

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

Senate Bill 836

By Senator Trump

[Introduced February 16, 2024; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §44D-1-103 of the Code of West Virginia, 1931, as amended; to
 2 amend and reenact §44D-4-402 of said code; to amend and reenact §44D-5-503c of said
 3 code; to amend and reenact §44D-7-701, §44D-7-704, and §44D-7-705 of said code; to
 4 amend and reenact §44D-8B-2 of said code; and to amend and reenact §44D-10-1011 of
 5 said code, all relating to permitting the electronic execution of trusts.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.

§44D-1-103. Definitions.

1 In this chapter:

2 (a) "Action", with respect to an act of a trustee, includes a failure to act.

3 (b) "Ascertainable standard" means a standard relating to an individual's health, education,
 4 support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal
 5 Revenue Code.

6 (c) "Beneficiary" means a person that:

7 (1) Has a present or future beneficial interest in a trust, vested or contingent;

8 (2) In a capacity other than that of trustee, holds a power of appointment over trust
 9 property; or

10 (3) A charitable organization that is expressly designated in the terms of the trust
 11 instrument to receive distributions.

12 (d) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose
 13 described in §44D-4-405 of this code.

14 (e) "Conservator" means a person appointed by the court to administer the estate and
 15 financial affairs of a protected person.

16 (f) "Court" means a court of this state having proper jurisdiction under §44D-2-203 of this
 17 code, and venue under §44D-2-204 of this code.

18 (g) "Current beneficiary" means a beneficiary that, on the date the beneficiary's

19 qualification is determined, is a distributee or permissible distributee of trust income or principal.

20 (h) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance
21 relating to protection of the environment.

22 (i) "Grantor" means a person, including a testator, who creates, or contributes property to a
23 trust. If more than one person creates or contributes property to a trust, each person is a grantor of
24 the portion of the trust property attributable to that person's contribution except to the extent
25 another person has the power to revoke or withdraw that portion.

26 (j) "Guardian" means a person appointed by the court who is responsible for the personal
27 affairs of a protected person or a parent to make decisions regarding the support, care, education,
28 health, and welfare of a minor. The term does not include a guardian ad litem.

29 (k) "Interested person" means heirs, devisees, children, spouses, creditors, beneficiaries
30 and any others having a property right in or claim against a trust or the property in a trust. It also
31 includes persons having priority for appointment as personal representative and other fiduciaries
32 representing interested persons. The meaning as it relates to particular persons may vary from
33 time to time and must be determined according to the particular purposes of, and matter involved,
34 in any proceeding.

35 (l) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the
36 trust.

37 (m) "Internal Revenue Code" or "Internal Revenue Code of 1986" has the same meaning
38 as when used in a comparable context in the laws of the United States then in effect relating to
39 income, estate, generation-skipping transfer and other taxes including all amendments made to
40 the laws of the United States and amendments which have been adopted and incorporated into
41 West Virginia law by the West Virginia Legislature in §11-21-9 of this code.

42 (n) "Jurisdiction" with respect to a geographic area, includes a state or country.

43 (o) "Person" means an individual, corporation, business trust, estate, trust, partnership,
44 limited liability company, association, joint venture, unincorporated nonprofit association,

45 charitable organization, government, governmental subdivision, agency, or instrumentality, public
46 corporation, or any other legal or commercial entity.

47 (p) "Power of withdrawal" means a presently exercisable general power of appointment
48 other than a power:

49 (1) Exercisable by a trustee and limited by an ascertainable standard; or

50 (2) Exercisable by another person only upon consent of the trustee or a person holding an
51 adverse interest.

52 (q) "Property" means anything that may be the subject of ownership, whether real or
53 personal, legal or equitable or any interest therein.

54 (r) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's
55 qualification is determined:

56 (1) Is a distributee or permissible distributee of trust income or principal;

57 (2) Would be a distributee or permissible distributee of trust income or principal if the
58 interests of the distributees described in paragraph (1) of this subdivision terminated on that date
59 without causing the trust to terminate; or

60 (3) Would be a distributee or permissible distributee of trust income or principal if the trust
61 terminated on that date.

62 (s) "Record" means information that is inscribed on a tangible medium or that is stored in
63 an electronic or other medium and is retrievable in perceivable form. A record does not include a
64 will of the grantor unless such will is duly admitted to probate

65 ~~(s)~~(t) "Revocable", as applied to a trust, means revocable by the grantor without the
66 consent of the trustee or a person holding an adverse interest.

