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## SENATE BILL NO. 181

Offered January 13, 2016

Prefiled January 4, 2016

A BILL to amend and reenact §§ 55-41, 55-47.01, 64.2-300, 64.2-311, 64.2-317, 64.2-500, 64.2-502, 64.2-556, 64.2-632, 64.2-1805, and 64.2-2022 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 3 of Title 64.2 an article numbered 1.1, consisting of sections numbered 64.2-308.1 through 64.2-308.17, relating to elective share of surviving spouse.

Patron—Chafin

Referred to Committee for Courts of Justice

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

1. That §§ 55-41, 55-47.01, 64.2-300, 64.2-311, 64.2-317, 64.2-500, 64.2-502, 64.2-556, 64.2-632, 64.2-1805, and 64.2-2022 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 3 of Title 64.2 an article numbered 1.1, consisting of sections numbered 64.2-308.1 through 64.2-308.17, as follows:

**§ 55-41. Conveyance from husband and wife; effect on right of wife or husband.**

When a husband and his wife have signed and delivered a writing purporting to convey any estate, real or personal, such writing, whether admitted to record or not, shall (i) if delivered prior to January 1, 1991, operate to convey from the spouse her right of dower or his right of curtesy in the real estate embraced therein, and (ii) if delivered after December 31, 1990, operate to manifest the spouse's written consent or joinder, as contemplated in § 64.2-305 or 64.2-308.9 to the transfer embraced therein. In either case, the writing passes from such spouse and his or her representatives all right, title and interest of every nature which at the date of such writing he or she may have in any estate conveyed thereby as effectively as if he or she were at such date an unmarried person. If, in either case, the writing is a deed conveying a spouse's land, no covenant or warranty therein on behalf of the other spouse joining in the deed shall operate to bind him or her any further than to convey her or his interest in such land, unless it is expressly stated that such spouse enters into such covenant or warranty for the purpose of binding himself or herself personally.

**§ 55-47.01. Equitable separate estates abolished.**

The estate known as the equitable separate estate no longer exists and any language in any writing, whenever executed, which purports to convey real property to a person as an equitable separate estate has no legal or equitable significance after January 1, 1991, except as provided in § 64.2-301 or 64.2-308.2.

**Article 1.****Elective Share of Surviving Spouse of Decedent Dying before January 1, 2017.****§ 64.2-300. Applicability; definitions.**

A. The provisions of this article shall apply to determining the elective share of a surviving spouse for decedents dying before January 1, 2017.

B. As used in this article, the terms "estate" and "property" shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime. All such insurance policies and other benefits are included in the terms "estate" and "property" notwithstanding the presence of language contained in any statute otherwise providing that neither they nor their proceeds shall be liable to attachment, garnishment, levy, execution, or other legal process or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law or any other such similar language.

**Article 1.1.****Elective Share of Surviving Spouse of Decedent Dying on or after January 1, 2017.****§ 64.2-308.1. Applicability; definitions.**

A. The provisions of this article shall apply to determining the elective share of a surviving spouse for decedents dying on or after January 1, 2017.

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

"Decedent's non-probate transfers to others" means the amounts that are included in the augmented estate under § 64.2-308.6.

"Fractional interest in property held in joint tenancy with the right of survivorship," whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one

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59 and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants  
 60 who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint  
 61 tenants.

62 "Marriage," as it relates to a transfer by the decedent during marriage, means any marriage of the  
 63 decedent to the decedent's surviving spouse.

64 "Non-adverse party" means a person who does not have a substantial beneficial interest in the trust  
 65 or other property arrangement that would be adversely affected by the exercise or non-exercise of the  
 66 power that he possesses respecting the trust or other property arrangement. A person having a general  
 67 power of appointment over property is deemed to have a beneficial interest in the property.

68 "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary  
 69 designation.

70 "Presently exercisable general power of appointment" means a power of appointment under which, at  
 71 the time in question, the decedent, whether or not he then had the capacity to exercise the power, held a  
 72 power to create a present or future interest in himself, his creditors, his estate, or creditors of his  
 73 estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

74 "Property" includes values subject to a beneficiary designation.

75 "Right to income" includes a right to payments under a commercial or private annuity, an annuity  
 76 trust, a unitrust, or a similar arrangement.

77 "Transfer," as it relates to a transfer by or of the decedent, includes (i) an exercise or release of a  
 78 presently exercisable general power of appointment held by the decedent, (ii) a lapse at death of a  
 79 presently exercisable general power of appointment held by the decedent, and (iii) an exercise, release,  
 80 or lapse of a general power of appointment that the decedent created in himself and of a power  
 81 described in subdivision 2 b of § 64.2-308.6 that the decedent conferred on a non-adverse party.

82 **§ 64.2-308.2. Dower or curtesy abolished.**

83 The interests of dower and curtesy are abolished. However, the abolition of dower and curtesy  
 84 pursuant to this section shall not change or diminish the nature or right of (i) any dower or curtesy  
 85 interest of a surviving spouse whose dower or curtesy vested prior to January 1, 1991, or (ii) a creditor  
 86 or other interested third party in any real estate subject to a right of dower or curtesy.

87 The rights of all such parties, and the procedures for enforcing such rights, shall continue to be  
 88 governed by the laws in force prior to January 1, 1991.

