

VIRGINIA ACTS OF ASSEMBLY -- 2012 SESSION

CHAPTER 562

An Act to amend and reenact § 55-548.08 of the Code of Virginia, relating to protection of trustees from liability when they follow the actions of a trust director.

[S 180]

Approved April 4, 2012

Be it enacted by the General Assembly of Virginia:

1. That § 55-548.08 of the Code of Virginia is amended and reenacted as follows:

§ 55-548.08. Powers to direct.

A. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

B. If the terms of a trust (i) confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee *and* (ii) *subsection E does not apply*, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

C. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

D. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

E. The provisions of this subsection shall apply if the settlor incorporates this subsection into the trust instrument by specific reference. The provisions of this subsection shall also apply if this subsection is incorporated into the trust instrument by a nonjudicial settlement agreement under § 55-541.11 by specific reference.

1. For the purpose of this subsection, a "trust director" means any person who is not a trustee and who has, pursuant to the governing instrument, a power to direct the trustee on any matter. No person shall be a "trust director" for purposes of this subsection merely by holding a general or limited power of appointment over the trust assets.

Notwithstanding anything in the trust instrument to the contrary, the trust director shall be deemed a fiduciary who, as such, is (i) required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries and (ii) liable for any loss that results from a breach of a fiduciary duty.

2. A trustee who acts in accordance with a direction in the governing instrument that the trustee is to follow the trust director's direction or act only with the trust director's consent or direction shall not, other than in cases of willful misconduct or gross negligence on the part of the directed trustee, be liable for any loss resulting directly or indirectly from any act taken or not taken by the trustee (i) pursuant to the trust director's direction or (ii) as a result of the trust director's failure to direct, consent, or act, after receiving a request by the trustee for such direction, consent, or action.

3. A trustee shall not, except as otherwise expressly provided in the trust instrument, have any duty to (i) monitor the trust director's conduct; (ii) provide the trust director with information, other than material facts related to the trust administration expressly requested in writing by the trust director; (iii) inform or warn any beneficiary or third party that the trustee disagrees with any of the trust director's actions or directions; (iv) notify the trust director that the trustee disagrees with any of the trust director's actions or directions; (v) do anything to prevent the trust director from giving any direction or taking any action; or (vi) compel the trust director to redress its action or direction.

4. The actions of the trustee pertaining to matters within the scope of the authority of the trust director, including confirming that the trust director's directions have been carried out and recording and reporting actions taken pursuant to the trust director's direction, shall, absent clear and convincing evidence to the contrary, presumptively be considered administrative actions by the trustee and not be considered to constitute either monitoring the trust director's actions or participating in the actions of the trust director.