WEST VIRGINIA CODE CHAPTER 44D ARTICLE 5

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§44D-5-501. Rights of beneficiary's creditor or assignee.

To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest in a trust by execution or other process against the present or future distributions to or for the benefit of the beneficiary. The court may limit the award to relief as appropriate under the circumstances.

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§44D-5-502. Spendthrift provision.

(a) A spendthrift provision contained in a trust instrument is valid if it contains language substantially to the effect that it restrains both voluntary and involuntary transfers of a beneficiary's interest.

(b) A term of a trust instrument providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision, and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

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§44D-5-503. Exceptions to spendthrift provision.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) A spendthrift provision is unenforceable against:

(1) A beneficiary's child, who has a judgment or court order against the beneficiary for child support;

(2) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and

(3) A claim of this state or the United States to the extent a statute of this state or federal law so provides.

(c) A claimant against whom a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

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§44D-5-503a..Self-settled spendthrift trusts.

(a) A grantor may transfer assets to a qualified self-settled spendthrift trust and retain in that trust a qualified interest, and, except as otherwise provided in this article, the provisions of section five hundred five of this article do not apply to such qualified interest.

(b)The provisions of section five hundred five of this article shall continue to apply with respect to any interest held by a grantor in a qualified self-settled spendthrift trust, other than a qualified interest.

(c) A grantor's transfer to a qualified self-settled spendthrift trust shall not, to the extent of the grantor's qualified interest, be deemed to have been made with intent to delay, hinder or defraud creditors, for purposes of article one-a, chapter forty of this code, merely because it is made to a trust with respect to which the grantor retains a qualified interest and merely because it is made without consideration. A grantor's transfer to a qualified self-settled spendthrift trust may, however, be set aside under article one-a, chapter forty of this code or if the qualified affidavit contains a material misstatement of fact: Provided, That any transfer made to a qualified self-settled spendthrift trust which may be set aside under article one-a, chapter forty of this code shall be chargeable first with the entire costs and expenses, including attorney's fees, properly incurred by the trustee in the defense of the action or proceeding to set aside the transfer.

(d) A grantor's creditor may bring an action under article one-a, chapter forty of this code to avoid a transfer to a qualified self-settled spendthrift trust or otherwise to enforce a claim that existed on the date of the grantor's transfer to such trust within four years after the date of the grantor's transfer to such trust to which such claim relates.

(e) A creditor shall have only such rights with respect to a grantor's transfer to a qualified self-settled spendthrift trust as are provided in this section. No creditor and no other person has any claim or cause of action against any trustee, trust adviser, trust director or any person involved in the counseling, drafting, preparation or execution of, or transfers to, a qualified self-settled spendthrift trust.

(f) If a grantor makes more than one transfer to the same qualified self-settled spendthrift trust, the following rules apply:

(1) The grantor's making of a subsequent transfer shall be disregarded in determining a

creditor's claim with respect to whether a prior transfer is valid under this section;

(2) With respect to each subsequent transfer by the grantor, the four-year limitations period provided in subsection (d) of this section, with respect to actions brought under article one-a of chapter forty of this code with respect to the subsequent transfer, commences on the date of such subsequent transfer; and

(3) Any distribution to a beneficiary is deemed to have been made from the latest such

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transfer.

(g) The movement to this state of the administration of an existing trust, which, after such movement to the state, meets for the first time all of the requirements of a qualified self-settled spendthrift trust, shall be treated, for purposes of this section, as a transfer to this trust by the grantor on the date of such movement of all of the assets previously transferred to the trust by the grantor.

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§44D-5-503b. Definitions.

As used in this article, unless the context requires a different meaning:

(a) "Qualified trustee" means any person who is a natural person residing within the state or a legal entity authorized to engage in trust business within the state and who maintains or arranges for custody within the state of some or all of the property that has been transferred to the trust by the grantor, maintains records within the state for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation within the state of fiduciary income tax returns for the trust, or otherwise materially participates within the state in the administration of the trust. A trustee is not a qualified trustee if such trustee's authority to make distributions of income or principal or both are subject to the direction of someone who, were that person a trustee of the trust, would not meet the requirements to be a qualified trustee.

(b) "Independent qualified trustee" means a qualified trustee who is not, and whose actions are not, subject to direction by:

(1) The grantor;

(2) Any natural person who is not a resident of the state;

(3) Any entity that is not authorized to engage in trust business within the state;

(4) The grantor's spouse;

(5) A parent of the grantor;

(6) Any descendant of the grantor; or

(7) A sibling of the grantor.

