



SPONSOR: Sen. DeLuca & Rep. Stone  
Sen. Amick; Reps. George & Valihura

DELAWARE STATE SENATE

143rd GENERAL ASSEMBLY

SENATE BILL NO. 150  
AS AMENDED BY  
SENATE AMENDMENT NO. 1

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

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

Section 1. Amend § 1309, Title 12, Delaware Code, by deleting Subsection (a) thereof and substituting in lieu thereof the following:

"(a) Any person interested who shall not voluntarily appear at the time of taking the proof of a will, or be served with citation or notice as provided in § 1303 of this title, shall, at any time within 6 months after the entry of the order of probate, have a right of review which shall on the person's petition be ordered by the Court of Chancery. Upon such review, there shall be the same proceedings as upon a caveat, and the allowance of the will and granting of letters may be affirmed or the will rejected and the letters revoked."

Section 2. Amend Section 1566, Title 12, Delaware Code, by deleting such section in its entirety and substituting in lieu thereof the following:

"§ 1566. Powers.

A domiciliary foreign personal representative who has complied with § 1565 of this title may exercise as to assets in this State all powers of a local personal representative and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally and provided that such domiciliary foreign personal representative complies with § 1905 of this title governing the filing of an inventory and appraisal of estate assets consisting of tangible personal property and real estate actually situated within this State."

Section 3. Amend § 3303, Title 12, Delaware Code, by adding the following new sentence to Subsection (b) thereof:

"A settlor may maintain an action to enforce a charitable trust under this section and may designate a person or persons, whether or not born at the time of such designation, to enforce a charitable trust under this section."

Section 4. Amend Title 12, Section 3325, by adding new Subsections (29) and (30) to read as follows:

"(29) To merge any two or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust .

(30) To take such actions as are necessary to cause gains from the sale or exchange of trust assets, as determined for federal income-tax purposes, to be taxed for federal income-tax purposes as part of a distribution of income (including income which has been increased by an adjustment from principal to income under § 6113), a unitrust distribution, or a distribution of principal to a beneficiary."

Section 5. Amend § 3522, Title 12, Delaware Code, by deleting said section in its entirety and substituting in lieu thereof the following:

"§ 3522. Waiver of filing of accounts in will.

Trustees named in wills and trustees appointed by the Court of Chancery shall be required to file judicial accounts of their trusts only in accordance with the express terms, if any, of such wills or upon order of the Court of Chancery."

Section 6. Amend Title 12, § 3536, by adding the following new sentences to Subsection (a) thereof:

"Notwithstanding the foregoing, a creditor shall have no right against the interest of a beneficiary in a trust solely because such beneficiary has the right to appoint all or part of the trust property to a person or persons (other than the beneficiary, the beneficiary's estate, or creditors of the beneficiary or the beneficiary's estate) by will or by other instrument under which the beneficiary's exercise of the power of appointment would take effect only upon the death of the beneficiary whether or not such power is exercised and a creditor shall have no right against the interest of a beneficiary in a trust solely because the beneficiary has the right to appoint all or part of the trust property to the beneficiary, the beneficiary's estate or creditors of the beneficiary or the beneficiary's estate by will or other instrument under which the beneficiary's exercise of the power of appointment would take effect only upon the death of the beneficiary unless the beneficiary actually exercises such power in favor of the beneficiary, the beneficiary's estate or creditors of the beneficiary or the beneficiary's estate and then only to the extent of such exercise. The provisions of this subsection shall apply to the interest of a trust beneficiary until the actual distribution of trust property to the beneficiary."

Section 7. Amend § 3546, Title 12, Delaware Code, by deleting subsection (a) in its entirety and substituting in lieu thereof the following:

"(a) A judicial proceeding to contest whether a trust, or any amendment thereto, was validly created may not be initiated later than the first to occur of:

(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person.

(2) Two years after the trustor's death;

(3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

(4) The date the person's right to contest was precluded by adjudication, consent or other limitation.”

Section 8. Amend Title 12 of the Delaware Code by adding the following new section to read as follows:

"§ 6113. Trustee's power to adjust.

