WEST VIRGINIA CODE: §44B-1-104A

§44B-1-104a. Total return unitrust.

(a) As used in this section:

(1) "Disinterested person" means a person who is not a "related or subordinate party", as defined in I.R.C. §672(c) et seq., with respect to the person then acting as trustee of the trust, and excludes the grantor of the trust and any interested trustee.

(2) "Income Trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee, and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one or more such persons.

(3) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party" as defined in I.R.C. §672(c) with respect to such distributee.

(4)"Interested trustee" means: (i) An individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed; (ii) any individual trustee who may be removed and replaced by an interested distributee; or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(5) "Total return unitrust" means an income trust, which has been converted under and meets the provisions of this section.

(6) "Trustee" means all persons acting as trustee of the trust, except where expressly noted otherwise, whether acting in their discretion or at the direction of one or more persons acting in a fiduciary capacity.

(7) "Grantor" means an individual who created an inter vivos or a testamentary trust.

(8) "Unitrust amount" means an amount computed as a percentage of the fair market value of the trust.

(b) A trustee, other than an interested trustee, or where two or more persons are acting as trustee a majority of the trustees who are not an interested trustee, may, in its sole discretion and without judicial approval: (i) Convert an income trust to a total return unitrust; (ii) reconvert a total return unitrust to an income trust; or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

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(1) The trustee adopts a written policy for the trust providing: (i) In the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income; (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy; and

(2) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this section, to: (i) The grantor of the trust, if living; (ii) all living persons who are currently receiving or eligible to receive distributions of income of the trust; (iii) all living persons who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice, without regard to the exercise of any power of appointment, or, if the trust does not provide for its termination, all living persons who would receive or be eligible to receive distributions of income or principal of the trust if the persons identified in clause (ii) of this subdivision (2) were deceased; and (iv) all persons acting as advisor or protector of the trust; and at least one person receiving notice under each of clauses (ii) and (iii) of subdivision (2) is legally competent.

(A) Notice of the proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(B) The notice of the proposed action shall state that it is given pursuant to this section and shall state all of the following:

(i) The name and mailing address of the trustee;

(ii) The name and telephone number of a person who may be contacted for additional information;

(iii) A description of the action proposed to be taken and an explanation of the reasons for the action;

(iv) The time within which objections to the proposed action can be made, which shall be at least thirty days from the mailing of the notice of proposed action; and

(v) The date on or after which the proposed action may be taken or is effective.

(C) A beneficiary may object to the proposed action by mailing a written objection to the trustee at the address stated in the notice of proposed action within the time period specified in the notice of proposed action.

(D) A trustee is not liable to a beneficiary for an action regarding a matter governed by this chapter if the trustee does not receive a written objection to the proposed action from the beneficiary within the applicable period and the other requirements of this section are

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satisfied. If no beneficiary entitled to notice objects under this section, the trustee is not liable to any current or future beneficiary with respect to the proposed action.

(c) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of such interested trustees may, in its sole discretion and without judicial approval: (i) Convert an income trust to a total return unitrust; (ii) reconvert a total return unitrust to an income trust; or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing: (i) In the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income; (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy;

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee: (i) The percentage to be used to calculate the unitrust amount; (ii) the method to be used in determining the fair market value of the trust; and (iii) which assets, if any, are to be excluded in determining the unitrust amount;

(3) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this section, to: (i) The grantor of the trust, if living; (ii) all living persons who are currently receiving or eligible to receive distributions of income of the trust; (iii) all living persons who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice, without regard to the exercise of any power of appointment, or, if the trust does not provide for its termination, all living persons who would receive or be eligible to receive distributions of income or principal of the trust if the persons identified in clause (ii) of subdivision (2) of this section were deceased; and (iv) all persons acting as advisor or protector of the trust; and at least one person receiving notice under each of clauses (ii) and (iii) of subdivision (2) of this section is legally competent.

(A) Notice of the proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(B) The notice of the proposed action shall state that it is given pursuant to this section and shall state all of the following:

(i) The name and mailing address of the trustee;

(ii) The name and telephone number of a person who may be contacted for additional

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information;

(iii) A description of the action proposed to be taken and an explanation of the reasons for the action;

(iv) The time within which objections to the proposed action can be made, which shall be at least thirty days from the mailing of the notice of proposed action; and

(v) The date on or after which the proposed action may be taken or is effective.

(C) A beneficiary may object to the proposed action by mailing a written objection to the trustee at the address stated in the notice of proposed action within the time period specified in the notice of proposed action.

(D) A trustee is not liable to a beneficiary for an action regarding a matter governed by this chapter if the trustee does not receive a written objection to the proposed action from the beneficiary within the applicable period and the other requirements of this section are satisfied. If no beneficiary entitled to notice objects under this section, the trustee is not liable to any current or future beneficiary with respect to the proposed action.

