

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 562

By Senators Jeffries, Barrett, Oliverio, Weld, Plymale,

Clements, and Maroney

[Introduced February 03, 2023; referred
to the Committee on Banking and Insurance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new chapter,
 2 designated §311-1-1, §311-1-2, §311-1-3, §311-1-4, §311-1-5, §311-1-6, §311-1-7, §311-1-8,
 3 §311-1-9, §311-1-10, §311-1-11, and §311-1-12; and to amend and reenact §36-1A-1 of said
 4 code, all relating to the operation of private trust companies in the State of West Virginia;
 5 and relating to the statutory rule against perpetuities in the State of West Virginia.

Be it enacted by the Legislature of West Virginia:

CHAPTER 31I. PRIVATE TRUST COMPANY ACT.

ARTICLE 1. PRIVATE TRUST COMPANIES AND PRIVATE TRUST BUSINESS.

§311-1-1. Short title.

1 This chapter may be cited as the "West Virginia Private Trust Company Act".

§311-1-2. Purposes; findings.

1 The purposes of the Private Trust Company Act are to establish requirements for licensing
 2 private trust companies, to regulate persons who provide fiduciary services to family members of
 3 no more than three families and their related interests as a private trust company, and to establish
 4 the degree of regulatory oversight required of the Commissioner and State Auditor over such
 5 companies. The public interest served by this chapter is to ensure that fiduciary activities
 6 performed by a private trust company are restricted to family members and their related interests
 7 and as otherwise provided in this chapter. Therefore, the Legislature finds that:

8 (a) A private trust company is not a financial institution and licensure of such a company is
 9 not required.

10 (b) A private trust company may elect to be a licensed private trust company under this
 11 chapter if the company desires to be subject to the regulatory oversight of the State Auditor, as
 12 provided in this chapter, notwithstanding that the company restricts its services to family members.

13 (c) With respect to:

14 (1) A licensed private trust company, the State Auditor is responsible for regulating,

15 supervising, and examining the company as provided under this chapter.

16 (2) A private trust company that does not elect to be licensed, the State Auditor's role is
17 limited to ensuring that fiduciary services provided by the company are restricted to family
18 members and authorized related interests and not to the general public. The State Auditor is not
19 responsible for examining a private trust company regarding the safety or soundness of its
20 operations.

§311-1-3.

Definitions.

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

2 (a) "Applicant" means the corporation or limited liability company on whose behalf an
3 application for a license to operate as a licensed private trust company is submitted under §311-1-
4 4(e) of this code.

5 (b) "Capital account" means the aggregate value of unimpaired capital stock based on the
6 par value of the shares, plus any unimpaired surplus and undivided profits or retained earnings of
7 a private trust company organized as a corporation; or the initial cash investment remitted for
8 membership interests in a private trust company organized as a limited liability company, plus any
9 undivided profits or retained earnings of the limited liability company.

10 (c) "Capital stock" means the shares of stock issued to create nonwithdrawable capital for
11 a corporation, or membership interests issued to create nonwithdrawable capital for a limited
12 liability company.

13 (d) "Collateral kinship" means a relationship that is not lineal but derives from a common
14 ancestor.

15 (e) "Commissioner" means the Commissioner of the West Virginia Division of Financial
16 Institutions.

17 (f) "Degrees of kinship" means, with respect to two persons, the: (1) Degrees of lineal
18 kinship computed by counting one degree for each person in the line of ascent or descent,
19 exclusive of the person from whom the computing begins; and (2) degrees of collateral kinship

20 computed by commencing with one of the persons and ascending from that person to a common
21 ancestor, descending from that ancestor to the other person, and counting one degree for each
22 person in the line of ascent and in the line of descent, exclusive of the person from whom the
23 computation begins, the total to represent the degree of such kinship.

24 (g) "Designated relative" means a common ancestor of a family, who may be a living or
25 deceased person, who is the individual to or through whom the family members are related, and
26 who is so designated in the application for a license.

27 (h) "Family" means a designated relative and family members of that designated relative.

28 (i) "Family affiliate" means a company or other entity in which one or more family members
29 own, control, or have the power, directly or indirectly, to vote all of the capital stock, partnership
30 interests, membership interests, or other equity interests of the entity.

