

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

Senate Bill 493

BY SENATOR TRUMP

[Originating in the Committee on the Judiciary;

reported on February 11, 2016]

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; permitting a grantor to transfer assets into a qualified self-settled
5 spendthrift trust and retain an interest in that trust; excluding applicability of certain
6 provisions of code to that qualified interest; clarifying applicability of self-settled spendthrift
7 trust provisions when certain interests are not qualified interests; prohibiting inference of
8 intent to delay, hinder or defraud creditors solely based on grantor's establishment of or
9 transfer to a self-settled spendthrift trust; permitting transfer to trust to be set aside under
10 certain circumstances; providing for the payment of expenses associated with defending
11 the trust to be paid from transfer; permitting creditors to bring actions against transfer of
12 trust assets within four years after date of grantor's transfer; limiting creditor rights to
13 grantor's transfer; prohibiting credit claims or causes of action against certain other
14 persons or entities; providing applicability of provisions governing creditor's actions to
15 avoid transfers to situations involving multiple transfers; setting statute of limitations for
16 self-settled spendthrift trust moved to this state for four years from date assets moved to
17 the state; defining terms; providing for filling of vacancies in office of qualified trustee or
18 independent qualified trustee; permitting certain terms to be included in self-settled
19 spendthrift trust without deeming trust irrevocable; requiring treatment of beneficiary with
20 right to withdraw entire beneficial interest be treated as grantor once right to withdraw has
21 lapsed, been released or otherwise expired; and exempting self-settled spendthrift trusts
22 from being subject to claims of the grantor's creditors.

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 this article do not apply to such qualified interest.

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

7 (c) A grantor's transfer to a qualified self-settled spendthrift trust shall not, to the extent of
8 the grantor's qualified interest, be deemed to have been made with intent to delay, hinder or
9 defraud creditors, for purposes of article one-a, chapter forty of this code, merely because it is
10 made to a trust with respect to which the grantor retains a qualified interest and merely because
11 it is made without consideration. A grantor's transfer to a qualified self-settled spendthrift trust
12 may, however, be set aside under article one-a, chapter forty of this code or if the qualified affidavit
13 contains a material misstatement of fact: *Provided*, That any transfer made to a qualified self-
14 settled spendthrift trust which may be set aside under article one-a, chapter forty of this code shall
15 be chargeable first with the entire costs and expenses, including attorney's fees, properly incurred
16 by the trustee in the defense of the action or proceeding to set aside the transfer.

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

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

25 spendthrift trust.

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

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

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

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

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

§44D-5-503b. Definitions.

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

2 (a) "Qualified trustee" means any person who is a natural person residing within the state
3 or a legal entity authorized to engage in trust business within the state and who maintains or
4 arranges for custody within the state of some or all of the property that has been transferred to
5 the trust by the grantor, maintains records within the state for the trust on an exclusive or
6 nonexclusive basis, prepares or arranges for the preparation within the state of fiduciary income
7 tax returns for the trust or otherwise materially participates within the state in the administration
8 of the trust. A trustee is not a qualified trustee if such trustee's authority to make distributions of
9 income or principal or both are subject to the direction of someone who, were that person a trustee

10 of the trust, would not meet the requirements to be a qualified trustee.

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

13 (1) The grantor;

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

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

16 (4) The grantor's spouse;

17 (5) A parent of the grantor;

18 (6) Any descendant of the grantor; or

19 (7) A sibling of the grantor.

20 (c) "Qualified interest" means a grantor's interest in a qualified self-settled spendthrift trust,
21 to the extent that such interest entitles the grantor to receive distributions of income, principal or
22 both in the sole discretion of a qualified trustee. A grantor may have a qualified interest in a
23 qualified self-settled spendthrift trust and also have an interest in the same trust that is not a
24 qualified interest, and the rules of section five hundred five of this article shall apply to each
25 interest of the grantor in the same trust other than the grantor's qualified interest.

26 (d) "Qualified self-settled spendthrift trust" means a trust if:

27 (1) The trust is irrevocable;

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

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

35 (4) The trust has at all times at least one qualified trustee who may be, but need not be,

36 an independent qualified trustee;

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

39 (6) The trust instrument includes a spendthrift provision, as defined in section five hundred
40 two of this article, that restrains both voluntary and involuntary transfer of the grantor's qualified
41 interest;

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

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

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

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

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

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

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

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

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

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

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

64 An affidavit is defective and is not a qualified affidavit if it materially fails to meet the
65 requirements set forth in this subsection. An affidavit is not considered defective and is a qualified
66 affidavit if it contains any nonsubstantive variances from the language set forth in this subsection,
67 it contains statements or representations in addition to those required in this subsection which do
68 not materially contradict the required statements or representations or there are any technical
69 errors in the form, substance or method of preparation or execution of the affidavit if those errors
70 were not the fault of the affiant and the affiant reasonably relied upon another person to prepare
71 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 instrument 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 instrument 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 Section
27 664(d) of the Internal Revenue Code) and the grantor's right, at any time, and from time to time,
28 to release, in writing delivered to the qualified trustee, all or any part of the grantor's retained
29 interest in such 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 qualified trustee or independent qualified trustee and
34 to appoint a new trustee who meets the same criteria;

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

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

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

42 inheritance, or death tax imposed on or with respect to the grantor's estate; and

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

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

§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 the creditors of the deceased grantor, to the extent the grantor's probate
14 estate is inadequate to satisfy them, and with such claims payable in order of priority of the
15 following classes:

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

- 17 (B) Reasonable funeral expenses;
- 18 (C) Debts and taxes with preference under federal law;
- 19 (D) Unpaid child support which is due and owing at the time of the decedent's death;
- 20 (E) Debts and taxes with preference under other laws of the State of West Virginia;
- 21 (F) Reasonable and necessary medical and hospital expenses of the last illness of the
- 22 decedent, including compensation for persons attending the decedent during his or her last
- 23 illness; and
- 24 (G) All other claims.
- 25 (b) For purposes of this section:
- 26 (1) During the period the power may be exercised, the holder of a power of withdrawal is
- 27 treated in the same manner as the grantor of a revocable trust to the extent of the property subject
- 28 to the power; and
- 29 (2) Upon the lapse, release or waiver of the power, the holder is treated as the grantor of
- 30 the trust only to the extent the value of the property affected by the lapse, release or waiver
- 31 exceeds the greater of the amount specified in Section 2041(b)(2), Section 2503(b) or Section
- 32 2514(e) of the Internal Revenue Code.