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HOUSE BILL NO. 1996

Offered January 19, 1999

A BILL to amend and reenact § 64.1-73 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.1-73.1, relating to pour-over wills.

Patrons—Howell, Clement, McClure and Murphy

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 64.1-73 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 64.1-73.1 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, or (ii) a corporation or association authorized to do a trust business in this Commonwealth. However, prior to distribution of the devise or bequest to the trustee, each 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 the clerk of the court in which he is qualified or 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 or the court in which the nonresident qualifies waives surety under the provisions of § 26-4.

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

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60 the testator.

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

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

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

89 H. This section shall apply to any devise or bequest under the will of a decedent dying on or after
90 July 1, 1994 and before July 1, 1999.

91 *§ 64.1-73.1. Testamentary additions to trusts.*

92 A. A will may validly devise or bequeath property (including by the exercise of a power of
93 appointment) to the trustee of a trust established or to be established (i) during the testator's lifetime by
94 the testator, by the testator and some other person, or by some other person including a funded or
95 unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the
96 insurance contracts, or (ii) at the testator's death by the testator's devise or bequest to the trustee, if the
97 trust is identified in the testator's will and its terms are set forth in a written instrument, other than a
98 will, executed before, concurrently with, or after the execution of the testator's will or in another
99 individual's will if that other individual has predeceased the testator, regardless of the existence, size, or
100 character of the corpus of the trust. The devise or bequest is not invalid because the trust is amendable
101 or revocable, or because the trust was amended after the execution of the will or the testator's death.

102 B. Unless the testator's will provides otherwise, property devised or bequeathed to a trust described
103 in subsection A is not held under a testamentary trust of the testator but it becomes a part of the trust
104 to which it is devised or bequeathed, and shall be administered and disposed of in accordance with the
105 provisions of the governing instrument setting forth the terms of the trust, including any amendments
106 thereto made before or after the testator's death.

107 C. Unless the testator's will provides otherwise, a revocation or termination of the trust before the
108 testator's death causes the devise or bequest to lapse.

109 D. Unless at least one trustee of the trust is an individual resident of this Commonwealth or an
110 entity authorized to do a trust business in this Commonwealth, at the time the devise or bequest is to be
111 distributed to the trust, the testator's personal representative shall not make any distribution to the trust
112 until each nonresident individual or entity files with the clerk of the circuit court of the jurisdiction
113 wherein the testator's will was admitted to probate, a consent in writing that service of process in any
114 action against the trustee or any other notice with respect to administration of the trust in the trustee's
115 charge, may be by service upon a resident of this Commonwealth at such address as the trustee may
116 appoint in the written instrument filed with the clerk. No further requirement shall be imposed upon any
117 nonresident individual or entity as a condition to receiving the devise or bequest.

118 E. This section applies to a will of a testator who dies after June 30, 1999, and it shall be applied
119 and construed to effectuate its general purpose to make uniform the law with respect to the subject of
120 this section among states enacting it.