

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2200

BY DELEGATES ROWAN, J. KELLY, PYLES, ROHRBACH

AND LOVEJOY

[Introduced January 9, 2019; Referred
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §39B-1-102, §39B-1-114 and §39B-1-115 of the Code of West
 2 Virginia, 1931, as amended, all relating to prohibiting a person appointed agent under a
 3 power of attorney from exerting undue influence over the principal; defining undue
 4 influence; and prohibiting exoneration of a fiduciary who has exerted undue influence over
 5 a principal

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. GENERAL PROVISIONS.

§39B-1-102. Definitions

1 In this act:

2 (1) "Agent" means a person granted authority to act for a principal under a power of
 3 attorney, whether denominated an agent, attorney-in-fact or otherwise. The term includes an
 4 original agent, co-agent, successor agent and a person to which an agent's authority is delegated.

5 (2) "Durable," with respect to a power of attorney means not terminated by the principal's
 6 incapacity.

7 (3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless,
 8 optical, electromagnetic or similar capabilities.

9 (4) "Good faith" means honesty in fact.

10 (5) "Incapacity" means inability of an individual to manage property or business affairs
 11 because the individual:

12 (A) Has an impairment in the ability to receive and evaluate information or make or
 13 communicate decisions even with the use of technological assistance; or

14 (B) Is:

15 (i) Detained, including incarcerated in a penal system; or

16 (ii) Outside the United States and unable to return.

17 (6) "Person" means an individual, corporation, business trust, estate, trust, partnership,
 18 limited liability company, association, joint venture, public corporation, government or

19 governmental subdivision, agency, or instrumentality or any other legal or commercial entity.

20 (7) "Power of attorney" means a writing or other record that grants authority to an agent to
21 act in the place of the principal, whether or not the term power of attorney is used.

22 (8) "Presently exercisable general power of appointment," with respect to property or a
23 property interest subject to a power of appointment, means power exercisable at the time in
24 question to vest absolute ownership in the principal individually, the principal's estate, the
25 principal's creditors or the creditors of the principal's estate. The term includes a power of
26 appointment not exercisable until the occurrence of a specified event, the satisfaction of an
27 ascertainable standard, or the passage of a specified period only after the occurrence of the
28 specified event, the satisfaction of the ascertainable standard or the passage of the specified
29 period. The term does not include a power exercisable in a fiduciary capacity or only by will.

30 (9) "Principal" means an individual who grants authority to an agent in a power of attorney.

31 (10) "Property" means anything that may be the subject of ownership, whether real or
32 personal, or legal or equitable or any interest or right therein.

33 (11) "Record" means information that is inscribed on a tangible medium or that is stored
34 in an electronic or other medium and is retrievable in perceivable form.

35 (12) "Sign" means, with present intent to authenticate or adopt a record:

36 (A) To execute or adopt a tangible symbol; or

37 (B) To attach to or logically associate with the record an electronic sound, symbol or
38 process.

39 (13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the
40 United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the
41 United States.

42 (14) "Stocks and bonds" means stocks, bonds, mutual funds and all other types of
43 securities and financial instruments, whether held directly, indirectly or in any other manner. The
44 term does not include commodity futures contracts and call or put options on stocks or stock

45 indexes.

46 (15) "Undue Influence" means using a position of power, authority, confidence, or trust, or
47 a fiduciary, family or intimate relationship to implement strategies to overcome the free agency,
48 independent reasoning, judgment, ability or will of a person to the financial detriment of the victim
49 to financially benefit the perpetrator or others. The strategies include, without limitation, coercion,
50 deception, intimidation, isolation, creating fear of isolation, taking advantage of isolation, inducing
51 dependence, creating fear of dependence, taking advantage of dependence, creating need,
52 creating fear of need, taking advantage of need, creating incapacity, creating fear of incapacity,
53 taking advantage of incapacity, assault, threat of assault, battery, threat of battery, and
54 befriending or establishing an emotional connection with a person to lower the victim's inhibitions.

§39B-1-114. Agent's duties.

