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HOUSE OF REPRESENTATIVES  
151st GENERAL ASSEMBLY

HOUSE BILL NO. 406

AN ACT TO AMEND TITLE 12 OF THE DELAWARE CODE RELATING TO DECEDENTS' ESTATES AND  
FIDUCIARY RELATIONS.

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

1           Section 1. Amend § 3534, Title 12 of the Delaware Code by making deletions as shown by strike through and  
2     insertions as shown by underline as follows:

3           § 3534. Notice procedure.

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

6           (1) Except for service or notice pursuant to a judicial proceeding whereby such matters are covered by an  
7     applicable court rule, any notice of, or communication pertaining to, a trust by a fiduciary of such trust to a beneficiary,  
8     other fiduciary or other person having an interest in the trust pursuant to the express terms of the trust instrument or by any  
9     such person to a fiduciary, including without limitation notice required under § 3312 of this title, may be given to such  
10    person, such person's designated representative under § 3339 of this title, or such person's representative under § 3547 of  
11    this title:

12           a. By regular U.S. mail or commercial carrier to the mailing address reasonably determined to be such  
13    person's address;

14           b. By facsimile telecommunication to a number at which such person last consented to receive notice;

15           c. By electronic mail to an electronic mail address at which such person last consented to receive notice;

16           d. By a posting on an electronic network, provided notice of such posting is delivered to such person;

17           e. By any other form of electronic transmission as to which such person last consented to receive notice;

18           f. By regular U.S. mail or commercial carrier to the address at which such person last consented to  
19    receive notice; or

20           g. By such other manner reasonably suitable under the circumstances and likely to result in receipt.

(2) 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.

(3) 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.

(4) For purposes of this section:

a. 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.

b. 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 2. Amend § 3536, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3536. Rights of creditors and assignees of beneficiary of trust [For application of this section, see 79 Del. Laws, c. 172, § 6].

(e) Notwithstanding subsection (a) of this section, unless the trust’s governing instrument expressly provides otherwise, a beneficiary of a charitable remainder unitrust or charitable-remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986 (26 U.S.C. § 664) and any successor provision thereto, shall have the right, at any time and from time to time, by written instrument delivered to the trustee, to release such beneficiary’s retained interest in such a trust, in whole or in part, ~~to in favor of—~~ or to assign such interest, in whole or in part, to— a charitable organization that has or charitable organizations that have a succeeding beneficial interest in such trust. Notwithstanding subsection (a) of this section, unless the trust’s governing instrument expressly provides otherwise, a beneficiary may also disclaim an interest in a trust pursuant to Chapter 6 of this title. In addition, notwithstanding subsection (a) of this section, a trustor’s spouse holding ~~an interest—~~ an interest in a trust described in subsection (c) of this section shall have the right, at any time and from time to time, by written instrument delivered to the trustee, to release, assign, or otherwise dispose of within the meaning of § 2519 of the Internal Revenue Code of 1986 (26 U.S.C. § 2519), such spouse’s interest in such trust, in whole or in part, ~~to in favor of~~ the beneficiary or beneficiaries having the next succeeding beneficial interest in such trust.

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

§ 3536A. Release of beneficial interests by beneficiaries.

(a) Subject to the limitations and conditions of subsections (b) through (f) of this section, a beneficiary of a trust may, in whole or in part, release such beneficiary's beneficial interest in the trust, including any discretionary power of withdrawal or consumption, with or without consideration, with respect to the whole or any part of the property subject to such interest.

(b) A beneficiary may not release any condition in the governing instrument with which a beneficiary must comply to be eligible to receive a distribution from the trust.

(c) This section does not apply to or supersede the following subjects under the following provisions of this Code:

(1) An interest that may be disclaimed, or a power that may be disclaimed or released, under Chapter 6 of this title;

(2) A beneficiary's right to release, assign, or dispose of an interest in a trust under § 3536(b) or (e) of this title; or

(3) The release of a power of appointment under § 502 of Title 25.

(d) A beneficiary of a trust may not release such beneficiary's interest if the terms of the governing instrument expressly prohibit such release; provided, however, that for purposes of subsection (e) of this section, a prohibition in the nature of a spendthrift provision or similar provision of the governing instrument does not constitute such an express prohibition of such a release.

