

Title 12 Decedents' Estates and Fiduciary Relations: Fiduciary Relations

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§ 3301. Application of chapter; definitions.

(a) This chapter shall govern fiduciaries, as well as agents in certain instances, now or hereafter acting under governing instruments.

(b) The term “agents” shall mean custodians (other than those acting under the Uniform Transfers to Minors Act, Chapter 45 of this title), escrow agents, managing agents and other persons holding, other than in the capacity of a fiduciary as defined in this section, property belonging to another person whether that other person is a fiduciary or a nonfiduciary.

(c) The term “clearing corporation” shall refer to a “clearing corporation” as defined in § 8-102 of Title 6.

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

(e) The term “governing instrument” shall mean a will, trust agreement or declaration, court order or other instrument that creates or defines the duties and powers of a fiduciary.

(f) The terms “legal investment” or “authorized investment” or words of similar import, as used in any governing instrument, shall mean any investment which is permitted by the terms of § 3302 of this title.

(g) The term “wilful misconduct” shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness and ‘wrongdoing’ means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

(h) For purposes of construing a governing instrument, unless a contrary statement appears in such governing instrument:

(1) The term “fiduciary fund” means the trust, estate, guardianship account, or account established under a Uniform Transfers to Minors Act [Chapter 45 of this title] that is being administered by a fiduciary.

(2) The term “interested person” means any living person who:

a. Is an income beneficiary or remainder beneficiary of a trust;

b. Has a vested interest in a decedent’s estate;

c. Receives benefits as a ward from a guardianship account;

or

d. Is the minor with respect to an account established under a Uniform Transfers to Minors Act [Chapter 45 of this title].

(3) The term “issue” shall denote a distribution per stirpes, such that the children of the person whose issue is referred to shall be taken to be the heads of the respective stocks of issue and a person legally adopted, whether under or over the age of 18 years at adoption, shall thereafter be considered to be a child and issue of the adopting person and an issue of the ascendants of the adopting person, and the issue of the person so adopted shall be considered to be issue of the adopting person and the adopting person’s ascendants.

(4) The term “wilful misconduct” means intentional wrongdoing, not mere negligence, gross negligence or recklessness and ‘wrongdoing’ means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 43 Del. Laws, c. 224, § 1; 44 Del. Laws, c. 171, § 1; 12 Del. C. 1953, § 3301; 59 Del. Laws, c. 271, § 2; 76 Del. Laws, c. 254, § 2; 77 Del. Laws, c. 98, §§ 3-5; 77 Del. Laws, c. 330, §§ 1, 2.; 78 Del. Laws, c. 117, § 2.;

§ 3302. Degree of care; authorized investments.

(a) When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making investment decisions, a fiduciary may consider the general economic conditions, the anticipated tax consequences of the investment and the anticipated duration of the account and the needs of its beneficiaries.

(b) Within the limitations of the foregoing standard and considering individual investments as part of an overall investment strategy, a fiduciary is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, wherever located, whether within or without the United States, including, but not by way of limitation, bonds, debentures and other corporate obligations, stocks, preferred or common, shares or interests in common funds or common trust funds, securities of any open-end or closed-end management type investment company or investment trust registered under the Federal Investment Company Act of 1940 (15 U.S.C. § 80a-1 et seq.), options, futures, warrants, limited partnership interests and life insurance. No investment made by a fiduciary shall be deemed imprudent solely because the investment is not specifically mentioned in this subsection.

(c) The propriety of an investment decision is to be determined by what the fiduciary knew or should have known at the time of the decision about:

(1) The inherent nature and expected performance of the investment portfolio;

(2) The limitations of the standard set forth in subsection (a) of this section; and

(3) The nature and extent of other investments and resources, whether held in trust or otherwise, available to the beneficiaries as they existed at the time of the decision; provided however, that the fiduciary shall have no duty to inquire as to the nature and extent of any such other investments and resources not held by the fiduciary.

Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.

(d) Notwithstanding the foregoing provisions of this section, a trustee who discloses the application of this subsection and the limitation of the trustee's duties thereunder either in the governing instrument or in a separate writing delivered to each insured at the inception of a contract of life insurance or thereafter if prior to an event giving rise to a claim thereunder, may acquire or retain a contract of life insurance upon the life of the trustor or the trustor's spouse, or both, without liability for a loss arising from the trustee's failure to:

(1) Determine whether the contract is or remains a proper investment;

(2) Investigate the financial strength or changes in the financial strength of the life insurance company;

(3) Make a determination of whether to exercise any policy option available under the contract;

(4) Make a determination of whether to diversify such contracts relative to 1 another or to other assets, if any, administered by the trustee; or

(5) Inquire about changes in the health or financial condition of the insured or insureds relative to any such contract.

(e) Any fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from that instrument for breach of fiduciary duty for the fiduciary's good faith reliance on the express provisions of such instrument. The standards set forth in this section may be expanded, restricted or eliminated by express provisions in a governing instrument.

(f) Where a bank or trust company acting in a fiduciary capacity invests trust funds in, or otherwise acquires an interest in, a common trust fund which it or 1 of its affiliates manages, as defined in § 23A of the Federal Reserve Act (12 U.S.C. § 371c), the plan for such common trust fund shall be filed and recorded in the office of the Register in Chancery of the county in which is located the main office in Delaware of the bank or trust company which is the fiduciary for such trust funds.

(g) Fees may be charged for making an investment through a computerized or automated process, such as sweeping otherwise uninvested cash into a cash management vehicle, provided that the amount of such fees is disclosed on a continuing basis as a separate item on the regular periodic statements furnished to the beneficiaries of the account.

