



SPONSOR: Sen. Bushweller & Rep. B. Short & Rep. M. Smith  
Sens. Hansen, Townsend, Delcollo, Pettyjohn; Reps.  
Hensley, Keeley, Lynn, Paradee, Spiegelman

DELAWARE STATE SENATE  
149th GENERAL ASSEMBLY

SENATE BILL NO. 195

AN ACT TO AMEND TITLES 10, 12, 18, AND 25 OF THE DELAWARE CODE RELATING TO DECEDENTS' ESTATES AND FIDUCIARY RELATIONS AND PROPERTY.

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

Section 1. Amend Chapter 49, Title 10 of the Delaware Code by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 4915 Exemption of retirement plans, life insurance contracts, and annuity contracts [For application of this section, see 80 Del. Laws, c. 153, § 5]

§ 4916 Exemption of ~~Delaware College Investment Plan Accounts~~ qualified tuition programs and ~~Delaware Achieving a Better Life Experience Accounts~~ qualified ABLE programs.

(a) In addition to the exemptions provided in §§ 4902 and 4903 of this title, there shall be exempt from execution or attachment process assets held in and proceeds payable under or from any account established under ~~the Delaware College Investment Plan pursuant to subchapter XII of Chapter 34 of Title 14 (a "Plan~~ a Qualified Tuition Program under § 529 of the Internal Revenue Code of 1986 (26 U.S.C. § 529), as amended (a "Tuition Account") and ~~or any account established under § 529A of the Internal Revenue Code of 1986 (26 U.S.C. § 529A) the Delaware Achieving a Better Life Experience Program pursuant to Chapter 96A of Title 16 (an "ABLE Account")~~. This exemption shall only apply to such amount as does not exceed the total contributions permitted under § 529(b)(6) of the Internal Revenue Code of 1986 (26 U.S.C. § 529(b)(6)) with respect to any ~~Plan~~ Tuition Account or under § 529A(b)(6) of the Internal Revenue Code of 1986 (26 U.S.C. § 529A(b)(6)) with respect to any ABLE Account.

(b) This section shall not exempt from execution or attachment assets contributed by a debtor to any ~~Plan~~ Tuition Account or ABLE Account within 365 days to the extent that such assets contributed within said 365 days exceed the greater of:

(1) \$5,000; or

(2) The average annual contribution made by such debtor to such ~~Plan~~ Tuition Account or ABLE

Account for the 2 calendar years preceding the date of the filing of such execution or attachment or the filing of such petition.

(d) In the case of a ~~Plan~~ Tuition Account or ABLE Account owned by a trust, nothing in this section may be construed to limit the protections afforded to trusts by § 3536 of Title 12.

Section 2. Amend Chapter 65, Title 10 of the Delaware Code by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 6504 Persons entitled to declaration of rights or legal relations in respect to trust or estate of decedent.

Any person interested as or through an executor, administrator, trustee, guardian, ~~or~~ fiduciary, adviser, or protector under section 3313(a) of this title, designated representative under section 3339 of this title, creditor, devisee, legatee, heir, next-of kin or cestui que trust, in the administration of a trust, or the administration of the estate of a decedent, an infant, or a person with a mental condition, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next-of-kin or others; or

(2) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Section 3. Amend Chapter 2, Title 12 of the Delaware Code by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 213 Rules for construction or interpretation of will ~~or trust~~.

In the construction or interpretation of any will ~~or trust~~, the following rules set forth in section 3330 of this title shall apply in the absence of any contrary expression of intent in such will. ~~or trust~~:

~~(1) The period of time during which an interest in trust is revocable pursuant to the uncontrolled volition of the person having such a power of revocation shall not be included in determining whether the trust is invalid under the rule against perpetuities.~~

~~(2) There shall be no presumption that a testator or trustor did or did not intend that any law apply to a will or trust which was not in effect on the date of execution of such will or trust instrument.~~

~~(3) Except where the will or trust instrument expressly provides to the contrary, the determination of a class shall be governed by the law in effect on the date the will or trust instrument becomes irrevocable.~~

Section 4. Amend Chapter 33, Title 12 of the Delaware Code by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 3301 Application of chapter; definitions [For application of this section, see 79 Del. Laws, c. 172, § 6; 81 Del. Laws, c. 149, § 6]

(a) This chapter shall govern fiduciaries, as well as agents in certain instances, now or hereafter acting under governing instruments. Except as otherwise specified within the definitions of this section, the definitions of this section shall apply to this chapter, as well as to Chapters 35, 39, and 45 of this title, as well as to any other laws of this state incorporating by reference either this section or the laws of trusts generally.

