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## SENATE BILL NO. 127

Offered January 13, 2016

Prefiled December 29, 2015

A BILL to amend and reenact §§ 64.2-407, 64.2-408, and 64.2-2700 of the Code of Virginia; to amend the Code of Virginia by adding in Article 1 of Chapter 27 of Title 64.2 sections numbered 64.2-2705 and 64.2-2706 and by adding in Chapter 27 of Title 64.2 articles numbered 2 through 6, consisting of sections numbered 64.2-2707 through 64.2-2741; and to repeal §§ 55-25.1, 64.2-406, 64.2-423, and 64.2-2701 through 64.2-2704 of the Code of Virginia, relating to the Uniform Powers of Appointment Act.

Patron—Edwards

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-407, 64.2-408, and 64.2-2700 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 27 of Title 64.2 sections numbered 64.2-2705 and 64.2-2706 and by adding in Chapter 27 of Title 64.2 articles numbered 2 through 6, consisting of sections numbered 64.2-2707 through 64.2-2741, as follows:

## § 64.2-407. Will of personal estate of nonresidents.

Notwithstanding the provisions of §§ 64.2-403 and 64.2-406, the will of a person domiciled out of the Commonwealth at the time of his death shall be valid as to personal property in the Commonwealth if the will is executed according to the law of the state or country in which the person was so domiciled.

## § 64.2-408. Presumption of formal execution of wills made by persons in military service; will of personal estate of persons in military service and seamen.

A. A will executed by a person while in the military service of the United States, as that term is defined in the Servicemembers Civil Relief Act (50 U.S.C. app. § 501 et seq.), that purports on its face to be witnessed as required by § 64.2-403, upon proof of the signature of the testator by any two disinterested witnesses, shall be presumed, in the absence of evidence to the contrary, to have been executed in accordance with the requirements of that section and shall be admitted to probate as if the formalities of execution were proved.

B. Notwithstanding the provisions of §§ 64.2-403 and 64.2-406, a person while in the military service of the United States, or a seaman or mariner while at sea, may dispose of his personal estate in the same manner as he might heretofore have done.

## CHAPTER 27.

## RELEASE OF UNIFORM POWERS OF APPOINTMENT ACT.

## Article 1.

## General Provisions.

## § 64.2-2700. Definitions.

As used in this chapter, *unless the context requires a different meaning*:

"Donee" means any person, whether a resident or nonresident of the Commonwealth, who has the right to exercise a power either alone or with another.

"Object" means the person in whose favor the power may be exercised.

"Power" includes (i) any power to appoint or designate to whom property shall go; (ii) any power to invade property; (iii) any power to alter, amend, or revoke any instrument under which an estate or trust is held or created or to terminate any right or interest thereunder; and (iv) any power remaining when one or more partial releases have been made with respect to a power, regardless of (a) whether the power is vested, contingent, or conditional; (b) whether the power is classified in law or known as a power in gross, a power appendant, a power appurtenant, a collateral power, a general, special or limited power, an exclusive or nonexclusive power, or otherwise; and (c) when, in what manner, or in whose favor it may be exercised.

"Property" means any real or personal property and any interest in or income from property that is subject to the power.

"Release" means renunciation, relinquishment, surrender, refusal to accept, extinguishment, or any other form of release.

"Appointee" means a person to which a powerholder makes an appointment of appointive property.

"Appointive property" means the property or property interest subject to a power of appointment.

"Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment

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59 and is not a specific-exercise clause. "Blanket-exercise clause" includes a clause that:

60 1. Expressly uses the words "any power" in exercising any power of appointment the powerholder  
61 has;

62 2. Expressly uses the words "any property" in appointing any property over which the powerholder  
63 has a power of appointment; or

64 3. Disposes of all property subject to disposition by the powerholder.

65 "Donor" means a person that creates a power of appointment.

66 "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one  
67 or more of the permissible appointees to the exclusion of the other permissible appointees.

68 "General power of appointment" means a power of appointment exercisable in favor of the  
69 powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's  
70 estate.

71 "Gift-in-default clause" means a clause in the instrument creating the power identifying a taker in  
72 default of appointment.

73 "Impermissible appointee" means a person that is not a permissible appointee.

74 "Instrument" means a record.

75 "Nongeneral power of appointment" means a power of appointment that is not a general power of  
76 appointment.

77 "Permissible appointee" means a person in whose favor a powerholder may exercise a power of  
78 appointment.

79 "Person" means an individual; estate; trust; business or nonprofit entity; public corporation;  
80 government or governmental subdivision, agency, or instrumentality; or other legal entity.

81 "Powerholder" means a person in which a donor creates a power of appointment.