(h) A fiduciary is authorized, in the absence of an express provision to the contrary, whenever a law, regulation, governing instrument or order directs, requires, authorizes or permits investment in United States government obligations, to invest in those obligations, either directly or in the form of securities of, or other interests in, any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (54 Stat. 847, 15 U.S.C. § 80a-1 et seq.), if the portfolio of that investment company or investment trust is limited to United States government obligations and to repurchase agreements fully collateralized by United States government obligations, which collateral shall be delivered to or held by the investment company or investment trust, either directly or through an authorized custodian.

(i) Except in the case of United States government obligations, which are treated in subsection (h) of this section above, the authority to invest in specified types of investments includes authorization to invest in any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (54 Stat. 847, 15 U.S.C. § 80a-1 et seq.), or in any common or collective trust fund established and maintained by a corporate fiduciary, if the portfolio of the investment company or investment trust, or of the common or collective trust fund, consists substantially of the specified types of investments and is otherwise in conformity with the laws of the State.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 44 Del. Laws, c. 171, § 1; 12 Del. C. 1953, § 3302; 64 Del. Laws, c. 141, § 3; 65 Del. Laws, c. 422, § 5; 72 Del. Laws, c. 55; 74 Del. Laws, c. 81, §§ 1, 2; 75 Del. Laws, c. 97, § 18.

§ 3303. Effect of provisions of instrument.

(a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or

otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time, the grounds for removal of a fiduciary, the circumstances, if any, in which the fiduciary must diversify investments, and a fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument; provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own wilful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's wilful misconduct. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.

(b) In furtherance of and not in limitation of the provisions of subsection (a) of this section, the terms of a governing instrument of a trust established and existing for religious, charitable, scientific, literary, or educational purposes or for noncharitable purposes shall not be modified by the court to change the trust's purposes unless the purposes of the trust have become unlawful under the Constitution of this State or the United States or the trust would otherwise no longer serve any religious, charitable, scientific, literary, educational, or noncharitable purpose, in which case the court shall proceed in the manner directed by § 3541 of this title. A settlor may maintain an action to enforce a charitable or noncharitable trust under this section and may designate a person or persons, whether or not born at the time of such designation, to enforce a charitable or noncharitable trust under this section. For purposes of this subsection, a "noncharitable purpose" is a purpose within the meaning of § 3555 or § 3556 of this title.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 44 Del. Laws, c. 171, § 1; 47 Del. Laws, c. 19, § 1; 48 Del. Laws, c. 41, § 1; 12 Del. C. 1953, § 3303; 59 Del. Laws, c. 271, § 3; 72 Del. Laws, c. 388, § 9; 74 Del. Laws, c. 82, § 1; 75 Del. Laws, c. 97, § 3; 76 Del. Laws, c. 90, § 1; 76 Del. Laws, c. 254, § 3.

§ 3304. Retention by fiduciary of decedent's or settlor's investments.

Unless expressly provided otherwise in any instrument specified in § 3303 of this title, any provisions in any such instrument prescribing, defining or limiting the kind of property in which the funds of the trust to which such instrument relates shall be invested shall not apply to any property owned by a testator at the time of the testator's death and delivered to the fiduciary by the personal representative of such testator who has created a trust by the testator's will or delivered by the settlor to the fiduciary of a

trust created in a trust agreement or delivered to the fiduciary pursuant to a court order or other instrument creating or defining the fiduciary's duties and powers and such fiduciary may retain all such property so acquired, subject to the limitations of the standards set forth in § 3302 of this title. Furthermore, a provision in any such instrument directing the retention of any such property as a trust investment shall be deemed to waive any duty of diversification otherwise applicable to the fiduciary with respect to such property and shall exonerate the fiduciary from liability for retaining the property except in the case of wilful misconduct proven by clear and convincing evidence in the Court of Chancery.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 44 Del. Laws, c. 171, § 1; 48 Del. Laws, c. 41, § 1; 12 Del. C. 1953, § 3304; 70 Del. Laws, c. 186, § 1; 77 Del. Laws, c. 330, § 3.

§ 3305. Retention by bank or trust company acting as a fiduciary of its own stock.

Unless expressly provided otherwise in any instrument specified in § 3303 of this title, a bank or trust company acting as a fiduciary and authorized so to act may retain in a trust estate shares of its own capital stock acquired in any manner referred to in § 3304 of this title, as effectively as though the instrument creating or defining the fiduciary's duties and powers expressly so provided, subject to the limitations of the standards set forth in § 3302 of this title.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 44 Del. Laws, c. 171, § 1; 47 Del. Laws, c. 19, § 1; 48 Del. Laws, c. 41, § 1; 12 Del. C. 1953, § 3305.

§ 3306. Deviation from terms of instrument.

Subject to the provisions of § 3303 of this title, nothing contained in this chapter shall be construed as restricting the power of a court of proper jurisdiction to permit fiduciaries to deviate from the terms of any will, agreement or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 44 Del. Laws, c. 171, § 1; 12 Del. C. 1953, § 3306; 76 Del. Laws, c. 254, § 4.

§ 3307. Common fund investments by bank or trust company; regulations.

(a) A bank or trust company authorized to act in a fiduciary capacity

or in the capacity of agent with investment discretion, and acting in such capacity, may invest funds held by it for investment in fractional undivided interests in a common fund composed exclusively of property permitted for investment by the terms of § 3302 of this title and of cash, if such common fund shall have been created and is managed by any bank or trust company authorized to act in a fiduciary capacity, as trustee under a written plan, an original copy of which, executed by such bank or trust company, has been filed and is recorded in the Office of the Register in Chancery of the county in which the main office of such bank or trust company is located. Under such plan it shall not be permitted that any such fractional interests shall at any time be owned by other than a bank or trust company as fiduciary under will, under agreement or for a mentally ill person or as guardian of a minor or of the property of an aged, mentally infirm or physically incapacitated person or as executor or administrator or as custodian pursuant to Chapter 45 of this title or as agent with investment discretion.

