

## ASSET PROTECTION

### § 3570. Definitions.

As used in this subchapter:

- (1) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.
- (2) "Creditor" means, with respect to a transferor, a person who has a claim.
- (3) "Debt" means liability on a claim.
- (4) "Disposition" means a transfer, conveyance or assignment of property (including a change in the legal ownership of property occurring upon the substitution of 1 trustee for another or the addition of 1 or more new trustees), or the exercise of a power so as to cause a transfer of property, to a trustee or trustees, but shall not include the release or relinquishment of an interest in property that theretofore was the subject of a qualified disposition.
- (5) "Person" has the meaning ascribed to it in § 302(16) of Title 1.
- (6) "Property" includes real property, personal property, and interests in real or personal property.
- (7) "Qualified disposition" means a disposition by or from a transferor to a qualified trustee or qualified trustees, with or without consideration, by means of a trust instrument.
- (8) "Qualified trustee" means a person who:
  - a. In the case of a natural person, is a resident of this State other than the transferor or, in all other cases, is authorized by the law of this State to act as a trustee and whose activities are subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision or any successor thereto; and
  - b. Maintains or arranges for custody in this State of some or all of the property that is the subject of the qualified disposition, maintains records for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of fiduciary income tax returns for the trust, or otherwise materially participates in the administration of the trust.
  - c. For purposes of this subchapter, neither the transferor nor any other natural person who is a nonresident of this State nor an entity that is not authorized by the law of this State to act as a trustee or whose activities are not subject to supervision as provided in paragraph (8)a. of this section shall be considered a qualified trustee; however, nothing in this subchapter shall preclude a transferor from appointing one or more advisers, including but not limited to:
    1. Advisers who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisers;
    2. Advisers who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and
    3. Advisers described in § 3313 of this title, whether or not such advisers would meet the requirements imposed by paragraphs a. and b. of this subsection.For purposes of this subsection, the term "adviser" includes a trust "protector" or any other person who, in addition to a qualified trustee, holds 1 or more trust powers.
  - d. A person may serve as an investment adviser described in § 3313 of this title, notwithstanding that such person is the transferor of the qualified disposition, but such a person may not

otherwise serve as adviser of a trust that is a qualified disposition except with respect to the retention of the veto right permitted by paragraph (11)b. of this section.

e. In the event that a qualified trustee of a trust ceases to meet the requirements of paragraph (8)a. of this section, and there remains no trustee that meets such requirements, such qualified trustee shall be deemed to have resigned as of the time of such cessation, and thereupon the successor qualified trustee provided for in the trust instrument shall become a qualified trustee of the trust, or in the absence of any successor qualified trustee provided for in the trust instrument, the Court of Chancery shall, upon application of any interested party, appoint a successor qualified trustee.

f. In the case of a disposition to more than 1 trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the trustees are qualified trustees.

(9) "Spouse" and "former spouse" means only persons to whom the transferor was married at, or before, the time the qualified disposition is made.

(10) "Transferor" means a person who, as an owner of property, as a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate, or as a trustee, directly or indirectly makes a disposition or causes a disposition to be made.

(11) "Trust instrument" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition, which instrument:

a. Expressly incorporates the law of this State to govern the validity, construction and administration of the trust;

b. Is irrevocable, but a trust instrument shall not be deemed revocable on account of its inclusion of 1 or more of the following:

1. A transferor's power to veto a distribution from the trust;

2. A power of appointment (other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate) exercisable by will or other written instrument of the transferor effective only upon the transferor's death;

3. The transferor's potential or actual receipt of income, including rights to such income retained in the trust instrument;

4. The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as such terms are defined in § 664 of the Internal Revenue Code of 1986 [26 U.S.C. § 664] and any successor provision thereto; and the transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release such transferor's retained interest in such a trust, in whole or in part, in favor of a charitable organization that has or charitable organizations that have a succeeding beneficial interest in such trust.

5. The transferor's receipt each year of a percentage (not to exceed 5) specified in the trust instrument of the initial value of the trust assets or their value determined from time to time pursuant to the trust instrument or of a fixed amount that on an annual basis does not exceed 5% of the initial value of the trust assets;

6. The transferor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a qualified trustee's or qualified trustees' acting:

A. In such qualified trustee's or qualified trustees' discretion;

B. Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal; or

C. At the direction of an adviser described in paragraph (8)c. of this section who is acting: I. In such adviser's discretion; or II. Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt of or use of principal.