89 **§ 64.2-308.3. Elective share amount; effect of election on statutory benefits; non-domiciliary.**

90 A. The surviving spouse of a decedent who dies domiciled in this state has a right of election, under  
 91 the limitations and conditions stated in this article, to take an elective-share amount equal to 50 percent  
 92 of the value of the marital-property portion of the augmented estate.

93 B. If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's  
 94 homestead allowance, exempt property, and family allowance, if any, are not charged against but are in  
 95 addition to the elective-share amount.

96 C. The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to  
 97 take an elective share in property in this state is governed by the law of the decedent's domicile at  
 98 death.

99 **§ 64.2-308.4. Composition of the augmented estate; marital property portion.**

100 A. Subject to § 64.2-308.9, the value of the augmented estate, to the extent provided in §§ 64.2-308.5,  
 101 64.2-308.6, 64.2-308.7, and 64.2-308.8, consists of the sum of the values of all property, whether real or  
 102 personal, movable or immovable, tangible or intangible, wherever situated, that constitute:

- 103 1. The decedent's net probate estate;
- 104 2. The decedent's non-probate transfers to others;
- 105 3. The decedent's non-probate transfers to the surviving spouse; and
- 106 4. The surviving spouse's property and non-probate transfers to others.

107 B. The value of the marital-property portion of the augmented estate consists of the sum of the  
 108 values of the four components of the augmented estate as determined under subsection A multiplied by  
 109 the following percentage:

110 If the decedent and the spouse were married to each other: The percentage is:

111 Less than 1 year	3%
112 1 year but less than 2 years	6%
113 2 years but less than 3 years	12%
114 3 years but less than 4 years	18%
115 4 years but less than 5 years	24%
116 5 years but less than 6 years	30%
117 6 years but less than 7 years	36%
118 7 years but less than 8 years	42%
119 8 years but less than 9 years	48%

9 years but less than 10 years	54%
10 years but less than 11 years	60%
11 years but less than 12 years	68%
12 years but less than 13 years	76%
13 years but less than 14 years	84%
14 years but less than 15 years	92%
15 years or more	100%

**§ 64.2-308.5. Decedent's net probate estate.**

The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses (excluding federal or state transfer taxes), homestead allowance, family allowances, exempt property, and enforceable claims.

**§ 64.2-308.6. Decedent's non-probate transfers to others.**

The value of the augmented estate includes the value of the decedent's non-probate transfers to others, not included under § 64.2-308.5, of any of the following types, in the amount provided respectively for each type of transfer:

1. Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

a. Property over which the decedent, alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

b. The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

c. The decedent's ownership interest in property or accounts held in Payable on Death or Transfer on Death designations or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

d. Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

2. Property transferred in any of the following forms by the decedent during marriage:

a. Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

b. Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a non-adverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

3. Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

a. Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under subdivision 1 a, b, or c, or under subdivision 2, if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those subdivisions if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent

181 or the decedent's estate, spouse, or surviving spouse. As used in this subdivision, "termination," with  
182 respect to a right or interest in property, occurs when the right or interest terminated by the terms of  
183 the governing instrument or the decedent transferred or relinquished the right or interest, and, with  
184 respect to a power over property, occurs when the power terminated by exercise, release, lapse, default,  
185 or otherwise, but, with respect to a power described in subdivision 1 a, "termination" occurs when the  
186 power terminated by exercise or release, but not otherwise.

187 b. Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would  
188 have been included in the augmented estate under subdivision 1 d had the transfer not occurred. The  
189 amount included is the value of the insurance proceeds to the extent the proceeds were payable at the  
190 decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

191 c. Any transfer of property, to the extent not otherwise included in the augmented estate, made to or  
192 for the benefit of a person other than the decedent's surviving spouse. The amount included is the value  
193 of the transferred property to the extent the transfers to any one donee in either of the two years next  
194 preceding the date of the decedent's death exceeded the amount excludable from taxable gifts under 26  
195 U.S.C. § 2503(b), or its successor, on the date of the gift.

196 **§ 64.2-308.7. Decedent's non-probate transfers to the surviving spouse.**

197 Excluding property passing to the surviving spouse under the federal social security system, the value  
198 of the augmented estate includes the value of the decedent's non-probate transfers to the decedent's  
199 surviving spouse, which consist of all property that passed outside probate at the decedent's death from  
200 the decedent to the surviving spouse by reason of the decedent's death, including:

201 1. The decedent's fractional interest in property held as a joint tenant with the right of survivorship,  
202 to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint  
203 tenant;

204 2. The decedent's ownership interest in property or accounts held in co-ownership registration with  
205 the right of survivorship, or with Payable on Death or Transfer on Death designations to the extent the  
206 decedent's ownership interest passed to the surviving spouse as surviving co-owner; and

207 3. All other property that would have been included in the augmented estate under subdivision 1 or  
208 2 of § 64.2-308.6 had it passed to or for the benefit of a person other than the decedent's spouse,  
209 surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

210 **§ 64.2-308.8. Surviving spouse's property and non-probate transfers to others.**

211 A. Except to the extent included in the augmented estate under § 64.2-308.5 or 64.2-308.7, the value  
212 of the augmented estate includes the value of:

213 1. Property that was owned by the decedent's surviving spouse at the decedent's death, including:

214 a. The surviving spouse's fractional interest in property held in joint tenancy with the right of  
215 survivorship;

216 b. The surviving spouse's ownership interest in property or accounts held in co-ownership  
217 registration with the right of survivorship; and

218 c. Property that passed to the surviving spouse by reason of the decedent's death, but not including  
219 the spouse's right to homestead allowance, family allowance, exempt property, or payments under the  
220 federal social security system.

