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HB 3272

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2007



ENROLLED

House Bill No. 3272

(By Delegates Webster and Amores)



Passed March 10, 2007

In Effect Ninety Days from Passage

FILED

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2007 APR -3 PM 4: 26

H. B. 3272

OFFICE WEST VIRGINIA
SECRETARY OF STATE

(BY DELEGATES WEBSTER AND AMORES)

[Passed March 10, 2007; in effect ninety days from passage.]

AN ACT to the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated § 44B-1-104a, relating to total return unitrusts.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated § 44B-1-104a, to read as follows:

ARTICLE 1. DEFINITIONS AND FIDUCIARY DUTIES.

§44B-1-104a. Total return unitrust.

1 (a) As used in this section:

2 (1) "Disinterested person" means a person who is not a
3 "related or subordinate party", as defined in I. R. C. §672(c)
4 *et seq.*, with respect to the person then acting as trustee of the
5 trust, and excludes the grantor of the trust and any interested
6 trustee.

7 (2) "Income Trust" means a trust, created by either an
8 inter vivos or a testamentary instrument, which directs or
9 permits the trustee to distribute the net income of the trust to
10 one or more persons, either in fixed proportions or in
11 amounts or proportions determined by the trustee, and
12 regardless of whether the trust directs or permits the trustee
13 to distribute the principal of the trust to one or more such
14 persons.

15 (3) "Interested distributee" means a person to whom
16 distributions of income or principal can currently be made
17 who has the power to remove the existing trustee and
18 designate as successor a person who may be a "related or
19 subordinate party" as defined in I. R. C. §672(c) with respect
20 to such distributee.

21 (4)"Interested trustee" means: (i) An individual trustee
22 to whom the net income or principal of the trust can currently
23 be distributed or would be distributed if the trust were then to
24 terminate and be distributed; (ii) any individual trustee who
25 may be removed and replaced by an interested distributee; or
26 (iii) an individual trustee whose legal obligation to support a
27 beneficiary may be satisfied by distributions of income and
28 principal of the trust.

29 (5) "Total return unitrust" means an income trust, which
30 has been converted under and meets the provisions of this
31 section.

32 (6) "Trustee" means all persons acting as trustee of the
33 trust, except where expressly noted otherwise, whether acting
34 in their discretion or at the direction of one or more persons
35 acting in a fiduciary capacity.

36 (7) "Grantor" means an individual who created an inter
37 vivos or a testamentary trust.

38 (8) "Unitrust amount" means an amount computed as a
39 percentage of the fair market value of the trust.

40 (b) A trustee, other than an interested trustee, or where
41 two or more persons are acting as trustee a majority of the
42 trustees who are not an interested trustee, may, in its sole
43 discretion and without judicial approval: (i) Convert an
44 income trust to a total return unitrust; (ii) reconvert a total
45 return unitrust to an income trust; or (iii) change the
46 percentage used to calculate the unitrust amount or the
47 method used to determine the fair market value of the trust if:

48 (1) The trustee adopts a written policy for the trust
49 providing: (i) In the case of a trust being administered as an
50 income trust, that future distributions from the trust will be
51 unitrust amounts rather than net income; (ii) in the case of a
52 trust being administered as a total return unitrust, that future
53 distributions from the trust will be net income rather than
54 unitrust amounts; or (iii) that the percentage used to calculate
55 the unitrust amount or the method used to determine the fair
56 market value of the trust will be changed as stated in the
57 policy; and

58 (2) The trustee sends written notice of its intention to take
59 such action, along with copies of such written policy and this
60 section, to: (i) The grantor of the trust, if living; (ii) all living
61 persons who are currently receiving or eligible to receive
62 distributions of income of the trust; (iii) all living persons
63 who would receive principal of the trust if the trust were to
64 terminate at the time of the giving of such notice, without
65 regard to the exercise of any power of appointment, or, if the
66 trust does not provide for its termination, all living persons
67 who would receive or be eligible to receive distributions of
68 income or principal of the trust if the persons identified in
69 clause (ii) of this subdivision (2) were deceased; and (iv) all
70 persons acting as advisor or protector of the trust; and at least
71 one person receiving notice under each of clauses (ii) and (iii)
72 of subdivision (2) is legally competent.

