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HOUSE OF REPRESENTATIVES  
151st GENERAL ASSEMBLY

HOUSE BILL NO. 164

AN ACT TO AMEND TITLES 6 AND 12 OF THE DELAWARE CODE RELATING TO DECEDENTS' ESTATES  
AND TRUSTS.

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

1 Section 1. Amend Chapter 12A, Title 6 of the Delaware Code by making insertions as shown by underline and  
2 deletions as shown by strike through as follows:

3 § 12A-103 Scope.

4 (b) This chapter does not apply to a transaction to the extent it is governed by:

5 (1) A law governing the creation and execution of wills; or codicils, or testamentary trusts;

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

8 § 3315 Trustee's exercise of discretion; review by court; discretionary interests.

9 (b) A beneficiary eligible to receive distributions from a trust in the ~~trustee's~~ discretion of a trustee or other  
10 fiduciary has a discretionary interest in the trust. discretionary interest in a trust is a mere expectancy, not a property right..  
11 A beneficiary eligible to receive distributions from a trust in the discretion of a trustee or other fiduciary, even if subject to  
12 an ascertainable standard (as defined in Treas. Reg. § 20.2041-1(c)(2) (26 CFR § 20.2041-1(c)(2)) or any successor  
13 provision thereto), has a discretionary interest in the trust. An interest that includes mandatory distribution language such  
14 as "shall" but is qualified by discretionary distribution language is a discretionary interest. A creditor may not directly or  
15 indirectly compel the distribution of a discretionary interest except to the extent expressly granted by the terms of a  
16 governing instrument in accordance with § 3536(a) of this title. Nothing within this subsection (b) shall be deemed to alter  
17 the standard of review of the discretion of the trustee or other fiduciary under subsection (a) of this section.

18 § 3326 Resignation of ~~trustee~~ an officeholder.

19 (a) For purposes of this section and § 3327 of this title, the term "officeholder" includes a trustee, an adviser as  
20 defined in § 3313 of this title, and a designated representative as defined in § 3339 of this title.

21 (b) ~~A trustee~~ An officeholder may resign:

22 (1) If the ~~trust~~ governing instrument expressly permits the ~~trustee-officeholder~~ to resign, in accordance with  
23 the terms of the ~~trust~~ governing instrument;

24 (2) If the ~~trust~~ governing instrument neither expressly permits nor prohibits the ~~trustee's officeholder's~~  
25 resignation, but establishes a procedure for the appointment of a successor ~~trustee-officeholder~~ who shall be willing and  
26 able to serve as such, upon 30 days written notice to the beneficiaries, those holding the power to appoint a successor  
27 officeholder, and any ~~co-trustees~~ other officeholders; or

28 (3) In all other cases, with the approval of the Court of Chancery.

29 ~~(b)(c)~~ A beneficiary or ~~co-trustee~~ other officeholder may waive the notice otherwise required by this section.

30 ~~(e)(d)~~ In approving a resignation, the Court of Chancery may impose orders and conditions reasonably necessary  
31 for the protection of the trust property, including the appointment of a special fiduciary.

32 ~~(d)(e)~~ Any liability of a resigning ~~trustee-officeholder~~ or of any sureties on the ~~trustee's-officeholder's~~ bond, if  
33 any, for acts or omissions of a resigning ~~trustee-officeholder~~ is not discharged or affected by the ~~trustee's-officeholder's~~  
34 resignation.

35 § 3327 Removal of ~~trustee~~ an officeholder.

36 ~~A trustee~~ If a governing instrument expressly permits an officeholder (as defined in § 3326 of this title) to be  
37 removed, the officeholder may be removed in accordance with the terms of the governing instrument. In addition, may be  
38 removed by the Court of Chancery may remove an officeholder on its the Court's own initiative or on petition of a trustor,  
39 ~~co-trustee~~ another officeholder, or beneficiary if:

40 (1) The ~~trustee-officeholder~~ has committed a breach of trust; or

41 ~~A lack of cooperation among co-trustees~~ The continued service of the officeholder substantially impairs  
42 the administration of the trust; or

43 (3) The court, having due regard for the expressed intention of the trustor and the best interests of the  
44 beneficiaries, determines that notwithstanding the absence of a breach of trust, there exists:

45 a. A substantial change in circumstances;

46 b. Unfitness, unwillingness or inability of the ~~trustee~~ officeholder to administer the trust or perform its  
47 duties properly; or

48 c. Hostility between the ~~trustee~~ officeholder and beneficiaries or other officeholders that threatens the  
49 efficient administration of the trust.

