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## HOUSE BILL NO. 1115

Offered January 11, 2006

Prefiled January 11, 2006

A *BILL to amend and reenact §§ 64.1-105, 64.1-106, 64.1-107, 64.1-108, and 64.1-110 through 64.1-115 of the Code of Virginia; to amend the Code of Virginia by adding a section numbered 64.1-106.1; and to repeal §§ 64.1-105.1, 64.1-105.2, and 64.1-109 of the Code of Virginia, relating to persons presumed dead, the date of the presumption, and survivorship of any beneficiaries.*

Patron—Athey

Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 64.1-105, 64.1-106, 64.1-107, 64.1-108, and 64.1-110 through 64.1-115 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.1-106.1 as follows:**

§ 64.1-105. Presumption of death from absence or disappearance; in cause wherein death comes in question.

A. 1. Any person who has resided in this Commonwealth who (i) leaves, does not return to the Commonwealth for seven years successively and is not heard from; (ii) disappears for seven years successively and is not heard from; or (iii) disappears in a foreign country, whose body has not been found and who is not known to be alive, upon issuance of a report of presumptive death by the Department of State of the United States ~~following an investigation by a competent local authority~~, shall be presumed to be dead. Any person not residing in this Commonwealth, but owning real or personal property herein, who disappears for seven years successively from the place of his residence outside of this Commonwealth and is not heard from, shall be presumed to be dead.

2. The presumption created by this subsection shall arise in any cause wherein the person's death is in question, unless proof is offered that he was alive within the time specified or, in the case of a presumed death in a foreign country, at any time *following his disappearance, whether* before or after the report of presumptive death was issued.

B. The fact that any person was exposed to a specific peril of death may be a sufficient basis for determining at any time after the exposure that the person is presumed to have died less than seven years after the person was last heard from.

C. *Any person on board any ship or vessel underway on the high seas who disappears from such ship or vessel, or any person on board an aircraft that disappears at sea, and who is not known to be alive, whose body has not been found or identified prior to a hearing of a board of inquiry as to such disappearance shall be presumed to be dead upon the findings of a board of inquiry that the person is presumed dead, or six months after the date of such disappearance, whichever shall first occur.*

¶D. Before any final order or decree is entered in a cause under subsection A ¶, B or C in favor of the alleged heirs, devisees, *next of kin*, legatees, beneficiaries, *survivors*, or other successors in interest of the presumed decedent, or persons claiming by, through or under them, or any of them, proceedings shall be held in conformity with §§ 64.1-107 through 64.1-112.

¶E. The person presumed to be dead under subsection A ¶, B, or C his heirs at law, devisees, next of kin, legatees, beneficiaries, *survivors*, or other successors in interest may be made parties defendant to proceedings in respect to real or personal property in which the person presumed dead may have an undivided interest, by order of publication or other process as provided by law. The proceedings, whether in the nature of partition, eminent domain or otherwise, shall not be stayed in respect to the division, sale or other disposition of the entire property. The provisions of subsection ¶D shall be applicable only to the portion of the property set apart or to the share of the proceeds to which such person would be entitled.

§ 64.1-106. Distribution of fund when presumption of death not applicable.

If in any civil action wherein any estate or fund is to be distributed the interest of any person therein depends upon his having been alive at a particular time and it is not known and cannot be shown by the exercise of reasonable diligence whether such person was alive at that time and the case is one in which the legal presumption of death does not apply, the court may, if it sees no cause to the contrary, enter its decree distributing the estate or fund among those who would be entitled thereto if it were shown that such person above referred to were dead at such particular time. However, a proper refunding bond, *which shall have surety thereon in such form as the court directs until such person is determined to be dead in accordance with § 64.1-105*, shall be given, with condition to account for the estate or fund to

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59 any person who may establish title thereto adverse to that of ~~thesuch~~ distributees, or to the heirs,  
60 ~~personal representatives or assigns of such person~~ *their successors in interest.*

61 No motion shall be made hereunder except after reasonable notice to all parties upon whom service  
62 may be had. Nothing in this section shall be construed to affect in any way any requirement of law as  
63 to service or publication of process.