(d) The term "fiduciary" shall mean trustees, personal representatives, guardians, custodians under the Uniform Transfers to Minors Act (Chapter 45 of this title), advisers or protectors acting in a fiduciary capacity under section 3313(a) of this title, designated representatives acting in a fiduciary capacity under section 3339 of this title, agents to the extent delegated duties by another fiduciary, and other fiduciaries; while the term "nonfiduciary" shall mean advisers or protectors acting in a nonfiduciary capacity under section 3313(a) of this title or designated representatives acting in a nonfiduciary capacity under section 3339 of this title.

§ 3302 Degree of care; authorized investments [For application of this section, see 79 Del. Laws, c. 172, § 6]

(a) When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making investment decisions, a fiduciary may consider the general economic conditions, the anticipated tax consequences of the investment and the anticipated duration of the account and the needs of ~~the its~~ beneficiaries; when considering the needs of the beneficiaries, the fiduciary may take into account the financial needs of the beneficiaries as well as the beneficiaries' personal values, including the beneficiaries' desire to engage in sustainable investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs of the beneficiaries.

(c) The propriety of an investment decision is to be determined by what the fiduciary knew or should have known at the time of the decision about:

(1) The inherent nature and expected performance of the investment portfolio;

(2) The limitations of the standard set forth in subsection (a) of this section; and

(3) The nature and extent of other investments and resources, whether held in trust or otherwise, available to the beneficiaries as they existed at the time of the decision; provided however, that the fiduciary shall have no duty to inquire as to the nature and extent of any such other investments and resources not held by the fiduciary, ~~or~~ held by the fiduciary in a trust or trust account subject to the direction of an adviser or cotrustee authorized to direct the fiduciary with respect to investment decisions, within the meaning of § 3313(d) of this title, concerning the assets held in the trust or trust account, or held by the fiduciary in a trust or trust account where a cotrustee has

exclusive authority with respect to investment decisions, within the meaning of § 3313(d) of this title, concerning the assets held in the trust or trust account.

Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.

§ 3303 Effect of provisions of instrument [For application of this section, see 79 Del. Laws, c. 172, § 79; Del. Laws, c. 352, § 6; 80 Del. Laws, c. 89, § 2]

(a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts and trust administration, including, but not limited to, any such laws pertaining to:

(1) The rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time, as set forth in subsection (c) of this section;

(2) The grounds for removal of a fiduciary;

(3) The circumstances, if any, in which the fiduciary must diversify investments; ~~and~~

(4) The manner in which a fiduciary should invest assets, including whether to engage in one or more sustainable or socially responsible investment strategies, in addition to, or in place of, other investment strategies, with or without regard to investment performance; and

(5) A fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument; provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's wilful misconduct. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.

§ 3313 Advisers [For application of this section, see 79 Del. Laws, c. 197, § 3; 80 Del. Laws, c. 153, § 5]

(d) For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes; provided, however, that the power to lend for investment purposes shall be considered an investment decision only with respect to loans other than those described in section 3325(19)(b) and (c) of this title), all management, control and voting powers related directly or

indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

(g) A person who accepts appointment as an adviser of a trust, or acts as an adviser of a trust under this section, submits to personal jurisdiction of this State regarding any matter related to the trust. This provision does not preclude other methods of obtaining jurisdiction over such adviser of a trust.

§ 3313A Excluded cotrustee [For application of this section, see 81 Del. Laws, c. 149, § 6]

(a) If the terms of a governing instrument confer upon a cotrustee, to the exclusion of another cotrustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the duty and liability of the excluded trustee is as follows:

(1) If the terms of the governing instrument confer upon the cotrustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes wilful misconduct on the part of the directed cotrustee;

(2) If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the cotrustee in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this subsection (a)(2), but shall remain a fiduciary with respect to any powers or other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee; and

(3) The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.

§ 3317 Co-fiduciaries and co-nonfiduciaries; duty to keep informed.