(b) At least once each 3 months, as of a predetermined date, a bank or trust company administering a common fund shall determine the fair value of the assets in the common fund. No fractional interest in the common fund shall be acquired or redeemed except on the basis of such valuation and as of such valuation date. A fractional interest in such common fund may only be acquired by payment:

(1) In cash; or

(2) In property other than cash, provided that such property other than cash is a permissible investment under the terms of § 3302 of this title and under the terms of the plan of a common fund.

If a fractional interest is acquired with property other than cash, such property shall be valued for the purposes of the acquisition in the same manner as assets are valued when held in the common fund and the purchaser shall bear all costs of the transfer to the common fund of title to such property. A fractional interest in such common fund may be redeemed by payment of an amount in cash, or ratably in kind, or partly in cash and partly in kind, equal to its proportionate part of the fair value of the common fund.

A reasonable period following each such predetermined date may be used to make the computations necessary to determine the value of the common fund and of the participations therein.

(c) Unless a bank or trust company making an investment for an account in a common fund shall find that the investments of the common fund as a whole are ones in which the funds of such account might not properly be invested at the time, the investment in such common fund shall not be improper.

(d) The bank or trust company may charge a fee or commission to the

common fund for its management and receive fees or commissions from participating accounts which may be invested in a common fund in addition to those it would be entitled to receive if such accounts were otherwise invested.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 43 Del. Laws, c. 224, § 1; 44 Del. Laws, c. 171, § 1; 46 Del. Laws, c. 268, § 1; 12 Del. C. 1953, § 3307; 55 Del. Laws, c. 209; 63 Del. Laws, c. 207, § 1; 63 Del. Laws, c. 280, § 1.;

§ 3308. Power of bank or trust company acting as a fiduciary to purchase property held by its commercial or banking department.

(a) A bank or trust company shall not purchase, with funds held by it as a fiduciary, any property held by its commercial or banking department, but this prohibition shall not apply to mortgages and their accompanying bonds designated by its commercial or banking department for future trust investment at the time of acquisition by the commercial or banking department and purchased within 1 year from such time of acquisition with funds held by it in its trust department; provided the interest and taxes are current at the time of purchase by the trust department and an appraisal certificate on the real estate covered by the mortgages being purchased from at least 1 person competent and qualified to appraise real estate is obtained by the trust department at any time within 10 days prior to the purchase by and transfer to the trust department. This exception shall apply to all types of mortgages held by the commercial or banking department, including mortgages covering properties constructed during the 1-year period from the time the mortgages were acquired by the commercial or banking department; provided, with respect to the latter type of mortgages, that an appraisal certificate on the completed property from at least 1 person competent and qualified to appraise such property and a certificate from the owner of the property and/or the registered architect who planned the construction of the property certifying that the construction is complete and satisfactory in every respect, are obtained by the trust department at any time within 10 days prior to the purchase by and transfer to said department.

(b) The commercial or banking department shall make a report monthly to the board of directors of the bank or trust company listing all mortgages designated for trust investment and covering all transactions relating thereto and such report shall be noted in the minutes of the meeting of the board.

(c) The purchase of mortgages and their accompanying bonds permitted by this section shall be made subject to the limitations of the standard set forth in § 3302 of this title.

25 Del. Laws, c. 226, § 3; Code 1915, § 3875; 37 Del. Laws, c. 259, § 1; 40 Del. Laws, c. 230, § 1; Code 1935, § 4401; 48 Del. Laws, c. 226, § 1; 12 Del. C. 1953, § 3308.;

§ 3309. Identification of securities.

(a) Except as otherwise provided by the terms of the governing instrument, all securities in a fiduciary estate, whether held by the fiduciary or an agent for the fiduciary, shall be held in such manner that the fiduciary's name and the fiduciary capacity in which the securities are held are fully disclosed, except as provided hereafter in this section or in § 3311 of this title.

(b) A bank or trust company acting as fiduciary or as agent for a fiduciary or nonfiduciary may hold securities in the name of its nominee without disclosing the capacity in which they are held, provided the records maintained with respect to those securities disclose the capacity in which they are held and provided there is no written objection from either a cofiduciary or the person for whom it is acting as agent.

59 Del. Laws, c. 271, § 4.;

§ 3310. Storage of securities.

(a) Except as otherwise provided by the terms of the governing instrument, all securities in a fiduciary estate, whether held by the fiduciary or an agent for the fiduciary, shall be stored separately from any other securities, except as provided hereafter in this section or in § 3311 of this title.

(b) A bank or trust company may store together securities of the same class of the same issuer held by it as fiduciary or as agent for a fiduciary or nonfiduciary (but not its own securities) and may combine the securities so stored together into 1 or more securities of the same class of the same issuer, provided the records maintained with respect to those securities disclose the capacity in which they are held and provided there is no written objection from either a cofiduciary or the person for whom it is acting as agent.

59 Del. Laws, c. 271, § 5.;

§ 3311. Deposit of securities in clearing corporation.

(a) Except as otherwise provided by the terms of the governing instrument, a bank or trust company may deposit or arrange for the deposit of in a clearing corporation securities held by it as fiduciary or as agent for a fiduciary or nonfiduciary, provided the records maintained with respect to those securities by such bank or trust company disclose the capacity in

which they are held and provided there is no written objection from either a cofiduciary or the person for whom it is acting as agent.

(b) Securities deposited in a clearing corporation may be registered in the name of either the clearing corporation or its nominee without disclosing the capacity in which they are held.

(c) Securities deposited in a clearing corporation may be stored together with other securities of the same class of the same issuer also stored in the clearing corporation (but not the securities of the clearing corporation) and may be combined with such other securities into 1 or more securities of the same class of the same issuer.

59 Del. Laws, c. 271, § 6; 61 Del. Laws, c. 489, § 1.;

§ 3312. Investments in affiliated investments; transactions with affiliates.