221 2. Property that would have been included in the surviving spouse's non-probate transfers to others,  
222 other than the spouse's fractional and ownership interests included under subdivision 1 a or b, had the  
223 spouse been the decedent.

224 B. Property included under this section is valued at the decedent's death, taking the fact that the  
225 decedent predeceased the spouse into account, but, for purposes of subdivision A 1 a or b, the values of  
226 the spouse's fractional and ownership interests are determined immediately before the decedent's death if  
227 the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of  
228 subdivision A 2, proceeds of insurance that would have been included in the spouse's non-probate  
229 transfers to others under subdivision 1 d of § 64.2-308.6 are not valued as if the spouse were deceased.

230 C. The value of property included under this section is reduced by enforceable claims against the  
231 surviving spouse.

232 **§ 64.2-308.9. Exclusions, valuation, and overlapping application.**

233 A. The value of any property is excluded from the decedent's non-probate transfers to others:

234 1. To the extent the decedent received adequate and full consideration in money or money's worth  
235 for a transfer of the property; or

236 2. If the property was transferred with the written joinder of, or if the transfer was consented to in  
237 writing before or after the transfer by, the surviving spouse.

238 B. 1. The value of any property otherwise included under § 64.2-308.5 or 64.2-308.6, and its income  
239 or proceeds, is excluded from the decedent's net probate estate and non-probate transfers to others to  
240 the extent such property was transferred to or for the benefit of the decedent, before or during the  
241 marriage to the surviving spouse, by gift, will, transfer in trust, intestate succession, or any other  
242 method or form of transfer to the extent it was (i) transferred without full consideration in money or

money's worth from a person other than the surviving spouse and (ii) maintained by the decedent as separate property.

2. The value of any property otherwise included under § 64.2-308.8, and its income or proceeds, is excluded from the surviving spouse's property and non-probate transfers to others to the extent such property was transferred to or for the benefit of the surviving spouse, before or during the marriage to the decedent, by gift, will, transfer in trust, intestate succession, or any other method or form of transfer to the extent it was (i) transferred without full consideration in money or money's worth from a person other than the decedent and (ii) maintained by the surviving spouse as separate property.

C. 1. The value of property:

1. Included in the augmented estate under § 64.2-308.5, 64.2-308.6, 64.2-308.7, or 64.2-308.8 is reduced in each category by enforceable claims against the included property; and

2. Includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system. Except as provided herein for interests passing to a surviving spouse, life estates and remainder interests are valued in the manner prescribed in Article 2 (§ 55-269.1 et seq.) of Chapter 15 of Title 55 and deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1. In valuing partial and contingent interests passing to the surviving spouse, and beneficial interests in trust, the following special rules apply:

a. The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and if the terms of the trust meet the following requirements:

(1) During the lifetime of the surviving spouse, the trust is controlled by the surviving spouse or one or more trustees who are non-adverse parties;

(2) The trustee shall distribute to or for the benefit of the surviving spouse the entire net income of the trust at least annually;

(3) The trustee is permitted to distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines for the health, maintenance, and support of the surviving spouse; and

(4) In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.

b. To the extent that the partial or contingent interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation by reference to the mortality and annuity tables set forth in §§ 55-271 through 55-277, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse.

c. To the extent that the valuation of a partial or contingent interest is dependent upon the life expectancy of the surviving spouse, that life expectancy shall be conclusively presumed to be no less than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death.

D. In case of overlapping application to the same property of the subsections or subdivisions of § 64.2-308.6, 64.2-308.7, or 64.2-308.8, the property is included in the augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

#### **§ 64.2-308.10. Sources from which elective share payable.**

A. In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's non-probate transfers to others:

1. The value of property excluded from the augmented estate under subsection A of § 64.2-308.9, which passes or has passed to the surviving spouse;

2. Amounts included in the augmented estate under § 64.2-308.5 that pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under § 64.2-308.7; and

3. The marital property portion of amounts included in the augmented estate under § 64.2-308.8.

B. The marital property portion under subdivision A 3 is computed by multiplying the value of the amounts included in the augmented estate under § 64.2-308.8 by the percentage of the augmented estate set forth in the schedule in subsection B of § 64.2-308.4 appropriate to the length of time the spouse and the decedent were married to each other.

C. If, after the application of subsection A, the elective share amount is not fully satisfied, amounts included in the decedent's net probate estate, other than assets passing to the surviving spouse by testate or intestate succession, and in the decedent's non-probate transfers to others under subdivisions 1, 2, and 3 b of § 64.2-308.6 are applied first to satisfy the unsatisfied balance of the elective share amount.

