

Trust Act 2020

On August 6, 2020, Governor John C. Carney signed Delaware's Trust Act 2020 into law. Below are some highlights of the new legislation:

12 Del. C. §3338 Non-Judicial Settlement Agreement and §3342 Modification of Trust While the Trustor is Living

The nonjudicial settlement statute, as well as the trust modification statute, were modified this year to reflect limitations on the trustor's ability to bind beneficiaries of the trust in instances where it may have adverse estate tax inclusion consequences. In particular, as to a nonjudicial settlement agreement unless a transfer in trust is incomplete for federal gift tax purposes, the trustor may not represent and bind any beneficiary other than the trustor. In addition, if the nonjudicial settlement agreement is intended to alter any beneficial interest, all of the trust's beneficiaries must be parties to that agreement.

In addition, the modification statute is similarly amended to make it clear that unless a transfer in trust is an incomplete gift for federal gift tax purposes, a trustor, a guardian of a trustor, or an agent of the trustor under a power of attorney may not represent and bind any beneficiary other than the trustor with respect to a modification under Section 3342. In addition, all of the trust's beneficiaries must be parties to the modification.

12 Del. C. §3343 Authority to Allocate Duties Amongst Multiple Trustees

Originally added to the Delaware Trust Code in 2019, Section 3343 was amended this year to clarify the circumstances in which its provisions are available as well as the Section's connection to the directed trustee provisions of Sections 3313 and 3313A. Specifically, section (a) has been revised to clarify that a presently exercisable power to remove and replace a trustee will allow that individual to appoint additional trustees to serve with the current trustee and allocate responsibilities amongst them.

In addition, section (c) was amended to make it clear that the power to allocate duties applies to

both the creation of directed and excluded trustee fiduciary relationships, applying the relevant standards of conduct included in the existing Sections 3313 and 3313A, as well as defining the relationship and responsibilities amongst co-fiduciaries.

Finally, a new section (d) has been added to the statute which provides a notice requirement where the duties and responsibilities of an existing trustee are being changed. The existing trustee must be given thirty (30) days' notice of the proposed changes by the person authorized to appoint additional trustees. This notice period is intended to provide existing trustees with a period of time in which they can determine whether it is prudent for them to remain in the role of trustee, as redefined by the changes, or choose to resign. The notice requirement can be waived by the existing trustee in situations where they choose to do so.

12 Del. C. §3585 Limitation of Action Against Trustee Following Trustee's Report

Section 3585 of Title 12 has long provided a limitation period for actions against a trustee who has resigned, been removed, or otherwise ceases to serve. Claims are limited to 120 days from the date that certain notice requirements are met. The 2020 update expressly applies this statutory limitation on claims to situations in which the trustee is "resigning, being removed or ceasing to serve." The applicability of the statute in these situations is contingent upon the trustee actually transferring the trust assets to a successor trustee within a reasonable period of time after the expiration of the 120 day period. In addition, language has been added to paragraph (e) making it clear that if the trustee continues to serve for any period after the expiration of the 120 days limitation period, it will remain responsible for its actions during that time and subject to on-going fiduciary duties.