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SENATE BILL NO. 1071

Offered January 12, 2011

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A *BILL to amend the Code of Virginia by adding a section numbered 55-548.16:1, relating to irrevocable trusts; trustee's power to appoint assets into second trust.*

Patron—Edwards

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 55-548.16:1 as follows:

§ 55-548.16:1. Trustee's special power to appoint to a second trust.

A. *As used in this section:*

"Current beneficiary" means a person who is a permissible distributee of trust income or principal.

"Original trust" means a trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries of the trust.

"Second trust" means a trust established under an irrevocable trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.

B. *Subject to a trustee's fiduciary duties to the beneficiaries of the original trust, a trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust subject to the power in favor of a trustee of a second trust. The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the terms of the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust.*

C. *The terms of the second trust shall be subject to the following conditions:*

1. *The beneficiaries of the second trust shall include only beneficiaries of the original trust;*

2. *A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust shall not have the future beneficial interest accelerated to a present interest in the second trust;*

3. *The terms of the second trust shall not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust;*

4. *If any contribution to the original trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code, then the second trust shall not contain any provision that, if included in the original trust, would have prevented the original trust from qualifying for the deduction or that would have reduced the amount of the deduction;*

5. *If contributions to the original trust have been excluded from the gift tax by the application of § 2503(b) or 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust;*

6. *If any beneficiary of the original trust has a power of withdrawal over trust property, then either:*

a. *The terms of the second trust shall provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or*

b. *Sufficient trust property shall remain in the original trust to satisfy the outstanding power of withdrawal;*

7. *If the power to distribute principal or income in the original trust is subject to an ascertainable standard, then the power to distribute income or principal in the second trust shall be subject to the same ascertainable standard as in the original trust and shall be exercisable in favor of the same current beneficiaries as in the original trust; and*

8. *The terms of the second trust may include a power of appointment that is identical to the power of appointment granted in the original trust. In the case of an original trust that includes a power of appointment that is not subject to an ascertainable standard, the second trust may confer a newly created power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust which power in*

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59 the original trust was not subject to an ascertainable standard. The power of appointment conferred
60 upon a beneficiary shall be subject to the provisions of §§ 55-12.1 through 55-13.3, covering the time at
61 which the permissible period of the rule against perpetuities and suspension of power of alienation
62 begins and the law that determines the permissible period of the rule against perpetuities and
63 suspension of power of alienation of the original trust.

64 D. A trustee may not exercise the power to appoint principal or income under subsection B if the
65 trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining
66 cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust or at the request
67 of any one or more trustees, the court may appoint a special fiduciary with authority to exercise the
68 power to appoint principal or income under subsection B.

69 E. The exercise of the power to appoint principal or income under subsection B:

70 1. Shall be considered the exercise of a power of appointment, other than a power to appoint to the
71 trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

72 2. Shall be subject to the provisions of §§ 55-12.1 through 55-13.3, covering the time at which the
73 permissible period of the rule against perpetuities and suspension of power of alienation begins and the
74 law that determines the permissible period of the rule against perpetuities and suspension of power of
75 alienation of the original trust; and

76 3. Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that
77 prohibits amendment or revocation of the trust.

78 F. To effect the exercise of the power to appoint principal or income under subsection B, the
79 following shall apply:

80 1. The exercise of the power to appoint shall be made by an instrument in writing, signed and
81 acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms
82 of the second trust, and the effective date of the exercise of the power. The instrument shall be filed with
83 the records of the original trust;

84 2. The trustee shall give written notice to all qualified beneficiaries of the original trust at least 60
85 days prior to the effective date of the exercise of the power to appoint of the trustee's intention to
86 exercise the power. The notice shall include a copy of the instrument described in subdivision 1;

87 3. If all qualified beneficiaries waive the notice period by a signed written instrument delivered to
88 the trustee, the trustee's power to appoint principal or income shall be exercisable after notice is waived
89 by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power; and

90 4. The trustee's notice under this subsection shall not limit the right of any beneficiary to object to
91 the exercise of the trustee's power to appoint and, subject to all available defenses, bring an action for
92 breach of trust seeking appropriate relief as provided by § 55-550.01.

93 G. Nothing in this section shall be construed to create or imply a duty of the trustee to exercise the
94 power to distribute principal or income, and no inference of impropriety shall be made as a result of a
95 trustee not exercising the power to appoint principal or income conferred under subsection B. Nothing
96 in this section shall be construed to abridge the right of any trustee who has a power to appoint
97 property in further trust that arises under the terms of the original trust, under any other section of this
98 title, under another provision of law, or under common law.

99 H. A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed
100 exercise of the trustee's special power to appoint to a second trust pursuant to subsection B.

101 I. Subject to the provisions of the governing instrument, this section shall be construed as pertaining
102 to the administration of a trust and shall be available to any trust that is administered under Virginia
103 law, regardless of the date the trust was created, unless the governing instrument expressly prohibits use
104 of this section by specific reference to this section or expressly reflects the grantor's intent that the
105 trustee not have the power described in subsection B. A provision in the governing instrument that "The
106 provisions of § 55-548.16:1, Code of Virginia, as amended, or any corresponding provision of future
107 law, shall not be used in the administration of this trust" or "My trustee shall not have the power to
108 appoint the income or principal of this trust to another trust" or similar words reflecting such intent
109 shall be sufficient to preclude the use of this section.

110 J. In the case of an original trust that is a testamentary trust or other trust subject to the provisions
111 of Title 26, excluding any original trust for which there is a waiver under § 26-17.7, to which the
112 trustee exercises the power described in subsection B, the second trust shall also be subject to the
113 provisions of Title 26. The provisions of this subsection and the application of the provisions of Title 26
114 to the second trust may be waived by an order of the circuit court having jurisdiction over the original
115 trust.