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SENATE BILL NO. 913

Offered January 11, 2017

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A BILL to amend and reenact § 64.2-701 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 7 of Title 64.2 an article numbered 8.1, consisting of sections numbered 64.2-779.1 through 64.2-779.25; and to repeal § 64.2-778.1 of the Code of Virginia, relating to the Uniform Trust Decanting Act.

Patron—Edwards

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-701 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Chapter 7 of Title 64.2 an article numbered 8.1, consisting of sections numbered 64.2-779.1 through 64.2-779.25, as follows:

§ 64.2-701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Action," with respect to an act of a trustee, includes a failure to act.

"Appointive property" means the property or property interest subject to a power of appointment.

"Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986 and any applicable regulations.

"Authorized fiduciary" means (i) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the income or principal of the first trust to one or more current beneficiaries; (ii) a special fiduciary appointed under § 64.2-779.6; or (iii) a special-needs fiduciary under § 64.2-779.10.

"Beneficiary" means a person that (i) has a present or future, vested or contingent, beneficial interest in a trust, vested or contingent; or (ii) in a capacity other than that of trustee, holds a power of appointment over trust property; or (iii) is an identified charitable organization that will or may receive distributions under the terms of the trust.

"Charitable interest" means an interest in a trust that (i) is held by an identified charitable organization and makes the organization a qualified beneficiary; (ii) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or (iii) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

"Charitable organization" means (i) a person, other than an individual, organized and operated exclusively for charitable purposes or (ii) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

"Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose the achievement of which is beneficial to the community.

"Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in § 64.2-723.

"Conservator" means a person appointed by the court to administer the estate of an adult individual.

"Court" means the court of the Commonwealth having jurisdiction in matters related to trusts.

"Current beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. "Current beneficiary" includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

"Decanting power" means the power of an authorized fiduciary under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.) to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

"Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

"Expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

"First trust" means a trust over which an authorized fiduciary may exercise the decanting power.

"First-trust instrument" means the trust instrument for a first trust.

INTRODUCED

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59 *"General power of appointment" means a power of appointment exercisable in favor of a*
60 *powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's*
61 *estate.*

62 *"Guardian" means a person appointed by the court to make decisions regarding the support, care,*
63 *education, health, and welfare of a minor or adult individual. The term does not include a guardian ad*
64 *litem.*

65 *"Guardian of the estate" means a person appointed by the court to administer the estate of a minor.*

66 *"Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.*

67 *"Jurisdiction," with respect to a geographic area, includes a state or country.*

68 *"Person" means an individual, ~~corporation, business trust,~~ estate, trust, partnership, limited liability*
69 *company, association, joint venture, business or nonprofit entity, government, governmental*
70 *subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.*

71 *"Powerholder" means a person in which a donor creates a power of appointment.*

72 *"Power of appointment" means a power that enables a powerholder acting in a nonfiduciary*
73 *capacity to designate a recipient of an ownership interest in or another power of appointment over the*
74 *appointive property. "Power of appointment" does not include a power of attorney.*

75 *"Power of withdrawal" means a presently exercisable general power of appointment other than a*
76 *power exercisable by a trustee that is limited by an ascertainable standard, or that is exercisable by*
77 *another person only upon consent of the trustee or a person holding an adverse interest.*

78 *"Presently exercisable power of appointment" means a power of appointment exercisable by the*
79 *powerholder at the relevant time. "Presently exercisable power of appointment" includes a power of*
80 *appointment exercisable only after the occurrence of a specified event, the satisfaction of an*
81 *ascertainable standard, or the passage of a specified time, only after (i) the occurrence of the specified*
82 *event, (ii) the satisfaction of the ascertainable standard, or (iii) the passage of the specified time.*
83 *"Presently exercisable power of appointment" does not include a power exercisable only at the*
84 *powerholder's death.*

85 *"Property" means anything that may be the subject of ownership, whether real or personal, legal or*
86 *equitable, or any interest therein.*

87 *"Qualified beneficiary" means a ~~living or then-existing~~ beneficiary who, on the date the beneficiary's*
88 *qualification is determined, (i) is a distributee or permissible distributee of trust income or principal; (ii)*
89 *would be a distributee or permissible distributee of trust income or principal if the interests of the*
90 *distributees described in clause (i) terminated on that date, but the termination of those interests would*
91 *not cause without causing the trust to terminate; or (iii) would be a distributee or permissible distributee*
92 *of trust income or principal if the trust terminated on that date.*