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

68 (1) To execute or adopt a tangible symbol; or

69 (2) To attach to or logically associate with the record an electronic symbol, sound, or
70 process

71 ~~(t)~~(v) "Spendthrift provision" means a term of a trust which restrains both voluntary and
 72 involuntary transfer of a beneficiary's interest.

73 ~~(u)~~(w) "State" means a state of the United States, the District of Columbia, Puerto Rico, the
 74 United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the
 75 United States. The term includes an Indian tribe or band recognized by federal law or formally
 76 acknowledged by a state.

77 ~~(v)~~(x) "Terms of a trust" means:

78 (1) Except as otherwise provided in subparagraph (2); and the manifestation of the
 79 grantor's intent regarding a trust's provisions as:

80 (A) Expressed in the trust instrument; or

81 (B) Established by other evidence that would be admissible in a judicial proceeding; or

82 (2) The trust's provisions as established, determined, or amended by:

83 (i) A trustee or trust director in accordance with applicable law;

84 (ii) A court order; or

85 (iii) A nonjudicial settlement agreement under §44D-1-111 of this code.

86 ~~(w)~~(y) "Trust instrument" means a ~~writing, including a will, executed~~ will of the grantor
 87 which is duly admitted to probate, or a record by the grantor that contains terms of the trust,
 88 including any amendments thereto.

89 ~~(x)~~(z) "Trustee" includes an original, additional, successor trustee and a cotrustee.

90 ~~(y) "Writing" or "written instrument" does not include an electronic record or electronic~~
 91 ~~signature as provided in §39A-1-1 et seq. of this code~~

ARTICLE 4. CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST.

§44D-4-402. Requirement for creation.

1 (a) Except as created by an order of the court, a trust is created only if:

2 (1) The grantor has capacity to create a trust;

3 (2) The grantor indicates an intention, in ~~writing~~ a trust instrument, to create the trust;

4 (3) The trust has a definite beneficiary or is:

5 (A) A charitable trust;

6 (B) A trust for the care of an animal, as provided in section four hundred eight of this article;

7 or

8 (C) A trust for a noncharitable purpose, as provided in section four hundred nine, article
9 four of this chapter;

10 (4) The trustee has duties to perform; and

11 (5) The same person is not the sole trustee and sole beneficiary.

12 (b) A beneficiary is definite if the beneficiary can be ascertained now or in the future,
13 subject to any applicable rule against perpetuities.

14 (c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power
15 is not exercised within a reasonable time, the power fails and the property subject to the power
16 passes to the persons who would have taken the property had the power not been conferred.

17 (d) Notwithstanding the foregoing:

18 (1) In accordance with the provisions of section eight, article three of chapter forty-one of
19 this code, a trust is valid regardless of the existence, value or character of the corpus of the trust.

20 (2) The grantor need not have capacity to create a trust if the trust is created in writing a
21 record during the grantor's lifetime by the grantor's agent acting in accordance with authority
22 granted under a durable power of attorney which expressly authorizes the agent to create a trust
23 on the grantor's behalf.

24 (e) A trust is not invalid or terminated, and title to trust assets is not merged, because the
25 trustee or trustees are the same person or persons as the beneficiaries of the trust.

ARTICLE 5. CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS.

§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 the
16 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 one
18 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 record effective only upon the grantor's death, other than a power to appoint to the grantor's estate
21 or 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 standard;

24 (4) The grantor's potential or actual receipt of income or principal from a charitable
25 remainder unitrust or charitable remainder annuity trust (each within the meaning of Section
26 664(d) of the Internal Revenue Code) and the grantor's right, at any time, and from time to time, to
27 release, in ~~writing~~ a record delivered to the qualified trustee, all or any part of the grantor's retained

28 interest in such trust;

29 (5) The grantor's receipt each year of a percentage, not to exceed five percent, specified in
30 the trust instrument of the initial value of the trust assets or their value determined from time to time
31 pursuant to the trust instrument;

32 (6) The grantor's right to remove a qualified trustee or independent qualified trustee and to
33 appoint a new trustee who meets the same criteria;

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

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

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

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

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

ARTICLE 7. OFFICE OF THE TRUSTEE.