31 (j) "Family member" means a designated relative and:

32 (1) Any individual within (A) the fifth degree of lineal kinship to a designated relative of a
33 private trust company, or the sixth degree of lineal kinship to a designated relative of a licensed
34 private trust company; or (B) the seventh degree of collateral kinship to a designated relative of a
35 private trust company, or the ninth degree of collateral kinship to a designated relative of a
36 licensed private trust company;

37 (2) The present or past spouse of any individual qualifying as a family member and an
38 individual who is within the fifth degree of lineal kinship to such spouse or former spouse;

39 (3) A trust established by (A) a family member if the trust is funded exclusively by one or
40 more family members and, for these purposes, a trust to which property has been transferred as a
41 result of a family member's exercise of a power of appointment shall be considered established by
42 that family member if all qualified beneficiaries of the appointee trust are family members, or (B) an
43 individual who is not a family member if all of the noncharitable qualified beneficiaries of the trust
44 are family members, except that a trust composed exclusively of nonindividual qualified
45 beneficiaries is considered to be a family member if all of the nonindividual qualified beneficiaries

46 are charitable foundations or other charitable entities as described in subdivision (6);

47 (4) A family affiliate or officer or former officer of a family affiliate: *Provided*, That in the case
48 of a former officer, such officer must have qualified as an officer of the family affiliate at any time
49 within the past three years;

50 (5) The estate of a family member or the estate of an individual who is not a family member
51 if all of the noncharitable beneficiaries of such estate are family members, except that an estate
52 composed exclusively of nonindividual beneficiaries is considered to be a family member if all of
53 the nonindividual beneficiaries are charitable foundations or other charitable entities as described
54 in subdivision (6); or

55 (6) A charitable foundation or other charitable entity that either (A) was created by a family
56 member, or (B) has a governing body consisting mostly of family members.

57 (k) "Fiduciary" means executor, administrator, conservator, guardian, committee, or
58 trustee.

59 (l) "Licensed private trust company" means a private trust company that operates in
60 accordance with this chapter and has been issued a license that has not been revoked or
61 suspended by the State Auditor.

62 (m) "Lineal kinship" means a family member who is in the direct line of ascent or descent
63 from a designated relative.

64 (n) "Officer" of a family affiliate means an individual, regardless of whether the individual
65 has an official title or receives a salary or other compensation, who may participate in the major
66 policymaking functions of a family affiliate, other than as a director. The term does not include an
67 individual who may have an official title and exercise discretion in the performance of duties and
68 functions, but who does not participate in determining the major policies of the family affiliate and
69 whose decisions are limited by policy standards established by other officers, regardless of
70 whether the policy standards have been adopted by the board of directors or other members of
71 management. The chair of the board of directors, the president, the chief officer, the chief financial

72 officer, the senior trust officer, and all executive vice presidents of a family affiliate, and all
73 managers if organized as a limited liability company, are presumed to be officers unless such
74 officer is excluded by resolution of the board of directors or members or by the bylaws or operating
75 agreement of the family affiliate, other than in the capacity of a director, from participating in major
76 policymaking functions of the family affiliate, and such excluded officer does not actually
77 participate therein.

78 (o) "Operating plan" means a plan that establishes the policies and procedures a private
79 trust company will have in effect when the institution opens for business and thereafter: (1) To
80 ensure that trust accounts are handled in accordance with recognized standards of fiduciary
81 conduct; and (2) to assure compliance with applicable laws and regulations.

82 (p) "Private trust business" means acting as or performing the duties of a fiduciary in the
83 regular course of its business for family members. A person does not engage in private trust
84 business by:

85 (1) Rendering services as an attorney at law in the performance of duties as a fiduciary;

86 (2) Rendering services as a certified or registered public accountant in the performance of
87 duties as such;

88 (3) Acting as trustee under a deed of trust made only as security for the payment of money
89 or for the performance of another act;

90 (4) Acting as a trustee in bankruptcy or as a receiver;

91 (5) Holding trusts of real estate for the primary purpose of subdivision, development or
92 sale, or to facilitate any business transaction with respect to such real estate;

93 (6) Engaging in the business of an escrow agent;

94 (7) Holding assets as trustee of a trust created for charitable purposes if:

95 (A) The trustee is an entity exempt from federal income tax under §501(c)(3) of the Internal
96 Revenue Code; and

97 (B) The trust is (i) exempt from federal income taxes under §501(c)(3) of the Internal

98 Revenue Code; (ii) a charitable remainder trust described in §664 of the Internal Revenue Code;
99 (iii) a pooled income fund described in §642(c)(5) of the Internal Revenue Code; or (iv) a trust the
100 charitable interest in which is either a guaranteed annuity or a fixed percentage distributed yearly
101 of the fair market value of the trust property, described in §2055(e)(2)(B) or § 2522(c)(2)(B) of the
102 Internal Revenue Code;

103 (8) Receiving rents and proceeds of sale as a licensed real estate broker on behalf of the
104 principal; or

105 (9) Engaging in securities transactions as a broker-dealer or salesman.

