

CHAPTER 197  
FORMERLY  
SENATE BILL NO. 156

AN ACT TO AMEND TITLE 12 OF THE DELAWARE CODE RELATING TO FIDUCIARY RELATIONS

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 deletions as shown by strike through and insertions as shown by underline as follows:

§ 3313. Advisers.

(a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority ~~unless provided, however, that~~ the governing instrument ~~otherwise provides~~ may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.

(b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

(c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then except in cases of wilful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to provide such consent after having been requested to do so by the fiduciary.

(d) For purposes of this section, "investment decision" means with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

(e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

- (1) Monitor the conduct of the adviser;
- (2) Provide advice to the adviser or consult with the adviser; or
- (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

(f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

- (1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
- (2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
- (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.

§ 3316. Substituted property; equivalent value; fiduciary duty.

~~Notwithstanding~~ Except as otherwise expressly provided by the terms of a governing instrument, if a trustor has a power to substitute property of equivalent value, the fiduciary responsible for investment decisions has a fiduciary duty to determine that the substituted property is of equivalent value prior to allowing the substitution.

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

§ 3521. Trustees' accounts; filing; contents; approval.

(a) Except as provided in §§ 3522 and 3523 of this title or otherwise validly waived by the beneficiaries pursuant to subsection (b) below, all trustees named in wills, as well as trustees appointed by the Court of Chancery, shall file with the Register in Chancery in the county in which such wills are probated or in which such appointments are made and submit for the approval of the Court of Chancery just and true accounts, showing all receipts and disbursements of their trusts, as the Court requires, but not oftener than once in 2 years, unless there is special occasion. Such accounts shall also show the manner in which the principal of the trust is invested. Upon the request of the trustee or of any party in interest the Court shall, and upon its own motion may, proceed to approve or disapprove the investments, but otherwise the Court shall approve or disapprove the remainder of the account without passing upon the manner in which the principal of the trust is invested. Notwithstanding the foregoing provisions of this section, the trustee of an inter vivos trust, ~~to whom~~ regardless of whether the trust is one to which property shall have been bequeathed or devised by a will, shall not be required to file any accounts with respect to such property so bequeathed or devised, except upon an order of the Court of Chancery, for cause shown, expressly requiring an accounting by such trustee nor shall a successor trustee of an inter vivos trust appointed by the Court of Chancery be required to file any accounts with respect to the property held in such trust, except as may be otherwise provided in the order of the Court of Chancery appointing such successor trustee or upon an order of the Court of Chancery, for cause shown, expressly requiring an accounting by such successor trustee.

(b) Without the approval of the Court of Chancery, a trustee or trustees (in either case hereafter referred to as “trustee”) who would otherwise be required under subsection (a) of this section to file with the Register in Chancery just and true accounts for the approval of the Court of Chancery may be released from such obligation by the interested parties of the trust if the trustee sends a written notice and request for waiver and consent or non-objection to the interested parties, which notice shall:

(i) Describe the obligation of the trustee under § 3521(a) of this Title and identify the alternative means by which the trustee will provide the beneficiaries with the information formerly set forth in the account;

(ii) Request the interested person waive the obligations under § 3521(a) of this Title with respect to the trust and consent, or signify such person’s non-objection, to the alternative means described in the notice for the dissemination of trust information; and

(iii) Request that a waiver and consent or non-objection be executed by (1) the interested party personally; (2) the interested party’s attorney ad litem; (3) a person authorized to represent the interested party under 12 Del. C. § 3547 or any successor statute; or (4) a person authorized by applicable law to represent the interested party in transactions involving the trust (such as, but not limited to, the interested party’s attorney-in-fact or the Attorney General in the case of certain charitable beneficiaries);

In addition, such waiver and consent or non-objection shall: (i) be acknowledged by a person authorized to notarize documents (or a similar official if a document is signed in a foreign jurisdiction) or witnessed by a person who is not an interested party; and (ii) affirm that the party executing the waiver and consent or non-objection has read, understood, and been provided with an opportunity to consult with counsel regarding the waiver and consent or non-objection and the information provided therein.

(c) For purposes of subsection (b), the “interested parties” means:

(i) The trustor of the trust, if living;

(ii) All living persons who are currently receiving or eligible to receive distributions of income of the trust;

(iii) Without regard to the exercise of any power of appointment, all living persons who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice and all living persons who would receive or be eligible to receive distributions of income or principal of the trust if the interests of all of the beneficiaries currently eligible to receive income under paragraph (c)(ii) of this section were to terminate at the time of the giving of such notice; and

(iv) All persons acting as adviser or protector of the trust.

(d) Any release of the obligations under § 3521(a) of this Title obtained in accordance with § 3521(b) of this Title shall release the trustee from the reporting obligations of § 3521(a) of this Title for the duration of the trust, unless a shorter period of time is specified in the written notice provided to the interested parties or an order of a court of competent jurisdiction provides otherwise.

(e) Upon being released from the obligations under § 3521(a) of this Title in accordance with provisions of subsection (b), the trustee shall provide notice of such release to the Register in Chancery in the county in which the trustee would otherwise have filed the accountings required under § 3521(a) of this Title, which notice shall include as exhibits copies of the requisite executed notices and requests for waiver and consent or non-objection of the interested parties.

§ 3546. Limitation on action contesting validity of trusts.

(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 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.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a) of this section, a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

(d) For purposes of paragraph (a)(1) of this section, a person is deemed to have been given any notice that has been given to any other person who under § 3547 of this title may represent and bind such person.

Section 3. The provisions of this Act shall become effective upon enactment and shall apply to trusts whenever created.

Approved February 25, 2014