Except as otherwise provided in a governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries), and each trust nonfiduciary, has a ~~fiduciary~~ duty upon request to keep all of the ~~other~~ fiduciaries and nonfiduciaries for the trust reasonably informed about the administration of the trust with respect to any specific duty or function being performed by such fiduciary or nonfiduciary to the extent that providing such information to the other fiduciaries and nonfiduciaries is reasonably necessary for the other fiduciaries and nonfiduciaries to perform their duties; provided, however, that:

(1) a fiduciary or nonfiduciary requesting and receiving any such information shall have no duty to: monitor the conduct of the fiduciary or nonfiduciary providing the information; provide advice to or consult with the fiduciary or nonfiduciary providing the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary or nonfiduciary receiving the information would or might have exercised the fiduciary's or nonfiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary or nonfiduciary providing the information; and

(2) a fiduciary or nonfiduciary providing any such information shall have no duty to: monitor the conduct of the fiduciary or nonfiduciary requesting and receiving the information; provide advice to or consult with the fiduciary or nonfiduciary requesting and receiving the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary or nonfiduciary providing the information would or might have exercised the fiduciary's or nonfiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary or nonfiduciary requesting and receiving the information.

§ 3323 Co-fiduciaries and co-nonfiduciaries.

(a) Unless provided otherwise by the governing instrument, any power vested in 3 or more fiduciaries or nonfiduciaries by the governing instrument or by law may be exercised by a majority of such fiduciaries or nonfiduciaries and a majority of fiduciaries or nonfiduciaries named in a governing instrument may designate 1 of such fiduciaries or nonfiduciaries to perform ministerial functions on behalf of all such fiduciaries or nonfiduciaries. A fiduciary or nonfiduciary who dissents from the action of the majority is not liable to anyone having an interest in the fiduciary fund, or to the other fiduciaries or nonfiduciaries, if such dissent is evidenced by a writing delivered to the majority of the fiduciaries or nonfiduciaries.

(b) This section does not excuse a co-fiduciary or co-nonfiduciary from liability for failure to participate in the administration of the fiduciary fund or for failure to attempt to prevent a breach of trust, or for failure to seek advice and guidance from the court in a recurring situation, unless otherwise expressly provided by the governing instrument.

§ 3330 Construction or interpretation affecting validity under rule against perpetuities, applicability of later-enacted laws, and class determination; eEffect of survivorship requirement.

(a) In the construction or interpretation of any governing instrument, the following rules shall apply in the absence of any contrary expression of intent in such governing instrument:

(1) The period of time during which an interest in trust is revocable pursuant to the uncontrolled volition of the person having such a power of revocation shall not be included in determining whether the trust is invalid under the rule against perpetuities.

(2) There shall be no presumption that a testator or trustor did or did not intend that any law apply to a governing instrument which was not in effect on the date of execution of such governing instrument.

(3) Except where the governing instrument expressly provides to the contrary, the determination of a class shall be governed by the law in effect on the date the governing instrument becomes irrevocable.

(b) If, in the construction or interpretation of any ~~will or trust~~ governing instrument, the vesting in ownership, possession, or enjoyment of an interest in property of any person is dependent, whether as a matter of expression, implication or inference, in whole or in part upon:

(1) That person's survival of or for a period of time after the life of some other person, including but not limited to the ~~transfer or~~ testator or trustor, who has interest in such property, whether vested or contingent, and

(2) That person fails to so survive the life of such other person or for a period of time thereafter, Then the probable or perceived intention of the transferor with respect to any person who would otherwise be entitled to the interest because of a gift, bequest, or devise made by the person who failed to so survive shall not be considered and shall not be admissible in any proceeding involving the construction or interpretation of such ~~will or trust~~ governing instrument.

§ 3338 Nonjudicial settlement agreements [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del. Laws, c. 153, § 5; 80 Del. Laws, c. 340, § 2; 81 Del. Laws, c. 149, § 6]

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) The interpretation or construction of the terms of the trust;

(2) The approval of a trustee's report or accounting;

(3) The direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) The resignation, removal, or appointment of a trustee and the determination of a trustee's compensation;

(5) The transfer of a trust's principal place of administration; and

(6) The liability of a trustee for an action relating to the trust.

