary or a nonfiduciary.

(d) The term "fiduciary" shall mean trustees, personal representatives, guardians, custodians under the Uniform Transfers to Minors Act (Chapter 45 of this title), agents to the extent delegated duties by another fiduciary and other fiduciaries.

§ 3312 Investments in affiliated investments; transactions with affiliates [For application of this section, see 80 Del. Laws, c. 153, § 5]

(a) As used in this section:

(4) "Fiduciary" means any person, including a bank or trust company, acting as a fiduciary as defined in § 3301(d) of this title, and includes an agent with investment discretion, whether or not such investment discretion has been delegated to such agent by another fiduciary or fiduciaries or granted directly to such agent.

(5) "Governing instrument" means any governing instrument as defined in §3301(e) of this title, and includes any agreement or instrument granting fiduciary investment discretion.

§3313A Excluded cotrustee.

(a) If the terms of a governing instrument confer upon a cotrustee, to the exclusion of another cotrustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the duty and liability of the excluded trustee is as follows:

(1) If the terms of the governing instrument confer upon the cotrustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes willful misconduct on the part of the directed cotrustee;

(2) If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the cotrustee in the exercise of the power; and

(3) The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.

(b) The cotrustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and shall have the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

§ 3325 Specific powers of trustee [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del. Laws, c. 153, § 5]

Without limiting the authority conferred by § 3324 of this title, a trustee may:

(5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust and, in connection with any such borrowing, mortgaging or pledging, indemnify the lender against liability incurred with respect to, or in connection with, the borrowing and entering into any related mortgage or pledge or security agreement;

(19) Make loans out of or guarantees based on trust property; and, in connection with any such guarantee of a loan, indemnify the lender against liability incurred with respect to, or in connection with, the loan and any related mortgage, pledge or security agreement, including loans to or guarantees for the benefit of a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and subject to § 3536 of this title, the trustee has a lien on future distributions for repayment of those loans and for the repayment of an amount equal to any payment made or that might be made on account of such guarantee; provided further that any such loans or guarantees shall only be permitted to the extent the same are either:

a. Made for investment purposes;

b. Made in lieu of a distribution amount that could have been made currently to or for such beneficiary under the terms of the governing instrument, not made in excess of such amount, and the fiduciary creates a reserve for the potential liability; or

c. Made to or for the benefit of another trust of which such beneficiary is also a beneficiary, provided the requirements of paragraph (19)b. of this section are satisfied.

(29) Declare 1 or more new trusts for the purpose of merging all, or a portion, of ~~an existing~~ the trust or trusts with and/or into the new trust or trusts and ~~to merge~~ all or a portion of the trust with or into any other trust ~~any 2 or more~~ trusts, including statutory trusts and foreign statutory trusts as defined in § 3801 of this title, whether or not created by the same trustor and whether or not funded prior to the merger, to be held and

administered as a single trust if such a merger would not result in a material change in the ~~beneficial interests of the trust beneficiaries, or any of them,~~ indispositive terms of the trust defining the nature and extent of any trust beneficiary's interest in the principal or income of the trust;

§ 3332 Governing law; change of situs [For application of this section, see 80 Del. Laws, c. 153, § 5]

(b) Except as otherwise provided by the terms of a court order and notwithstanding a general choice of law provision in the governing instrument of a trust, such as a provision to the effect that the laws of a jurisdiction other than this State shall govern the trust or the administration of the trust, the laws of this State shall govern the administration of the trust while the trust is administered in this State unless the governing instrument expressly provides that the laws of another jurisdiction govern the administration of the trust and further provides that the laws governing the administration of the trust shall not change on account of a change in the place of administration of the trust.

§ 3333 Retention of counsel by fiduciary [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del. Laws, c. 153, § 5]

(b) Except as otherwise provided in the governing instrument, a fiduciary may retain counsel in connection with any matter that is or that might reasonably be believed to be one that will become the subject of or related to a claim against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege even if the communications with counsel had the effect of guiding the fiduciary in the performance of fiduciary duties. However, in the event that the fiduciary is ~~found to~~ determined by a court to have breached a fiduciary duty related to such matter, the court may, in its discretion, deny such fiduciary the right to have all or some part of the fiduciary's counsel fees paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have been previously paid.