82 "Power of appointment" means a power that enables a powerholder acting in a nonfiduciary  
83 capacity to designate a recipient of an ownership interest in or another power of appointment over the  
84 appointive property. "Power of appointment" does not include a power of attorney.

85 "Presently exercisable power of appointment" means a power of appointment exercisable by the  
86 powerholder at the relevant time. "Presently exercisable power of appointment":

87 1. Includes a power of appointment not exercisable until the occurrence of a specified event, the  
88 satisfaction of an ascertainable standard, or the passage of a specified time only after:

89 a. The occurrence of the specified event;

90 b. The satisfaction of the ascertainable standard; or

91 c. The passage of the specified time; and

92 2. Does not include a power exercisable only at the powerholder's death.

93 "Record" means information that is inscribed on a tangible medium or that is stored in an electronic  
94 or other medium and is retrievable in perceivable form.

95 "Specific-exercise clause" means a clause in an instrument which specifically refers to and exercises  
96 a particular power of appointment.

97 "Taker in default of appointment" means a person that takes all or part of the appointive property to  
98 the extent that the powerholder does not effectively exercise the power of appointment.

99 "Terms of the instrument" means the manifestation of the intent of the maker of the instrument  
100 regarding the instrument's provisions as expressed in the instrument or as may be established by other  
101 evidence that would be admissible in a legal proceeding.

102 **§ 64.2-2705. Governing law.**

103 Unless the terms of the instrument creating a power of appointment manifest a contrary intent:

104 1. The creating, revocation, or amendment of the power is governed by the law of the donor's  
105 domicile at the relevant time; and

106 2. The exercise, release, or disclaimer of the power, or the revocation or amendment of the exercise,  
107 release, or disclaimer of the power is governed by the law of the powerholder's domicile at the relevant  
108 time.

109 **§ 64.2-2706. Common law and principles of equity.**

110 The common law and principles of equity supplement this chapter, except to the extent modified by  
111 this chapter or other law of the Commonwealth.

112 **Article 2.**

113 **Creation, Revocation, and Amendment of Power of Appointment.**

114 **§ 64.2-2707. Creation of power of appointment.**

115 A. A power of appointment is created only if:

116 1. The instrument creating the power:

117 a. Is valid under applicable law; and

118 b. Except as otherwise provided in subsection B, transfers the appointive property; and

119 2. The terms of the instrument creating the power manifest the donor's intent to create in a  
120 powerholder a power of appointment over the appointive property exercisable in favor of a permissible

appointee.

B. Subdivision A 1 b does not apply to the creation of a power of appointment by the exercise of a power of appointment.

C. A power of appointment may not be created in a deceased individual.

D. Subject to an applicable rule against perpetuities, a power of appointment may be created in an unborn or unascertained powerholder.

**§ 64.2-2708. Nontransferability.**

A powerholder may not transfer a power of appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

**§ 64.2-2709. Presumption of unlimited authority.**

Subject to § 64.2-2711, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

1. Presently exercisable;
2. Exclusionary; and
3. Except as otherwise provided in § 64.2-2710, general.

**§ 64.2-2710. Exception to presumption of unlimited authority.**

Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

1. The power is exercisable only at the powerholder's death; and
2. The permissible appointees of the power do not include the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate.

**§ 64.2-2711. Rules of classification.**

A. As used in this section, "adverse party" means a person with a substantial beneficial interest in property which would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

B. If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

C. Only a power of appointment whose permissible appointees are defined and limited can be nonexclusionary.

**§ 64.2-2712. Power to revoke or amend.**

A donor may revoke or amend a power of appointment only to the extent that:

1. The instrument creating the power is revocable by the donor; or
2. The donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

Article 3.

Exercise of Power of Appointment.

**§ 64.2-2713. Requisites for exercise of power of appointment.**

A power of appointment is exercised only:

1. If the instrument exercising the power is valid under applicable law;
2. If the terms of the instrument exercising the power:
  - a. Manifest the powerholder's intent to exercise the power; and
  - b. Subject to § 64.2-2716, satisfy the requirements of exercise, if any, imposed by the donor; and
3. To the extent that the appointment is a permissible exercise of the power.

**§ 64.2-2714. Intent to exercise; determining intent from residuary clause.**

A. As used in this section:

"Residuary clause" does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause.

"Will" includes a codicil and a testamentary instrument that revises another will.

B. A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:

1. The terms of the instrument containing the residuary clause do not manifest a contrary intent;
2. The power is a general power exercisable in favor of the powerholder's estate;
3. There is no gift-in-default clause or the clause is ineffective; and
4. The powerholder did not release the power.