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines that the trustee is otherwise unable to comply with § 6102 in a fair and equitable manner.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent that they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be or has been allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) If the adjustment is from any amount that is permanently set aside for charitable purposes under the governing instrument and for which a federal estate- or gift-tax charitable deduction has been taken unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income-tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate-tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether the possession or exercise of the power will cause a result described in subsection (c)(1) through (6) or (c) (8) or if the trustee determines that the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

(g) This section shall have no application to trusts governed by §§ 3527 and 3527A of this title.

(h) Following the exercise of the power conferred by subsection (a) to adjust principal to income, the trustee:

(1) Shall consider the amount so adjusted as paid from ordinary income for federal income-tax purposes to the extent not allocable to net accounting income;

(2) After calculating the trust's capital gain net income described in § 1222(9) of the Internal Revenue Code, may consider the amount so adjusted as paid from net short-term capital gain described in § 1222(5) of the Internal Revenue Code, and then from net long-term capital gain described in § 1222(7) of the Internal Revenue Code; and

(3) Shall then consider any remaining amount so adjusted as coming from the principal of the trust.”

Section 9. Amend Title 12, Delaware Code, by adding the following new section to read as follows:

“§ 6114. Judicial proceedings and discretionary powers.

(a) In any proceeding involving a trustee's decision to exercise or refrain from the exercise of a discretionary power conferred upon the trustee by this chapter, the trustee's decision shall be changed by the court only if the court determines that the trustee's decision was an abuse of the trustee's discretion. A trustee's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) applies include:

(1) A decision under § 6113 as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by § 6113.

(c) If the court determines that a trustee has abused the trustee's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the trustee to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the trustee to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying paragraphs (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the trustee to pay an appropriate amount from its own funds to one or more beneficiaries or the trust or both.

(d) In a proceeding brought by a trustee under this section, the Court of Chancery is to determine in accordance with the provisions of this section whether a proposed exercise or nonexercise by the trustee of a discretionary power conferred by this chapter would result in an abuse of the trustee's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reason for the proposal, the facts upon which the trustee relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.”

Section 10. Amend § 3570(10), Title 12, Delaware Code, by deleting Subparagraph 5 of Paragraph b and substituting in lieu thereof the following:

"5. The transferor's receipt each year of a percentage (not to exceed 5) specified in the trust instrument of the initial value of the trust assets or their value determined from time to time pursuant to the trust instrument or of a fixed amount that on an annual basis does not exceed 5 percent of the initial value of the trust assets.”

Section 11. Amend § 3570(10)b, Title 12, Delaware Code, by adding the following phrase immediately after the word "thereto" at the end of the present Subparagraph 8:

"or the transferor's possession and enjoyment of a qualified annuity interest within the meaning of such term as described in Treasury Regulation § 25.2702-5(c)(8) and any successor provision thereto."

Section 12. Amend § 3570(10)b, Title 12, Delaware Code by replacing the period at the end of Subparagraph 8 thereof with a semicolon and by adding the following Subparagraph 9 to such paragraph:

“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

B. At the direction of an adviser described in paragraph 9c of this section who is acting in such adviser’s discretion.

Distributions to pay income taxes made under discretion included in a governing instrument pursuant to subparagraph 3, subparagraph 6 or this subparagraph 9 may be made by direct payment to the taxing authorities.”

Section 13. Amend § 3572, Title 12, Delaware Code, by adding the following two new sentences at the end of Subsection (c) thereof:

“If a trustee of an existing trust proposes to make a qualified disposition pursuant to the provisions of this subsection (c) but the trust would not conform to the requirements of § 3570(10)b2 of this title as a result of the original transferor’s nonconforming powers of appointment, then, upon the trustee’s delivery to the qualified trustee of an irrevocable written election to have this subsection apply to the trust, the nonconforming powers of appointment shall be deemed modified to the extent necessary to conform with § 3570(10)b2. For purposes of this subchapter, the irrevocable written election shall include a description of the original transferor’s powers of appointment as modified together with the original transferor’s written consent thereto, but no such consent of the original transferor shall be considered a disposition within the meaning of § 3570(4) of this title.”