93 *"Reasonably definite standard" means a clearly measurable standard under which a holder of a*
94 *power of distribution is legally accountable within the meaning of § 674(b)(5)(A) of the Internal*
95 *Revenue Code of 1986 and any applicable regulations.*

96 *"Record" means information that is inscribed on a tangible medium or that is stored in an electronic*
97 *or other medium and is retrievable in perceivable form.*

98 *"Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee*
99 *or a person holding an adverse interest.*

100 *"Second trust" means (i) a first trust after modification, including a restatement of the first trust,*
101 *under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.) or (ii) a trust to which a distribution of*
102 *property from a first trust is or may be made under the Uniform Trust Decanting Act (§ 64.2-779.1 et*
103 *seq.).*

104 *"Second-trust instrument" means the trust instrument for a second trust.*

105 *"Settlor," except as otherwise provided in § 64.2-779.22, means a person, including a testator, who*
106 *creates, or contributes property to, a trust. If more than one person creates or contributes property to a*
107 *trust, each person is a settlor of the portion of the trust property attributable to that person's contribution*
108 *except to the extent another person has the power to revoke or withdraw that portion.*

109 *"Sign" means, with present intent to authenticate or adopt a record, (i) to execute or adopt a*
110 *tangible symbol or (ii) to attach to or logically associate with the record an electronic symbol, sound,*
111 *or process.*

112 *"Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer*
113 *of a beneficiary's interest.*

114 *"State" means a state of the United States, the District of Columbia, Puerto Rico, the United States*
115 *Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The*
116 *term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.*

117 *"Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as*
118 *expressed in the trust instrument or as may be established by (i) other evidence that would be admissible*
119 *in a judicial proceeding or (ii) court order or nonjudicial settlement agreement.*

120 *"Trust instrument" means ~~an instrument~~ a record executed by the settlor to create a trust or by any*

121 person to create a second trust that contains some or all of the terms of the trust, including any
122 amendments thereto.

123 "Trustee" includes an original, additional, and successor trustee; and a cotrustee.

124 Article 8.1.

125 Uniform Trust Decanting Act.

126 **§ 64.2-779.1. Scope.**

127 A. Except as otherwise provided in subsections B and C, this article applies to an express trust that
128 is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an
129 adverse interest.

130 B. This article does not apply to a trust held solely for charitable purposes.

131 C. Subject to § 64.2-779.12, a trust instrument may restrict or prohibit exercise of the decanting
132 power.

133 D. This article does not limit the power of a trustee, powerholder, or other person to distribute or
134 appoint property in further trust or to modify a trust under the trust instrument, a law of the
135 Commonwealth other than this article, common law, a court order, or a nonjudicial settlement
136 agreement.

137 E. This article does not affect the ability of a settlor to provide in a trust instrument for the
138 distribution of the trust property or appointment in further trust of the trust property or for modification
139 of the trust instrument.

140 **§ 64.2-779.2. Fiduciary duty.**

141 A. In exercising the decanting power, an authorized fiduciary shall act in accordance with its
142 fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

143 B. This article does not create or imply a duty to exercise the decanting power or to inform
144 beneficiaries about the applicability of this article.

145 C. Except as otherwise provided in a first-trust instrument, for purposes of this article and
146 § 64.2-763 and subsection A of § 64.2-764, the terms of the first trust are deemed to include the
147 decanting power.

148 **§ 64.2-779.3. Application; governing law.**

149 This article applies to a trust created before, on, or after July 1, 2017, that:

150 1. Has its principal place of administration in the Commonwealth, including a trust whose principal
151 place of administration has been changed to the Commonwealth; or

152 2. Provides by its trust instrument that it is governed by the law of the Commonwealth or is
153 governed by the law of the Commonwealth for the purpose of:

154 a. Administration, including administration of a trust whose governing law for purposes of
155 administration has been changed to the law of the Commonwealth;

156 b. Construction of terms of the trust; or

157 c. Determining the meaning or effect of terms of the trust.

158 **§ 64.2-779.4. Reasonable reliance.**

159 A trustee or other person that reasonably relies on the validity of a distribution of part or all of the
160 property of a trust to another trust, or a modification of a trust, under this article, a law of the
161 Commonwealth other than this article, or the law of another jurisdiction is not liable to any person for
162 any action or failure to act as a result of the reliance.

