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HOUSE BILL NO. 1643

Offered January 11, 2017

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A *BILL to amend and reenact §§ 64.2-100, 64.2-403, 64.2-410, 64.2-443, and 64.2-455 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-403.1, relating to electronic wills.*

Patron—Loupassi

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-100, 64.2-403, 64.2-410, 64.2-443, and 64.2-455 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-403.1 as follows:

§ 64.2-100. Definitions.

As used in this title, unless the context otherwise requires:

"Bona fide purchaser" means a purchaser of property for value who has acted in the transaction in good faith. Notice of a seller's marital status, or notice of the existence of a premarital or marital agreement, does not affect the status of a bona fide purchaser. A "purchaser" is one who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien or who otherwise deals with property in a voluntary transaction, other than a gift. A purchaser gives "value" for property acquired in return for a binding commitment to extend credit to the transferor or another as security for or in total or partial satisfaction of a pre-existing claim, or in return for any other consideration sufficient to support a simple contract.

"Fiduciary" includes a guardian, committee, trustee, executor, conservator, or personal representative.

"Personal representative" includes the executor under a will or the administrator of the estate of a decedent, the administrator of such estate with the will annexed, the administrator of such estate unadministered by a former representative, whether there is a will or not, any person who is under the order of a circuit court to take into his possession the estate of a decedent for administration, and every other curator of a decedent's estate, for or against whom suits may be brought for causes of action that accrued to or against the decedent.

"Trustee" means a trustee under a probated will or an inter vivos trust instrument.

"Will" includes any testament, codicil, exercise of a power of appointment by will or by a writing in the nature of a will, or any other testamentary disposition. "Will" includes an electronic will.

§ 64.2-403. Execution of wills; requirements.

A. No will shall be valid unless it is in writing and signed by the testator, or by some other person in the testator's presence and by his direction, in such a manner as to make it manifest that the name is intended as a signature.

B. A will wholly in the testator's handwriting is valid without further requirements, provided that the fact that a will is wholly in the testator's handwriting and signed by the testator is proved by at least two disinterested witnesses.

C. A will not wholly in the testator's handwriting is not valid unless the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator. No form of attestation of the witnesses shall be necessary.

D. All electronic wills shall be executed in accordance with § 64.2-403.1.

§ 64.2-403.1. Electronic wills; requirements.

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

"Authoritative electronic record" means an electronic record created, sent, communicated, received, maintained, and stored in such a manner that (i) a single authoritative electronic record exists that is unique, identifiable, and unalterable; (ii) each copy of the authoritative electronic record and any copy of a copy is readily identifiable as a copy that is not the authoritative electronic record; and (iii) any attempted alteration of the authoritative electronic record is readily identifiable.

"Certified paper original" means a tangible document that contains the text of an electronic will and any self-proving acknowledgments or affidavits, together with an affidavit of the qualified custodian designated or otherwise serving as provided therein pursuant to subsection D.

"Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the

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59 document. "Electronic signature" includes an electronic notary seal.

60 "Qualified custodian" means a person who, if an individual, is domiciled in the Commonwealth or
61 that, if an entity, is incorporated or organized under the laws of the Commonwealth and that has filed
62 an affidavit with the court having jurisdiction over the probate of wills in the county where such person
63 is domiciled, or in which such person's registered office is located, affirming that such person (i) intends
64 to serve as a qualified custodian under this section; (ii) will consistently employ a system for creating,
65 sending, communicating, receiving, maintaining, storing, and producing electronic wills in a manner that
66 complies with the requirements of this section; and (iii) will furnish to the court upon request such
67 information as the court shall require with regard to its qualifications, policies, and practices with
68 regard to creating, sending, communicating, receiving, maintaining, storing, and producing electronic
69 wills.

70 B. An electronic will that meets the requirements of this section (i) is subject to no other formalities
71 with respect to execution, (ii) may be made in or out of the Commonwealth, and (iii) is valid and has
72 the same force and effect, and shall be interpreted in the same manner, as a will formally executed in
73 accordance with § 64.2-403.

74 A certified paper original of an electronic will satisfies any requirement for an original will.

75 C. No electronic will is valid unless it:

76 1. Is written, created, and stored in an authoritative electronic record under the control of the
77 qualified custodian designated therein; and

78 2. Contains the electronic signatures of the testator and either:

79 a. At least two competent witnesses who shall, at the request of the testator and in the testator's
80 presence, attest to the testator's electronic signature by placing their electronic signatures on the
81 electronic will; or

82 b. A notary public who shall, at the request of the testator and in the testator's presence, attest to
83 the testator's electronic signature by placing his electronic signature on the electronic will.

