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SENATE BILL NO. 980

Senate Amendments in [] — February 4, 2003

A BILL to amend and reenact § 64.1-57 of the Code of Virginia, relating to the power of fiduciaries.

Patrons Prior to Engrossment—Senator Mims; Delegate: Albo

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That § 64.1-57 of the Code of Virginia is amended and reenacted as follows:**

§ 64.1-57. Incorporation by reference of certain powers of fiduciaries into will or trust instrument.

(1) The following powers, in addition to all other powers granted by law, may be incorporated in whole or in part in any will or trust instrument by reference to this section:

(a) To keep and retain any or all investments and property, real, personal or mixed, including stock in the fiduciary institution, if the same be a corporation, as they may be at the time they come into the custody of said fiduciary, regardless of the character of same or whether they are such as then would be authorized by law for investment by fiduciaries or whether a disproportionately large part of the trust or estate remains invested in one or more types of property, for such time as the fiduciary shall deem best, and to dispose of such property by sale, exchange, or otherwise as and when such fiduciary shall deem advisable.

(a1) At the discretion of the fiduciary, to receive additions to the estate from any source, in cash or in kind, and to hold, administer and distribute such additions as a part of and under the same terms and conditions as the estate then currently held.

(b) To sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the investments and property, either real, personal or mixed, [~~which may be included in, or may at any time become part of the trust or estate of which the decedent died seized and possessed or which may from time to time come into the possession or control of the executor,~~ which may be included in, or may at any time become part of the trust or estate] upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable, at either public or private sale, either for cash or deferred payments or other consideration, as such fiduciary may determine; and for the purpose of selling, assigning, exchanging, transferring or conveying the same, to make, execute, acknowledge and deliver any and all instruments of conveyance, deeds of trust, or assignments in such form and with warranties and covenants as such fiduciary may deem expedient and proper; and in the event of any sale, conveyance, exchange, or other disposition of any of the trust or estate, the purchaser shall not be obligated in any way to see to the application of the purchase money or other consideration passing in connection therewith.

(b1) To grant, sell, transfer, exchange, purchase or acquire options of any kind on property held by such trust or estate or acquired or to be acquired by such trust or estate or held or owned by any other person.

(c), (c1) [Repealed.]

(d) To lease any or all of the real estate, which may be included in or at any time become a part of the trust or estate, upon such terms and conditions as said fiduciary, in his sole judgment and discretion, may deem advisable, and any lease or leases made by such fiduciary may extend beyond the term of the trust or administration of the estate and for the purpose of leasing said real estate, to make, execute, acknowledge and deliver any and all instruments, in such form and with such covenants and warranties as such fiduciary may deem expedient and proper.

(e) To vote any stocks, bonds, or other securities held by such fiduciary at any meeting of stockholders, bondholders, or other security holders, and to delegate the power to so vote to attorneys-in-fact or proxies under power of attorney, restricted or unrestricted.

(f) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and security as to such fiduciary shall seem advisable, including the power to borrow from the fiduciary, if the fiduciary be a bank, for the purpose of paying debts, taxes or other charges against the trust or estate or any part thereof, and with prior approval of the court for any proper purpose of the trust or estate, and to mortgage or pledge such portion of the trust or estate as may be required to secure such loan or loans; and as maker or endorser to renew existing loans.

(f1) To make loans or advancements to the executor or other representative of the grantor's estate in case such executor or other representative is in need of cash with which to pay taxes, claims or other indebtedness of the grantor's estate; but no assets acquired from a qualified retirement benefit plan under § 2039 (c) of the Internal Revenue Code shall be so used, and such assets shall be segregated and held

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59 separately until all claims against the estate for debts of the decedent or claims of administration have
60 been satisfied. Such loans or advancements may be secured or unsecured, and the trustee shall not be
61 liable in any way for any loss resulting to the trust or estate by reason of the exercise of this authority.

62 (g) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle
63 claims, in favor of or against the trust or estate as the fiduciary shall deem best, and his decision shall
64 be conclusive.

65 (h) To make distributions in cash or in kind or partly in each at valuations to be determined by the
66 fiduciary, whose decision as to values shall be conclusive.

67 (i), (i1) [Repealed.]

68 (j) To repair, alter, improve, renovate, reconstruct and demolish any of the buildings on the real
69 estate held by such fiduciary and to construct such buildings and improvements thereon as such
70 fiduciary may, in his discretion, deem advisable.

71 (k) To employ and compensate, out of the principal or the income or both as to the fiduciary shall
72 seem proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real
73 estate brokers, licensed salesmen and other assistants and advisors deemed by the fiduciary needful for
74 the proper administration of the trust or estate, and to do so without liability for any neglect, omission,
75 misconduct, or default of any such agent or professional representative provided he was selected and
76 retained with reasonable care.

