

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 493

BY SENATOR TRUMP

[Introduced February 3, 2016;

Referred to the Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto three new
 2 sections, designated §44D-5-503a, §44D-5-503b and §44D-5-503c; and to amend and
 3 reenact §44D-5-505 of said code, all relating to allowing the creation of self-settled
 4 spendthrift trusts.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto three
 2 new sections, designated §44D-5-503a, §44D-5-503b and §44D-5-503c; and that §44D-5-505 of
 3 said code be amended and reenacted, all to read as follows:

ARTICLE 5. CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS.

§44D-5-503a. Self-settled spendthrift trusts.

1 (a) A grantor may transfer assets to a qualified self-settled spendthrift trust and retain in
 2 that trust a qualified interest, and, except as otherwise provided in this article, the provisions of
 3 section five hundred five of article five of this chapter [44D-5-505] do not apply to such qualified
 4 interest.

5 (b)The provisions of section five hundred five of article five of this chapter shall continue
 6 to apply with respect to any interest held by a grantor in a qualified self-settled spendthrift trust,
 7 other than a qualified interest.

8 (c) A grantor’s transfer to a qualified self-settled spendthrift trust shall not, to the extent of
 9 the grantor’s qualified interest, be deemed to have been made with intent to delay, hinder, or
 10 defraud creditors, for purposes of article one-a of chapter forty of this code [West Virginia Uniform
 11 Fraudulent Conveyances Act, §40-1A-1, et seq.] merely because it is made to a trust with respect
 12 to which the grantor retains a qualified interest and merely because it is made without
 13 consideration. A grantor’s transfer to a qualified self-settled spendthrift trust may, however, be set
 14 aside under article one-a of chapter forty of this code on other bases, such as if the transfer
 15 renders the grantor insolvent. It is provided, however, that any transfer made to a qualified self-
 16 settled spendthrift trust which may be set aside under article one-a of chapter forty of this code

17 shall be chargeable first with the entire costs and expenses, including attorney's fees, properly
18 incurred by the trustee in the defense of the action or proceeding to set aside the transfer.

19 (d) A grantor's creditor may bring an action under article one-a of chapter forty of the code
20 to avoid a transfer to a qualified self-settled spendthrift trust or otherwise to enforce a claim that
21 existed on the date of the grantor's transfer to such trust within four years after the date of the
22 grantor's transfer to such trust to which such claim relates.

23 (e) A creditor shall have only such rights with respect to a grantor's transfer to a qualified
24 self-settled spendthrift trust as are provided in this section. No creditor and no other person has
25 any claim or cause of action against any trustee, trust adviser, trust director, or any person
26 involved in the counseling, drafting, preparation, or execution of, or transfers to, a qualified self-
27 settled spendthrift trust.

28 (f) If a grantor makes more than one transfer to the same qualified self-settled spendthrift
29 trust, the following rules apply:

30 (1) The grantor's making of a subsequent transfer shall be disregarded in determining a
31 creditor's claim with respect to a prior transfer is valid under this section;

32 (2) With respect to each subsequent transfer by the grantor, the four-year limitations
33 period provided in subsection (d), with respect to actions brought under article one-a of chapter
34 forty of this code with respect to the subsequent transfer, commences on the date of such
35 subsequent transfer; and

36 (3) Any distribution to a beneficiary is deemed to have been made from the latest such
37 transfer.

38 (g) The movement to this state of the administration of an existing trust, which, after such
39 movement to the state, meets for the first time all of the requirements of a qualified self-settled
40 spendthrift trust, shall be treated, for purposes of this section, as a transfer to this trust by the
41 grantor on the date of such movement of all of the assets previously transferred to the trust by
42 the grantor.

§44D-5-503b. Definitions.

1 As used in this article, unless the context requires a different meaning:

2 (a) "Independent qualified trustee" means a qualified trustee who is not, and whose actions
3 are not, subject to direction by:

4 (1) The grantor;

5 (2) Any natural person who is not a resident of the state;

6 (3) Any entity that is not authorized to engage in trust business within the state;

7 (4) The grantor's spouse;

8 (5) A parent of the grantor;

9 (6) Any descendant of the grantor; or

10 (7) A sibling of the grantor.

11 (b) "Qualified interest" means a grantor's interest in a qualified self-settled spendthrift trust,
12 to the extent that such interest entitles the grantor to receive distributions of income, principal, or
13 both, in the sole discretion of an independent qualified trustee. A grantor may have a qualified
14 interest in a qualified self-settled spendthrift trust and also have an interest in the same trust that
15 is not a qualified interest, and the rules of section five hundred five of article five of this chapter
16 shall apply to each interest of the grantor in the same trust other than the grantor's qualified
17 interest.

