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WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1993

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ENROLLED

HOUSE BILL No. 2095

(By Delegates Burk and Rowe)

— ● —

Passed April 8, 1993

In Effect Ninety Days From Passage

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H. B. 2095

(By DELEGATES BURK AND ROWE)

[Passed April 8, 1993; in effect ninety days from passage.]

AN ACT to amend chapter forty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-a, relating to the administration of estates and trusts; powers of fiduciaries; providing that certain enumerated powers may be incorporated by reference in trust instrument; definition; and restrictions on exercise of power.

Be it enacted by the Legislature of West Virginia:

That chapter forty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-a, to read as follows:

ARTICLE 5A. POWERS OF FIDUCIARIES.

§44-5A-1. Definition.

1 As used in this article, the term "fiduciary" means the
2 one or more executors of the estate of a decedent, or the
3 one or more trustees of a testamentary or inter vivos
4 trust estate, whichever in a particular case is appropriate.
5

§44-5A-2. Incorporation by reference of enumerated powers; restriction on exercise of such powers.

1 (a) By an express intention of the testator or settlor

2 so to do contained in a will, or in an instrument in
3 writing whereby a trust estate is created inter vivos, any
4 or all of the powers or any portion thereof enumerated
5 in section three of this article, as they exist at the time
6 of the signing of the will by the testator or at the time
7 of the signing by the first settlor who signs the trust
8 instrument, may be, by appropriate reference made
9 thereto, incorporated in such will or other written
10 instrument, with the same effect as though such
11 language were set forth verbatim in the instrument.
12 Incorporation of one or more of the powers contained in
13 section three of this article by reference to that section
14 shall be in addition to and not in limitation of the
15 common law or statutory powers of the fiduciary.

16 (b) No power of authority conferred upon a fiduciary
17 as provided in this article may be exercised by such
18 fiduciary in such a manner as, in the aggregate, to
19 deprive the trust or the estate involved of an otherwise
20 available tax exemption, deduction or credit, expressly
21 including the marital deduction, or operate to impose a
22 tax upon a donor or testator or other person as owner
23 of any portion of the trust or estate involved. "Tax"
24 includes, but is not limited to, any federal, state, or local
25 income, gift, estate or inheritance tax.

26 (c) Nothing herein shall be construed to prevent the
27 incorporation of the powers enumerated in section three
28 of this article in any other kind of instrument or
29 agreement.

**§44-5A-3. Powers which may be incorporated by refer-
ence in trust instrument.**

1 The following powers may be incorporated by refer-
2 ence as provided in section two of this article:

3 (a) *Retain original property.* — To retain for such time
4 as the fiduciary considers advisable any property, real
5 or personal, which the fiduciary may receive, even
6 though the retention of such property by reason of its
7 character, amount, proportion to the total estate or
8 otherwise would not be appropriate for the fiduciary
9 apart from this provision.

10 (b) *Sell and exchange property.* — To sell, exchange,
11 give options upon, partition or otherwise dispose of any
12 property or interest therein which the fiduciary may
13 hold from time to time, with or without order of court,
14 at public or private sale or otherwise, upon such terms
15 and conditions, including credit, and for such consider-
16 ation as the fiduciary considers advisable, and to
17 transfer and convey the property or interest therein
18 which is at the disposal of the fiduciary, in fee simple
19 absolute or otherwise, free of all trust; and the party
20 dealing with the fiduciary is not under a duty to follow
21 the proceeds or other consideration received by the
22 fiduciary from such sale or exchange.

23 (c) *Invest and reinvest.* — To invest and reinvest, as
24 the fiduciary considers advisable, in stocks (common or
25 preferred), bonds, debentures, notes, mortgages or other
26 securities, in or outside the United States; in insurance
27 contracts on the life of any beneficiary or of any person
28 in whom a beneficiary has an insurable interest, or in
29 annuity contracts for any beneficiary, in any real or
30 personal property, in investment trusts; in participa-
31 tions in common trust funds, and generally in such
32 property as the fiduciary considers advisable, even
33 though such investment is not of the character approved
34 by applicable law but for this provision.

35 (d) *Invest without diversification.* — To make invest-
36 ments which cause a greater proportion of the total
37 property held by the fiduciary to be invested in
38 investments of one type or of one company than would
39 be considered appropriate for the fiduciary apart from
40 this provision.