(a) As used in this section:

(1) "Affiliate" means any corporation or other entity that directly or indirectly through 1 or more intermediaries controls, is controlled by or is under common control with the fiduciary.

(2) "Affiliated investment" means an investment for which the fiduciary or an affiliate of the fiduciary acts as adviser, administrator, distributor, placement agent, underwriter, broker or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the fiduciary or an affiliate of the fiduciary receives or has received a fee or commission.

(3) "Fee or commission" means compensation paid to a fiduciary or an affiliate thereof on account of its services to or on behalf of an investment.

(4) "Fiduciary" means any person, including a bank or trust company, acting as a fiduciary as defined in § 3301(d) of this title, and includes an agent with investment discretion.

(5) "Investment" shall mean any security as defined in § 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of § 2(i) of the Commodity Exchange Act, or any other asset permitted for fiduciary accounts pursuant to the terms of § 3302 of this title or by the terms of the governing instrument, including by way of illustration and not limitation, shares or interests in a private investment fund (including a private investment fund organized as a limited partnership, limited liability company, a statutory or common law business trust, or a real estate investment trust), joint venture or other general or limited partnership, or an open-end or closed-end management type

investment company or investment trust registered under the Investment Company Act of 1940.

(b) Subject to the investment standards stated in § 3302 of this title, a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment and, upon satisfaction of the conditions stated in subsection (c) of this section, such fiduciary may receive fiduciary compensation from such account at the same rate as the fiduciary would otherwise be entitled to be compensated.

(c) A fiduciary seeking compensation pursuant to subsection (b) of this section shall disclose to each principal in an agency relationship, and to all current recipients of account statements of any other fiduciary account, all fees or commissions paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment or such other dealing with an affiliate. The disclosure required under this subsection may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees or commissions received or to be received by the fiduciary or any affiliate of the fiduciary and an explanation of the manner in which such fees or commissions are calculated (either as a percentage of the assets invested or by some other method). Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure. Notwithstanding the foregoing provisions of this subsection, no such disclosure is required if the governing instrument or a court order expressly authorizes the fiduciary to invest the fiduciary account in affiliated investments or otherwise deal with an affiliate or an interest in an affiliated investment.

(d) A fiduciary that has complied with subsection (c) of this section (whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order) shall have full authority to administer an affiliated investment (including the authority to vote proxies thereon) without regard to the affiliation between the fiduciary and the investment.

65 Del. Laws, c. 422, § 5; 72 Del. Laws, c. 33, § 1; 73 Del. Laws, c. 329, § 54; 74 Del. Laws, c. 82, § 2; 74 Del. Laws, c. 268, §§ 1, 2, 3, 4, 5; 77 Del. Laws, c. 330, § 4.

§ 3313. Advisers.

(a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the governing instrument

otherwise provides.

(b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

(c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then except in cases of wilful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to provide such consent after having been requested to do so by the fiduciary.

(d) For purposes of this section, "investment decision" means with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein and with respect to non-publicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

(e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

(1) Monitor the conduct of the adviser;

(2) Provide advice to the adviser or consult with the adviser; or

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

(f) For purposes of this section, the term "adviser" shall include a

“protector” who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

(1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;

(2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and

(3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.

65 Del. Laws, c. 422, § 5; 69 Del. Laws, c. 279, § 1; 74 Del. Laws, c. 82, § 3; 76 Del. Laws, c. 90, § 2; 76 Del. Laws, c. 254, § 5.; 78 Del. Laws, c. 117, § 3.;

§ 3314. Limitation on certain fiduciary powers.

(a) This section shall apply to:

(1) Any trust created under a governing instrument that, but for this section, would permit any of the powers described in subsection (c) of this section to be exercised by the fiduciary unless the governing instrument expressly provides that this section does not apply.

(2) For purposes of this section, the term “fiduciary” means any trustee or trust adviser or the personal representative of an estate except to the extent the governing instrument expressly states that such person is not serving in a fiduciary capacity.

(b) This section shall not apply to:

(1) Any trust during the time that the trust is revocable or amendable by its trustor.

(2) A spouse of a decedent or trustor where the spouse is a fiduciary of a testamentary or inter vivos trust for which a marital deduction has been allowed.

(3) A fiduciary who possesses in such fiduciary’s individual, nonfiduciary, capacity an unlimited right to appoint all or part of the property held in trust to the fiduciary, the fiduciary’s estate, the fiduciary’s creditors, or the creditors of the fiduciary’s estate.

(4) A trust under a governing instrument that by specific reference expressly rejects the application of this section.

(5) A trust created under a governing instrument executed on or before August 1, 2008, if, in the case of a fiduciary’s possessing a power

described in subsection (c) of this section and dying at any time on or after August 1, 2008, no part of the property of the trust would be included in the gross estate of the fiduciary for federal estate-tax purposes or, notwithstanding that all or some part of the property held in trust would be so included, no federal estate tax would be payable by such estate.

(6) A trust created under a governing instrument executed on or before August 1, 2008, if, in the case of a beneficiary's possessing a power to appoint a trustee and dying at any time on or after August 1, 2008, no part of the property of the trust would be included in the gross estate of the beneficiary for federal estate-tax purposes or, notwithstanding that all or some part of the property held in trust would be so included, no federal estate tax would be payable by such estate.

(c) The following powers conferred by a governing instrument upon a fiduciary in that fiduciary's capacity as a fiduciary shall not be exercised by that fiduciary:

(1) The power to make discretionary distributions of either principal or income to or for the benefit of the fiduciary, the fiduciary's estate, the creditors of the fiduciary, or the creditors of the fiduciary's estate unless the power is either:

a. Limited by an ascertainable standard relating to the fiduciary's health, education, support, or maintenance within the meaning of 26 U.S.C. §§ 2041 (relating to powers of appointment) and 2514 (relating to powers of appointment); or

b. Exercisable by the fiduciary only in conjunction with another person having a substantial interest in the property subject to the power which is adverse to the interest of the fiduciary within the meaning of 26 U.S.C. § 2041(b)(1)(C)(ii).

