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HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE BILL NO. 169

AN ACT TO AMEND TITLES 12, 25 AND 30 OF THE DELAWARE CODE RELATING TO DECEDENTS' ESTATES AND FIDUCIARY RELATIONS, PROPERTY AND STATE TAXES.

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

1 Section 1. Amend Chapter 33, Title 12 of the Delaware Code by making insertions as shown by underline and
2 deletions shown by strikethrough as follows and by redesignating accordingly:

3 § 3301 Application of chapter; definitions [For application of this section, see 79 Del. Laws, c. 172, § 6]

4 (b) The term "agents" shall mean custodians (other than those acting under the Uniform Transfers to Minors Act,
5 Chapter 45 of this title), escrow agents, managing agents, all persons defined as agents by the general law of agency and
6 ~~other~~ persons holding, other than in the capacity of a fiduciary as defined in this section, property belonging to another
7 person whether that other person is a fiduciary or a nonfiduciary.

8 (d) The term "fiduciary" shall mean trustees, personal representatives, guardians, custodians under the Uniform
9 Transfers to Minors Act (Chapter 45 of this title), agents to the extent delegated duties by another fiduciary and other
10 fiduciaries.

11 § 3312 Investments in affiliated investments; transactions with affiliates [For application of this section, see 80
12 Del. Laws, c. 153, § 5]

13 (a) As used in this section:

14 (4) "Fiduciary" means any person, including a bank or trust company, acting as a fiduciary as defined in §
15 3301(d) of this title, and includes an agent with investment discretion, whether or not such investment discretion has
16 been delegated to such agent by another fiduciary or fiduciaries or granted directly to such agent.

17 (5) "Governing instrument" means any governing instrument as defined in §3301(e) of this title, and includes
18 any agreement or instrument granting fiduciary investment discretion.

19 §3313A Excluded cotrustee.

20 (a) If the terms of a governing instrument confer upon a cotrustee, to the exclusion of another cotrustee, the power
21 to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the
22 duty and liability of the excluded trustee is as follows:

23 (1) If the terms of the governing instrument confer upon the cotrustee the power to direct certain actions of the
24 excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the
25 absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly
26 from compliance with the direction unless compliance with the direction constitutes willful misconduct on the part of
27 the directed cotrustee;

28 (2) If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any
29 power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from
30 the action taken by the cotrustee in the exercise of the power; and

31 (3) The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee or
32 consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any
33 beneficiary of any action taken or not taken by the cotrustee whether or not the excluded trustee agrees with the result.
34 Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee,
35 including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the
36 cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.

37 (b) The cotrustee holding the power to take certain actions with respect to the trust shall be liable to the
38 beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and shall have the
39 exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the
40 exercise of the power.

41 § 3325 Specific powers of trustee [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del. Laws, c.
42 153, § 5]

43 Without limiting the authority conferred by § 3324 of this title, a trustee may:

44 (5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or
45 extending beyond the duration of the trust and, in connection with any such borrowing, mortgaging or pledging,
46 indemnify the lender against liability incurred with respect to, or in connection with, the borrowing and entering into
47 any related mortgage or pledge or security agreement;

48 (19) Make loans out of or guarantees based on trust property; and, in connection with any such guarantee of a
49 loan, indemnify the lender against liability incurred with respect to, or in connection with, the loan and any related

50 mortgage, pledge or security agreement, including loans to or guarantees for the benefit of a beneficiary on terms and
51 conditions the trustee considers to be fair and reasonable under the circumstances, and subject to § 3536 of this title,
52 the trustee has a lien on future distributions for repayment of those loans and for the repayment of an amount equal to
53 any payment made or that might be made on account of such guarantee; provided further that any such loans or
54 guarantees shall only be permitted to the extent the same are either:

55 a. Made for investment purposes;

56 b. Made in lieu of a distribution amount that could have been made currently to or for such beneficiary
57 under the terms of the governing instrument, not made in excess of such amount, and the fiduciary creates a
58 reserve for the potential liability; or

59 c. Made to or for the benefit of another trust of which such beneficiary is also a beneficiary, provided the
60 requirements of paragraph (19)b. of this section are satisfied.

