

CHAPTER 330  
FORMERLY  
SENATE BILL NO. 239  
AS AMENDED BY  
SENATE AMENDMENT NO. 1

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 Title 12, Chapter 33, by redesignating Subsection (g) of Section 3301 as Subsection (h) and adding a new Subsection (g) to Section 3301 to read as follows:

“(g) The term ‘willful misconduct’ shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness.”

Section 2. Amend the redesignated Subsection (h) of §3301, Title 12, Delaware Code, by adding a new paragraph (4) thereto to read as follows:

“(4) The term ‘willful misconduct’ means intentional wrongdoing, not mere negligence, gross negligence or recklessness.”

Section 3. Amend §3304, Title 12, Delaware Code, by adding the following sentence at the end of that Section:

“Furthermore, a provision in any such instrument directing the retention of any such property as a trust investment shall be deemed to waive any duty of diversification otherwise applicable to the fiduciary with respect to such property and shall exonerate the fiduciary from liability for retaining the property except in the case of willful misconduct proven by clear and convincing evidence in the Court of Chancery.”

Section 4. Amend §3312(c), Title 12, Delaware Code, by inserting the words “or such other dealing with an affiliate” at the end of the first sentence in Subsection (c), and further by inserting the words “or otherwise deal with an affiliate or an interest in an affiliated investment” at the end of the last sentence in Subsection (c).

Section 5 Amend Title 12, Delaware Code, by adding the following new Section thereto:

“§ 3316. Substituted Property; equivalent value; fiduciary duty.

Notwithstanding 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 6. Amend Title 12, Delaware Code, by adding the following new Section thereto:

“§ 3317. Co-fiduciaries; duty to keep informed.

Except as otherwise provided in a governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries) has a fiduciary duty upon request to keep all of the other fiduciaries for the trust reasonably informed about the administration of the trust with respect to any specific duty or function being performed by such fiduciary to the extent that providing such information to the other fiduciaries is reasonably necessary for the other fiduciaries to perform their duties; provided, however, that a fiduciary requesting and receiving any such information shall have no duty to monitor the conduct of the fiduciary providing the information; provide advice to or consult with the fiduciary providing the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary receiving the information would or might have exercised the fiduciary’s own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary providing the information.”

Section 7. Amend Title 12, Delaware Code, by deleting paragraph (19) of Section 3325 and substituting in lieu thereof the following:

“(19) Make loans out of or guarantees based on trust property, 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 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 subparagraph b of this paragraph (19) are satisfied.”

Section 8. Amend Title 12, Delaware Code, by deleting the word “To” appearing at the beginning of paragraphs (29) and (30) of Section 3325; deleting the words “rules of law” from paragraph (23) of Section 3325 and substituting in lieu thereof the words “subsection 61-103(b) of this title”; and deleting paragraph (28) of Section 3325 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 specific assets included in the trust property 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, to reduce potential generation-skipping transfer tax liability, or for any other reason, 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, specific assets, or gift after segregation occurs shall pass to the designated taker of such amount, specific assets, 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 or segregation; provided, however, that any terms of the trust before severance or segregation that, if altered, 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 9. Amend Title 12, Delaware Code, by adding the following new Section thereto:

“§ 3334. Contributions To Revocable Trusts.

Where a husband and wife make a contribution of property to a trust that 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 and be dealt with in a manner consistent with that applicable law but in every other respect shall be dealt with in accordance with the terms of the trust instrument. Furthermore, 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 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 10. Amend Title 12, Delaware Code, by redesignating Sections 3527 and 3527A thereof as Sections 61-106 and 61-107 of Chapter 61, respectively and by replacing the phrase “§ 3527” with the phrase “§ 61-106” in each place where the phrase “§ 3527” appears in the redesignated Sections 61-106 and 61-107.

Section 11. Amend §3535, Title 12, Delaware Code, by deleting the phrase “§ 501” as found therein and inserting the phrase “Chapter 5” in lieu thereof.

