

CHAPTER 98  
FORMERLY  
SENATE BILL NO. 88

AN ACT TO AMEND TITLES 6 AND 12 OF THE DELAWARE CODE  
RELATING TO TRANSFERS OF PROPERTY AND FIDUCIARY  
RELATIONS.

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

Section 1. Amend Title 12, Chapter 2, by deleting Section 212 in its entirety and substituting the following:

"Section 212 Bequest of tangible personal property by separate writing.

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing (a) must either be in the handwriting of the testator or be signed by the testator and must identify the items and the legatees with reasonable certainty (b) must not be inconsistent with the terms of the will and (c) must not be inconsistent with any other writing permitted by this section unless the writing is dated in which case the writing with the latest date will control. Notwithstanding the foregoing, in the case of a writing that includes both provisions for dispositions that are consistent with the terms of the will or any other writing permitted by this section and provisions for dispositions that are inconsistent with the terms of the will or any other writing permitted by this section, such writing shall be admissible under this section as evidence of the intended disposition of those items of tangible personal property that would be disposed of by the provisions of the writing that are not inconsistent with the terms of the will or any other writing permitted by this section. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will."

Section 2. Amend Title 12, Chapter 9, by deleting Subsection (a) of Section 907 and substituting in lieu thereof the following:

"(a) The surviving spouse's election of an elective share does not affect the share of the surviving spouse under any provisions made for the surviving spouse under the decedent's will, any trust established by the decedent, or the intestate succession laws unless the surviving spouse also either expressly disclaims the benefit of all or any of the provisions in accordance with Chapter 6 of this title, or expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so disclaimed or renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under § 908(a) of this title, as if the surviving spouse had predeceased the decedent for all purposes, except that such property or other benefit disclaimed or renounced by the surviving spouse shall nonetheless be deemed to be property transferred to the surviving spouse by the decedent to the extent specified in §§ 903 and 901(a) of this title."

Section 3. Amend Title 12, Chapter 33, by deleting the words "above defined" from Section 3301, Subsection (b), and substituting in lieu thereof the words "defined in this section."

Section 4. Amend Title 12, Chapter 33, by deleting in Section 3301, Subsection (d), the word "and" after the word "guardian" and adding a comma in lieu thereof and adding the words "agents to the extent delegated duties by another fiduciary" after the words "(Chapter 45 of this title)."

Section 5. Amend Title 12, Chapter 33, by deleting Section 3301, Subsection (e), and substituting in lieu thereof the following:

"(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."

Section 6. Amend Title 12, Chapter 33, of the Delaware Code by deleting Section 3325, Subsection (28), in its entirety and substituting in lieu thereof the following:

"(28) Sever any trust estate on a fractional basis into 2 or more separate trusts for any reason; and segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirement or election, or to reduce potential generation-skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and income earned on a segregated amount or gift after segregation occurs shall pass to the designated taker of such amount or gift. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation shall be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective, and shall be held on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance, provided, however, that any terms of the trust before severance that would adversely affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created."

Section 7. Amend Title 12, Chapter 33, by deleting Section 3328, Subsection (f), in its entirety and substituting the following:

"(f) Notwithstanding the provisions of this chapter or any other Delaware law, the term 'fiduciary' shall mean a fiduciary as defined in Section 3301 of this Chapter and an adviser, including but not limited to an investment adviser or distribution adviser serving in conjunction with such a fiduciary."

Section 8. Amend Title 12, Chapter 35, Section 3527, by deleting Paragraph (5) from Subsection (a) thereof and substituting in lieu thereof the following:

"(5) 'Total return unitrust' means an income trust that has been converted under this section or the laws of any other jurisdiction that permits an income trust to be converted to a trust in which a unitrust amount is treated as the net income of the trust."

Section 9. Amend Title 12, Chapter 35, Section 3527, by deleting the word "Reconvert" from Paragraph (2) of Subsection (b) thereof and substituting in lieu thereof the words "In the case of a total return unitrust converted under this section or the laws of any other jurisdiction, reconvert."

