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HOUSE BILL NO. 489

Offered January 19, 1998

A BILL to amend and reenact § 26-45.1 of the Code of Virginia, relating to standard of judgment and care required by the trustee of a life insurance trust.

Patrons—Howell, Clement, McClure and Murphy

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 26-45.1 of the Code of Virginia is amended and reenacted as follows:

§ 26-45.1. Standard of judgment and care required; authorized investments.

A. Except with respect to the securities described in § 26-40.01 and for those investments authorized by § 26-40, in acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary, whether individual or corporate, shall exercise the judgment of care, skill, prudence and diligence under the circumstances prevailing from time to time, (including, but not limited to, general economic conditions, anticipated tax consequences, the duties of the fiduciary and the interests of all beneficiaries) that a prudent person familiar with such matters and acting in his own behalf would exercise under the circumstances in order to accomplish the purposes set forth in the controlling document. In investing pursuant to this standard, a fiduciary shall consider individual investments in the context of the investment portfolio as a whole and as part of the fiduciary's overall investment plan and shall have a duty to diversify investments unless, under the circumstances, it is prudent not to do so. Any determination of liability for investment performance shall consider not only the performance of a particular investment, but also the performance of the portfolio as a whole.

Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment which persons of prudence, discretion and intelligence might acquire or retain for their own account under the circumstances. Also, within the limitations of the foregoing standard, a corporate fiduciary is authorized to retain as received its own stock or securities or the stock or securities of a corporation owning eighty percent or more of its common stock, or any stock or securities received in exchange for any such investments.

B. Nothing contained in this section shall be construed as authorizing any departure from, or variation of, the express terms or limitations set forth in the controlling document creating or defining a fiduciary's duties and powers, but the terms "legal investment," "authorized investment," "prudent man (or prudent investor) investment" or words of similar import, as used in any such instrument, shall be taken to mean any investment that is permitted by the terms of subsection A.

C. Nothing contained in this section shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any controlling document relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

D. The provisions of this section shall govern fiduciaries, acting under controlling documents now existing or hereafter made.

E. A controlling document may waive the rule of subsection A. A general authorization in a controlling document authorizing a fiduciary to invest in such assets as the fiduciary, in his sole discretion, may deem best, or other language purporting to expand the fiduciary's investment powers, shall not be construed to waive the rule of subsection A unless the controlling document expressly manifests an intention that it be waived (i) by reference to the "prudent man" or "prudent investor" rule, (ii) by reference to the power of the fiduciary to make "speculative" investments, (iii) by an express authorization to acquire or retain a specific asset or type of asset such as a closely held business, or (iv) by other language synonymous with (i), (ii), or (iii). A fiduciary shall not be liable to a beneficiary for the fiduciary's good faith reliance on a waiver of the rule of subsection A.

F. A trustee may hold any policies of life insurance acquired by gift or pursuant to an express permission or direction in the governing instrument including an authority granted by subdivision (1) (r) of § 64.1-57 with no duty or need to (i) determine whether any such policy is or remains a proper investment or (ii) dispose of such policy in order to diversify the investments of the trust. However, apart from these specific authorities, this subsection is not intended and shall not be construed to affect the application of the standard of judgment and care as set forth in subsection A of this section. This subsection shall apply to all trusts, regardless of when established.

FG. As used in this section, "fiduciary" shall be defined as in § 8.01-2 and shall include any attorney in fact or agent acting for a principal under a written power of attorney. "Controlling document" means the will, agreement, power of attorney, court order or other instrument creating the fiduciary's powers.

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HB489