

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 581

BY SENATORS TRUMP, WOELFEL AND PLYMALE

[Originating in the Committee on the Judiciary;

reported on March 15, 2017]

1 A BILL to amend and reenact §38-1-13 of the Code of West Virginia, 1931, as amended; to amend
2 and reenact §44D-1-103 of said code; to amend said code by adding thereto a new
3 section, designated §44D-1-113; to amend and reenact §44D-4-405 and §44D-4-414 of
4 said code; to amend and reenact §44D-5-503b and §44D-5-505 of said code; to amend
5 and reenact §44D-6-604 of said code; and to amend and reenact §44D-8-813 and §44D-
6 8-817 of said code, all relating generally to trusts and their administration; eliminating
7 requirement to give notice to trustee of substitution under certain circumstances; modifying
8 definitions; establishing insurable interest of a trustee; clarifying scope of provisions
9 regarding trust established for charitable purposes; increasing amount of noncharitable
10 trust property to modify or terminate trust without court approval; requiring self-settled
11 spendthrift trust have one independent qualified trustee; adding reference to exceptions
12 for self-settled spendthrift trusts to provision allowing creditor or assignee to reach amount
13 distributed for grantor's benefit from irrevocable trust; removing reference to exceptions
14 for self-settled spendthrift trusts to provisions allowing creditor or assignee to reach
15 amount distributed for grantor's benefit from revocable trusts; changing references from
16 beneficiary to interested person in limitation on actions to contest validity of revocable
17 trust; modifying duties of trustee to inform and report to beneficiaries; granting trustee
18 authority and requiring trustee to wind up administration of trust upon its termination; and
19 making technical changes.

Be it enacted by the Legislature of West Virginia:

1 That §38-1-13 of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted; that §44D-1-103 of said code be amended and reenacted; that said code be amended
3 by adding thereto a new section, designated §44D-1-113; that §44D-4-405 and §44D-4-414 of
4 said code be amended and reenacted; that §44D-5-503b and §44D-5-505 of said code be
5 amended and reenacted; that §44D-6-604 of said code be amended and reenacted; and that
6 §44D-8-813 and §44D-8-817 of said code be amended and reenacted, all to read as follows:

CHAPTER 38. LIENS.

ARTICLE 1. VENDOR'S AND TRUST DEED LIENS.

§38-1-13. Substitution of trustees under a trust deed securing a debt.

1 (a) When a trust deed to secure a debt or obligation does not by its terms prescribe a
2 method for substitution, the party secured by the trust deed, or any surety indemnified by the
3 deed, or the assignee or personal representative of any secured party or surety may, if there is a
4 death, removal, declination, resignation, refusal or inability of the original trustee or trustees
5 named in the instrument, substitute a trustee or trustees in his or her, or its place by a writing duly
6 signed and acknowledged and recorded in the office of the clerk of the county commission where
7 the real estate covered by the trust deed is situate.

8 (b) When a substitution is made under this section of a trustee or trustees of a trust deed
9 securing a debt or obligation, the substitution is effected when the party secured, or a surety
10 indemnified by the deed, or the assignee or personal representative of any such secured party or
11 surety has deposited true copies of the notice of the substitution in the United States mail, first
12 class postage prepaid, addressed to the last known addresses of the grantor or grantors or any
13 other person owing the debt or obligation, and has presented the original of the notice to the clerk
14 of the county commission in whose office the trust deed is recorded, causing the notice to be
15 recorded and indexed in a general lien book or other appropriate book in which trust deeds or
16 assignments of trust deeds are recorded. There shall be appended to the notice presented for
17 recording a certificate by the party making the substitution, certifying that copies of the notice
18 were mailed as required by this subsection and showing the date of the mailing.

19 ~~(c) It is not necessary to give notice under this section to a trustee who has removed from~~
20 ~~the state, declined to accept the trust, refused to act as trustee, or has resigned, or to the personal~~
21 ~~representative of one who has died.~~

CHAPTER 44D. UNIFORM TRUST CODE.

ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.

§44D-1-103. Definitions.

1 In this chapter:

2 (a) "Action", with respect to an act of a trustee, includes a failure to act.

3 (b) "Ascertainable standard" means a standard relating to an individual's health,
4 education, support or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of
5 the Internal Revenue Code.

6 (c) "Beneficiary" means a person that:

7 (1) Has a present or future beneficial interest in a trust, vested or contingent;

8 (2) In a capacity other than that of trustee, holds a power of appointment over trust
9 property; or

10 (3) A charitable organization that is expressly designated in the terms of the trust
11 instrument to receive distributions.

