



SPONSOR: Sen. DeLuca & Rep. Stone

DELAWARE STATE SENATE

142nd GENERAL ASSEMBLY

SENATE BILL NO. 124

AN ACT AMENDING TITLE 12 OF THE DELAWARE CODE RELATING TO TRUSTS.

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

1 Section 1. Amend § 3303, Title 12 of the Delaware Code, by deleting such section in its entirety and substituting
2 in lieu thereof the following:

3 **"§ 3303. Effect of provisions of instrument.**

4 (a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument
5 may expand, restrict, eliminate, or otherwise vary the rights and interests of beneficiaries, including the right to be
6 informed of the beneficiary's interest for a period of time, the grounds for removal of a fiduciary, and a fiduciary's powers,
7 duties, standard of care, rights of indemnification, and liability to persons whose interests arise from that instrument;
8 provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification
9 of a fiduciary for the fiduciary's own willful misconduct or preclude a court of competent jurisdiction from removing a
10 fiduciary on account of the fiduciary's willful misconduct. The rule that statutes in derogation of the common law are to
11 be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the
12 principle of freedom of disposition and to the enforceability of governing instruments.

13 (b) In furtherance of and not in limitation of the provisions of Subsection (a) of this Section, and
14 notwithstanding any contrary provisions of § 3541 of this Title, the terms of a governing instrument of a trust established
15 and existing for religious, charitable, scientific, literary or educational purposes shall not be modified by the court to
16 change the trust's purpose unless the purposes of the trust have become unlawful under the constitution of this state or the
17 United States or the trust would otherwise no longer serve any religious, charitable, scientific, literary, or educational
18 purpose in which case the court shall proceed in the manner directed by § 3541 of this Title."

19 Section 2. Amend Section 3312, Title 12 of the Delaware Code, by deleting Paragraph (4) of Subsection (a)
20 thereof and substituting a new paragraph (4) to read as follows:

21 "(4) 'Affiliated investment' means an investment for which the fiduciary or an affiliate of the fiduciary
22 acts as adviser, administrator, distributor, placement agent, underwriter or in any other capacity for which it receives or
23 has received a fee or commission from such investment or an investment or an investment acquired or disposed of in a
24 transaction for which the fiduciary or an affiliate or the fiduciary receives or has received a fee or commission."

25 Section 3. Amend Chapter 33, Title 12 of the Delaware Code, by deleting Section 3313 in its entirety and
26 substituting a new Section 3313 to read as follows:

27 **"§ 3313. Advisers.**

28 (a) Where one or more persons are given authority by the terms of a governing instrument to direct,
29 consent to, or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions, or other decision of
30 the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the
31 governing instrument otherwise provides.

32 (b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the
33 fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the fiduciary
34 so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

35 (c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an
36 adviser, then except in cases of willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not
37 be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to
38 provide such consent after having been requested to do so by the fiduciary.

39 (d) For purposes of this section, 'investment decision' means with respect to any investment, the
40 retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein, and an
41 adviser with authority with respect to such decisions is an investment adviser."

42 Section 4. Amend Chapter 34, Title 12 of the Delaware Code, by adding the following new section:

43 **"§ 3409. Effect of no-contest provision.**

44 (a) A provision of a will or trust that if given effect would reduce or eliminate the interest of any
45 beneficiary of such will or trust who initiates or participates in an action to contest the validity of such will or trust or to
46 set aside or vary the terms of such will or trust shall be enforceable.

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- (b) The provisions of subsection (a) shall have no application to:
1. Any action brought by the trustee of a trust or the personal representative under a will;
 2. Any action in which the beneficiary is determined by the court to have prevailed substantially;
 3. Any agreement among beneficiaries of the will or trust in settlement of a dispute relating to such will or trust;
 4. Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision described in subsection (a); or
 5. Any action brought by a beneficiary under a will or trust instrument for a construction or interpretation of such will or trust instrument."

Section 5. Amend Chapter 34, Title 12 of the Delaware Code, by adding the following new section:

"§ 3410. Effect of survivorship requirement.

If, in the construction or interpretation of any will or trust instrument, the vesting in ownership, possession, or enjoyment of an interest in property of any person is dependent, whether as a matter of expression, implication or inference, in whole or in part upon (a) that person's survival of or for a period of time after the life of some other person, including but not limited to the transferor, who has interest in such property, whether vested or contingent, and (b) that person fails to so survive the life of such other person or for a period of time thereafter, then the probable or perceived intention of the transferor with respect to any person who would otherwise be entitled to the interest because of a gift, bequest, or devise made by the person who failed to so survive shall not be considered and shall not be admissible in any proceeding involving the construction or interpretation of such will or trust."