§44D-7-701. Accepting or declining trusteeship.

1 (a) Except as otherwise provided in subsection (c) of this section, a person designated as
2 trustee accepts the trusteeship:

3 (1) By substantially complying with a method of acceptance provided in the terms of the
4 trust instrument; or

5 (2) If the terms of the trust instrument do not provide a method or the method provided in
6 the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising
7 powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship
8 including by signing a ~~written instrument~~ record so stating.

9 (b) A person designated as trustee who has not yet accepted the trusteeship may reject the
10 trusteeship. A person designated as trustee who does not accept the trusteeship within a
11 reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

12 (c) A person designated as trustee, without accepting the trusteeship, may:

13 (1) Act to preserve the trust property if, within a reasonable time after acting, the person
14 sends a rejection of the trusteeship to the grantor or, if the grantor is dead or lacks capacity, to a
15 qualified beneficiary; and

16 (2) Inspect or investigate trust property to determine potential liability under environmental
17 or other law or for any other proper purpose.

§44D-7-704. Vacancy in trusteeship; appointment of successor.

1 (a) A vacancy in a trusteeship occurs if:

2 (1) A person designated as trustee rejects the trusteeship;

3 (2) A person designated as trustee cannot be identified or does not exist;

4 (3) A trustee resigns;

5 (4) A trustee is disqualified or removed;

6 (5) A trustee dies; or

7 (6) A guardian or conservator is appointed for an individual serving as trustee.

8 (b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled,
9 unless otherwise provided in the terms of the trust instrument. A vacancy in a trusteeship must be
10 filled if the trust has no remaining trustee.

11 (c) Unless otherwise provided in the terms of the trust instrument, a vacancy in a
12 trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of
13 priority:

14 (1) By a person designated in the terms of the trust instrument to act as successor trustee;

15 (2) By a person appointed by a unanimous written agreement record of the qualified
16 beneficiaries; or

17 (3) By a person appointed by the court having jurisdiction of the trust.

18 (d) Unless otherwise provided, a vacancy in a trusteeship of a charitable trust that is
19 required to be filled shall be filled in the following order of priority:

20 (1) By a person designated in the terms of the trust to act as successor trustee;

21 (2) By a person selected by the charitable organizations expressly designated to receive
22 distributions under the terms of the trust instrument if the Attorney General of West Virginia either
23 concurs in writing a record to the selection or fails to make a written objection to the selection
24 within 90 days after receiving by certified or registered mail a notice of the selection by the
25 charitable organizations; or

26 (3) By a person appointed by the court having jurisdiction over the trust.

27 (e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may
28 upon petition of the grantor, a qualified beneficiary, or a cotrustee appoint an additional trustee or
29 special fiduciary whenever the court considers the appointment necessary for the administration
30 of the trust.

§44D-7-705. Resignation of trustee.

1 (a) Unless otherwise provided in the terms of the trust instrument, a trustee may resign
2 without court approval by giving at least 30 days' notice in writing a record to the grantor, if living,
3 all of the qualified beneficiaries, and all cotrustees, if any.

4 (b) A trustee may resign with the approval of the court having jurisdiction of the trust upon
5 the filing of a petition for such purpose which joins as respondents the grantor, if living, all of the

6 qualified beneficiaries, and all cotrustees, if any. In approving a resignation, the court may issue
7 orders and impose conditions reasonably necessary for the protection of the trust property.

8 (c) Unless otherwise provided by order of the court, any liability of a resigning trustee or of
9 any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected
10 by the trustee's resignation.

ARTICLE 8B. WEST VIRGINIA UNIFORM TRUST DECANTING ACT.

§44D-8B-2. Definitions.

1 In addition to the definitions contained in §44D-1-103 of this code which apply to this
2 article:

3 (1) "Appointive property" means the property or property interest subject to a power of
4 appointment.

5 (2) "Authorized fiduciary" means:

6 (A) A trustee or other fiduciary, other than a grantor, that has discretion to distribute or
7 direct a trustee to distribute part or all of the principal of the first trust to one or more current
8 beneficiaries;

9 (B) A special fiduciary appointed under §44D-8B-9 of this code; or

10 (C) A special-needs fiduciary under §44D-8B-13 of this code.

