

CHAPTER 117
FORMERLY
SENATE BILL NO. 83

AN ACT TO AMEND TITLES 10, 12, 18 AND 25 OF THE DELAWARE CODE RELATING TO JUDICIAL PROCEDURE, FIDUCIARY RELATIONS, INSURANCE AND PROPERTY.

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

Section 1. Amend Title 10, Chapter 49, by adding the following punctuation and words at the end of Subsection (a) of Section 4915: “, life insurance contract or annuity contract”; and by adding the following sentence at the end of Subsection (f) of Section 4915:

“The terms ‘life insurance contract’ and ‘annuity contract’ shall have the same meanings as under § 1035(b) of the Internal Revenue Code of 1986 [26 U.S.C. § 1035(b)], as amended.”

Section 2. Amend Title 12, Chapter 33, Section 3301 by adding the following words at the end of Subsection (g) and by adding the same words at the end of Subparagraph (4) of Subsection (h) thereof:

“and ‘wrongdoing’ means malicious conduct or conduct designed to defraud or seek an unconscionable advantage”.

Section 3. Amend Title 12, Chapter 33, by adding the words “and with respect to non-publicly traded investments, the valuation thereof” immediately after to the word “therein” appearing in Subsection (d) of Section 3313.

Section 4. Amend Title 12, Chapter 33, by deleting Section 3334 and substituting the following new Section 3334 in lieu thereof:

“§ 3334. Contributions to revocable trusts.

Where a husband and wife make a contribution of property to one 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 entirety, 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 entirety 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 trust property that is treated as though it were tenancy by the entirety property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entirety.”

Section 5. Amend Title 12, Chapter 33, Section 3335 by deleting Subsection (b) thereof and inserting the following new Subsection (b) in lieu thereof: “(b) This section shall apply only to a governing instrument of a decedent whose executor elects to apply the Internal Revenue Code as though subtitle A and E of title V of the Economic Growth and Tax Relief Reconciliation Act of 2001 applies with respect to chapter 11 of the Internal Revenue Code.”; and further by deleting the words “within 6 months following the later of (i) July 12, 2010; or (ii) the death of the testator or trustor, and not thereafter” from the end of Subsection (c) thereof and substituting the following words in lieu thereof: “prior to January 1, 2012”; and further by inserting the words “as to all or any part of the governing instrument” immediately before the word “and” appearing in the first sentence of Subsection (d) thereof.

Section 6. Amend Title 12, Chapter 35, by deleting Subsection (a) of Section 3528 in its entirety and substituting in lieu thereof the following:

“(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, to invade the principal of a trust (the “first trust”) to make distributions to, or for the benefit of, one or more proper objects of the exercise of the power, may instead exercise such authority by appointing all or part of the principal subject to the power in favor of a trustee of a trust

(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):

(1) The exercise of such authority is in favor of a second trust having only beneficiaries who are proper objects of the exercise of the power;

(2) In the case of any trust, contributions to which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) [26 U.S.C. § 2503(b)] of the Internal Revenue Code of 1986 (26 U.S.C. § 1, et seq.) (hereinafter referred to in this section as the “I.R.C.”), by reason of the application of I.R.C. § 2503(c) [26 U.S.C. § 2503(c)], the governing instrument for the second trust shall provide that the beneficiary’s remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the governing instrument for the first trust;

(3) The exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 [26 U.S.C. § 2056 or § 2523] or for state tax purposes under any comparable provision of applicable state law; and

(4) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary who is the only trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions.