§ 3341 Consequences of trust merger and similar transactions [For application of this section, see 80 Del. Laws, c. 153, § 5; 81 Del. Laws, c. 149, § 6]

Whenever any trust (a "transferor trust") is merged with and into another trust (the "transferee trust"):

(1) The separate existence of the transferor trust shall cease and the transferee trust shall possess all of the rights and privileges, and shall be subject to all of the obligations of, the transferor trust;

(2) All of the property (including title to any real property vested by deed or otherwise) and other interests of the transferor trust shall be thereafter treated as effectively the property and interests of the transferee trust as they were the property and interests of the transferor trust prior to the merger;

(3) No such property or interests shall revert or be in any way impaired by reason of the merger;

(4) In cases where the initial funding of the transferee trust occurs by reason of the merger, unless the governing instrument of the transferee trust expressly states that 1 or more powers of appointment exercisable over the property of the transferor trust shall not be exercisable over the property of the transferee trust: (i) any power of appointment exercisable over property of the transferor trust shall be exercisable, in accordance with the terms of the governing instrument of the transferor trust, over property of the transferee trust, and (ii) any instrument in writing, executed prior to the merger, purporting to exercise a power of appointment over property of the transferor trust shall be treated as a valid exercise of a power of appointment over property of the transferee trust to the same extent that the appointment purportedly made pursuant to the instrument would have been a valid exercise of the power of appointment granted over property of the transferor trust; and

(5) In cases where the initial funding of the transferee trust occurs prior to the merger, any power of appointment exercisable over property of either trust participating in the merger shall, following the merger, be exercisable over property of the transferee trust only to the extent expressly provided by the terms of the instrument of merger or other written documents effecting the merger; provided, however, that if any person holds substantially identical powers of appointment over all of the property of each trust participating in the merger, such person's power of appointment over the property of the transferee trust shall be exercisable over all of the property of the transferee trust following the merger unless the instrument of merger or other written document effecting the merger expressly provides otherwise.



Furthermore, all rights of creditors and all liens upon the property of the transferor trust shall be preserved unimpaired and all debts, liabilities and duties of the transferor trust shall thenceforth attach to the transferee trust and may be enforced against the transferee trust to the same extent as if the transferor trust's debts, liabilities and duties had been incurred or contracted by the transferee trust. Except to the extent provided in paragraph (5) of this section, the terms of the governing instrument of the transferee trust shall, following the merger, control the administration and disposition of the property of the transferee trust, including any such property obtained by the transferee trust by reason of the merger. Furthermore, any transaction in which all of the property of a trust is appointed or otherwise transferred to another trust, whether pursuant to § 3528 of this title, the terms of a governing instrument or otherwise, shall be treated as a merger within the meaning of this section with the appointing or transferring trust and the recipient trust treated as a transferor trust and transferee trust, respectively, for purposes of applying the provisions of this section to the transaction. This section is not intended, nor shall it be construed, to grant to any trustee a right or power to merge trusts but rather this section is intended only to describe certain consequences of a trust merger in cases where the merger is authorized by other applicable law. Except as expressly provided in clause (ii) of paragraph (4) of this section, this section is not intended, nor shall it be construed, to address the validity or effect of any instrument in writing, executed prior to a trust merger, purporting to exercise a power of appointment over property of any trust participating in a trust merger.

§ 3342 Modification of trust by consent while trustor is living [For application of this section, see 80 Del. Laws, c. 340, § 2; 81 Del. Laws, c. 149, § 6]

(a) Notwithstanding any provision of law or the trust's governing instrument limiting or prohibiting amendment of the trust, an irrevocable trust may be modified ~~to include~~ by the addition of a new provision or the modification of any existing provision that so long as such provision could have been included in the governing instrument of a trust were such trust created upon the date of the modification by written consent or written nonobjection of all of the trust's trustors, all then serving fiduciaries and all beneficiaries regardless of whether the modification may violate a material purpose of the trust. A trustor's power to provide a written consent or written nonobjection to a trust's modification may be exercised: (i) by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust's governing instrument; or (ii) if an agent under a power of attorney is not so authorized, by the guardian of the trustor's property (or similar court-appointed representative) with the approval of the court supervising the guardian (or similar representative).

Section 5. Amend Chapter 35, Title 12 of the Delaware Code by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 3524 Trustees' accounts for other testamentary trusts [For application of this section, see 79 Del. Laws, c. 352, § 6; 80 Del. Laws, c. 153, § 5]

(a) Trustees of a testamentary trust shall be required to file accounts as described in § 3525 of this title, except that:

(1) Trustees subject to § 3523 of this title shall file accounts only in accordance with such section.

