

CHAPTER 172
FORMERLY
SENATE BILL NO. 138
AS AMENDED BY
SENATE AMENDMENT NOS. 1 & 2

AN ACT TO AMEND TITLES 12, 18, AND 25 OF THE DELAWARE CODE RELATING TO FIDUCIARY RELATIONS, INSURANCE, AND PROPERTY.

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

Section 1. Amend Chapter 5, Title 12 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 508. Meaning of child and related terms.

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(1) An adopted person is the child of an adopting parent and not of the natural parent except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

(2) In cases not covered by paragraph (1) of this section, a person born out of wedlock is a child of the mother. That person is also a child of the father, if legitimated pursuant to chapter 13 of title 13 of this Code or, notwithstanding any contrary provision of chapter 13 of title 13 of this Code, if:

a. The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

b. The paternity is established by an adjudication before the death of the father or is established thereafter by preponderance of the evidence; except, that the paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

Section 2. Amend Chapter 33, Title 12 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 3301. Application of chapter; definitions.

(e) The term "governing instrument" shall mean a will, trust agreement or declaration, court order or other instrument that creates or defines the duties and powers of a fiduciary and shall include any instrument that modifies a governing instrument or, in effect, alters the duties and powers of a fiduciary or other terms of a governing instrument.

§ 3302. Degree of care; authorized investments.

(c) The propriety of an investment decision is to be determined by what the fiduciary knew or should have known at the time of the decision about:

(1) The inherent nature and expected performance of the investment portfolio;

(2) The limitations of the standard set forth in subsection (a) of this section; and

(3) The nature and extent of other investments and resources, whether held in trust or otherwise, available to the beneficiaries as they existed at the time of the decision; provided however, that the fiduciary shall have no duty to inquire as to the nature and extent of any such other investments and resources not held by the fiduciary or held by the fiduciary in a trust or trust account subject to the direction of an adviser authorized to direct the fiduciary with respect to investment decisions, within the meaning of subsection (d) of section 3313 of this title, concerning the assets held in the trust or trust account.

Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.

§ 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 (1) 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, (2) the grounds for removal of a

fiduciary, (3) the circumstances, if any, in which the fiduciary must diversify investments, (4) and a fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument, and (5) provisions of general application to trusts and trust administration; 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 wilful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's wilful misconduct. The rule that statutes in derogation of the 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.

§ 3325. Specific powers of trustee.

(30) Take such actions as are necessary to cause gains from the sale or exchange of trust assets, as determined for federal income-tax purposes, to be taxed for federal income-tax purposes as part of a distribution of income (including income which has been increased by an adjustment from principal to income under ~~§ 6113 [repealed]~~ §61-104 of this title), a unitrust distribution, or a distribution of principal to a beneficiary.

§ 3333. Retention of counsel by fiduciary.

Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has been or might be asserted 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. However, in the event that the fiduciary is found to have breached some fiduciary duty, the Court may, in its discretion, deny such fiduciary the right to have some part or all of such fees and expenses paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have previously been paid.

§ 3334. Contributions to revocable trusts.

Where ~~a husband and wife spouses~~ spouses make a contribution of property to 1 or more trusts, each of which is revocable by either or both of them, and, immediately before such contribution, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, then notwithstanding such contribution and except where the provisions of the trust instrument may expressly provide to the contrary, that property and any accumulation thereto shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entireties property to the extent that, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, the sole remedy available to the creditor with respect to such trust property ~~that is treated as though it were tenancy by the entireties property~~ shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

§ 3336. Appointment of Successor Trustee.

If a trust has no serving trustee because of the death, incapacity or resignation of the last serving trustee of the trust, 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 one or more beneficiaries (whether outright, or to one 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.

§ 3337. Claims against revocable trusts.

Following the death of the trustor of a trust that was revocable immediately prior to the trustor's death, all claims against the trust that, but for any applicable period of limitations, could have been brought against the trustor's estate, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis, if not barred earlier by other statute of limitations, are barred against the trust when and to the same extent barred against the trustor's estate by any applicable statute of limitations or statute of repose

on claims against the estate including any such statute of limitations or repose enacted by jurisdictions other than this State.

§ 3338. Non judicial Settlements Agreements.

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the Court of Chancery.

(b) Except as otherwise provided in subsection (c), 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 includes terms and conditions that could be properly approved by the Court of Chancery under this title or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee’s report or accounting;

(3) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;

(5) the transfer of a trust’s principal place of administration; and

(6) the liability of a trustee for an action relating to the trust.

(e) Any interested person may bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a nonjudicial settlement agreement adopted under this Section, including but not limited to determining whether the representation as provided in § 3547 of this title was adequate.”

Section 3. Amend Chapter 35, Title 12 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 3528. Trustee's authority to invade principal in trust.

(e) When exercising the authority granted under subsection (a) of this section, the trustee and any adviser directing or consenting to the trustee's exercise of such authority shall be held to the standard of care and the standard of liability applicable to the trustee and any such adviser when making outright distributions, free from trust, to or for the benefit of 1 or more permissible distributees. No trustee or adviser shall have a duty to exercise such authority nor, absent wilful misconduct, any liability to any person for failure to exercise such authority or failure to consider whether to exercise such authority.

