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Delaware Trust Act 2026 Legislative Update

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On July 23, 2026, Delaware Governor Matthew S. Meyer signed House Bill 297 ("Trust Act 2026") into law. The legislation includes the following highlights:

- Amends Section 3323 of Title 12 of the Delaware Code governing how multiple fiduciaries and nonfiduciaries exercise, or dissent from exercising, any power vested in them.
- Amends Sections 3325(29) and 3341 of Title 12 of the Delaware Code to allow trustees to select the governing instrument of either the transferor or transferee trust to govern the surviving trust post-merger, enabling the original trust to continue under the modified governing instrument.
- Amends Section 3326 of Title 12 of the Delaware Code to expand the definition of "officeholder" to include those who are empowered to remove or appoint one or more fiduciaries or nonfiduciaries and cross-referencing Sections 3327 and 3327A so that the new definition will apply to sections covering the resignation, removal and appointment of an officeholder.
- Creates new Section 3327A of Title 12 of the Delaware Code to govern the appointment of successor officeholders for any trust where an office is vacant and the governing instrument lacks a provision that can effectively be used to appoint a successor (including scenarios where the person authorized to appoint the successor does not do so).
- Amends Section 3345 of the Title 12 of the Delaware Code to clarify the dynamics of "directed" Beneficiary Well-Being Trusts and require authorizing language in the governing instrument to compensate trustees or advisers for costs and expenses of beneficiary well-being programs without prior notice to the beneficiaries.
- Amends Section 504(b) of Title 25 of the Delaware Code to replace the prior provision that referred generally to Section 501, rather than specifically to Section 501(a).

Trust Act 2026 is effective upon enactment and applies to trusts whenever created.

RESPONSIBILITIES OF COFIDUCIARIES AND CO-NONFIDUCIARIES

Section 3323 of Title 12 of the Delaware Code governs how multiple trust fiduciaries or nonfiduciaries serving in the same role exercise powers vested in them, unless the terms of the trust's governing instrument provide otherwise. Prior to Trust Act 2026, the Section provided that any power vested in three or more fiduciaries or nonfiduciaries may be exercised by a majority and a majority could designate one to perform ministerial functions on behalf of all, but did not expressly address scenarios where a trust had exactly two fiduciaries or nonfiduciaries. The statute also provided relief from liability for a dissenting fiduciary or nonfiduciary where such dissent was evidenced by a writing delivered to the majority of the fiduciaries or nonfiduciaries. Additionally, Section 3323(b) established that certain failures to act by a cofiduciary or co-nonfiduciary were not relieved from liability under the Section.

The amended provisions state that when two cofiduciaries and co-nonfiduciaries are serving, unanimity is required. One fiduciary or nonfiduciary may be designated to perform ministerial functions when two or more are serving. The Section's provisions regarding three or more fiduciaries or nonfiduciaries still apply but include a minor update clarifying that the dissenting fiduciary or nonfiduciary is only relieved from liability with respect to that action. Cofiduciaries and co-nonfiduciaries are not relieved from liability for failure to participate in the administration of the fiduciary fund, failure to attempt to prevent a breach of trust or failure to seek advice and guidance from the court in a recurring situation, unless otherwise provided by the terms of the trust's governing instrument.

TRUST MERGER

Under Section 3325(29) of Title 12 of the Delaware Code, a trustee of a Delaware trust has the power to declare one or more new trusts for the purpose of merging all, or a portion, of an existing trust or trusts with and into the new trust or trusts and to merge two or more existing trusts, provided such a merger would not result in a material change in certain dispositive terms of the trust. Section 3341 of Title 12 of the Delaware Code describes some of the consequences of such mergers. Under Section 3341, whenever any trust (a "transferor trust") is merged with and into another trust (the "transferee trust"), the transferor trust ceases to exist, and the transferee trust possesses all rights and privileges and is subject to all of the obligations of the transferor trust. Additionally, all of the property and interests of the transferor trust shall be treated as property and interests of the transferee trust. The merger power is a tool that has been used as an alternative to decanting, non-judicial modifications, non-judicial settlement agreements and administrative amendments, to modify the administrative provisions of a governing instrument.

