

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Committee Substitute

for

Senate Bill 81

SENATOR TRUMP, *original sponsor*

[Originating in the Committee on the Judiciary

reported on February 12, 2021]

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 generally to the West Virginia Uniform Trust Code; correcting
4 certain internal code references; adding certain cross references within the trust code; and
5 modifying standard for trustee liability from “willful misconduct” to breach of fiduciary duty
6 for consistency with similar trust law provisions.

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, inclusive, 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, inclusive, of this code of a
21 person other 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
26 as 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 §44D-1-
5 105 and §44D-8A-809 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.