

# WEST VIRGINIA CODE: §44-5A-3

## **§44-5A-3. Powers which may be incorporated by reference in trust instrument.**

The following powers may be incorporated by reference by a testator in the will as provided in section two of this article and the following powers apply without the need for incorporation by reference to trustees who are governed by the provisions of the West Virginia Uniform Trust Code in chapter forty-four-d of this code:

- (a) Retain original property. -- To retain for the time the fiduciary considers advisable any property, real or personal, which the fiduciary may receive, even though the retention of the property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.
- (b) Sell and exchange property. -- To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon the terms and conditions, including credit, and for the consideration the fiduciary considers advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary is not under a duty to follow the proceeds or other consideration received by the fiduciary from the sale or exchange.
- (c) Invest and reinvest. -- To invest and reinvest, as the fiduciary considers advisable, in stocks (common or preferred), bonds, debentures, notes, mortgages or other securities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest, or in annuity contracts for any beneficiary, in any real or personal property, in investment trusts; in participations in common trust funds, and generally in property the fiduciary considers advisable, even though the investment is not of the character approved by applicable law but for this provision.
- (d) Invest without diversification. -- To make investments which cause a greater proportion of the total property held by the fiduciary to be invested in investments of one type or of one company than would be considered appropriate for the fiduciary apart from this provision.
- (e) Continue business. -- To the extent and upon terms and conditions and for the periods as the fiduciary considers necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including, but not limited to, the power:
  - (1) To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

- (2) To dispose of any interest therein or acquire the interest of others therein;
- (3) To contribute thereto or invest therein additional capital or to lend money thereto, in any case upon terms and conditions the fiduciary approves from time to time;
- (4) To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and
- (5) In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it is not necessary to itemize receipts and disbursements and distributions of property but it is sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary is permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.
- (f) Form corporation or other entity. -- To form a corporation or other entity and to transfer, assign, and convey to the corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of the corporation or entity, and to continue to hold the stock and securities and obligations.
- (g) Operate farm. -- To continue any farming operation received by the fiduciary pursuant to the will or other instrument and to do any and all things considered advisable by the fiduciary in the management and maintenance of the farm and the production and marketing of crops and dairy, poultry, livestock, orchard and forest products including, but not limited to, the following powers:
  - (1) To operate the farm with hired labor, tenants or sharecroppers;
  - (2) To lease or rent the farm for cash or for a share of the crops;
  - (3) To purchase or otherwise acquire farm machinery and equipment and livestock;
  - (4) To construct, repair and improve farm buildings of all kinds needed in the fiduciary's judgment, for the operation of the farm;
  - (5) To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes such as for production, harvesting or marketing, or for the construction, repair or improvement of farm buildings or for the purchase of farm machinery or equipment or livestock;
  - (6) To employ approved soil conservation practices in order to conserve, improve and maintain the fertility and productivity of the soil;
  - (7) To protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate;

- (8) To ditch, dam and drain damp or wet fields and areas of the farm when and where needed;
- (9) To engage in the production of livestock, poultry or dairy products, and to construct such fences and buildings and plant pastures and crops necessary to carry on the operations;
- (10) To market the products of the farm; and
- (11) In general, to employ good husbandry in the farming operation.
- (h) Manage real property. -- (1) To improve, manage, protect and subdivide any real property;
- (2) To dedicate or withdraw from dedication parks, streets, highways or alleys;
- (3) To terminate any subdivision or part thereof;
- (4) To borrow money for the purposes authorized by this subdivision for periods and upon terms and conditions as to rates, maturities and renewals the fiduciary considers advisable and to mortgage or otherwise encumber any property or part thereof, whether in possession or reversion;
- (5) To lease any property or part thereof to commence at the present or in the future, upon terms and conditions, including options to renew or purchase, and for such period or periods the fiduciary considers advisable although the period or periods may extend beyond the duration of the trust or the administration of the estate involved;
- (6) To make coal, gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which the property lies;
- (7) To manage and improve timber and forests on the property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;
- (8) To modify, renew or extend leases;
- (9) To employ agents to rent and collect rents;
- (10) To create easements and release, convey or assign any right, title or interest with respect to any easement on the property or part of the property;
- (11) To erect, repair or renovate any building or other improvement on the property, and to remove or demolish any building or other improvement, in whole or in part; and
- (12) To deal with the property and every part of the property in all other ways and for other purposes or considerations as it would be lawful for any person owning the same to deal

with the property either in the same or in different ways from those specified elsewhere in this subdivision.

(i) Pay taxes and expenses. -- To pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration, and protection of the trust or estate.

(j) Receive additional property. -- To receive additional property from any source and administer the additional property as a portion of the appropriate trust or estate under the management of the fiduciary but the fiduciary is not required to receive the property without his or her consent.

(k) Deal with other trusts. -- In dealing with one or more fiduciaries:

(1) To sell property, real or personal, to, or to exchange property with, the trustee of any trust which the decedent or the settlor or his or her spouse or any child of his or her has created, for estates and upon terms and conditions as to sale price, terms of payment, and security as the fiduciary considers advisable; and the fiduciary is under no duty to follow the proceeds of any such sale; and

(2) To borrow money for periods and upon terms and conditions as to rates, maturities, renewals and securities the fiduciary considers advisable from any trust created by the decedent, his or her spouse, or any child of his or her, for the purpose of paying debts of the decedent, taxes, the costs of the administration of the estate, and like charges against the estate, or any part thereof, or discharging the liability of any fiduciary thereof and to mortgage, pledge or otherwise encumber a portion of the estate or any trust as may be required to secure the loan or loans and to renew the loans.