61 (29) Declare 1 or more new trusts for the purpose of merging all, or a portion, of ~~an existing~~ the trust ~~or trusts~~
62 with ~~and/or~~ into the new trust or trusts and ~~to merge~~ all or a portion of the trust with or into any other trust ~~any 2 or~~
63 ~~more~~ trusts, including statutory trusts and foreign statutory trusts as defined in § 3801 of this title, whether or not
64 created by the same trustor and whether or not funded prior to the merger, to be held and administered as a single trust
65 if such a merger would not result in a material change in the ~~beneficial interests of the trust beneficiaries, or any of~~
66 ~~them, in~~ dispositive terms of the trust defining the nature and extent of any trust beneficiary's interest in the principal or
67 income of the trust;

68 § 3332 Governing law; change of situs [For application of this section, see 80 Del. Laws, c. 153, § 5]

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

75 § 3333 Retention of counsel by fiduciary [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del.
76 Laws, c. 153, § 5]

77 (b) Except as otherwise provided in the governing instrument, a fiduciary may retain counsel in connection with
78 any matter that is or that might reasonably be believed to be one that will become the subject of or related to a claim against
79 the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts

80 as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without
81 limitation, the attorney-client privilege even if the communications with counsel had the effect of guiding the fiduciary in
82 the performance of fiduciary duties. However, in the event that the fiduciary is ~~found to~~ determined by a court to have
83 breached a fiduciary duty related to such matter, the court may, in its discretion, deny such fiduciary the right to have all or
84 some part of the fiduciary's counsel fees paid from such fund and may require the fiduciary to reimburse any such fees and
85 expenses that have been previously paid.

86 § 3336 Appointment of successor trustee [For application of this section, see 79 Del. Laws, c. 172, § 6]

87 If a trust has no serving trustee ~~because of~~ for any reason, including the death, incapacity, removal or resignation
88 of the last serving trustee of the trust, or due to the renunciation or declination of the last named successor trustee of the
89 trust of its appointment as such, and if the provisions of the governing instrument do not include any provisions which can
90 be effectively used to appoint a successor trustee, and if the only remaining dispositive provisions of the trust then require
91 distribution of the remaining property of the trust to 1 or more beneficiaries (whether outright, or to 1 or more other trusts
92 which do have a serving trustee), then the taking beneficiaries of the trust, by unanimous vote, may name a successor
93 trustee of the trust without the approval of the Court of Chancery. For purposes of the preceding sentence, the person
94 entitled to vote with respect to a beneficiary which is another trust which has a serving trustee is the trustee or trustees of
95 such trust.

96 § 3338 Nonjudicial settlement agreements [For application of this section, see 79 Del. Laws, c. 172, § 6; 80 Del.
97 Laws, c. 153, § 5; 80 Del. Laws, c. 340, § 2]

98 (b) Except as otherwise provided in subsection (c) of this section, interested persons may enter into a binding
99 nonjudicial settlement agreement with respect to any matter involving a trust ~~(other than a trust described in § 3541 of this~~
100 ~~title).~~

101 (c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the
102 trust, and if applicable, does not change the trust's purpose in a manner that would violate subsection (b) of §3303 of this
103 chapter if the change was effected by court order; provided, however, that this subsection shall not apply in cases where the
104 trustor is a party to the nonjudicial settlement agreement.

105 § 3341 Consequences of trust merger and similar transactions [For application of this section, see 80 Del. Laws, c.
106 153, § 5]

107 Whenever any trust (a "transferor trust") is merged with and into another trust (the "transferee trust"):

108 (1) The separate existence of the transferor trust shall cease and the transferee trust shall possess all of the
109 rights and privileges, and shall be subject to all of the obligations of, the transferor trust;

110 (2) All of the property (including title to any real property vested by deed or otherwise) and other interests of
111 the transferor trust shall be thereafter treated as effectively the property and interests of the transferee trust as they were
112 the property and interests of the transferor trust prior to the merger; ~~and~~

113 (3) No such property or interests shall revert or be in any way impaired by reason of the merger;

114 (4) In cases where the initial funding of the transferee trust occurs by reason of the merger, unless the
115 governing instrument of the transferee trust expressly states that one or more powers of appointment exercisable over
116 the property of the transferor trust shall not be exercisable over the property of the transferee trust, (i) any power of
117 appointment exercisable over property of the transferor trust shall be exercisable, in accordance with the terms of the
118 governing instrument of the transferor trust, over property of the transferee trust, and (ii) any instrument in writing,
119 executed prior to the merger, purporting to exercise a power of appointment over property of the transferor trust shall
120 be treated as a valid exercise of a power of appointment over property of the transferee trust to the same extent that the
121 appointment purportedly made pursuant to the instrument would have been a valid exercise of the power of
122 appointment granted over property of the transferor trust; and