**§ 64.2-2715. Intent to exercise; after-acquired power.**

Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

1. Except as otherwise provided in subdivision 2, a blanket-exercise clause extends to a power acquired by the powerholder after executing the instrument containing the clause; and
2. If the powerholder is also the donor of the power, the clause does not extend to the power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

**§ 64.2-2716. Substantial compliance with donor-imposed formal requirement.**

A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

1. The powerholder knows of and intends to exercise the power; and
2. The powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

**§ 64.2-2717. Permissible appointment.**

A. A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property.

B. A powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or of the powerholder's estate may appoint only to those creditors.

C. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

1. Make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;
2. Create a general power or a nongeneral power in a permissible appointee; or
3. Create a nongeneral power in an impermissible appointee to appoint to one or more of the permissible appointees of the original nongeneral power.

**§ 64.2-2718. Appointment to deceased appointee.**

An appointment to a deceased appointee is ineffective.

**§ 64.2-2719. Impermissible appointment.**

A. An exercise of a power of appointment in favor of an impermissible appointee is ineffective.

B. An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent that the appointment is a fraud on the power.

**§ 64.2-2720. Selective allocation doctrine.**

If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property shall be allocated in the permissible manner that best carries out the powerholder's intent.

**§ 64.2-2721. Capture doctrine; disposition of ineffectively appointed property under general power.**

To the extent that a powerholder of a general power of appointment, other than a power to withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

1. The gift-in-default clause controls the disposition of the ineffectively appointed property; or
2. If there is no gift-in-default clause or to the extent that the clause is ineffective, the ineffectively appointed property:
  - a. Passes to:
    - (1) The powerholder if the powerholder is a permissible appointee and living; or
    - (2) If the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or
  - b. If there is no taker under subdivision 2 a, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

**§ 64.2-2722. Disposition of unappointed property under released or unexercised general power.**

To the extent that a powerholder releases or fails to exercise a general power of appointment other than a power to withdraw property from, revoke, or amend a trust:

1. The gift-in-default clause controls the disposition of the unappointed property; or
2. If there is no gift-in-default clause or to the extent that the clause is ineffective:
  - a. Except as otherwise provided in subdivision 2 b, the unappointed property passes to:
    - (1) The powerholder if the powerholder is a permissible appointee and living; or
    - (2) If the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or
  - b. To the extent that the powerholder released the power, or if there is no taker under subdivision 2 a, the unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

**§ 64.2-2723. Disposition of unappointed property under released or unexercised nongeneral power.**

To the extent that a powerholder releases, ineffectively exercises, or fails to exercise a nongeneral power of appointment:

1. The gift-in-default clause controls the disposition of the unappointed property; or
2. If there is no gift-in-default clause or to the extent that the clause is ineffective, the unappointed property:
  - a. Passes to the permissible appointees if:

(1) The permissible appointees are defined and limited; and  
 (2) The terms of the instrument creating the power do not manifest a contrary intent; or  
 b. If there is no taker under subdivision 2 a, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

**§ 64.2-2724. Disposition of unappointed property if partial appointment to taker in default.**

Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

**§ 64.2-2725. Appointment to taker in default.**

If a powerholder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised and the appointee takes under the clause.

**§ 64.2-2726. Powerholder's authority to revoke or amend exercise.**

A powerholder may revoke or amend an exercise of a power of appointment only to the extent that:

1. The powerholder reserves a power of revocation or amendment in the instrument exercising the power of appointment, and if the power is nongeneral, the terms of the instrument creating the power of appointment do not prohibit the reservation; or

2. The terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

**Article 4.**

**Disclaimer or Release; Contract to Appoint or Not to Appoint.**

**§ 64.2-2727. Disclaimer.**

As provided by Chapter 26 (§ 64.2-2600 et seq.):

1. A powerholder may disclaim all or part of a power of appointment.

2. A permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property.

**§ 64.2-2728. Authority to release.**

A powerholder may release a power of appointment, in whole or in part, except to the extent that the terms of the instrument creating the power prevent the release.

**§ 64.2-2729. Method of release.**

A powerholder of a releasable power of appointment may release the power in whole or in part:

1. By substantial compliance with a method provided in the terms of the instrument creating the power; or

2. If the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by a record manifesting the powerholder's intent by clear and convincing evidence.

**§ 64.2-2730. Notice of release; recordation; fee.**

A. A fiduciary or other person, association, or corporation having possession or control of any appointive property, other than the powerholder, shall not be deemed to have notice of a release of the power of appointment until the original or a copy of the release is delivered to such fiduciary or other person, association, or corporation.

B. A purchaser or mortgagee of any real property subject to a power of appointment, without actual notice of the release, shall not be deemed to have notice of a release of power until (i) the original or a copy of the release is recorded in the circuit court clerk's office in the county or city in which the real property is located, referencing the will or deed book where the instrument creating the power is recorded, and (ii) the deed, will, or other instrument creating the power of appointment, or a certified copy thereof, is recorded in the same clerk's office.