64 *§ 64.1-106.1. Appointment of curator when presumption of death not applicable.*

65 *After one year has expired since the date that a resident of the Commonwealth was last seen or*  
66 *heard from, and it is not known and cannot be shown by the exercise of reasonable diligence whether*  
67 *such person is alive, and the case is one in which the legal presumption of death does not apply, the*  
68 *court may, upon good cause shown, enter its decree appointing a curator for the estate of such resident*  
69 *as if he were dead, pursuant to § 64.1-93. In determining good cause hereunder, the court shall take*  
70 *into account the existence and efficacy of any durable power of attorney.*

71 *§ 64.1-107. Probate or administration not to be granted by a clerk.*

72 Neither (i) probate of a will of a person presumed to be dead, nor (ii) administration upon the estate  
73 of such person, nor (iii) *appointment of a curator pursuant to § 64.1-106.1* shall in any case be granted  
74 by a clerk.

75 *§ 64.1-108. Petition seeking determination of death; notice.*

76 Whenever a will of any person presumed to be dead is offered for probate, or whenever letters of  
77 administration on the estate of any person presumed to be dead are applied for *petition is filed seeking a*  
78 *judicial determination that a person is dead*, the court having jurisdiction over the person's probate  
79 estate if such person were dead, if satisfied that the will should be probated or that the applicant would  
80 be entitled to letters of administration were the presumed decedent in fact dead, shall cause to be  
81 advertised in a newspaper published in the county or city once a week for four successive weeks the  
82 fact of the offer or application *petition*, together with notice that on a certain day, which shall be at least  
83 two weeks after the advertisement, the court will hear evidence concerning the alleged absence of the  
84 presumed decedent and the circumstances and duration thereof. The cost of such publication shall be  
85 paid by the petitioner or applicant.

86 *§ 64.1-110. Hearing application; evidence receivable; further publication.*

87 At the hearing, the court shall hear such legal evidence as may then be offered for the purpose of  
88 ascertaining whether or not the presumption of death is made out. If satisfied that the legal presumption  
89 of death is made out, the court shall so order. If the evidence shows the length of absence of a  
90 presumed decedent to be less than ~~twenty~~ *ten* years, the court shall forthwith cause notice of the order to  
91 be inserted once a week for two successive weeks in a newspaper published in the county or city and  
92 also, when practicable, in a newspaper published at or near the place where the presumed decedent had  
93 his residence when last heard from. The notice shall require the presumed decedent, if alive, or any  
94 person for him, to produce to the court within ~~twelve~~ *two* weeks from the date of its last insertion,  
95 satisfactory evidence of his continuance in life. If there is not a newspaper in the county or city in  
96 which the publication required by this section and §§ 64.1-108 and ~~64.1-109~~ may be had, the same may  
97 be published in such newspaper having general circulation therein as the court shall order. The cost of  
98 such publication shall be paid by the petitioner or applicant.

99 *§ 64.1-111. Grant of order; effect.*

100 A. If the evidence at the hearing required by § 64.1-110 ~~show~~ *shows* the length of absence to be  
101 ~~twenty~~ *ten* years or more or if within the period of ~~twelve~~ *two* weeks after publication of the order on the  
102 hearing aforesaid evidence satisfactory to the court or judge of the continuance in life of the supposed  
103 decedent shall not be forthcoming, the court or judge shall *enter its order determining that the supposed*  
104 *decedent is in fact dead* and proceed to admit ~~such~~ *any* will to probate or issue letters of administration  
105 to the party entitled thereto or order that the claim of the ~~widow or heirs at law or other person~~ ,  
106 *devisees, next of kin, legatees, beneficiaries, survivors, or other successors in interest of the person*  
107 *presumed dead* be established, as the case may be, and ~~such probate and letters and such descent~~, until  
108 the order in respect thereto is revoked, and all acts done in pursuance thereof and in reliance thereon,  
109 shall be as valid as if the supposed decedent were really dead.

110 B. The court's order determining a person to be dead shall state the person's date of death to be: 1.  
111 The date of the expiration of the seven-year period in a proceeding governed by subsection A of  
112 § 64.1-105, except that in a proceeding governed by clause (iii) of subsection A of § 64.1-105 it shall be  
113 the date of the Department of State's issuance of a report of presumptive death unless the evidence  
114 shows the likelihood of death at an earlier date;

115 2. The date of the person's exposure to the specific peril of death in a proceeding governed by  
116 subsection B of § 64.1-105; or

117 3. The date of the person's disappearance in a proceeding governed by subsection C of § 64.1-105.

118 C. A certified copy of the court's order determining that the supposed decedent is in fact dead shall  
119 be accepted as proof of death in all situations in which a certificate of death issued by the State  
120 Registrar of Vital Records of the Virginia Department of Health would have been accepted as such

proof.