(2) The power to make discretionary distributions of either principal or income to satisfy any of the fiduciary's personal legal obligations for support or other purposes.

(3) The power to make discretionary allocations in the fiduciary's personal favor of receipts or expenses as between income and principal unless the fiduciary has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of the fiduciary's duties.

(4) The power to exercise any of the powers proscribed in this subsection with regard to an individual other than the fiduciary to the extent that the individual could exercise a similar prohibited power in connection with a trust that benefits the fiduciary.

(5) The power to make an election, other than an election under 26

U.S.C. §§ 2056(b)(7) and 2523(f) (relating to the federal estate-tax and gift-tax marital deductions), in a fiduciary capacity that would cause the property over which the election could be made to be included in the gross estate of the fiduciary for federal estate-tax purposes.

(d) Notwithstanding the foregoing provisions:

(1) If a fiduciary is prohibited by this section from exercising a power conferred upon the fiduciary, the fiduciary nevertheless may exercise that power but shall be limited to distributions for the fiduciary's health, education, support, or maintenance to the extent otherwise permitted by the terms of the trust.

(2) Unless otherwise prohibited by the provisions of this section, a fiduciary may exercise a power described herein in favor of someone other than the fiduciary, the fiduciary's estate, the creditors of the fiduciary, or the creditors of the fiduciary's estate.

(3) Subject to the preceding paragraphs of this subsection, any purported exercise of a power proscribed by subsection (c) of this section shall be void and of no effect.

(e) If a governing instrument creates a power proscribed by this section:

(1) If the power is conferred on 2 or more fiduciaries, it may be exercised by the fiduciary or fiduciaries who are not so prohibited as if they were the only fiduciary or fiduciaries.

(2) If there is no fiduciary in office who can exercise the power as provided in paragraph (e)(1) of this section, the court, upon petition and hearing after such notice as it may direct, shall appoint a fiduciary who is not disqualified and whose term in office shall be as the court directs for the sole purpose of exercising the power that the other fiduciary or fiduciaries cannot exercise.

(3) The court may, upon petition by any fiduciary or beneficiary of the trust subject to the power, appoint an additional fiduciary or fiduciaries.

(f) No beneficiary of a trust in an individual, fiduciary, or other capacity may appoint, or remove and appoint, a fiduciary who is related or subordinate to the beneficiary within the meaning of 26 U.S.C. § 672(c) unless:

(1) The fiduciary's discretionary power to make distributions to or for the beneficiary is limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance within the meaning of 26 U.S.C. §§ 2041 and 2514;

(2) The fiduciary's discretionary power may not be exercised to satisfy any of the beneficiary's legal obligations for support or other

purposes; and

(3) The fiduciary's discretionary power may not be exercised to grant to the beneficiary a general power to appoint property of the trust to the beneficiary, the beneficiary's estate, or the creditors thereof within the meaning of 26 U.S.C. § 2041.

(4) This subsection shall not apply if the appointment of the fiduciary by the beneficiary may be made only in conjunction with another person having a substantial interest in the property of the trust subject to the power which is adverse to the exercise of the power in favor of the beneficiary within the meaning of 26 U.S.C. § 2041(b)(1)(C)(ii).

76 Del. Laws, c. 254, § 6; 70 Del. Laws, c. 186, § 1.;

§ 3315. Trustee's exercise of discretion; review by court; discretionary interests.

(a) Where discretion is conferred upon the fiduciary with respect to the exercise of a power, its exercise by the fiduciary shall be considered to be proper unless the court determines that the discretion has been abused within the meaning of § 187 of the Restatement (Second) of Trusts, not §§ 50 and 60 of the Restatement (Third) of Trusts.

(b) A beneficiary eligible to receive distributions from a trust in the trustee's discretion has a discretionary interest in the trust. A creditor may not directly or indirectly compel the distribution of a discretionary interest except to the extent expressly granted by the terms of a governing instrument in accordance with § 3536(a) of this title.

76 Del. Laws, c. 254, § 7.;

§ 3316. Substituted property; equivalent value; fiduciary duty.

Notwithstanding the terms of a governing instrument, if a trustor has a power to substitute property of equivalent value, the fiduciary responsible for investment decisions has a fiduciary duty to determine that the substituted property is of equivalent value prior to allowing the substitution.

77 Del. Laws, c. 330, § 5.;

§ 3317. Co-fiduciaries; duty to keep informed.

Except as otherwise provided in a governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries) has a fiduciary duty upon request to keep all of the other fiduciaries for the trust reasonably informed about the administration of the trust with respect to any specific duty or function being performed by such fiduciary to the extent that providing such information to the other fiduciaries is reasonably necessary for the other fiduciaries to perform their duties;

provided, however, that a fiduciary requesting and receiving any such information shall have no duty to: monitor the conduct of the fiduciary providing the information; provide advice to or consult with the fiduciary providing the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary receiving the information would or might have exercised the fiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary providing the information.

77 Del. Laws, c. 330, § 6.;

§§ 3318-3320. [Reserved.]

§ 3321. Applicability of chapter; definitions.

Repealed 76 Del. Laws, c. 254, § 8.

§ 3322. Fiduciary agency contracts; delegation.