Section 12. Amend §3536, Title 12, Delaware Code, by deleting the number “12” from paragraph (c)(1) and substituting the number “35” in lieu thereof; by deleting the word “unless” from paragraph (d)(1) and substituting the word “and” in lieu thereof; and by deleting the word “unless” from paragraph (d)(2) and substituting the word “and” in lieu thereof.

Section 13. Amend Title 12, Delaware Code, by deleting paragraph (7) of Section 3570 and substituting in lieu thereof the following:

“(7) ‘Qualified disposition’ means a disposition by or from a transferor (or multiple transferors in the case of property in which each such transferor owns an undivided interest) to one or more trustees, at least one of which is a qualified trustee, with or without consideration, by means of a trust instrument.”

Section 14. Amend §3570, Title 12, Delaware Code, by deleting the phrase “except with respect to the retention of the veto right permitted by” from Subparagraph (8)d. and by substituting the phrase “although such person may retain any of the powers and rights described in” in lieu thereof.

Section 15. Amend §3570(11)b, Title 12, Delaware Code, by deleting subdivision 5 as found therein and by substituting in lieu thereof the following:

“5. The transferor’s potential or actual receipt of income or principal from a grantor-retained annuity trust or grantor-retained unitrust as such terms are defined in § 2702 of the Internal Revenue Code of 1986 [26 U.S.C. § 2702] and any successor provision thereto or the transferor’s receipt each year of a percentage (not to exceed 5 percent) specified in the governing instrument of the initial value of the trust assets (which may be described either as a percentage or a fixed amount) or their value determined from time to time pursuant to the governing instrument.”

Section 16. Amend §3570(11)b, Title 12, Delaware Code, by deleting Subdivision 6 and by substituting in lieu thereof the following:

“6. The transferor’s potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a trustee’s acting:

A. In such trustee’s discretion;

B. Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal; or

C. At the direction of an adviser described in paragraph (8)c. of this section who is acting:

i. In such adviser’s discretion; or

ii. Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt of or use of principal.

For purposes of this paragraph, a trustee is presumed to have discretion with respect to the distribution of principal unless such discretion is expressly denied to such trustee by the terms of the trust instrument.”

Section 17. Amend §3574, Title 12, Delaware Code, by adding new Subsections to read as follows:

“(f) Where a husband and wife make a qualified disposition of property 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 entireties, 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 entireties property and be dealt with in a manner consistent with that applicable law but in every other respect shall be dealt with in accordance with the terms of the trust instrument. Furthermore, 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 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.

(g) Subject to all of the foregoing provisions of this section, and except as otherwise expressly provided in subsection (f) of this section, upon avoidance of a qualified disposition to the extent permitted under subsection (a) of this section, the sole remedy available to the creditor shall be an order directing the

trustee to transfer to the transferor such amount as is necessary to satisfy the transferor's debt to the creditor at whose instance the disposition has been avoided.”

Section 18. Amend Title 12, Delaware Code, by deleting the word “A” from the beginning of Subsection 3583(a) and inserting in lieu thereof the words “Except to the extent a trustee realizes a profit from conduct expressly permitted by law or the terms of the trust, a”.

Section 19. Amend Title 12, Delaware Code, by deleting paragraph (13) of Section 61-102 and substituting in lieu thereof the following:

“(13) ‘Trustee’ includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court, and an adviser described in § 3313 of this Title.”

Section 20. Amend §61-103(a)(2), Title 12, Delaware Code, by inserting the words “including, but not limited to, § 3325(23) of this title” immediately after the word “law”.

Section 21. Amend Title 12, Delaware Code, by deleting Subsection (g) of Section 61-104 and substituting in lieu thereof the following::

“(g) This section shall have no application to trusts governed by §§ 61-106 and 61-107 of this Title. This section shall be construed as pertaining to the administration of a trust.”

Section 22. The provisions of this Act shall become effective on August 1, 2010 and shall apply to transfers whenever made, to trusts whenever created, and to actions brought against fiduciaries on or after August 1, 2010 with respect to conduct whenever occurring.

Approved July 02, 2010