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## HOUSE BILL NO. 1434

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice  
on February 19, 1995)

(Patron Prior to Substitute—Delegate Mayer)

*A BILL to amend and reenact §§ 26-59 and 64.1-73 of the Code of Virginia, relating to nonresident fiduciaries.*

**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

60 the testator's will; or

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

64 In either event, at the time the devise or bequest is to be distributed to the trustee or trustees at least  
65 one trustee of the trust shall be (i) an individual resident of this Commonwealth, (ii) a corporation or  
66 association authorized to do a trust business in this Commonwealth or (iii) a nonresident of this  
67 Commonwealth who is a parent, brother, ~~or~~ sister, *niece or nephew* of the testator, a child or other  
68 descendent of the testator, the spouse of a child of the testator, the surviving spouse of the testator, or a  
69 person or all such persons otherwise eligible to file a statement in lieu of an accounting pursuant to  
70 § 26-20.1, or any combination of them. However, prior to distribution of the devise or bequest to the  
71 trustee, each such nonresident shall file, with the clerk of the circuit court of the jurisdiction wherein the  
72 testator's will was admitted to probate, his consent in writing that service of process in any action  
73 against him as trustee or any other notice with respect to administration of the trust in his charge, may  
74 be by service upon a resident of this Commonwealth at such address as he may appoint in the written  
75 instrument filed with the clerk. Where any nonresident qualifies pursuant to this paragraph, bond with  
76 surety shall be required in every case unless at least one other trustee is a resident.

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

79 B. The inter vivos trust may be an unfunded trust.

80 For the purposes of this section:

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

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

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

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

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

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

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

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

113 G. In any case in which the devise or bequest to the trustee of a trust such as is contemplated in the  
114 foregoing provisions fails to take effect by reason of the fact that there is no qualified trustee acting at  
115 the time the devise or bequest is to be distributed, or that one or more of the trustees then acting is a  
116 corporation or association not authorized to do a trust business in this Commonwealth, the court having  
117 jurisdiction with respect to the probate of the will or the administration of the testator's estate, upon  
118 sufficient evidence of the existence of a trust estate for administration, independent of the testator's  
119 estate, and of the validity of the trust established by virtue of such separate written instrument, may  
120 determine that the trusts declared by such separate written instrument are the trusts upon which the  
121 devise or bequest is made, so far as applicable in the nature of the case, to the same extent and with

122 like effect as if such trust provisions had been extensively incorporated in the testamentary documents,  
123 and that such trusts will not fail for want of a qualified trustee to administer the trust estate so devised  
124 or bequeathed. The court may then grant such further and ancillary relief as the nature of the case may  
125 require, including the appointment of a qualified trustee to perform the trusts with respect to the estate  
126 so devised or bequeathed, and granting instruction and guidance to the trustee so appointed in the  
127 performance of his duties. Nothing herein shall be deemed to authorize any such trustee to be excused  
128 from any obligations of accounting or performance such as are required by law of fiduciaries, nor to  
129 prevent the transfer of the trust estate to a trustee appointed by or qualified in a court of record in a  
130 foreign state in accordance with the provisions of § 26-64.

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