18 (c) "Qualified self-settled spendthrift trust" means a trust if:

19 (1) The trust is irrevocable;

20 (2) The trust is created during the grantor's lifetime;

21 (3) There is, at all times when distributions could be made to the grantor pursuant to the
22 grantor's qualified interest, at least one beneficiary other than the grantor: (i) To whom income
23 may be distributed, if the grantor's qualified interest relates to trust income; (ii) to whom principal
24 may be distributed, if the grantor's qualified interest relates to trust principal; or (iii) to whom both
25 income and principal may be distributed, if the grantor's qualified interest relates to both trust

26 income and principal;

27 (4) The trust has at all times at least one qualified trustee, who may be, but need not be,
28 an independent qualified trustee;

29 (5) The trust instrument expressly incorporates the laws of this state to govern the validity,
30 construction and administration of the trust;

31 (6) The trust instrument includes a spendthrift provision, as defined in section five hundred
32 two of article five of this chapter [44D-5-505] that restrains both voluntary and involuntary transfer
33 of the grantor's qualified interest;

34 (7) The grantor does not have the right to disapprove distributions from the trust; and

35 (8) The grantor duly executes a qualified affidavit before or substantially
36 contemporaneously with the making of the transfer of the asset or assets into the trust.

37 (d) "Qualified trustee" means any person who is a natural person residing within the state
38 or a legal entity authorized to engage in trust business within the state and who maintains or
39 arranges for custody within the state of some or all of the property that has been transferred to
40 the trust by the grantor, maintains records within the state for the trust on an exclusive or
41 nonexclusive basis, prepares or arranges for the preparation within the state of fiduciary income
42 tax returns for the trust, or otherwise materially participates within the state in the administration
43 of the trust. A trustee is not a qualified trustee if such trustee's authority to make distributions of
44 income or principal or both are subject to the direction of someone who, were that person a trustee
45 of the trust, would not meet the requirements to be a qualified trustee.

46 (e) "Qualified affidavit" means a duly executed affidavit of the grantor which contains under
47 oath all of the following statements, or statements substantially to the effect:

48 (1) The property being transferred to the trust was not derived from unlawful activities;

49 (2) The grantor has full right, title, and authority to transfer the property to the trust;

50 (3) The grantor will not be rendered insolvent immediately after the transfer of the property
51 to the trust;

52 (4) The grantor does not intend to defraud any creditor by transferring the property to the
53 trust;

54 (5) There are no pending or threatened court actions against the grantor, except for any
55 court action expressly identified in the affidavit or an attachment to the affidavit;

56 (6) The grantor is not involved in any administrative proceeding, except for any proceeding
57 expressly identified in the affidavit or an attachment to the affidavit; and

58 (7) The grantor does not contemplate at the time of the transfer the filing for relief under
59 the Bankruptcy Code of the United States.

60 An affidavit is defective and is not a qualified affidavit if it materially fails to meet the
61 requirements set forth in this subsection. An affidavit is not considered defective and is a qualified
62 affidavit if it contains any nonsubstantive variances from the language set forth in this subsection,
63 it contains statements or representations in addition to those required in this subsection which do
64 not materially contradict the required statements or representations or there are any technical
65 errors in the form, substance or method of preparation or execution of the affidavit if those errors
66 were not the fault of the affiant and the affiant reasonably relied upon another person to prepare
67 or notarize the affidavit.

§44D-5-503c. Vacancies; revocability of trust; right to withdraw.

1 (a) A vacancy in the position of qualified trustee that occurs for any reason, whether or not
2 there is then serving another trustee, shall be filled in the following order of priority:

3 (1) By a person eligible to be a qualified trustee and who is designated pursuant to the
4 terms of the trust to act as successor trustee;

5 (2) By a person eligible to be a qualified trustee and who is designated by unanimous
6 agreement of the qualified beneficiaries; or

7 (3) By a person eligible to be a qualified trustee and who is appointed by the court pursuant
8 to any of the provisions of article seven of this chapter.

9 (b) A vacancy in the position of independent qualified trustee that occurs for any reason,

10 whether or not there is then serving another trustee, shall be filled in the following order of priority:

11 (1) By a person eligible to be an independent qualified trustee and who is designated
12 pursuant to the terms of the trust to act as successor trustee; or

13 (2) By a person eligible to be an independent qualified trustee and who is designated by
14 unanimous agreement of the qualified beneficiaries; or

15 (3) By a person eligible to be an independent qualified trustee and who is appointed by
16 the court pursuant to any of the provisions of article seven of this chapter.

