



2017 Delaware Trust Conference

Winning the Wealth Management Game



“Mastering the Chess Pieces – Effectively Utilizing the Tools in Delaware Statutes”

Panelists



MATT D'EMILIO

Director

COOCH AND TAYLOR
ATTORNEYS • A PROFESSIONAL ASSOCIATION



MARK DOYLE

Sr. Vice President

B
BESSEMER
TRUST



VINCE THOMAS

Partner

YC **ST** **YOUNG CONAWAY**
STARGATT & TAYLOR, LLP



SCOTT E. SWENSON

Partner

 **CONNOLLY**
GALLAGHER LLP

Section 3313A

New Addition to Title 12

How it works

- What is an “Excluded Trustee”
- Power to Direct (3313A(a)(1)) v. Exclusive Authority (3313A(a)(3))
- Duties of the Excluded Trustee
- Liability of the Excluded Trustee

Comparison to “Directed Trusts” under Section 3313

Section 3585

Limitation of Action Against Trustee Following Trustee's Report

Overview

Mechanics

Thoughts



Section 3585

Overview

New subsection § 3585 **(a)(2)** provides a third alternative way to define a set period addressing a beneficiary's ability to raise a breach of trust claim against the trustee:

In the case of any trustee who has resigned, been removed or ceased to serve as trustee for any other reason (including on account of the termination of the trust by reason of liquidation or by reason of merger or similar transaction described in § 3341 of this title), one hundred and twenty days after the date the beneficiary was sent a report that:

- (i) **notifies the beneficiary** that the trustee has ceased to serve;
- (ii) **adequately discloses the facts** constituting a claim; and
- (iii) **adequately discloses the time allowed (120 days)** under this section for initiating proceedings against the former trustee.

§ 3585**(c)(3)** provides that a beneficiary of a **quiet/silent** trust is deemed to have received a report if it has been sent to the **Designated Representative** acting on behalf of that beneficiary.

Section 3585

Mechanics

Delaware law must govern the administration of the trust for § 3585 to be available.

The trustee, or other fiduciaries, must no longer be serving and must notify the beneficiary of this change.

The notice to the beneficiary must include a report (i.e., statement) that adequately discloses the facts.

The notice to the beneficiary must expressly reference the 120-day objection period.

Section 3585

Thoughts

- Prior to the addition of this new subsection, the default statutory period for a beneficiary to initiate an action for breach of trust against the trustee was **2 years** after being sent an adequate report unless precluded by adjudication, release, consent or limitation.
- This new subsection can be very useful when multiple signatures are needed on a release and it is possible that one (or more) of the beneficiaries may not respond or respond within 120 days.
- Thought should be given when initiating this 120-day limitations period since it may unnecessarily raise suspicion on behalf of a beneficiary or initiate a legal contest before all facts can be gathered.
- This new subsection apparently **cannot** be utilized in situations where the trustee is still serving (i.e., the trust is being modified but not terminated and a new trustee is not appointed, situations involving only a partial decant, etc.).
- It may be beneficial to send as a **separate document** (as opposed to adding it into a receipt & release) and you may want to consider reflecting the actual final date an objection could be raised with the trustee.
- What constitutes an “objection” by a beneficiary?

Statutory Changes Involving Trust Mergers

[12 Del. C. § 3325\(29\)](#) – The statutory change further clarifies that a portion of a trust may be merged, and most importantly, clarifies the standard required for a merger.

[12 Del. C. § 3341](#) – The statutory change addresses how a trust merger affects a power of appointment exercisable over property of a trust merged with and into another trust.

12 Del. C. § 3325(29)

“material change in the beneficial interest of the trust beneficiaries, or any of them”

- New Language: “material change in the **dispositive terms of the trust defining the nature and extent of any trust beneficiary’s interest in the principal and income of the trust**”

Importance of clarification of required standard

- Clear language reflecting that any administrative change is permissible.
- Avoids the previously potential gray area of changes to non-dispositive provisions that one could “argue” change the “beneficial interests”.

Statutory Changes Involving Trustee's Indemnification of Lenders

12 Del. C. § 3325 (5) and (19)

- In connection with borrowing, mortgaging, or pledging, the trustee is explicitly permitted to indemnify a lender against liability in connection with such matter.
- In connection with any permissible guarantee of a loan, the trustee is explicitly permitted to indemnify the lender against liability in connection with such matter.

Importance

- Resolves any ambiguity in a trustee's power to enter into loan documents which commonly contain such indemnity provisions.
- Assists with the issuance of legal opinions in connection with trust loan transactions.

12 Del. C. § 3341

Initial Funding of Transferee Trust Occurs by Reason of the Merger

- Unless transferee governing instrument provides otherwise, any power of appointment of the transferor trust, shall be exercisable, in accordance with the transferor trust, over property of the transferee trust. In addition, any instrument in writing, executed prior to the merger, purporting to exercise a power of appointment over property of the transferor trust shall be treated as a valid exercise of a power of appointment over property of the transferee trust.

Initial Funding of Transferee Trust Occurs Prior to the Merger

- Any power of appointment over either trust shall, following the merger, be exercisable over property of the transferee trust only to the extent expressly provided by the terms of the instrument of merger or other written documents effectuating the merger.

Nonjudicial Modification

12 *Del. C.* § 3342

Introduced in 2016

Permits modification of irrevocable trusts, without regard to material purpose, upon consent or non-objection of all trustors, beneficiaries and then-serving fiduciaries.

Nonjudicial Modification

12 *Del. C.* § 3342 – 2017 Updates

Clarity with respect to trustors

- Where there is more than one trustor, the consent or non-objection of all must be obtained
- Agent may execute on behalf of trustor if authorized by power of attorney or by trust instrument
- Guardian may execute on behalf of trustor if authorized by Court

Decanting Statute *12 Del. C. § 3528*

Introduced in 2003

Authorizes trustees having the power to invade principal for beneficiaries to appoint principal in favor of a new trust for one or more of those beneficiaries.

Decanting Statute

12 *Del. C.* § 3528 - 2017 Updates

Borrowed concept from 2016 version of the Uniform Trust Decanting Act

New trust need not be created – the existing trust may be modified instead

Obviates administrative steps of obtaining new tax ID number, opening new accounts, re-titling assets, etc.

Conclusion

Additional Topics/Q&A



Contact Details



MATT D'EMILIO

Director

Phone/ 302-984-3814
mdemilio@coochytaylor.com



MARK DOYLE

Sr. Vice President

Phone/ 302-230-2680
Doyle@bessemer.com



VINCE THOMAS

Partner

Phone/ 302-576-3278
vthomas@ycst.com



SCOTT E. SWENSON

Partner

Phone/ 302-252-4233
sswenson@connollygallagher.com