12 (d) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose
13 described in subsection (a), section four hundred five, article four of this chapter.

14 (e) "Conservator" means a person appointed by the court to administer the estate and
15 financial affairs of a protected person.

16 (f) "Court" means a court of this state having proper jurisdiction under section two hundred
17 three, article two of this chapter, and venue under section two hundred four of said article.

18 (g) "Current beneficiary" means a beneficiary that, on the date the beneficiary's
19 qualification is determined, is a distributee or permissible distributee of trust income or principal.

20 (h) "Environmental law" means a federal, state or local law, rule, regulation or ordinance
21 relating to protection of the environment.

22 (i) "Grantor" means a person, including a testator, who creates, or contributes property to
23 a trust. If more than one person creates or contributes property to a trust, each person is a grantor
24 of the portion of the trust property attributable to that person's contribution except to the extent
25 another person has the power to revoke or withdraw that portion.

26 (j) "Guardian" means a person appointed by the court who is responsible for the personal
27 affairs of a protected person or a parent to make decisions regarding the support, care, education,
28 health and welfare of a minor. The term does not include a guardian ad litem.

29 (k) "Interested person" means heirs, devisees, children, spouses, creditors, beneficiaries
30 and any others having a property right in or claim against a trust or the property in a trust. It also
31 includes persons having priority for appointment as personal representative and other fiduciaries
32 representing interested persons. The meaning as it relates to particular persons may vary from
33 time to time and must be determined according to the particular purposes of, and matter involved
34 in, any proceeding.

35 (l) "Interests of the beneficiaries" means the beneficial interests provided in the terms of
36 the trust.

37 (m) "Internal Revenue Code" or "Internal Revenue Code of 1986" ~~means the Internal~~
38 ~~Revenue Code of 1986 codified in 26 U.S.C. 1 et seq., as amended and in effect on January 1,~~
39 ~~2014~~ has the same meaning as when used in a comparable context in the laws of the United
40 States then in effect relating to income, estate, generation-skipping transfer and other taxes
41 including all amendments made to the laws of the United States and amendments which have
42 been adopted and incorporated into West Virginia law by the West Virginia Legislature in section
43 nine, article twenty-one, chapter eleven of this code.

44 (n) "Jurisdiction" with respect to a geographic area, includes a state or country.

45 (o) "Person" means an individual, corporation, business trust, estate, trust, partnership,
46 limited liability company, association, joint venture, unincorporated nonprofit association,

47 charitable organization, government, governmental subdivision, agency or instrumentality, public
48 corporation or any other legal or commercial entity.

49 (p) "Power of withdrawal" means a presently exercisable general power of appointment
50 other than a power:

51 (1) Exercisable by a trustee and limited by an ascertainable standard; or

52 (2) Exercisable by another person only upon consent of the trustee or a person holding an
53 adverse interest.

54 (q) "Property" means anything that may be the subject of ownership, whether real or
55 personal, legal or equitable or any interest therein.

56 (r) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's
57 qualification is determined:

58 (1) Is a distributee or permissible distributee of trust income or principal;

59 (2) Would be a distributee or permissible distributee of trust income or principal if the
60 interests of the distributees described in paragraph (A1) of this subdivision terminated on that
61 date without causing the trust to terminate; or

62 (3) Would be a ~~distributes~~ distributee or permissible ~~distributes~~ distributee of trust income
63 or principal if the trust terminated on that date.

64 (s) "Revocable", as applied to a trust, means revocable by the grantor without the consent
65 of the trustee or a person holding an adverse interest.

66 (t) "Spendthrift provision" means a term of a trust which restrains both voluntary and
67 involuntary transfer of a beneficiary's interest.

68 (u) "State" means a state of the United States, the District of Columbia, Puerto Rico, the
69 United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the
70 United States. The term includes an Indian tribe or band recognized by federal law or formally
71 acknowledged by a state.

72 (v) "Terms of a trust" means the manifestation of the grantor's intent regarding a trust's
73 provisions as expressed in the trust instrument or as may be established by other evidence that
74 would be admissible in a judicial proceeding.

75 (w) "Trust instrument" means a writing, including a will, executed by the grantor that
76 contains terms of the trust, including any amendments thereto.

77 (x) "Trustee" includes an original, additional, successor trustee and a cotrustee.

78 (y) "Writing" or "written instrument" does not include an electronic record or electronic
79 signature as provided in chapter thirty-nine-a of this code.