304 *The decedent's net probate estate and that portion of the decedent's non-probate transfers to others are*  
305 *so applied that liability for the unsatisfied balance of the elective share amount is apportioned among*  
306 *the recipients of the decedent's net probate estate and of that portion of the decedent's non-probate*  
307 *transfers to others in proportion to the value of their interests therein.*

308 *D. If, after the application of subsections A and C, the elective share amount is not fully satisfied,*  
309 *the remaining portion of the decedent's non-probate transfers to others is so applied that liability for the*  
310 *unsatisfied balance of the elective share amount is apportioned among the recipients of the remaining*  
311 *portion of the decedent's non-probate transfers to others in proportion to the value of their interests*  
312 *therein.*

313 *E. The unsatisfied balance of the elective share amount as determined under subsection C or D is*  
314 *treated as a general pecuniary bequest.*

315 **§ 64.2-308.11. Personal liability of recipients.**

316 *A. Only original recipients of the decedent's non-probate transfers to others, and the donees of the*  
317 *recipients of the decedent's non-probate transfers to others, to the extent the donees have the property*  
318 *or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving*  
319 *spouse's elective share amount. A person liable to make contribution may choose to give up the*  
320 *proportional part of the decedent's non-probate transfers to him or to pay the value of the amount for*  
321 *which he is liable in cash, or, upon agreement of the surviving spouse, other property.*

322 *B. If any section or part of any section of this article is preempted by federal law with respect to a*  
323 *payment, an item of property, or any other benefit included in the decedent's non-probate transfers to*  
324 *others, a person who, not for value, receives the payment, item of property, or any other benefit is*  
325 *obligated to return the payment, item of property, or benefit, or is personally liable for the amount of*  
326 *the payment or the value of that item of property or benefit, as provided in § 64.2-308.10, to the person*  
327 *who would have been entitled to it were that section or part of that section not preempted.*

328 **§ 64.2-308.12. Proceeding for elective share; time limit.**

329 *A. The election by the surviving spouse of a decedent who dies domiciled in the Commonwealth must*  
330 *be made no later than six months after the later of (i) the time of the admission of the decedent's will to*  
331 *probate or (ii) the qualification of an administrator on the decedent's intestate estate, by a writing*  
332 *recorded in the court or the clerk's office thereof, upon such acknowledgment or proof as would*  
333 *authorize a writing to be admitted to record under Chapter 6 (§ 55-106 et seq.) of Title 55. The clerk*  
334 *shall record such election in the will book of the court. A copy of such election shall be provided to the*  
335 *personal representative, if any, by regular U.S. mail or hand delivery within 30 days of filing.*

336 *B. The surviving spouse must file the complaint to determine the elective share no later than six*  
337 *months after the filing of the election as set forth in subsection A. No later than 30 days after the filing*  
338 *of the complaint, the surviving spouse must provide a copy of the complaint to all known persons*  
339 *interested in the estate and to the distributees and recipients of portions of the augmented estate whose*  
340 *interests will be adversely affected by the taking of the elective share. The decedent's non-probate*  
341 *transfers to others are not included within the augmented estate for the purpose of computing the*  
342 *elective share if the complaint is filed more than 12 months after the decedent's death.*

343 *C. Notwithstanding the provisions of § 8.01-380, the election for an elective share may be withdrawn*  
344 *by the surviving spouse at any time before entry of a final determination by the court and such election*  
345 *shall be extinguished.*

346 *D. After notice and hearing, the court shall determine the elective share amount, and shall order its*  
347 *payment from the assets of the augmented estate or by contribution as appears appropriate under §§*  
348 *64.2-308.10 and 64.2-308.11. If it appears that a fund or property included in the augmented estate has*  
349 *not come into the possession of the personal representative, or has been distributed by the personal*  
350 *representative, the court nevertheless shall fix the liability of any person who has any interest in the*  
351 *fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be*  
352 *maintained against fewer than all persons against whom relief could be sought, but no person is subject*  
353 *to contribution in any greater amount than such person would have been under §§ 64.2-308.10 and*  
354 *64.2-308.11 had relief been secured against all persons subject to contribution.*

355 *E. An order or judgment of the court may be enforced as necessary in suit for contribution or*  
356 *payment in other courts of this state or other jurisdictions.*

357 **§ 64.2-308.13. Right of election personal to surviving spouse; incapacitated surviving spouse.**

358 *A. The right of election may be exercised only by or on behalf of a surviving spouse who is living*  
359 *when the election for the elective share is filed in the court under subsection A of § 64.2-308.12. If the*  
360 *election is not made by the surviving spouse personally, it may be made on the surviving spouse's behalf*  
361 *by his or her conservator or agent under the authority of a durable power of attorney.*

362 *B. If the election is made on behalf of a surviving spouse who is an incapacitated person, and the*  
363 *court enters an order determining the amounts due to the surviving spouse, the court must set aside that*  
364 *portion of the elective share amount due from the decedent's probate estate and recipients of the*  
365 *decedent's non-probate transfers to others under subsections C and D of § 64.2-308.10 and must*

366 appoint a trustee to administer that property for the support of the surviving spouse. For the purposes  
 367 of this subsection, an election on behalf of a surviving spouse by a conservator or agent under a  
 368 durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated  
 369 person. The trustee must administer the trust in accordance with the following terms or such other terms  
 370 as the court determines appropriate:

371 1. Expenditures of income and principal may be made in the manner, when, and to the extent that  
 372 the trustee determines suitable and proper for the surviving spouse's support, without court order but  
 373 with regard to other support, income, and property of the surviving spouse and benefits of medical or  
 374 other forms of assistance from any state or federal government or governmental agency for which the  
 375 surviving spouse must qualify on the basis of need.

376 2. During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf  
 377 of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity,  
 378 the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the  
 379 trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse  
 380 declaring the termination.