41 (e) *Continue business.* — To the extent and upon such
42 terms and conditions and for such periods of time as the
43 fiduciary considers necessary or advisable, to continue
44 or participate in the operation of any business or other
45 enterprise, whatever its form of organization, including,
46 but not limited to, the power:

47 (1) To effect incorporation, dissolution, or other
48 change in the form of the organization of the business
49 or enterprise;

50 (2) To dispose of any interest therein or acquire the
51 interest of others therein;

52 (3) To contribute thereto or invest therein additional
53 capital or to lend money thereto, in any such case upon
54 such terms and conditions as the fiduciary approves
55 from time to time;

56 (4) To determine whether the liabilities incurred in
57 the conduct of the business are to be chargeable solely
58 to the part of the estate or trust set aside for use in the
59 business or to the estate or trust as a whole; and

60 (5) In all cases in which the fiduciary is required to
61 file accounts in any court or in any other public office,
62 it is not necessary to itemize receipts and disbursements
63 and distributions of property but it is sufficient for the
64 fiduciary to show in the account a single figure or
65 consolidation of figures, and the fiduciary is permitted
66 to account for money and property received from the
67 business and any payments made to the business in
68 lump sum without itemization.

69 (f) *Form corporation or other entity.* — To form a
70 corporation or other entity and to transfer, assign, and
71 convey to such corporation or entity all or any part of
72 the estate or of any trust property in exchange for the
73 stock, securities or obligations of any such corporation
74 or entity, and to continue to hold such stock and
75 securities and obligations.

76 (g) *Operate farm.* — To continue any farming opera-
77 tion received by the fiduciary pursuant to the will or
78 other instrument and to do any and all things considered
79 advisable by the fiduciary in the management and
80 maintenance of such farm and the production and
81 marketing of crops and dairy, poultry, livestock,
82 orchard and forest products including, but not limited
83 to, the following powers:

84 (1) To operate the farm with hired labor, tenants or
85 sharecroppers;

86 (2) To lease or rent the farm for cash or for a share
87 of the crops;

88 (3) To purchase or otherwise acquire farm machinery
89 and equipment and livestock;

90 (4) To construct, repair and improve farm buildings
91 of all kinds needed in the fiduciary's judgment, for the
92 operation of the farm;

93 (5) To make or obtain loans or advances at the
94 prevailing rate or rates of interest for farm purposes
95 such as for production, harvesting, or marketing, or for
96 the construction, repair, or improvement of farm
97 buildings or for the purchase of farm machinery or
98 equipment or livestock;

99 (6) To employ approved soil conservation practices in
100 order to conserve, improve and maintain the fertility
101 and productivity of the soil;

102 (7) To protect, manage and improve the timber and
103 forest on the farm and sell the timber and forest
104 products when it is to the best interest of the estate;

105 (8) To ditch, dam and drain damp or wet fields and
106 areas of the farm when and where needed;

107 (9) To engage in the production of livestock, poultry
108 or dairy products, and to construct such fences and
109 buildings and plant such pastures and crops as may be
110 necessary to carry on such operations;

111 (10) To market the products of the farm; and

112 (11) In general, to employ good husbandry in the
113 farming operation.

114 (h) *Manage real property.* — (1) To improve, manage,
115 protect and subdivide any real property;

116 (2) To dedicate or withdraw from dedication parks,
117 streets, highways or alleys;

118 (3) To terminate any subdivision or part thereof;

119 (4) To borrow money for the purposes authorized by
120 this subdivision for such periods of time and upon such
121 terms and conditions as to rates, maturities and
122 renewals as the fiduciary considers advisable and to
123 mortgage or otherwise encumber any such property or

124 part thereof, whether in possession or reversion;

125 (5) To lease any such property or part thereof to
126 commence at the present or in the future, upon such
127 terms and conditions, including options to renew or
128 purchase, and for such period or periods of time as the
129 fiduciary considers advisable although such period or
130 periods may extend beyond the duration of the trust or
131 the administration of the estate involved;

132 (6) To make coal, gravel, sand, oil, gas and other
133 mineral leases, contracts, licenses, conveyances or
134 grants of every nature and kind which are lawful in the
135 jurisdiction in which such property lies;

136 (7) To manage and improve timber and forests on such
137 property, to sell the timber and forest products, and to
138 make grants, leases, and contracts with respect thereto;

139 (8) To modify, renew or extend leases;

140 (9) To employ agents to rent and collect rents;

141 (10) To create easements and release, convey, or assign
142 any right, title, or interest with respect to any easement
143 on such property or part thereof;

144 (11) To erect, repair or renovate any building or other
145 improvement on such property, and to remove or
146 demolish any building or other improvement, in whole
147 or in part; and

148 (12) To deal with any such property and every part
149 thereof in all other ways and for such other purposes or
150 considerations as it would be lawful for any person
151 owning the same to deal with such property either in
152 the same or in different ways from those specified
153 elsewhere in this subdivision (h).