§44D-1-113. Insurable interest of trustee.

1 (a) A trustee of a trust has an insurable interest in the life of an individual insured under a
2 life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that
3 designates the trust itself as the owner if, on the date the policy is issued:

4 (1) The insured is:

5 (A) A grantor of the trust; or

6 (B) An individual in whom a grantor of the trust has, or would have had if living at the time
7 the policy was issued, an insurable interest as provided by the provisions of section two, article
8 six, chapter thirty-three of this code; and

9 (2) The life insurance proceeds are primarily for the benefit of one or more trust
10 beneficiaries that have an insurable interest in the life of the insured as provided by the provisions
11 of section two, article six, chapter thirty-three of this code.

12 (b) For purposes of this section, the term "grantor" means a person that executes a trust
13 instrument. The term includes a person for which a fiduciary or agent is acting.

ARTICLE 4. CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST.

§44D-4-405. Charitable purposes; enforcement.

1 (a) A charitable trust may be created for the relief of poverty, the advancement of
2 education or religion, the promotion of health, governmental or municipal purposes or other
3 purposes the achievement of which is beneficial to the community.

4 (b) If the terms of a charitable trust do not indicate a particular charitable purpose or
5 beneficiary, upon petition by the trustee or a person having a special interest in the trust, the court
6 may select one or more charitable purposes or beneficiaries. The selection must be consistent
7 with the grantor's intention to the extent it can be ascertained.

8 (c) The grantor of a charitable trust, trustee or a person having a special interest in the
9 trust, may maintain a proceeding to enforce the trust.

10 (d) This section is not intended to override the provisions of section four, article one,
11 chapter thirty-five of this code or section two, article two of said chapter, concerning conveyances,
12 devises, dedications, gifts or bequests to religious organizations, and to the extent there is a
13 conflict with ~~that~~ those sections, this section controls.

§44D-4-414. Modification or termination of uneconomic trust.

1 (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of a
2 noncharitable trust property having a total value less than ~~\$100,000~~ \$200,000 may terminate the
3 trust, without the necessity of court approval, if the trustee concludes that the value of the trust
4 property is insufficient to justify the cost of administration.

5 (b) The court may modify or terminate a trust or remove the trustee and appoint a different
6 trustee if it determines that the value of the trust property is insufficient to justify the cost of
7 administration.

8 (c) Upon termination of a trust under this section, the trustee shall distribute the trust
9 property in a manner consistent with the purposes of the trust.

10 (d) This section does not apply to an easement for conservation or preservation.

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

§44D-5-503b. Definitions.

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

12 (a) “Qualified trustee” means any person who is a natural person residing within the state
13 or a legal entity authorized to engage in trust business within the state and who maintains or
14 arranges for custody within the state of some or all of the property that has been transferred to
15 the trust by the grantor, maintains records within the state for the trust on an exclusive or
16 nonexclusive basis, prepares or arranges for the preparation within the state of fiduciary income
17 tax returns for the trust, or otherwise materially participates within the state in the administration
18 of the trust. A trustee is not a qualified trustee if such trustee’s authority to make distributions of
19 income or principal or both are subject to the direction of someone who, were that person a trustee
20 of the trust, would not meet the requirements to be a qualified trustee.

21 (b) “Independent qualified trustee” means a qualified trustee who is not, and whose actions
22 are not, subject to direction by:

- 23 (1) The grantor;
- 24 (2) Any natural person who is not a resident of the state;
- 25 (3) Any entity that is not authorized to engage in trust business within the state;
- 26 (4) The grantor’s spouse;
- 27 (5) A parent of the grantor;
- 28 (6) Any descendant of the grantor; or
- 29 (7) A sibling of the grantor.

30 (c) “Qualified interest” means a grantor’s interest in a qualified self-settled spendthrift trust,
31 to the extent that such interest entitles the grantor to receive distributions of income, principal, or
32 both, in the sole discretion of a an independent qualified trustee. A grantor may have a qualified
33 interest in a qualified self-settled spendthrift trust and also have an interest in the same trust that
34 is not a qualified interest, and the rules of section five hundred five of this article shall apply to
35 each interest of the grantor in the same trust other than the grantor’s qualified interest.

