

Delaware Silent Trusts



by
Vincent C. Thomas, Esq.
Young Conaway Stargatt & Taylor, LLP
and
Mark E. Doyle, Esq.,
SVP, Senior Trust Officer,
Associate Fiduciary Counsel,
Bessemer Trust Company of Delaware, N.A.

Delaware trustees and practitioners are routinely called upon to administer or form “Delaware silent trusts” drafted in accordance with 12 Del. C. §§ 3303 and 3339. This column assumes the reader has a general understanding of the aforementioned statutes and provides a non-exhaustive checklist of issues for the Delaware trustee and/or practitioner to consider in creating Delaware silent trusts.

Clear Drafting

Delaware’s statute generally provides that a trust instrument can vary or eliminate a beneficiary’s right to be informed for a period of time. Put simply, without specific and clear provisions in the trust instrument eliminating a beneficiary’s right to be informed, the trust will not be a silent trust. Some drafting issues to take specific note of, include:

a. No Duty vs. Prohibition. Many trustees are uncomfortable with language that merely provides the trustee “has no duty to notify the beneficiaries.” Preferred language would be the trustee “shall not notify the beneficiaries.” Most trustees prefer the latter language as it is a clear direction not to notify as opposed to the former language which arguably would require the trustee to exercise its discretion in order for the trust to be silent.

b. Specificity as to Scope. It is important the language specify the extent to which the trust is silent. Is it all matters, simply the trust’s existence, just as to its holdings, etc.? The settlor’s intent should be discerned in this regard and language drafted accordingly. If the trust is to be totally silent for the particular period, the trust should contain very broad language – e.g., the trustee shall not notify the beneficiaries of any information regarding the trust, including without

limitation, statements, the existence of the trust, the beneficiary’s interest in the trust, any trust assets or holdings, etc.

c. Reasonable Period. While Delaware’s statute does not require any particular time period after which the silent period should terminate, 12 Del. C. § 3303(c) provides examples and most practitioners believe a “reasonable” time period should be used. That is, a trust that is indefinitely silent is not the most ideal situation for a trustee.

d. Designated Representative. The trust should include language appointing a Designated Representative that will represent and bind the beneficiaries during the silent period. The Designated Representative is presumed to be a fiduciary and other common fiduciary language should be included: standard of care and indemnification, compensation, resignation and appointment of successors, etc. Ideally the trust should also include a signature block for the Designated Representative to sign and thereby indicate his or her acceptance to serve (alternatively, a separate acceptance instrument could be prepared).

e. Premature Knowledge of the Beneficiary. The trust should address the situation where the beneficiary learns of the trust’s existence and/or other information during the silent period, and then requests additional information or distributions from the trustee. When such circumstances arise, if the trust is silent as to how to address this situation, the trustee is in the precarious position of weighing the settlor’s intent vs. the beneficiary’s interest. Alternatively, one method to address the issue would be for the trust instrument to provide that upon

such occurrence the silent period immediately terminates.

f. Avoiding Inconsistencies. The trust instrument should be thoroughly reviewed to avoid any inconsistencies which could complicate the administration for the trustee. Some rather obvious inconsistencies which could be overlooked include: Crummey powers and withdrawal rights at particular ages.

Selection of the Designated Representative

The Designated Representative will represent and bind the beneficiaries during the silent period. Important considerations should go into the selection of the Designated Representative, including:

a. Conflict of Interests. Conflicts with other fiduciaries (e.g., Investment Advisers, Distribution Advisers, etc.) must be considered. Since the Designated Representative will be representing and binding the beneficiaries, it is generally wise for the Designated Representatives to be independent from the other fiduciaries administering the trust.

b. State Income Tax Issues. Since the Designated Representative is presumed to be a fiduciary, state income tax issues must be considered. The residency of a Designated Representative could subject the trust to income taxes in his or her state of residency depending upon the laws of such state.

c. Other Practical Issues. Given the role, in an ideal situation, the Designated Representative will have some financial and trust knowledge and a relationship with the beneficiaries or the family.

The content of this column is based largely upon a more comprehensive article by Vincent C. Thomas, Esquire, and the presentation of Mark E. Doyle and Vincent C. Thomas at the 2015 Delaware Trust Conference.