17 (c) A trust instrument shall not be deemed revocable on account of the inclusion of any
18 one or more of the following rights, powers, and interests:

19 (1) A power of appointment, exercisable by the grantor by will or other written instrument
20 effective only upon the grantor's death, other than a power to appoint to the grantor's estate or
21 the creditors of the grantor's estate;

22 (2) The grantor's qualified interest in the trust;

23 (3) The grantor's right to receive income or principal pursuant to an ascertainable
24 standard;

25 (4) The grantor's potential or actual receipt of income or principal from a charitable
26 remainder unitrust or charitable remainder annuity trust (each within the meaning of § 664(d) of
27 the Internal Revenue Code) and the grantor's right, at any time, and from time to time, to release,
28 in writing delivered to the qualified trustee, all or any part of the grantor's retained interest in such
29 trust;

30 (5) The grantor's receipt each year of a percentage, not to exceed five percent, specified
31 in the trust instrument of the initial value of the trust assets or their value determined from time to
32 time pursuant to the trust instrument;

33 (6) The grantor's right to remove a trustee and to appoint a new trustee;

34 (7) The grantor's potential or actual use of real property held under a personal residence
35 trust (within the meaning of Section 2702(c) of the Internal Revenue Code);

36 (8) The grantor's potential or actual receipt or use of a qualified annuity interest (within the
37 meaning of Section 2702 of the Internal Revenue Code);

38 (9) The ability of a qualified trustee, whether pursuant to discretion or direction, to pay,
39 after the grantor's death, all or any part of the grantor's debts outstanding at the time of the
40 grantor's death, the expenses of administering the grantor's estate, or any federal or state estate,
41 inheritance, or death tax imposed on or with respect to the grantor's estate; and

42 (10)A grantor's potential or actual receipt of income or principal to pay, in whole or in part,
43 income taxes due on trust income, or the direct payment of such taxes to the applicable tax
44 authorities, pursuant to a provision in the trust instrument that expressly provides for the direct
45 payment of such taxes or the reimbursement of the grantor for such tax payments.

46 (d) A beneficiary who has the right to withdraw his or her entire beneficial interest in a trust
47 shall be treated as its grantor to the extent of such withdrawal right, when such right to withdraw
48 has lapsed, been released, or otherwise expired, without regard to the limitations otherwise
49 imposed by subsection (b) of section five hundred five of article five of this chapter.

§44D-5-505. Creditor's claim against grantor.

1 (a) Whether or not the terms of a trust instrument contain a spendthrift provision, the
2 following rules apply:

3 (1) During the lifetime of the grantor, the property of a revocable trust is subject to claims
4 of the grantor's creditors, except to the extent otherwise provided in sections five hundred three-
5 a, five hundred three-b and five hundred three-c of this article.

6 (2) During the lifetime of the grantor, with respect to an irrevocable trust, a creditor or
7 assignee of the grantor may reach the maximum amount that can be distributed to or for the
8 grantor's benefit. If a trust has more than one grantor, the amount the creditor or assignee of a
9 particular grantor may reach may not exceed the grantor's interest in the portion of the trust
10 attributable to that grantor's contribution.

11 (3) After the death of a grantor, and subject to the grantor's right to direct the source from

12 which liabilities will be paid, the property of a trust that was revocable at the grantor's death is
13 subject to claims of, to the extent the grantor's probate estate is inadequate to satisfy them:

14 (A) The costs and expenses of administration of the grantor's estate;

15 (B) Reasonable funeral expenses;

16 (C) Debts and taxes with preference under federal law;

17 (D) Unpaid child support which is due and owing at the time of the decedent's death;

18 (E) Debts and taxes with preference under other laws of the State of West Virginia;

19 (F) Reasonable and necessary medical and hospital expenses of the last illness of the
20 decedent, including compensation for persons attending the decedent during his or her last
21 illness; and

22 (G) All other claims.

23 (b) For purposes of this section:

24 (1) During the period the power may be exercised, the holder of a power of withdrawal is
25 treated in the same manner as the grantor of a revocable trust to the extent of the property subject
26 to the power; and

27 (2) Upon the lapse, release or waiver of the power, the holder is treated as the grantor of
28 the trust only to the extent the value of the property affected by the lapse, release or waiver
29 exceeds the greater of the amount specified in Section 2041(b)(2), Section 2503(b) or Section
30 2514(e) of the Internal Revenue Code.

NOTE: The purpose of this bill is to allow a West Virginia grantor to create and transfer his or her own assets to a West Virginia trust which is protected by a spendthrift clause (called a "Self-Settled Spendthrift Trust" or a "Domestic Asset Protection Trust"). Sixteen (16) states now fully allow Domestic Asset Protection Trusts by statute. The bill is modeled primarily after provisions from the Virginia Code (Virginia Code Ann. §§ 64.2-745.1, 64.745.2) and to a lesser extent with provisions from the Ohio Legacy Trust Act (Ohio Revised Code § 5816.01, et seq.).

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.