Section 14. Amend § 3572, Title 12, Delaware Code, by deleting subsection (g) in its entirety and substituting in lieu thereof the following:

“(g) If, in any action brought against a trustee of a trust that is the result of a qualified disposition, a court takes any action whereby such court declines to apply the law of this state in determining the validity, construction or administration of such trust, or the effect of a spendthrift provision thereof, such trustee shall immediately upon such court’s action and without the further order of any court, cease in all respects to be trustee of such trust and a successor trustee shall thereupon succeed as trustee in accordance with the terms of the trust instrument or, if the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the Court of Chancery, upon the application of any beneficiary of such trust, shall appoint a successor trustee upon such terms and conditions as it

determines to be consistent with the purposes of such trust and this statute. Upon such trustee's ceasing to be trustee, such trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust instrument or appointed by the Court of Chancery in accordance with this section."

Section 15. Amend § 3573, Title 12, Delaware Code, by deleting such section in its entirety and substituting in lieu thereof the following:

"§ 3573. Limitations on qualified dispositions.

With respect to the limitations imposed by § 3572, 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 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.

Subsection (1) shall not apply to any claim for forced heirship, legitime or elective share."

Section 16. Amend § 3574, Title 12, Delaware Code, by deleting such section in its entirety and substituting in lieu thereof the following:

"§ 3574. Effect of avoidance of qualified dispositions.

(a) A qualified disposition shall be avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with such costs, including attorneys' fees, as the court may allow.

(b) In the event any qualified disposition shall be avoided as provided in subsection (a) of this section, then:

(1) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

a. Such trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by such trustee in the defense of the action or proceedings to avoid the qualified disposition;

b. The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of such trustee (and of any predecessor trustee that has not acted in bad faith); and

c. For purposes of this paragraph (1), it shall be presumed that such trustee did not act in bad faith merely by accepting such property; and

(2) If the court is satisfied that a beneficiary of a trust has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of such beneficiary to retain any distribution made prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this subdivision, it shall be presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) A creditor shall have the burden of proving that a trustee or beneficiary acted in bad faith as required under subsection (b) by clear and convincing evidence except that, in the case of a beneficiary who is also the transferor, the burden on the creditor shall be to prove that the transferor - beneficiary acted in bad faith by a preponderance of the evidence. The preceding sentence provides substantive not procedural rights under Delaware law.

(d) For purposes of this subchapter, attachment, garnishment, sequestration, or other legal or equitable process shall be permitted only in those circumstances permitted by the express terms of this subchapter."

Section 17. Amend §3527, Title 12, Delaware Code, by deleting Subsection (1) thereof and substituting in lieu thereof the following:

“(1) This section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in Delaware under Delaware law or to any trust, regardless of its place of administration, whose governing instrument provides that Delaware law governs matters of construction or administration unless:

(1) The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

(2) The trust is a pooled income fund described in I.R.C. § 642(c)(5) [26 U.S.C. § 642(c)(5)] or a charitable-remainder trust described in I.R.C. § 664(d) [26 U.S.C. § 664(d)];

(3) The governing instrument expressly prohibits use of this section by specific reference to the section or expressly states the trustor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that “The provisions of 12 Del. C. § 3527, as amended, or any corresponding provision of future law, shall not be used in

the administration of this trust.” or “My trustee shall not determine the distributions to the income beneficiary as a unitrust amount.” or similar words reflecting such intent shall be sufficient to preclude the use of this section.”

Section 18. Amend § 3302, Title 12, Delaware Code, by deleting such section in its entirety and substituting in lieu thereof the following:

“§ 3302. Degree of care; authorized investments.

(a) When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making investment decisions, a fiduciary may consider the general economic conditions, the anticipated tax consequences of the investment and the anticipated duration of the account and the needs of its beneficiaries.

(b) Within the limitations of the foregoing standard and considering individual investments as part of an overall investment strategy, a fiduciary is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, wherever located, whether within or without the United States, including, but not by way of limitation, bonds, debentures and other corporate obligations, stocks, preferred or common, shares or interests in common funds or common trust funds, securities of any open-end or closed-end management type investment company or investment trust registered under the Federal Investment Company Act of 1940 (15 U.S.C. § 80a-1 et seq.), options, futures, warrants, limited partnership interests and life insurance. No investment made by a fiduciary shall be deemed imprudent solely because the investment is not specifically mentioned in this subsection.