77 (l) To rely upon any affidavit, certificate, letter, notice, telegram, or other paper or upon any
78 telephone conversation believed by such fiduciary to be genuine and upon any other evidence believed
79 by such fiduciary to be sufficient, and to be protected and saved harmless in all payments or
80 distributions required to be made hereunder if made in good faith and without actual notice or
81 knowledge of the changed condition or status of any person receiving payments or other distributions
82 upon a condition.

83 (m) To retain any interest held by such fiduciary in any business, whether as a stockholder or
84 security holder of a corporation, a partner, a sole proprietor, or otherwise, for any length of time,
85 without limitations, solely at the risk of the trust or estate and without liability on the part of the
86 fiduciary for any losses resulting therefrom; to participate in the conduct of such business and take or
87 delegate to others discretionary power to take any action with respect to its management and affairs
88 which an individual could take as the owner of such business, including the voting of stock, and the
89 determination of any or all questions of policy; to participate in any incorporation, reorganization,
90 merger, consolidation, recapitalization or liquidation thereof; to invest additional capital in, subscribe to
91 additional stock or securities of, and loan money or credit with or without security to, such business out
92 of the trust or estate property; to elect or employ as directors, officers, employees or agents of such
93 business, and compensate, any persons, including the fiduciary or a director, officer, or agent of the
94 fiduciary; to accept as correct financial or other statements rendered by the business from time to time
95 as to his conditions and operations except when having actual notice to the contrary; to regard the
96 business as an entity separate from the trust or estate with no duty to account to any court as to his
97 operations; to deal with and act for the business in any capacity, including any banking or trust capacity
98 and the loaning of money out of the fiduciary's own funds, and to be compensated therefor; and to sell
99 or liquidate such interest or any part thereof at any time. If any business shall be unincorporated,
100 contractual and tort liabilities arising out of such business shall be satisfied, first, out of the business,
101 and second, out of the trust or estate; but it is intended that in no event shall there be a liability of the
102 fiduciary, and if the fiduciary shall be held liable, such fiduciary shall be entitled to indemnification
103 from the business and the trust or estate in the order named. Such fiduciary shall be entitled to such
104 additional compensation as is commensurate with the time, effort, and responsibility involved in his
105 performance of services with respect to such business. Such compensation for services rendered to the
106 business may be paid by such fiduciary from the business or from other assets or from both as the
107 fiduciary, in his discretion, may determine to be advisable; the amount of such additional compensation,
108 however, shall be subject to the final approval of the court.

109 (n) To do all other acts and things not inconsistent with the provisions of the will or trust in which
110 these powers are incorporated which such fiduciary may deem necessary or desirable for the proper
111 management of the trusts herein created, in the same manner and to the same extent as an individual
112 might or could do with respect to his own property.

113 (o) To hold property in his name or in the name of nominees.

114 (p) During the minority, incapacity or the disability of any beneficiary, the fiduciary may, in his sole
115 discretion, distribute income and principal to such beneficiary in any one of the following ways: (1)
116 directly to said beneficiary; (2) to a relative, friend, guardian, conservator or committee, to be expended
117 by such person for the education, maintenance, support or benefit of said beneficiary; (3) by himself
118 expending the same for the education, maintenance, support or benefit of said beneficiary; (4) to an
119 adult person or bank authorized to exercise trust powers as custodian for a minor beneficiary under the
120 Uniform Transfers to Minors Act (§ 31-37 et seq.) to be held by such custodian under the terms of such

act; or (5) to an adult person or bank authorized to exercise trust powers as custodial trustee for a beneficiary who is incapacitated as defined in § 55-34.1, under the Uniform Custodial Trust Act (§ 55-34.1 et seq.) to be held as custodial trustee under the terms of such act.

(q) To continue and carry on any farming operation transferred to him and to operate such farms and any other farm which may be acquired and, in so doing, by way of illustration and not in limitation of his powers, to operate the farm with hired labor, tenants or sharecroppers; to hire a farm manager or a professional farm management service to supervise the farming operations; to lease or rent the farm for cash or for a share of the crops; to purchase or otherwise acquire farm machinery and equipment and livestock; to construct, repair and improve farm buildings of all sorts needed, in its judgment, for the operation of the farm; to make loans or advances or to obtain such from any source, including the fiduciary 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; to employ approved soil conservation practices in order to conserve, improve and maintain the fertility and productivity of the soil; 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 or trust; to ditch and drain damp or wet fields and areas of the farm when and where needed; to engage in livestock production, if it is deemed advisable, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such a livestock program; to execute contracts, notes and chattel mortgages relating to agriculture with the Commodity Credit Corporation, the United States Secretary of Agriculture or any other officer or agency of the federal or state governments, to enter into acreage reduction agreements, to make soil conservation commitments, and to do all acts necessary to cooperate with any governmental agricultural program; and in general, to employ the methods of carrying on the farming operation that are in common use by the community in which the farm is located, inasmuch as the duties the fiduciary is requested to assume with respect to farming operations may considerably enlarge and increase his usual responsibility and work as fiduciary, it is agreed that the fiduciary shall be entitled to such additional reasonable compensation as is commensurate with the time, effort and responsibility involved in his performance of such services.