Before this amendment, the only alternative was for the terms of the transferee trust's governing instrument to control the administration and disposition of the property following the merger. Subsection 3325(29) and Section 3341 were amended to allow the trustee to select the governing instrument of either the transferor trust or the transferee trust to govern the surviving trust. Thus, a trustee can create a new unfunded trust with a governing instrument that includes the desired administrative provisions and merge the new trust with and into the original trust, with the original trust thereafter administered in accordance with the terms of the new trust's governing instrument. Consequently, the original trust does not need to be merged into the new trust in order to be administered under the new trust's administrative terms, and the titling of the original trust's assets, EIN, accounts and other identifying information and considerations may remain unchanged post-merger. This puts the merger power on par with the ability to decant into the same trust pursuant to Delaware's decanting statute, Section 3528 of Title 12 of the Delaware Code, and makes merger a more attractive tool for administrative modifications.

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EXPANDED DEFINITION OF OFFICEHOLDER

Section 3326 of Title 12 of the Delaware Code governs the resignation of trust officeholders, creating mechanisms for the resignation and appointment of officeholders without the time and expense of obtaining a court order. Prior to the amendment, Section 3326(a) defined "officeholder" to include a trustee, an adviser, a designated representative, and an enforcer. The amendment to this section expands the definition of "officeholder" to include those who are empowered to remove or appoint one or more fiduciaries or nonfiduciaries and cross-references Sections 3327 and 3327A so that the new definition will apply to sections covering the resignation, removal and appointment of an officeholder.

APPOINTMENT OF AN OFFICEHOLDER

Prior to Trust Act 2026, Section 3336 of Title 12 of the Delaware Code provided a statutory mechanism for appointing successor trustees when the previously serving trustee was no longer serving, the governing instrument lacked effective successor appointment provisions, and the only remaining dispositive provisions of the trust required distribution of the remaining property to one or more beneficiaries. Section 3336 has been amended in several ways. First, its language has been moved to new Section 3327A. Additionally, the references to "trustee" have been expanded to now include any "officeholder" so that Section 3327A now addresses the appointment of advisers, designated representatives, and enforcers in addition to trustees. Third, the statutory power to appoint successor officeholders now applies to any trust and not just trusts whose only remaining dispositive provisions require distribution to one or more beneficiaries.

Section 3327A provides beneficiaries with a statutory power to appoint an officeholder when the trust's governing instrument does not include a provision that effectively can be used to appoint a successor officeholder and the trust does not have a serving officeholder in a given office, for any reason. Such reasons may include the death, incapacity, removal, or resignation of the last serving officeholder, the renunciation or declination of appointment of the last named officeholder and the declination to appoint a successor officeholder by the holder or holders of the power to appoint.

For trusts that are terminating, the statute remains the same as it was prior to Trust Act 2026, except that the appointment is accomplished by unanimous consent, rather than by unanimous vote. For such trusts, a successor officeholder may be appointed by unanimous consent of the taking beneficiaries.

This new power addresses a significant and all-too common problem where… the holder(s) of the power to appoint a successor are unresponsive, refuse to act or cannot be located.

For any other trust, the current permissible beneficiaries and presumptive remainder beneficiaries of the trust, by unanimous consent, may name a successor trustee or other officeholder of the trust, subject to any conditions on such office that may be in place under the governing instrument. When a trust's governing instrument requires an officeholder to be appointed, or when a trust has no trustee, the holder(s) of the power to appoint a successor officeholder are deemed to have declined to appoint the successor if they fail to do so within 60 days of being notified of the vacancy, at which time the statutory power to appoint a successor is triggered. This new power addresses a significant and all-too common problem where an officeholder attempts to resign, or is removed, and the holder(s) of the power to appoint a successor are unresponsive, refuse to act or cannot be located, thus rendering the outgoing officeholder unable to exit the fiduciary (or nonfiduciary) role and leaving the trust in limbo.