154 (i) *Pay taxes and expenses.* — To pay taxes, assess-
155 ments, compensation of the fiduciary, and other ex-
156 penses incurred in the collection, care, administration,
157 and protection of the trust or estate.

158 (j) *Receive additional property.* — To receive addi-
159 tional property from any source and administer such
160 additional property as a portion of the appropriate trust

161 or estate under the management of the fiduciary but the
162 fiduciary is not required to receive such property
163 without his or her consent.

164 (k) *Deal with other trusts.* — In dealing with one or
165 more fiduciaries:

166 (1) To sell property, real or personal, to, or to
167 exchange property with, the trustee of any trust which
168 the decedent or the settlor or his spouse or any child of
169 his shall have created, for such estates and upon such
170 terms and conditions as to sale price, terms of payment,
171 and security as the fiduciary considers advisable; and
172 the fiduciary is under no duty to follow the proceeds of
173 any such sale; and

174 (2) To borrow money for such periods of time and upon
175 such terms and conditions as to rates, maturities,
176 renewals and securities as the fiduciary considers
177 advisable from any trust created by the decedent, his
178 spouse, or any child of his, for the purpose of paying
179 debts of the decedent, taxes, the costs of the adminis-
180 tration of the estate, and like charges against the estate,
181 or any part thereof, or discharging the liability of any
182 fiduciary thereof and to mortgage, pledge or otherwise
183 encumber such portion of the estate or any trust as may
184 be required to secure such loan or loans and to renew
185 such loans.

186 (l) *Borrow money.* — To borrow money for such
187 periods of time and upon such terms and conditions as
188 to rates, maturities, renewals, and security as the
189 fiduciary considers advisable, including the power of a
190 corporate fiduciary to borrow from its own banking
191 department, for the purpose of paying debts, taxes, or
192 other charges against the estate or any trust, or any part
193 thereof, and to mortgage, pledge or otherwise encumber
194 such portion of the estate or any trust as may be
195 required to secure such loan or loans; and to renew
196 existing loans either as maker or endorser.

197 (m) *Make advances.* — To advance money for the
198 protection of the trust or estate, and for all expenses,
199 losses and liabilities sustained in the administration of
200 the trust or estate or because of the holding or owner-

201 ship of any trust or estate assets, for which advances
202 with any interest the fiduciary shall have a lien on the
203 assets of the trust or estate as against a beneficiary.

204 (n) *Vote shares.* — To vote shares of stock owned by
205 the estate or any trust at stockholders meetings in
206 person or by special, limited, or general proxy, with or
207 without power of substitution.

208 (o) *Register in name of nominee.* — To hold a security
209 in the name of a nominee or in other form without
210 disclosure of the fiduciary relationship so that title to the
211 security may pass by delivery, but the fiduciary is liable
212 for any act of the nominee in connection with the stock
213 so held.

214 (p) *Exercise options, rights and privileges.* — To
215 exercise all options, rights, and privileges to convert
216 stocks, bonds, debentures, notes, mortgages, or other
217 property into other stocks, bonds, debentures, notes,
218 mortgages, or other property; to subscribe for other or
219 additional stocks, bonds, debentures, notes, mortgages,
220 or other property; and to hold such stocks, bonds,
221 debentures, notes, mortgages, or other property so
222 acquired as investments of the estate or trust so long as
223 the fiduciary considers advisable.

