

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Introduced**

## **Senate Bill 81**

BY SENATOR TRUMP

[Introduced February 10, 2021; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §44D-1-105 of the Code of West Virginia, 1931, as amended; to  
 2 amend and reenact §44D-8A-809 of said code; and to amend and reenact §44D-10-1008  
 3 of said code, all relating to correcting certain cross-references in the West Virginia Uniform  
 4 Trust Code to be consistent with other language concerning the standards governing trust  
 5 directors and directed trustees.

*Be it enacted by the Legislature of West Virginia:*

## **ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.**

### **§44D-1-105. Default and mandatory rules.**

1 (a) Except as otherwise provided in the terms of the trust instrument, this chapter governs  
 2 the duties and powers of a trustee, relations among trustees, and the rights and interests of a  
 3 beneficiary.

4 (b) The terms of a trust prevail over any provision of this chapter except:

5 (1) The requirements for creating a trust;

6 (2) The duty of a trustee to act in good faith and in accordance with the terms and purposes  
 7 of the trust but subject to the provisions of ~~§44D-8A-901~~, ~~§44D-8A-809~~, ~~§44D-8A-1101~~ ~~§44D-8A-~~  
 8 ~~811~~, and ~~§44D-8A-1201~~ ~~§44D-8A-812~~ of this code;

9 (3) The requirement that a trust and its terms have a purpose that is lawful, not contrary  
 10 to public policy, and possible to achieve;

11 (4) The power of the court to modify or terminate a trust under §44D-4-410 through §44D-  
 12 4-416 of this code;

13 (5) The effect of a spendthrift provision and the rights of certain creditors and assignees  
 14 to reach a trust as provided in §44D-5-501 *et seq.* of this code;

15 (6) The power of the court under §44D-7-702 of this code to require, dispense with, or  
 16 modify or terminate a bond;

17 (7) The power of the court under §44D-7-708(b) of this code to adjust a trustee's

18 compensation specified in the terms of the trust instrument which is unreasonably low or high;

19 (8) The effect of an exculpatory term under §44D-10-1008 of this code;

20 (9) The rights under §44D-10-1010 through §44D-10-1013 of this code of a person other  
21 than a trustee or beneficiary;

22 (10) Periods of limitation for commencing a judicial proceeding;

23 (11) The power of the court to take action and exercise jurisdiction as may be necessary  
24 in the interests of justice; and

25 (12) The subject-matter jurisdiction of the court and venue for commencing a proceeding as  
26 provided in §44D-2-203 and §44D-2-204 of this code.

## **ARTICLE 8A. WEST VIRGINIA UNIFORM DIRECTED TRUST ACT.**

### **§44D-8A-809. Duty and liability of directed trustee.**

1 (a) Subject to subsection (b) of this section, a directed trustee shall take reasonable action  
2 to comply with a trust director's exercise or nonexercise of a power of direction or further power  
3 under §44D-8A-806(b)(1) of this code, and the trustee is not liable for the action.

4 (b) A directed trustee must not comply with a trust director's exercise or nonexercise of a  
5 power of direction or further power under §44D-8A-806(b)(1) of this code to the extent that the  
6 directed trustee is thereby directed knowingly to violate the laws or regulations of any jurisdiction  
7 applicable to the trust. The directed trustee may reasonably rely upon the advice of legal counsel  
8 to determine what actions would be consistent with or contrary to applicable law. Reasonable  
9 expenses incurred by the directed trustee in good faith for legal advice concerning an instruction  
10 from a trust director or a petition to the court for instructions shall be proper expenses of the trust.

11 (c) An exercise of a power of direction under which a trust director may release a trustee  
12 or another trust director from liability for breach of trust is not effective if:

13 (1) The breach involved the trustee's or other director's ~~willful misconduct~~ breach of  
14 fiduciary duty as set forth in subsection (b) of this section;

15 (2) The release was induced by improper conduct of the trustee or other director in

16 procuring the release; or

17 (3) At the time of the release, the director did not know the material facts relating to the  
18 breach.

19 (d) A directed trustee that has reasonable doubt about its duty under this section may  
20 petition the court for instructions.

21 (e) The terms of a trust may impose a duty or liability on a directed trustee in addition to  
22 the duties and liabilities under this section.

**ARTICLE 10. LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH  
TRUSTEE.**

**§44D-10-1008. Exculpation of trustee.**

1 (a) A term of a trust instrument relieving a trustee of liability for breach of trust is  
2 unenforceable to the extent that it:

3 (1) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless  
4 indifference to the purposes of the trust or the interests of the beneficiaries, subject to §44  
5 d-8A-809 and §44D-1-105 of this code; or

6 (2) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential  
7 relationship to the grantor.

8 (b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an  
9 abuse of a fiduciary or confidential relationship unless:

10 (1) The trustee proves that the exculpatory term is fair under the circumstances and that  
11 its existence and contents were adequately communicated to the grantor; or

12 (2) The grantor was represented by an attorney not employed by the trustee with respect  
13 to the trust and the attorney provided independent legal advice.

NOTE: The purpose of this bill is to correct certain cross references in the West Virginia  
Uniform Trust Code to be consistent with other language concerning the standards  
governing trust directors and directed trustees.

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