

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**ENROLLED**

**Committee Substitute**

**for**

**House Bill 4320**

BY DELEGATES MCGEEHAN AND FOLK

[Passed March 10, 2018; in effect ninety days from passage.]



1 AN ACT to amend and reenact §39B-1-114 of the Code of West Virginia, 1931, as amended; and  
2 to amend and reenact §39B-2-101 of said code, all relating to limiting the ability of an  
3 agent under a power of attorney to take self-benefiting actions; clarifying the presumption  
4 that an act is not within the scope of authority granted in a power of attorney when an  
5 agent benefits from the act to the detriment of an ancestor, spouse, heir, or descendant;  
6 requiring express grant of authority to exercise authority over the content of electronic  
7 communications sent or received by the principal; and clarifying the prohibition against an  
8 agent exercising authority under a power of attorney to create in the agent, or in an  
9 individual to whom the agent owes a legal obligation of support, an interest in the  
10 principal's property, whether by gift, right of survivorship, beneficiary designation,  
11 disclaimer, or otherwise.

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

**ARTICLE 1. GENERAL PROVISIONS.**

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

29 (d) An agent that acts with care, competence and diligence for the best interest of the  
30 principal is not liable solely because the agent also benefits from the act or has an individual or  
31 conflicting interest in relation to the property or affairs of the principal.

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

36 (f) Absent a breach of duty to the principal, an agent is not liable if the value of the  
37 principal's property declines.

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

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

**ARTICLE 2. AUTHORITY.**

**§39B-2-101. Authority that requires specific grant; grant of general authority.**

1 (a) An agent under a power of attorney may do the following on behalf of the principal or  
2 with the principal's property only if the power of attorney expressly grants the agent the authority  
3 and exercise of the authority is not otherwise prohibited by another agreement or instrument to  
4 which the authority or property is subject to:

- 5 (1) Create, amend, revoke or terminate an inter vivos trust;
- 6 (2) Make a gift;
- 7 (3) Create or change rights of survivorship;
- 8 (4) Create or change a beneficiary designation;
- 9 (5) Delegate authority granted under the power of attorney;

10           (6) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including  
11 a survivor benefit under a retirement plan;

12           (7) Exercise fiduciary powers that the principal has authority to delegate; or

13           (8) Disclaim property, including a power of appointment.

14           (9) Exercise authority over the content of electronic communications, as defined in 18  
15 U.S.C. Section 2510(12) sent or received by the principal.

16           (b) Notwithstanding a grant of authority to do an act described in this section, unless the  
17 power of attorney otherwise provides, an agent may not exercise authority under a power of  
18 attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of  
19 support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary  
20 designation, disclaimer or otherwise.

21           (c) Subject to subsections (a), (b), (d) and (e) of this section, if a power of attorney grants  
22 to an agent authority to do all acts that a principal could do, the agent has the general authority  
23 described in §39B-2-104 through §39B-2-116 of this code.

24           (d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is  
25 subject to the provisions of §39B-2-117 of this code.

26           (e) Subject to subsections (a), (b) and (d) of this section, if the subjects over which  
27 authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

28           (f) Authority granted in a power of attorney is exercisable with respect to property that the  
29 principal has when the power of attorney is executed or acquires later, whether or not the property  
30 is located in this state and whether or not the authority is exercised or the power of attorney is  
31 executed in this state.

32           (g) An act performed by an agent pursuant to a power of attorney has the same effect and  
33 inures to the benefit of and binds the principal and the principal's successors in interest as if the  
34 principal had performed the act.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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*Chairman, House Committee*

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*Chairman, Senate Committee*

Originating in the House.

In effect ninety days from passage.

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*Clerk of the House of Delegates*

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*Clerk of the Senate*

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*Speaker of the House of Delegates*

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*President of the Senate*

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The within ..... this the.....  
day of ....., 2018.

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*Governor*