11 (3) "Charitable interest" means an interest in a trust which:

12 (A) Is held by an identified charitable organization and makes the organization a qualified
13 beneficiary;

14 (B) Benefits only charitable organizations and, if the interest were held by an identified
15 charitable organization, would make the organization a qualified beneficiary; or

16 (C) Is held solely for charitable purposes and, if the interest were held by an identified
17 charitable organization, would make the organization a qualified beneficiary.

18 (4) "Charitable organization" means:

19 (A) A person, other than an individual, organized and operated exclusively for charitable

20 purposes; or

21 (B) A government or governmental subdivision, agency, or instrumentality, to the extent it
22 holds funds exclusively for a charitable purpose.

23 (5) "Charitable purpose" means the relief of poverty, the advancement of education or
24 religion, the promotion of health, a municipal or other governmental purpose, or another purpose
25 the achievement of which is beneficial to the community.

26 (6) "Decanting power" or "the decanting power" means the power of an authorized
27 fiduciary under this article to distribute property of a first trust to one or more second trusts or to
28 modify the terms of the first trust.

29 (7) "Expanded distributive discretion" means a discretionary power of distribution that is
30 not limited to an ascertainable standard or a reasonably definite standard.

31 (8) "First trust" means a trust over which an authorized fiduciary may exercise the
32 decanting power.

33 (9) "First-trust instrument" means the trust instrument for a first trust.

34 (10) "General power of appointment" means a power of appointment exercisable in favor of
35 a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the
36 powerholder's estate.

37 (11) "Power of appointment" means a power that enables a powerholder acting in a
38 nonfiduciary capacity to designate a recipient of an ownership interest in or another power of
39 appointment over the appointive property. The term does not include a power of attorney.

40 (12) "Powerholder" means a person in which a donor creates a power of appointment.

41 (13) "Presently exercisable power of appointment" means a power of appointment
42 exercisable by the powerholder at the relevant time. The term:

43 (A) Includes a power of appointment exercisable only after:

44 (i) The occurrence of the specified event;

45 (ii) The satisfaction of the ascertainable standard; or

46 (iii) The passage of the specified time; and

47 (B) Does not include a power exercisable only at the powerholder's death.

48 (14) "Reasonably definite standard" means a clearly measurable standard under which a
49 holder of a power of distribution is legally accountable within the meaning of 26 U.S.C.
50 §674(b)(5)(A) and any applicable regulations.

51 ~~(15) "Record" means information that is inscribed on a tangible medium or that is stored in~~
52 ~~an electronic or other medium and is retrievable in perceivable form~~

53 ~~(16)~~(15) "Second trust" means:

54 (A) A first trust after modification under this article; or

55 (B) A trust to which a distribution of property from a first trust is or may be made under this
56 article.

57 ~~(17)~~(16) "Second-trust instrument" means the trust instrument for a second trust.

58 ~~(18) "Sign" means with present intent to authenticate or adopt a record:~~

59 ~~(A) To execute or adopt a tangible symbol; or~~

60 ~~(B) To attach to or logically associate with the record an electronic symbol, sound, or~~
61 ~~process~~

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

§44D-10-1011. Interest as general partner.

1 (a) Except as otherwise provided in subsection (c) of this section or unless personal liability
2 is imposed in the contract, a trustee who holds an interest as a general partner in a general or
3 limited partnership is not personally liable on a contract entered into by the partnership after the
4 trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract. The
5 requirement of disclosure in the contract is satisfied if the trustee signs the contract, or signs
6 another ~~writing~~ record which is contemporaneously delivered to the other parties to the contract, in

7 a manner that clearly evidences that the trustee executed the contract in a fiduciary capacity.

8 (b) Except as otherwise provided in subsection (c) of this section, a trustee who holds an
9 interest as a general partner is not personally liable for torts committed by the partnership or for
10 obligations arising from ownership or control of the interest unless the trustee is personally at fault.

11 (c) The immunity provided by this section does not apply if an interest in the partnership is
12 held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one
13 or more of the trustee's descendants, siblings or parents or the spouse of any of them.

14 (d) If the trustee of a revocable trust holds an interest as a general partner, the grantor is
15 personally liable for contracts and other obligations of the partnership as if the grantor were a
16 general partner.

NOTE: The purpose of this bill is to update the provisions of the West Virginia Uniform Trust Code to permit the electronic execution of trust agreements.

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