381 3. Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the  
 382 following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against  
 383 whom the elective share was taken, as if that predeceased spouse died immediately after the surviving  
 384 spouse; or (ii) to the predeceased spouse's heirs under Chapter 2 (§ 64.2-200 et seq.).

385 4. The trust shall be treated as a testamentary trust subject to the provisions governing testamentary  
 386 trustees under Title 64.2.

387 **§ 64.2-308.14. Waiver of right to elect and of other rights; defenses.**

388 A. The right of election of a surviving spouse and the rights of the surviving spouse to homestead  
 389 allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially,  
 390 before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

391 B. A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

392 1. The waiver was not executed voluntarily; or

393 2. The waiver was unconscionable when it was executed and before execution of the waiver because:  
 394 a. A fair and reasonable disclosure of the property or financial obligations of the decedent was not  
 395 provided;

396 b. Any right to disclosure of the property or financial obligations of the decedent beyond the  
 397 disclosure provided was not voluntarily and expressly waived, in writing; and

398 c. The surviving spouse did not have, or reasonably could not have had, an adequate knowledge of  
 399 the property or financial obligations of the decedent.

400 C. An issue of unconscionability of a waiver is for decision by the court as a matter of law.

401 D. Unless it provides to the contrary, a waiver of all rights, or equivalent language, in the property  
 402 or estate of a present or prospective spouse or a complete property settlement entered into after or in  
 403 anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance,  
 404 exempt property, and family allowance by each spouse in the property of the other and a renunciation  
 405 by each of all benefits that would otherwise pass to one spouse from the other by intestate succession or  
 406 by virtue of any will executed before the waiver or property settlement.

407 E. If a spouse willfully deserts or abandons the other spouse and such desertion or abandonment  
 408 continues until the death of the other spouse, the party who deserted or abandoned the deceased spouse  
 409 shall be barred of all interest in the decedent's estate by intestate succession, elective share, exempt  
 410 property, family allowance, and homestead allowance.

411 **§ 64.2-308.15. Protection of payors and other third parties.**

412 A. Although under § 64.2-308.6 a payment, item of property, or other benefit is included in the  
 413 decedent's non-probate transfers to others, a payor or other third party is not liable for having made a  
 414 payment or transferred an item of property or other benefit to a beneficiary designated in a governing  
 415 instrument, or for having taken any other action in good faith reliance on the validity of a governing  
 416 instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third  
 417 party received written notice from the surviving spouse or spouse's representative as required by §  
 418 64.2-308.12, that a complaint for the elective share has been filed. A payor or other third party is liable  
 419 for payments made or other actions taken after the payor or other third party received written notice  
 420 that a complaint for the elective share has been filed.

421 B. A written notice that a complaint for the elective share has been filed must be mailed to the  
 422 payor's or other third party's main office or home by registered or certified mail, return receipt  
 423 requested, or served upon the payor or other third party in the same manner as a summons in a civil  
 424 action. Upon receipt of written notice that a complaint for the elective share has been filed, a payor or  
 425 other third party may pay any amount owed or transfer or deposit any item of property held by it to or  
 426 with the court having jurisdiction of the probate proceedings relating to the decedent's estate. The court

427 shall hold the funds or item of property, and, upon its determination under subsection D of §  
428 64.2-308.12, shall order disbursement in accordance with the determination. If no complaint is filed in  
429 the court within the specified time under subsection A of § 64.2-308.12 or, if filed, the election for an  
430 elective share is withdrawn under subsection C of § 64.2-308.12, the court shall order disbursement to  
431 the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the  
432 payor or other third party from all claims for amounts so paid or the value of property so transferred  
433 or deposited.

434 C. Upon complaint to the probate court by the beneficiary designated in a governing instrument, the  
435 court may order that all or part of the property be paid to the beneficiary in an amount and subject to  
436 conditions consistent with this article.

437 **§ 64.2-308.16. Rights in family residence.**

438 Until the surviving spouse's rights in the principal family residence have been determined and  
439 satisfied by an agreement between the parties or a final court decree, in cases (i) where the principal  
440 family residence passes under the provisions of § 64.2-200 and the decedent is survived by children or  
441 their descendants, one or more of whom are not children or their descendants of the surviving spouse,  
442 or (ii) where the surviving spouse claims an elective share in the decedent's augmented estate under this  
443 article, the surviving spouse may hold, occupy, and enjoy the principal family residence and curtilage  
444 without charge for rent, repairs, taxes, or insurance. If the surviving spouse is deprived of possession of  
445 the principal family residence and curtilage, upon the filing of a complaint for unlawful entry or  
446 detainer, he is entitled to recover possession of such residence and damages sustained by him by reason  
447 of such deprivation during the time he was so deprived. Nothing in this section shall be construed to  
448 impair the lien or delay the enforcement of such lien of the Commonwealth or any locality for the taxes  
449 assessed upon the property.

450 **§ 64.2-308.17. Statutory rights barred by desertion or abandonment.**

451 If a parent willfully deserts or abandons his minor or incapacitated child and such desertion or  
452 abandonment continues until the death of the child, the parent shall be barred of all interest in the  
453 child's estate by intestate succession.

454 **§ 64.2-311. Homestead allowance.**

455 A. In addition to any other right or allowance under this article, a surviving spouse of a decedent  
456 who was domiciled in the Commonwealth is entitled to a homestead allowance of \$20,000. If there is  
457 no surviving spouse, each minor child of the decedent is entitled to a homestead allowance amounting to  
458 \$20,000, divided by the number of minor children.