106 (q) "Private trust company" means a corporation or limited liability company that: (1) Is
107 exclusively owned by one or more family members; (2) is organized or qualified to do business in
108 this state; (3) engages or proposes to engage in private trust business under this chapter with one
109 or more family members; (4) does not serve as a fiduciary for a person, entity, trust, or estate that
110 is not a family member, except that it may serve as a fiduciary for up to 35 individuals who are not
111 family members if the individuals are current or former employees of the private trust company or
112 one or more trusts, companies, or other entities that are family members; and (5) does not
113 transact business with the general public.

114 (r) "Qualified beneficiary" has the meaning provided in §44D-1-103(r) of this code.

115 (s) "State Auditor" means the West Virginia State Auditor's Office.

116 (t) "Tax" includes, but is not limited to, federal, state, or local income, gift, estate,
117 generation-skipping transfer, or inheritance tax.

118 (u) "Trust institution" means a bank or trust company chartered by a state bank supervisory
119 agency or by the Office of the Comptroller of Currency.

§311-1-4. Organization; minimum capital; notice to State Auditor; control; application for license.

1 (a) No person other than a corporation or limited liability company organized under the
2 laws of this state to engage exclusively in the private trust business shall act as a private trust

3 company or licensed private trust company.

4 (b) A licensed private trust company that has one designated relative may not be organized
5 or operated with an owners' capital account of less than \$250,000. The minimum capital account
6 shall be increased to \$350,000 if two designated relatives of the licensed private trust company
7 are named in the application for a license or in the annual license renewal; or to \$450,000 if three
8 designated relatives of the licensed private trust company are named in the application for a
9 license or in the annual license renewal. A private trust company may not be organized or
10 operated with a capital account of less than \$250,000

11 (c) No person shall engage in business as a private trust company or licensed private trust
12 company without first giving written notice to the State Auditor. The notice shall identify: (1) At least
13 one designated relative for any private trust company, and up to three designated relatives for any
14 licensed private trust company, whose relationship(s) to other individuals determines whether the
15 individuals are family members; and (2) the location of the principal office and additional office, if
16 any, within this state. The notice shall be accompanied by an operating plan and such other books,
17 records, documents, or information as the Commissioner may require. The notice shall also certify
18 that: (1) All provisions of law have been complied with; (2) the private trust company or licensed
19 private trust company is formed for no other reason than to engage in the private trust business;
20 (3) family members have subscribed for capital stock, surplus, and a reserve for operation in an
21 amount equal to or in excess of \$250,000; and (4) the private trust company or licensed private
22 trust company is serving or will serve as trustee for one or more trusts having an aggregate of at
23 least \$50,000,000 in trust assets as further specified in §311-1-10 of this code.

24 (d) All of the capital stock, membership interests, or other equity interests of a private trust
25 company or licensed private trust company shall be and shall remain owned by, and under the
26 voting control of, family members, including any spouses, trusts, stock corporations, limited
27 partnerships, limited liability companies, or estates qualifying under subdivision (2), (3), (4), or (5)
28 of the definition of "family member" set forth in §311-1-3 of this code, of one or more families.

29 (e) An applicant seeking to operate as a licensed private trust company must file an
30 application with the Commissioner on forms prescribed by the Commissioner, accompanied by a
31 nonrefundable \$10,000 application fee to be deposited into a regulatory trust fund created for the
32 purpose of administering this chapter. The application must contain or be accompanied by:

33 (1) The name of the proposed licensed private trust company.

34 (2) A copy of the articles of incorporation or articles of organization and the bylaws or
35 operating agreement of the proposed licensed private trust company.

36 (3) The physical address and mailing address of the proposed licensed private trust
37 company, which must be located in this state.

38 (4) A statement describing in detail the services that will be provided to family members by
39 the proposed licensed private trust company.

40 (5) The name and biographical information of each individual who will initially serve as a
41 director, officer, manager, or member acting in a managerial capacity of the proposed licensed
42 private trust company.

