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HOUSE OF REPRESENTATIVES
150th GENERAL ASSEMBLY

HOUSE BILL NO. 72

AN ACT TO AMEND TITLES 12 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:

1 Section 1. Amend Chapter 33, Title 12 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 3301 Application of chapter; definitions [For application of this section, see 79 Del. Laws, c. 172, § 6; 81 Del.
4 Laws, c. 149, § 6; 81 Del. Laws, c. 320, § 8]

5 (e) The term "governing instrument" shall mean a will, trust agreement or declaration, court order, or other
6 instrument that creates or defines the duties and powers of a fiduciary, and shall include any instrument that modifies a
7 governing instrument, allocates trustee powers, duties, and responsibilities among co-trustees under § 3343 of this title, or,
8 in effect, alters the duties and powers of a fiduciary or other terms of a governing instrument.

9 (h) For purposes of construing a governing instrument, unless a contrary statement appears in such governing
10 instrument:

11 (4) The term "published fee schedule" and other terms of similar import mean the schedule or formula
12 described in § 3561(b)(1) of this title in the case of any trustee required to file such a schedule or formula under that
13 section.

14 (5) The term "wilful misconduct" means intentional wrongdoing, not mere negligence, gross negligence, or
15 recklessness and "wrongdoing" means malicious conduct or conduct designed to defraud or seek an unconscionable
16 advantage.

17 § 3303 Effect of provisions of instrument [For application of this section, see 79 Del. Laws, c. 172, § 79; Del.
18 Laws, c. 352, § 6; 80 Del. Laws, c. 89, § 2; 81 Del. Laws, c. 320, § 8]

19 (a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may
20 expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts, and trust administration,
21 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;

(4) The manner in which a fiduciary should invest assets, including whether to engage in 1 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; and

(6) The terms of a power of appointment over trust property;

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 wilful 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.

§ 3322 Fiduciary agency contracts; delegation [For application of this section, see 79 Del. Laws, c. 352, § 6]

~~(a) A fiduciary acting under a governing instrument which neither affirmatively permits the fiduciary to hire agents, nor expressly prohibits the fiduciary from hiring agents, may employ agents and pay them from the fiduciary fund in accordance with this section. Such agents may be hired to assist in the performance of such fiduciary's administrative duties, whether discretionary or ministerial, or to render investment advice, if the fiduciary reasonably believes in the exercise of its discretion that such an arrangement is in the best interests of all interested persons. The agent must observe the same standard of care required of the fiduciary with respect to each responsibility so delegated, and neither the establishment of such agency relationship nor the performance of such agent shall diminish, increase or otherwise affect the standard by which the performance of the fiduciary is governed. In any suit or proceeding involving an evaluation of fiduciary performance, the fiduciary shall be liable for abusing its discretion in hiring such agent, for negligently hiring such agent, or for negligently continuing the agency relationship, but shall not otherwise be liable for the conduct of such agent.~~

~~(b) A fiduciary may delegate investment functions to any person including a cofiduciary subject to the standard of care required of the fiduciary in making investment decisions of the type so delegated with respect to the fiduciary fund. A~~

51 fiduciary may delegate management functions to any person including a cofiduciary subject to the standard of care required
52 of the fiduciary in making management decisions of the type so delegated with respect to the fiduciary fund.

53 ~~(e) A fiduciary shall not be responsible for the decisions or actions of any agent to which functions are delegated~~
54 ~~pursuant to this section if the fiduciary exercises the standard of care required of the fiduciary in making such decisions~~
55 ~~when selecting the agent, when establishing the scope and specific terms of the delegation and when reviewing periodically~~
56 ~~the agent's actions in order to monitor the agent's performance and compliance with the scope and specific terms of the~~
57 ~~delegation.~~

58 ~~(d) The agent shall comply with the scope and terms of the delegation and shall exercise the delegated function~~
59 ~~subject to the standard of care required of the fiduciary and shall be liable to the trust for failure to do so.~~

60 ~~(e) An agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the~~
61 ~~jurisdiction of a court of this State shall be deemed to have submitted to the jurisdiction of that court even if the delegation~~
62 ~~agreement provides for a different jurisdiction or venue.~~

63 (a) A fiduciary may appoint agents to assist in the performance of the fiduciary's duties, pay such agents from the
64 fiduciary fund and delegate investment, management, or other fiduciary duties to any such agent, including an agent who is
65 a co-fiduciary.