224 (q) *Participate in reorganizations.* — To unite with
225 other owners of property similar to any which may be
226 held at any time in the decedent's estate or in any trusts
227 in carrying out any plan for the consolidation or merger,
228 dissolution or liquidation, foreclosure, lease, or sale of
229 the property, incorporation or reincorporation, reorgan-
230 ization or readjustment of the capital or financial
231 structure of any corporation, company or association the
232 securities of which may form any portion of an estate
233 or trust; to become and serve as a member of a
234 stockholders or bondholders protective committee; to
235 deposit securities in accordance with any plan agreed
236 upon; to pay any assessments, expenses, or sums of
237 money that may be required for the protection or
238 furtherance of the interest of the distributees of an
239 estate or beneficiaries of any trust with reference to any
240 such plan; and to receive as investments of an estate or

- 241 any trust any securities issued as a result of the
242 execution of such plan.
- 243 (r) *Reduce interest rates.* — To reduce the interest rate
244 from time to time on any obligation, whether secured
245 or unsecured, constituting a part of an estate or trust.
- 246 (s) *Renew and extend obligations.* — To continue any
247 obligation, whether secured or unsecured, upon and
248 after maturity with or without renewal or extension
249 upon such terms as the fiduciary considers advisable,
250 without regard to the value of the security, if any, at
251 the time of such continuance.
- 252 (t) *Foreclose and bid in.* — To foreclose, as an incident
253 to the collection of any bond, note or other obligation,
254 any mortgage, deed of trust, or other lien securing such
255 bond, note or other obligation, and to bid in the property
256 at such foreclosure sale, or to acquire the property by
257 deed from the mortgagor or obligor without foreclosure;
258 and to retain the property so bid in or taken over
259 without foreclosure.
- 260 (u) *Insure.* — To carry such insurance coverage,
261 including public liability, for such hazards and in such
262 amounts, either in stock companies or in mutual
263 companies, as the fiduciary considers advisable.
- 264 (v) *Collect.* — To collect, receive and receipt for rents,
265 issues, profits, and income of an estate or trust.
- 266 (w) *Litigate, compromise or abandon.* — To compro-
267 mise, adjust, arbitrate, sue on or defend, abandon, or
268 otherwise deal with and settle claims in favor of or
269 against the estate or trust as the fiduciary considers
270 advisable, and the fiduciary's decision is conclusive
271 between the fiduciary and the beneficiaries of the estate
272 or trust and the person against or for whom the claim
273 is asserted, in the absence of fraud by such persons; and
274 in the absence of fraud, bad faith or gross negligence
275 of the fiduciary, is conclusive between the fiduciary and
276 the beneficiaries of the estate or trust.
- 277 (x) *Employ and compensate agents, etc.* — To employ
278 and compensate, out of income or principal or both and
279 in such proportion as the fiduciary considers advisable,

280 persons considered by the fiduciary needful to advise or
281 assist in the proper settlement of the estate or admin-
282 istration of any trust, including, but not limited to,
283 agents, accountants, brokers, attorneys-at-law, attor-
284 neys-in-fact, investment brokers, rental agents, realtors,
285 appraisers, and tax specialists; and to do so without
286 liability for any neglect, omission, misconduct, or
287 default of such agent or representative provided he or
288 she was selected and retained with due care on the part
289 of the fiduciary.

290 (y) *Acquire and hold property of two or more trusts*
291 *undivided.* — To acquire, receive, hold and retain the
292 principal of several trusts created by a single instru-
293 ment undivided until division becomes necessary in
294 order to make distributions; to hold, manage, invest,
295 reinvest, and account for the several shares or parts of
296 shares by appropriate entries in the fiduciary's books of
297 account, and to allocate to each share or part of share
298 its proportionate part of all receipts and expenses:
299 *Provided,* That the provisions of this subdivision do not
300 defer the vesting in possession of any share or part of
301 share of the estate or trust.

302 (z) *Establish and maintain reserves.* — To set up
303 proper and reasonable reserves for taxes, assessments,
304 insurance premiums, depreciation, obsolescence, amor-
305 tization, depletion of mineral or timber properties,
306 repairs, improvements, and general maintenance of
307 buildings or other property out of rents, profits, or other
308 income received; and to set up reserves also for the
309 equalization of payments to or for beneficiaries: *Pro-*
310 *vided,* That the provisions of this subdivision do not
311 affect the ultimate interests of beneficiaries in such
312 reserves.

313 (aa) *Distribute in cash or kind.* — To make distribu-
314 tion of capital assets of the estate or trust in kind or in
315 cash, or partially in kind and partially in cash, in
316 divided or undivided interests, as the fiduciary finds to
317 be most practicable and for the best interests of the
318 distributees; and to determine the value of capital assets
319 for the purpose of making distribution thereof if and
320 when there be more than one distributee thereof, which

321 determination shall be binding upon the distributees
322 unless clearly capricious, erroneous and inequitable:
323 *Provided*, That the fiduciary may not exercise any
324 power under this subdivision unless the fiduciary holds
325 title to or an interest in the property to be distributed
326 and is required or authorized to make distribution
327 thereof.

