

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Introduced**

### **Senate Bill 501**

BY SENATOR TRUMP

[Introduced February 3, 2016;

Referred to the Committee on Banking and Insurance.]

1 A BILL to amend and reenact §38-1-13 of the Code of West Virginia, 1931, as amended; to  
 2 amend and reenact §44D-1-103 and §44D-1-107 of said code; to amend said code by  
 3 adding thereto a new section, designated §44D-1-113; to amend and reenact §44D-3-303  
 4 of said code; to amend and reenact §44D-4-403, §44D-4-405, §44D-4-409 and §44D-4-  
 5 414 of said code; to amend and reenact §44D-5-505 of said code; to amend and reenact  
 6 §44D-6-604 of said code; and to amend and reenact §44D-8-817 of said code, all relating  
 7 generally to trusts and their administration; and making technical improvements and  
 8 updates.

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

1 That §38-1-13 of the Code of West Virginia, 1931, as amended, be amended and  
 2 reenacted; that §44D-1-103 and §44D-1-107 of said code be amended and reenacted; that said  
 3 code be amended by adding thereto a new section, designated §44D-1-113; that §44D-3-303 of  
 4 said code be amended and reenacted; that §44D-4-403, §44D-4-405, §44D-4-409 and §44D-4-  
 5 414 of said code be amended and reenacted; that §44D-5-505 of said code be amended and  
 6 reenacted; that §44D-6-604 of said code be amended and reenacted; and that §44D-8-817 of  
 7 said code be amended and reenacted, all to read as follows:

## **CHAPTER 38. LIENS.**

### **ARTICLE 1. VENDOR'S AND TRUST DEED LIENS.**

#### **§38-1-13. Substitution of trustees under a trust deed securing a debt.**

1 (a) When a trust deed to secure a debt or obligation does not by its terms prescribe a  
 2 method for substitution, the party secured by the trust deed, or any surety indemnified by the  
 3 deed, or the assignee or personal representative of any secured party or surety may, if there is a  
 4 death, removal, declination, resignation, refusal or inability of the original trustee or trustees  
 5 named in the instrument, substitute a trustee or trustees in his or her, or its place by a writing duly  
 6 signed and acknowledged and recorded in the office of the clerk of the county commission where

7 the real estate covered by the trust deed is situate.

8 (b) When a substitution is made under this section of a trustee or trustees of a trust deed  
 9 securing a debt or obligation, the substitution is effected when the party secured, or a surety  
 10 indemnified by the deed, or the assignee or personal representative of any such secured party or  
 11 surety has deposited true copies of the notice of the substitution in the United States mail, first  
 12 class postage prepaid, addressed to the last known addresses of the grantor or grantors or any  
 13 other person owing the debt or obligation, and has presented the original of the notice to the clerk  
 14 of the county commission in whose office the trust deed is recorded, causing the notice to be  
 15 recorded and indexed in a general lien book or other appropriate book in which trust deeds or  
 16 assignments of trust deeds are recorded. There shall be appended to the notice presented for  
 17 recording a certificate by the party making the substitution, certifying that copies of the notice  
 18 were mailed as required by this subsection, and showing the date of the mailing.

19 ~~(c) It is not necessary to give notice under this section to a trustee who has removed from~~  
 20 ~~the state, declined to accept the trust, refused to act as trustee, or has resigned, or to the personal~~  
 21 ~~representative of one who has died~~

## CHAPTER 44D. UNIFORM TRUST CODE.

### 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,  
 4 education, support or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of  
 5 the Internal 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 subsection (a), section four hundred five, article four of this chapter.

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 section two hundred  
17 three, article two of this chapter, and venue under section two hundred four of that article.

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  
23 a trust. If more than one person creates or contributes property to a trust, each person is a grantor  
24 of 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  
36 the trust.