66 (b) When a fiduciary appoints an agent at the direction of an adviser in accordance with § 3313(b) of this title or
67 other applicable law, then, except in cases of wilful misconduct on the part of the fiduciary, the fiduciary shall not be liable
68 for any loss resulting directly or indirectly from following such direction, including, but not limited to, liability for the
69 selection and hiring of the agent, paying the agent from the fiduciary fund (even if the aggregate amount paid to the agent
70 and the fiduciary from the fiduciary fund exceeds the amount otherwise payable from the fiduciary fund to the fiduciary
71 pursuant to subchapter V of chapter 35 of this title or other applicable law), establishing the scope and specific terms of the
72 agency relationship (including the standard of care applicable to the agent), overseeing the agent's actions and continuing
73 the agency relationship, and the fiduciary shall not otherwise be liable for the conduct of such agent.

74 (c) Except as otherwise provided in subsection (d) of this section, when a fiduciary, acting in the fiduciary's
75 discretion and not at the direction of any adviser, appoints an agent to assist in the performance of the fiduciary's duties, the
76 standard of care applicable to the fiduciary when personally performing such duties shall continue to apply to the fiduciary
77 with respect to selecting and hiring the agent, paying the agent from the fiduciary fund, establishing the scope and specific
78 terms of the agency relationship, and overseeing the agent's actions and continuing the agency relationship, but the
79 fiduciary shall not otherwise be liable for the conduct of such agent. The foregoing rule shall apply even if: (i) the
80 aggregate amount paid to the agent and the fiduciary from the fiduciary fund exceeds the amount otherwise payable from

81 the fiduciary fund to the fiduciary under subchapter V of chapter 35 of this title or other applicable law; or (ii) the standard
82 of care applicable to the agent is a lower standard than the standard applicable to the fiduciary when personally performing
83 duties to be performed by the agent.

84 (d) Notwithstanding any other provision of this Code or other law, a trust's interested persons, by unanimous
85 written action, may, pursuant to this section and § 3588 of this title or other applicable law, consent to the selection and
86 hiring of an agent by the fiduciary, paying the agent from the fiduciary fund, establishing the scope and specific terms of
87 the agency relationship (including the standard of care applicable to the agent), the fiduciary's conduct (including future
88 conduct) in overseeing the agent's actions, and continuing the agency relationship. Such interested persons may release a
89 fiduciary from all liability (including liability for future conduct) for any of the foregoing conduct and from liability
90 otherwise directly or indirectly attributable to the creation, continuation or termination of the agency relationship, provided,
91 however, that the trust's interested persons may not exculpate the fiduciary from liability for the fiduciary's own future
92 wilful misconduct. For purposes of this subsection, the term "interested persons" means the trustor of the trust, if living,
93 the trust's current income beneficiaries, and the trust beneficiaries who would be vested remaindermen if the trust were to
94 terminate at the time of the written action (without regard to the exercise of any power of appointment).

95 (e) When a fiduciary delegates investment, management, or other fiduciary duties to an agent, such delegation
96 shall not cause the fiduciary to cease to be a fiduciary or cause the agent to be a fiduciary.

97 § 3325 Specific powers of trustee [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del. Laws, c.
98 153, § 5; 81 Del. Laws, c. 149, § 6]

99 Without limiting the authority conferred by § 3324 of this title, a trustee may:

100 (28) Sever any trust estate on a fractional basis into 2 or more separate trusts for any reason; and segregate by
101 allocation to a separate account or trust a specific amount or specific assets included in the trust property or gift made
102 from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any
103 federal tax requirement or election, to reduce potential generation-skipping transfer tax liability, to accomplish a
104 division along family lines, or for any other reason, in a manner consistent with the rules governing disclaimers, such
105 federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and income earned on a
106 segregated amount, specific assets, or gift after segregation occurs shall pass to the designated taker of such amount,
107 specific assets, or gift. In managing, investing, administering, and distributing the trust property of any separate
108 account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes
109 and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts
110 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;

§ 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]

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the Court of Chancery. With respect to any nonjudicial settlement agreement regarding a trust, the term "interested persons" means all whose interest in the trust would be affected by the proposed nonjudicial settlement agreement, which may include:

(4) All other persons having an interest in the trust according to the express terms of the governing instrument (such as, but not limited to, holders of powers of appointment over trust property, holders of powers to remove or appoint fiduciaries or nonfiduciaries with respect to the trust, and persons having other rights, held in a nonfiduciary capacity, relating to trust property).