(2) Trustees of a testamentary trust established under a will probated on or after April 5, 1909, but of a decedent dying on or before July 31, 2005, shall be required to file accounts as described in § 3525 of this title unless waived by express provision in such will, in which case such trustees shall be required to file such accounts only in accordance with the express terms, if any, of such will or upon order of the Court of Chancery with respect to any such trust.

(3) Trustees of a testamentary trust established under the will of a decedent dying after July 31, 2005, shall be required to file accounts as described in § 3525 of this title only in accordance with the express terms, if any, of any such trust or upon order of the Court of Chancery with respect to any such trust.

~~(b) Trustees of a testamentary trust established under a will probated on or after April 5, 1909, but of a decedent dying on or before July 31, 2005, shall be required to file accounts as described in § 3525 of this title unless waived by express provision in such will, in which case such trustees shall be required to file such accounts only in accordance with the express terms, if any, of such will or upon order of the Court of Chancery with respect to any such trust.~~

§ 3528 Trustee's authority to invade principal in trust [For application of this section, see 80 Del. Laws, c. 153, § 5; 81 Del. Laws, c. 149, § 6]

(b) The exercise of the power to invade the principal or income or both of a ~~the~~ trust under subsection (a) of this section shall be by an instrument in writing, signed ~~and acknowledged~~ by the trustee ~~and filed with the records of the trust.~~

§ 3536 Rights of creditors and assignees of beneficiary of trust [For application of this section, see 79 Del. Laws, c. 172, § 6; 79 Del. Laws, c. 352, § 6]

(e) Notwithstanding subsection (a) of this section, 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 trustee, to release such beneficiary's retained interest in such a trust, 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, 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 beneficiary of a trust, holding a beneficial interest described in subsection (c)(1) of this

section, 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 trust, in whole or in part, to the beneficiary or beneficiaries having the next succeeding beneficial interest in such trust.

§ 3545 Limitations on oral trusts; execution requirements for written trusts [For application of this section, see 81 Del. Laws, c. 149, § 6]

(a) Except as otherwise required by this Code, the creation, modification or revocation of a trust whereby a person other than the trustor acquires or is divested of an interest in the trust the possession or enjoyment of which is contingent upon surviving the trustor shall be void unless such creation, modification or revocation be:

(1) In a writing executed by the trustor and witnessed in writing in the trustor's presence by at least 1 disinterested person or 2 credible persons; or

(2) In a writing executed by a trustee who is a disinterested person without regard to whether any other person, including the trustor, has executed the writing.

For purposes of this section, a disinterested person is one who has no beneficial interest in the trust that would be materially increased or decreased as a result of the creation, modification or revocation of the trust and a notary public or similar official may serve as a witness in cases where such official is a disinterested or credible person without regard to whether such notary public or similar official signs the writing as a witness or solely in a notarial capacity.

§ 3547 Representation by person with a substantially identical interest [For application of this section, see 79 Del. Laws, c. 172, § 6]

(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 or person who is incapacitated, unborn or unascertainable. In addition, a contingent successor remainder beneficiary or the person or persons authorized to represent the contingent successor remainder beneficiary under any other subsection of this section may represent and bind more remote 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 or person who is incapacitated, unborn or unascertainable. As used in this subsection (b), (i) 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; (ii) a “contingent successor remainder beneficiary” means a beneficiary who would succeed to the interest of a presumptive remainder beneficiary in the circumstances described in clause (i) above if the presumptive remainder beneficiary and all of the trust’s other beneficiaries, if any, failed to take such interest; and (iii) a contingent successor remainder beneficiary shall be considered “more remote” than any other beneficiary whose interest must fail in order for such contingent successor remainder beneficiary to take the interest.

(c) The holder of a general testamentary or inter vivos power of appointment—or a nongeneral testamentary or inter vivos power of appointment that is expressly exercisable in favor of any person or persons, excepting such holder, his estate, his creditors, or the creditors of his estate—may represent and bind persons whose interests, as takers in default, are subject to the power, but only to the extent that there is no material conflict of interest between the holder and the persons represented with respect to the particular question or dispute.