73 (A) Notice of the proposed action need not be given to
74 any person who consents in writing to the proposed action.
75 The consent may be executed at any time before or after the
76 proposed action is taken.

77 (B) The notice of the proposed action shall state that it is
78 given pursuant to this section and shall state all of the
79 following:

80 (i) The name and mailing address of the trustee;

81 (ii) The name and telephone number of a person who may
82 be contacted for additional information;

83 (iii) A description of the action proposed to be taken and
84 an explanation of the reasons for the action;

85 (iv) The time within which objections to the proposed
86 action can be made, which shall be at least thirty days from
87 the mailing of the notice of proposed action; and

88 (v) The date on or after which the proposed action may
89 be taken or is effective.

90 (C) A beneficiary may object to the proposed action by
91 mailing a written objection to the trustee at the address stated
92 in the notice of proposed action within the time period
93 specified in the notice of proposed action.

94 (D) A trustee is not liable to a beneficiary for an action
95 regarding a matter governed by this chapter if the trustee does
96 not receive a written objection to the proposed action from
97 the beneficiary within the applicable period and the other
98 requirements of this section are satisfied. If no beneficiary
99 entitled to notice objects under this section, the trustee is not
100 liable to any current or future beneficiary with respect to the
101 proposed action.

102 (c) If there is no trustee of the trust other than an
103 interested trustee, the interested trustee or, where two or more
104 persons are acting as trustee and are interested trustees, a
105 majority of such interested trustees may, in its sole discretion
106 and without judicial approval: (i) Convert an income trust to
107 a total return unitrust; (ii) reconvert a total return unitrust to
108 an income trust; or (iii) change the percentage used to

109 calculate the unitrust amount or the method used to determine
110 the fair market value of the trust if:

111 (1) The trustee adopts a written policy for the trust
112 providing: (i) In the case of a trust being administered as an
113 income trust, that future distributions from the trust will be
114 unitrust amounts rather than net income; (ii) in the case of a
115 trust being administered as a total return unitrust, that future
116 distributions from the trust will be net income rather than
117 unitrust amounts; or (iii) that the percentage used to calculate
118 the unitrust amount or the method used to determine the fair
119 market value of the trust will be changed as stated in the
120 policy;

121 (2) The trustee appoints a disinterested person who, in its
122 sole discretion but acting in a fiduciary capacity, determines
123 for the trustee: (i) The percentage to be used to calculate the
124 unitrust amount; (ii) the method to be used in determining the
125 fair market value of the trust; and (iii) which assets, if any,
126 are to be excluded in determining the unitrust amount;

127 (3) The trustee sends written notice of its intention to take
128 such action, along with copies of such written policy and this
129 section, to: (i) The grantor of the trust, if living; (ii) all living
130 persons who are currently receiving or eligible to receive
131 distributions of income of the trust; (iii) all living persons
132 who would receive principal of the trust if the trust were to
133 terminate at the time of the giving of such notice, without
134 regard to the exercise of any power of appointment, or, if the
135 trust does not provide for its termination, all living persons
136 who would receive or be eligible to receive distributions of
137 income or principal of the trust if the persons identified in
138 clause (ii) of subdivision (2) of this section were deceased;
139 and (iv) all persons acting as advisor or protector of the trust;
140 and at least one person receiving notice under each of clauses
141 (ii) and (iii) of subdivision (2) of this section is legally
142 competent.

143 (A) Notice of the proposed action need not be given to
144 any person who consents in writing to the proposed action.

145 The consent may be executed at any time before or after the
146 proposed action is taken.

147 (B) The notice of the proposed action shall state that it is
148 given pursuant to this section and shall state all of the
149 following:

150 (i) The name and mailing address of the trustee;

151 (ii) The name and telephone number of a person who may
152 be contacted for additional information;

153 (iii) A description of the action proposed to be taken and
154 an explanation of the reasons for the action;

155 (iv) The time within which objections to the proposed
156 action can be made, which shall be at least thirty days from
157 the mailing of the notice of proposed action; and

158 (v) The date on or after which the proposed action may
159 be taken or is effective.

160 (C) A beneficiary may object to the proposed action by
161 mailing a written objection to the trustee at the address stated
162 in the notice of proposed action within the time period
163 specified in the notice of proposed action.