84 D. The testator shall designate a qualified custodian in the electronic will to control the authoritative
85 electronic record of the electronic will. The qualified custodian shall prepare an affidavit to be stored
86 with the certified paper original that states that (i) the qualified custodian is eligible to act as a
87 qualified custodian in the Commonwealth, (ii) the qualified custodian is the qualified custodian
88 designated by the testator in the electronic will or otherwise duly appointed to act in such capacity, (iii)
89 an authoritative electronic record was created at the time the testator made the electronic will, (iv) the
90 authoritative electronic record has been in the control of one or more qualified custodians since the
91 time the authoritative electronic record was created and that identifies each such qualified custodian, (v)
92 the authoritative electronic record has not been altered since the time the authoritative electronic record
93 was created, and (vi) the text of the electronic will set forth therein is a true, correct, and complete
94 tangible manifestation of the electronic will. For purposes of making such an affidavit, the qualified
95 custodian shall be entitled to rely conclusively on any affidavits delivered by a predecessor qualified
96 custodian in connection with its designation or appointment as qualified custodian.

97 E. The qualified custodian designated in the electronic will shall create and store in the authoritative
98 electronic record each of the following:

99 1. A photograph or other visual record of the testator taken by the qualified custodian
100 contemporaneously to the execution of the electronic will;

101 2. A photocopy, photograph, facsimile, or other visual record of a document taken or made by the
102 qualified custodian contemporaneously to the execution of the electronic will that provides satisfactory
103 evidence of the testator's identity;

104 3. If there are attesting witnesses to the electronic will, a photocopy, photograph, facsimile, or other
105 visual record of a document taken or made by the qualified custodian contemporaneously to the
106 execution of the electronic will that provides satisfactory evidence of the attesting witnesses' identities;
107 and

108 4. An audio and video recording of the testator and the attesting witnesses or notary taking the
109 actions described in subdivision C 2.

110 The items set forth in subdivisions E 1 through 4 shall be attached to or logically associated with
111 the electronic will but shall not be deemed to be a part of the electronic will itself, and in no respect
112 does the presence or absence of any such item affect any question relating to whether the electronic will
113 was validly executed or whether the electronic will is admissible to probate.

114 Notwithstanding any provisions to the contrary, for purposes of this section an individual shall be
115 deemed to be in the presence of another individual if (i) such individuals are in the same physical
116 location or (ii) such individuals are in remote physical locations but can communicate with each other
117 by means of live video and audio conference.

118 For the purposes of this subsection, "satisfactory evidence of identity" means one or more of the
119 following unexpired documents bearing a photographic image of the individual's face and signature: a
120 United States Passport Book, a United States Passport Card, a certificate of United States citizenship, a

certificate of naturalization, a foreign passport, an alien registration card with photograph, a state-issued driver's license, a state-issued identification card, or a United States military identification card.

F. A certified paper copy original of an electronic will validly executed under this section may be proved and allowed in the circuit court. The jurisdiction for the probate of electronic wills shall be as provided in § 64.2-443.

G. An electronic will may be made self-proved in the same manner as prescribed in §§ 64.2-452 and 64.2-453. Any self-proving affidavit shall be part of the authoritative electronic record. Any electronic will notarized as prescribed in subdivision C 2 b shall be automatically self-proved.

H. In dealing with the authoritative electronic record of an electronic will, the qualified custodian (i) shall provide access or information concerning such electronic will only to the testator and such other persons as directed by the written instructions of the testator and, after the testator's death, the personal representative designated in such electronic will and (ii) may, in its discretion, elect to destroy such authoritative electronic record at any time following (a) the fifth anniversary of the admission of any will of the testator to probate, (b) the tenth anniversary of the testator's death, or (c) the one hundredth anniversary of the execution of such electronic will.

I. A qualified custodian who at any time or from time to time controls the authoritative electronic record of an electronic will may elect to cease to serve in such capacity by:

1. Delivering 30 days' written notice to (i) the testator or, if the testator is deceased, to the duly appointed personal representative of the testator and (ii) a successor qualified custodian designated by the outgoing qualified custodian, that the outgoing qualified custodian has elected to cease to serve in such capacity;

2. Delivering the authoritative electronic record of the electronic will to such successor qualified custodian; and

3. Delivering to such successor qualified custodian an affidavit of the outgoing qualified custodian stating that:

a. The outgoing qualified custodian is eligible to act as a qualified custodian in the Commonwealth;

b. The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or otherwise duly appointed to act in such capacity;

c. An authoritative electronic record was created at the time the testator made the electronic will;

d. The authoritative electronic record has been in the control of one or more qualified custodians since the time the authoritative electronic record was created and identifying such qualified custodians; and

e. The authoritative electronic record has not been altered since the time the authoritative electronic record was created.