43 (6) The name and biographical information of each individual who owns or has the ability or
44 power to directly or indirectly vote at least 10 percent or more of the outstanding shares,
45 membership interest, or membership units of the proposed licensed private trust company.

46 (7) The names of the designated relatives.

47 (8) The amount of the initial capital account of the proposed licensed private trust company
48 and the form in which the capital was paid and will be maintained.

49 (9) The type and amount of bonds or insurance that will be procured and maintained on
50 directors, officers, managers, or members acting in a managerial capacity or employees pursuant
51 to §311-1-12 of this code.

52 (10) A statement signed by the applicant, or by the individual signing on behalf of the
53 proposed licensed private trust company, under penalty of perjury, affirming that the following
54 statements are true:

55 (A) The proposed licensed private trust company is not currently transacting business with
56 the general public.

57 (B) No director, officer, manager, or member served as a director, officer, or manager, or
58 acted in a managerial capacity, for a trust company or any other financial institution that had a
59 license issued under the financial institutions codes or by the Federal Government or any other
60 state, the District of Columbia, a territory of the United States, or a foreign country that was
61 suspended or revoked within the 10 years preceding the date of the application.

62 (C) No director, officer, manager, or member acting in a managerial capacity has been
63 convicted of, or pled guilty or nolo contendere, regardless of whether adjudication of guilt is
64 entered by the court, to a violation of the financial institutions codes, or other similar state or
65 federal laws or related rules, or to a crime involving fraud, misrepresentation, or moral turpitude.

66 (D) No director, officer, manager, or member acting in a managerial capacity has had a
67 professional license suspended or revoked within the 10 years preceding the date of the
68 application.

69 (E) All information contained in the application is true and correct to the best knowledge of
70 the individual signing the application on behalf of the proposed licensed private trust company.

71 (11) Any other additional information reasonably required by the Commissioner or State
72 Auditor.

§31I-1-5. Operation and powers.

1 Every private trust company and licensed private trust company shall conduct its business
2 in accordance with an operating plan and in accordance with generally accepted fiduciary
3 standards. A private trust company or licensed private trust company when engaging in a private
4 trust business shall have the same rights, powers, and privileges as a banking or trust institution
5 pursuant to §31A-4-14 of this code, including the power to act as executor under the last will and
6 testament or administrator of the estate of any deceased family member.

§31I-1-6. Reacquisition of shares or interests; dividends.

1 (a) In the exercise of any power held by a private trust company or licensed private trust
2 company in its capacity as a fiduciary, the private trust company or licensed private trust company
3 shall have a duty not to exercise any power in such a way as to deprive the estate, trust, or other
4 entity for which it acts as a fiduciary of an otherwise available tax exemption, deduction, or credit
5 for tax purposes or deprive a donor of trust assets of a tax exemption, deduction, or credit or
6 operate to impose a tax upon a donor or other person as owner of any portion of the estate, trust,
7 or otherwise.

8 (b) Without limitation to subsection (a), no family member who is a stockholder or member
9 or who otherwise holds an equity interest in, or is serving as a director, officer, manager, or
10 employee of, a private trust company or licensed private trust company shall participate in or
11 otherwise have a voice in any discretionary decision by the private trust company or licensed
12 private trust company to distribute income or principal of any trust in order to discharge a legal
13 obligation of the family member or for the family member's pecuniary benefit, unless:

14 (1) The exercise of the discretion is limited by an ascertainable standard relating to the
15 health, education, support, or maintenance of that family member;

16 (2) The distribution is necessary for that family member's support, health, or education; or

17 (3) The instrument governing the administration of that trust clearly so provides.

§311-1-10. Minimum trust assets under management certification.

1 As part of the notice to the State Auditor required of any private trust company or licensed
2 private trust company that is required under §311-1-4 of this code, an affidavit must also be
3 submitted by the applicant, signed under penalty of perjury, certifying that the private trust
4 company or licensed private trust company serves or will serve as trustee for one or more trusts
5 having at least \$50,000,000 in aggregate trust assets under management as of the date of such
6 affidavit.

§311-1-11. Unlawful to advertise services.

1 A private trust company or licensed private trust company may not advertise its services to

2 the public.

§311-1-12. Fidelity bonds; insurance.