C. No release shall be invalid or ineffective for failing to comply with subsection A or B.

D. The clerk shall record a release of a power of appointment in the deed book and index the release in the daily and general indexes with the name of the powerholder being entered on the grantor index. For each such recordation, the clerk shall be paid a fee in the amount applicable to the recordation of deeds as set forth in subdivision A 2 of § 17.1-275 and an additional fee of \$5.

**§ 64.2-2731. Revocation or amendment of release.**

A powerholder may revoke or amend a release of a power of appointment only to the extent that:

1. The instrument of release is revocable by the powerholder; or

2. The powerholder reserves a power of revocation or amendment in the instrument of release.

**§ 64.2-2732. Power to contract; presently exercisable power of appointment.**

A powerholder of a presently exercisable power of appointment may contract:

1. Not to exercise the power; or

2. To exercise the power if the contract when made does not confer a benefit on an impermissible appointee.

**§ 64.2-2733. Power to contract; power of appointment not presently exercisable.**

A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the powerholder:

1. Is also the donor of the power; and
2. Has reserved the power in a revocable trust.

**§ 64.2-2734. Remedy for breach of contract to appoint or not to appoint.**

The remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

Article 5.

*Right of Powerholder's Creditors in Appointive Property.*

**§ 64.2-2735. Creditor claim; general power created by powerholder.**

A. As used in this section, "power of appointment created by the powerholder" includes a power of appointment created in a transfer by another person to the extent that the powerholder contributed value to the transfer.

B. Appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in Chapter 5 (§ 55-80 et seq.) of Title 55.

C. Subject to subsection B, appointive property subject to a general power of appointment created by the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder irrevocably appointed the property in favor of a person other than the powerholder or the powerholder's estate.

D. Subject to subsections B and C, and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the power of appointment, appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of:

1. The powerholder, to the same extent as if the powerholder owned the appointive property, if the power is presently exercisable; and

2. The powerholder's estate, to the extent that the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the powerholder's death.

**§ 64.2-2736. Creditor claim; general power not created by powerholder.**

A. Except as otherwise provided in subsection C, appointive property subject to a presently exercisable general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of the powerholder to the extent that the powerholder's property is insufficient.

B. Appointive property subject to a general power of appointment exercisable at the powerholder's death is not subject to a claim of a creditor of the powerholder or the powerholder's estate except to the extent that the power is exercised in favor of the powerholder's estate.

C. Subject to subsection C of § 64.2-2738, a power of appointment created by a person other than the powerholder, which is subject to an ascertainable standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1), as amended, is treated for purposes of this article as a nongeneral power.

**§ 64.2-2737. Power to withdraw.**

A. For purposes of this article, and except as otherwise provided in subsection B, a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.

B. On the lapse, release, or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent that the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in 26 U.S.C. § 2041(b)(2) and 26 U.S.C. § 2514(e) or two times the amount specified in 26 U.S.C. § 2503(b), as amended.

**§ 64.2-2738. Creditor claim; nongeneral power.**

A. Except as otherwise provided in subsections B and C, appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate.

B. Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of Chapter 5 (§ 55-80 et seq.) of Title 55.

C. If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a nongeneral power of appointment is treated for purposes of this article as a general power.

Article 6.

*Miscellaneous Provisions.***§ 64.2-2739. Uniformity of application and construction.**

*In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.*

**§ 64.2-2740. Relation to Electronic Signatures in Global and National Commerce Act.**

*This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede § 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(b) of that act, 15 U.S.C. § 7003(b).*

**§ 64.2-2741. Application to existing relationships.**

*A. Except as otherwise provided in this chapter, on and after July 1, 2016:*

*1. This chapter applies to a power of appointment created before, on, or after July 1, 2016;*

*2. This chapter applies to a judicial proceeding concerning a power of appointment commenced on or after July 1, 2016;*

*3. This chapter applies to a judicial proceeding concerning a power of appointment commenced before July 1, 2016, unless the court finds that application of a particular provision of this chapter would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of this chapter does not apply and the superseded law applies;*

*4. A rule of construction or presumption provided in this chapter applies to an instrument executed before July 1, 2016, unless there is a clear indication of a contrary intent in the terms of the instrument; and*

*5. Except as otherwise provided in subdivisions 1 through 4, an action done before July 1, 2016, is not affected by this chapter.*

*B. If a right is acquired, extinguished, or barred on the expiration of a prescribed period that commenced under law of the Commonwealth other than this chapter before July 1, 2016, the law continues to apply to the right.*

**2. That §§ 55-25.1, 64.2-406, 64.2-423, and 64.2-2701 through 64.2-2704 of the Code of Virginia are repealed.**