

# WEST VIRGINIA CODE: §44B-1-104

## §44B-1-104. Trustee's power to adjust.

(a) Subject to the provisions of subsection (b) of this section, a trustee may make an adjustment between principal and income to the extent the trustee considers necessary if all of the following conditions are satisfied:

- (1) The trustee invests and manages trust assets under the prudent investor rule.
- (2) The trust describes the amount that shall or may be distributed to a beneficiary by referring to the trust's income.
- (3) The trustee determines, after applying the rules in subsection (a), section one hundred three of this article, and considering any power the trustee may have under the trust to invade principal or accumulate income, that the trustee is unable to comply with subsection (b), section one hundred three of this article.

(b) A trustee may not make an adjustment between principal and income in any of the following circumstances:

- (1) Where it would diminish the income interest in a trust (A) that requires all of the income to be paid at least annually to a spouse and (B) for which, if the trustee did not have the power to make the adjustment, an estate tax or gift tax marital deduction would be allowed, in whole or in part.
- (2) Where it would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion.
- (3) Where it would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.
- (4) Where it would be made from any amount that is permanently set aside for charitable purposes under a will or trust, unless both income and principal are so set aside.
- (5) Where possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment.
- (6) Where possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment.

(7) Where the trustee is a beneficiary of the trust.

(c) Notwithstanding any provision to the contrary, if subdivision (5), (6), or (7) of subsection (b) of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the trust.

(d) A trustee may release the entire power conferred by subsection (a) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income in either of the following circumstances:

(1) If the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (1) to (6), inclusive, of subsection (b) of this section.

(2) If the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (b) of this section.

(e) A release under subsection (d) of this section may be permanent or for a specified period, including a period measured by the life of an individual.

(f) A trust that limits the power of a trustee to make an adjustment between principal and income does not affect the application of this section unless it is clear from the trust that it is intended to deny the trustee the power of adjustment provided by subsection (a) of this section.

(g) Nothing in this section or in this chapter is intended to create or imply a duty to make an adjustment, and a trustee is not liable for not considering whether to make an adjustment or for choosing not to make an adjustment.