36 (d) “Qualified self-settled spendthrift trust” means a trust if:

- 37 (1) The trust is irrevocable;
- 38 (2) The trust is created during the grantor's lifetime;
- 39 (3) There is, at all times when distributions could be made to the grantor pursuant to the
40 grantor's qualified interest, at least one beneficiary other than the grantor:
- 41 (i) To whom income may be distributed, if the grantor's qualified interest relates to trust
42 income;
- 43 (ii) to whom principal may be distributed, if the grantor's qualified interest relates to trust
44 principal; or
- 45 (iii) to whom both income and principal may be distributed, if the grantor's qualified interest
46 relates to both trust income and principal;
- 47 (4) The trust has at all times at least one qualified trustee, who may be, but need not be,
48 an independent qualified trustee;
- 49 (5) The trust instrument expressly incorporates the laws of this state to govern the validity,
50 construction and administration of the trust;
- 51 (6) The trust instrument includes a spendthrift provision, as defined in section five hundred
52 two of this article, that restrains both voluntary and involuntary transfer of the grantor's qualified
53 interest;
- 54 (7) The grantor does not have the right to disapprove distributions from the trust; and
- 55 (8) The grantor duly executes a qualified affidavit before or substantially
56 contemporaneously with the making of the transfer of the asset or assets into the trust.
- 57 (e) "Qualified affidavit" means a duly executed affidavit of the grantor which contains under
58 oath all of the following statements, or statements substantially to the effect:
- 59 (1) The property being transferred to the trust was not derived from unlawful activities;
- 60 (2) The grantor has full right, title, and authority to transfer the property to the trust;
- 61 (3) The grantor will not be rendered insolvent immediately after the transfer of the property
62 to the trust;

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

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

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

69 (7) The grantor is not indebted on account of an agreement or order of court for the
70 payment of support or alimony in favor of such transferor's spouse, former spouse or children, or
71 for a division or distribution of property incident to a judicial proceeding with respect to a divorce
72 or annulment in favor of such transferor's spouse or former spouse, except for any such
73 indebtedness expressly identified in the affidavit or an attachment to the affidavit; and

74 (8) The grantor does not contemplate at the time of the transfer the filing for relief under
75 the Bankruptcy Code of the United States.

76 An affidavit is defective and is not a qualified affidavit if it materially fails to meet the
77 requirements set forth in this subsection. An affidavit is not considered defective and is a qualified
78 affidavit if it contains any nonsubstantive variances from the language set forth in this subsection,
79 it contains statements or representations in addition to those required in this subsection which do
80 not materially contradict the required statements or representations or there are any technical
81 errors in the form, substance or method of preparation or execution of the affidavit if those errors
82 were not the fault of the affiant and the affiant reasonably relied upon another person to prepare
83 or notarize the affidavit.

§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, except to the
7 extent otherwise provided in sections five hundred three-a, five hundred three-b and five hundred
8 three-c of this article, a creditor or assignee of the grantor may reach the maximum amount that
9 can be distributed to or for the grantor's benefit. If a trust has more than one grantor, the amount
10 the creditor or assignee of a particular grantor may reach may not exceed the grantor's interest
11 in the portion of the trust attributable to that grantor's contribution.

12 (3) After the death of a grantor, and subject to the grantor's right to direct the source from
13 which liabilities will be paid, the property of a trust that was revocable at the grantor's death is
14 subject to claims of the creditors of the deceased grantor, to the extent the grantor's probate
15 estate is inadequate to satisfy them, and with such claims payable in order of priority of the
16 following classes:

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

18 (B) Reasonable funeral expenses;

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

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

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

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

25 (G) All other claims.

26 (b) For purposes of this section:

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

30 (2) Upon the lapse, release or waiver of the power, the holder is treated as the grantor of
31 the trust only to the extent the value of the property affected by the lapse, release or waiver
32 exceeds the greater of the amount specified in Section 2041(b)(2), Section 2503(b) or Section
33 2514(e) of the Internal Revenue Code.

ARTICLE 6. REVOCABLE TRUSTS.

§44D-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.

1 (a) (1) An interested person may commence a judicial proceeding to contest the validity
2 of a trust that was revocable at the grantor's death within the earlier of:

3 (A) Two years after the grantor's death; or

4 (B) Six months after the trustee has sent ~~beneficiary~~ the interested person a copy of the
5 trust instrument and a notice informing the ~~beneficiary~~ interested person of the trust's existence,
6 of the trustee's name and address, and of the time allowed for commencing a proceeding.

7 (2) Notwithstanding subdivision (1) of this subsection:

8 (A) If the ~~beneficiary~~ interested person is under the age of eighteen years or is a convict
9 or mentally incapacitated person, the ~~beneficiary~~ interested person has one year after he or she
10 becomes of age or the disability ceases, to commence a judicial proceeding; and

11 (B) If the ~~beneficiary~~ interested person resided out of the state at the time the ~~beneficiary~~
12 interested person received the trust instrument and notice, the ~~beneficiary~~ interested person has
13 one year after receipt thereof to commence the judicial proceeding.