163 **§ 64.2-779.5. Notice; exercise of decanting power.**

164 A. In this section, a notice period begins on the day notice is given under subsection C and ends 59
165 days after the day notice is given.

166 B. Except as otherwise provided in this article, an authorized fiduciary may exercise the decanting
167 power without the consent of any person and without court approval.

168 C. Except as otherwise provided in subsection F, an authorized fiduciary shall give notice in a
169 record of the intended exercise of the decanting power not later than 60 days before the exercise to (i)
170 each settlor of the first trust, if living or then in existence; (ii) each qualified beneficiary of the first
171 trust; (iii) each holder of a presently exercisable power of appointment over any part or all of the first
172 trust; (iv) each person that currently has the right to remove or replace the authorized fiduciary; (v)
173 each other fiduciary of the first trust; (vi) each fiduciary of the second trust; (vii) each person acting as
174 an advisor or protector of the first trust; (viii) each person holding an adverse interest who has the
175 power to consent to the revocation of the first trust; and (ix) the Attorney General, if subsection B of
176 § 64.2-779.11 applies.

177 D. An authorized fiduciary is not required to give notice under subsection C to a person that is not
178 known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after
179 reasonable diligence.

180 E. A notice under subsection C shall (i) specify the manner in which the authorized fiduciary intends
181 to exercise the decanting power, (ii) specify the proposed effective date for exercise of the power, (iii)

182 include a copy of the first-trust instrument, and (iv) include a copy of all second-trust instruments.

183 F. The decanting power may be exercised before expiration of the notice period under subsection A
184 if all persons entitled to receive notice waive the period in a signed record.

185 G. The receipt of notice, waiver of the notice period, or expiration of the notice period does not
186 affect the right of a person to file an application under § 64.2-779.6 asserting that (i) an attempted
187 exercise of the decanting power is ineffective because it did not comply with this article or was an
188 abuse of discretion or breach of fiduciary duty or (ii) § 64.2-779.19 applies to the exercise of the
189 decanting power.

190 H. An exercise of the decanting power is not ineffective because of the failure to give notice to one
191 or more persons under subsection C if the authorized fiduciary acted with reasonable care to comply
192 with subsection C.

193 **§ 64.2-779.6. Court involvement.**

194 A. On application of an authorized fiduciary, a person entitled to notice under subsection C of §
195 64.2-779.5, a beneficiary, or with respect to a charitable interest the Attorney General or other person
196 that has standing to enforce the charitable interest, the court may (i) provide instructions to the
197 authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under
198 this article and consistent with the fiduciary duties of the authorized fiduciary; (ii) appoint a special
199 fiduciary and authorize the special fiduciary to determine whether the decanting power should be
200 exercised under this article and to exercise the decanting power; (iii) approve an exercise of the
201 decanting power; (iv) determine that a proposed or attempted exercise of the decanting power is
202 ineffective because (a) after applying § 64.2-779.19, the proposed or attempted exercise does not or did
203 not comply with this article or (b) the proposed or attempted exercise would be or was an abuse of the
204 fiduciary's discretion or a breach of fiduciary duty; (v) determine the extent to which § 64.2-779.19
205 applies to a prior exercise of the decanting power; (vi) provide instructions to the trustee regarding the
206 application of § 64.2-779.19 to a prior exercise of the decanting power; or (vii) order other relief to
207 carry out the purposes of this article.

208 B. On application of an authorized fiduciary, the court may approve (i) an increase in the fiduciary's
209 compensation under § 64.2-779.13 or (ii) a modification under § 64.2-779.15 of a provision granting a
210 person the right to remove or replace the fiduciary.

211 **§ 64.2-779.7. Formalities.**

212 An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The
213 signed record shall, directly or by reference to the notice required by § 64.2-779.5, identify the first
214 trust and the second trust or trusts and state the property of the first trust being distributed to or held
215 subject to the terms of each second trust and the property, if any, that remains in the first trust.

216 **§ 64.2-779.8. Decanting power under expanded distributive discretion.**

217 A. As used in this section:

218 "Noncontingent right" means a right that is not subject to the exercise of discretion or the
219 occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a
220 right held by a beneficiary if any person has discretion to distribute property subject to the right to any
221 person other than the beneficiary or the beneficiary's estate.

222 "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

223 "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the
224 beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a
225 beneficiary only because the person holds a nongeneral power of appointment.

