

SPONSOR: Rep. Bush & Rep. Griffith & Rep. Lynn &
Sen. Mantzavinos & Sen. Hansen & Sen. Townsend
Reps. Gray, Hensley, Matthews; Sens. Hocker, Hoffner,
Paradee, Pettyjohn, Walsh

HOUSE OF REPRESENTATIVES
152nd GENERAL ASSEMBLY

HOUSE BILL NO. 132
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 10, TITLE 12, TITLE 13, AND TITLE 18 OF THE DELAWARE CODE RELATING TO DECEDENTS' ESTATES AND FIDUCIARY RELATIONS.

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

Section 1. Amend § 6504, Title 10 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline 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, fiduciary, adviser, or protector under § 3313(a) of ~~this title~~ Title 12, designated representative under § 3339 of ~~this title~~ Title 12, 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 2. Amend § 3301, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

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

(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 § 3313(a) of this title, agents acting in a fiduciary capacity under § 3322 of this title, designated representatives acting in a fiduciary capacity under § 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 § 3313(a) of this ~~title~~ title,

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agents acting in a nonfiduciary capacity under § 3322 of this title, or designated representatives acting in a nonfiduciary capacity under § 3339 of this title.

Section 3. Amend § 3332, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3332. Governing law; change of situs [For application of this section, see 80 Del. Laws, c. 153, § 5].

(b) Except as otherwise provided by the terms of a court order and notwithstanding a general choice of law provision in the governing instrument of a trust, such as a provision to the effect that the laws of a jurisdiction other than this State shall govern the trust or the administration of the trust, the laws of this State shall govern the administration of the trust while the trust is administered in this ~~State~~ State, as provided in § 3340(1) through (3) of this title or otherwise, unless the governing instrument expressly provides that the laws of another jurisdiction govern the administration of the trust and further provides that the laws governing the administration of the trust shall not change on account of a change in the place of administration of the trust.

Section 5. Amend § 3339, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3339. Designated representatives of trusts.

(a) For purposes of this title, the term "designated representative" means a person who has delivered to the trustee such person's written acceptance of the office of designated representative or who has otherwise agreed, through service or similar action, to serve as designated representative following such person's appointment to act as a designated representative in the manner described in at least 1 of the following paragraphs of this subsection:

(1) Express appointment under the terms of a governing instrument as a designated representative or by reference to this section;

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

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

(4) To the extent that a designated representative is not appointed and serving in accordance with paragraphs (a)(1) through (a)(3) of this section, appointment by the trustor to act as designated representative for 1 or more beneficiaries; provided, however, when a trustor is appointing a designated representative for purposes of paragraph (b)(2) of this section:

a. The appointed designated representative shall serve in a fiduciary capacity, notwithstanding any provision to the contrary in the governing instrument;

b. The appointed designated representative must not be the trustor or related or subordinate to the trustor within the meaning of § 672(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 672(c)], as amended; and

c. The trustor, within 30 days of appointment of the designated representative under this paragraph (a)(4), must provide written notice to 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 who will be represented by the appointed designated representative; or

(5) To the extent that a designated representative is not appointed and serving in accordance with paragraphs (a)(1) through (4) of this section, appointment by a beneficiary to act as a designated representative of such beneficiary.

Section 6. Amend § 3340, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3340. Place of administration [For application of this section, see 80 Del. Laws, c. 153, § 5].

For purposes of this title, and without limiting other ways in which a trust may be considered to be administered in this State, a trust ~~shall be deemed to be~~ is administered in this State if:

(1) The sole trustee is an individual residing in this State or a corporation or other entity having an office for the conduct of trust business in this State;

(2) The trust has more than 1 trustee only 1 of which is a corporation or other entity and that corporation or other entity has an office for the conduct of trust business in this State; or

(3) The trust has more than 1 trustee all of whom are individuals and $^{1}/_{2}$ or more of whom reside in this State.