14 (b) Upon the death of the grantor of a trust that was revocable at the grantor's death, the
15 trustee may proceed to distribute the trust property in accordance with the terms of the trust
16 instrument. The trustee is not subject to liability for doing so unless:

17 (1) The trustee knows of a pending judicial proceeding contesting the validity of the trust;

18 or

19 (2) A potential contestant has notified the trustee of a possible judicial proceeding to
20 contest the trust and a judicial proceeding is commenced within sixty days after the contestant
21 sent the notification.

22 (c) A beneficiary of a trust that was revocable at the grantor's death that is determined to
23 have been invalid is liable to return any distribution received.

ARTICLE 8. DUTIES AND POWERS OF TRUSTEE.

§44D-8-813. Duty to inform and report.

1 (a) A trustee shall keep the current beneficiaries of the trust reasonably informed about
2 the administration of the trust and of the material facts necessary for them to protect their interests.
3 Unless unreasonable under the circumstances, a trustee shall within a reasonable time respond
4 to a beneficiary's request for information related to the administration of the trust.

5 (b) A trustee:

6 (1) Upon request of a beneficiary, shall within a reasonable time furnish to the beneficiary
7 a copy of the trust instrument;

8 (2) Within ~~sixty days~~ a reasonable time after accepting a trusteeship, shall notify the
9 ~~qualified current~~ qualified current beneficiaries of the acceptance and of the trustee's name, address and
10 telephone number;

11 (3) Within ~~sixty days~~ a reasonable time after the date the trustee acquires knowledge of
12 the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly
13 revocable trust has become irrevocable, whether by the death of the grantor or otherwise, shall
14 notify the ~~qualified current~~ qualified current beneficiaries of the trust's existence, of the identity of the grantor or
15 grantors, of the right to request a copy of the trust instrument, and of the right to a trustee's report
16 as provided in subsection (c) of this section; and

17 (4) Shall notify the ~~qualified~~ current beneficiaries within a reasonable time in advance of
18 any change in the method or rate of the trustee's compensation.

19 (c) A trustee shall send to the ~~distributees or permissible distributees~~ current beneficiaries
20 of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at
21 least annually and at the termination of the trust, a report of the trust property, liabilities, receipts,
22 and disbursements, including the source and amount of the trustee's compensation, a listing of
23 the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship,
24 unless a cotrustee remains in office, a report shall be sent to the current beneficiaries, and to
25 other nonqualified or qualified beneficiaries who request it or who have previously requested it,
26 by the former trustee. A personal representative, conservator or guardian ~~is responsible for~~
27 ~~sending~~ may send the qualified beneficiaries a report on behalf of a deceased or incapacitated
28 individual who was a trustee, and the personal representative, conservator or guardian shall
29 deliver to the successor trustee or trustees any books, records, documentation, instruments of
30 title, or assets of or concerning the trust which are in the possession or under the control of the
31 personal representative, conservator or guardian.

32 (d) A beneficiary may waive the right to a trustee's report or other information otherwise
33 required to be furnished under this section. A beneficiary, with respect to future reports and other
34 information, may withdraw a waiver previously given.

35 (e) The trustee may provide reports or other information to beneficiaries to whom reports
36 and other information are not otherwise required to be furnished under this section.

37 ~~(e)~~ (f) Subdivisions (2) and (3), subsection (b) of this section do not apply to a trustee who
38 accepts a trusteeship before the effective date of this chapter, to an irrevocable trust created
39 before the effective date of this chapter, or to a revocable trust that becomes irrevocable before
40 the effective date of this chapter.

§44D-8-817. Distribution upon termination.

1 (a) Upon termination or partial termination of a trust, the trustee may send to the
2 beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed
3 distribution terminates if the beneficiary does not notify the trustee of an objection within sixty
4 days after the proposal was sent but only if the proposal informed the beneficiary of the right to
5 object and of the time allowed for objection.

6 (b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee
7 shall have and exercise all powers appropriate to wind up the administration of the trust and shall
8 proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the
9 right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.

10 (c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the
11 extent:

12 (1) It was induced by improper conduct of the trustee; or

13 (2) The beneficiary, at the time of the release, did not know of the beneficiary's rights or
14 of the material facts relating to the breach.

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