(l) Borrow money. -- To borrow money for periods and upon terms and conditions as to rates, maturities, renewals, and security the fiduciary considers advisable, including the power of a corporate fiduciary to borrow from its own banking department, for the purpose of paying debts, taxes or other charges against the estate or any trust, or any part thereof, and to mortgage, pledge or otherwise encumber a portion of the estate or any trust as may be required to secure the loan or loans; and to renew existing loans either as maker or endorser.

(m) Make advances. -- To advance money for the protection of the trust or estate, and for all expenses, losses and liabilities sustained in the administration of the trust or estate or because of the holding or ownership of any trust or estate assets, for which advances with any interest the fiduciary has a lien on the assets of the trust or estate as against a beneficiary.

(n) Vote shares. -- To vote shares of stock owned by the estate or any trust at stockholders meetings in person or by special, limited or general proxy, with or without power of substitution.

(o) Register in name of nominee. -- To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship so that title to the security may pass by delivery, but the fiduciary is liable for any act of the nominee in connection with the stock so held.

(p) Exercise options, rights and privileges. -- To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes, mortgages or other property into other stocks, bonds, debentures, notes, mortgages or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages or other property; and to hold the stocks, bonds, debentures, notes, mortgages or other property so acquired as investments of the estate or trust so long as the fiduciary considers advisable.

(q) Participate in reorganizations. -- To unite with other owners of property similar to any which may be held at any time in the decedent's estate or in any trusts in carrying out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease or sale of the property, incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a stockholders or bondholders protective committee; to deposit securities in accordance with any plan agreed upon; to pay any assessments, expenses or sums of money that may be required for the protection or furtherance of the interest of the distributees of an estate or beneficiaries of any trust with reference to the plan; and to receive as investments of an estate or any trust any securities issued as a result of the execution of the plan.

(r) Reduce interest rates. -- To reduce the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of an estate or trust.

(s) Renew and extend obligations. -- To continue any obligation, whether secured or unsecured, upon and after maturity with or without renewal or extension upon terms the fiduciary considers advisable, without regard to the value of the security, if any, at the time of the continuance.

(t) Foreclose and bid in. -- To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust or other lien securing the bond, note or other obligation, and to bid in the property at the foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(u) Insure. -- To carry insurance coverage, including public liability, for hazards and in amounts, either in stock companies or in mutual companies, as the fiduciary considers advisable.

(v) Collect. -- To collect, receive and receipt for rents, issues, profits, and income of an estate or trust.

(w) Litigate, compromise or abandon. -- To compromise, adjust, arbitrate, sue on or defend, abandon or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary considers advisable, and the fiduciary's decision is conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by those persons; and in the absence of fraud, bad faith or gross negligence of the fiduciary, is conclusive between the fiduciary and the beneficiaries of the estate or trust.

(x) Employ and compensate agents, etc. -- To employ and compensate, out of income or principal or both and in proportion as the fiduciary considers advisable, persons considered by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of any trust, including, but not limited to, agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without liability for any neglect, omission, misconduct or default of the agent or representative as long as he or she was selected and retained with due care on the part of the fiduciary.

(y) Acquire and hold property of two or more trusts undivided. -- To acquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division becomes necessary in order to make distributions; to hold, manage, invest, reinvest, and account for the several shares or parts of shares by appropriate entries in the fiduciary's books of account, and to allocate to each share or part of share its proportionate part of all receipts and expenses: Provided, That the provisions of this subdivision do not defer the vesting in possession of any share or part of share of the estate or trust.

(z) Establish and maintain reserves. -- To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements and general maintenance of buildings or other property out of rents, profits or other income received; and to set up reserves also for the equalization of payments to or for beneficiaries: Provided, That the provisions of this subdivision do not affect the ultimate interests of beneficiaries in the reserves.

(aa) Distribute in cash or kind. -- To make distribution of capital assets of the estate or trust in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests, as the fiduciary finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution thereof if and when there is more than one distributee thereof, which determination is binding upon the distributees unless clearly capricious, erroneous and inequitable: Provided, That the fiduciary may not exercise any power under this subdivision unless the fiduciary holds title to or an interest in the property to be distributed and is required or authorized to make distribution thereof.

(bb) Pay to or for minors or incompetents. -- To make payments in money, or in property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

- (1) Directly to the minor or incompetent;
- (2) To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital or other institutional care of the minor or incompetent;
- (3) To the legal or natural guardian of the minor or incompetent;
- (4) To any other person, whether or not appointed guardian of the person by any court, who does, in fact, have the care and custody of the person of the minor or incompetent.

The fiduciary is not under any duty to see to the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom the payments were made; and the receipt of the person is full acquittance to the fiduciary.

(cc) Apportion and allocate receipts and expenses. -- Where not otherwise provided by statute to determine:

- (1) What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;
- (2) Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary considers advisable; and
- (3) What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(dd) Make contracts and execute instruments. -- To make contracts and to execute instruments, under seal or otherwise, as may be necessary in the exercise of the powers granted in this section.

(ee) The foregoing powers are limited as follows for any trust which is classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (including each nonexempt charitable trust described in section 4947(a)(1) of the code which is treated as a private foundation) or nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (but only to the extent that section 508(e) of the code is applicable to the nonexempt split-interest trust under section 4947(a)(2)):

- (1) The fiduciary shall make distributions of amounts, for each taxable year, at times and in a manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue

Code of 1954, or corresponding provisions of any subsequent federal tax laws;

(2) No fiduciary may engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws;

(3) No fiduciary may retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws;

(4) No fiduciary may make any investments in a manner as to subject the trust to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws;

(5) No fiduciary may make any taxable expenditures as defined in section 4945(e) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.