Notwithstanding the foregoing provisions of this subsection (a) of this section, the governing instrument for the second trust may grant a power of appointment (including a power to appoint trust property to the powerholder, the powerholder’s creditors, the powerholder’s estate, the creditors of the powerholder’s estate or any other person, whether or not such person is a trust beneficiary) to 1 or more of the trust beneficiaries who are proper objects of the exercise of the power in the first trust. Furthermore, notwithstanding the foregoing provisions of this subsection (a), the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary’s interest that are substantially identical to the first trust’s terms and conditions concerning such beneficial interests. The exercise of a trustee’s authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee’s authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard. For purposes of this subsection (a), an open class of beneficiaries identified in the governing instrument for the first trust (such as, but not limited to, a class comprised of the descendants of a person who is living or who has living descendants) is a proper object of the exercise of a power to make distributions and the exercise of such a power in favor of a second trust having only beneficiaries, including unborn future beneficiaries, who are among the members of the open class satisfies the requirement of paragraph (1) of this subsection (a) provided that the governing instrument for the second trust permits distributions to or among members of the class only when and to the extent permitted by the governing instrument for the first trust. A trustee’s power, pursuant to this subsection (a), to appoint principal in favor of the trustee of a second trust shall include the power to create the second trust.”

Section 7. Amend Title 12, Chapter 35, Section 3528 by adding the following new Subsections (e) and (f) thereto:

“(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 one or more permissible distributees.

(f) This section shall be available to any trust that is administered in this State.”

Section 8. Amend Title 12, Chapter 35, by adding the following new Section thereto:

“§ 3534. Notice Procedure.

Except as may be expressly provided in the trust instrument to the contrary, the following shall apply to any trust the administration of which is governed by this title.

(a) Except for service or notice pursuant to a judicial proceeding whereby such matters are covered by an applicable court rule, any notice of, or communication pertaining to, a trust by a fiduciary of such trust to a beneficiary, other fiduciary or other person having an interest in the trust pursuant to the express terms of the trust instrument or by any such person to a fiduciary, including without limitation notice required under section 3312 of this title, may be given to such person or such person's representative under section 3547 of this title: (1) by regular U.S. Mail or commercial carrier to the mailing address reasonably determined to be such person's address, (2) by facsimile telecommunication to a number at which such person last consented to receive notice, (3) by electronic mail to an electronic mail address at which such person last consented to receive notice, (4) by a posting on an electronic network, provided notice of such posting is delivered to such person, (5) by any other form of electronic transmission as to which such person last consented to receive notice, (6) by regular U.S. Mail or commercial carrier to the address at which such person last consented to receive notice, or (7) by such other manner reasonably suitable under the circumstances and likely to result in receipt.

(b) Notwithstanding any other provision of this Code or other law, a trustee shall have no duty to confirm the reliability of an approved address, and, without creating such a duty, a trustee may withhold notice, including to an approved address, while it exercises reasonable diligence to obtain confirmation that it has a reliable address for such person.

(c) Any person may waive in writing the right to receive notice of a trust or other communications pertaining to a trust, and may thereafter rescind such waiver in writing delivered to the trustee. A trustee without actual notice to the contrary may rely on the representation of a predecessor trustee or a co-trustee pertaining to a waiver or rescission.

(d) For purposes of this section:

(1) A 'commercial carrier' shall mean a carrier authorized by the United States Department of the Treasury to deliver notices or returns for purposes of satisfying delivery under the Internal Revenue Code.

(2) The term "electronic transmission" shall mean any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process."

Section 9. Amend Title 12, Chapter 35, Section 3546, by deleting the words and punctuation "trust, or any amendment thereto," from Subsection (a) thereof and inserting the following words and punctuation in lieu thereof: "revocable trust or any amendment thereto, or an irrevocable trust,".

Section 10. Amend Title 12, Chapter 35, Section 3547, by deleting the first sentence in Subsection (c) thereof and inserting the following sentence in lieu thereof:

"In the case of a trust having a minor or incapacitated beneficiary who may not be represented by another pursuant to subsection (a) or subsection (b) of this section, the surviving and competent parent or parents or custodial parent (in cases where one parent has sole custody of the beneficiary), or guardian of the property of the beneficiary may represent and bind the beneficiary for purposes of any judicial proceeding or nonjudicial matter pertaining to the trust; provided that, in the case of a beneficiary represented by one or both parents, there is no material conflict of interest between the minor or incapacitated beneficiary and either of such beneficiary's parents with respect to the particular question or dispute."