(d) In the case of a trust having a beneficiary who is a minor or incapacitated 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 1 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 1 or both parents, there is no material conflict of interest between the beneficiary who is a minor or incapacitated and either of such beneficiary's parents with respect to the particular question or dispute. In the case of a trust having a potential beneficiary who is unborn who may not be represented by another pursuant to subsection (a) or subsection (b) of this section, the parent of such unborn beneficiary may represent and bind such unborn beneficiary for purposes of any judicial proceeding or nonjudicial matter pertaining to the trust; provided that there is no material conflict of interest between such unborn beneficiary and such unborn beneficiary’s parent with respect to the particular question or dispute. Furthermore, such a representative under either of the preceding sentences may, for all purposes, represent and bind a another minor, incapacitated, a 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 beneficiary who is a minor or incapacitated or unborn represented by the representative, but only to the extent that there is no material conflict of interest between the beneficiary who is a minor or incapacitated or unborn represented by the representative and the minor, incapacitated, unborn, or unascertainable person with respect to the particular question or dispute.

(e) 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 nonjudicial 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 nonjudicial matters include, but are not limited to, the grant of consents, releases or ratifications pursuant to § 3588 of this title and the measurement of the limitation period described in § 3585 of this title.

(fe) For purposes of this section, there is a presumption that a material conflict of interest exists between the representative and each trust beneficiary in any judicial proceeding or nonjudicial matter:

(1) In which the representative would, as a result of the judicial proceeding or nonjudicial matter, be appointed to a fiduciary or nonfiduciary office or role relating to the trust unless the representative presently serves in a fiduciary or nonfiduciary office or role relating to the trust and will not receive greater authority, broader discretion, or increased protection by reason of the new appointment;

(2) In which the representative currently holds a fiduciary or nonfiduciary office or role relating to the trust and, as a result of the judicial proceeding or nonjudicial matter, will receive greater authority, broader discretion, or increased protection, including but not limited to any limitation on exculpation from, or indemnification for any existing or potential future liability; or

(3) In which the representative has any other actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth.

(g) For purposes of this section, when a trust (the "beneficiary trust") is a beneficiary of another trust, the beneficiary trust shall be represented by its trustee or, if the beneficiary trust is not in existence, the beneficiary trust shall be represented by those persons who would be beneficiaries of the beneficiary trust if the beneficiary trust were then in existence.

§ 3580 Definition [For application of this section, see 79 Del. Laws, c. 172, § 6; 79 Del. Laws, c. 352, § 6]

In this subchapter, the term "trustee" includes fiduciaries and other persons exercising, or directing or consenting to the exercise of, or who are required to be consulted before the exercise of, trust powers or duties under a trust's governing instrument or under this title, as well as designated representatives under section 3339 of this title.

§ 3585 Limitation of action against trustee following trustee's report [For application of this section, see 81 Del. Laws, c. 149, § 6]

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

(1) ~~Two~~ One years after the date the beneficiary 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 one year after such date, then claims shall survive for the period specified in the governing instrument;

(2) In the case of any trustee who has resigned, been removed or 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: (i) notifies the beneficiary person that the trustee has ceased to serve; (ii) adequately discloses the facts constituting a claim; and (iii) adequately discloses the time allowed under this section for initiating proceedings against the former trustee; 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 report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary person knows of the claim or reasonably should have inquired into its existence.

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

(1) In the case of a beneficiary person having capacity, it is sent to the beneficiary 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) If subsection (a) of this section does not apply, a judicial proceeding by a beneficiary 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 beneficiary's person's interest in the trust; or

(3) The termination of the trust.

(e) This section does not preclude an action to recover for fraud or misrepresentation related to the report.

§ 3588 Beneficiary's Consent, release, or ratification, or indemnification in favor of a trustee.

(a) Whether or not the consent, release, or ratification is supported by consideration, a A beneficiary person may not hold a trustee liable for a breach of trust or other claim if the beneficiary person consented to the conduct constituting

the breach or other claim, released the trustee from liability for the breach or other claim, or ratified the transaction constituting the breach or other claim, unless:

(1) The consent, release or ratification of the ~~beneficiary~~ person was induced by improper conduct of the trustee; or

(2) At the time of the consent, release or ratification, the ~~beneficiary~~ person did not know of:

a. The ~~beneficiary's~~ person's rights; or

b. Material facts the trustee knew or should have known with the exercise of reasonable inquiry.

(b) A consent, release, ratification, or indemnification in favor of a trustee need not be supported by consideration.