50 § 3331 Preference for early vesting.

51 In the construction or interpretation of any will or trust, or other governing instrument, if a determination is to be  
52 made whether the beneficiaries entitled to receive a distribution from an estate or trust are to be determined at an earlier or  
53 later time, such beneficiaries are to be determined at the earlier time unless the will or trust, or other governing instrument,  
54 expressly provides that the determination shall be made at the later time.

55 § 3339 Designated representatives of trusts.

56 (a) For purposes of this title, the term “designated representative” means a person who has delivered to the trustee  
57 such person’s written acceptance of the office of designated representative or who has otherwise agreed, through service or  
58 similar action, to serve as designated representative following such person’s appointment is authorized to act as a  
59 designated representative in the manner described in at least 1 of the following paragraphs of this subsection ~~(a) and who~~  
60 ~~delivers to the trustee such person’s written acceptance of the office of designated representative. A person who is~~  
61 ~~authorized to act as a designated representative in the manner described in this subsection:~~

62 (1) ~~Is expressly appointed~~ Express appointment under the terms of a governing instrument as a designated  
63 representative or by reference to this section;

64 (2) ~~Is authorized or directed~~ Authorization, appointment, or direction under the terms of a governing  
65 instrument to represent or bind 1 or more beneficiaries in connection with a judicial proceeding or nonjudicial matter,  
66 as those terms are defined in § 3303(e) of this title;

67 (3) ~~Is a person appointed~~ Appointment by 1 or more persons who are expressly authorized under a governing  
68 instrument to appoint a person who is described in paragraph (a)(1) or (2) of this section;

69 (4) To the extent that a designated representative is not appointed in accordance with paragraphs (a)(1)  
70 through (a)(3) of this section, Is appointment by the trustor to act as designated representative for 1 or more  
71 beneficiaries; provided, however, when a trustor is appointing a designated representative for purposes of paragraph  
72 (b)(2) of this section: (i) the appointed designated representative shall serve in a fiduciary capacity, notwithstanding  
73 any provision to the contrary in the governing instrument; (ii) the appointed designated representative must not be  
74 related or subordinate to the trustor within the meaning of section 672(c) of the Internal Revenue Code of 1986, as  
75 amended, and (iii) the trustor, within 30 days of appointment of the designated representative under this paragraph  
76 (a)(4), must provide written notice to the surviving and competent parent or parents or custodial parent (in cases where  
77 1 parent has sole custody of the beneficiary), or guardian of the property of the beneficiary who will be represented by  
78 the appointed designated representative; or

79           (5) To the extent that a designated representative is not appointed in accordance with paragraphs (a)(1)  
80 through (4) of this section, a person appointed appointment by a beneficiary to act as a designated representative of  
81 such beneficiary; and/or

82           ~~(5) Is a person appointed by the trustor to act as designated representative for 1 or more beneficiaries.~~

83           (b) A designated representative may be appointed under paragraph (a) of this section:

84           (1) for purposes of representing a beneficiary in accordance with § 3303(d) of this title;

85           (2) for purposes of representing a minor beneficiary, a beneficiary who is incapacitated, an unborn  
86 beneficiary, or a beneficiary whose identity or location is unknown and not reasonably ascertainable, in any nonjudicial  
87 matter, as such term is defined in § 3303(e) of this title;

88           (3) with respect to appointment under paragraph (a)(5), for purposes of representing the appointing  
89 beneficiary, in any nonjudicial matter, as such term is defined in § 3303(e) of this title.

90           (c) For purposes of paragraphs (b)(2) and (b)(3) of this section, any designated representative then serving may  
91 represent and bind the applicable beneficiary for purposes of any nonjudicial matter, as such term is defined in § 3303(e) of  
92 this title, notwithstanding that the governing instrument does not restrict or eliminate the right of such beneficiary to be  
93 informed of the beneficiary's interest in the trust.

94           (d) A designated representative shall be presumed to be a fiduciary. A person who accepts an appointment as  
95 a designated representative of a trust, or acts as a designated representative of a trust under this section, submits to personal  
96 jurisdiction of this State regarding any matter related to the trust. This provision does not preclude other methods of  
97 obtaining jurisdiction over such designated representative of a trust.

98           § 3342 Modification of trust by consent while trustor is living.