Section 11. Amend Title 12, Chapter 35, Section 3570, by deleting the word "qualified" from both places where the word appears in Paragraph (11)c thereof.

Section 12. Amend Title 12, Chapter 35, Section 3573 by adding the words "incident to a separation or divorce proceeding" immediately after the word "property" appearing in Paragraph (1) thereof.

Section 13. Amend Title 12, Chapter 35, Section 3574 by deleting the word "A" from Subsection (a) thereof and substituting in lieu thereof the words "After making any payments from the trust required under

subsection (b), a”; and by deleting Subsection (f) thereof and inserting the following new Subsection (f) in lieu thereof:

“(f) Where a husband and wife make a qualified disposition of property to one or more trusts and, immediately before such qualified disposition, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entirety, then notwithstanding such qualified disposition 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 entirety property to the extent that, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the qualified disposition, the sole remedy available to the creditor with respect to trust property that is treated as though it were tenancy by the entirety property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entirety.”

Section 14. Amend Title 12, Chapter 35, Section 3588 by deleting the following punctuation and words therefrom: “, while having capacity.”

Section 15. Amend Title 12, Chapter 61, by deleting the word “A” from the beginning of Subsection (c) of Section 61-401 and substituting in lieu thereof the following words: “Subject to subsection (f) of this section, a”; and by deleting Subsection (f) of Section 61-401 and substituting in lieu thereof the following:

“(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made by the entity’s board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation’s board of directors or by a person authorized by such board of directors or comparable person or group of persons to make such a statement.”

Section 16. Amend Title 12, Chapter 61, by deleting Section 61-413 and substituting in lieu thereof the following:

“§ 61-413. Property not productive of income.

Upon request of the income beneficiary, if the trustee determines that the assets of a trust consist substantially of property that does not provide the income beneficiary with a reasonable income from or use of the trust assets, and that the amounts that the trustee transfers from principal to income under § 61-104 of this title and distributes to the income beneficiary from principal pursuant to the terms of the trust are insufficient to provide the income beneficiary with the beneficial enjoyment of the income interest, the trustee shall make such property productive of income, convert such property within a reasonable time, or exercise the power conferred by § 61-104(a) of this title, as such action or combination of actions are deemed appropriate in the trustee’s discretion.”

Section 17. Amend Title 18, Chapter 27, Section 2704 by deleting the word “established” from the first sentence in Paragraph (5) of Subsection (c) thereof and substituting in lieu thereof the words “created and initially funded” and by adding the following words to the end of the sentence: “without regard to (i) the identity of the trust beneficiaries; (ii) whether the identity of the trust beneficiaries changes from time to time; and (iii) the means by which any trust beneficiary acquires a beneficial interest in the trust.”

Section 18. Amend Title 25, Chapter 5, by adding the following sentence at the end of Subsection (e) of Section 503:

“If a trust owns an interest in an entity described in the preceding sentence and the entity is the owner of real property, but the entity ceases to exist so that the trust becomes the owner of any interest in such real property, the trust shall not become void or subject to termination by reason of the common-law rule against perpetuities or other similar rule, and except as otherwise provided in the governing instrument, the trustee may either distribute the interest in real property in accordance with subsection (b) of this section or convey the interest in real property to another such entity in exchange for an interest in the entity to be held as before.”

Section 19. Section 5 of this Act shall be effective as of January 1, 2010. The remaining provisions of this Act shall become effective August 1, 2011, and shall apply to transfers whenever made, to trusts whenever created, to petitions filed on or after August 1, 2011, and to actions brought against fiduciaries on or after August 1, 2011, with respect to conduct whenever occurring.

Approved July 13, 2011