459 B. The homestead allowance has priority over all claims against the estate, except the family  
460 allowance and the right to exempt property.

461 C. The homestead allowance is in lieu of any share passing to the surviving spouse or minor children  
462 by the decedent's will or by intestate succession; provided, however, if the amount passing to the  
463 surviving spouse and minor children by the decedent's will or by intestate succession is less than  
464 \$20,000, then the surviving spouse or minor children are entitled to a homestead allowance in an  
465 amount that when added to the property passing to the surviving spouse and minor children by the  
466 decedent's will or by intestate succession, equals the sum of \$20,000.

467 D. If the surviving spouse claims and receives an elective share of the decedent's estate under  
468 §§ 64.2-302 through 64.2-307 or Article 1.1 (§ 64.2-308.1 et seq.), as applicable, the surviving spouse  
469 shall not have the benefit of any homestead allowance.

470 **§ 64.2-317. Disposition upon death.**

471 Upon death of a married person, one-half of the property to which this article applies is the property  
472 of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution  
473 under the laws of intestate succession of the Commonwealth. One-half of that property is the property of  
474 the decedent and is subject to testamentary disposition or distribution under the laws of intestate  
475 succession of the Commonwealth. With respect to property to which this article applies, the decedent's  
476 one-half of the property is not subject to the surviving spouse's right to an elective share under  
477 § 64.2-302 or Article 1.1 (§ 64.2-308.1 et seq.), as applicable.

478 **§ 64.2-500. Grant of administration with the will annexed.**

479 A. If the will does not name an executor, or the executor named refuses to accept, fails to give bond,  
480 or dies, resigns, or is removed from office, the court or clerk may grant administration with the will  
481 annexed to a person who is a residual or substantial legatee under the will, or his designee, or if such  
482 person fails to apply for administration within 30 days, to a person who would have been entitled to  
483 administration if there had been no will.

484 B. Administration shall not be granted to any person unless he takes the required oath and gives  
485 bond, and the court or clerk is satisfied that he is suitable and competent to perform the duties of his  
486 office. Administration shall not be granted to any person under a disability as defined in § 8.01-2.

487 C. If any beneficiary of the estate objects, a spouse or parent who has been barred from all interest  
488 in the estate because of desertion or abandonment as provided under § 64.2-308 or 64.2-308.17, as



applicable, may not serve as an administrator of the estate.

**§ 64.2-502. Grant of administration of intestate estate.**

A. The court or the clerk who would have jurisdiction as to the probate of a will, if there were a will, has jurisdiction to hear and determine the right of administration of the estate in the case of a person dying intestate. Administration shall be granted as follows:

1. During the first 30 days following the decedent's death, the court or the clerk may grant administration to a sole distributee, or his designee, or in the absence of a sole distributee, to any distributee, or his designee, who presents written waivers of the right to qualify from all other competent distributees.

2. After 30 days have passed since the decedent's death, the court or the clerk may grant administration to the first distributee, or his designee, who applies, provided, that if, during the first 30 days following the decedent's death, more than one distributee notifies the court or the clerk of an intent to qualify after the 30-day period has elapsed, the court or the clerk shall not grant administration to any distributee, or his designee, until the court or the clerk has given all such distributees an opportunity to be heard.

3. After 45 days have passed since the decedent's death, the court or the clerk may grant administration to any nonprofit charitable organization that operated as a conservator or guardian for the decedent at the time of his death if such organization certifies that it has made a diligent search to find an address for any sole distributee and has sent notice by certified mail to the last known address of any such distributee of its intention to apply for administration at least 30 days before such application, or, that it has not been able to find any address for such distributee. However, if, during the first 45 days following the decedent's death, any distributee notifies the court or the clerk of an intent to qualify after the 45-day period has elapsed, the court or the clerk shall not grant administration to any such organization until the court or the clerk has given all such distributees an opportunity to be heard. Qualification of such nonprofit charitable organization is not subject to challenge on account of the failure to make the certification required by this subdivision.

4. After 60 days have passed since the decedent's death, the court or the clerk may grant administration to one or more of the creditors or to any other person, provided such creditor or person other than a distributee certifies that he has made a diligent search to find an address for any sole distributee and has sent notice by certified mail to the last known address of any such distributee of his intention to apply for administration at least 30 days before such application, or that he has not been able to find any address for such distributee. Qualification of a creditor or person other than a distributee is not subject to challenge on account of the failure to make the certification required by this subdivision.

B. When granting administration, if the court determines that it is in the best interests of a decedent's estate, the court may depart from the provisions of this section at any time and grant administration to such person as the court deems appropriate.

C. The court or clerk may admit to probate a will of the decedent after a grant of administration. If administration has been granted to a creditor or person other than a distributee, the court or clerk may grant administration to a distributee who applies for administration and who has not previously been refused administration after reasonable notice has been given to such creditor or other person previously granted administration. Admission of a will to probate or the grant of administration pursuant to this subsection terminates any previous grant of administration.