99           ~~(a) Notwithstanding any provision of law or the trust's governing instrument limiting or prohibiting amendment of~~  
100 ~~the trust~~ Unless the trust's governing instrument expressly provides that the governing instrument may not be modified  
101 under this section, under a nonjudicial settlement agreement under § 3338 of this title or similar provision of law, or under a  
102 modification agreement, an irrevocable trust may be modified by the addition of a new provision or the modification of any  
103 existing provision—so long as such provision could have been included in the governing instrument of a trust were such  
104 trust created upon the date of the modification—by written consent or written nonobjection of all of the trust's trustors, all  
105 then serving fiduciaries and all beneficiaries having an interest in the trust, regardless of whether the modification may  
106 violate a material purpose of the trust; provided, however, that unless the trustor, or a person acting on behalf of the trustor,  
107 confirms in writing that the transfer in trust is an incomplete gift for federal gift tax purposes, neither a trustor nor, on  
108 behalf of a trustor, a guardian or an agent under a power of attorney, may represent and bind any beneficiary (other than the

109 trustor) with respect to the modification, notwithstanding any provision in the governing instrument, or applicable law, that  
110 provides that the trustor may represent or bind 1 or more beneficiaries. A trustor’s power to provide a written consent or  
111 written nonobjection to a trust’s modification may be exercised: (i) by an agent under a power of attorney only to the extent  
112 expressly authorized by the power of attorney or the terms of the trust’s governing instrument; or (ii) if an agent under a  
113 power of attorney is not so authorized, by the guardian of the trustor’s property (or similar court-appointed representative)  
114 with the approval of the court supervising the guardian (or similar representative).

115 § 3344 Income tax reimbursement or payment.

116 (a) Unless the terms of the governing instrument expressly provide ~~otherwise~~ that a trustor may not be reimbursed  
117 by a trust for the trustor’s personal income tax liability, if the trustor of a trust is treated under 26 U.S.C. § 671 et seq. as the  
118 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  
119 subordinate party” with respect to the trustor within the meaning of 26 U.S.C. § 672(c)) may, in the trustee’s sole  
120 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  
121 subordinate party” with respect to the trustor within the meaning of 26 U.S.C. § 672(c)), reimburse the trustor for any  
122 amount of the trustor’s personal federal, ~~or state, county, metropolitan-region, city, local, foreign, or other~~ income tax  
123 liability that is attributable to the inclusion of the trust’s income, capital gains, deductions, and credits in the calculation of  
124 the trustor’s taxable income. The trustee may pay such amount to the trustor directly or may pay such amount to an  
125 appropriate taxing authority on the trustor’s behalf, as the trustee determines in the trustee’s sole discretion. No policy of  
126 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  
127 an interest in the policy may be used to reimburse the trustor or to pay an appropriate taxing authority on the trustor’s  
128 behalf. Neither the trustee’s power to make payments to, or for the benefit of, the trustor under this section, nor the trustee’s  
129 decision to exercise such power in favor of the trustor, shall cause the trustor to be treated as a beneficiary of the trust for  
130 purposes of § 3536(c) of this title or for other purposes of Delaware law.

131 (b) ~~If the application of this section to a trust would reduce a charitable deduction otherwise available to any~~  
132 ~~person for state or federal income, gift, or estate tax purposes, the~~ The provisions of this section shall not apply to the  
133 ~~trust if the application of this section would disqualify a trust for, or reduce the amount of, a marital or charitable~~  
134 deduction otherwise available to any person for state or federal income, gift, or estate tax purposes.

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

137 § 3536 Rights of creditors and assignees of beneficiary of trust [For application of this section, see 79 Del. Laws,  
138 c. 172, § 6].

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

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

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

148 (3) The trustor is a proper object of the exercise of a power of appointment over trust property held by  
149 someone other than the trustor; or

150 (4) The trustor has retained a beneficial interest that is contingent upon surviving the trustor's spouse (or  
151 surviving until the release of an interest by such a spouse under subsection (e) of this section) such as, but not limited  
152 to, an interest in an inter vivos marital deduction trust in which the interest of the trustor's spouse is treated as qualified  
153 terminable interest property under § 2523(f) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(f)), as amended,  
154 an interest in an inter vivos marital deduction trust that is treated as a general power of appointment trust for which a  
155 marital deduction would be allowed under § 2523(a) and (e) of the Internal Revenue Code of 1986 (26 U.S.C. §  
156 2523(a) and (e)), as amended, and an interest in an inter vivos trust commonly known as a "credit shelter trust" that  
157 used all or a portion of the trustor's unified credit under § 2505 of the Internal Revenue Code of 1986 (26 U.S.C. §  
158 2505), as amended.