37 (m) "Internal Revenue Code" or "Internal Revenue Code of 1986" ~~means the Internal~~  
38 ~~Revenue Code of 1986 codified in 26 U.S.C. 1 et seq., as amended and in effect on January 1,~~  
39 2014 has the same meaning as when used in a comparable context in the laws of the United  
40 States then in effect relating to income, estate, generation-skipping transfer, and other taxes  
41 including all amendments made to the laws of the United States and amendments which have  
42 been adopted and incorporated into West Virginia law by the West Virginia Legislature in section  
43 nine, article twenty-one, chapter eleven of this code.

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

45 (o) "Person" means an individual, corporation, business trust, estate, trust, partnership,  
46 limited liability company, association, joint venture, unincorporated nonprofit association,  
47 charitable organization, government, governmental subdivision, agency or instrumentality, public  
48 corporation or any other legal or commercial entity.

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

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

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

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

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

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

59 (2) Would be a distributee or permissible distributee of trust income or principal if the

60 interests of the distributees described in subparagraph (A)(1) terminated on that date without  
61 causing the trust to terminate; or

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

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

66 (t) "Spendthrift provision" means a term of a trust which restrains both voluntary and  
67 involuntary transfer of a beneficiary's interest.

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

72 (v) "Terms of a trust" means the manifestation of the grantor's intent regarding a trust's  
73 provisions as expressed in the trust instrument or as may be established by other evidence that  
74 would be admissible in a judicial proceeding.

75 (w) "Trust instrument" means a writing, including a will, executed by the grantor that  
76 contains terms of the trust, including any amendments thereto.

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

78 (y) "Writing" or "written instrument" does not include an electronic record or electronic  
79 signature as provided in chapter thirty-nine-a of this code.

**§44D-1-107. Governing law.**

1 The meaning and effect of the terms of a trust are determined by:

2 (4) (a) The law of the jurisdiction designated in the terms of the trust instrument, including  
3 terms which may provide for change of jurisdiction from time to time, unless the designation of  
4 that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most  
5 significant relationship to the matter at issue; or

6           ~~(2)~~ (b) In the absence of a controlling designation in the terms of the trust instrument, the  
7 law of the jurisdiction in which the grantor is domiciled when the trust becomes irrevocable.

**§44D-1-113. Insurable Interest of Trustee.**

1           (a) In this section, "grantor" means person that executes a trust instrument. The term  
2 includes a person for which a fiduciary or agent is acting.

3           (b) A trustee of a trust has an insurable interest in the life of an individual insured under a  
4 life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that  
5 designates the trust itself as the owner if, on the date the policy is issued:

6           (1) The insured is:

7           (A) A grantor of the trust; or

8           (B) An individual in whom a grantor of the trust has, or would have had if living at the time  
9 the policy was issued, an insurable interest as provided by the provisions of section two, article  
10 six, chapter thirty-three of this code; and

11           (2) The life insurance proceeds are primarily for the benefit of one or more trust  
12 beneficiaries that have an insurable interest in the life of the insured as provided by the provisions  
13 of section two, article six, chapter thirty-three of this code.

**ARTICLE 3. REPRESENTATION.**

**§44D-3-303. Representation by fiduciaries and parents.**

1           To the extent there is no conflict of interest between the representative and the person  
2 represented or among those being represented with respect to a particular question or dispute:

3           ~~(1)~~ (a) A conservator or guardian of the protected person may represent and bind the  
4 estate that the fiduciary controls;

5           ~~(2)~~ (b) An agent having authority to act with respect to the particular question or dispute  
6 may represent and bind the principal;

7           ~~(3)~~ (c) A trustee may represent and bind the beneficiaries of the trust;

8           ~~(4)~~ (d) A personal representative of a decedent's estate may represent and bind persons

9 interested in the estate;

10 ~~(5)~~ (e) A parent may represent and bind the parent's minor or unborn child if a conservator  
11 or guardian for the child has not been appointed; and

12 ~~(6)~~ (f) If a minor or unborn person is not otherwise represented under this section, a  
13 grandparent or more remote ancestor may represent and bind that minor or unborn person.