1 (a) The directors or managers of a licensed private trust company shall procure and
2 maintain fidelity bonds on all active officers, directors, managers, members acting in a managerial
3 capacity, and employees of the company, regardless of whether they receive a salary or other
4 compensation from the company, in order to indemnify the company against loss because of a
5 dishonest, fraudulent, or criminal act or omission on their part, whether acting alone or in
6 combination with other persons.

7 (b) Each fidelity bond shall be issued in an amount of at least \$1,000,000.

8 (c) In lieu of the fidelity bonds required under subsection (a), a licensed private trust
9 company may increase its capital account required under §311-1-4(b) of this code by \$1,000,000
10 so that if it has: (1) One designated relative, then it is organized or operated with a capital account
11 of at least \$1,250,000; (2) two designated relatives, then it is organized or operated with a capital
12 account of at least \$1,350,000; or (3) three designated relatives, then it is organized or operated
13 with a capital account of at least \$1,450,000.

14 (d) The licensed private trust company shall also procure and maintain an errors and
15 omissions insurance policy of at least \$1,000,000 in which it is listed as the insured to cover the
16 acts and omissions of officers, directors, managers, and members acting in a managerial capacity,
17 regardless of whether the person receives a salary or other compensation from the company.

18 (e) A private trust company or licensed private trust company may also procure and
19 maintain other insurance policies necessary or desirable in connection with the business of the
20 company, including, but not limited to, one or more casualty insurance policies.

21 (f) A private trust company that is not a licensed private trust company may procure and
22 maintain fidelity bonds as described in this section.

23 (g) A private trust company that is not a licensed private trust company may procure and
24 maintain errors and omissions insurance coverage as described in this section.

CHAPTER 36. ESTATES AND PROPERTY.

ARTICLE 1A. UNIFORM STATUTORY RULE AGAINST PERPETUITIES.

§36-1A-1. Statutory rule against perpetuities.

1 (a) ~~A~~ Except as otherwise provided in subsection (e) of this section, a nonvested property
 2 interest is invalid unless:

3 (1) When the interest is created, it is certain to vest or terminate no later than 21 years after
 4 the death of an individual then alive; or

5 (2) The interest either vests or terminates within 90 years after its creation.

6 (b) A Except as otherwise provided in subsection (e) of this section, a general power of
 7 appointment not presently exercisable because of a condition precedent is invalid unless:

8 (1) When the power is created, the condition precedent is certain to be satisfied or become
 9 impossible to satisfy no later than 21 years after the death of an individual then alive; or

10 (2) The condition precedent either is satisfied or becomes impossible to satisfy within 90
 11 years after its creation.

12 (c) A Except as otherwise provided in subsection (e) of this section, a nongeneral power of
 13 appointment or a general testamentary power of appointment is invalid unless:

14 (1) When the power is created, it is certain to be irrevocably exercised or otherwise to
 15 terminate no later than 21 years after the death of an individual then alive; or

16 (2) The power is irrevocably exercised or otherwise terminates within 90 years after its
 17 creation.

18 (d) In determining whether a nonvested property interest or a power of appointment is valid
 19 under the provisions of ~~subdivision (1), subsection (a), or subdivision (1), subsection (b), or~~
 20 ~~subdivision (1), subsection (c)~~ of this section, the possibility that a child will be born to an individual
 21 after the individual's death is disregarded.

22 (e) As to any trust created on or after the effective date of the West Virginia Private Trust

23 Company Act, this section shall apply to a nonvested property interest or power of appointment
24 contained in a trust by substituting 1,000 years in place of "90 years" in each place such term
25 appears in this section unless the terms of the trust require that all beneficial interests in the trust
26 vest or terminate within a lesser period.

27 (f) With respect to any matter relating to the validity of an interest within the rule against
28 perpetuities, unless a contrary intent appears, it shall be presumed that the transferor of the
29 interest intended that the interest be valid. This section is the sole expression of any rule against
30 perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or
31 remoteness in vesting shall exist with respect to any interest or power regardless of whether such
32 interest or power is governed by this section.

33 (g) This section shall be applied and construed to effectuate its general purpose to make
34 uniform the law with respect to the subject of this act among states enacting it.

NOTE: The purpose of this bill is to enact laws authorizing the formation and operation of licensed and unlicensed private trust companies under West Virginia law and to make substantive changes to West Virginia's rule against perpetuities by replacing its 90 year "wait and see" provision with a 1,000 "wait and see" provision to thereby permit dynastic, multigenerational trusts to be formed under West Virginia law, all in an effort to make West Virginia a more attractive situs for the formation and administration of trusts.

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