VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 26-59 and 64.1-73 of the Code of Virginia, relating to nonresident fiduciaries.

[H 1434]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 26-59 and 64.1-73 of the Code of Virginia are amended and reenacted as follows:

§ 26-59. Nonresident fiduciaries must have resident cofiduciaries; exceptions.

A. Except as provided in subsection B, a natural person, not a resident of this Commonwealth shall not be appointed or allowed to qualify or act as personal representative, or trustee under a will, of any decedent, or appointed as guardian of an infant's estate, or guardian of the person or property of an incapacitated person under § 37.1-132 or committee of any person non compos mentis, unless there is also appointed to serve with the nonresident personal representative, trustee, guardian or committee, a person resident in this Commonwealth or corporation authorized to do business in this Commonwealth. In the event such resident personal representative, trustee, or guardian ceases, for any reason to act, then a new resident personal representative, trustee, or guardian shall be appointed in the same manner as provided in § 26-48. However, when the nonresident guardian or committee is the parent of the infant or person non compos mentis, the resident guardian appointed under this section shall have no control over the person of the ward.

B. Notwithstanding the provisions of subsection A, a parent, brother, ~~or~~ sister, *niece or nephew* of a decedent, a child or other descendant of a decedent, the spouse of a child of a decedent, the surviving spouse of a decedent, 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, may be appointed and allowed to qualify as personal representative, or trustee under a will, of the decedent, provided, in each instance, (i) such qualification shall be subject to the provisions of Article 1 (§ 64.1-116 et seq.) of Chapter 6 of Title 64.1, and (ii) at the time of qualification each such person files with the clerk of the circuit court of the jurisdiction wherein such qualification is had, his consent in writing that service of process in any action or proceeding against him as personal representative, or trustee under a will, or any other notice with respect to the administration of the probate estate or the trust in his charge in this Commonwealth may be by service upon such resident of this Commonwealth and at such address as he may appoint in the written instrument. In the event of the death, removal, resignation or absence from this Commonwealth of such resident agent or any successor named by a similar instrument filed with the clerk, or in the event that such resident agent or any such successor cannot with due diligence be found for service at the address designated in such instrument, then any process or notice may be served on the clerk of such circuit court. Notwithstanding § 64.1-121, where any nonresident qualifies pursuant to this subsection, bond with surety shall be required in every case, unless a resident personal representative or trustee qualifies at the same time.

C. No corporation shall be appointed or allowed to qualify or act as personal representative, or trustee under a will, or as one of the personal representatives or trustees under a will, of any decedent, or appointed or allowed to qualify or act as guardian of an infant, or as one of the guardians of an infant, or guardian of the person or property of an incapacitated person under § 37.1-132, or as one of the guardians of the person or property of an incapacitated person under § 37.1-132, or as committee of any person non compos mentis, or as one of the committees of a person non compos mentis, unless such corporation be authorized to do business in this Commonwealth. Nothing in this section shall be construed to impair the validity of any appointment or qualification made prior to January 1, 1962, nor to affect in any way the other provisions of this chapter or of § 64.1-130. The provisions of this section shall not authorize or allow any appointment or qualifications prohibited by § 6.1-5.

D. The fact that an individual nominated or appointed as the guardian of the person of an infant is not a resident of this Commonwealth shall not prevent the qualification of the individual to serve as the sole guardian of the person of the infant.

§ 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, *niece or nephew* 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. 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 trust.

For the purposes of this section:

1. An inter vivos trust shall be deemed established upon execution of the instrument creating such trust; and

2. An 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. 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.