Unanimous consent of beneficiaries under the statute may be achieved via virtual representation pursuant to Section 3547 of Title 12 or a designated representative under Section 3339 of Title 12. Under Subsection 3327A(f) there is no requirement to fill a vacancy unless the appointment is required by the governing instrument or law and Subsection 3327A(g) clarifies that the section does not limit the appointment of an officeholder pursuant to modification under Section 3342 of Title 12 or nonjudicial settlement agreement under Section 3338 of Title 12.

BENEFICIARY WELL-BEING TRUSTS

Delaware's Beneficiary Well-Being Trust statute facilitates the design and administration of trusts that can support beneficiary well-being. The statute was amended to clean up the mechanics of Beneficiary Well-Being Trusts that are drafted to include the role of an adviser with the power to direct the trustee with respect to issues relating to beneficiary wellbeing. Section 3345 of Title 12 of the Delaware Code now references both the trustee and an adviser of a trust in each place where only the trustee was previously referenced. Under Section 3345(d), the trustees and advisers of a Beneficiary Well-Being Trust must pay the costs and expenses of beneficiary well-being programs from the trust. Beneficiary well-being programs may be provided by the trustee or adviser itself, by an affiliate of the trustee or adviser, or by third parties. The trustee or adviser is now only entitled to its full compensation to which the trustee or adviser is entitled without diminution for the fees and costs of the beneficiary well-being programs without any prior notice or disclosure to any beneficiary of the trust if the governing instrument expressly so provides. In the absence of such language in the governing instrument, default fiduciary rules relating to disclosure will apply.

MECHANICS OF TRIGGERING THE DELAWARE TAX TRAP

Section 504(b) of Title 25 of the Delaware Code was amended to replace the prior provision that referred generally to Section 501 of Title 25 of the Delaware Code, rather than specifically to Section 501(a). This section directs that the instrument of exercise of a power of appointment should make express reference to the provisions of Section 501(a) and should expressly state that Section 501(a) shall apply to the exercise of the power in order to deliberately trigger the Delaware tax trap.

About the Authors

Todd Flubacher is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and he serves on the Fiduciary Litigation Committee and is the past Chair and member of the Fiduciary Administration Committee. He serves as a member of the ACTEC Board of Regents and is the Delaware State Chair. Todd is also a member of the Board of the ACTEC Foundation. He is an Accredited Estate Planner® (AEP®) Distinguished and was inducted into the National Association of Estate Planners & Councils' (NAEPC) Estate Planning Hall of Fame in 2023.

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In his Trusts & Estates practice, Todd represents Delaware trust companies, individuals, and law firms throughout the United States on all aspects of the creation, migration, modification, and administration of Delaware trusts.

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Zachary Haupt is an active member of the Estates and Trusts Section of the Delaware State Bar Association and the Delaware Estate Planning Council. In 2020, he graduated with the inaugural class of the Mid-Atlantic Fellows Institute of the American College of Trust and Estate Counsel (ACTEC). He has been recognized in Chambers HNW's guide to leading individuals in Delaware Private Wealth Law. Zach has also been included in Best Lawyers for his work in trusts and estates and trusts and estates litigation.

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About Morris Nichols' Trusts & Estates/ Private Client Group

Morris Nichols is nationally known for the strength of its Trusts & Estates/Private Client practice. We advise a broad range of clients in connection with trusts, estate planning and administration, and fiduciary litigation. We also have a market leading practice advising banks and trust companies in the highly specialized area of Delaware trust law. Chambers High Net Worth (HNW) has ranked our practice in Band 1 among Delaware private wealth law firms, with sources touting the group's reputation as "one of the leading firms in Delaware," and the "first point of reference" on Delaware trust law.