Section 7. Amend § 3536, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

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

(a) Except as expressly provided in subsections (c) and (d) of this section, a creditor of a beneficiary of a trust shall have only such rights against or with respect to such beneficiary's interest in the trust or the property of the trust as shall be expressly granted to such creditor by the terms of the instrument that creates or defines the trust or by the laws of this State. The provisions of this subsection shall be effective regardless of the nature or extent of the beneficiary's interest, whether or not such interest is subject to an exercise of discretion by the trustee or other fiduciary, and shall be effective regardless of any action taken or that might be taken by the beneficiary. Every interest in a trust or in trust property or the income

therefrom that shall not be subject to the rights of creditors of such beneficiary as expressly provided in this section shall be exempt from execution, attachment, distress for rent, foreclosure, garnishment and from all other legal or equitable process or remedies instituted by or on behalf of any creditor, including, without limitation, actions at law or in equity against a trustee or beneficiary that seeks a remedy that directly or indirectly affects a beneficiary's interest such as, by way of illustration and not of limitation, an order, whether such order be at the request of a creditor or on the court's own motion or other action, that would:

(1) Compel the trustee or any other fiduciary or any beneficiary to notify the creditor of a distribution made or to be made from the trust;

(2) Compel the trustee or beneficiary to make a distribution from the trust whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary;

(3) Prohibit a trustee from making a distribution from the trust to or for the benefit of the beneficiary whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary; or

(4) Compel the beneficiary to exercise a power of appointment or power of revocation over the trust.

Every direct or indirect assignment, or act having the effect of an assignment, whether voluntary or involuntary, by a beneficiary of a trust of the beneficiary's interest in the trust or the trust property or the income or other distribution therefrom that is unassignable by the terms of the instrument that creates or defines the trust is void. No beneficiary may waive the application of this subsection. For purposes of this subsection, the creditors of a beneficiary shall include, but not be limited to, (i) any person that has a claim against the beneficiary, the beneficiary's estate, or the beneficiary's property by reason of any forced heirship, legitime, marital elective share, or similar ~~rights.~~ rights, and (ii) a former spouse who has a claim against the beneficiary, the beneficiary's estate, or the beneficiary's property. The provisions of this subsection shall apply to the interest of a trust beneficiary until the actual distribution of trust property to the beneficiary. Regardless of whether a beneficiary has any outstanding creditor, a trustee may make direct payment of any expense on behalf of such beneficiary to the extent permitted by the instrument that creates or defines the trust and may exhaust the income and principal of the trust for the benefit of such beneficiary. A trustee shall not be liable to any creditor of a beneficiary for paying the expenses of a beneficiary.

Section 8. Amend § 3570, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3570. Definitions [For application of this section, see 80 Del. Laws, c. 153, § 5].

As used in this subchapter:

(4) “Disposition” means a transfer, conveyance or assignment of property (including a change in the legal ownership of property occurring upon the substitution of 1 trustee for another or the addition of 1 or more new trustees), or the exercise of a power so as to cause a transfer of property, to a ~~trustee or trustees,~~ trustee, trustees, or a trust, but shall not include the release or relinquishment of an interest in property that theretofore was the subject of a qualified disposition and shall not include a sale or exchange for full and adequate consideration.

Section 9. Amend § 3573, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3573. Limitations on qualified dispositions.

(a) With respect to the limitations imposed by § 3572 of this title, those limitations on actions by creditors to avoid a qualified disposition shall not apply:

(1) To any person to whom the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of such transferor’s spouse, former spouse or children, or for a division or distribution of property incident to a judicial proceeding with respect to a separation or divorce in favor of such transferor’s spouse or former spouse, but only to the extent of such debt; or

(2) To any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor, which death, personal injury or property damage is at any time determined to have been caused in whole or in part by the tortious act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable but only to the extent of such claim against such transferor or other person for whom such transferor is or was vicariously liable.

(b) Paragraph ~~(1)~~ (a)(1) of this section shall not apply to any claim for forced heirship, legitime or elective share.

(c) Paragraph (a)(1) of this section shall not apply to a transferor’s spouse, and the limitations imposed by § 3572 of this title shall apply, with respect to each qualified disposition made by the transferor if the following requirements are met:

(1) The following information and documents are delivered to the transferor’s spouse before the qualified disposition is made:

a. A written instrument providing notice of the qualified disposition as described in paragraphs (c)(2)a. through (c)(2)c. of this section and consent to the qualified disposition as described in paragraph (c)(2)d. of this section that is executed as provided in paragraph (c)(2)e. of this section;

b. A copy of the Qualified Dispositions In Trust Act, subchapter VI of Chapter 35 of this title; and

c. A copy of the governing instrument of the trust that is the subject of the qualified disposition, a list of the property that will be the subject of the qualified disposition, disclosure of all material information relating to the value of such property, a reasonable estimate of the value of such property, and the basis for such estimate;

(2) The written instrument referred to in paragraph (c)(1) of this section must:

a. Contain the following statement, in capital letters:

