

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4320

BY DELEGATES MCGEEHAN AND FOLK

[Introduced January 26, 2018; Referred
to the Committee on the Judiciary.]

1 A BILL 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; removing a 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 and removing the prohibition that an agent from exercising authority under a power of
7 attorney to create in the agent, or in an individual to whom the agent owes a legal
8 obligation of support, an interest in the principal's property, whether by gift, right of
9 survivorship, beneficiary designation, 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. ~~However, when the agent~~
32 ~~benefits from the act to the substantial and direct detriment of an ancestor, spouse, heir or~~
33 ~~descendant of the principal a presumption is created that the act was not within the scope of~~
34 ~~authority granted in the power of attorney, unless the authority to perform that specific act is~~
35 ~~expressed with particularity in identifying the existing property interest and provided in the power~~
36 ~~of attorney~~

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

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

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

47 (h) Except as otherwise provided in the power of attorney, an agent is not required to
48 disclose receipts, disbursements or transactions conducted on behalf of the principal or provide
49 an accounting unless: ordered by a court or requested by the principal, a guardian, a conservator,
50 another fiduciary acting for the principal, a governmental agency having authority to protect the
51 welfare of the principal or, upon the death of the principal, by the personal representative or
52 successor in interest of the principal's estate. If so requested, within 30 days the agent shall
53 comply with the request or provide a writing or other record substantiating why additional time is
54 needed and shall comply with the request within an additional 30 days. If an agent fails or refuses
55 to comply with the provisions of this section, the court may award the principal or other authorized
56 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 (b) Notwithstanding a grant of authority to do an act described in this section, an agent
15 may not exercise authority under a power of attorney to create in the agent, or in an individual to
16 whom the agent owes a legal obligation of support, an interest in the principal's property, whether
17 by gift, right of survivorship, beneficiary designation, disclaimer or otherwise. ~~unless the power of
18 attorney expresses in the grant of authority the specific act and identifies the existing property
19 interest with particularity, rather than in general terms~~

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

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

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

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

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

NOTE: The purpose of this bill is to remove the presumption that an act is not within the scope of authority granted in a power of attorney when an agent benefits from the act to the detriment of an ancestor, spouse, heir, or descendant. The bill removes the prohibition that an agent from exercising authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

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