D. The court or clerk shall not grant administration to any person unless satisfied that he is suitable and competent to perform the duties of his office. The clerk shall require such person to sign under oath that such person is not under a disability as defined in § 8.01-2 or, regardless of whether his civil rights have been restored, has not been convicted of a felony offense of (i) fraud or misrepresentation or (ii) robbery, extortion, burglary, larceny, embezzlement, fraudulent conversion, perjury, bribery, treason, or racketeering. However, if the person convicted of such felony offense is the sole distributee of the estate, then the court or clerk may grant administration to such person if he is otherwise suitable and competent to perform the duties of his office.

E. If any beneficiary of the estate objects, a spouse or parent who has been barred from all interest in the estate because of desertion or abandonment as provided under § 64.2-308 or 64.2-308.17, as applicable, may not serve as an administrator of the estate of the deceased spouse or child.

**§ 64.2-556. Order to creditors to show cause against distribution of estate to legatees or distributees; liability of legatees or distributees to refund.**

A. When a report of the accounts of any personal representative and of the debts and demands against the decedent's estate has been filed in the office of a clerk of a court, whether under §§ 64.2-550 and 64.2-551 or in a civil action, the court, after six months from the qualification of the personal representative, may, on motion of the personal representative, or a successor or substitute personal representative, or on motion of a legatee or distributee of the decedent, enter an order for the creditors

and all other persons interested in the estate of the decedent to show cause on the day named in the order against the payment and delivery of the estate of the decedent to his legatees or distributees. A copy of the order shall be published once a week for two successive weeks, in one or more newspapers, as the court directs; the costs of such publication shall be paid by the petitioner or applicant. On or after the day named in the order, the court may order the payment and delivery to the legatees or distributees of the whole or a part of the money and other estate not before distributed, with or without a refunding bond, as it prescribes. However, every legatee or distributee to whom any such payment or delivery is made, and his representatives, may, in a suit brought against him within five years after such payment or delivery is made, be adjudged to refund a due proportion of any claims enforceable against the decedent or his estate that have been finally allowed by the commissioner of accounts or the court, or that were not presented to the commissioner of accounts, and the costs of the recovery of such claim. In the event any claim becomes known to the fiduciary after the notice for debts and demands but prior to the entry of an order of distribution, the claimant, if the claim is disputed, shall be given notice in the form provided in § 64.2-550 and the order of distribution shall not be entered until after expiration of 10 days from the giving of such notice. If the claimant, within such 10-day period, indicates his desire to pursue the claim, the commissioner of accounts shall schedule a date for hearing the claim and for reporting thereon if action thereon is contemplated under § 64.2-550.

B. Any personal representative who has in good faith complied with the provisions of this section and has, in compliance with or, as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto shall not be liable for any demands of creditors and all other persons.

C. Any personal representative who has in good faith complied with the provisions of this section and has, in compliance with, or as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto, even if such distribution shall be prior to the expiration of the period of one year provided in § 64.2-302, *Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3, or § 64.2-313, 64.2-448, or 64.2-457*, shall not be liable for any demands of spouses, persons seeking to impeach the will or establish another will, or purchasers of real estate from the personal representative, provided that the personal representative has contacted any surviving spouse known to it having rights of renunciation and ascertained that the surviving spouse had no plan to renounce the will, such intent to be stated in writing in the case of renunciation under § 64.2-302 *or Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3, as applicable*, and that the personal representative has not been notified in writing of any person's intent to impeach the will or establish a later will in the case of persons claiming under § 64.2-448 or 64.2-457 or under a later will.

D. In the case of such distribution prior to the expiration of such one-year period, the personal representative shall take refunding bonds, without surety, to the next of kin or legatees to whom distribution is made, to protect against the contingencies specified in this section.

**§ 64.2-632. Effect of transfer on death deed at transferor's death.**

A. Except as otherwise provided in the transfer on death deed, in this section, in § 64.2-302 *or Article 1.1 (§ 64.2-308.1 et seq.) of Chapter 3, as applicable*, or in Chapter 22 (§ 64.2-2200 et seq.) or 25 (§ 64.2-2500 et seq.), on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

1. Subject to subdivision 2, the interest in the property is transferred to and vests in the designated beneficiary at the death of the transferor in accordance with the deed.

2. The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive the transferor lapses.

3. Subject to subdivision 4, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

4. If the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one that lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

5. If, after making a transfer on death deed, the transferor is divorced a vinculo matrimonii or his marriage is annulled, the divorce or annulment revokes any transfer to a former spouse as designated beneficiary unless the transfer on death deed expressly provides otherwise.

B. Subject to Chapter 6 (§ 55-106 et seq.) of Title 55, a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and Chapter 6 (§ 55-106 et seq.) of Title 55, the transfer and conveyance of the property subject to the transfer on death deed shall be deemed to be effective at the transferor's death.