For purposes of this paragraph, a qualified trustee is presumed to have discretion with respect to the distribution of principal unless such discretion is expressly denied to such trustee by the terms of the trust instrument.

7. The transferor's right to remove a trustee or adviser and to appoint a new trustee or adviser (other than a person who is a related or subordinate party with respect to the transferor within the meaning of § 672(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 672(c)] and any successor provision thereto);

8. The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of such term as described in § 2702(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 2702(c)] and any successor provision thereto or the transferor's possession and enjoyment of a qualified annuity interest within the meaning of such term as described in Treasury Regulation § 25.2702-5(c)(8) [26 C.F.R. 25.2702-5(c)(8)] and any successor provision thereto;

9. The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if such potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of such taxes and if such potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting:

A. In such qualified trustee's or qualified trustees' discretion; or

B. At the direction of an adviser described in paragraph (8)c. of this section who is acting in such adviser's discretion.

Distributions to pay income taxes made under discretion included in a governing instrument pursuant to paragraph (11)b.3. or paragraph (11)b.6. or this paragraph (11)b.9. of this section may be made by direct payment to the taxing authorities.

c. Provides that the interest of the transferor or other beneficiary in the trust property or the income therefrom may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income therefrom to the beneficiary, and such provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision thereto.

d. A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of paragraph (11)a. of this section. (71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 343, §§ 1-5; 72 Del. Laws, c. 59, §§ 1, 2; 72 Del. Laws, c. 341, §§ 1-4; 73 Del. Laws, c. 378, §§ 1-3; 74 Del. Laws, c. 100, §§ 2, 4; 75 Del. Laws, c. 97, §§ 10-12; 75 Del. Laws, c. 301, § 6.)

§ 3571. Retained interests of transferor.

A qualified disposition shall be subject to § 3572 of this title notwithstanding a transferor's retention of any or all of the powers and rights described in § 3570(11)b. of this title and the transferor's service as investment adviser pursuant to § 3570(8)d. of this title. The transferor shall have only such powers and rights as are conferred by the trust instrument. Except as permitted by

§§ 3570(8)d. and 3570(11)b. of this title, a transferor shall have no rights or authority with respect to the property that is the subject of a qualified disposition or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void. (71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 343, § 6; 72 Del. Laws, c. 59, § 2; 72 Del. Laws, c. 341, § 5.)

§ 3572. Avoidance of qualified dispositions.

(a) Notwithstanding any other provision of this Code, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition unless such action shall be brought pursuant to the provisions of § 1304 or § 1305 of Title 6. The Court of Chancery shall have exclusive jurisdiction over any action brought with respect to a qualified disposition.

(b) A creditor's claim under subsection (a) of this section shall be extinguished unless:

(1) The creditor's claim arose before the qualified disposition was made, and the action is brought within the limitations of § 1309 of Title 6 in effect on the later of the date of the qualified disposition or August 1, 2000; or

(2) Notwithstanding the provisions of § 1309 of Title 6, the creditor's claim arose concurrent with or subsequent to the qualified disposition and the action is brought within 4 years after the qualified disposition is made.

In any action described in subsection (a) of this section, the burden to prove the matter by clear and convincing evidence shall be upon the creditor.

(c) For purposes of this subchapter, a qualified disposition that is made by means of a disposition by a transferor who is a trustee shall be deemed to have been made as of the time (whether before, on or after July 1, 1997) the property that is the subject of the qualified disposition was originally transferred to the transferor (or any predecessor trustee) making the qualified disposition in a form that meets the requirements of § 3570(11)b. and c. of this title. If a trustee of an existing trust proposes to make a qualified disposition pursuant to the provisions of this subsection (c) of this section but the trust would not conform to the requirements of § 3570(11)b.2. of this title as a result of the original transferor's nonconforming powers of appointment, then, upon the trustee's delivery to the qualified trustee of an irrevocable written election to have this subsection apply to the trust, the nonconforming powers of appointment shall be deemed modified to the extent necessary to conform with § 3570(11)b.2. of this title. For purposes of this subchapter, the irrevocable written election shall include a description of the original transferor's powers of appointment as modified together with the original transferor's written consent thereto, but no such consent of the original transferor shall be considered a disposition within the meaning of § 3570(4) of this title.