226 "Vested interest" means:

227 1. A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of
228 the decanting power;

229 2. A current and noncontingent right, annually or more frequently, to a mandatory distribution of
230 income, a specified dollar amount, or a percentage of value of some or all of the trust property;

231 3. A current and noncontingent right, annually or more frequently, to withdraw income, a specified
232 dollar amount, or a percentage of value of some or all of the trust property;

233 4. A presently exercisable general power of appointment; or

234 5. A right to receive an ascertainable part of the trust property on the trust's termination that is not
235 subject to the exercise of discretion or to the occurrence of a specified event that is not certain to
236 occur.

237 B. Subject to subsection C and § 64.2-779.11, an authorized fiduciary that has expanded distributive
238 discretion over the income or principal of a first trust for the benefit of one or more current
239 beneficiaries may exercise the decanting power over the income or principal of the first trust.

240 C. Subject to § 64.2-779.10, in an exercise of the decanting power under this section, a second trust
241 may not:

242 1. Include as a current beneficiary a person that is not a current beneficiary of the first trust, except
243 as otherwise provided in subsection D;

244 2. Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a
 245 current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except
 246 as otherwise provided in subsection D; or

247 3. Reduce or eliminate a vested interest.

248 D. Subject to subdivision C 3 and § 64.2-779.11, in an exercise of the decanting power under this
 249 section, a second trust may be a trust created or administered under the law of any jurisdiction and
 250 may:

251 1. Retain a power of appointment granted in the first trust;

252 2. Omit a power of appointment granted in the first trust, other than a presently exercisable general
 253 power of appointment;

254 3. Create or modify a power of appointment if the powerholder is a current beneficiary of the first
 255 trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the
 256 beneficiary; and

257 4. Create or modify a power of appointment if the powerholder is a presumptive remainder
 258 beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only
 259 after the powerholder becomes, or would have become if then living, a current beneficiary.

260 E. A power of appointment described in subdivisions D 1 through 4 may be general or nongeneral.
 261 The class of permissible appointees in favor of which the power may be exercised may be broader than
 262 or different from the beneficiaries of the first trust.

263 F. If an authorized fiduciary has expanded distributive discretion over part but not all of the income
 264 or principal of a first trust, the fiduciary may exercise the decanting power under this section over that
 265 part of the income or principal over which the authorized fiduciary has expanded distributive discretion.

266 **§ 64.2-779.9. Decanting power under limited distributive discretion.**

267 A. As used in this section, "limited distributive discretion" means a discretionary power of
 268 distribution that is limited to an ascertainable standard or a reasonably definite standard.

269 B. An authorized fiduciary that has limited distributive discretion over the income or principal of the
 270 first trust for benefit of one or more current beneficiaries may exercise the decanting power over the
 271 income or principal of the first trust.

272 C. Under this section and subject to § 64.2-779.11, a second trust may be created or administered
 273 under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant
 274 each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial
 275 interests of the beneficiary in the first trust. A second trust that defers or postpones a contingent right of
 276 a beneficiary to receive an outright distribution of assets upon the attainment of a certain age or upon
 277 the occurrence of a specific event (a "deferred distribution") shall be substantially similar to the first
 278 trust if the second trust provides that (i) during the lifetime of the beneficiary, no portion of the income
 279 or principal attributable to the deferred distribution may be distributed to, or for the benefit of, any
 280 person other than the beneficiary and (ii) the beneficiary shall have a testamentary general power of
 281 appointment exercisable in favor of the beneficiary's estate over the deferred distribution or the deferred
 282 distribution shall be payable to the beneficiary's estate if the second trust does not terminate during the
 283 beneficiary's lifetime.

284 D. A power to make a distribution under a second trust for the benefit of a beneficiary who is an
 285 individual is substantially similar to a power under the first trust to make a distribution directly to the
 286 beneficiary. A distribution is for the benefit of a beneficiary if:

287 1. The distribution is applied for the benefit of the beneficiary;

288 2. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is
 289 incapacitated, and the distribution is made as permitted under this chapter; or

290 3. The distribution is made as permitted under the terms of the first-trust instrument and the
 291 second-trust instrument for the benefit of the beneficiary.

292 E. If an authorized fiduciary has limited distributive discretion over part but not all of the income or
 293 principal of a first trust, the fiduciary may exercise the decanting power under this section over that
 294 part of the income or principal over which the authorized fiduciary has limited distributive discretion.