(e) A beneficiary of a trust having spendthrift provisions or similar protective provisions applicable to the beneficiary may not release the beneficiary's interest in the trust's income or principal of the trust, unless—as a result of the beneficiary's being treated under subsection (h) of this section as having died or having ceased to exist because of the beneficiary's release, as applied to the terms of the trust's governing instrument—such released income or principal will be distributed to or held in further trust for one or more of the trustor's descendants (other than the releasing beneficiary) or the releasing beneficiary's descendants.

(f) No release of an interest in a trust shall be deemed to make imperative—that is, convert a beneficial interest into a power that a beneficiary has a fiduciary duty to exercise—an interest that was not imperative before such release unless the governing instrument expressly so provides.

(g) To be effective, the release of an interest under subsection (a) of this section must:

(1) Be in a writing, which writing must declare that the releasing party is releasing the interest absolutely and unconditionally;

(2) Declare the scope of the release, i.e., specify whether the release is with respect to the whole or any part of the property subject to such interest;

(3) Describe the interest released;

(4) Be signed by:

a. The releasing party;

b. A designated representative on behalf of the releasing party under section 3339 of this title, but only to the extent such designated representative is a fiduciary with respect to the releasing party or is otherwise expressly so authorized under the terms of the trust's governing instrument to release such interest;

c. An agent under a power of attorney, but only to the extent expressly authorized by the power of attorney or the terms of the trust's governing instrument; or

d. The guardian of the releasing party's property (or similar court-appointed representative) with the approval of the court supervising the guardian (or similar court-appointed representative); and

(5) Be delivered to all then-serving fiduciaries of the trust and to any person designated in the trust's governing instrument to receive a release.

(h) Unless otherwise specified in the trust's governing instrument, a full or partial release under this section of any interest in a trust results in the releasing party being treated for purposes of the trust as having died or ceased to exist as of the time the release becomes effective, but only with respect to the interest so released.

Section 4. Amend § 3546, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3546. Limitation on action contesting validity of trusts [For application of this section, see 80 Del. Laws, c. 153, § 5].

(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 (a)(1), 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 notice mailed or delivered to the last known address of such person constitutes receipt by such person. sent to the person to whom the notice was given. Absent evidence to the contrary, it shall be presumed that notice was received by the person 7 days after it was sent to such person in accordance with § 3534 of this title;

(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.

Section 5. Amend § 3585, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3585. Limitation of action against trustee following trustee's report [For application of this section, see 81 Del. Laws, c. 320, § 8].

(a) A person may initiate a judicial proceeding against a trustee for breach of trust or other claim until the first to occur of:

(1) One year after the date the person was sent a report that adequately disclosed the facts constituting a claim provided, however, that if the governing instrument provides that claims shall survive for a period longer than 1 year after such date, then claims shall survive for the period specified in the governing instrument;

(2) In the case of any trustee who is resigning, has resigned, is being removed, has been removed, is ceasing to serve, or has ceased to serve as trustee for any other reason (including on account of the termination of the trust by reason of liquidation or by reason of a merger or similar transaction described in § 3341 of this title), 120 days after the date the ~~beneficiary person~~ was sent a report that:

a. Notifies the ~~beneficiary person~~ that the trustee is resigning, has resigned, is being removed, has been removed, is ceasing to serve, or has ceased to serve;

b. Adequately discloses the facts constituting a claim; and

c. Adequately discloses the time allowed under this section for initiating proceedings against the former trustee;

provided that the trustee transfers the trust property to the appropriate successors in interest within a reasonable period of time following the expiration of the 120-day period; or

(3) The date the proceeding was otherwise precluded by adjudication, release, consent, limitation or pursuant to the terms of the governing instrument.

(b) ~~A~~ For the purpose of subsection (a) of this section, a report adequately discloses the facts constituting a claim if it provides sufficient information so that the person knows of the claim or reasonably should have inquired into its existence. Also, for the purpose of commencing the one year period in paragraph (a)(1) of this section or the 120-day period in paragraph (a)(2) of this section, either period shall begin when the report is received by the person to whom the report was sent. Absent evidence to the contrary, it shall be presumed that the report was received by the person 7 days after it was sent to such person in accordance with § 3534 of this title.

(c) For the purpose of subsection (a) of this section, a person is deemed to have been sent a report if:

(1) In the case of a person having capacity, it is sent to the person;

(2) In the case of a person who is a beneficiary and who under § 3547 of this title may be represented and bound by another person, it is sent to the other person; or

(3) In the case of a person who is a beneficiary and who under § 3303(d) of this title is represented and bound by a designated representative, it is sent to the designated representative.

