



SPONSOR: Sen. DeLuca & Rep. B. Short
Sens. Bunting & Bonini;
Reps. Bennett, Brady, Viola & Hocker

DELAWARE STATE SENATE
145th GENERAL ASSEMBLY

SENATE BILL NO. 282

AN ACT TO AMEND 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 Title 12, Delaware Code, by adding new Section 3335 to read as follows:

2 "§ 3335. Effect of Formula Clauses in Certain Wills and Trusts.

3 (a) A governing instrument, such as a will or trust of a decedent, who dies after December 31, 2009 and before
4 January 1, 2011, that contains a formula referring to the "unified credit," "estate tax exemption," "applicable exemption
5 amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST
6 exemption," "marital deduction," "maximum marital deduction," or "unlimited marital deduction," or that measures a share
7 of an estate or trust based on the amount that can pass free of federal estate taxes or the amount that can pass free of federal
8 generation-skipping transfer taxes, or that is otherwise based on a similar provision of federal estate tax or generation-
9 skipping transfer tax law, shall be presumed to refer to the federal estate tax and generation-skipping transfer tax laws as
10 they applied to estates of decedents dying on December 31, 2009. This provision shall not apply to a will or trust that is
11 executed or amended after December 31, 2009, or that manifests an intent that a contrary rule shall apply. Furthermore,
12 this provision shall not apply in cases where the application of this provision would cause (i) a decrease in the amount
13 passing to one trust and a substantially equal increase in the amount passing to another trust if the terms of both trusts
14 concerning beneficial interests are substantially similar; (ii) a decrease in the amount passing to a trust and a substantially
15 equal increase in the amount passing to an individual if the individual is eligible to receive unlimited discretionary principal
16 distributions from the trust or (iii) a decrease in the amount passing to one trust and a substantially equal combined total
17 increase in the amount passing to another trust or trusts and individuals described in clauses (i) and (ii). For purposes of
18 determining whether the terms of two trusts concerning beneficial interests are substantially the same:

19 (1) any provision of the will or trust requiring, or expressing a preference for, distributions from one trust
20 rather than from the other trust shall be disregarded;

21 (2) (i) a trust intended to be a general power of appointment marital trust under section 2056(b)(5) of the
22 Internal Revenue Code or (ii) which, would, if an election could have been made under section 2056(b)(7) of the Internal

23 Revenue Code as in effect for decedents dying on December 31, 2009, qualify as qualified terminable interest property
24 under section 2056(b)(7), shall be considered to be substantially the same as any other trust which requires that all income
25 be distributed currently to the surviving spouse, regardless of whether the other trust may have current beneficiaries of
26 principal who are persons other than the surviving spouse; and

27 (3) any provision of the will or trust which may have different provisions concerning the identity,
28 selection or nomination of current or future trustees shall be disregarded.

29 (b) The reference to January 1, 2011 in subsection (a) shall, if the federal estate tax and generation-skipping
30 transfer tax become effective before that date, refer instead to the first date on which such tax shall become effective.

31 (c) Any person interested under a will or trust may bring a proceeding under 10 Del. C. § 6504 to determine
32 whether the decedent intended that the references under subsection (a) be construed with respect to the law as it existed
33 after December 31, 2009. Such a proceeding must be commenced within six months following the later of (i) the effective
34 date of this section; or (ii) the death of the testator or trustor, and not thereafter.

35 (d) The presumption described in subsection (a) shall not apply if fiduciaries such as personal representatives or
36 trustees serving under the governing instrument, who are not interested fiduciaries, elect to opt out of the application of
37 subsection (a) and no beneficiary under the governing instrument objects to the election within thirty (30) days following
38 receipt of written notice of the election. A fiduciary is interested if (i) the fiduciary is a beneficiary under the governing
39 instrument whose beneficial interest would or might change in value by reason of the election; (ii) the fiduciary may be
40 removed and replaced by a beneficiary described in clause (i) above; or (iii) the fiduciary is an individual legally obligated
41 to support a beneficiary described in clause (i) above. If all of the fiduciaries are interested, this subsection (d) shall have
42 no application.

43 (e) Whenever the term “pass” or “passing” is used in this section, the term shall relate to an amount distributable
44 or allocable under the governing instrument as result of the decedent’s death.”

SYNOPSIS

Many wills and trusts contain formula clauses allocating shares of a decedent’s estate or trust estate based on Internal Revenue Code provisions relating to federal estate tax exemptions and generation-skipping transfer tax exemptions. The federal estate tax and generation-skipping transfer tax are repealed for calendar year 2010 but, under current law, will be reinstated in calendar year 2011. The bill is intended to create a presumption that if a decedent’s formula clause had different beneficiaries of the different shares of his estate or trust under the formula, the clause is to be interpreted based on the law in effect as though the decedent died on December 31, 2009. If a decedent’s formula clause had substantially the same beneficiaries of the different shares of his estate or trust under the formula, the clause is to be interpreted so as though the estate and generation skipping tax exemptions are unlimited. This section allows an interested person to file a petition under 10 Del. C. § 6504 within six months following the later of (i) the effective date of this section; or (ii) the death of the decedent, if such person believes that presumptions in the statute are incorrect as to that decedent, so that the provisions of this section should not apply. This section does not apply to a will or trust that is executed or amended after December 31, 2009.

Author: Senator DeLuca