§ 64.1-112. Distribution of property; refunding bond.

Before any distribution of the proceeds of the estate of a ~~presumed decedent~~ *person determined to be dead, or the payment or transfer of any of his other property*, is made and before the sale of any real or personal property passing in kind by persons claiming the same as heirs at law or devisees, *next of kin, distributees, beneficiaries, survivors, or other successors in interest*, the persons entitled to receive such proceeds or such property in kind shall give a refunding bond ~~with~~*without* surety ~~to be approved by the court, in such form as the court shall direct, and with~~*upon* condition that if the ~~presumed decedent~~ *person determined to be dead* is in fact alive at that time, they will respectively refund *to such person* the ~~amounts~~*proceeds or property, or proceeds of such property* received by each on demand, ~~with~~*without* interest thereon. If the persons entitled to receive the same are unable to give the security aforesaid, the money shall be invested under an order of the court in such manner as the court may approve. The investment may be changed from time to time as the court deems proper. The interest arising from such investment shall be paid annually to the persons appearing to be entitled thereto. The investment shall continue until security is given, as aforesaid, or the court, on application, orders it to be paid to the persons appearing to be entitled to it.

If the evidence shows the length of absence of the ~~presumed decedent~~ to be more than fifteen years, the court shall not require surety on such refunding bond.

§ 64.1-113. Revocation of determination of death, etc.; effect on previous acts; title of purchasers, etc.

The court, ~~or judge thereof in vacation~~, after reasonable notice to the parties interested, may revoke such ~~letters or such order of probate or such order establishing descent of property in kind~~ *determination of death* at any time on due and satisfactory evidence that the supposed decedent is in fact alive. After such revocation all powers of ~~the any~~ personal representative shall cease, but all receipts and disbursements of assets and other acts previously done by him and the title of bona fide purchasers to property under sales made by him or by the ~~widow~~, heir at law, or devisee, *next of kin, legatee, survivor, beneficiary, or other successor in interest* if such ~~widow, heir at law or devisee~~ *person* shall have complied with § 64.1-112, shall remain as valid as if no revocation had been made. ~~The Any~~ personal representative shall settle his account and all assets remaining in his hands or in the hands of such ~~widow~~, heir at law, or devisee, *next of kin, legatee, survivor, beneficiary, or other successor in interest* and the proceeds thereof shall be transferred to the owner thereof ~~presumed~~ *determined* to be dead or to his duly authorized agent or attorney. Nothing in this section shall validate the title of any person to any money or property received as ~~widow~~, heir at law, devisee, next of kin, or legatee, *survivor, beneficiary, or other successor in interest* of such supposed decedent, but the same may be recovered from them in like manner as if such ~~administration order~~ had not been granted.

§ 64.1-114. Substitution of supposed decedent in pending actions; reopening of judgments; effect of judgments.

After revocation of the ~~letters order determining death~~ the person erroneously supposed to be dead may, on suggestion filed of record of the proper fact, be substituted as plaintiff in all actions brought by ~~the administrator~~ *his personal representative*, whether prosecuted to judgment or otherwise. He may, in all actions previously brought against his ~~administrator~~ *personal representative*, be substituted as defendant, on proper suggestion filed by himself, or of the plaintiff therein, but shall not be compelled to go to trial in less than three months from the time of such suggestion filed. Judgments recovered against the ~~administrator~~ *personal representative* before revocation as aforesaid of the letters may be opened, on application by the supposed decedent made within three months from the revocation and supported by affidavit, denying specifically, on the knowledge of the affiant, the cause of the action, in whole or in part, or specifically alleging the existence of facts which would be a valid defense; but, if within such period of three months, such application shall not be made or, being made, the facts exhibited shall be adjudged an insufficient defense, the judgment shall be conclusive to all intents, saving the defendant's right to have it reviewed, as in other cases, by certiorari, appeal or writ of error. After the substitution of the supposed decedent as defendant in any judgment, as aforesaid, it shall become a lien upon his real estate in the county or city and shall so continue as other judgments, unless and until it shall be set aside by the court below or reversed in the Supreme Court.

§ 64.1-115. Costs, by whom payable.

The costs attending the issue of such ~~letters orders determining death~~ or their revocation shall be paid out of the estate of the supposed decedent; and costs arising upon an ~~application for letters~~ *a petition* which shall not be granted shall be paid by the ~~applicant~~ *petitioner*.

2. That §§ 64.1-105.1, 64.1-105.2 and 64.1-109 of the Code of Virginia are repealed.