295 **§ 64.2-779.10. Trust for beneficiary with disability.**

296 A. As used in this section:

297 "Beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary
 298 believes may qualify for governmental benefits based on disability, whether or not the beneficiary
 299 currently receives those benefits or is an individual who has been determined to be an incapacitated
 300 person.

301 "Governmental benefits" means financial aid or services from a state, federal, or other public
 302 agency.

303 "Special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

304 1. A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the

305 principal of a first trust to one or more current beneficiaries;

306 2. If no trustee or fiduciary has discretion under subdivision 1, a trustee or other fiduciary, other
307 than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more
308 current beneficiaries; or

309 3. If no trustee or fiduciary has discretion under subdivisions 1 and 2, a trustee or other fiduciary,
310 other than a settlor, that is required to distribute part or all of the income or principal of the first trust
311 to one or more current beneficiaries.

312 "Special-needs trust" means a trust the trustee believes would not be considered a resource for
313 purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

314 B. A special-needs fiduciary may exercise the decanting power under § 64.2-779.8 over the income
315 or principal of a first trust, including a first trust under which the fiduciary has only limited distributive
316 discretion as defined in subsection A of § 64.2-779.9, as if the fiduciary had authority to distribute
317 income or principal to a beneficiary with a disability subject to expanded distributive discretion if:

318 1. A second trust is a special-needs trust that benefits the beneficiary with a disability; and

319 2. The special-needs fiduciary determines that exercise of the decanting power will further the
320 purposes of the first trust.

321 C. In an exercise of the decanting power under this section, the following rules apply:

322 1. Notwithstanding subdivision C 2 of § 64.2-779.8, the interest in the second trust of a beneficiary
323 with a disability may:

324 a. Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability
325 under 42 U.S.C. § 1396p(d)(4)(C); or

326 b. Contain payback provisions complying with reimbursement requirements of Medicaid law under 42
327 U.S.C. § 1396p(d)(4)(A).

328 2. Subdivision C 3 of § 64.2-779.8 does not apply to the interests of the beneficiary with a disability.

329 3. Except as affected by any change to the interests of the beneficiary with a disability, the second
330 trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each
331 other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar
332 to the beneficiary's beneficial interests in the first trust.

333 **§ 64.2-779.11. Protection of charitable interest.**

334 A. As used in this section:

335 "Determinable charitable interest" means a charitable interest that is a right to a mandatory
336 distribution currently, periodically, on the occurrence of a specified event, or after the passage of a
337 specified time and that is unconditional or will be held solely for charitable purposes.

338 "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur,
339 other than a requirement in a trust instrument that a charitable organization be in existence or qualify
340 under a particular provision of the United States Internal Revenue Code of 1986 on the date of the
341 distribution, if the charitable organization meets the requirement on the date of determination.

342 B. If a first trust contains a determinable charitable interest, the Attorney General has the rights of a
343 qualified beneficiary and may represent and bind the charitable interest.

344 C. If a first trust contains a charitable interest, the second trust or trusts may not:

345 1. Diminish the charitable interest;

346 2. Diminish the interest of an identified charitable organization that holds the charitable interest;

347 3. Alter any charitable purpose stated in the first-trust instrument; or

348 4. Alter any condition or restriction related to the charitable interest.

349 D. If there are two or more second trusts, the second trusts shall be treated as one trust for
350 purposes of determining whether the exercise of the decanting power diminishes the charitable interest
351 or diminishes the interest of an identified charitable organization for purposes of subsection C.

352 E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a
353 charitable interest pursuant to subsection C must be administered under the law of the Commonwealth
354 unless:

355 1. The Attorney General, after receiving notice under § 64.2-779.5, fails to object in a signed record
356 delivered to the authorized fiduciary within the notice period;

357 2. The Attorney General consents in a signed record to the second trust or trusts being administered
358 under the law of another jurisdiction; or

359 3. The court approves the exercise of the decanting power.

360 F. This article does not limit the powers and duties of the Attorney General under law of the
361 Commonwealth other than this article.

362 **§ 64.2-779.12. Trust limitation on decanting.**

363 A. An authorized fiduciary may not exercise the decanting power to the extent the first-trust
364 instrument expressly prohibits exercise of:

365 1. The decanting power; or

366 2. A power granted by state law to the fiduciary to distribute part or all of the income or principal

367 of the trust to another trust or to modify the trust.