§ 3536. Rights of creditors and assignees of beneficiary of trust.

(a) Except as expressly provided in subsections (c) and (d) of this section, a creditor of a beneficiary of a trust shall have only such rights against or with respect to such beneficiary's interest in the trust or the property of the trust as shall be expressly granted to such creditor by the terms of the instrument that creates or defines the trust or by the laws of this State. The provisions of this subsection shall be effective regardless of the nature or extent of the beneficiary's interest, whether or not such interest is subject to an exercise of discretion by the trustee or other fiduciary, and shall be effective regardless of any action taken or that might be taken by the beneficiary. Every interest in a trust or in trust property or the income therefrom that shall not be subject to the rights of creditors of such beneficiary as expressly provided in this section shall be exempt from execution, attachment, distress for rent, foreclosure, garnishment and from all other legal or equitable process or remedies instituted by or on behalf of any creditor, including, without limitation, actions at law or in equity against a trustee or beneficiary that seeks a remedy that directly or indirectly affects a beneficiary's interest such as, by way of illustration and not of limitation, an order, whether such order be at the request of a creditor or on the court's own motion or other action, that would:

(1) Compel the trustee or any other fiduciary or any beneficiary to notify the creditor of a distribution made or to be made from the trust;

(2) Compel the trustee or beneficiary to make a distribution from the trust whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary;

(3) Prohibit a trustee from making a distribution from the trust to or for the benefit of the beneficiary whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary; or

(4) Compel the beneficiary to exercise a power of appointment or power of revocation over the trust.

Every direct or indirect assignment, or act having the effect of an assignment, whether voluntary or involuntary, by a beneficiary of a trust of the beneficiary's interest in the trust or the trust property or the income or other distribution therefrom that is unassignable by the terms of the instrument that creates or defines the trust is void. No beneficiary may waive the application of this subsection (a). For purposes of this subsection (a), the creditors of a beneficiary shall include, but not be limited to, any person that has a claim against the beneficiary, the beneficiary's estate, or the beneficiary's property by reason of any forced heirship, legitime, marital elective share, or similar rights. The provisions of this subsection shall apply to the interest of a trust beneficiary until the actual distribution of trust property to the beneficiary. Regardless of whether a beneficiary has any outstanding creditor, a trustee may make direct payment of any expense on behalf of such beneficiary to the extent permitted by the instrument that creates or defines the trust and may exhaust the income and principal of the trust for the benefit of such beneficiary. A trustee shall not be liable to any creditor of a beneficiary for paying the expenses of a beneficiary.

§ 3547. Representation by person with a substantially identical interest.

(e) For purposes of this section, there is a presumption that a material conflict of interest exists between the representative and each trust beneficiary in any judicial proceeding or nonjudicial matter:

(1) in which the representative would, as a result of the judicial proceeding or nonjudicial matter, be appointed to a fiduciary or nonfiduciary office or role relating to the trust unless the representative presently serves in a fiduciary or nonfiduciary office or role relating to the trust and will not receive greater authority, broader discretion, or increased protection by reason of the new appointment;

(2) in which the representative currently holds a fiduciary or nonfiduciary office or role relating to the trust and, as a result of the judicial proceeding or nonjudicial matter, will receive greater authority, broader discretion, or increased protection, including but not limited to any limitation on exculpation from, or indemnification for any existing or potential future liability; or

(3) in which the representative has any other actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth.

§ 3580. Definition.

In this ~~subchapter~~ title, "good faith" means honesty in fact and the observance of reasonable standards of fair dealing.

§ 3593. Interest on pecuniary gifts in trust.

Except where circumstances justify a longer period, pecuniary gifts from an inter vivos trust which are payable as of the death of the trustor or another person, shall bear interest at the rate of 4 percent per annum payable from the trust beginning 13 months after such death, or, if there is a change of trustee as a result of such death, 13 months after the trustee first takes office as trustee following such death, ~~the death of the trustor~~ until payment, unless a contrary intent is indicated by the ~~trust governing~~ instrument.

Section 4. Amend Chapter 1, Title 18 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 102. Definitions.

As used in this part:

(1) "Person" means corporations, companies, associations, firms, partnerships, societies and joint stock companies and individuals as is provided in § 302 of Title 1. In addition, "person" includes trustees of common law trusts, syndicates, organizations, statutory trusts, business trusts, attorneys-in-fact and every natural or artificial legal entity.

Section 5. Amend Chapter 5, Title 25 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 502. Release of powers of appointment.

(c) A release of a power of appointment ~~may be delivered to~~ shall be effective upon delivery to any one of the following:

- (1) Any person specified for such purpose in the instrument creating the power;
- (2) Any trustee of the property to which the power relates;
- (3) Any person, other than the grantee, who could be adversely affected by an exercise of the power;
- (4) The recorder in any county and when so filed the recorder shall record the release in a separate docket, but any such release, recorded in any county record prior to April 7, 1947, shall be deemed to be sufficient delivery within the provisions of this section.

Section 6. The provisions of this Act shall become effective upon enactment and shall apply to the estate of decedents dying on or after the Act's effective date, to transfers whenever made, to trusts whenever created, and to actions brought on or after the Act's effective date with respect to conduct whenever occurring.

Approved August 06, 2013