C. If a transferor is a joint owner and is:

1. Survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship but remains subject to the naming of the designated beneficiary in the transfer on death deed; or

2. The last surviving joint owner, the transfer on death deed is effective.  
 D. A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

**§ 64.2-1805. Powers of guardian.**

A. Whether appointed by a parent, the circuit court, or the circuit court clerk, a guardian of a ward's estate shall have the powers set forth in § 64.2-105 as of the date the guardian acts. A guardian of a ward's estate shall also have the following powers:

1. To ratify or reject a contract entered into by the ward;
2. To pay any sum distributable for the benefit of the ward by paying the sum directly to the ward, to the provider of goods and services that have been furnished to the ward, to any individual or facility that is responsible for or has assumed responsibility for care and custody of the ward, or to a ward's custodian under a Uniform Transfers to Minors Act, Uniform Gifts to Minors Act, or comparable law of any applicable jurisdiction;
3. To maintain life, health, casualty, and liability insurance for the benefit of the ward;
4. To manage the estate following the termination of the guardianship until its delivery to the ward or successors in interest;
5. To execute and deliver all instruments and to take all other actions that will serve the best interests of the ward;
6. To initiate a proceeding to seek a divorce or to make an augmented estate election under § 64.2-302 or 64.2-308.13, as applicable; and
7. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian deems advisable, including the power to borrow from the guardian, if the guardian is a bank, for any purpose; to mortgage or pledge such portion of the ward's personal estate, and real estate subject to subsection B, as may be required to secure such loan or loans; and, as maker or endorser, to renew existing loans.

B. A guardian may exercise the powers set forth in subsection A without prior authorization, except that the court or the commissioner of accounts, if a guardian is appointed other than by the court, may impose requirements to be satisfied by the guardian prior to the conveyance of any interest in real estate, including (i) increasing the amount of the guardian's bond, (ii) securing an appraisal of the real estate or interest, (iii) giving notice to interested parties as the court or commissioner deems proper, and (iv) consulting with the commissioner of accounts.

1. If the court or commissioner of accounts imposes any requirements under this subsection, the guardian shall make a report of his compliance with each requirement, which shall be filed with the commissioner of accounts. Upon receipt of the guardian's report, the commissioner of accounts shall file promptly a report with the court stating whether the requirements imposed have been met and whether the conveyance is otherwise consistent with the guardian's duties. The conveyance shall not be closed until a report by the commissioner of accounts is filed with the court and confirmed as provided in §§ 64.2-1212, 64.2-1213, and 64.2-1214.

2. If the commissioner of accounts does not impose any requirements under this subsection, he shall, upon request of the guardian of the minor, issue a notarized statement providing that "The Commissioner of Accounts has declined to impose any requirements upon the power of (name of guardian), Guardian of (name of minor), to convey the following real estate of the minor: (property identification)." The conveyance shall not be closed until the guardian has furnished such a statement to the proposed grantee.

C. Any guardian may at any time irrevocably disclaim the right to exercise any of the powers conferred by this section by filing a written disclaimer with the clerk of the circuit court wherein his accounts may be settled. Such disclaimer shall relate back to the time when the guardian assumed the guardianship and shall be binding upon any successor guardian.

**§ 64.2-2022. Management powers and duties of conservator.**

A. A conservator, in managing the estate, shall have the powers set forth in § 64.2-105 as of the date the conservator acts as well as the following powers, which may be exercised without prior court authorization except as otherwise specifically provided in the court's order of appointment:

1. To ratify or reject a contract entered into by an incapacitated person;
2. To pay any sum distributable for the benefit of the incapacitated person or for the benefit of a legal dependent by paying the sum directly to the distributee, to the provider of goods and services, to any individual or facility that is responsible for or has assumed responsibility for care and custody, or to a distributee's custodian under a Uniform Gifts or Transfers to Minors Act of any applicable jurisdiction or by paying the sum to the guardian of the incapacitated person or, in the case of a dependent, to the dependent's guardian or conservator;
3. To maintain life, health, casualty, and liability insurance for the benefit of the incapacitated person or his legal dependents;

673 4. To manage the estate following the termination of the conservatorship until its delivery to the  
674 incapacitated person or successors in interest;

675 5. To execute and deliver all instruments and to take all other actions that will serve in the best  
676 interests of the incapacitated person;

677 6. To initiate a proceeding (i) to revoke a power of attorney under the provisions of the Uniform  
678 Power of Attorney Act (§ 64.2-1600 et seq.), (ii) to make an augmented estate election under § 64.2-302  
679 or 64.2-308.13, *as applicable*, or (iii) to make an election to take a family allowance, exempt property,  
680 or a homestead allowance under § 64.2-313; and

681 7. To borrow money for periods of time and upon terms and conditions for rates, maturities,  
682 renewals, and security that to the conservator shall seem advisable, including the power to borrow from  
683 the conservator, if the conservator is a bank, for any purpose; to mortgage or pledge the portion of the  
684 incapacitated person's estate that may be required to secure the loan or loans; and, as maker or endorser,  
685 to renew existing loans.

686 B. The court may impose requirements to be satisfied by the conservator prior to the conveyance of  
687 any interest in real estate, including (i) increasing the amount of the conservator's bond, (ii) securing an  
688 appraisal of the real estate or interest, (iii) giving notice to interested parties as the court deems proper,  
689 (iv) consulting by the conservator with the commissioner of accounts and, if one has been appointed,  
690 with the guardian, and (v) requiring the use of a common source information company, as defined in §  
691 54.1-2130, when listing the property. If the court imposes any such requirements, the conservator shall  
692 make a report of his compliance with each requirement, to be filed with the commissioner of accounts.  
693 Promptly following receipt of the conservator's report, the commissioner of accounts shall file a report  
694 with the court indicating whether the requirements imposed have been met and whether the sale is  
695 otherwise consistent with the conservator's duties. The conveyance shall not be closed until a report by  
696 the commissioner of accounts is filed with the court and confirmed as provided in §§ 64.2-1212,  
697 64.2-1213, and 64.2-1214.