368 B. Exercise of the decanting power is subject to any restriction in the first-trust instrument that
369 expressly applies to exercise of:

370 1. The decanting power; or

371 2. A power granted by state law to a fiduciary to distribute part or all of the income or principal of
372 the trust to another trust or to modify the trust.

373 C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a
374 clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude
375 exercise of the decanting power.

376 D. Subject to subsections A and B, an authorized fiduciary may exercise the decanting power under
377 this article even if the first-trust instrument permits the authorized fiduciary or another person to modify
378 the first-trust instrument or to distribute part or all of the income or principal of the first trust to
379 another trust.

380 E. If a first-trust instrument contains an express prohibition described in subsection A or an express
381 restriction described in subsection B, the provision must be included in the second-trust instrument.

382 **§ 64.2-779.13. Change in compensation.**

383 A. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not
384 exercise the decanting power to increase the fiduciary's compensation above the specified compensation
385 unless:

386 1. All qualified beneficiaries of the second trust consent to the increase in a signed record; or

387 2. The increase is approved by the court.

388 B. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary
389 may not exercise the decanting power to increase the fiduciary's compensation above the compensation
390 permitted by this chapter unless:

391 1. All qualified beneficiaries of the second trust consent to the increase in a signed record; or

392 2. The increase is approved by the court.

393 C. A change in an authorized fiduciary's compensation that is incidental to other changes made by
394 the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of
395 subsections A and B.

396 **§ 64.2-779.14. Relief from liability and indemnification.**

397 A. Except as otherwise provided in this section, a second-trust instrument may not relieve an
398 authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

399 B. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first
400 trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that
401 would have been payable from the first trust if the decanting power had not been exercised.

402 C. A second-trust instrument may not reduce fiduciary liability in the aggregate.

403 D. Subject to subsection C, a second-trust instrument may divide and reallocate fiduciary powers
404 among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust
405 protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another
406 fiduciary as permitted by law of the Commonwealth other than this article.

407 **§ 64.2-779.15. Removal or replacement of authorized fiduciary.**

408 An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust
409 instrument granting another person power to remove or replace the fiduciary unless:

410 1. The person holding the power consents to the modification in a signed record and the
411 modification applies only to the person;

412 2. The person holding the power and the qualified beneficiaries of the second trust consent to the
413 modification in a signed record and the modification grants a substantially similar power to another
414 person; or

415 3. The court approves the modification and the modification grants a substantially similar power to
416 another person.

417 **§ 64.2-779.16. Tax-related provisions.**

418 A. As used in this section:

419 "Grantor trust" means a trust as to which a settlor of a first trust is considered the owner under
420 §§ 671 through 677 of the Internal Revenue Code or § 679 of the Internal Revenue Code.

421 "Internal Revenue Code" means the United States Internal Revenue Code of 1986.

422 "Nongrantor trust" means a trust that is not a grantor trust.

423 "Qualified benefits property" means property subject to the minimum distribution requirements of §
424 401(a)(9) of the Internal Revenue Code and any applicable regulations, or to any similar requirements
425 that refer to § 401(a)(9) of the Internal Revenue Code or the regulations.

426 B. An exercise of the decanting power is subject to the following limitations:

427 1. If a first trust contains property that qualified, or would have qualified but for provisions of this

428 article other than this section, for a marital deduction for purposes of the gift or estate tax under the
429 Internal Revenue Code or a state gift, estate, or inheritance tax, the second-trust instrument must not
430 include or omit any term that, if included in or omitted from the trust instrument for the trust to which
431 the property was transferred, would have prevented the transfer from qualifying for the deduction, or
432 would have reduced the amount of the deduction, under the same provisions of the Internal Revenue
433 Code or state law under which the transfer qualified.

434 2. If the first trust contains property that qualified, or would have qualified but for provisions of this
435 article other than this section, for a charitable deduction for purposes of the income, gift, or estate tax
436 under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second-trust
437 instrument must not include or omit any term that, if included in or omitted from the trust instrument
438 for the trust to which the property was transferred, would have prevented the transfer from qualifying
439 for the deduction, or would have reduced the amount of the deduction, under the same provisions of the
440 Internal Revenue Code or state law under which the transfer qualified.