(c) "Qualified interest" means a grantor's interest in a qualified self-settled spendthrift trust, to the extent that such interest entitles the grantor to receive distributions of income, principal, or both, in the sole discretion of an independent qualified trustee. A grantor may have a qualified interest in a qualified self-settled spendthrift trust and also have an interest in the same trust that is not a qualified interest, and the rules of section five hundred five of this article shall apply to each interest of the grantor in the same trust other than the grantor's qualified interest.

(d) "Qualified self-settled spendthrift trust" means a trust if:

(1) The trust is irrevocable;

(2) The trust is created during the grantor's lifetime;

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(3) There is, at all times when distributions could be made to the grantor pursuant to the grantor's qualified interest, at least one beneficiary other than the grantor:

(i) To whom income may be distributed, if the grantor's qualified interest relates to trust income;

(ii) to whom principal may be distributed, if the grantor's qualified interest relates to trust principal; or

(iii) to whom both income and principal may be distributed, if the grantor's qualified interest relates to both trust income and principal;

(4) The trust has at all times at least one qualified trustee, who may be, but need not be, an independent qualified trustee;

(5) The trust instrument expressly incorporates the laws of this state to govern the validity, construction and administration of the trust;

(6) The trust instrument includes a spendthrift provision, as defined in section five hundred two of this article, that restrains both voluntary and involuntary transfer of the grantor's qualified interest;

(7) The grantor does not have the right to disapprove distributions from the trust; and

(8) The grantor duly executes a qualified affidavit before or substantially contemporaneously with the making of the transfer of the asset or assets into the trust.

(e) "Qualified affidavit" means a duly executed affidavit of the grantor which contains under oath all of the following statements, or statements substantially to the effect:

(1) The property being transferred to the trust was not derived from unlawful activities;

(2) The grantor has full right, title, and authority to transfer the property to the trust;

(3) The grantor will not be rendered insolvent immediately after the transfer of the property to the trust;

(4) The grantor does not intend to defraud any creditor by transferring the property to the trust;

(5) There are no pending or threatened court actions against the grantor, except for any court action expressly identified in the affidavit or an attachment to the affidavit;

(6) The grantor is not involved in any administrative proceeding, except for any proceeding expressly identified in the affidavit or an attachment to the affidavit;

(7) The grantor is not indebted on account of an agreement or order of court for the payment

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of support or alimony in favor of such transferor's spouse, former spouse or children, or for a division or distribution of property incident to a judicial proceeding with respect to a divorce or annulment in favor of such transferor's spouse or former spouse, except for any such indebtedness expressly identified in the affidavit or an attachment to the affidavit; and

(8) The grantor does not contemplate at the time of the transfer the filing for relief under the Bankruptcy Code of the United States.

An affidavit is defective and is not a qualified affidavit if it materially fails to meet the requirements set forth in this subsection. An affidavit is not considered defective and is a qualified affidavit if it contains any nonsubstantive variances from the language set forth in this subsection, it contains statements or representations in addition to those required in this subsection which do not materially contradict the required statements or representations or there are any technical errors in the form, substance or method of preparation or execution of the affidavit if those errors were not the fault of the affiant and the affiant reasonably relied upon another person to prepare or notarize the affidavit.

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§44D-5-503c. Vacancies; revocability of trust; right to withdraw.

(a) A vacancy in the position of qualified trustee that occurs for any reason, whether or not there is then serving another trustee, shall be filled in the following order of priority:

(1) By a person eligible to be a qualified trustee and who is designated pursuant to the terms of the trust instrument to act as successor trustee;

(2) By a person eligible to be a qualified trustee and who is designated by unanimous agreement of the qualified beneficiaries; or

(3) By a person eligible to be a qualified trustee and who is appointed by the court pursuant to any of the provisions of §44D-7-1 *et seq*. of this code.

(b) A vacancy in the position of independent qualified trustee that occurs for any reason, whether or not there is then serving another trustee, shall be filled in the following order of priority:

(1) By a person eligible to be an independent qualified trustee and who is designated pursuant to the terms of the trust instrument to act as successor trustee; or

(2) By a person eligible to be an independent qualified trustee and who is designated by unanimous agreement of the qualified beneficiaries; or

(3) By a person eligible to be an independent qualified trustee and who is appointed by the court pursuant to any of the provisions of §44D-7-1 *et seq*. of this code.