159 Further, a beneficiary of a trust shall not be considered a trustor of the trust merely because of a lapse, waiver, or  
160 release of the beneficiary's right to withdraw all or a part of the trust property. For purposes of paragraph (3) of this  
161 subsection, if a person who otherwise would be considered a trustor of a trust becomes a beneficiary of a trust created by  
162 exercise of a testamentary power of appointment by another person, such person shall be treated as a beneficiary of such  
163 trust and shall not be treated as a trustor of the trust so created and such beneficiary's creditors may not satisfy their  
164 respective claims from such beneficiary's interest in the trust even if such beneficiary granted the power of appointment to  
165 the other person.

166 § 3545 Limitations on oral trusts; execution requirements for written trusts [For application of this section, see 81  
167 Del. Laws, c. 320, § 8].

168           (c) If the creation, modification, or revocation of a trust that is not described in subsection (a) of this section is  
169 made by a writing, such writing shall be validly executed if it is executed as described in subsection (a) of this section. The  
170 provisions of this subsection shall not be construed to limit the creation, modification, or revocation of a trust by any other  
171 means otherwise permitted by law. The provisions of this section shall not apply to any trust created under the Delaware  
172 Statutory Trust Act, 12 Del. C. § 3801 et seq., as amended and in effect from time to time, or a trust formed for the purpose  
173 of consummating a commercial transaction.

174           ~~(e)~~(d) Notwithstanding the provisions of subsections (a) and (b) of this section, a trust instrument that by its  
175 express terms is revocable by the trustor during the trustor's lifetime may refer to a written statement or list to dispose of  
176 items of tangible personal property not otherwise specifically disposed of by the trust instrument, other than money,  
177 evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be enforceable  
178 under this section, as though part of the trust, the writing:

179           (1) Must either be in the handwriting of the trustor or be signed by the trustor and must identify the items and  
180 the legatees with reasonable certainty;

181           (2) Must not be inconsistent with the terms of the trust instrument; and

182           (3) Must not be inconsistent with any other writing permitted by this subsection unless the writing is dated in  
183 which case the writing with the latest date will control.

184           Notwithstanding the foregoing, in the case of a writing that includes both provisions for dispositions that are  
185 consistent with the terms of the trust or any other writing permitted by this section and provisions for dispositions that are  
186 inconsistent with the terms of the trust or any other writing permitted by this section, such writing shall be admissible under  
187 this section as evidence of the intended disposition of those items of tangible personal property that would be disposed of  
188 by the provisions of the writing that are not inconsistent with the terms of the trust or any other writing permitted by this  
189 section. The writing may be referred to as one in existence at the time of the trustor's death; it may be prepared before or  
190 after the execution of the trust instrument; it may be altered by the trustor after its preparation; and it may be a writing  
191 which has no significance apart from its effect upon the dispositions made by the trust instrument. This subsection ~~(e)~~(d)  
192 shall apply only with respect to dispositions intended to take effect upon the death of the trustor, although such a writing  
193 may direct that an item or items of tangible personal property shall be administered as part of a trust or trusts created under  
194 the trust pursuant to terms of the trust instrument that were executed pursuant to the provisions of subsections (a) and (b) of  
195 this section.

196           § 3550 Electronic execution of documents.

197 (a) If otherwise validly executed, the following documents may be executed in accordance with the Uniform  
198 Electronic Transaction Act, Chapter 12A of Title 6:

199 (1) A governing instrument or other document—other than a will or codicil—described in §§ 3325(29), 3338,  
200 3342, 3343, 3528, or 3545 of this title.

201 (2) The resignation, removal, appointment, or acceptance of appointment of any trustee, any adviser or  
202 protector as described in § 3313(a) of this title, or of any designated representative described in § 3339 of this title.

203 (3) A consent, release, ratification, or indemnification described in § 3588 of this title.

204 (4) Any other document addressed by Chapters 33 and 35 of this title to the extent it is not excluded from the  
205 scope of Chapter 12A of Title 6 under § 12A-103(a) of Title 6.

206 (b) Notwithstanding any provision of Chapter 12A of Title 6 to the contrary, the documents under subsection (a) of  
207 this section are deemed to be a “transaction” within the meaning of § 12A-102 of Title 6 and are within the scope of § 12A-  
208 103 of Title 6.