Section 6. Amend Chapter 5, Title 25 of the Delaware Code by making insertions as shown by underline as follows:

§ 505 Exercise of powers of appointment [For application of this section, see 79 Del. Laws, c. 352, § 6]

(e) When a donee of a nongeneral power of appointment appoints, effective on the donee's death, all or a portion of the assets subject to such power, to the donee's revocable trust, for the benefit of 1 or more objects of the power, such appointment shall be treated as having created, effective on the donee's death, a separate trust within such donee's revocable trust solely for the benefit of the objects of the power, which therefore shall not be subject to the claims of creditors of the donee, the donee's estate, or the donee's revocable trust (whether under section 3337 of Title 12 or any other law).

Section 7. Sections 2725 and 2728 of Title 18 of the Delaware Code are hereby repealed.

Section 8. The provisions of section 5 of this Act amending section 3545(a)(1) of Title 12 shall be effective with respect to the creation, modification or revocation of trusts executed on or after January 1, 2001. The provisions of section 5 of this Act amending the period under section 3585(a)(1) of Title 12 from two years to one year shall apply to trusts whenever created, but shall apply only to reports sent to persons after the date of enactment, and thus shall not apply to reports sent to persons at any time within the two-year period immediately preceding the date of enactment. Otherwise, this Act shall be effective upon enactment and shall apply to trusts whenever created.

#### SYNOPSIS

Section 1 of the Act addresses statutes under Chapter 49 of Title 10 and (i) amends the title of section 4915 (but makes no substantive changes to the statute); and (ii) modifies section 4916 to provide that plans similar to the Delaware College Investment Plan and the Delaware Achieving a Better Life Experience Plan, but created under the laws of other states, are similarly exempt from the execution or attachment process in Delaware.

Section 2 of the Act modifies section 6504 of Title 10 by: (i) providing that advisers and protectors under section 3313(a) of Title 12, and designated representatives under section 3339 of Title 12, are among those persons who may have a declaration of rights or legal relations in respect to the subjects currently enumerated in the statute; and (ii) making minor grammatical clarifications.

Section 3 of the Act transfers certain statutes affecting the construction of trusts' governing instruments from Chapter 2 of Title 12 (which governs wills) to Chapter 33 of Title 12 (which governs trusts) so that these statutes will be more readily accessible as a part of Delaware's nationwide trust practice, and therefore cross-references the transferred statutes for purposes of the construction of wills.

Section 4 of the Act addresses statutes under Chapter 33 of Title 12 and (i) clarifies that the definitions of section 3301 also apply to Chapters 35, 39, and 45 of Title 12, and to any other Delaware laws specifically incorporating section 3301 or the laws of trusts generally; (ii) clarifies that the definition of “fiduciary” as used in other sections of Title 12 also includes advisers or protectors acting in a fiduciary capacity under section 3313(a) of Title 12 and designated representatives acting in a fiduciary capacity under section 3339 of Title 12; (iii) defines in section 3301 the term “nonfiduciary” as used in other sections of Title 12; (iv) clarifies that sections 3302 and 3303 authorize sustainable investment strategies; (v) clarifies that section 3302’s protections of fiduciaries who do not have control over assets, or whose control is subject to the direction of a direction adviser, also apply to fiduciaries whose control is subject to the direction of a co-trustee or to fiduciaries whose co-trustees have exclusive authority over investment decisions; (vi) clarifies section 3313 such that only loans not in the nature of distribution decisions are considered to be investment decisions for purposes of directed trusts; (vii) modifies section 3313 by adding a new subsection (g), which provides that persons accepting appointment, or serving, as trust advisers submit to personal jurisdiction of this State, thereby paralleling the Uniform Trust Code; (viii) clarifies that under section 3313A, an excluded co-trustee is a fiduciary only with respect to powers from which such co-trustee is not excluded, and thus is not a fiduciary as to powers from which such co-trustee is excluded; (ix) clarifies that section 3317’s requirement for co-fiduciaries to keep each other informed also extends to nonfiduciaries with powers relating to a trust; (x) clarifies that section 3317’s protections for fiduciaries and nonfiduciaries providing information to co-fiduciaries or co-nonfiduciaries also extend to fiduciaries and nonfiduciaries receiving information from cofiduciaries or co-nonfiduciaries; (xi) clarifies that section 3323’s “majority rules” provisions