YOUR SPOUSE IS CREATING OR HAS CREATED AN IRREVOCABLE TRUST INTO WHICH PROPERTY IS BEING TRANSFERRED. A COPY OF THE TRUST INSTRUMENT THAT WILL GOVERN OR GOVERNS SUCH IRREVOCABLE TRUST IS ANNEXED HERETO AS AN EXHIBIT. THE PROPERTY THAT IS TO BE TRANSFERRED TO THE IRREVOCABLE TRUST, WHICH IS THE SUBJECT OF A PROPOSED DISPOSITION UNDER DELAWARE'S QUALIFIED DISPOSITIONS IN TRUST ACT (12 *Del. C.* §§ 3570 *et seq.*), IS AS FOLLOWS: _____. THE ESTIMATED VALUE OF SUCH PROPERTY IS _____. YOUR CONSENT TO YOUR SPOUSE'S TRANSFER TO THE TRUST DESCRIBED HEREIN IS IRREVOCABLE AND YOUR RIGHTS TO THIS PROPERTY AS A SPOUSE OF THE TRANSFEROR WILL BE AFFECTED DURING YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF ALIMONY OR A DIVISION OR DISTRIBUTION OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR SPOUSE.

b. Contain a list of the property that will be the subject of the qualified disposition;

c. Contain a reasonable estimate of the value of such property;

d. Contain the consent of the transferor's spouse, which consent may be with or without consideration, to the qualified disposition; and

e. Be signed by the transferor's spouse and witnessed in writing by someone other than the transferor or any person related or subordinate to the transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 672(c)].

Section 10. Amend § 3585, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

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

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

(3) In the case of a person who is a beneficiary and who under ~~§ 3303(d)~~ § 3339 of this title is represented and bound by a designated representative, it is sent to the designated representative.

Section 11. Amend § 61-604, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 61-604. Certain charitable remainder unitrusts.

(a) Notwithstanding any contrary provision of the chapter, if the trust instrument adopts the provisions of this section by reference, an increase in the value of the following investments owned by a charitable remainder unitrust of the type authorized in § 664(d)(3) of the Internal Revenue Code (26 U.S.C. § 664(d)(3)) or any successor provision thereof, is distributable as income when it becomes available for distribution:

(5) An interest in ~~partnership~~ a partnership, a limited liability company, or a statutory trust (as any of those terms may be ~~defined~~ described in § 7701 of the Internal Revenue Code (26 U.S.C § 7701) or any successor provision ~~thereof);~~ thereof), including any partnership, limited liability company, or statutory trust that is a disregarded entity for federal income tax purposes; or

Section 12. Amend § 1513, Title 13 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1513. Disposition of marital property; imposition of lien; insurance policies.

(b) For purposes of this chapter only, "marital property" means all of the following:

(1) All property acquired by either party subsequent to the marriage, except any of the following:

a. Property acquired by an individual spouse by bequest, devise, or descent or by gift, ~~except~~ including a gift in trust and excluding gifts between ~~spouses, provided~~ spouses, if any of the following apply:

1. ~~the~~ The gifted property is titled and maintained in the sole name of the donee ~~spouse,~~ spouse;

2. The gifted property is held in a trust created by another person, of which trust the donee spouse is a beneficiary, regardless of whether other individuals are beneficiaries of the same trust;

3. ~~or a~~ A gift tax return is filed reporting the transfer of the gifted property in the sole name of the donee spouse or in a trust of which the donee spouse is a beneficiary; or

4. ~~or a~~ A notarized or other validly executed document, executed before or contemporaneously with the transfer, is offered demonstrating the nature of the transfer.

(g) A spouse's beneficial interest in property held in a trust created by another person, which property interest is described in § 3315(b) of Title 12, is not property acquired by the spouse.

Section 13. Amend § 2704, Title 18 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

(e) As used in this section and in § 2708(4) of this title, and § 702(c) of this title, except as provided in § 702(c)(3) of this title [sic]:

(4) A "trust-owned life insurance policy" means an insurance contract for which an insurable interest exists under paragraph (c)(3) or (c)(5) of this section, issued for delivery in this State to a trust established under the laws of this State and having a trustee with its principal place of business in this ~~State.~~ State, or to an entity formed under the laws of this State that is wholly owned by such a trust, which entity is classified as a disregarded entity for federal income tax purposes.

Section 14. This Act shall be effective upon enactment and shall apply to trusts whenever created.