(d) For the purpose of paragraphs (a)(1) and (a)(2) of this section, a person who has been sent a report (including a person described under paragraph (c)(2) or (c)(3) of this section who is sent a report on behalf of another) may waive the period specified in paragraph (a)(1) or (a)(2) of this section (or any portion remaining of such period) by an instrument in writing executed by such person and delivered to the trustee who sent the report. Upon delivery of such instrument to the trustee who sent the report, the period under paragraph (a)(1) or (a)(2) of this section, as applicable, shall be deemed to have expired with respect to the person to whom the report was sent (or was deemed to have been sent pursuant to subsection (c) of this section).

~~(d)~~(e) If subsection (a) of this section does not apply, a judicial proceeding by a person against a trustee for breach of trust or other claim must be commenced within 5 years after the first to occur of:

(1) The removal, resignation, or death of the trustee;

(2) The termination of the person's interest in the trust; or

(3) The termination of the trust.

~~(e)~~(f) This section does not preclude an action to recover for fraud or misrepresentation related to the report or an action related to a trustee's administration of assets during or following expiration of any period provided in this section.

(g) Notwithstanding anything to the contrary within this section, nothing within this section shall expand any period during which any claims may be brought against the estate of a deceased individual fiduciary, or trust of such fiduciary that was revocable by such fiduciary immediately before such fiduciary's death, under any law of such deceased fiduciary's domicile that governs claims against such deceased fiduciary's estate or such trust.

### SYNOPSIS

Section 1 of the Act amends section 3534 of Title 12 to include, within the class of persons who may receive notice under the statute, designated representatives under section 3339 of Title 12 (representatives under section 3547 of Title 12 already being specifically included within section 3534).

Section 2 of the Act expands, within existing section 3536(e) of Title 12, on the ability of a beneficiary of a charitable remainder trust to transfer the remainder interest to charity by assignment in addition to a release, and expands on the ability of a beneficiary of a QTIP trust to transfer an interest in the trust by assignment or other means to the next succeeding beneficial interest.

Section 3 of the Act creates a new section 3536A in Title 12, similar in concept to the laws of other states, to permit a beneficiary of a trust to release (in full or in part) the interest, even if the beneficiary previously accepted the benefits of such interest (a situation not addressed by Chapter 6 of Title 12 of the Delaware Code (regarding disclaimers, which includes releases of nonfiduciary powers)), but subject to many conditions (and would overrule *Smith v. Bank of Delaware*, 219 A.2d 576 (Del. 1966) and *Bank of Delaware v. Smith*, 211 A.2d 591 (Del. Ch. 1965), but would be consistent with *Shepard v. Burr*, 87 A. 1020 (Del. Ch. 1913)). It should be further noted that: (i) while there is existing statutory authority that may be used to achieve the same outcome afforded herein, this statute provides a more efficient framework for releases of interests in trusts; (ii) a typical scenario that this statute is designed to resolve in a streamlined way involves a longtime income beneficiary of a trust who no longer wants or needs the income, and would like her interest to terminate so that her children may receive the remainder interest, which would not otherwise occur until her death; (iii) with death being a random event that could occur at any time, permitting a beneficiary to terminate her interest before her death does not run afoul of a trustor's intent; and (iv) the language of subsection (f) of this new section 3536A was drafted to parallel that of section 502(b) of Title 25 of the Delaware Code, thereby reflecting concepts discussed in, for example, section 116 of the *Bogert* treatise.

Section 4 of the Act amends section 3546 of Title 12 to conform its provisions regarding receipt of notice to those of section 3585 as changed under this Act.

Section 5 of the Act: (i) clarifies that the bar of section 3585 of Title 12 applies against judicial proceedings; (ii) expands the class of those against whom that bar would apply to persons other than beneficiaries; (iii) defines when a person is deemed to have received a 120-day notice under section 3585 (in conformity with the aforementioned amendment to Section 3546 of Title 12 under this Act); (iv) provides that a person may waive the 120-day period to accelerate what would otherwise occur upon expiration of that period; and (v) clarifies that the limitation period of section 3585 does not expand the limitation period for claims against the estate or revocable trust of a deceased individual fiduciary.

Section 6 of the Act provides an effective date.