(a) A fiduciary acting under a governing instrument which neither affirmatively permits the fiduciary to hire agents, nor expressly prohibits the fiduciary from hiring agents, may employ agents and pay them from the fiduciary fund in accordance with this section. Such agents may be hired to assist in the performance of such fiduciary's administrative duties, whether discretionary or ministerial, or to render investment advice, if the fiduciary reasonably believes in the exercise of its discretion that such an arrangement is in the best interests of all interested persons and will improve the investment performance or the efficiency of the administration of the fiduciary fund. The agent must observe the same standard of care required of the fiduciary with respect to each responsibility so delegated, and neither the establishment of such agency relationship nor the performance of such agent shall diminish, increase or otherwise affect the standard by which the performance of the fiduciary is governed. In any suit or proceeding involving an evaluation of fiduciary performance, the fiduciary shall be liable for abusing its discretion in hiring such agent, for negligently hiring such agent, or for negligently continuing the agency relationship, but shall not otherwise be liable for the conduct of such agent.

(b) A fiduciary may delegate investment functions to any person including a cofiduciary subject to the standard of care required of the fiduciary in making investment decisions of the type so delegated with respect to the fiduciary fund. A fiduciary may delegate management functions to any person including a cofiduciary subject to the standard of care required of the fiduciary in making management decisions of the type so delegated with respect to the fiduciary fund.

(c) A fiduciary shall not be responsible for the decisions or actions of any agent to which functions are delegated pursuant to this section if the fiduciary exercises the standard of care required of the fiduciary in making

such decisions when selecting the agent, when establishing the scope and specific terms of the delegation and when reviewing periodically the agent's actions in order to monitor the agent's performance and compliance with the scope and specific terms of the delegation.

(d) The agent shall comply with the scope and terms of the delegation and shall exercise the delegated function subject to the standard of care required of the fiduciary and shall be liable to the trust for failure to do so.

(e) An agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the jurisdiction of a court of this State shall be deemed to have submitted to the jurisdiction of that court even if the delegation agreement provides for a different jurisdiction or venue.

65 Del. Laws, c. 422, § 6; 73 Del. Laws, c. 47, § 1; 74 Del. Laws, c. 82, § 7; 75 Del. Laws, c. 300, § 1.;

§ 3323. Cofiduciaries.

(a) Unless provided otherwise by the governing instrument, any power vested in 3 or more fiduciaries may be exercised by a majority of such fiduciaries and a majority of fiduciaries named in a governing instrument may designate 1 of such fiduciaries to perform ministerial functions on behalf of all such fiduciaries. A fiduciary who dissents from the action of the majority is not liable to anyone having an interest in the fiduciary fund, or to the other fiduciaries, if such dissent is evidenced by a writing delivered to the majority of the fiduciaries.

(b) This section does not excuse a cofiduciary from liability for failure to participate in the administration of the fiduciary fund or for failure to attempt to prevent a breach of trust, or for failure to seek advice and guidance from the court in a recurring situation, unless otherwise expressly provided by the governing instrument.

65 Del. Laws, c. 422, § 6; 74 Del. Laws, c. 82, § 7.;

§ 3324. General powers of trustee.

(a) A trustee, without authorization by the court, may exercise:

(1) Powers conferred by the terms of the trust; and

(2) Except as limited by the terms of the trust, any other powers conferred by this chapter.

(b) Except as modified by the terms of a trust, the exercise of a power is subject to the fiduciary duties otherwise prescribed by law.

72 Del. Laws, c. 388, § 4; 74 Del. Laws, c. 82, § 7.;

§ 3325. Specific powers of trustee.

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

(1) Collect trust property and accept or decline additions to the trust property from a trustor or any other person;

(2) Acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition or otherwise change the character of trust property;

(4) Deposit trust funds in an account in a regulated financial services institution, including an institution operated by or affiliated with the trustee;

(5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) Advance money for the protection of the trust, where the trustee has a lien on the trust property as against a beneficiary for reimbursement of those advances, with reasonable interest;

(7) With respect to an interest in a proprietorship, partnership, limited liability company, statutory trust, business trust, corporation or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members or property owners, including merging, dissolving or otherwise changing the form of business organization or contributing additional capital;

(8) With respect to stocks or other securities, to exercise the rights of an absolute owner, including the right to:

a. Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

c. Pay calls, assessments and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

d. Deposit the securities with a securities depository or other regulated financial services institution;

(9) With respect to an interest in real property, construct, make ordinary or extraordinary repairs, alterations or improvements in buildings

or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(10) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within the duration of the trust;

(11) Grant an option involving a sale, lease or other disposition of trust property or take an option for the acquisition of property, excluding an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(12) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents and beneficiaries against liability arising from the administration of the trust;

(13) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(14) With respect to possible liability for environmental conditions:

a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an entity in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

b. Take action to prevent, abate or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the initiation of a claim or governmental enforcement action;

c. Decline to accept property into trust or to disclaim any power with respect to property that has or may have environmental liability attached;

d. Compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

e. Pay the expense of any inspection, review, abatement or remedial action to comply with environmental law;

(15) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust:

(16) Pay taxes, assessments and compensation of the trustee and

of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(17) Exercise elections with respect to federal, state and local taxes;

(18) Select a mode of payment under any employee benefit or retirement plan, annuity or life insurance payable to the trustee, exercise rights thereunder, and take appropriate action to collect the proceeds, including exercise of the right to indemnification against expenses and liabilities;

(19) Make loans out of or guarantees based on trust property, including loans to or guarantees for the benefit of a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and subject to § 3536 of this title, the trustee has a lien on future distributions for repayment of those loans and for the repayment of an amount equal to any payment made or that might be made on account of such guarantee; provided further that any such loans or guarantees shall be permitted to the extent the same are either:

a. Made for investment purposes;

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

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

(20) Appoint a trustee to act in another state or country as to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

a. Paying it to the beneficiary's guardian;

b. Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act [Chapter 45 of this title], and for such purpose, to create a custodianship;

c. If there is no custodian paying it to an adult relative or

other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

d. Depositing it in a regulated financial services institution in an interest bearing account or certificate in the sole name of the beneficiary and by giving notice of the deposit to the beneficiary; or

e. The trustee managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) Decide, in accordance with § 61-103(b) of this title, how and in what proportions any receipts or disbursements are credited, charged or apportioned as between principal and income, including the ability to create reserves out of income for depreciation, depletion, amortization or obsolescence;

