

# VIRGINIA ACTS OF ASSEMBLY -- 1994 SESSION

## CHAPTER 562

*An Act to amend and reenact § 64.1-73 of the Code of Virginia, relating to devise or bequest to an existing trust.*

[H 783]

Approved April 9, 1994

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

**1. That § 64.1-73 of the Code of Virginia is amended and reenacted as follows:**

§ 64.1-73. Devise or bequest to trustee of an established trust.

A. A devise or bequest (including the exercise of a power of appointment) may be made by a will duly executed pursuant to the provisions of this chapter to the trustee or trustees of an inter vivos trust or testamentary trust, whether the trust was established by the testator, by the testator and another, or by some other person if:

1. In the case of an inter vivos trust, the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will; or

2. In the case of a testamentary trust, the trust is identified in the testator's will and its terms are set forth in the valid last will of a person who has predeceased the testator and whose will was executed before or concurrently with the execution of the testator's will.

In either event, at the time the devise or bequest is to be distributed to the trustee or trustees at least one trustee of the trust shall be (i) an individual resident of this Commonwealth, (ii) a corporation or association authorized to do a trust business in this Commonwealth or (iii) a nonresident of this Commonwealth who is a parent, brother, or sister of the testator, a child or other descendent of the testator, the spouse of a child of the testator, the surviving spouse of the testator, or a person or all such persons otherwise eligible to file a statement in lieu of an accounting pursuant to § 26-20.1, or any combination of them; ~~provided that~~ . However, prior to distribution of the devise or bequest to the trustee, each such nonresident shall file, with the clerk of the circuit court of the jurisdiction wherein the testator's will was admitted to probate, his consent in writing that service of process in any action against him as trustee or any other notice with respect to administration of the trust in his charge, may be by service upon a resident of this Commonwealth at such address as he may appoint in the written instrument filed with the clerk. Where any nonresident qualifies pursuant to this paragraph, bond with surety shall be required in every case unless at least one other trustee is a resident.

A corporation or association not authorized to do a trust business in this Commonwealth at the time the devise or bequest is to be distributed shall not, in any case, be a trustee of such trust.

B. The inter vivos trust may be an unfunded insurance trust ~~with the trustee being the beneficiary under the insurance contract and with the testator or some other person having the right to change the beneficiary or having any or all other rights of ownership in such contract.~~

For the purposes of this section:

1. An ~~unfunded insurance~~ *inter vivos* trust shall be deemed established upon execution of the instrument creating such trust ~~regardless of the existence, size or character of the corpus of the trust; and~~

2. An ~~unfunded insurance~~ *inter vivos* trust may contain provisions whereby the amount of corpus to be allocated to any particular portion of the trust will be determined, measured or affected by the "adjusted gross estate" of the settlor or testator for federal estate tax purposes, or by the amount of the "marital deduction allowable" to the settlor's or testator's estate, the amount of deductions or credits available to the estate of the settlor or testator for federal estate tax purposes, or by the value of such estate for federal estate tax purposes, or by any other method, and such unfunded trust shall not be deemed testamentary by reason thereof.

C. The devise or bequest shall not be invalid because (i) the trust is amendable or revocable or both by the settlor or any other person, either prior or subsequent to the testator's death, (ii) the trust instrument or any amendment thereto was not executed in the manner required for wills, or (iii) the trust was amended after the execution of the will or after the death of the testator.

D. Unless the testator's will provides otherwise, the property so devised or bequeathed:

1. Shall not be deemed held under a testamentary trust of the testator, but shall become a part of the corpus of the trust to which it is given or, if the will so specifies, it shall become a part of any one or more particular portions of the corpus; and

2. Shall be administered and disposed of (i) in accordance with the terms of the trust as they appear in writing at the testator's death, including any amendments thereto made before the death of the testator and regardless of whether made before or after the execution of the testator's will, or (ii) if the testator expressly so specifies in his will, and only in such event, as such terms are amended after the death of the testator.

E. In the event that the settlor or other person having the right to do so revokes or otherwise terminates the trust pursuant to a power so to do reserved in the trust instrument, and such revocation or termination is effected at a date subsequent to the death of a testator who has devised or bequeathed property to such trust, the revocation or termination shall be ineffective as to property devised or bequeathed to such trust by a testator other than the settlor, unless the testator's will expressly provides to the contrary.

F. The devise or bequest shall not be valid should the entire trust not be operative for any reason at the testator's death. If the devise or bequest is to augment only one or more portions of the trust, the devise or bequest shall not be valid should the trust not be operative for any reason as to such portion at the testator's death.

G. ~~This section shall apply to any devise or bequest made by a testator living on June 29, 1962, or born thereafter, without regard to the date of the execution of the will or of the trust instrument or any amendment thereto. However, the provisions of this section shall not be construed as casting any doubt upon the validity as heretofore existing of any devise or bequest made by a testator who died prior to June 29, 1962, or any devise or bequest which does not come within the provisions of this section.~~

H. In any case in which the devise or bequest to the trustee of a trust such as is contemplated in the foregoing provisions fails to take effect by reason of the fact that there is no qualified trustee acting at the time the devise or bequest is to be distributed, or that one or more of the trustees then acting is a corporation or association not authorized to do a trust business in this Commonwealth, the court having jurisdiction with respect to the probate of the will or the administration of the testator's estate, upon sufficient evidence of the existence of a trust estate for administration, independent of the testator's estate, and of the validity of the trust established by virtue of such separate written instrument, may determine that the trusts declared by such separate written instrument are the trusts upon which the devise or bequest is made, so far as applicable in the nature of the case, to the same extent and with like effect as if such trust provisions had been extensively incorporated in the testamentary documents, and that such trusts will not fail for want of a qualified trustee to administer the trust estate so devised or bequeathed. The court may then grant such further and ancillary relief as the nature of the case may require, including the appointment of a qualified trustee to perform the trusts with respect to the estate so devised or bequeathed, and granting instruction and guidance to the trustee so appointed in the performance of his duties. Nothing herein shall be deemed to authorize any such trustee to be excused from any obligations of accounting or performance such as are required by law of fiduciaries, nor to prevent the transfer of the trust estate to a trustee appointed by or qualified in a court of record in a foreign state in accordance with the provisions of § 26-64.

*H. This section shall apply to any devise or bequest under the will of a decedent dying on or after July 1, 1994.*