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HOUSE BILL NO. 1448

House Amendments in [ ] — January 25, 2017

A BILL to amend and reenact § 64.2-745.2 of the Code of Virginia, relating to qualified trustee of self-settled spendthrift trusts.

Patron Prior to Engrossment—Delegate Miyares

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-745.2 of the Code of Virginia is amended and reenacted as follows:

§ 64.2-745.2. Definitions; vacancies; right to withdraw.

A. As used in this article, unless the context requires a different meaning:

"Independent qualified trustee" means a qualified trustee who is not, and whose actions are not [ ; ] subject to direction by:

- 1. The settlor;
- 2. Any natural person who is not a resident of the Commonwealth;
- 3. Any entity that is not authorized under Title 6-2 to engage in trust business by law to act as a trustee within the Commonwealth;
- 4. The settlor's spouse;
- 5. A parent of the settlor;
- 6. Any issue of the settlor;
- 7. A sibling of the settlor;
- 8. An employee of the settlor;
- 9. A business entity in which the settlor's holdings represent at least 30 percent of the total voting power of all interests entitled to vote;
- 10. A subordinate employee of the settlor; or
- 11. A subordinate employee of a business entity in which the settlor is an executive.

"Qualified interest" means a settlor's interest in a qualified self-settled spendthrift trust, to the extent that such interest entitles the settlor to receive distributions of income, principal, or both, in the sole discretion of an independent qualified trustee. A settlor may have a qualified interest in a qualified self-settled spendthrift trust and also have an interest in the same trust that is not a qualified interest, and the rules of § 64.2-747 shall apply to each interest of the settlor in the same trust other than the settlor's qualified interest.

"Qualified self-settled spendthrift trust" means a trust if:

- 1. The trust is irrevocable;
- 2. The trust is created during the settlor's lifetime;
- 3. There is, at all times when distributions could be made to the settlor pursuant to the settlor's qualified interest, at least one beneficiary other than the settlor (i) to whom income may be distributed, if the settlor's qualified interest relates to trust income, (ii) to whom principal may be distributed, if the settlor's qualified interest relates to trust principal, or (iii) to whom both income and principal may be distributed, if the settlor's qualified interest relates to both trust income and principal;
- 4. The trust has at all times at least one qualified trustee, who may be, but need not be, an independent qualified trustee;
- 5. The trust instrument expressly incorporates the laws of the Commonwealth to govern the validity, construction, and administration of the trust;
- 6. The trust instrument includes a spendthrift provision, as defined in § 64.2-743, that restrains both voluntary and involuntary transfer of the settlor's qualified interest; and
- 7. The settlor does not have the right to disapprove distributions from the trust.

"Qualified trustee" means any person who is a natural person residing within the Commonwealth or a legal entity authorized to engage in trust business by law to act as a trustee within the Commonwealth and who maintains or arranges for custody within the Commonwealth of some or all of the property that has been transferred to the trust by the settlor, maintains records within the Commonwealth for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation within the Commonwealth of fiduciary income tax returns for the trust, or otherwise materially participates within the Commonwealth in the administration of the trust. A trustee is not a qualified trustee if such trustee's authority to make distributions of income or principal or both are subject to the direction of someone who, were that person a trustee of the trust, would not meet the requirements to be a qualified trustee.

B. A vacancy in the position of qualified trustee that occurs for any reason, whether or not there is

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59 then serving another trustee, shall be filled in the following order of priority:

60 1. By a person eligible to be a qualified trustee and who is designated pursuant to the terms of the  
61 trust to act as successor trustee;

62 2. By a person eligible to be a qualified trustee and who is designated by unanimous agreement of  
63 the qualified beneficiaries; or

64 3. By a person eligible to be a qualified trustee and who is appointed by the court pursuant to  
65 §§ 64.2-1405 and 64.2-1406 or pursuant to § 64.2-712.

66 C. A vacancy in the position of independent qualified trustee that occurs for any reason, whether or  
67 not there is then serving another trustee, shall be filled in the following order of priority:

68 1. By a person eligible to be an independent qualified trustee and who is designated pursuant to the  
69 terms of the trust to act as successor trustee;

70 2. By a person eligible to be an independent qualified trustee and who is designated by unanimous  
71 agreement of the qualified beneficiaries; or

72 3. By a person eligible to be an independent qualified trustee and who is appointed by the court  
73 pursuant to §§ 64.2-1405 and 64.2-1406 or pursuant to § 64.2-712.

74 D. A trust instrument shall not be deemed revocable on account of the inclusion of any one or more  
75 of the following rights, powers, and interests:

76 1. A power of appointment, exercisable by the settlor by will or other written instrument effective  
77 only upon the settlor's death, other than a power to appoint to the settlor's estate or the creditors of the  
78 settlor's estate;

79 2. The settlor's qualified interest in the trust;

80 3. The settlor's right to receive income or principal pursuant to an ascertainable standard;

81 4. The settlor's potential or actual receipt of income or principal from a charitable remainder unitrust  
82 or charitable remainder annuity trust (each within the meaning of § 664(d) of the Internal Revenue  
83 Code) and the settlor's right, at any time, and from time to time, to release, in writing delivered to the  
84 qualified trustee, all or any part of the settlor's retained interest in such trust;

85 5. The settlor's receipt each year of a percentage, not to exceed five percent, specified in the trust  
86 instrument of the initial value of the trust assets or their value determined from time to time pursuant to  
87 the trust instrument;

88 6. The settlor's right to remove a trustee and to appoint a new trustee;

89 7. The settlor's potential or actual use of real property held under a personal residence trust (within  
90 the meaning of § 2702(c) of the Internal Revenue Code);

91 8. The settlor's potential or actual receipt or use of a qualified annuity interest (within the meaning of  
92 § 2702 of the Internal Revenue Code);

93 9. The ability of a qualified trustee, whether pursuant to discretion or direction, to pay, after the  
94 settlor's death, all or any part of the settlor's debts outstanding at the time of the settlor's death, the  
95 expenses of administering the settlor's estate, or any estate inheritance tax imposed on or with respect to  
96 the settlor's estate; and

97 10. A settlor's potential or actual receipt of income or principal to pay, in whole or in part, income  
98 taxes due on trust income, or the direct payment of such taxes to the applicable tax authorities, pursuant  
99 to a provision in the trust instrument that expressly provides for the direct payment of such taxes or the  
100 reimbursement of the settlor for such tax payments.

101 E. A beneficiary who has the right to withdraw his entire beneficial interest in a trust shall be treated  
102 as its settlor to the extent of such withdrawal right, when such right to withdraw has lapsed, been  
103 released, or otherwise expired, without regard to the limitations otherwise imposed by subsection B of  
104 § 64.2-747.