(c) A trust instrument shall not be deemed revocable on account of the inclusion of any one or more of the following rights, powers, and interests:

(1) A power of appointment, exercisable by the grantor by will or other record effective only upon the grantor's death, other than a power to appoint to the grantor's estate or the creditors of the grantor's estate;

(2) The grantor's qualified interest in the trust;

(3) The grantor's right to receive income or principal pursuant to an ascertainable standard;

(4) The grantor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust (each within the meaning of Section 664(d) of the Internal Revenue Code) and the grantor's right, at any time, and from time to time, to release, in a record delivered to the qualified trustee, all or any part of the grantor's retained interest in such trust;

(5) The grantor's receipt each year of a percentage, not to exceed five percent, specified in the trust instrument of the initial value of the trust assets or their value determined from

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time to time pursuant to the trust instrument;

(6) The grantor's right to remove a qualified trustee or independent qualified trustee and to appoint a new trustee who meets the same criteria;

(7) The grantor's potential or actual use of real property held under a personal residence trust (within the meaning of Section 2702(c) of the Internal Revenue Code);

(8) The grantor's potential or actual receipt or use of a qualified annuity interest (within the meaning of Section 2702 of the Internal Revenue Code);

(9) The ability of a qualified trustee, whether pursuant to discretion or direction, to pay, after the grantor's death, all or any part of the grantor's debts outstanding at the time of the grantor's death, the expenses of administering the grantor's estate, or any federal or state estate, inheritance, or death tax imposed on or with respect to the grantor's estate; and

(10) A grantor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on trust income, or the direct payment of such taxes to the applicable tax authorities, pursuant to a provision in the trust instrument that expressly provides for the direct payment of such taxes or the reimbursement of the grantor for such tax payments.

(d) A beneficiary who has the right to withdraw his or her entire beneficial interest in a trust shall be treated as its grantor to the extent of such withdrawal right, when such right to withdraw has lapsed, been released, or otherwise expired, without regard to the limitations otherwise imposed by §44D-505(b) of this code.

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§44D-5-504. Discretionary trusts; effect of standard.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Except as otherwise provided in subsection (c) of this section, whether or not a trust instrument contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(1) The discretion is expressed in the form of a standard of distribution; or

(2) The trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for child support of the beneficiary's child; and

(2) The court shall direct the trustee to pay to the child, spouse or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) A creditor may not reach the interest of a beneficiary who is also a trustee or cotrustee or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

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§44D-5-505. Creditor's claim against grantor.

(a) Whether or not the terms of a trust instrument contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the grantor, the property of a revocable trust is subject to claims of the grantor's creditors.

(2) During the lifetime of the grantor, with respect to an irrevocable trust, except to the extent otherwise provided in sections five hundred three-a, five hundred three-b and five hundred three-c of this article, a creditor or assignee of the grantor may reach the maximum amount that can be distributed to or for the grantor's benefit. If a trust has more than one grantor, the amount the creditor or assignee of a particular grantor may reach may not exceed the grantor's interest in the portion of the trust attributable to that grantor's contribution.

(3) After the death of a grantor, and subject to the grantor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the grantor's death is subject to claims of the creditors of the deceased grantor, to the extent the grantor's probate estate is inadequate to satisfy them, and with such claims payable in order of priority of the following classes:

(A) The costs and expenses of administration of the grantor's estate;

(B) Reasonable funeral expenses;

(C) Debts and taxes with preference under federal law;

(D) Unpaid child support which is due and owing at the time of the decedent's death;

(E) Debts and taxes with preference under other laws of the State of West Virginia;

(F) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation for persons attending the decedent during his or her last illness; and

(G) All other claims.

(b) For purposes of this section:

(1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the grantor of a revocable trust to the extent of the property subject to the power; and

(2) Upon the lapse, release or waiver of the power, the holder is treated as the grantor of the trust only to the extent the value of the property affected by the lapse, release or waiver

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exceeds the greater of the amount specified in Section 2041(b)(2), Section 2503(b) or Section 2514(e) of the Internal Revenue Code.

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§44D-5-506. Overdue distribution.

(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust instrument, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if:

(1) The discretion is expressed in the form of a standard of distribution; or

(2) The terms of the trust instrument authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

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§44D-5-507. Personal obligations of trustee.

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

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