Section 10. Amend Title 12, Chapter 35, Section 3527, by deleting the word "Change" from Paragraph (3) of Subsection (b) thereof and substituting in lieu thereof the words "In the case of a total return unitrust converted under this section or the laws of any other jurisdiction, change."

Section 11. Amend Title 12, Chapter 35, Section 3527, by adding after the phrase "shall be available to any trust" in Subsection (l) thereof the words "including a trust initially converted to a total return unitrust under the laws of another jurisdiction."

Section 12. Amend Title 12, Chapter 35, by adding to Section 3527A, Subsection (e), the following: "and the express total return unitrust shall be deemed to be a 'total return unitrust' within the meaning of § 3527 of this title for purposes of applying § 3527 of this title to the trust."

Section 13. Amend Title 12, Chapter 35, by deleting the word "and" from Section 3528, Subsection (a), Paragraph (3), and by adding the word "and" to Paragraph (4) and by adding new Paragraph 5 to read as follows:

"(5) The exercise of such authority shall comply with any standard that limits the trustee's authority to make distributions from the first trust."

Section 14. Amend Title 12, Chapter 35, by deleting the word "shall" from the first sentence of Section 3531 and substituting in lieu thereof the word "may."

Section 15. Amend Title 12, Chapter 35, by deleting the first three sentences of Subsection (a) of Section 3536 and substituting in lieu thereof the following:

"(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, 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."

Section 16. Amend Title 12, Chapter 35, by designating present Subsection (c) of Section 3536 as Paragraph (1) of said Subsection and adding a new Paragraph (2) to read as follows:

"(2) For the purposes of this section, property contributed to an inter vivos marital trust that is treated as qualified terminable interest property under Section 2523(f) of the Internal Revenue Code of 1986, as amended, or to an inter vivos marital trust that is treated as a general power of appointment trust for which a marital deduction would be allowed under Section 2523 (a) and (e) of the Internal Revenue Code of 1986, as amended, over which the settlor's spouse holds either a general power of appointment exercisable in favor of the settlor's spouse's estate or a limited power of appointment, or both, shall not be deemed to have been contributed by the settlor even if the settlor would be a beneficiary of the trust subsequent to the death of the settlor's spouse. "

Section 17. Amend Title 12, Chapter 35, by adding after the phrase "person named as trustee" in Section 3538, Subsection (a), the words "and the will requires the filing of accounts with one of the Registers in Chancery."

Section 18. Amend Title 12, Chapter 35, by adding to Section 3545 new subsection (c) to read as follows:

"(c) Notwithstanding the provisions of subsections (a) and (b) of this section, a trust instrument that by its express terms is revocable by the trustor during the trustor's lifetime may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the trust instrument, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be enforceable under this section, as though part of the trust, the writing (i) must either be in the handwriting of the trustor or be signed by the trustor and must identify the items and the legatees with reasonable certainty (ii) must not be inconsistent with the terms of the trust instrument and (iii) must not be inconsistent with any other writing permitted by this subsection unless the writing is dated in which case the writing with the latest date will control. Notwithstanding the foregoing, in the case of a writing that includes both provisions for dispositions that are consistent with the terms of the trust or any other writing permitted by this section and provisions for dispositions that are inconsistent with the terms of the trust or any other writing permitted by this section, such writing shall be admissible under this section as evidence of the intended disposition of those items of tangible personal property that would be disposed of by the provisions of the writing that are not inconsistent with the terms of the trust or any other writing permitted by this section. The writing may be referred to as one in existence at the time of the trustor's death; it may be prepared before or after the execution of the trust instrument; it may be altered by the trustor after its preparation; and it

may be a writing which has no significance apart from its effect upon the dispositions made by the trust instrument. This subsection (c) shall apply only with respect to dispositions intended to take effect upon the death of the trustor, although such a writing may direct that an item or items of tangible personal property shall be administered as part of a trust or trusts created under the trust pursuant to terms of the trust instrument that were executed pursuant to the provisions of subsections (a) and (b)."