§ 3336 Appointment of successor trustee [For application of this section, see 79 Del. Laws, c. 172, § 6]

If a trust has no serving trustee ~~because of~~ for any reason, including the death, incapacity, removal or resignation of the last serving trustee of the trust, or due to the renunciation or declination of the last named successor trustee of the trust of its appointment as such, and if the provisions of the governing instrument do not include any provisions which can be effectively used to appoint a successor trustee, and if the only remaining dispositive provisions of the trust then require distribution of the remaining property of the trust to 1 or more beneficiaries (whether outright, or to 1 or more other trusts which do have a serving trustee), then the taking beneficiaries of the trust, by unanimous vote, may name a successor trustee of the trust without the approval of the Court of Chancery. For purposes of the preceding sentence, the person entitled to vote with respect to a beneficiary which is another trust which has a serving trustee is the trustee or trustees of such trust.

§ 3338 Nonjudicial settlement agreements [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del. Laws, c. 153, § 5; 80 Del. Laws, c. 340, § 2]

(b) Except as otherwise provided in subsection (c) of this section, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust ~~(other than a trust described in § 3541 of this title).~~

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust, and if applicable, does not change the trust's purpose in a manner that would violate subsection (b) of §3303 of this chapter if the change was effected by court order; provided, however, that this subsection shall not apply in cases where the trustor is a party to the nonjudicial settlement agreement.

§ 3341 Consequences of trust merger and similar transactions [For application of this section, see 80 Del. Laws, c. 153, § 5]

Whenever any trust (a "transferor trust") is merged with and into another trust (the "transferee trust"):

(1) The separate existence of the transferor trust shall cease and the transferee trust shall possess all of the rights and privileges, and shall be subject to all of the obligations of, the transferor trust;

(2) All of the property (including title to any real property vested by deed or otherwise) and other interests of the transferor trust shall be thereafter treated as effectively the property and interests of the transferee trust as they were the property and interests of the transferor trust prior to the merger; ~~and~~

(3) No such property or interests shall revert or be in any way impaired by reason of the merger;

(4) In cases where the initial funding of the transferee trust occurs by reason of the merger, unless the governing instrument of the transferee trust expressly states that one or more powers of appointment exercisable over the property of the transferor trust shall not be exercisable over the property of the transferee trust, (i) any power of appointment exercisable over property of the transferor trust shall be exercisable, in accordance with the terms of the governing instrument of the transferor trust, over property of the transferee trust, and (ii) any instrument in writing, executed prior to the merger, purporting to exercise a power of appointment over property of the transferor trust shall be treated as a valid exercise of a power of appointment over property of the transferee trust to the same extent that the appointment purportedly made pursuant to the instrument would have been a valid exercise of the power of appointment granted over property of the transferor trust; and

(5) In cases where the initial funding of the transferee trust occurs prior to the merger, any power of appointment exercisable over property of either trust participating in the merger shall, following the merger, be exercisable over property of the transferee trust only to the extent expressly provided by the terms of the instrument of merger or other written documents effecting the merger.

Furthermore, all rights of creditors and all liens upon the property of the transferor trust shall be preserved unimpaired and all debts, liabilities and duties of the transferor trust shall thenceforth attach to the transferee trust and may be enforced against the transferee trust to the same extent as if the transferor trust's debts, liabilities and duties had been incurred or contracted by the transferee trust. ~~Notwithstanding anything herein to the contrary~~Except to the extent provided in subsection (5) of this section, the terms of the governing instrument of the transferee trust shall, following the merger, control the administration and disposition of the property of the transferee trust, including any such property obtained by the transferee trust by reason of the merger. Furthermore, any transaction in

which all of the property of a trust is appointed or otherwise transferred to another trust, whether pursuant to § 3528 of this title, the terms of a governing instrument or otherwise, shall be treated as a merger within the meaning of this section with the appointing or transferring trust and the recipient trust treated as a transferor trust and transferee trust, respectively, for purposes of applying the provisions of this section to the transaction. This section is not intended, nor shall it be construed, to grant to any trustee a right or power to merge trusts but rather this section is intended only to describe certain consequences of a trust merger in cases where the merger is authorized by other applicable law.