1 (a) Notwithstanding provisions in the power of attorney, an agent who has accepted
2 appointment shall:

3 (1) Act in accordance with the principal's reasonable expectations to the extent ~~actually~~
4 known by the agent and, otherwise, in the principal's best interest;

5 (2) Act in good faith; and

6 (3) Act only within the scope of authority granted in the power of attorney.

7 (b) Except as otherwise provided in the power of attorney, an agent who has accepted
8 appointment shall:

9 (1) Act loyally for the principal's benefit;

10 (2) Act so as not to create a conflict of interest that impairs the agent's ability to act
11 impartially in the principal's best interest;

12 (3) Act with the care, competence and diligence ordinarily exercised by agents in similar
13 circumstances;

14 (4) Keep a record of all receipts, disbursements and transactions made on behalf of the
15 principal;

16 (5) Cooperate with a person that has authority to make health-care decisions for the
17 principal to carry out the principal's reasonable expectations to the extent ~~actually~~ known by the
18 agent and, otherwise, act in the principal's best interest; and

19 (6) Attempt to preserve the principal's estate plan, to the extent ~~actually~~ known by the
20 agent, if preserving the plan is consistent with the principal's best interest based on all relevant
21 factors, including:

22 (A) The value and nature of the principal's property;

23 (B) The principal's foreseeable obligations and need for maintenance;

24 (C) Minimization of taxes, including income, estate, inheritance, generation-skipping
25 transfer and gift taxes; and

26 (D) Eligibility for a benefit, a program or assistance under a statute or regulation.

27 (7) Restrain from exerting undue influence over the principal;

28 (c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate
29 plan for failure to preserve the plan.

30 (d) An agent that acts with care, competence and diligence for the best interest of the
31 principal is not liable solely because the agent also benefits from the act or has an individual or
32 conflicting interest in relation to the property or affairs of the principal. However, when the agent
33 benefits from the act to the substantial and direct detriment of an ancestor, spouse, heir or
34 descendant of the principal a presumption is created that the act was not within the scope of
35 authority granted in the power of attorney, unless the authority to perform that specific act is
36 expressed with particularity in identifying the existing property interest and provided in the power
37 of attorney.

38 (e) If an agent is selected by the principal because of special skills or expertise possessed
39 by the agent or in reliance on the agent's representation that the agent has special skills or
40 expertise, the special skills or expertise must be considered in determining whether the agent has
41 acted with care, competence and diligence under the circumstances.

42 (f) Absent undue influence or a breach of duty to the principal, an agent is not liable if the
43 value of the principal's property declines.

44 (g) An agent who exercises authority to delegate to another person the authority granted
45 by the principal or who engages another person on behalf of the principal is not liable for an act,
46 error of judgment or default of that person if the agent exercises care, competence and diligence
47 in selecting and monitoring the person.

48 (h) Except as otherwise provided in the power of attorney, an agent is not required to
49 disclose receipts, disbursements or transactions conducted on behalf of the principal or provide
50 an accounting unless: ordered by a court or requested by the principal, a guardian, a conservator,
51 another fiduciary acting for the principal, a governmental agency having authority to protect the
52 welfare of the principal or, upon the death of the principal, by the personal representative or
53 successor in interest of the principal's estate. If so requested, within 30 days the agent shall
54 comply with the request or provide a writing or other record substantiating why additional time is
55 needed and shall comply with the request within an additional 30 days. If an agent fails or refuses
56 to comply with the provisions of this section, the court may award the principal or other authorized
57 party requesting the disclosure reimbursement of reasonable attorney fees and costs incurred.

§39B-1-115. Exoneration of agent.

1 (a) A provision in a power of attorney relieving an agent of liability for breach of duty is
2 binding on the principal and the principal's successors in interest except to the extent the
3 provision:

4 (1) Relieves the agent of liability for breach of duty committed dishonestly, with an
5 improper motive or with reckless indifference to the purposes of the power of attorney or the best
6 interest of the principal; or

7 (2) Was inserted as a result of undue influence or an abuse of a confidential or fiduciary
8 relationship with the principal.

NOTE: The purpose of this bill is to define undue influence and prohibit exoneration of a

fiduciary who has exerted undue influence over a principal.

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