(24) If all interested beneficiaries also consent, consent to the resolution of a dispute concerning the interpretation of the trust or its administration by mediation, arbitration or other procedure for alternative dispute resolution;

(25) Prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(26) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(27) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(28) Sever any trust estate on a fractional basis into 2 or more separate trusts for any reason; and segregate by allocation to a separate account or trust a specific amount or specific assets included in the trust property or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirement or election, to reduce potential generation-skipping transfer tax liability, or for any other reason, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and income earned on a segregated amount, specific assets, or gift after segregation occurs

shall pass to the designated taker of such amount, specific assets, or gift. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation shall be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective, and shall be held on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance or segregation that, if altered, would adversely affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created;

(29) Merge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust; and

(30) Take such actions as are necessary to cause gains from the sale or exchange of trust assets, as determined for federal income-tax purposes, to be taxed for federal income-tax purposes as part of a distribution of income (including income which has been increased by an adjustment from principal to income under § 6113 [repealed] of this title), a unitrust distribution, or a distribution of principal to a beneficiary.

72 Del. Laws, c. 388, § 5; 73 Del. Laws, c. 329, § 55; 74 Del. Laws, c. 82, § 7; 75 Del. Laws, c. 97, § 4; 76 Del. Laws, c. 90, § 13; 77 Del. Laws, c. 98, § 6; 77 Del. Laws, c. 330, §§ 7, 8.;

§ 3326. Resignation of trustee.

(a) A trustee may resign:

(1) If the trust instrument expressly permits the trustee to resign, in accordance with the terms of the trust instrument;

(2) If the trust instrument neither expressly permits nor prohibits the trustee's resignation, but establishes a procedure for the appointment of a successor trustee who shall be willing and able to serve as such, upon 30 days written notice to the beneficiaries and any co-trustees; or

(3) In all other cases, with the approval of the Court of Chancery.

(b) A beneficiary or co-trustee may waive the notice otherwise required

by this section.

(c) In approving a resignation, the Court of Chancery may impose orders and conditions reasonably necessary for the protection of the trust property, including the appointment of a special fiduciary.

(d) Any liability of a resigning trustee or of any sureties on the trustee's bond, if any, for acts or omissions of a resigning trustee is not discharged or affected by the trustee's resignation.

72 Del. Laws, c. 388, § 6; 74 Del. Laws, c. 82, § 7.;

§ 3327. Removal of trustee.

A trustee may be removed by the Court of Chancery on its own initiative or on petition of a trustor, co-trustee, or beneficiary if:

(1) The trustee has committed a breach of trust; or

(2) A lack of cooperation among co-trustees substantially impairs the administration of the trust; or

(3) The court, having due regard for the expressed intention of the trustor and the best interests of the beneficiaries, determines that notwithstanding the absence of a breach of trust, there exists:

a. A substantial change in circumstances;

b. Unfitness, unwillingness or inability of the trustee to administer the trust properly; or

c. Hostility between the trustee and beneficiaries that threatens the efficient administration of the trust.

72 Del. Laws, c. 388, § 6; 74 Del. Laws, c. 82, § 7.;

§ 3328. Limitation on personal liability of fiduciary.

(a) Except as otherwise provided in the contract, a fiduciary is not personally liable on a contract properly entered into in a fiduciary capacity if the fiduciary in the contract discloses the fiduciary capacity.

(b) The debts, obligations and liabilities incurred by a fiduciary by reason of the ownership or control of property held in a fiduciary capacity, including but not limited to liability incurred as a general or limited partner or for violation of environmental law, shall be enforceable solely against the fiduciary fund and no fiduciary shall be obligated personally for any such debt, obligation or liability solely by reason of owning or controlling the fiduciary fund.

(c) A fiduciary is personally liable for torts committed in the course of

administering a fiduciary fund only if the fiduciary is personally at fault on account of the fiduciary's own wilful misconduct proven by clear and convincing evidence in the court then having primary jurisdiction over the fiduciary.

(d) A claim based on a contract entered into by a fiduciary in the fiduciary's fiduciary capacity on an obligation arising from ownership or control of the fiduciary fund or on a tort committed in the course of administering a fiduciary fund may be asserted in a judicial proceeding against the fiduciary in the fiduciary's fiduciary capacity whether or not the fiduciary is personally liable on the claim.

(e) This section shall have no application to any action brought by or on behalf of a beneficiary for violation of a fiduciary's fiduciary duties.

(f) Notwithstanding the provisions of this chapter or any other Delaware law, the term "fiduciary" shall mean a fiduciary as defined in § 3301 of this title and an adviser, including but not limited to an investment adviser or distribution adviser serving in conjunction with such a fiduciary.

73 Del. Laws, c. 409, § 1; 74 Del. Laws, c. 82, § 7; 77 Del. Laws, c. 98, § 7.

§ 3329. Effect of no-contest provision.

(a) A provision of a will or trust that if given effect would reduce or eliminate the interest of any beneficiary of such will or trust who initiates or participates in an action to contest the validity of such will or trust or to set aside or vary the terms of such will or trust shall be enforceable.

(b) The provisions of subsection (a) of this section shall have no application to:

(1) Any action brought by the trustee of a trust or the personal representative under a will;

(2) Any action in which the beneficiary is determined by the court to have prevailed substantially;

(3) Any agreement among beneficiaries of the will or trust in settlement of a dispute relating to such will or trust;

(4) Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision described in subsection (a) of this section; or

(5) Any action brought by a beneficiary under a will or trust instrument for a construction or interpretation of such will or trust instrument.