§ 3342 Modification of trust by consent while trustor is living [For application of this section, see 80 Del. Laws, c. 340, § 2]

(a) Notwithstanding any provision of law or ~~a~~the trust's governing instrument limiting or prohibiting amendment of the trust, an irrevocable trust may be modified to include any provision that could have been included in the governing instrument of a trust were such trust created upon the date of the modification ~~upon~~ by written consent or written nonobjection of all of the trust's trustors, all then serving fiduciaries and all beneficiaries ~~even if~~ regardless of whether the modification may violates a material purpose of the trust. A trustor's power to provide a written consent or written nonobjection to a trust's modification may be exercised (i) by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust's governing instrument; or (ii) if an agent under a power of attorney is not so authorized, by the guardian of the trustor's property (or similar court-appointed representative) with the approval of the court supervising the guardian (or similar representative).

(b) No fiduciary shall have a duty to consent to any proposed modification nor, absent wilful misconduct, have any liability to any person having an interest in the trust for failure to consent to any proposed modification.

(c) Any interested person, including the trustor, may bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a modification adopted under this section, including but not limited to determining whether the representation as provided in § 3547 of this title was adequate; provided, however, that any such person may waive the right to contest the modification.

(d) This section shall ~~be available to~~ apply to any trust ~~that is~~ administered under the laws of this State.

Section 2. Amend Chapter 35, Title 12 of the Delaware Code by making insertions as shown by underline and deletions shown by strikethrough as follows:

§ 3528 Trustee's authority to invade principal in trust [For application of this section, see 80 Del. Laws, c. 153, § 5]

(a) Unless the terms of the instrument expressly provide otherwise, a trustee who has authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser), under the terms of a testamentary instrument or irrevocable inter vivos trust agreement (including a trust that, by its terms, is revocable but was created by a settlor who presently lacks the capacity to revoke the trust), to invade the principal or income or both of a trust (the "first trust") to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, may instead exercise such authority (whether acting at such trustee's discretion or at the

direction or with the consent of an adviser, as the case may be) by appointing all or part of the such principal or income or both as is subject to the power in favor of a trustee of a second trust, which may be a separate trust or the first trust as modified after appointment under this section (the "second trust") under an instrument other than that under which the power to invade is created or under the same instrument, provided, however, that, except as otherwise provided in this subsection (a):

§ 3541 Administration of charitable trusts or noncharitable purpose trusts; cy pres rule.

(a) Notwithstanding any other provision of this Code or other law, a trust having any religious, charitable, scientific, literary or educational purpose (collectively, hereinafter referred to as a "charitable purpose") or a noncharitable purpose shall not be modified to alter or eliminate such purpose except pursuant to §3342 of this title or pursuant to this section. Subject to subsection (b) of this section, if a particular charitable purpose or noncharitable purpose becomes unlawful under the Constitution of this State or the United States or the trust would otherwise no longer serve any ~~religious, charitable, scientific, literary, educational,~~ or noncharitable purpose:

(1) The trust does not fail in whole or in part;

(2) The trust property does not revert to the trustor or the trustor's successors in interest; and

(3) The Court of Chancery shall modify or terminate the trust and direct that the trust property be applied or distributed, in whole or in part, in a manner consistent with the trustor's charitable or noncharitable purposes, whether or not such purposes be specific or general.

§ 3545 Limitations on oral trusts; execution requirements for written trusts.