(d) Notwithstanding any law to the contrary, a creditor, including a creditor whose claim arose before or after a qualified disposition, or any other person shall have only such rights with respect to a qualified disposition as are provided in this section and §§ 3573 and 3574 of this title, and no such creditor nor any other person shall have any claim or cause of action against the trustee, or advisor described in § 3570(8)c. of this title, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition.

(e) Notwithstanding any other provision of law, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative

authority, shall be brought at law or in equity against the trustee, or advisor described in § 3570(8)c. of this title, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition, if, as of the date such action is brought, an action by a creditor with respect to such qualified disposition would be barred under this section.

(f) In circumstances where more than 1 qualified disposition is made by means of the same trust instrument, then:

(1) The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in subsection (b) of this section; and

(2) Any distribution to a beneficiary shall be deemed to have been made from the latest such qualified disposition.

(g) If, in any action brought against a trustee of a trust that is the result of a qualified disposition, a court takes any action whereby such court declines to apply the law of this State in determining the validity, construction or administration of such trust, or the effect of a spendthrift provision thereof, such trustee shall immediately upon such court's action and without the further order of any court, cease in all respects to be trustee of such trust and a successor trustee shall thereupon succeed as trustee in accordance with the terms of the trust instrument or, if the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the Court of Chancery, upon the application of any beneficiary of such trust, shall appoint a successor trustee upon such terms and conditions as it determines to be consistent with the purposes of such trust and this statute. Upon such trustee's ceasing to be trustee, such trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust instrument or appointed by the Court of Chancery in accordance with this section. (71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 343, § 7; 72 Del. Laws, c. 59, § 2; 72 Del. Laws, c. 195, § 1; 72 Del. Laws, c. 341, §§ 6-8; 73 Del. Laws, c. 378, § 4; 74 Del. Laws, c. 100, §§ 3, 5; 75 Del. Laws, c. 97, §§ 13, 14.)

§ 3573. Limitations on qualified dispositions.

With respect to the limitations imposed by § 3572 of this title, those limitations on actions by creditors to avoid a qualified disposition shall not apply:

(1) To any person to whom the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of such transferor's spouse, former spouse or children, or for a division or distribution of property in favor of such transferor's spouse or former spouse, but only to the extent of such debt; or

(2) To any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor, which death, personal injury or property damage is at any time determined to have been caused in whole or in part by the tortious act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable but only to the extent of such claim against such transferor or other person for whom such transferor is or was vicariously liable.

Paragraph (1) of this section shall not apply to any claim for forced heirship, legitime or elective share. (71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 254, § 36; 71 Del. Laws, c. 343, § 8; 72 Del. Laws, c. 341, § 9; 74 Del. Laws, c. 100, § 1; 75 Del. Laws, c. 97, § 15.)

§ 3574. Effect of avoidance of qualified dispositions.

(a) A qualified disposition shall be avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with such costs, including attorneys' fees, as the court may allow.

(b) In the event any qualified disposition shall be avoided as provided in subsection (a) of this section, then:

(1) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

a. Such trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by such trustee in the defense of the action or proceedings to avoid the qualified disposition;

b. The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of such trustee (and of any predecessor trustee that has not acted in bad faith); and

c. For purposes of this paragraph (1) of this subsection, it shall be presumed that such trustee did not act in bad faith merely by accepting such property; and

(2) If the court is satisfied that a beneficiary of a trust has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of such beneficiary to retain any distribution made prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this subdivision, it shall be presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) A creditor shall have the burden of proving that a trustee or beneficiary acted in bad faith as required under subsection (b) of this section by clear and convincing evidence except that, in the case of a beneficiary who is also the transferor, the burden on the creditor shall be to prove that the transferor-beneficiary acted in bad faith by a preponderance of the evidence. The preceding sentence provides substantive not procedural rights under Delaware law.

(d) For purposes of this subchapter, attachment, garnishment, sequestration, or other legal or equitable process shall be permitted only in those circumstances permitted by the express terms of this subchapter. (71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 343, § 9; 72 Del. Laws, c. 195, § 2; 75 Del. Laws, c. 97, § 16.)

§ 3575. Application of subchapter.

This subchapter shall apply to qualified dispositions and dispositions by transferors who are trustees made on or after July 1, 1997. (71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 343, § 10.)

§ 3576. Short title.

This subchapter may be cited as the "Qualified Dispositions in Trust Act." (71 Del. Laws, c. 159, § 1.)