WEST VIRGINIA CODE CHAPTER 44B ARTICLE 1

WV Legislature

§44B-1-101. Short title.

This chapter may be cited as the "Uniform Principal and Income Act."

WV Legislature

§44B-1-102. Definitions.

(a) "Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

(b) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(c) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator and a person performing substantially the same function.

(d) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange or liquidation of a principal asset, to the extent provided in article four of this chapter.

(e) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(f) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(g) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(h) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(i) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity.

(j) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(k) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(l) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(m) "Trustee" includes an original, additional or successor trustee, whether or not appointed or confirmed by a court.

WV Legislature

§44B-1-103. Fiduciary duties; general principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of articles two and three of this chapter, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter, and no inference that the fiduciary has improperly exercised the discretion arises from the fact that the fiduciary has made an allocation contrary to a provision of this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under subsection (a), section one hundred four of this article, or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will or this chapter, including the trustee's power to adjust under subsection (a), section one hundred four of this article, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. The exercise of discretion in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

www.Legislature

§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.

WV Legislature

(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.

WV Legislature

§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:

(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

WV Legislature

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 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.

WV Legislature

(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 information;

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

WV Legislature

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 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.

WV Legislature

(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 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

WV Legislature

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:

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

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

WV Legislature

(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.

WV Legislature

§44B-1-105. Trustee's right to give notice.

(a) A trustee may but is not required to give a notice of proposed action regarding a matter governed by this chapter as provided in this section. For the purpose of this section, a proposed action includes a course of action and a decision not to take action.

(b) The trustee shall mail notice of the proposed action to all adult beneficiaries who are receiving, or are entitled to receive, income under the trust or to receive a distribution of principal if the trust were terminated at the time the notice is given.

(c) Notice of 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.

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

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

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

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

(4) 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;

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

(e) 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.

(f) 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.

(g) If the trustee receives a written objection within the applicable period, either the trustee or a beneficiary may petition the court to have the proposed action taken as proposed, taken with modifications, or denied. In the proceeding, a beneficiary objecting to the proposed action has the burden of proving that the trustee's proposed action should not be taken. A beneficiary who has not objected is not estopped from opposing the proposed action in the proceeding. If the trustee decides not to implement the proposed action, the trustee shall

WV Legislature

notify the beneficiaries of the decision not to take the action and the reasons for the decision, and the trustee's decision not to implement the proposed action does not itself give rise to liability to any current or future beneficiary. A beneficiary may petition the court to have the action taken, and has the burden of proving that it should be taken.

(h) In a proceeding with respect to a trustee's exercise or nonexercise of the power to make an adjustment under section one hundred four, the sole remedy is to direct, deny, or devise an adjustment between principal and income.

(i) Nothing in this section is intended to create or imply a duty to give notice and a trustee is not liable for choosing not to give notice or for not considering whether to give notice.

(j) This chapter applies to any will and trust established under an instrument executed on or after the effective date of this chapter except as otherwise expressly provided in the will or terms of the trust or in this chapter, or if the trustee or personal representative elects in either's sole discretion to administer the trust or will under this chapter. With respect to any will or trust established under an instrument executed prior to the effective date of this chapter, this chapter applies if the trustee or personal representative elects, in either's sole discretion, to administer the trust or will under this chapter.

WV Legislature