For purposes of making such affidavit, the outgoing qualified custodian is entitled to rely conclusively on any affidavits delivered by a predecessor qualified custodian in connection with its designation or appointment as qualified custodian, provided that all such affidavits are delivered to the successor qualified custodian.

Upon the written request of the testator during his life, a qualified custodian who at any time controls the authoritative electronic record of the testator's electronic will shall cease to serve in such capacity and shall deliver to a successor qualified custodian designated in writing by the testator (i) such authoritative electronic record and (ii) the affidavit of the outgoing qualified custodian as described in subdivision 3.

No qualified custodian may effectively succeed to office as a qualified custodian of an electronic will, and no outgoing qualified custodian may be effectively discharged from office, unless and until such successor shall affirmatively agree in writing to serve in such capacity.

J. An electronic will shall be deemed to be executed in the Commonwealth if all of the following requirements are met:

1. The electronic will states that the testator understands that he is executing, and that he intends to execute, an electronic will in and pursuant to the laws of the Commonwealth;

2. The electronic will provides that its validity, interpretation, and effect are governed by the laws of the Commonwealth;

3. The attesting witnesses whose electronic signatures are contained in the electronic will were physically located within the Commonwealth at the time the electronic will was executed in accordance with this section; and

4. The electronic will designates a qualified custodian who, if an individual, is domiciled in the Commonwealth at the time of execution or that, if an entity, is incorporated or organized under the laws of the Commonwealth at the time of execution.

§ 64.2-410. Revocation of wills generally.

A. If a testator with the intent to revoke a will or codicil, or some person at his direction and in his

presence, cuts, tears, burns, obliterates, cancels, or destroys a will or codicil, or the signature thereto, or some provision thereof, such will, codicil, or provision thereof is void and of no effect.

B. If a testator executes a will in the manner required by law or other writing in the manner in which a will is required to be executed that expressly revokes a former will, such former will, including any codicil thereto, is void and of no effect.

C. If a testator executes a will or codicil in the manner required by law that (i) expressly revokes a part, but not all, of a former will or codicil or (ii) contains provisions inconsistent with a former will or codicil, such former will or codicil is revoked and superseded to the extent of such express revocation or inconsistency if the later will or codicil is effective upon the death of the testator.

D. No electronic will or clause thereof shall be revoked unless by some other valid will or codicil or by some other writing executed in the manner in which a will is required to be executed.

§ 64.2-443. Jurisdiction of probate of wills.

A. The circuit courts shall have jurisdiction of the probate of wills. A will shall be offered for probate in the circuit court in the county or city wherein the decedent has a known place of residence; if he has no such known place of residence, then in a county or city wherein any real estate lies that is devised or owned by the decedent; and if there is no such real estate, then *either (i) in the county or city wherein in which he dies or a county or city wherein in which he has estate or (ii) in the county or city in which the qualified custodian has filed an affidavit pursuant to § 64.2-403.1.*

B. Where any person has become, either voluntarily or involuntarily, a patient in a nursing home, convalescent home, or similar institution due to advanced age or impaired health, the place of legal residence of the person shall be rebuttably presumed to be the same as it was before he became a patient.

§ 64.2-455. Wills to be recorded; recording copies; effect; transfer to The Library of Virginia.

A. Every will, *certified paper original as defined in § 64.2-403.1*, or authenticated copy admitted to probate by any circuit court or clerk of any circuit court shall be recorded by the clerk and remain in the clerk's office, except during such time as the same may be carried to another court under a subpoena duces tecum or as otherwise provided in § 17.1-213. A certified copy of such will, *certified paper original*, or ~~of any~~ authenticated copy may be recorded in any county or city wherein there is any estate, real or personal, devised or bequeathed by such will.

B. The personal representative of the testator shall cause a certified copy of any will, *certified paper original*, or ~~of any~~ authenticated copy so admitted to record to be recorded in any county or city wherein there is any real estate of which the testator possessed at the time of his death or that is devised by his will.

C. Every will, *certified paper original*, or certified copy when recorded shall have the effect of notice to all persons of any devise or disposal by the will of real estate situated in a county or city in which such will or copy is so recorded.

D. With the approval of the judges of a circuit court of any county or city, the clerk of such court may transfer such original wills from his office to the Archives Division of The Library of Virginia. A copy of any will that has been microfilmed or stored in an electronic medium, prepared from such microfilmed or electronic record and certified as authentic by the clerk or his designee, shall constitute a certified copy of the will for any purpose arising under this title for which a certified copy of the will is required.