§ 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; 81 Del. Laws, c. 320, § 8]

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 or to the same trust as modified after such appointment, 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; 81 Del. Laws, c. 320, § 8]

(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 by the addition of a new provision or the modification of any existing provision—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).

§ 3343 Authority to Allocate Trustee Duties Among Multiple Trustees

(a) The power to appoint a successor trustee under a governing instrument shall be deemed to include the power to appoint multiple successor trustees and additional trustees. The power to appoint multiple successor trustees and additional trustees shall be deemed to include the power to allocate various trustee powers exclusively to one or some of the trustees serving from time to time.

(b) All of the provisions of a governing instrument generally applicable to the trustees (including, but not limited to, the provisions regarding trustee qualifications, resignation, removal, standard of care, indemnification, compensation, and the scope and nature of the restrictions, limitations, and immunities applicable when exercising powers and authority) shall apply to trustees appointed under this section so that, for example (but not by way of limitation), (1) provisions waiving certain duties when exercising certain investment powers shall apply equally to trustees appointed under this section; (2) provisions permitting the removal and replacement of a trustee subject to various limitations and conditions shall apply equally to trustees appointed under this section; and (3) provisions proscribing the trustor and trust beneficiaries and persons or entities related or subordinate to the trustor and any trust beneficiary from being eligible to serve as a trustee shall apply equally to proscribe all of those persons from serving as trustees appointed under this section.

(c) Notwithstanding the provisions of subsection (b) of this section, in accordance with § 3313A of this title, a trustee to whom powers have been exclusively allocated under subsection (a) of this section shall be a fiduciary only with respect to the powers so allocated, and a trustee excluded from exercising powers shall have no liability for, nor any duty to monitor, the actions of any trustee to whom any such powers, duties, and responsibilities are so allocated.

(d) Except as otherwise expressly provided by the terms of a governing instrument, this section shall be available to any trust that is administered in this State or otherwise governed by the laws of this State.

§ 3344 Income Tax Reimbursement or Payment

(a) Unless the terms of the governing instrument expressly provide otherwise, if the trustor of a trust is treated under 26 U.S.C. § 671 et seq. as the owner of all or part of the trust, the trustee (other than a trustee who is the trustor or a person who is a “related or subordinate party” with respect to the trustor within the meaning of 26 U.S.C. § 672(c)) may, in the trustee’s sole discretion, or at the direction or with the consent of an adviser (who is not the trustor or a person who is a “related or subordinate party” with respect to the trustor within the meaning of 26 U.S.C. § 672(c)), reimburse the trustor for any amount of the trustor’s personal federal or state income tax liability that is attributable to the inclusion of the trust’s income, capital gains, deductions, and credits in the calculation of the trustor’s taxable income. The trustee may pay such amount to the trustor directly or may pay such amount to an appropriate taxing authority on the trustor’s behalf, as the trustee determines in the trustee’s sole discretion. No policy of insurance on the trustor’s life held in the trust nor the cash value of any such policy nor the proceeds of any loan secured by an interest in the policy may be used to reimburse the trustor or to pay an appropriate taxing authority on the trustor’s behalf. Neither the trustee’s power to make payments to, or for the benefit of, the trustor under this section, nor the trustee’s decision to exercise such power in favor of the trustor, shall cause the trustor to be treated as a beneficiary of the trust for purposes of subsection (c) of § 3536 of this title or for other purposes of Delaware law.

(b) If the application of this section to a trust would reduce a charitable deduction otherwise available to any person for state or federal income, gift, or estate tax purposes, the provisions of this section shall not apply to the trust.

Section 2. Amend Chapter 35, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3528 Trustee's authority to invade principal or income in trust [For application of this section, see 80 Del. Laws, c. 153, § 5; 81 Del. Laws, c. 149, § 6; 81 Del. Laws, c. 320, § 8]

(f) This section shall be available to any trust that is administered in this State. Except as otherwise expressly prohibited in the governing instrument for the first trust which granted the trustee the authority to invade the principal or income or both of the first trust to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, the terms of the governing instrument for the first trust are deemed to include the decanting power.

(g) The standard applicable to a trustee’s exercise of discretion under § 3315 of this title shall apply to a trustee’s authority under this section.