209 Section 4. Sections 2 and 3 of this Act shall apply to trusts whenever created.

#### SYNOPSIS

Section 1 of the Act amends subsection (b)(1) of section 12A-103 of Title 6 to remove a reference to testamentary trusts that is either a redundancy or otherwise might conflict with new section 3550 of Title 12 (which is a part of the Act).

Section 2 of the Act addresses statutes under Chapter 33 of Title 12 and (i) amends section 3315(b) to make clear that a discretionary interest in a trust is not a property right and to define more clearly what constitutes a discretionary interest, and also to make clear that these clarifications do not affect the standard of review applicable to the discretion of a trustee or other fiduciary; (ii) amends section 3326 to expand its application to the resignation of officeholders (such as advisers under section 3313 or designated representatives under section 3339) and not just to the resignation of trustees; (iii) amends section 3327 to expand its application to the removal of officeholders (such as advisers under section 3313 or designated representatives under section 3339) and not just to the removal of trustees, and to permit other officeholders (in addition to trustors and beneficiaries) to petition to remove an officeholder; (iv) amends section 3331 to expand its application to governing instruments (beyond just wills and trust instruments, such that it is not intended to change the statute’s application to wills and trust instruments); (v) amends section 3339 to make clear that a designated representative begins to serve when the representative is appointed (and not merely when authorized) and has accepted the role (whether by written acceptance or through service or other action signifying acceptance), to prioritize appointment methods (that is, to provide that certain appointment methods are available if a designated representative is not appointed under previously-enumerated methods), to define for what purposes a designated representative may be appointed, to provide that the surviving parent or parents or custodial parent of a minor for whom a designated beneficiary has been appointed must be given notice of such appointment, to enable a trustor to appoint a designated representative to represent and bind beneficiaries who are minors or are otherwise described in paragraph (b)(2) of section 3339 in any nonjudicial matter, to enable a beneficiary to appoint a designated representative to represent and bind such beneficiary in any nonjudicial matter, and to provide that a person accepting appointment as a designated representative submits to personal jurisdiction in this State regarding any matter involving the trust (without precluding other methods of obtaining jurisdiction over the designated representative); (vi) amends section 3342 to make clear that, consistent with section 3303 of Title 12, a trustor may opt out of the application of section 3342 by express reference; and (vii) amends section 3344 to make clear that the statute applies unless a governing instrument expressly provides that a trustor may not be reimbursed by the trust for the trustor’s income tax liability, to expand the scope of permissible reimbursement to include county, metropolitan-region, city, local, foreign, and other income taxes (in addition to state income taxes), and to make clear that the statute does not apply if it would eliminate or reduce a marital or charitable deduction available to any person for state or federal income, gift, or estate tax purposes.

Section 3 of the Act addresses statutes under Chapter 35 of Title 12 and (i) amends section 3536 to add to the flush language of subsection (c) to provide that a person who becomes a beneficiary of a trust due to the exercise of a power of appointment by someone other than such person is not considered under this title to be a trustor of a trust—even if the



person who so became the beneficiary created and funded the trust and granted the power of appointment of another, such that if the trustor did not otherwise retain a beneficial interest in the trust that was otherwise reachable (e.g., the trustor did not name himself as a beneficiary of the trust at the time it was created), the mere fact that some other person exercises a power of appointment to later make the trustor a beneficiary will not create an interest that is reachable by the trustor's creditors—which change would abrogate the common law relation back doctrine as it pertains to who is to be deemed the trustor of a trust created upon exercise of a power of appointment, if such doctrine were extant in Delaware, although the applicability of the common law relation back doctrine to this particular issue does not appear to have been adjudicated or acknowledged in any decisional case law in Delaware; (ii) amends section 3545 to add a new subsection (c), which confirms that other writings that create, modify, or revoke trusts and that are not described in subsection (a) of section 3545 are validly executed if they are executed in conformity with subsection (a), but also confirms that subsection (c) does not limit the creation, modification, or revocation of a trust by other means that Delaware law permits, and further confirms that subsection (c) does not apply to trusts formed under Delaware's Statutory Trust Act and other trusts formed for the purpose of consummating a commercial transaction; and (iii) adds a new section 3550 providing that governing instruments and certain other trust-related documents, if validly executed under the sections of the Delaware Code that apply to those documents, may also be executed under Chapter 12A of Title 6 of the Delaware Code (the Uniform Electronic Transactions Act).

Section 4 of the Act provides that Sections 2 and 3 apply to trust whenever created.