123 (5) In cases where the initial funding of the transferee trust occurs prior to the merger, any power of
124 appointment exercisable over property of either trust participating in the merger shall, following the merger, be
125 exercisable over property of the transferee trust only to the extent expressly provided by the terms of the instrument of
126 merger or other written documents effecting the merger.

127 Furthermore, all rights of creditors and all liens upon the property of the transferor trust shall be preserved unimpaired and
128 all debts, liabilities and duties of the transferor trust shall thenceforth attach to the transferee trust and may be enforced
129 against the transferee trust to the same extent as if the transferor trust's debts, liabilities and duties had been incurred or
130 contracted by the transferee trust. ~~Notwithstanding anything herein to the contrary~~ Except to the extent provided in
131 subsection (5) of this section, the terms of the governing instrument of the transferee trust shall, following the merger,
132 control the administration and disposition of the property of the transferee trust, including any such property obtained by
133 the transferee trust by reason of the merger. Furthermore, any transaction in which all of the property of a trust is appointed
134 or otherwise transferred to another trust, whether pursuant to § 3528 of this title, the terms of a governing instrument or
135 otherwise, shall be treated as a merger within the meaning of this section with the appointing or transferring trust and the
136 recipient trust treated as a transferor trust and transferee trust, respectively, for purposes of applying the provisions of this
137 section to the transaction. This section is not intended, nor shall it be construed, to grant to any trustee a right or power to
138 merge trusts but rather this section is intended only to describe certain consequences of a trust merger in cases where the
139 merger is authorized by other applicable law.

140 § 3342 Modification of trust by consent while trustor is living [For application of this section, see 80 Del. Laws, c.
141 340, § 2]

142 (a) Notwithstanding any provision of law or ~~a~~the trust's governing instrument limiting or prohibiting amendment
143 of the trust, an irrevocable trust may be modified to include any provision that could have been included in the governing
144 instrument of a trust were such trust created upon the date of the modification ~~upon~~ by written consent or written
145 nonobjection of all of the trust's trustors, all then serving fiduciaries and all beneficiaries ~~even if~~ regardless of whether the
146 modification may violates a material purpose of the trust. A trustor's power to provide a written consent or written
147 nonobjection to a trust's modification may be exercised (i) by an agent under a power of attorney only to the extent
148 expressly authorized by the power of attorney or the terms of the trust's governing instrument; or (ii) if an agent under a
149 power of attorney is not so authorized, by the guardian of the trustor's property (or similar court-appointed representative)
150 with the approval of the court supervising the guardian (or similar representative).

151 (b) No fiduciary shall have a duty to consent to any proposed modification nor, absent wilful misconduct, have
152 any liability to any person having an interest in the trust for failure to consent to any proposed modification.

153 (c) Any interested person, including the trustor, may bring a proceeding in the Court of Chancery to interpret,
154 apply, enforce, or determine the validity of a modification adopted under this section, including but not limited to
155 determining whether the representation as provided in § 3547 of this title was adequate; provided, however, that any such
156 person may waive the right to contest the modification.

157 (d) This section shall ~~be available~~ apply to any trust ~~that is~~ administered under the laws of this State.

158 Section 2. Amend Chapter 35, Title 12 of the Delaware Code by making insertions as shown by underline and
159 deletions shown by strikethrough as follows:

160 § 3528 Trustee's authority to invade principal in trust [For application of this section, see 80 Del. Laws, c. 153, §
161 5]

162 (a) Unless the terms of the instrument expressly provide otherwise, a trustee who has authority (whether acting at
163 such trustee's discretion or at the direction or with the consent of an adviser), under the terms of a testamentary instrument
164 or irrevocable inter vivos trust agreement (including a trust that, by its terms, is revocable but was created by a settlor who
165 presently lacks the capacity to revoke the trust), to invade the principal or income or both of a trust (the "first trust") to
166 make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, may instead exercise such
167 authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser, as the case may
168 be) by appointing all or part of the such principal or income or both as is subject to the power in favor of a trustee of a
169 second trust, which may be a separate trust or the first trust as modified after appointment under this section (the "second

170 trust") under an instrument other than that under which the power to invade is created or under the same instrument,
171 provided, however, that, except as otherwise provided in this subsection (a):

172 § 3541 Administration of charitable trusts or noncharitable purpose trusts; cy pres rule.

