

THE WEST VIRGINIA
LAWYER

October – December 2013

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Things to Know

about the New West Virginia

Uniform Trust Code

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West Virginia has adopted the model uniform trust code with some variations. The new law is Chapter 44D of the Code. Outside of new Chapter 44D, the Act also made two interesting changes in other areas of the law. Some of the changes codify existing case law while other provisions create new law. The highlights of House Bill 2551 include the following:

1

Exercise of Fiduciary Powers

The powers given to a fiduciary now cannot be exercised by the fiduciary in such a manner that would cause the loss of a tax deduction or exemption or causes a tax to be imposed upon "...a donor or testator or other person as owner of any portion of the trust..." W.Va. Code Section 44-5A-2(b). This means that fiduciaries now must be fully aware of the tax ramifications of the exercise of any power given to them and must satisfy themselves that the tax ramifications do not violate the new law. This should generate more work for CPAs and tax attorneys.

2

To "Sprinkle" or Not to "Sprinkle"

In credit shelter trusts, bypass trusts and other trusts, the surviving spouse is often named as the trustee and given the power to "sprinkle" income or principal to himself or herself or to the children. Newly enacted W.Va. Code Section 44-5A-6 prohibits a fiduciary from exercising any discretionary power over the distribution of income or principal so as to result in payments or distributions to himself or herself. If there is a co-trustee, the other trustee can exercise the discretionary power in favor of the other trustee/beneficiary. This prohibition can be avoided by a "clear" statement in the trust instrument that this statutory prohibition will not apply.

3

Mandatory Provisions

The new uniform trust code (UTC) and its provisions can be expressly changed in a trust instrument except for 12 items, the most important of which appears to be

the fact that the trust instrument cannot “override” the spendthrift provisions contained in the UTC nor can it “override” the authority of a judge to adjust the trustee’s compensation. W.Va. Code Section 44-D-1-105.

4

Moving the Trust Out of State

Any beneficiary of a trust who is entitled to a current distribution is now entitled to 60 days written notice from the trustee if the principal place of administering the trust will be moved out of West Virginia. If a beneficiary objects to that change within the 60-day period then the principal place of administration of the trust cannot be moved. W.Va. Code Section 44-D-1-108.

5

Amending or Modifying Irrevocable Trusts

If all persons having an interest in a trust (which may or may not include the trustee) agree to modify or amend the trust then such a settlement agreement can be legally entered into unless it would “violate a material purpose of the trust.” If such an action is taken any beneficiary can petition a court for confirmation that the modification did not violate a material purpose of the trust. W.Va. Code Section 44D-1-111. We should expect litigation to define what is a “material purpose” of a trust.

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Agent Can Create a Trust

A durable general power of attorney can now specifically authorize the agent to create a trust on behalf of the principal. W.Va. Code Section 44D-4-401(b).

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At Least Two People Needed

A trust cannot be created if the same person is the sole trustee and sole beneficiary. W.Va. Code Section 44D-4-402(a)(5).

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Trust Contest Litigation

We now officially have a new area of litigation for trusts. The validity of a trust can now be challenged (as a will can be) on the basis of “fraud”, “duress” and/or “undue influence.” W.Va. Code Section 44D-4-406.

9

No Oral Trusts

The UTC prohibits oral trusts. W.Va. Code Section 44D-4-407.

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Don’t Overfund Fido’s Trust

Trusts for the benefit of pets are now specifically authorized; however, if a judge determines that the trust is “overfunded” then the excess will be distributed to the grantor’s “successors in interest.” W.Va. Code Section 44D-4-408.

11

No Beneficiaries

It is now specifically permissible to create a non-charitable trust without specific beneficiaries. In such a trust the general focuses or goals to be accomplished by the trust would be described. The trustee would then select the individuals or entities to receive funds from the trust to fulfill those goals. W.Va. Code Section 44D-4-409.

12

Up from \$50,000

A trustee can now unilaterally terminate a trust containing less than \$100,000 if it would be uneconomical to continue the trust. W.V. Code Section 44D-4-414. The beneficiaries are entitled to notice of this action.

13

Banks Watch Out No. 1

Significantly, a court can now terminate a trust or select a new trustee if the court determines that the value of the trust is insufficient to justify the cost of administration of the trust. W.Va. Code Section 44D-4-414(b).

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Banks Watch Out No. 2

Even if the trust specifically authorizes a level of compensation to the trustee, “windfall fees” can be prohibited by a judge. W.Va. Code Section 44D-7-708(b) (2). This could raise questions concerning the validity of bank trustee fee schedules as they relate to closely held stock, notes from family members and other valuable but illiquid or non-income producing assets.

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Copy of the Trust

Any beneficiary whether current, future or contingent is entitled to request and receive a copy of the trust from the trustee. W.Va. Code Section 44D-8-813(b)(1).

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Change in Fees

All beneficiaries are entitled to notice for any change in the trustee’s method of compensation. W.Va. Code Section 44D-8-813(b)(4).

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Statements

Any current distributee, permissive distributee or any other beneficiary is entitled to request and receive an annual statement from the trustee. W.Va. Code Section 44D-8-813(c).

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A Big Change

Of interest to trial lawyers is W.V. Code Section 44D-10-1004, which grants discretion to the judge to award attorneys’ fees in any litigation involving a trust to be paid by a party or from the trust corpus.

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One Year Statute

There is now a one-year statute of limitations to bring suit against the trustee for breach of fiduciary duty provided the breach was ascertainable from a report given by the trustee to the beneficiaries. W.Va. Code Section 44D-10-1005.

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Certification

There is now a procedure whereby a trustee can “certify” the terms and conditions of a trust, and absent knowledge to the contrary, the “outside world” is entitled to rely upon the correctness of that certification. W.Va. Code Section 44D-10-1013.

In summary, we now have a procedure to amend irrevocable trusts by unanimous consent assuming such amendment does not interfere with a “material purpose” of the trust. Future litigation will further define what is or is not a “material purpose.” West Virginia now specifically authorizes “trust contest” litigation using the same factors historically employed for “will contest” litigation. Lawyer fees can now be awarded in connection with trust litigation. The fees charged by trustees are now, basically, subject to review by a court if challenged by a beneficiary. Any beneficiary is entitled to a copy of the trust instrument and an annual statement from the trustee. If disclosed, suit for breach of fiduciary duty by the trustee must commence within one year of the disclosure.

On balance, these statutory changes seem to be beneficial. The provisions of the UTC apply to all trusts, even if the trust was created years and years ago. W.Va. Code Section 44D-11-1105(a)(1). **WVL**

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