

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

### **Trust Act 2017 (House Bill No. 169)**

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#### **A. 12 Del. C. § 3301**

The term “agents” in Section 3301 has been modified to include all persons defined as agents under the general law of agency. As previously drafted, there was some question as to whether the trustee had the power to hire certain kinds of agents if not expressly provided in the governing instrument.

#### **B. 12 Del. C. § 3312**

Section 3312 generally addresses affiliated investments and transactions with affiliates. The term “Fiduciary” as defined in Section 3312, was expanded to clarify that investments and transactions with affiliates of an agent are permitted, unless prohibited by the governing instrument. As amended, the term “Fiduciary” includes a bank or trust company, and an agent with investment discretion, irrespective of whether the investment discretion has been delegated to such agent by another fiduciary or directly granted to such agent.

In addition, Section 3312 was modified by adding the term “Governing instrument,” which is defined as any “any governing instrument as defined in Section 3301(e) of this title, and includes any agreement or instrument granting fiduciary investment discretion.”

#### **C. 12 Del. C. § 3313A**

Trust Act 2017 added a new excluded trustee statute in Section 3313A which addresses the duties and liabilities of trustees in cases where the governing instrument grants a co-trustee, to the exclusion of another co-trustee, authority to take specified actions on behalf of the trust.

*Direction.* If the governing instrument authorizes a co-trustee to direct an excluded trustee to take or refrain from taking certain actions, the excluded trustee must act in accordance with such direction and shall have no duty to act in the absence of such direction. The excluded trustee shall not be liable for such action or inaction *unless* compliance with the direction constitutes willful misconduct.

*Exclusive Authority.* If the governing instrument grants a co-trustee the exclusive power to take certain actions, the excluded trustee is not liable for any loss resulting from such action.

*No Duty to Monitor or Give Advice.* The excluded trustee has no duty to:

Monitor the conduct of the co-trustee;

Provide advice to the co-trustee;  
Consult with the co-trustee;  
Request directions from the co-trustee;  
Give notice to any beneficiary of any action or inaction of the co-trustee; or  
Account to beneficiaries for any action taken by the co-trustee

*Administrative Actions by Excluded Co-Trustee.* The excluded trustee’s administrative actions in executing the directions of the co-trustee will not amount to monitoring or participating in the actions or inactions of the co-trustee.

Further, the co-trustee that has exclusive authority as to certain powers, under Section 3313A, shall be solely liable to the beneficiaries for the exercise of such powers “as if the excluded trustee were not in office,” and “shall have the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.”

**D. 12 Del. C. §§ 3325(5) and (19)**

Sections 3325(5) and (19) were amended to expressly permit Trustees to indemnify a lender in connection with borrowing or a guarantee, or the mortgaging or pledging of trust property, as is customary and required in many commercial loan transactions.

**E. 12 Del. C. § 3325(29)**

Delaware’s merger statute was modified in two ways. First, the amendments make clear that a portion (as opposed to all) of a trust may be merged with another trust in all circumstances where merger is otherwise permitted. Second, the statute has been modified to permit a merger whenever such merger “would not result in a material change in the dispositive terms of the trust defining the nature and extent of any trust beneficiary’s interest in the principal or income” of a trust. Previously, the statute stated that the merger must not result in a material change in the beneficial interests of the trust beneficiaries. The change is intended to clarify the arguably vague standard of “material change in beneficial interests” to reflect how most practitioners have interpreted such language – namely, in a merger, one cannot change the dispositive provisions relating to a beneficiary’s interest in income and principal.

**F. 12 Del. C. §§ 3332 and 3333**

These sections were modified to address typographical errors.

**G. 12 Del. C. § 3336**

Modifications to Section 3336 clarify the circumstances when trust beneficiaries may appoint a successor trustee, absent express guidance in the governing instrument. Section 3336 now provides that the trust beneficiaries may appoint a successor when a trust is without a trustee “for any reason, including the death, incapacity, removal or resignation of the last serving trustee, or due to the renunciation or declination of the last named successor trustee . . .” if the only thing left for the trustee to do is to make final distribution of the remaining trust property to the beneficiaries under the terms of the trust.

