

VIRGINIA ACTS OF ASSEMBLY -- 2012 SESSION

CHAPTER 555

An Act to amend and reenact § 55-545.05 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 55-545.03:2 and 55-545.03:3, relating to the creation of self-settled spendthrift trusts.

[S 11]

Approved April 4, 2012

Be it enacted by the General Assembly of Virginia:

1. That § 55-545.05 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding sections numbered 55-545.03:2 and 55-545.03:3 as follows:

§ 55-545.03:2. Self-settled spendthrift trusts.

A. A settlor 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, § 55-545.05 shall not apply to such qualified interest.

B. Section 55-545.05 shall continue to apply with respect to any interest held by a settlor in a qualified self-settled spendthrift trust, other than a qualified interest.

C. A settlor's transfer to a qualified self-settled spendthrift trust shall not, to the extent of the settlor's qualified interest, be deemed to have been made with intent to delay, hinder, or defraud creditors, for purposes of § 55-80, merely because it is made to a trust with respect to which the settlor retains a qualified interest and merely because it is made without consideration. A settlor's transfer to a qualified self-settled spendthrift trust may, however, be set aside under § 55-80 or 55-81 on other bases, such as if the transfer renders the settlor insolvent.

D. A settlor's creditor may bring an action under § 55-82 to avoid a transfer to a qualified self-settled spendthrift trust or otherwise to enforce a claim that existed on the date of the settlor's transfer to such trust within five years after the date of the settlor's transfer to such trust to which such claim relates.

E. A creditor shall have only such rights with respect to a settlor's transfer to a qualified self-settled spendthrift trust as are provided in this section. No creditor and no other person shall have 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 settlor makes more than one transfer to the same qualified self-settled spendthrift trust, the following rules shall apply:

1. The settlor's making of a subsequent transfer shall be disregarded in determining whether a creditor's claim with respect to a prior transfer is valid under this section;

2. With respect to each subsequent transfer by the settlor, the five-year limitations period provided in subsection D, with respect to actions brought under Chapter 5 of Title 55 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 transfer.

G. The movement to the Commonwealth of the administration of an existing trust, which, after such movement to the Commonwealth, 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 settlor on the date of such movement of all of the assets previously transferred to the trust by the settlor.

§ 55-545.03:3. Definitions; vacancies; right to withdraw.

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

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

1. The settlor;

2. Any natural person who is not a resident of the Commonwealth;

3. Any entity that is not authorized under Title 6.2 to engage in trust business within the Commonwealth;

4. The settlor's spouse;

5. A parent of the settlor;

6. Any issue of the settlor;

7. A sibling of the settlor;

8. An employee of the settlor;

9. A business entity in which the settlor's holdings represent at least 30 percent of the total voting power of all interests entitled to vote;

10. A subordinate employee of the settlor; or

11. A subordinate employee of a business entity in which the settlor is an executive.

"Qualified interest" means a settlor's interest in a qualified self-settled spendthrift trust, to the extent that such interest entitles the settlor to receive distributions of income, principal, or both, in the sole discretion of an independent qualified trustee. A settlor 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 § 55-545.05 shall apply to each interest of the settlor in the same trust other than the settlor's qualified interest.

"Qualified self-settled spendthrift trust" means a trust if:

1. The trust is irrevocable;
2. The trust is created during the settlor's lifetime;
3. There is, at all times when distributions could be made to the settlor pursuant to the settlor's qualified interest, at least one beneficiary other than the settlor (i) to whom income may be distributed, if the settlor's qualified interest relates to trust income, (ii) to whom principal may be distributed, if the settlor's qualified interest relates to trust principal, or (iii) to whom both income and principal may be distributed, if the settlor'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 the Commonwealth to govern the validity, construction, and administration of the trust;
6. The trust instrument includes a spendthrift provision, as defined in § 55-545.02, that restrains both voluntary and involuntary transfer of the settlor's qualified interest; and
7. The settlor does not have the right to disapprove distributions from the trust.

"Qualified trustee" means any person who is a natural person residing within the Commonwealth or a legal entity authorized to engage in trust business within the Commonwealth and who maintains or arranges for custody within the Commonwealth of some or all of the property that has been transferred to the trust by the settlor, maintains records within the Commonwealth for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation within the Commonwealth of fiduciary income tax returns for the trust, or otherwise materially participates within the Commonwealth 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. 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 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 §§ 26-48 and 26-50 or pursuant to § 55-542.05.

C. 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 to act as successor trustee;
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 §§ 26-48 and 26-50 or pursuant to § 55-542.05.

D. 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 settlor by will or other written instrument effective only upon the settlor's death, other than a power to appoint to the settlor's estate or the creditors of the settlor's estate;
2. The settlor's qualified interest in the trust;
3. The settlor's right to receive income or principal pursuant to an ascertainable standard;
4. The settlor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust (each within the meaning of § 664(d) of the Internal Revenue Code) and the settlor's right, at any time, and from time to time, to release, in writing delivered to the qualified trustee, all or any part of the settlor's retained interest in such trust;
5. The settlor'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 time to time pursuant to the trust instrument;
6. The settlor's right to remove a trustee and to appoint a new trustee;
7. The settlor's potential or actual use of real property held under a personal residence trust (within the meaning of § 2702(c) of the Internal Revenue Code);

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

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

10. *A settlor'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 settlor for such tax payments.*

E. A beneficiary who has the right to withdraw his entire beneficial interest in a trust shall be treated as its settlor 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 subsection B of § 55-545.05.

§ 55-545.05. Creditor's claim against settlor.

A. Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

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

2. With respect to an irrevocable trust, *except to the extent otherwise provided in §§ 55-545.03:2 and 55-545.03:3*, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

3. After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children including the family allowance, the right to exempt property, and the homestead allowance to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances. This section shall not apply to life insurance proceeds under § 38.2-3122. No proceeding to subject a trustee, trust assets or distributees of such assets to such claims, costs and expenses shall be commenced unless the personal representative of the settlor has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the settlor and no proceeding shall be commenced later than two years following the death of the settlor. This section shall not affect the right of a trustee to make distributions required or permitted by the terms of the trust prior to being served with process in a proceeding brought by the personal representative.

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 settlor 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 settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of (i) the amount specified in § 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, (ii) the amount specified in § 2503(b) of the Internal Revenue Code of 1986, or (iii) two times the amount specified in § 2503(b) of the Internal Revenue Code of 1986 if the donor was married at the time of the transfer to which the power of withdrawal applies.

3. The assets in a trust that are attributable to a contribution to an inter vivos marital deduction trust described in either § 2523(e) or (f) of the Internal Revenue Code of 1986, after the death of the spouse of the settlor of the inter vivos marital deduction trust shall be deemed to have been contributed by the settlor's spouse and not by the settlor.