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

### **§44D-4-403. Trusts created in other jurisdictions.**

1 A trust not created by will is validly created if its creation complies with the law of the  
2 jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at  
3 the time of creation:

4 ~~(1)~~ (a) The grantor was domiciled, had a place of abode, or was a national;

5 ~~(2)~~ (b) A trustee was domiciled or had a place of business; or

6 ~~(3)~~ (c) Any trust property was located.

### **§44D-4-405. Charitable purposes; enforcement.**

1 (a) A charitable trust may be created for the relief of poverty, the advancement of  
2 education or religion, the promotion of health, governmental or municipal purposes or other  
3 purposes the achievement of which is beneficial to the community.

4 (b) If the terms of a charitable trust do not indicate a particular charitable purpose or  
5 beneficiary, upon petition by the trustee or a person having a special interest in the trust, the court  
6 may select one or more charitable purposes or beneficiaries. The selection must be consistent  
7 with the grantor's intention to the extent it can be ascertained.

8 (c) The grantor of a charitable trust, trustee or a person having a special interest in the  
9 trust, may maintain a proceeding to enforce the trust.

10 (d) This section is not intended to override the provisions of section four, article one,  
11 chapter thirty-five or section two, article two, chapter thirty-five of this code, concerning  
12 conveyances, devises, dedications, gifts or bequests to religious organizations and to the extent



13 there is a conflict with ~~that section~~ those sections, this section controls.

**§44D-4-409. Noncharitable trust without ascertainable beneficiary.**

1 Except as otherwise provided in section four hundred eight of this article, or by the  
2 provisions of article five-a, chapter thirty-five of this code, or by another statute, the following rules  
3 apply:

4 ~~(1)~~ (a) A trust may be created for a noncharitable purpose without a definite or definitely  
5 ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the  
6 trustee. The trust may not be enforced for more than the period set forth in section one, article  
7 one-a, chapter thirty-six of this code.

8 ~~(2)~~ (b) A trust authorized by this section may be enforced by a person appointed in the  
9 terms of the trust instrument or, if no person is so appointed, by a person appointed by the court.

10 ~~(3)~~ (c) Property of a trust authorized by this section may be applied only to its intended  
11 use, except to the extent the court determines that the value of the trust property exceeds the  
12 amount required for the intended use. Except as otherwise provided in the terms of the trust  
13 instrument, property not required for the intended use must be distributed to the grantor, if then  
14 living, otherwise to the grantor's successors in interest.

**§44D-4-414. Modification or termination of uneconomic trust.**

1 (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of a  
2 noncharitable trust property having a total value less than ~~\$100,000~~ \$200,000 may terminate the  
3 trust, without the necessity of court approval, if the trustee concludes that the value of the trust  
4 property is insufficient to justify the cost of administration.

5 (b) The court may modify or terminate a trust or remove the trustee and appoint a different  
6 trustee if it determines that the value of the trust property is insufficient to justify the cost of  
7 administration.

8 (c) Upon termination of a trust under this section, the trustee shall distribute the trust  
9 property in a manner consistent with the purposes of the trust.

10 (d) This section does not apply to an easement for conservation or preservation.

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

**§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.

5 (2) During the lifetime of the grantor, with respect to an irrevocable trust, a creditor or  
6 assignee of the grantor may reach the maximum amount that can be distributed to or for the  
7 grantor's benefit. If a trust has more than one grantor, the amount the creditor or assignee of a  
8 particular grantor may reach may not exceed the grantor's interest in the portion of the trust  
9 attributable to that grantor's contribution.