relating to decisions among three or more co-fiduciaries also extend to decisions among three or more co-nonfiduciaries, and apply to powers vested in three or more such persons by a governing instrument or by law; (xii) transfers certain statutes affecting the construction of trusts’ governing instruments from Chapter 2 of Title 12 (which governs wills) to Chapter 33 of Title 12 (which governs trusts), and specifically to section 3330 (whose title is accordingly clarified), so that these statutes will be more readily accessible as a part of Delaware’s nationwide trust practice; (xiii) clarifies that section 3330 applies to trusts’ governing instruments generally (and not just wills or trust instruments); (xiv) clarifies that nonjudicial settlement agreements under section 3338 may resolve or address the removal of a trustee; (xv) clarifies section 3341 to provide that where substantially identical powers of appointment exist between two merged trusts, such powers applicable to the surviving trust before the merger shall extend to all of the assets within the surviving trust after the merger, unless the instrument of merger specifies otherwise, and also to clarify that section 3341 does not address the validity or effect of written instruments executed before trust mergers that purport to exercise powers of appointment over trusts; and (xvi) clarifies that modification of a trust under section 3342 permits both the addition of new provisions that were not included in the governing instrument previously as well as the modification of existing provisions that were included in the governing instrument previously.

Section 5 of the Act addresses statutes under Chapter 35 of Title 12 and (i) reorders section 3524 to clarify when accountings for testamentary trusts are required to be filed with the Court of Chancery; (ii) modifies section 3528, such that exercises of powers to invade principal or income or both of a trust under that section need only be signed, and no longer need be acknowledged or filed with the records of the trust; (iii) modifies section 3536 so that a trustor may release a beneficial interest that is contingent on surviving the trustor’s spouse, so as to accelerate the next succeeding beneficial interests, thereby overturning Delaware common law to

the contrary; (iv) clarifies the execution requirements for a trust’s governing instrument under section 3545; (v) clarifies section 3547 to define contingent successor remainder beneficiaries, define when such beneficiaries are more remote than others, and define when such beneficiaries may virtually represent more remote such beneficiaries; (vi) consistent with the Uniform Trust Code, modifies section 3547 to permit holders of general powers of appointment and the broadest form of nongeneral powers of appointment to virtually represent takers in default absent a conflict of interest; (vii) modifies section 3547 to allow a parent to virtually represent an unborn beneficiary (consistent with the Uniform Trust Code), and to provide that a virtual representative who represents a minor or incapacitated or unborn beneficiary and who, under the statute’s existing language, may therefore also represent an unborn or unascertainable person who has an interest in the trust substantially identical to that of the minor or incapacitated or unborn beneficiary represented by such virtual representative, may now also represent a minor or

incapacitated or unborn person who has an interest in the trust substantially identical to that of the minor or incapacitated or unborn beneficiary represented by such virtual representative; (viii) clarifies section 3547 to provide that for purposes of virtually representing a trust that is a beneficiary of another trust, a trustee of an existing beneficiary-trust, or those who would be the beneficiaries under the terms of a beneficiary-trust not yet in existence, may virtually represent such beneficiary-trust; (ix) clarifies the definition of “trustee” in section 3580 for purposes of Subchapter VII of Chapter 35; (x) clarifies that sections 3585 and 3588 govern statutes of

limitations applicable to any person interested in a trust (and not just beneficiaries) and to any claim against a trustee (and not just breach of trust claims); (xi) modifies the statute of limitations applicable to claims against a trustee from two years after a report is sent to a person to one year after such report is sent, to align such period with the Uniform Trust Code (unless the trust’s governing instrument specifies a period longer than one year, in which case the governing



instrument shall control); and (xii) clarifies that section 3588 does not require consideration for indemnifications of trustees.

Section 6 of the Act clarifies, within Section 505 of Title 25, that exercises of nongeneral powers of appointment to a donee's revocable trust, for the benefit of proper objects of the power, are not rendered invalid by such appointment, and thus are deemed to create a separate trust within such revocable trust that is not subject to the creditors of the donee, the donee's estate, or the donee's revocable trust.

Section 7 of the Act repeals sections 2725 and 2728 of Title 18 because they have been superseded by recent amendments to section 4915 of Title 10.

Section 8 of the Act provides effective dates.

Author: Senator Bushweller