173 (a) Notwithstanding any other provision of this Code or other law, a trust having any religious, charitable,
174 scientific, literary or educational purpose (collectively, hereinafter referred to as a "charitable purpose") or a noncharitable
175 purpose shall not be modified to alter or eliminate such purpose except pursuant to §3342 of this title or pursuant to this
176 section. Subject to subsection (b) of this section, if a particular charitable purpose or noncharitable purpose becomes
177 unlawful under the Constitution of this State or the United States or the trust would otherwise no longer serve any ~~religious,~~
178 ~~charitable, scientific, literary, educational,~~ or noncharitable purpose:

179 (1) The trust does not fail in whole or in part;

180 (2) The trust property does not revert to the trustor or the trustor's successors in interest; and

181 (3) The Court of Chancery shall modify or terminate the trust and direct that the trust property be applied
182 or distributed, in whole or in part, in a manner consistent with the trustor's charitable or noncharitable purposes,
183 whether or not such purposes be specific or general.

184 § 3545 Limitations on oral trusts; execution requirements for written trusts.

185 (a) Except as otherwise required by this Code, the creation, modification or revocation of a trust whereby a person
186 other than the trustor acquires or is divested of an interest in the trust the possession or enjoyment of which is contingent
187 upon surviving the trustor shall be void unless such creation, modification or revocation be:

188 (1) In a writing executed by the trustor and witnessed by at least 1 disinterested person or 2 credible persons,
189 or

190 (2) In a writing executed by a trustee who is a disinterested person without regard to whether any other
191 person, including the trustor, has executed the writing.

192 For purposes of this section, a disinterested person is one who has no beneficial interest in the trust that would be materially
193 increased or decreased as a result of the creation, modification or revocation of the trust and a notary public or similar
194 official may serve as a witness in cases where such official is a disinterested or credible person without regard to whether
195 such notary public or similar official signs the writing as a witness or solely in a notarial capacity.

196 § 3546 Limitation on action contesting validity of trusts [For application of this section, see 79 Del. Laws, c. 197,
197 § 3; 80 Del. Laws, c. 153, § 5]

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

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

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

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

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

211 § 3570 Definitions [For application of this section, see 79 Del. Laws, c. 198, § 2; 80 Del. Laws, c. 153, § 5]

212 As used in this subchapter:

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

218 § 3585 Limitation of action against trustee following trustee's report.

219 (a) A beneficiary may initiate a proceeding against a trustee for breach of trust until the first to occur of:

220 (1) Two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a
221 claim;~~or~~

222 (2) In the case of any trustee who has resigned, been removed or ceased to serve as trustee for any other
223 reason (including on account of the termination of the trust by reason of liquidation or by reason of a merger or similar
224 transaction described in §3341 of this title), one hundred and twenty days after the date the beneficiary was sent a
225 report that (i) notifies the beneficiary that the trustee has ceased to serve; (ii) adequately discloses the facts constituting
226 a claim; and (iii) adequately discloses the time allowed under this section for initiating proceedings against the former
227 trustee; or

228 (23) The date the proceeding was otherwise precluded by adjudication, release, consent~~or~~, limitation or
229 pursuant to the terms of the governing instrument.

230 (b) A report adequately discloses the facts constituting a claim if it provides sufficient information so that the
231 beneficiary knows of the claim or reasonably should have inquired into its existence.

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

233 (1) In the case of a beneficiary having capacity, it is sent to the beneficiary;~~or~~

234 (2) In the case of a beneficiary who under § 3547 of this title may be represented and bound by another
235 person, it is sent to the other person; or

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

238 Section 3. Amend Chapter 61, Title 12 of the Delaware Code by making insertions as shown by underline and
239 deletions as shown by strikethrough as follows:

240 § 61-107 Express total return unitrusts.