#### **H. 12 Del. C. § 3338**

Section 3338, Delaware's nonjudicial settlement agreement statute, was modified to permit parties with interests in charitable trusts and noncharitable purpose trusts to enter into nonjudicial settlement agreements (but not with respect to the charitable or noncharitable purposes of such trusts).

#### **I. 12 Del. C. § 3341**

This section was modified to address the validity of powers of appointment existing prior to a merger. If a transferee trust is initially funded by reason of the merger, and the governing instrument of the transferee trust does not expressly invalidate such power, any power of appointment granted by the transferor trust shall remain valid and any exercise of any such power of appointment prior to the merger shall remain valid. However, if the transferee trust was funded prior to the merger, any power of appointment of either the transferor or transferee trust shall remain valid only if expressly provided by the terms of the merger documents.

Additional amendments to Section 3341 make clear that Section 3341 does not provide a right or power to merge trusts, but simply describes certain consequences of a merger if authorized by the governing instrument or applicable law.

#### **J. 12 Del. C. § 3342**

Section 3342 permits modification to trusts, even those that violate a material purpose of the trust, upon the written consent or non-objection of the trustor, all serving fiduciaries, and all of the beneficiaries of the trust. The amendment clarifies that if there is more than one trustor, all must join, and provides that an agent for a trustor may execute the consent or non-objection on behalf of the Trustor only if expressly authorized by the power of attorney or by the governing instrument of the trust, and a guardian of the trustor may execute the consent or non-objection on behalf of the Trustor if authorized by the court.

This modification provides additional clarity involving the potential use of a nonjudicial modification agreement, under Section 3342, when a trustor is living but not competent.

#### **K. 12 Del. C. § 3528**

The decanting statute now expressly permits trustees to decant a trust without creating a separate new trust. Instead, the trustee can decant into a trust which is a modified version of the same trust. This removes the administrative burdens of needing to obtain a new EIN, opening a new trust account, transferring over assets to that new account, retitling trust assets, etc.

#### **L. 12 Del. C. § 3541**

The modifications to Section 3541 make it clear that no modifications to any charitable or noncharitable purpose trust that alter or eliminate such purposes are permitted by nonjudicial means except under Section 3342.

**M. 12 Del. C. § 3545**

The modifications to Section 3545 provide that a trust is valid if executed by a trustee who is a disinterested person regardless of whether it has been executed by any other party to the trust agreement. Further, Section 3545 now provides that a notary public, whether signing as a witness or as a notary public, will satisfy the disinterested person requirement.

**N. 12 Del. C. § 3570**

Section 3570 has been modified to clarify that a sale or exchange for full and adequate consideration is not a “disposition” for purposes of the Delaware asset protection trust statute (12 Del. C. § 3570 et seq.).

**O. 12 Del. C. § 3585**

Section 3585 was modified to create a new 120 day limitations period for claims against a trustee following the trustee’s resignation, removal, or ceasing to serve for any other reason, including termination of the trust. The new limitations period begins on the date the trustee sends the beneficiary a report which (i) notifies the beneficiary that the trustee will no longer serve as trustee, (ii) discloses the facts constituting a claim, and (iii) discloses the limitations period.

In addition, the modifications to Section 3585 provide that reports may be sent to the designated representative of a beneficiary under Section 3303(d).

**P. 12 Del. C. § 61-107**

Modifications to Section 61-107 revise the language of the tax ordering rules of Section 61-107 to mirror that of Section 61-106, which applies to total return unitrusts created by conversion.

**Q. 25 Del. C. § 501**

Section 501(b) has been added to provide a clear method for avoiding application of the Delaware tax trap by affirmatively electing to “opt out” of the general default rule of Section 501(a) so that the exercise of a power of appointment shall be deemed to have been created at the time of creation, and not at the time of the exercise.

**R. 30 Del. C. § 1636**

Pursuant to the modifications to Section 1636, federal taxable income of an electing small business trust shall be treated as having been set aside for distribution in future years for purposes of determining the amount of the deduction for future distributions to nonresident beneficiaries.