§ 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; 81 Del. Laws, c. 320, § 8]

(c) Except as provided in subchapter VI of this Chapter 35, if the trustor is also a beneficiary of a trust, a provision that restrains the voluntary or involuntary transfer of the trustor's beneficial interest shall not prevent such trustor's creditors from satisfying their respective claims from the trustor's interest in the trust to the extent that such interest is attributable to the trustor's contributions to the trust. ~~provided, however, that~~ The trustor shall not be considered a beneficiary for purposes of this section, and a trustor's creditors may not satisfy their respective claims from the trust, merely because:

(1) the trustor may be named as an additional trust beneficiary;

(2) the trustee, under the governing instrument or § 3344 of this title, may, in its discretion (or at the direction of or with the consent of an adviser other than the trustor), reimburse the trustor for any income tax liability attributable to the trust; or

(3) the trustor is a proper object of the exercise of a power of appointment over trust property held by someone other than the trustor; ~~or. A trustor's creditors may satisfy their respective claims from the trustor's interest in the trust to the extent provided in the preceding sentence except where the trustor has not retained any beneficial interest in the trust other than either or both:~~

~~(4) A~~ (4) the trustor has retained a beneficial interest that is contingent upon surviving the trustor's spouse (or surviving until the release of an interest by such a spouse under subsection (e) of this section) such as, but not limited to, an interest in an inter vivos marital deduction trust in which the interest of the trustor's spouse is treated as qualified terminable interest property under § 2523(f) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(f)), as amended, an interest in an inter vivos marital deduction trust that is treated as a general power of appointment trust for which a marital deduction would be allowed under § 2523(a) and (e) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(a) and (e)), as amended, and an interest in an inter vivos trust commonly known as a "credit shelter trust" that used all or a portion of the trustor's unified credit under § 2505 of the Internal Revenue Code (26 U.S.C. § 2505), as amended; and

~~(2) A right to receive discretionary distributions to reimburse the trustor's income tax liability attributable to the trust.~~

Further, a beneficiary of a trust shall not be considered a trustor of the trust merely because of a lapse, waiver, or release of the beneficiary's right to withdraw all or a part of the trust property.

(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,~~ trustor's spouse holding an ~~beneficial interest in a trust~~ described in paragraph (c)(4) 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~~ spouse's interest in such trust, in whole or in part, to the beneficiary or beneficiaries having the next succeeding beneficial interest in such trust.

§ 3544 Successor trustee [For application of this section, see 79 Del. Laws, c. 352, § 6]

Unless provided otherwise by the terms of the governing instrument or by order of court, in the absence of actual knowledge of a breach of trust, or information concerning a possible breach of trust that would cause a reasonable person to inquire, a successor trustee appointed in accordance with the terms of the governing instrument, by the court, or by nonjudicial settlement agreement, is under no duty to examine the accounts and records of a its predecessor trustee, is under no duty to inquire into or confirm the validity of a governing instrument or actions by a predecessor trustee altering or modifying a governing instrument -or to inquire into the acts or omissions of its predecessor, is not liable for any failure to seek redress for any act or omission of any predecessor trustee, shall have responsibility only for property which is actually delivered to it by its predecessor, and shall have all of the powers and discretions conferred in the governing instrument upon the original trustee.

§ 3545 Limitations on oral trusts; execution requirements for written trusts [For application of this section, see 81 Del. Laws, c. 149, § 6; 81 Del. Laws, c. 320, § 8]

(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 (or by some person subscribing the trustor's name in the trustor's presence and by the trustor's express direction) 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. Unless otherwise expressly prohibited by the terms of a writing described in this subsection, then—subject to the foregoing requirements regarding witnesses—such writing may be executed in counterparts.

§ 3547 Representation by person with a substantially identical interest [For application of this section, see 79 Del. Laws, c. 172, § 6; 81 Del. Laws, c. 320, § 8]

(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 or her estate, his or her creditors, or the creditors of his or her estate — may, with the consent of any person whose consent would be required for the valid exercise of the power, represent and bind persons whose interests, as takers in default, are subject to the power, but, in the case of any such nongeneral power of appointment, 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.

(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 § 3322 or § 3588 of this title and the measurement of the limitation period described in § 3585 of this title.