441 3. If the first trust contains property that qualified, or would have qualified but for provisions of this
442 article other than this section, for the exclusion from the gift tax described in § 2503(b) of the Internal
443 Revenue Code, the second-trust instrument must not include or omit a term that, if included in or
444 omitted from the trust instrument for the trust to which the property was transferred, would have
445 prevented the transfer from qualifying under § 2503(b) of the Internal Revenue Code. If the first trust
446 contains property that qualified, or would have qualified but for provisions of this article other than this
447 section, for the exclusion from the gift tax described in § 2503(b) of the Internal Revenue Code by
448 application of § 2503(c) of the Internal Revenue Code, the second-trust instrument must not include or
449 omit a term that, if included or omitted from the trust instrument for the trust to which the property was
450 transferred, would have prevented the transfer from qualifying under § 2503(c) of the Internal Revenue
451 Code.

452 4. If the property of the first trust includes shares of stock in an S corporation, as defined in § 1361
453 of the Internal Revenue Code, and the first trust is, or but for provisions of this article other than this
454 section would be, a permitted shareholder under any provision of § 1361 of the Internal Revenue Code,
455 an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock
456 only if any second trust receiving the stock is a permitted shareholder under § 1361(c)(2) of the
457 Internal Revenue Code. If the property of the first trust includes shares of stock in an S corporation and
458 the first trust is, or but for provisions of this article other than this section would be, a qualified
459 subchapter-S trust within the meaning of § 1361(d) of the Internal Revenue Code, the second-trust
460 instrument must not include or omit a term that prevents the second trust from qualifying as a qualified
461 subchapter-S trust.

462 5. If the first trust contains property that qualified, or would have qualified but for provisions of this
463 article other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer
464 tax under § 2642(c) of the Internal Revenue Code the second-trust instrument must not include or omit
465 a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer
466 to the first trust from qualifying for a zero inclusion ratio under § 2642(c) of the Internal Revenue
467 Code.

468 6. If the first trust is directly or indirectly the beneficiary of qualified benefits property, the
469 second-trust instrument may not include or omit any term that, if included in or omitted from the
470 first-trust instrument, would have increased the minimum distributions required with respect to the
471 qualified benefits property under § 401(a)(9) of the Internal Revenue Code and any applicable
472 regulations, or any similar requirements that refer to § 401(a)(9) of the Internal Revenue Code or the
473 regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee
474 is deemed to have held the qualified benefits property and any reinvested distributions of the property as
475 a separate share from the date of the exercise of the power, and § 64.2-779.19 applies to the separate
476 share.

477 7. If the first trust qualifies as a grantor trust because of the application of § 672(f)(2)(A) of the
478 Internal Revenue Code, the second trust may not include or omit a term that, if included in or omitted
479 from the first-trust instrument, would have prevented the first trust from qualifying under § 672(f)(2)(A)
480 of the Internal Revenue Code.

481 8. In this paragraph, "tax benefit" means a federal or state tax deduction, exemption, exclusion, or
482 other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust.
483 Subject to subdivision 9, a second-trust instrument may not include or omit a term that, if included in or
484 omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

485 a. The first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust
486 instrument clearly is designed to enable the first trust to qualify for the benefit; and

487 b. The transfer of property held by the first trust or the first trust qualified, or would have qualified
488 but for provisions of this article other than this section, would have qualified for the tax benefit.

489 9. Subject to subdivision 4:

490 a. Except as otherwise provided in subdivision 7, the second trust may be a nongrantor trust, even if
491 the first trust is a grantor trust; and

492 b. Except as otherwise provided in subdivision 10, the second trust may be a grantor trust, even if
493 the first trust is a nongrantor trust.

494 10. An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed
495 record delivered to the fiduciary within the notice period and:

496 a. The first trust and a second trust are both grantor trusts, in whole or in part, the first-trust
497 instrument grants the settlor or another person the power to cause the first trust to cease to be a
498 grantor trust, and the second-trust instrument does not grant an equivalent power to the settlor or other
499 person; or

500 b. The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with
501 respect to the settlor, unless:

502 (1) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

503 (2) The first-trust instrument contains a provision granting the settlor or another person a power that
504 would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the
505 same provision.

506 C. If an authorized fiduciary that has limited distributive discretion over the income or principal of a
507 first trust reasonably determines that the overall income, estate, gift, and generation-skipping tax
508 consequences of the first trust may be reduced by either (i) granting a general power of appointment to
509 a beneficiary of the first trust or (ii) eliminating a general power of appointment granted to a
510 beneficiary of the first trust, the fiduciary may exercise the decanting power over all or any portion of
511 the principal of the trust to grant or eliminate such a general power of appointment and shall, in
512 addition, have the powers found in subsection D of § 64.2-779.8 as if the fiduciary had expanded
513 distributive discretion, subject to the following provisions:

514 1. In the case of the grant of a general power of appointment, the class of permissible appointees
515 contained in the second trust shall be limited to the creditors of the powerholder or the creditors of the
516 powerholder's estate.