(r) To purchase and hold policies of life insurance on the life of any beneficiary, or any person in whom the beneficiary has an insurable interest, and pay the premiums thereon out of income or principal as he deems appropriate; provided, however, that the decision of the beneficiary of any trust otherwise meeting the requirements of § 2056 (b) (5) of the Internal Revenue Code of 1954, as amended, shall control in respect to the purchase or holding of a policy of life insurance by the trustee of such trust.

(s) To make any election authorized under any law requiring, or relating to the requirement for, payment of any taxes or assessments on assets or income of the estate or in connection with any fiduciary capacity, regardless of whether any property or income is received by or is under the control of the fiduciary, including, but not limited to, elections concerning the timing of payment of any such tax or assessment, the valuation of any property subject to any such tax or assessment, the alternative use of items of deduction in computing any tax or assessment and including specifically elections permitted by statutes enacted after the date of execution of the will or trust instrument.

(t) To comply with environmental law:

1. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to a change in, or any actual or threatened violation of, any environmental law affecting property held by the fiduciary;

2. To take, on behalf of the estate or trust, any action necessary to respond to a change in, or prevent, abate, or otherwise remedy any actual or threatened violation of, any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

3. To refuse to accept property in trust if the fiduciary determines that any property to be transferred to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving any hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

4. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

5. To charge the cost of any inspection, review, abatement, response, cleanup or remedial action authorized herein against the income or principal of the trust or estate;

6. For purposes of this subdivision, "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health and "hazardous substances" means any substances defined as hazardous or toxic or otherwise regulated by any

182 environmental law.

183 (u) To resign as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of
184 interest between it in its fiduciary capacity and in its individual capacity because of potential claims or
185 liabilities which may be asserted against it on behalf of the trust or estate because of the type or
186 condition of assets held therein.

187 (2) As used in the section, the term "fiduciary" shall mean and include one or more individuals or
188 corporations having trust powers and the use of the male gender shall include the female; and any
189 substitute, added or successor fiduciary shall have all of the powers hereby provided for the fiduciary
190 named in the will or trust instrument. The provisions of this section may by reference hereto be made
191 applicable to a fiduciary of the estate of a decedent as well as to the trustee of an inter vivos or
192 testamentary trust.

193 (3) Any fiduciary upon whom a document confers any or all of the powers set forth in subsection (1)
194 may irrevocably disclaim the right to exercise any or all of the powers conferred by filing a suitable
195 written disclaimer with the clerk of court where the document is recorded or probated or, if the
196 document is not recorded, by sending a written disclaimer by registered or certified mail to the last
197 known address of all persons then living entitled to receive the principal or income. Such disclaimer
198 shall relate back to the time when the disclaiming fiduciary originally assumed such fiduciary capacity
199 and shall be binding upon any successor fiduciary. For the purpose of this subsection, a fiduciary shall
200 not be deemed to have assumed a fiduciary capacity under a revocable document until the same
201 becomes irrevocable.

202 (4) For the purposes of this section, unless the will or trust instrument expresses a contrary intention,
203 the incorporation by reference of powers enumerated by this statute shall refer to those powers existing
204 at the time of death and reference to powers under the Uniform Gifts to Minors Act in an instrument
205 executed prior to July 1, 1989, shall be construed to refer to the Uniform Transfers to Minors Act
206 (§ 31-37 et seq.).

207 (5) This section is not intended and shall not be construed to affect the application of the standard of
208 judgment and care as set forth in Article 2 (§ 26-45.3 et seq.) of Chapter 3 of Title 26.

209 (6) In the event that the will or trust instrument shall contain a provision in favor of a surviving
210 spouse of the testator or grantor, the powers above enumerated shall in no way be construed or
211 interpreted in any fashion which might cause the bequest to fail to qualify for the marital deduction
212 permitted under the federal estate tax law, unless the will or trust instrument shall specifically provide to
213 the contrary. A fiduciary acting under a construction or interpretation of a power, which action is
214 otherwise reasonable under the circumstances, shall incur no responsibility for acts taken in good faith
215 which are otherwise thereafter contended to be in a fashion which might cause disqualification for the
216 marital deduction. The provision of this subsection shall apply without regard to the time the will or
217 trust was executed or probated or the testator died in relation to the effective date of this section or
218 amendments thereto.

219 [(7) For the purposes of this section, the term "estate" shall include all interests in the real or
220 personal property of a decedent passing by will or by intestacy. This subsection is declarative of existing
221 law.]