241 (a) The following provisions shall apply to a trust that, by its governing instrument, requires or permits the
242 distribution, at least annually, of a unitrust amount equal to a fixed percentage of not less than 3 nor more than 5 percent per
243 year of the fair market value of the trust's assets, valued at least annually, such trust to be referred to in this section as an
244 "express total return unitrust."

245 (b) The unitrust amount for an express total return unitrust may be determined by reference to the fair market
246 value of the trust's assets in 1 year or more than 1 year.

247 (c) Distribution of such a fixed percentage unitrust amount is considered a distribution of all of the income of the
248 express total return unitrust.

249 (d) An express total return unitrust may or may not provide a mechanism for changing the unitrust percentage
250 similar to the mechanism provided under § 61-106 of this title, based upon the factors noted therein, and may or may not
251 provide for a conversion from a unitrust to an income trust and/or a reconversion of an income trust to a unitrust similar to
252 the mechanism under § 61-106 of this title.

253 (e) If an express total return unitrust does not specifically or by reference to § 61-106 of this title deny a power to
254 change the unitrust percentage or to convert to an income trust, then the trustee shall have such power and the express total
255 return unitrust shall be deemed to be a "total return unitrust" within the meaning of § 61-106 of this title for purposes of
256 applying § 61-106 of this title to the trust.

257 (f) The distribution of a fixed percentage of not less than 3 percent nor more than 5 percent reasonably apportioned
258 the total return of an express total return unitrust.

259 (g) The trust instrument may grant discretion to the trustee to adopt a consistent practice of treating capital gains
260 as part of the unitrust distribution, to the extent that the unitrust distribution exceeds the net accounting income, or it may
261 specify the ordering of such classes of income.

262 (h) Unless the terms of the trust specifically provide otherwise, ~~the trusteea distribution of the unitrust amount~~
263 ~~from an express total return unitrust shall be considered to have been made from the following sources in order of priority:~~

264 (1) ~~From~~ Shall consider the unitrust amount as paid from net accounting income determined as if the trust
265 were not a unitrust;

266 (2) ~~From~~ Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting
267 income;

268 (3) After calculating the trust's capital gain net income as described in Internal Revenue Code ("I.R.C.") §
269 1222(9) [26 U.S.C. § 1222(9)], may consider the unitrust amount as paid from net realized short-term capital gain as
270 described in I.R.C. § 1222(5) [26 U.S.C. § 1222(5)] and then from net realized long-term capital gain described in
271 I.R.C. § 1222(7) [26 U.S.C. § 1222(7)]; and

272 (4) Shall then consider the unitrust amount as paid From the principal of the trust.

273 (i) The trust instrument may provide that:

274 (1) Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation
275 methods as are deemed reasonable and appropriate; and

276 (2) Assets used by a trust beneficiary, such as a residence property or tangible personal property, may be
277 excluded from the net fair market value for computing the unitrust amount.

278 Section 4. Amend Chapter 5, Title 25 of the Delaware Code by making insertions as shown by underline and
279 deletions as shown by strikethrough as follows:

280 § 501 Powers of appointment; effect of rule against perpetuities [For application of this section, see 79 Del. Laws,
281 c. 352, § 6]

282 (a) ~~Every~~ Except as otherwise provided in subsection (b) of this section, every estate or interest in property, real or
283 personal, created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of:

284 (1) Whether such power is nongeneral or general as to appointees;

285 (2) The manner in which such power was created or may be exercised;

286 (3) Whether such power was created before or after the passage of this section,

287 shall, for the purpose of any rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or
288 accumulations now in effect or hereafter enacted be deemed to have been created at the time of the exercise and not at the

289 time of the creation of such power of appointment. No such estate or interest shall be void on account of any such rule
290 unless the estate or interest would have been void had it been created at the date of the exercise of such power of
291 appointment otherwise than through the exercise of a power of appointment.

292 (b) Subsection (a) of this section shall not apply to the exercise of a power over property held in a trust if the
293 instrument of exercise of any such power makes express reference to this section and expressly states that the provisions of
294 this subsection shall apply. If the provisions of this subsection apply, every estate or interest in property, real or personal,
295 created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of:

296 (1) Whether such power is nongeneral or general as to appointees;

297 (2) The manner in which such power was created or may be exercised;

298 (3) Whether such power was created before or after the passage of this section, shall, for the purpose of any
299 rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or accumulations now in
300 effect or hereafter enacted, be deemed to have been created at the time of the creation and not at the time of the
301 exercise of such power of appointment.