Section 6. Amend Chapter 34, Title 12 of the Delaware Code, by adding the following new section:

"§ 3411. Preference for Early Vesting.

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

74 Section 7. Amend Chapters 33 and 34, Title 12 of the Delaware Code, by redesignating Sections 3401 through
75 3411 as Sections 3321 through 3331 and retitling Chapter 33 to "Administrative Provisions."

76 Section 8. Sections 1, 2, 3, 4, 5 of this Act shall be effective upon enactment and shall apply to wills and trusts
77 whenever created. Section 6 of the Act shall be effective upon enactment.

SYNOPSIS

Section 1 of the Act amends Section 3303 in several respects. Subsection (a) is clarified and strengthened by adding a provision that allows a provision in a governing instrument whereby a trustor may authorize a trustee not to inform a beneficiary of the beneficiary's interest in the trust for a period of time. Subsection (b) further clarifies and strengthens the effect of the section in response to recent litigation in a neighboring state and to commentary to the effect that the actions of the governing body of a charity established as a corporation will be given greater deference than those of a trustee of a charitable trust by providing that the terms of the governing instrument of a charitable trust should be given effect unless the enforcement of such terms would be unconstitutional or impossible. By way of illustration and not limitation, it is the intention of the Act that a court not modify the terms of the governing instrument merely because changes in circumstances have occurred that were not foreseen by the trustor, or changes in circumstances have made enforcement of the terms of the governing instrument less practical than had previously been the case.

Section 2 clarifies the meaning of the term "affiliated investment."

Section 3 clarifies certain existing statutory provisions relating to investment advisers and expands the scope of the statute to cover advisers generally.

Section 4 of the Act codifies the circumstances under which so-called no-contest or in terrorem clauses will apply. The Act provides that such clauses will generally be given effect, but that such clauses shall not apply to actions brought by a trustee or personal representative in regard to a will or trust, to actions brought by a beneficiary in which the beneficiary substantially prevails, to agreements among beneficiaries for the purpose of settling a dispute, whether or not then the subject of litigation, in regard to a will or trust, to actions brought by beneficiaries for the purpose of obtaining a construction or interpretation of will or trust instrument, or to actions brought for the purpose of determining whether a proposed or pending motion, petition or other proceeding would constitute a contest within the meaning of subsection (a) of the proposed section.

Section 5 provides a rule for the construction or interpretation of a will or trust. In general, the Act provides that the intention or perceived intention of a trustor or testator toward a person who might acquire an interest in an estate or trust only because of gift, bequest or devise by another person is to be disregarded. In this regard the Act would negate the rationale of a number of cases in which courts have construed or interpreted a will or trust based on the perceived intention of the trustor or testator with respect to a person or persons whose right to the property in question exists because of the independent act of a person other than such trustor or testator. The application of the Act may be illustrated by the following examples:

Example 1. A bequeaths property to B if B is then living and, if not, to C. B survives A but dies before the property is actually distributed by the personal representative. B bequeaths B's own estate to D. Because D would take the property in substitution of B only because of B's own independent action, A's intentions with respect to D do not provide a reason to conclude that B does not take even if the effect of B's taking is that D will become the recipient of the property bequeathed to B.

Example 2. T creates a testamentary trust and provides that the income be paid to A for life with remainder to the first son of A who attains 21. The will further provides that in absence of a son of A, the trust fund be distributed to the "respective descendants" of T's grandfather, G. If those descendants are determined at T's death, X will be entitled to the trust fund because C, who was the sole descendant of G living at T's death but predeceased A, left the residue of his estate to X. T's intentions with respect to X do not provide a reason to conclude that C should not take even if the effect of C's taking is that X will become the recipient of the trust

created by T.

Section 6 codifies and strengthens the presumption in favor of determining beneficiaries at the earliest permissible time. Although the statute stops short of declaring a rule of law that defeats intention, it does require that if the determination of beneficiaries is to be made at the later of two possible times, the will or trust instrument must expressly so state, and the later time not be determined on the basis of an inferred or implied intention, even if thought to be clear or manifest. Thus, in the examples described with respect to Section 5 of the Act, D and X would be entitled to the distributions.

Section 7 reorganizes Chapters 33 and 34 of Title 12.

Section 8 provides effective dates.

Author: Delaware Bar Association