§ 3570 Definitions [For application of this section, see 79 Del. Laws, c. 198, § 2; 80 Del. Laws, c. 153, § 5; 81 Del. Laws, c. 149, § 6]

As used in this subchapter:

(11) "Trust instrument" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition, which instrument:

b. Is irrevocable, but a trust instrument shall not be deemed revocable on account of its inclusion of 1 or more of the following:

9. The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if such potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of such taxes and if such potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting:

A. In such qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the trust instrument; or

B. Pursuant to the transferor's exercise of a lifetime power of appointment or at the direction of an adviser described in paragraph (8)c. of this section who is acting in such adviser's discretion;~~and~~

10. The ability, whether pursuant to discretion, direction or the grantor's exercise of a testamentary power of appointment, of a qualified trustee to pay, after the death of the transferor, all or any part of the debts of the transferor outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate; and

11. The transferor's ability, whether under § 3339 of this title or the trust instrument, to appoint a designated representative within the meaning of § 3339 and to serve as such designated representative; and

§ 3585 Limitation of action against trustee following trustee's report [For application of this section, see 81 Del. Laws, c. 149, § 6; 81 Del. Laws, c. 320, § 8]

(a) A person may initiate a 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 or has resigned, is being or has been removed, or is ceasing 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 person was sent a report that:

a. Notifies the person that the trustee is ceasing 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; or

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

§ 3586 Reliance on ~~trust governing~~ instrument.

A trustee who acted in good faith reliance on the terms of a written ~~trust governing~~ instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Section 3. Amend Chapter 5, Title 25 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 501 Powers of appointment; effect of rule against perpetuities [For application of this section, see 79 Del. Laws, c. 352, § 6; 81 Del. Laws, c. 149, § 6]

(b) Subsection (a) of this section shall not apply to the exercise of a power over property held in a trust (the “first power”) if the instrument of exercise of any such power makes express reference to this section and expressly states that the provisions of this subsection shall apply. If the provisions of this subsection apply, every estate or interest in property, real or personal, created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of:

(1) Whether such power is nongeneral or general as to appointees;

(2) The manner in which such power was created or may be exercised;

(3) Whether such power was created before or after the passage of this section;

shall, for the purpose of any rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or accumulations now in effect or hereafter enacted, be deemed to have been created at the time of the creation and not at the time of the exercise of such power of appointment. For purposes of applying the foregoing rule, if any part of an estate or interest in property created through the exercise of the first power includes another power of appointment (the “second power”), then the second power and any estate or interest in property (including additional powers of appointment) created through the exercise of the second power shall be deemed to have been created at the time of the creation of the first power.

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

(b) Subsection (a) of this section shall not apply to the exercise of a ~~first-power or second-power of appointment~~ (other than any such power of appointment created through the exercise of another power of appointment) over property held in a trust that is not subject to, or has an inclusion ratio of zero for purposes of, the tax on generation-skipping transfers imposed pursuant to Chapter 13 of the Internal Revenue Code (26 U.S.C. Ch. 13) or any successor provision thereto if the instrument of exercise of ~~any such~~the power makes express reference to subsection (a) of this section and expressly states that subsection (a) of this section shall not apply to the exercise of the power or makes express reference to § 501 of this title and expressly states that § 501 of this title shall apply to the exercise of the power.

§ 505 Exercise of powers of appointment [For application of this section, see 79 Del. Laws, c. 352, § 6; 81 Del. Laws, c. 320, § 8]

(a) Unless the instrument creating a nongeneral power of appointment expressly manifests a contrary intent of the donor, the donee of such a power, in addition to exercising the power in any other manner permitted by law and the instrument creating the power, may effectively appoint all or a portion of the assets subject to such power to a trustee or trustees for the benefit of 1 or more objects of the power and may, in addition, create in an object of the power a general or

379 nongeneral power of appointment, exercisable during life or at death, over assets subject to the original power or may create
380 in a person who is not an object of the power a nongeneral power of appointment, exercisable during life or at death, to
381 appoint such assets among objects all of whom are objects of the original power.

382 Section 4. The provisions of section 1 of this Act amending § 3322 of Title 12 (lines 37 through 96) take effect
383 with respect to appointments of and delegations to agents, and with respect to actions taken under such appointments and
384 delegations, occurring after its enactment into law. Otherwise, this Act takes effect upon enactment and shall apply to all
385 trusts whenever created.

