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Delaware's Modification by Consent Statute – 12 Del. C. § 3342

DELAWARE TAX INSTITUTE

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General Summary of 12 Del. C. § 3342

- Generally modeled off of UTC 411, but some significant differences from the UTC.
- Permits the modification of a trust notwithstanding any provision of law or the governing instrument prohibiting amendment with the written consent of **ALL trustors, then serving fiduciaries, and beneficiaries.**
- Notably, no material purpose restriction. Modification can violate a material purpose of the trust.
- A fiduciary has no duty to consent, and absent willful misconduct, has no liability for failing to consent.
- Any interested person may bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a modification adopted under this section, including but not limited to determining whether the representation as provided in 12 Del. C. § 3547 of this title was adequate; provided, however, that any such person may waive the right to contest the modification.

Common Types of Modifications

- Administrative Modifications
 - Conversion to Directed Trust
 - Adding removal/appointment language for trustees
 - Other administrative amendments (compensation, indemnification, Delaware specific provisions, etc.)
- Changes to Beneficial Interests
 - Permissible but be wary of tax consequences to the Trustors and Beneficiaries.

Consent/Non-Objection of Trustors, Fiduciaries, and Beneficiaries

- Trustors
 - Can be exercised by an agent under a POA only to the extent expressly authorized by the power of attorney or trust's governing instrument; **OR**
 - If an agent under a POA is not so authorized, by the guardian of the trustor's property (or similar court- appointed representative) with the approval of the court supervising the guardian (or similar representative).
- Fiduciaries
 - Trustees
 - Direction advisers under 12 Del. C. § 3313
 - Trust Protectors
 - Designated Representatives under 12 Del. C. § 3339
- Beneficiaries
 - All beneficiaries
 - Reliance on 12 Del. C. § 3547

Use of Virtual Representation Statute

12 Del. C. § 3547

- Representation by another who has a “substantially identical interest”
- A presumptive remainder beneficiary or the person or persons authorized to represent the presumptive remainder may represent and bind contingent successor remainder beneficiaries for the same purposes, in the same circumstances, and to the same extent as an ascertainable competent beneficiary may represent and bind a minor or person who is incapacitated, unborn or unascertainable.
- Pursuant to 12 Del. C. § 3547(c), if a beneficiary cannot otherwise be represented, the surviving and competent parent or parents or custodial parent (in cases where 1 parent has sole custody of the beneficiary), or guardian of the property of the beneficiary may represent and bind the beneficiary.

Obtaining Consent of ALL Beneficiaries

- Practically, for purposes of 12 Del. C. § 3342 (with the use of virtual representation under 12 Del. C. § 3547), the consent of all current beneficiaries and presumptive remainder beneficiaries is necessary.
- “Presumptive Remainder Beneficiary” means as of any date, a beneficiary who, as of any date and but for the exercise of any power of appointment, would receive income or principal of the trust if the trust were to terminate as of that date (without regard to the exercise of any power of appointment) or, if the trust does not provide for its termination, a beneficiary who would receive or be eligible to receive distributions of income or principal of the trust if all of the beneficiaries currently receiving or eligible to receive distributions of income or principal were deceased.
- Be wary of conflicts of interest in virtual representation:
 - Granting additional powers through the amendment
 - Altering standards of care
 - Altering beneficial interests

Obtaining Consent of All Fiduciaries

- 12 Del. C. § 3342 requires the consent of all fiduciaries:
 - Trustees
 - Protectors and Advisers appointed under 12 Del. C. § 3313
 - Designated Representatives appointed under 12 Del. C. § 3339
 - Note: Protectors/Advisers under 12 Del. C. § 3313 and Designated Representatives under 12 Del. C. § 3339 are by default “fiduciaries.”
 - Consideration of obtaining consent of non-fiduciaries.

Waiver of Right to Contest the Modification

- Notably, paragraph (c) of 12 Del. C. § 3342 permits the an interested person to bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a modification, including but not limited to determining whether the representation as provided in 12 Del. C § 3547 of was adequate
- In addition, any such person may waive the right to contest the modification.
- Can include waiver/release/indemnification in connection with the modification

Trust Administered in Delaware

- 12 Del. C. § 3342 applies to any trust administered under the laws of the State of Delaware.
- Consider 12 Del. C. § 3340 (Deemed Delaware Administration)
 - Sole trustee is an individual residing in Delaware or a corporation or other entity having an office for the conduct of trust business in Delaware.
 - Trust has more than 1 trustee only 1 of which is a corporation or other entity and that corporation or other entity has an office for the conduct of trust business in Delaware.
 - The trust has more than 1 trustee all of whom are individuals and 1/2 or more of whom reside in Delaware.
- If situs change, ensure proper Delaware administration prior to utilization of the 12 Del. C. § 3342.

Tax Considerations

- For administrative modifications, there should be no Estate, Gift, or GST tax issues:
 - **Estate or GST** - PLRs 200919008, 200919009, 200919010 confirm that use of a statute based on UTC 411 do not cause adverse Estate or GST Tax purposes. All of the modifications in the aforementioned PLRs were administrative in nature – namely, increasing indemnity of trustee and trust protector, revising trustee compensation structure, adding requirements for selection of trustee, restricting the investments to certain assets, and adding a requirement that the trustee and trust protector execute a HIPPA release. *See also* Section 20.2038-1(a)(2)
 - **Gift Taxes**. See PLR 201722007 (no gift tax consequences would result where trust modifications and future trust divisions would not change any beneficiary's beneficial interest), PLR 201709020 (no gift tax consequences would result where trust would make pro-rata transfer of all trust assets, except S corporation stock, to separate trusts, one for each beneficiary, and beneficial interests of beneficiaries would be substantially same before and after proposed transaction), PLR 201642030, PLR 201642029, PLR 201642028 (trust modifications would not result in gift tax consequences where beneficial interests of beneficiaries would be substantially same as prior to trust modifications), PLR 9826050 (trust modification that is administrative in nature and does not result in any change in quality, value, or timing of any of powers, beneficial interests, rights, or expectancies originally provided does not constitute taxable gift).
- Exercise caution when changing beneficial interests
 - Potential gift tax issues
 - Potential estate tax issues
 - Potential GST tax issues

Comparison with Other Utilized Methods of Modification

	12 Del. C § 3342	Merger	Decanting	NJSA
Consent Required	Yes. All beneficiaries, fiduciaries, and trustor	No, but trustee may require a release	No, but trustee may require a release	Interested Persons as defined in statute
Trustor Must Be Living	Yes	No	No	No, but material purpose restriction applies
Ability to Invade Principal	No	No	Yes	No
New Trust Required	No	Yes	No	No
Override of Provision Prohibiting Amendment	Yes	N/A	N/A	No

Questions?

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