(a) Except as otherwise required by this Code, the creation, modification or revocation of a trust whereby a person other than the trustor acquires or is divested of an interest in the trust the possession or enjoyment of which is contingent upon surviving the trustor shall be void unless such creation, modification or revocation be:

(1) In a writing executed by the trustor and witnessed by at least 1 disinterested person or 2 credible persons, or

(2) In a writing executed by a trustee who is a disinterested person without regard to whether any other person, including the trustor, has executed the writing.

For purposes of this section, a disinterested person is one who has no beneficial interest in the trust that would be materially increased or decreased as a result of the creation, modification or revocation of the trust and a notary public or similar official may serve as a witness in cases where such official is a disinterested or credible person without regard to whether such notary public or similar official signs the writing as a witness or solely in a notarial capacity.

§ 3546 Limitation on action contesting validity of trusts [For application of this section, see 79 Del. Laws, c. 197, § 3; 80 Del. Laws, c. 153, § 5]

(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:

(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a

beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that ~~delivery~~ notice mailed or delivered to the last known address of such person constitutes receipt by such person.

(2) Two years after the trustor's death;

(3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

(4) The date the person's right to contest was precluded by adjudication, consent or other limitation.

§ 3570 Definitions [For application of this section, see 79 Del. Laws, c. 198, § 2; 80 Del. Laws, c. 153, § 5]

As used in this subchapter:

(4) "Disposition" means a transfer, conveyance or assignment of property (including a change in the legal ownership of property occurring upon the substitution of 1 trustee for another or the addition of 1 or more new trustees), or the exercise of a power so as to cause a transfer of property, to a trustee or trustees, but shall not include the release or relinquishment of an interest in property that theretofore was the subject of a qualified disposition and shall not include a sale or exchange for full and adequate consideration.

§ 3585 Limitation of action against trustee following trustee's report.

(a) A beneficiary may initiate a proceeding against a trustee for breach of trust until the first to occur of:

(1) Two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim; ~~or~~

(2) In the case of any trustee who has resigned, been removed or ceased to serve as trustee for any other reason (including on account of the termination of the trust by reason of liquidation or by reason of a merger or similar transaction described in §3341 of this title), one hundred and twenty days after the date the beneficiary was sent a report that (i) notifies the beneficiary that the trustee has ceased to serve; (ii) adequately discloses the facts constituting a claim; and (iii) adequately discloses the time allowed under this section for initiating proceedings against the former trustee; or

(~~2~~3) The date the proceeding was otherwise precluded by adjudication, release, consent~~or~~, limitation or pursuant to the terms of the governing instrument.

(b) A report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence.

(c) For the purpose of subsection (a) of this section, a beneficiary is deemed to have been sent a report if:

(1) In the case of a beneficiary having capacity, it is sent to the beneficiary; ~~or~~

(2) In the case of a beneficiary who under § 3547 of this title may be represented and bound by another person, it is sent to the other person; or

(3) In the case of a beneficiary who under subsection (d) of §3303 of this title is represented and bound by a designated representative, it is sent to the designated representative.

Section 3. Amend Chapter 61, Title 12 of the Delaware Code by making insertions as shown by underline and deletions as shown by strikethrough as follows:

§ 61-107 Express total return unitrusts.

(a) The following provisions shall apply to a trust that, by its governing instrument, requires or permits the distribution, at least annually, of a unitrust amount equal to a fixed percentage of not less than 3 nor more than 5 percent per year of the fair market value of the trust's assets, valued at least annually, such trust to be referred to in this section as an "express total return unitrust."

(b) The unitrust amount for an express total return unitrust may be determined by reference to the fair market value of the trust's assets in 1 year or more than 1 year.

(c) Distribution of such a fixed percentage unitrust amount is considered a distribution of all of the income of the express total return unitrust.

(d) An express total return unitrust may or may not provide a mechanism for changing the unitrust percentage similar to the mechanism provided under § 61-106 of this title, based upon the factors noted therein, and may or may not provide for a conversion from a unitrust to an income trust and/or a reconversion of an income trust to a unitrust similar to the mechanism under § 61-106 of this title.