164 (D) A trustee is not liable to a beneficiary for an action
165 regarding a matter governed by this chapter if the trustee does
166 not receive a written objection to the proposed action from
167 the beneficiary within the applicable period and the other
168 requirements of this section are satisfied. If no beneficiary
169 entitled to notice objects under this section, the trustee is not
170 liable to any current or future beneficiary with respect to the
171 proposed action.

172 (d) If any trustee desires to convert an income trust to a
173 total return unitrust, reconvert a total return unitrust to an
174 income trust or change the percentage used to calculate the
175 unitrust amount or the method used to determine the fair

176 market value of the trust but does not have the ability to or
177 elects not to do it under the provisions of subsections (b) or
178 (c) of this section, the trustee may petition the circuit court of
179 the county in which the trustee or beneficiary resides, or if
180 the trustee is a corporate trustee and there is no resident
181 beneficiary, the circuit court of the county where the trust
182 account is administered, for such order as the trustee deems
183 appropriate. In the event, however, there is only one trustee
184 of the trust and the trustee is an interested trustee or in the
185 event there are two or more trustees of the trust and a
186 majority of them are interested trustees, the court, in its own
187 discretion or on the petition of such trustee or trustees or any
188 person interested in the trust, may appoint a disinterested
189 person who, acting in a fiduciary capacity, shall present such
190 information to the court as shall be necessary to enable the
191 court to make its determinations hereunder.

192 (e) The fair market value of the trust shall be determined
193 at least annually, using a valuation date or dates or averages
194 of valuation dates as are deemed appropriate. Assets for
195 which a fair market value cannot be readily ascertained shall
196 be valued using the valuation methods as are deemed
197 reasonable and appropriate. Assets may be excluded from
198 valuation, provided all income received with respect to the
199 assets is distributed to the extent distributable in accordance
200 with the terms of the governing instrument.

201 (f) The percentage to be used in determining the unitrust
202 amount shall be a reasonable current return from the trust, in
203 any event no less than three percent nor more than five
204 percent, taking into account the intentions of the grantor of
205 the trust as expressed in the governing instrument, the needs
206 of the beneficiaries, general economic conditions, projected
207 current earnings and appreciation for the trust and projected
208 inflation and its impact on the trust.

209 (g) Following the conversion of an income trust to a total
210 return unitrust, the trustee:

211 (1) Shall consider the unitrust amount as paid from net
212 accounting income determined as if the trust were not a
213 unitrust;

214 (2) Shall then consider the unitrust amount as paid from
215 ordinary income not allocable to net accounting income;

216 (3) After calculating the trust's capital gain net income
217 described in I. R. C. §1222(9), 26 U. S. C. §1222(9), may
218 consider the unitrust amount as paid from net short-term
219 capital gain described in I. R. C. §1222(5), 26 U. S. C.
220 §1222(5) and then from net long-term capital gain described
221 in I. R. C. §1222(7), 26 U. S. C. §1222(7); and

222 (4) Shall then consider the unitrust amount as coming
223 from the principal of the trust.

224 (h) In administering a total return unitrust, the trustee
225 may, in its sole discretion but subject to the provisions of the
226 governing instrument, determine: (i) The effective date of the
227 conversion; (ii) the timing of distributions, including
228 provisions for prorating a distribution for a short year in
229 which a beneficiary's right to payments commences or
230 ceases; (iii) whether distributions are to be made in cash or in
231 kind or partly in cash and partly in kind; (iv) if the trust is
232 reconverted to an income trust, the effective date of such
233 reconversion; and (v) such other administrative matters as
234 may be necessary or appropriate to carry out the purposes of
235 this section.

236 (i) In the case of a trust for which a marital deduction has
237 been taken for federal tax purposes under I. R. C. §2056 or
238 §2523, 26 U. S. C. §2056 or §2523, the spouse otherwise
239 entitled to receive the net income of the trust shall have the
240 right, by written instrument delivered to the trustee, to
241 compel the reconversion during his or her lifetime of the trust
242 from a total return unitrust to an income trust,
243 notwithstanding anything in this section to the contrary.

244 (j) Conversion to a total return unitrust under the
245 provisions of this section shall not affect any other provision
246 of the governing instrument, if any, regarding distributions of
247 principal.