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

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

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

(3) The nature and extent of other investments and resources, whether held in trust or otherwise, available to the beneficiaries as they existed at the time of the decision; provided however, that the fiduciary shall have no duty to inquire as to the nature and extent of any such other investments and resources not held by the fiduciary.

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

(d) Notwithstanding the foregoing provisions of this section, a trustee who discloses the application of this subsection and the limitation of the trustee's duties thereunder either in the governing instrument or in a separate writing delivered to each insured at the inception of a contract of life insurance or thereafter if prior to an event giving rise to a claim thereunder,

may acquire or retain a contract of life insurance upon the life of the trustor or the trustor's spouse, or both, without liability for a loss arising from the trustee's failure to:

- (1) Determine whether the contract is or remains a proper investment;
- (2) Investigate the financial strength or changes in the financial strength of the life insurance company;
- (3) Make a determination of whether to exercise any policy option available under the contract;
- (4) Make a determination of whether to diversify such contracts relative to one another or to other assets, if any, administered by the trustee; or
- (5) Inquire about changes in the health or financial condition of the insured or insured relative to any such contract.

(e) Any fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from that instrument for breach of fiduciary duty for the fiduciary's good faith reliance on the express provisions of such instrument. The standards set forth in this section may be expanded, restricted or eliminated by express provisions in a governing instrument.

(f) Where a bank or trust company acting in a fiduciary capacity invests trust funds in, or otherwise acquires an interest in, a common trust fund which it or one of its affiliates manages, as defined in § 23A of the Federal Reserve Act (12 U.S.C. § 371c), the plan for such common trust fund shall be filed and recorded in the office of the Register in Chancery of the county in which is located the main office in Delaware of the bank or trust company which is the fiduciary for such trust funds.

(g) Fees may be charged for making an investment through a computerized or automated process, such as sweeping otherwise uninvested cash into a cash management vehicle, provided that the amount of such fees is disclosed on a continuing basis as a separate item on the regular periodic statements furnished to the beneficiaries of the account.

(h) A fiduciary is authorized, in the absence of an express provision to the contrary, whenever a law, regulation, governing instrument or order directs, requires, authorizes or permits investment in United States government obligations, to invest in those obligations, either directly or in the form of securities of, or other interests in, any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (54 Stat. 847, 15 U.S.C. § 80a-1 et seq.), if the portfolio of that investment company or investment trust is limited to United States government obligations and to repurchase agreements fully collateralized by United States government obligations, which collateral shall be delivered to or held by the investment company or investment trust, either directly or through an authorized custodian.

(i) Except in the case of United States government obligations, which are treated in subsection (h) of this section above, the authority to invest in specified types of investments includes authorization to invest in any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (54 Stat. 847, 15 U.S. C. § 80a-1 et

seq.), or in any common or collective trust fund established and maintained by a corporate fiduciary, if the portfolio of the investment company or investment trust, or of the common or collective trust fund, consists substantially of the specified types of investments and is otherwise in conformity with the laws of the State.”

Section 19. Amend § 1308, Title 12, Delaware Code, by deleting Subsection (a) thereof and substituting in lieu thereof the following:

"(a) A caveat against the allowance of an instrument as a will shall be received by the Court of Chancery at any time before its proof. The caveat having been received, the Court shall appoint a time for hearing and award citations for the parties interested, and order service or publication of notice to the parties not within the State in accordance with §1303 of this title. If, when a caveat is received, a time be appointed and process issued, it shall not be necessary to adjourn the taking of the proof and hearing; but an adjournment may be decreed, and other process awarded, or order made."

Section 20. Sections 1 and 19 of the Act shall be effective with respect to petitions or caveats filed after July 31, 2005. Section 5 of the Act shall be effective with respect to trustees appointed by the Court of Chancery after July 31, 2005, to successor trustees appointed pursuant to the terms of the will after July 31, 2005 and to trustees under the wills of decedents dying after July 31, 2005. The remaining sections of the Act shall be effective on August 1, 2005, and shall apply to trusts and estates whenever created or commenced.