(d) If any trustee desires to convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under the provisions of subsections (b) or (c) of this section, the trustee may petition the circuit court of the county in which the trustee or beneficiary resides, or if the trustee is a corporate trustee and there is no resident beneficiary, the circuit court of the county where the trust account is administered, for such order as the trustee deems appropriate. In the event, however, there is only one trustee of the trust and the trustee is an interested trustee or in the event there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determinations hereunder.

(e) The fair market value of the trust shall be determined at least annually, using a valuation date or dates or averages of valuation dates as are deemed appropriate. Assets for which a fair market value cannot be readily ascertained shall be valued using the valuation methods as are deemed reasonable and appropriate. Assets may be excluded from valuation, provided all income received with respect to the assets is distributed to the extent distributable in accordance with the terms of the governing instrument.

(f) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event no less than three percent nor more than five percent, taking into account the intentions of the grantor of the trust as expressed in the

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governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust and projected inflation and its impact on the trust.

(g) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) After calculating the trust's capital gain net income described in I.R.C. §1222(9), 26 U.S.C. §1222(9), may consider the unitrust amount as paid from net short-term capital gain described in I.R.C. §1222(5), 26 U.S.C. §1222(5) and then from net long-term capital gain described in I.R.C. §1222(7), 26 U.S.C. §1222(7); and

(4) Shall then consider the unitrust amount as coming from the principal of the trust.

(h) In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine: (i) The effective date of the conversion; (ii) the timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases; (iii) whether distributions are to be made in cash or in kind or partly in cash and partly in kind; (iv) if the trust is reconverted to an income trust, the effective date of such reconversion; and (v) such other administrative matters as may be necessary or appropriate to carry out the purposes of this section.

(i)In the case of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. §2056 or §2523, 26 U.S.C. §2056 or §2523, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel the reconversion during his or her lifetime of the trust from a total return unitrust to an income trust, notwithstanding anything in this section to the contrary.

(j) Conversion to a total return unitrust under the provisions of this section shall not affect any other provision of the governing instrument, if any, regarding distributions of principal.

(k) This section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered under West Virginia law unless:

(1) The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

(2) The trust is a trust described in I.R.C. §170(f)(2)(B) or I.R.C. §664 (d); or

(3) The governing instrument expressly prohibits use of this section by specific reference to

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this section or expressly reflects the grantor's intent that net income not be calculated as a unitrust amount.

(l) Any trustee or disinterested person who in good faith takes or fails to take any action under this section shall not be liable to any person affected by the action or inaction, regardless of whether such person received written notice as provided in this section and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The person's exclusive remedy shall be to obtain an order of the court directing the trustee to convert an income trust to a total return unitrust, to reconvert from a total return unitrust to an income trust or to change the percentage used to calculate the unitrust amount.

(m) The following provisions shall apply to a trust that, by its governing instrument, requires or permits the distribution, at least annually, of a unitrust amount equal to a fixed percentage of not less than three nor more than five percent per year of the fair market value of the trust's assets, valued at least annually, the trust to be referred to in this section as an "express total return unitrust."

(1) The unitrust amount for an express total return unitrust may be determined by reference to the fair market value of the trust's assets in one year or more than one year.

(2) Distribution of a fixed percentage unitrust amount is considered a distribution of all of the income of the express total return unitrust.

(3) An express total return unitrust may or may not provide a mechanism for changing the unitrust percentage similar to the mechanism provided under this section, based upon the factors noted therein, and may or may not provide for a conversion from a unitrust to an income trust and/or a reconversion of an income trust to a unitrust similar to the mechanism under this section.

(4) If an express total return unitrust does not specifically or by reference to this section deny a power to change the unitrust percentage or to convert to an income trust, then the trustee shall have such power.

(5) The distribution of a fixed percentage of not less than three percent nor more than five percent reasonably apportions the total return of an express total return unitrust.

(6) The trust instrument may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust distribution, to the extent that the unitrust distribution exceeds the net accounting income, or it may specify the ordering of such classes of income.

(7) Unless the terms of the trust specifically provide otherwise, a distribution of the unitrust amount from an express total return unitrust shall be considered to have been made from the following sources in order of priority:

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(A) From net accounting income determined as if the trust were not a unitrust;

(B) From ordinary income not allocable to net accounting income;

(C) After calculating the trust's capital gain net income as described in Internal Revenue Code 26 U.S.C. §1, et seq. §1222(9), 26 U.S.C. §1222(9), from net realized short-term capital gain as described in I.R.C. §1222(5), 26 U.S.C. § 1222(5) and then from net realized long-term capital gain described in I.R.C. §1222(7), 26 U. S.C. §1222(7); and

(D) From the principal of the trust.

(8) The trust instrument may provide that:

(A) Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate; and

(B) Assets used by a trust beneficiary, such as a residence property or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount.

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