328 (bb) *Pay to or for minors or incompetents.* — To make
329 payments in money, or in property in lieu of money, to
330 or for a minor or incompetent in any one or more of the
331 following ways:

332 (1) Directly to such minor or incompetent;

333 (2) To apply directly in payment for the support,
334 maintenance, education, and medical, surgical, hospital,
335 or other institutional care of such minor or incompetent;

336 (3) To the legal or natural guardian of such minor or
337 incompetent;

338 (4) To any other person, whether or not appointed
339 guardian of the person by any court, who does, in fact,
340 have the care and custody of the person of such minor
341 or incompetent.

342 The fiduciary is not under any duty to see to the
343 application of the payments so made, if the fiduciary
344 exercised due care in the selection of the person,
345 including the minor or incompetent, to whom such
346 payments were made; and the receipt of such person is
347 full acquittance to the fiduciary.

348 (cc) *Apportion and allocate receipts and expenses.* —
349 Where not otherwise provided by statute to determine:

350 (1) What is principal and what is income of any estate
351 or trust and to allocate or apportion receipts and
352 expenses as between principal and income in the
353 exercise of the fiduciary's discretion, and, by way of
354 illustration and not limitation of the fiduciary's discre-
355 tion, to charge premiums on securities purchased at a
356 premium against principal or income or partly against
357 each;

358 (2) Whether to apply stock dividends and other

359 noncash dividends to income or principal or apportion
360 them as the fiduciary considers advisable; and

361 (3) What expenses, costs, taxes (other than estate,
362 inheritance, and succession taxes and other governmen-
363 tal charges) shall be charged against principal or
364 income or apportioned between principal and income
365 and in what proportions.

366 (dd) *Make contracts and execute instruments.* — To
367 make contracts and to execute instruments, under seal
368 or otherwise, as may be necessary in the exercise of the
369 powers herein granted.

370 (ee) The foregoing powers are limited as follows for
371 any trust which shall be classified as a “private
372 foundation” as that term is defined by section 509 of the
373 Internal Revenue Code of 1954 or corresponding
374 provisions of any subsequent federal tax laws (including
375 each nonexempt charitable trust described in section
376 4947(a)(1) of the code which is treated as a private
377 foundation) or nonexempt split-interest trust described
378 in section 4947(a)(2) of the Internal Revenue Code of
379 1954 or corresponding provisions of any subsequent
380 federal tax laws (but only to the extent that section
381 508(e) of the code is applicable to such nonexempt split-
382 interest trust under section 4947(a)(2)):

383 (1) The fiduciary shall make distributions of such
384 amounts, for each taxable year, at such time and in such
385 manner as not to become subject to the tax imposed by
386 section 4942 of the Internal Revenue Code of 1954, or
387 corresponding provisions of any subsequent federal tax
388 laws;

389 (2) No fiduciary may engage in any act of self-dealing
390 as defined in section 4941(d) of the Internal Revenue
391 Code of 1954, or corresponding provisions of any
392 subsequent federal tax laws;

393 (3) No fiduciary may retain any excess business
394 holdings as defined in section 4943(c) of the Internal
395 Revenue Code of 1954, or corresponding provisions of
396 any subsequent federal tax laws;

397 (4) No fiduciary may make any investments in such

398 manner as to subject the trust to tax under section 4944
399 of the Internal Revenue Code of 1954, or corresponding
400 provisions of any subsequent federal tax laws;

401 (5) No fiduciary may make any taxable expenditures
402 as defined in section 4945(e) of the Internal Revenue
403 Code of 1954, or corresponding provisions of any
404 subsequent federal tax laws.



The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled

[Handwritten Signature]
.....
Chairman Senate Committee

[Handwritten Signature]
.....
Ernest C. Moore
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

[Handwritten Signature]
.....
Clerk of the Senate

[Handwritten Signature]
.....
Clerk of the House of Delegates

[Handwritten Signature]
.....
President of the Senate

[Handwritten Signature]
.....
Speaker of the House of Delegates

The within is approved this the 26th
day of April 1993.

[Handwritten Signature]
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/20/93

Time 10:21 am