248 (k) This section shall be construed as pertaining to the
249 administration of a trust and shall be available to any trust
250 that is administered under West Virginia law unless:

251 (1) The governing instrument reflects an intention that the
252 current beneficiary or beneficiaries are to receive an amount
253 other than a reasonable current return from the trust;

254 (2) The trust is a trust described in I. R. C. §170(f)(2)(B)
255 or I. R. C. §664 (d); or

256 (3) The governing instrument expressly prohibits use of
257 this section by specific reference to this section or expressly
258 reflects the grantor's intent that net income not be calculated
259 as a unitrust amount.

260 (l) Any trustee or disinterested person who in good faith
261 takes or fails to take any action under this section shall not be
262 liable to any person affected by the action or inaction,
263 regardless of whether such person received written notice as
264 provided in this section and regardless of whether the person
265 was under a legal disability at the time of the delivery of the
266 notice. The person's exclusive remedy shall be to obtain an
267 order of the court directing the trustee to convert an income
268 trust to a total return unitrust, to reconvert from a total return
269 unitrust to an income trust or to change the percentage used
270 to calculate the unitrust amount.

271 (m) The following provisions shall apply to a trust that,
272 by its governing instrument, requires or permits the
273 distribution, at least annually, of a unitrust amount equal to
274 a fixed percentage of not less than three nor more than five
275 percent per year of the fair market value of the trust's assets,
276 valued at least annually, the trust to be referred to in this
277 section as an "express total return unitrust."

278 (1) The unitrust amount for an express total return
279 unitrust may be determined by reference to the fair market
280 value of the trust's assets in one year or more than one year.

281 (2) Distribution of a fixed percentage unitrust amount is
282 considered a distribution of all of the income of the express
283 total return unitrust.

284 (3) An express total return unitrust may or may not
285 provide a mechanism for changing the unitrust percentage
286 similar to the mechanism provided under this section, based
287 upon the factors noted therein, and may or may not provide
288 for a conversion from a unitrust to an income trust and/or a
289 reconversion of an income trust to a unitrust similar to the
290 mechanism under this section.

291 (4) If an express total return unitrust does not specifically
292 or by reference to this section deny a power to change the
293 unitrust percentage or to convert to an income trust, then the
294 trustee shall have such power.

295 (5) The distribution of a fixed percentage of not less than
296 three percent nor more than five percent reasonably
297 apportions the total return of an express total return unitrust.

298 (6) The trust instrument may grant discretion to the
299 trustee to adopt a consistent practice of treating capital gains
300 as part of the unitrust distribution, to the extent that the
301 unitrust distribution exceeds the net accounting income, or it
302 may specify the ordering of such classes of income.

303 (7) Unless the terms of the trust specifically provide
304 otherwise, a distribution of the unitrust amount from an
305 express total return unitrust shall be considered to have been
306 made from the following sources in order of priority:

307 (A) From net accounting income determined as if the
308 trust were not a unitrust;

309 (B) From ordinary income not allocable to net accounting
310 income;

311 (C) After calculating the trust's capital gain net income as
312 described in Internal Revenue Code 26 U. S. C. §1, et seq.
313 §1222(9), 26 U. S. C. §1222(9), from net realized short-term
314 capital gain as described in I. R. C. §1222(5), 26 U. S. C. §
315 1222(5) and then from net realized long-term capital gain
316 described in I. R. C. §1222(7), 26 U. S. C. §1222(7); and

317 (D) From the principal of the trust.

318 (8) The trust instrument may provide that:

319 (A) Assets for which a fair market value cannot be
320 readily ascertained shall be valued using such valuation
321 methods as are deemed reasonable and appropriate; and

322 (B) Assets used by a trust beneficiary, such as a residence
323 property or tangible personal property, may be excluded from
324 the net fair market value for computing the unitrust amount.

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




Chairman Senate Committee



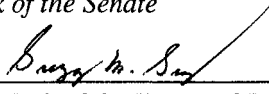
Chairman House Committee

Originating in the House.

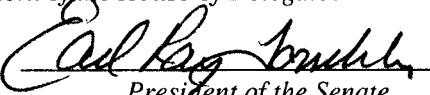
In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates



President of the Senate



Speaker of the House of Delegates

The within is approved this the 3rd
day of April, 2007.



Governor

PRESENTED TO THE
GOVERNOR

MAR 26 2007

Time

4:10 pm