517 2. In the case of the elimination of a general power of appointment, the class of permissible
518 appointees in the second trust shall exclude the powerholder, the powerholder's creditors, the
519 powerholder's estate, and the creditors of the powerholder's estate, but shall otherwise be identical to
520 the class of appointees permitted in the first trust.

521 **§ 64.2-779.17. Duration of second trust.**

522 A. Subject to subsection B, a second trust may have a duration that is the same as or different from
523 the duration of the first trust.

524 B. To the extent that property of a second trust is attributable to property of the first trust, the
525 property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or
526 suspension of the power of alienation that apply to property of the first trust.

527 **§ 64.2-779.18. Need to distribute not required.**

528 An authorized fiduciary may exercise the decanting power whether or not under the first trust's
529 discretionary distribution standard the fiduciary would have made or could have been compelled to
530 make a discretionary distribution of income or principal at the time of the exercise.

531 **§ 64.2-779.19. Savings provision.**

532 A. If exercise of the decanting power would be effective under this article except that the
533 second-trust instrument in part does not comply with this article, the exercise of the power is effective
534 and the following rules apply with respect to the income or principal of the second trust attributable to
535 the exercise of the power:

536 1. A provision in the second-trust instrument which is not permitted under this article is void to the
537 extent necessary to comply with this article.

538 2. A provision required by this article to be in the second-trust instrument which is not contained in
539 the instrument is deemed to be included in the instrument to the extent necessary to comply with this
540 article.

541 B. If a trustee or other fiduciary of a second trust determines that subsection A applies to a prior
542 exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's
543 duties.

544 **§ 64.2-779.20. Trust for care of animal.**

545 A. As used in this section:

546 "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more
547 animals.

548 "Protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal
549 or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

550 B. The decanting power may be exercised over an animal trust that has a protector to the extent that

551 *the trust could be decanted under this article if each animal that benefits from the trust were an*
552 *individual, if the protector consents in a signed record to the exercise of the power.*

553 *C. A protector for an animal has the rights under this article of a qualified beneficiary.*

554 *D. Notwithstanding any other provision of this article, if a first trust is an animal trust, in an*
555 *exercise of the decanting power, the second trust must provide that trust property may be applied only*
556 *to its intended purpose for the period the first trust benefited the animal.*

557 **§ 64.2-779.21. Terms of second trust.**

558 *A reference in this chapter to a trust instrument or terms of the trust includes a second-trust*
559 *instrument and the terms of the second trust.*

560 **§ 64.2-779.22. Settlor.**

561 *A. For purposes of law of the Commonwealth other than this article and subject to subsection B, a*
562 *settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the*
563 *income or principal of the first trust subject to the exercise of the decanting power.*

564 *B. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust,*
565 *a settlor of the second trust, and the authorized fiduciary may be considered.*

566 **§ 64.2-779.23. Later-discovered property.**

567 *A. Except as otherwise provided in subsection C, if exercise of the decanting power was intended to*
568 *distribute all the income or principal of the first trust to one or more second trusts, later-discovered*
569 *property belonging to the first trust and property paid to or acquired by the first trust after the exercise*
570 *of the power is part of the trust estate of the second trust or trusts.*

571 *B. Except as otherwise provided in subsection C, if exercise of the decanting power was intended to*
572 *distribute less than all the income or principal of the first trust to one or more second trusts,*
573 *later-discovered property belonging to the first trust or property paid to or acquired by the first trust*
574 *after exercise of the power remains part of the trust estate of the first trust.*

575 *C. An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a*
576 *second trust for disposition of later-discovered property belonging to the first trust or property paid to*
577 *or acquired by the first trust after exercise of the power.*

578 **§ 64.2-779.24. Obligations.**

579 *A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the*
580 *same extent against the property when held by the second trust after exercise of the decanting power.*

581 **§ 64.2-779.25. Accountings.**

582 *If accounts for the first trust are filed with the commissioner of accounts, the accounts for the second*
583 *trust shall be filed with the commissioner of accounts unless the court orders otherwise.*

584 **2. That § 64.2-778.1 of the Code of Virginia is repealed.**