WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 1993

ENROLLED

HOUSE BILL No. 2095

(By Delegates Burk and Rowe)

Passed April 8, 1993
In Effect Ninety Days From Passage
ENROLLED

H. B. 2095

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[Passed April 8, 1993; in effect ninety days from passage.]

AN ACT to amend chapter forty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-a, relating to the administration of estates and trusts; powers of fiduciaries; providing that certain enumerated powers may be incorporated by reference in trust instrument; definition; and restrictions on exercise of power.

Be it enacted by the Legislature of West Virginia:

That chapter forty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-a, to read as follows:

ARTICLE 5A. POWERS OF FIDUCIARIES.

§44-5A-1. Definition.

As used in this article, the term “fiduciary” means the one or more executors of the estate of a decedent, or the one or more trustees of a testamentary or inter vivos trust estate, whichever in a particular case is appropriate.

§44-5A-2. Incorporation by reference of enumerated powers; restriction on exercise of such powers.

(a) By an express intention of the testator or settlor
so to do contained in a will, or in an instrument in
writing whereby a trust estate is created inter vivos, any
or all of the powers or any portion thereof enumerated
in section three of this article, as they exist at the time
of the signing of the will by the testator or at the time
of the signing by the first settlor who signs the trust
instrument, may be, by appropriate reference made
thereto, incorporated in such will or other written
instrument, with the same effect as though such
language were set forth verbatim in the instrument.
Incorporation of one or more of the powers contained in
section three of this article by reference to that section
shall be in addition to and not in limitation of the
common law or statutory powers of the fiduciary.

(b) No power of authority conferred upon a fiduciary
as provided in this article may be exercised by such
fiduciary in such a manner as, in the aggregate, to
deprive the trust or the estate involved of an otherwise
available tax exemption, deduction or credit, expressly
including the marital deduction, or operate to impose a
tax upon a donor or testator or other person as owner
of any portion of the trust or estate involved. "Tax"
includes, but is not limited to, any federal, state, or local
income, gift, estate or inheritance tax.

(c) Nothing herein shall be construed to prevent the
incorporation of the powers enumerated in section three
of this article in any other kind of instrument or
agreement.

§44-5A-3. Powers which may be incorporated by refer-
ence in trust instrument.

The following powers may be incorporated by refer-
ence as provided in section two of this article:

(a) Retain original property. — To retain for such time
as the fiduciary considers advisable any property, real
or personal, which the fiduciary may receive, even
though the retention of such 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 such terms and conditions, including credit, and for such consideration as 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 such 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 such property as the fiduciary considers advisable, even though such 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 such terms and conditions and for such periods of time 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 such case upon such terms and conditions as 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 such corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of any such corporation or entity, and to continue to hold such 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 such 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 such pastures and crops as may be necessary to carry on such 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 such periods of time and upon such terms and conditions as to rates, maturities and renewals as the fiduciary considers advisable and to mortgage or otherwise encumber any such property or
(5) To lease any such property or part thereof to commence at the present or in the future, upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary considers advisable although such 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 such property lies;

(7) To manage and improve timber and forests on such 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 such property or part thereof;

(11) To erect, repair or renovate any building or other improvement on such property, and to remove or demolish any building or other improvement, in whole or in part; and

(12) To deal with any such property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this subdivision (h).

(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 such 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 such 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 spouse or any child of his shall have created, for such estates and upon such 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 such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the fiduciary considers advisable from any trust created by the decedent, his spouse, or any child of his, 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 such portion of the estate or any trust as may be required to secure such loan or loans and to renew such loans.

(l) **Borrow money.** — To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as 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 such portion of the estate or any trust as may be required to secure such 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 owner-
ship of any trust or estate assets, for which advances
with any interest the fiduciary shall have 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 such 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, reorgan-
ization 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 any
such plan; and to receive as investments of an estate or
any trust any securities issued as a result of the execution of such 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 such terms as the fiduciary considers advisable, without regard to the value of the security, if any, at the time of such 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 such bond, note or other obligation, and to bid in the property at such 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 such insurance coverage, including public liability, for such hazards and in such 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 such 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 such 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 such agent or representative provided 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 such 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 be more than one distributee thereof, which
determination shall be 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 such minor or incompetent;

(2) To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital, or other institutional care of such minor or incompetent;

(3) To the legal or natural guardian of such 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 such 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 such payments were made; and the receipt of such 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
359 noncash dividends to income or principal or apportion
360 them as the fiduciary considers advisable; and
361 (3) What expenses, costs, taxes (other than estate,
362 inheritance, and succession taxes and other governmen-
363 tal charges) shall be charged against principal or
364 income or apportioned between principal and income
365 and in what proportions.
366 (dd) Make contracts and execute instruments. — To
367 make contracts and to execute instruments, under seal
368 or otherwise, as may be necessary in the exercise of the
369 powers herein granted.
370 (ee) The foregoing powers are limited as follows for
371 any trust which shall be classified as a “private
372 foundation” as that term is defined by section 509 of the
373 Internal Revenue Code of 1954 or corresponding
374 provisions of any subsequent federal tax laws (including
375 each nonexempt charitable trust described in section
376 4947(a)(1) of the code which is treated as a private
377 foundation) or nonexempt split-interest trust described
378 in section 4947(a)(2) of the Internal Revenue Code of
379 1954 or corresponding provisions of any subsequent
380 federal tax laws (but only to the extent that section
381 508(e) of the code is applicable to such nonexempt split-
382 interest trust under section 4947(a)(2)):
383 (1) The fiduciary shall make distributions of such
384 amounts, for each taxable year, at such time and in such
385 manner as not to become subject to the tax imposed by
386 section 4942 of the Internal Revenue Code of 1954, or
387 corresponding provisions of any subsequent federal tax
388 laws;
389 (2) No fiduciary may engage in any act of self-dealing
390 as defined in section 4941(d) of the Internal Revenue
391 Code of 1954, or corresponding provisions of any
392 subsequent federal tax laws;
393 (3) No fiduciary may retain any excess business
394 holdings as defined in section 4943(c) of the Internal
395 Revenue Code of 1954, or corresponding provisions of
396 any subsequent federal tax laws;
397 (4) No fiduciary may make any investments in such
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.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signatures]

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

[Signatures]

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within is approved this the 26th day of April, 1993.

Governor