74 Del. Laws, c. 82, §§ 4, 7.

§ 3330. Effect of survivorship requirement.

If, in the construction or interpretation of any will or trust instrument, the vesting in ownership, possession, or enjoyment of an interest in property of any person is dependent, whether as a matter of expression, implication or inference, in whole or in part upon:

(1) That person's survival of or for a period of time after the life of some other person, including but not limited to the transferor, who has interest in such property, whether vested or contingent, and

(2) That person fails to so survive the life of such other person or for a period of time thereafter,

Then the probable or perceived intention of the transferor with respect to any person who would otherwise be entitled to the interest because of a gift, bequest, or devise made by the person who failed to so survive shall not be considered and shall not be admissible in any proceeding involving the construction or interpretation of such will or trust.

74 Del. Laws, c. 82, §§ 5, 7.;

§ 3331. Preference for early vesting.

In the construction or interpretation of any will or trust instrument, if a determination is to be made whether the beneficiaries entitled to receive a distribution from an estate or trust are to be determined at an earlier or later time, such beneficiaries are to be determined at the earlier time unless the will or trust instrument expressly provides that the determination shall be made at the later time.

74 Del. Laws, c. 82, §§ 6, 7.;

§ 3332. Governing law; change of situs.

(a) The duration of a trust and time of vesting of interests in the trust property shall not change merely because the place of administration of the trust is changed from some other jurisdiction to this State.

(b) Except as otherwise expressly provided by the terms of a governing instrument or by court order, the laws of this State shall govern the administration of a trust while the trust is administered in this State.

75 Del. Laws, c. 300, § 3.;

§ 3333. Retention of counsel by fiduciary.

Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the

fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. However, in the event that the fiduciary is found to have breached some fiduciary duty, the Court may, in its discretion, deny such fiduciary the right to have some part or all of such fees and expenses paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have previously been paid.

76 Del. Laws, c. 90, § 19.;

§ 3334. Contributions to revocable trusts.

Where a husband and wife make a contribution of property to one or more trusts, each of which is revocable by either or both of them, and, immediately before such contribution, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, then notwithstanding such contribution and except where the provisions of the trust instrument may expressly provide to the contrary, that property and any accumulation thereto shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entireties property to the extent that, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, the sole remedy available to the creditor with respect to trust property that is treated as though it were tenancy by the entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties."

77 Del. Laws, c. 330, § 9; 70 Del. Laws, c. 186, § 1.; 78 Del. Laws, c. 117, § 4.;

§ 3335. Effect of formula clauses in certain wills and trusts.

(a) A governing instrument, such as a will or trust of a decedent, who dies after December 31, 2009, and before January 1, 2011, that contains a formula referring to the "unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST exemption," "marital deduction," "maximum marital deduction," or "unlimited marital deduction," or that measures a share 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 generation-skipping transfer taxes, or that is otherwise based on a similar provision of federal estate tax or generation-skipping transfer tax law, shall be presumed to refer to the federal estate tax and generation-skipping transfer tax laws as they applied to estates of decedents dying on December 31, 2009. This provision shall not apply to a will or trust that is executed or amended after December 31, 2009, or that manifests an intent that a contrary rule shall apply. Furthermore,

this provision shall not apply in cases where the application of this provision would cause: (i) a decrease in the amount passing to 1 trust and a substantially equal increase in the amount passing to another trust if the terms of both trusts concerning beneficial interests are substantially similar; (ii) a decrease in the amount passing to a trust and a substantially equal increase in the amount passing to an individual if the individual is eligible to receive unlimited discretionary principal distributions from the trust or (iii) a decrease in the amount passing to 1 trust and a substantially equal combined total increase in the amount passing to another trust or trusts and individuals described in clauses (i) and (ii). For purposes of determining whether the terms of 2 trusts concerning beneficial interests are substantially the same:

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

(2) a. A trust intended to be a general power of appointment marital trust under § 2056(b)(5) of the Internal Revenue Code [26 U.S.C. § 2056(b)(5)]; or

b. Which, would, if an election could have been made under § 2056(b)(7) of the Internal Revenue Code [26 U.S.C. § 2056(b)(7)] as in effect for decedents dying on December 31, 2009, qualify as qualified terminable interest property under § 2056(b)(7) [26 U.S.C. § 2056(b)(7)], shall be considered to be substantially the same as any other trust which requires that all income be distributed currently to the surviving spouse, regardless of whether the other trust may have current beneficiaries of principal who are persons other than the surviving spouse; and

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

(b) This section shall apply only to a governing instrument of a decedent whose executor elects to apply the Internal Revenue Code as though subtitle A and E of title V of the Economic Growth and Tax Relief Reconciliation Act of 2001 applies with respect to chapter 11 of the Internal Revenue Code.

(c) Any person interested under a will or trust may bring a proceeding under § 6504 of Title 10 to determine whether the decedent intended that the references under subsection (a) of this section be construed with respect to the law as it existed after December 31, 2009. Such a proceeding must be commenced prior to January 1, 2012.

(d) The presumption described in subsection (a) of this section shall not apply if fiduciaries such as personal representatives or trustees serving under the governing instrument, who are not interested fiduciaries, elect to opt out of the application of subsection (a) of this section as to all or any

part of the governing instrument and no beneficiary under the governing instrument objects to the election within 30 days following receipt of written notice of the election. A fiduciary is interested if: (i) the fiduciary is a beneficiary under the governing instrument whose beneficial interest would or might change in value by reason of the election; (ii) the fiduciary may be removed and replaced by a beneficiary described in clause (i) of this subsection above; or (iii) the fiduciary is an individual legally obligated to support a beneficiary described in clause (i) of this subsection above. If all of the fiduciaries are interested, this subsection shall have no application.

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

77 Del. Laws, c. 379, § 1.; 78 Del. Laws, c. 117, § 5.;