(e) If an express total return unitrust does not specifically or by reference to § 61-106 of this title deny a power to change the unitrust percentage or to convert to an income trust, then the trustee shall have such power and the express total return unitrust shall be deemed to be a "total return unitrust" within the meaning of § 61-106 of this title for purposes of applying § 61-106 of this title to the trust.

(f) The distribution of a fixed percentage of not less than 3 percent nor more than 5 percent reasonably apportions the total return of an express total return unitrust.

(g) The trust instrument may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust distribution, to the extent that the unitrust distribution exceeds the net accounting income, or it may specify the ordering of such classes of income.

(h) Unless the terms of the trust specifically provide otherwise, ~~the trustee's distribution of the unitrust amount from an express total return unitrust shall be considered to have been made from the following sources in order of priority:~~

(1) ~~From~~Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) ~~From~~Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) After calculating the trust's capital gain net income as described in Internal Revenue Code ("I.R.C.") § 1222(9) [26 U.S.C. § 1222(9)], may consider the unitrust amount as paid from net realized short-



term capital gain as described in I.R.C. § 1222(5) [26 U.S.C. § 1222(5)] and then from net realized long-term capital gain described in I.R.C. § 1222(7) [26 U.S.C. § 1222(7)]; and

(4) Shall then consider the unitrust amount as paid ~~From~~ the principal of the trust.

(i) The trust instrument may provide that:

(1) Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate; and

(2) Assets used by a trust beneficiary, such as a residence property or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount.

Section 4. Amend Chapter 5, Title 25 of the Delaware Code by making insertions as shown by underline and deletions as shown by strikethrough as follows:

§ 501 Powers of appointment; effect of rule against perpetuities [For application of this section, see 79 Del. Laws, c. 352, § 6]

(a) Every~~Except as otherwise provided in subsection (b) of this section, every~~ estate or interest in property, real or personal, created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of:

(1) Whether such power is nongeneral or general as to appointees;

(2) The manner in which such power was created or may be exercised;

(3) Whether such power was created before or after the passage of this section,

shall, for the purpose of any rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or accumulations now in effect or hereafter enacted be deemed to have been created at the time of the exercise and not at the time of the creation of such power of appointment. No such estate or interest shall be void on account of any such rule unless the estate or interest would have been void had it been created at the date of the exercise of such power of appointment otherwise than through the exercise of a power of appointment.

(b) Subsection (a) of this section shall not apply to the exercise of a power over property held in a trust if the instrument of exercise of any such power makes express reference to this section and expressly states that the provisions of this subsection shall apply. If the provisions of this subsection apply, every estate or interest in property, real or personal, created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of:

(1) Whether such power is nongeneral or general as to appointees;

(2) The manner in which such power was created or may be exercised;

(3) Whether such power was created before or after the passage of this section, shall, for the purpose of any rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or accumulations now in effect or hereafter enacted, be deemed to have been created at the time of the creation and not at the time of the exercise of such power of appointment.

Section 5. Amend Chapter 16, Title 30 of the Delaware Code by making insertions as shown by underline and deletions as shown by strikethrough as follows:

§ 1636 Nonresident beneficiary deduction for resident estates or resident trusts.

(b) *Rules of application.* — The following rules shall apply in determining whether or to what extent income is set aside for future distribution to nonresident individual beneficiaries:

(3) For purposes of determining under paragraphs (b)(1) and (2) of this section the share of each beneficiary of an estate or trust in the federal taxable income, as modified by § 1106 of this title, the discretion in any person over the distribution of such income (whether or not acting in a fiduciary capacity and whether or not subject to a standard) shall be presumed not to have been exercised unless such discretion was irrevocably exercised as of the last day of the taxable year and all of the federal taxable income of an electing small business trust described in subsection (b) of §1635 of this title, attributable to the trust's ownership of S corporation stock, shall be treated as having been set aside for distribution in future taxable years.

Section 6. This Act shall apply to trusts whenever created.

Approved August 30, 2017