10 (3) After the death of a grantor, and subject to the grantor's right to direct the source from  
11 which liabilities will be paid, the property of a trust that was revocable at the grantor's death is  
12 subject to claims of the creditors of the deceased grantor, to the extent the grantor's probate  
13 estate is inadequate to satisfy them and with such claims payable in order of priority of the  
14 following classes:

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

16 (B) Reasonable funeral expenses;

17 (C) Debts and taxes with preference under federal law;

18 (D) Unpaid child support which is due and owing at the time of the decedent's death;

19 (E) Debts and taxes with preference under other laws of the State of West Virginia;

20 (F) Reasonable and necessary medical and hospital expenses of the last illness of the  
21 decedent, including compensation for persons attending the decedent during his or her last  
22 illness; and

23 (G) All other claims.

24 (b) For purposes of this section:

25 (1) During the period the power may be exercised, the holder of a power of withdrawal is  
 26 treated in the same manner as the grantor of a revocable trust to the extent of the property subject  
 27 to the power; and

28 (2) Upon the lapse, release or waiver` of the power, the holder is treated as the grantor of  
 29 the trust only to the extent the value of the property affected by the lapse, release or waiver  
 30 exceeds the greater of the amount specified in Section 2041(b)(2), Section 2503(b) or Section  
 31 2514(e) of the Internal Revenue Code.

## **ARTICLE 6. REVOCABLE TRUSTS.**

### **§44D-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.**

1 (a) (1) An interested person may commence a judicial proceeding to contest the validity  
 2 of a trust that was revocable at the grantor's death within the earlier of:

3 (A) Two years after the grantor's death; or

4 (B) Six months after the trustee has sent the ~~beneficiary~~ interested person a copy of the  
 5 trust instrument and a notice informing the ~~beneficiary~~ interested person of the trust's existence,  
 6 of the trustee's name and address, and of the time allowed for commencing a proceeding.

7 (2) Notwithstanding subdivision (1) of this subsection:

8 (A) If the ~~beneficiary~~ interested person is under the age of eighteen years or is a convict  
 9 or mentally incapacitated person, the beneficiary has one year after he or she becomes of age or  
 10 the disability ceases to commence a judicial proceeding; and

11 (B) If the ~~beneficiary~~ interested person resided out of the state at the time the beneficiary  
 12 received the trust instrument and notice, the ~~beneficiary~~ interested person has one year after  
 13 receipt thereof to commence the judicial proceeding.

14 (b) Upon the death of the grantor of a trust that was revocable at the grantor's death, the  
 15 trustee may proceed to distribute the trust property in accordance with the terms of the trust

16 instrument. The trustee is not subject to liability for doing so unless:

17 (1) The trustee knows of a pending judicial proceeding contesting the validity of the trust;

18 or

19 (2) A potential contestant has notified the trustee of a possible judicial proceeding to  
20 contest the trust and a judicial proceeding is commenced within sixty days after the contestant  
21 sent the notification.

22 (c) A beneficiary of a trust that was revocable at the grantor's death that is determined to  
23 have been invalid is liable to return any distribution received.

## **ARTICLE 8. DUTIES AND POWERS OF TRUSTEE.**

### **§44D-8-817. Distribution upon termination.**

1 (a) Upon termination or partial termination of a trust, the trustee may send to the  
2 beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed  
3 distribution terminates if the beneficiary does not notify the trustee of an objection within sixty  
4 days after the proposal was sent but only if the proposal informed the beneficiary of the right to  
5 object and of the time allowed for objection.

6 (b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee  
7 shall have and exercise all powers appropriate to wind up the administration of the trust and shall  
8 proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the  
9 right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.

10 (c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the  
11 extent:

12 (1) It was induced by improper conduct of the trustee; or

13 (2) The beneficiary, at the time of the release, did not know of the beneficiary's rights or of  
14 the material facts relating to the breach.

NOTE: The purpose of this bill is to make technical corrections to the West Virginia Uniform

Trust Code and its companion provisions in the West Virginia Code dealing with trusts which was passed in 2011 as H.B. 2551.

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