Section 19. Amend Title 12, Chapter 35, by deleting Section 3547 in its entirety and substituting in lieu thereof the following:

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

(a) Unless otherwise represented, a minor, incapacitated, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable (hereinafter referred to as an 'unascertainable person'), may for all purposes be represented by and bound by another who has a substantially identical interest with respect to the particular question or dispute but only to the extent that there is no material conflict of interest between the representative and the person represented with respect to the particular question or dispute.

(b) A presumptive remainder beneficiary or the person or persons authorized to represent the presumptive remainder beneficiary under any other subsection of this section may represent and bind contingent successor remainder beneficiaries for the same purposes, in the same circumstances, and to the same extent as an ascertainable competent beneficiary may represent and bind a minor, incapacitated, unborn or unascertainable person. As used in this subsection (b), a 'presumptive remainder beneficiary' means as of any date, a beneficiary who, as of any date and but for the exercise of any power of appointment, would receive income or principal of the trust if the trust were to terminate as of that date (without regard to the exercise of any power of appointment) or, if the trust does not provide for its termination, a beneficiary who would receive or be eligible to receive distributions of income or principal of the trust if all of the beneficiaries currently receiving or eligible to receive distributions of income or principal were deceased.

(c) 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 custodial parent or parents 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 custodial parent or 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. Furthermore, such representative may, for all purposes, represent and bind an unborn person or unascertainable person who has an interest, with respect to the particular question or dispute, that is substantially identical to the interest of the minor or incapacitated beneficiary represented by the representative, but only to the extent that there is no material conflict of interest between the minor or incapacitated beneficiary represented by the representative and the unborn or unascertainable person with respect to the particular question or dispute.

(d) Unless otherwise provided in the governing instrument, the provisions of this section shall apply for purposes of any judicial proceeding and for purposes of any non-judicial matter. For purposes of this section, judicial proceedings shall include any

proceeding before a court or administrative tribunal of this State, including a proceeding that involves a trust whether or not the administration of the trust is governed by the laws of this State, and non-judicial matters include, but are not limited to, the grant of consents, releases or ratifications pursuant to Section 3588 of this title and the measurement of the limitation period described in Section 3585 of this title. "

Section 20. Amend Title 12, Chapter 35, of the Delaware Code by deleting the word "A" appearing at the beginning of Section 3570, paragraph (11)b.2, and substituting in lieu thereof the words "Except as otherwise provided in paragraph (11)b.10 of this section, a"; deleting the period at the end of Section 3570, paragraph (11)b.4 and substituting a semicolon in lieu thereof; deleting the period at the end of Section 3570, paragraph (11)b.6.C.II and substituting a semicolon in lieu thereof; deleting the period at the end of Section 3570, paragraph (11)b.9.B and substituting a semicolon followed by the word "and" in lieu thereof; deleting in its entirety the sentence appearing immediately after Section 3570, paragraph (11)b.9.B; deleting the words "or direction" from Section 3570, paragraph (11)b.10 and substituting in lieu thereof the punctuation and words ", direction or the grantor's exercise of a testamentary power of appointment,"; deleting the period at the end of Section 3570, paragraph (11)b.10 and substituting a semicolon followed by the word "and" in lieu thereof; deleting paragraph (11)d. from Section 3570; and adding the following flush language at the end of Section 3570:

"A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of paragraph (11)a. of this section. Distributions to pay income taxes made under a discretionary or mandatory provision included in a governing instrument pursuant to paragraph (11)b.3., paragraph (11)b.6., or paragraph (11)b.9. of this section may be made by direct payment to the taxing authorities."

Section 21. Amend Title 6, Chapter 13, of the Delaware Code by adding to Section 1301, Subsection (12) the following:

"but excludes, without limitation, any disposition of or parting with property or an interest in property described in Subsection 2 of this Section."

Section 22. The provisions of this Act shall become effective on August 1, 2009, and shall apply to transfers whenever made, to trusts whenever created, and to estates of decedents who have died before or after that date.

Approved July 06, 2009