SYNOPSIS

Section 1 of the Act addresses statutes under Chapter 33 of Title 12 and (i) clarifies the definition of governing instrument in section 3301(e) to include cross-references to new section 3343; (ii) adds a definition of “published fee schedule” to section 3301(h) as a cross-reference to the schedule or formula required by section 3561 to be filed periodically with the Court of Chancery; (iii) clarifies that section 3303(a) permits a trustor within a governing instrument to vary laws concerning the terms of powers of appointment over trust property; (iv) revises section 3322 regarding the appointment of agents by fiduciaries and the delegation of trust powers to provide that the standard of care applicable to a fiduciary when performing duties delegated to an agent shall apply to the fiduciary when selecting and monitoring the agent (and not to the agent), and to permit trust beneficiaries to release the fiduciary from liability for future conduct in monitoring agents—all to correct inconsistencies and conform the law to prevailing practice; (v) clarifies that under subsection 28 of section 3325 (which already permits a division of a trust for any reason), division along family lines is permitted; (vi) clarifies that under section 3338, the requirement for “holders of powers” to join in nonjudicial settlement agreements includes both those who hold powers of appointment and those who hold powers to remove or appoint fiduciaries or nonfiduciaries; (vii) clarifies that section 3341’s provisions regarding the consequences of a merger also apply in the case of trust decantings under section 3328 where a new trust is not created; (viii) clarifies section 3342 (merely by setting off an existing phrase with dashes) that modification with the trustor’s consent is permitted so long as the provisions as modified could have been included in the trust’s governing instrument if the trust were created on the date of the modification; (ix) adds a new section 3343 providing that where a governing instrument authorizes appointment of a successor trustee, multiple trustees may be appointed and fiduciary duties may be allocated among them; and (x) adds a new section 3344 providing that with respect to grantor trusts under the Internal Revenue Code, certain trustees are deemed to have discretion to reimburse a trustor (i.e., the grantor) of such a trust for that trustor’s income tax liabilities attributable to that trust—but without making the trustor a beneficiary of the trust, and not if the provisions of this section would reduce a charitable deduction available to any person for federal or state income or transfer tax purposes.

Section 2 of the Act addresses statutes under Chapter 35 of Title 12 and (i) clarifies in section 3528 that after a decanting, the terms of the predecessor trust’s governing instrument are deemed to include the decanting power, in accordance with federal law requirements regarding certain charitable deductions; (ii) clarifies in section 3528 that the standard under section 3315, governing a trustee’s exercise of discretion, also applies to a trustee’s decanting authority in section 3528; (iii) clarifies subsections (c) and (c)(2) of section 3536 (subsection (c)(2) being moved within subsection (c) and expanded) that a trustor eligible for reimbursement from a trust of that trustor’s income tax liabilities attributable to the trust under section 3344 is not a beneficiary of the trust; (iv) clarifies the wording of subsections (c)(4) and (e) of section 3536 (subsection (c)(4) being created from existing wording in former subsection (c)(1) and expanded) regarding a trustor’s right to release a beneficial interest contingent on surviving the trustor’s spouse so as to accelerate the next succeeding beneficial interests; (v) clarifies section 3544 that a trustee has no duty to inquire into or confirm the validity of previous nonjudicial modifications, decantings, mergers, and the like; (vi) amends section 3545 to allow a trust instrument to be executed at a trustor’s direction (intended for situations where a trustor cannot physically sign the governing instrument, thus paralleling a similar provision that has existed for decades in Delaware’s wills statutes), and clarifies section 3545 that (as is the predominating practice) counterpart execution of trust instruments is permitted (subject to existing requirements regarding witnesses); (vii) modifies section 3547 to provide that takers in default under certain nongeneral powers of appointment cannot be virtually represented by the holders of such powers if there is a material conflict of interest—but also clarifies that those who must consent to the exercise of a power must also consent to any such virtual representation by the holder of the power; (viii) adds a cross-reference within section 3547(e) (regarding virtual representation) to section 3322 (regarding delegation); (ix) modifies section 3570 of Delaware’s Qualified Dispositions in Trust Act to allow a trustor to retain within a trust the ability to appoint and serve as a designated representative for a beneficiary under section 3339; (x) clarifies subsection (a)(2) of section 3585 to provide that the report procedure described in that subsection may be used while the trustee is in the process of resigning (and not just after completion of the act of

resignation or the effective date of a resignation); and (xi) clarifies that section 3586 applies to governing instruments (which term is defined in section 3301(e)) and not just to trust instruments.

Section 3 of the Act addresses statutes under Chapter 5 of Title 25 and (i) makes technical corrections to sections 501 and 504 regarding the method authorized in 2016 by which the donee of a power of appointment over trust property may avoid the application of the general default rule of section 501(a) of title 25 (which provides that interests in property created by the exercise of such a power of appointment are deemed to have been created at the time of the exercise of the power); and (ii) modifies section 505 to conform it with the Uniform Powers of Appointment Act, by allowing powerholders who have a nongeneral power of appointment the option of exercising the power in trust and creating a further nongeneral power of appointment (and not just a further general power of appointment as the existing language provides).

Section 4 of the Act provides effective dates.