302 Section 5. Amend Chapter 16, Title 30 of the Delaware Code by making insertions as shown by underline and
303 deletions as shown by strikethrough as follows:

304 § 1636 Nonresident beneficiary deduction for resident estates or resident trusts.

305 (b) *Rules of application.* — The following rules shall apply in determining whether or to what extent income is set
306 aside for future distribution to nonresident individual beneficiaries:

307 (3) For purposes of determining under paragraphs (b)(1) and (2) of this section the share of each beneficiary
308 of an estate or trust in the federal taxable income, as modified by § 1106 of this title, the discretion in any person over
309 the distribution of such income (whether or not acting in a fiduciary capacity and whether or not subject to a standard)
310 shall be presumed not to have been exercised unless such discretion was irrevocably exercised as of the last day of the
311 taxable year and all of the federal taxable income of an electing small business trust described in subsection (b) of
312 §1635 of this title, attributable to the trust's ownership of S corporation stock, shall be treated as having been set aside
313 for distribution in future taxable years.

314 Section 6. This Act shall apply to trusts whenever created.

SYNOPSIS

Section 1 of the Act (i) clarifies that the defined term “agents”, as used in chapter 33 of title 12, consistent with common usage of the term, includes all agents defined as such by the general law of agency; (ii) modifies section 3312 to provide that the rules of that section, permitting certain investments and transactions with affiliates, apply in cases where the investment or counterparty to the transaction is affiliated with an agent having discretionary investment authority over a fund either by reason of a delegation to the agent by a fiduciary or by reason of a direct grant of such discretion to the

agent; (iii) adds a new section 3313A, patterned upon section 3313, regarding the duties and liability of a trustee in cases where the trust instrument grants another co-trustee exclusive authority to take specified actions on behalf of the trust; (iv) grants trustees the general power to indemnify lenders as customary commercial loan documents sometimes require such indemnities; (v) clarifies the circumstances in which a trustee may merge trusts pursuant to section 3325(29); (vi) corrects typographical errors in sections 3332 and 3333; (vii) clarifies the circumstances in which certain trust beneficiaries may appoint a successor trustee pursuant to section 3336; (viii) makes section 3338 regarding nonjudicial settlement agreements available to charitable trusts and noncharitable purpose trusts subject to certain limitations described therein; (ix) revises section 3341 to address how a trust merger affects a power of appointment exercisable over property of a trust merged with and into another trust; and (x) revises section 3342 to make certain stylistic changes and address the power of an agent or guardian to consent to a trust modification on behalf of a trustor.

Section 2 of the Act (i) revises section 3528 to incorporate a provision, appearing in the recently promulgated Uniform Trust Decanting Act, permitting trustees to effect a trust decanting without creating a new separate trust; (ii) modifies the wording but not the substantive terms of section 3541; (iii) clarifies section 3545 regarding the execution requirements for certain trusts; (iv) corrects a typographical error in section 3546; (v) clarifies that a sale or exchange for full and adequate consideration is not a “disposition” for purposes of Delaware’s asset protection trust legislation meaning that (1) a person engaging in such a transaction does not become a settlor of the trust by reason of the sale or exchange, and (2) such a transaction may not be avoided by a creditor; and (vi) adds a new limitations period for actions against a trustee following the trustee’s departure from office.

Section 3 of the Act conforms the tax ordering rules of section 61-107, applicable to express unitrusts, with the tax ordering rules of section 61-106, applicable to unitrusts created by means of the conversion procedure described in that statute.

Section 4 of the Act revises Delaware’s “tax trap” legislation (chapter 5 of title 25) to create a new method, in addition to the method already available under current law, by which the donee of a power of appointment over trust property may avoid the application of the general default rule of section 501(a) of title 25 providing that interests in property created by the exercise of such power of appointment are deemed to have been created at the time of the exercise of the power.

Section 5 of the Act revises section 1636 of title 30 to create a new rule of application, treating the federal taxable income of an electing small business trust as having been set aside for distribution in future taxable years, for purposes of determining the amount of the trust’s section 1636 deduction for federal taxable income set aside for future distribution to nonresident beneficiaries.

Section 6 of the Act provides that it shall apply to trusts whenever created.