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SENATE BILL NO. 78

Offered January 10, 2018

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A *BILL to amend and reenact §§ 64.2-701 and 64.2-779.5 of the Code of Virginia, relating to trust decanting; authorized fiduciary.*

Patron—Edwards

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That §§ 64.2-701 and 64.2-779.5 of the Code of Virginia are amended and reenacted as follows:****§ 64.2-701. Definitions.**

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

"Action," with respect to an act of a trustee, includes a failure to act.

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

"Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986 and any applicable regulations.

"Authorized fiduciary" means (i) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the income or principal of the first trust to one or more current beneficiaries *and that is not (a) a current beneficiary of the first trust or a beneficiary to which the net income or principal of the first trust would be distributed if the first trust were terminated, (b) a trustee of the first trust that may be removed and replaced by a current beneficiary who has the power to remove the existing trustee of the first trust and designate as successor trustee a person that may be a related or subordinate party, as defined in 26 U.S.C. § 672(c), with respect to such current beneficiary, or (c) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the first trust;* (ii) a special fiduciary appointed under § 64.2-779.6; or (iii) a special-needs fiduciary under § 64.2-779.10.

"Beneficiary" means a person that (i) has a present or future, vested or contingent, beneficial interest in a trust; (ii) holds a power of appointment over trust property; or (iii) is an identified charitable organization that will or may receive distributions under the terms of the trust.

"Charitable interest" means an interest in a trust that (i) is held by an identified charitable organization and makes the organization a qualified beneficiary; (ii) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or (iii) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

"Charitable organization" means (i) a person, other than an individual, organized and operated exclusively for charitable purposes or (ii) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

"Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose the achievement of which is beneficial to the community.

"Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in § 64.2-723.

"Conservator" means a person appointed by the court to administer the estate of an adult individual.

"Court" means the court of the Commonwealth having jurisdiction in matters related to trusts.

"Current beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. "Current beneficiary" includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

"Decanting power" means the power of an authorized fiduciary under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.) to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

"Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

"Expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

"First trust" means a trust over which an authorized fiduciary may exercise the decanting power.

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SB78

59 "First-trust instrument" means the trust instrument for a first trust.

60 "General power of appointment" means a power of appointment exercisable in favor of a
61 powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's
62 estate.

63 "Guardian" means a person appointed by the court to make decisions regarding the support, care,
64 education, health, and welfare of a minor or adult individual. The term does not include a guardian ad
65 litem.

66 "Guardian of the estate" means a person appointed by the court to administer the estate of a minor.

67 "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

68 "Jurisdiction," with respect to a geographic area, includes a state or country.

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

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

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

75 "Power of withdrawal" means a presently exercisable general power of appointment other than a
76 power exercisable by a trustee that is limited by an ascertainable standard, or that is exercisable by
77 another person only upon consent of the trustee or a person holding an adverse interest.

78 "Presently exercisable power of appointment" means a power of appointment exercisable by the
79 powerholder at the relevant time. "Presently exercisable power of appointment" includes a power of
80 appointment exercisable only after the occurrence of a specified event, the satisfaction of an
81 ascertainable standard, or the passage of a specified time, only after (i) the occurrence of the specified
82 event, (ii) the satisfaction of the ascertainable standard, or (iii) the passage of the specified time.
83 "Presently exercisable power of appointment" does not include a power exercisable only at the
84 powerholder's death.

85 "Property" means anything that may be the subject of ownership, whether real or personal, legal or
86 equitable, or any interest therein.

87 "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is
88 determined, (i) is a distributee or permissible distributee of trust income or principal; (ii) would be a
89 distributee or permissible distributee of trust income or principal if the interests of the distributees
90 described in clause (i) terminated on that date without causing the trust to terminate; or (iii) would be a
91 distributee or permissible distributee of trust income or principal if the trust terminated on that date.

92 "Reasonably definite standard" means a clearly measurable standard under which a holder of a power
93 of distribution is legally accountable within the meaning of § 674(b)(5)(A) of the Internal Revenue Code
94 of 1986 and any applicable regulations.

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

97 "Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee
98 or a person holding an adverse interest.

99 "Second trust" means (i) a first trust after modification, including a restatement of the first trust,
100 under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.) or (ii) a trust to which a distribution of
101 property from a first trust is or may be made under the Uniform Trust Decanting Act (§ 64.2-779.1 et
102 seq.).

103 "Second-trust instrument" means the trust instrument for a second trust.

104 "Settlor," except as otherwise provided in § 64.2-779.22, means a person, including a testator, who
105 creates or contributes property to a trust. If more than one person creates or contributes property to a
106 trust, each person is a settlor of the portion of the trust property attributable to that person's contribution
107 except to the extent another person has the power to revoke or withdraw that portion.

108 "Sign" means, with present intent to authenticate or adopt a record, (i) to execute or adopt a tangible
109 symbol or (ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

110 "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer
111 of a beneficiary's interest.

112 "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States
113 Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The
114 term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

115 "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as
116 expressed in the trust instrument or as may be established by (i) other evidence that would be admissible
117 in a judicial proceeding or (ii) court order or nonjudicial settlement agreement.

118 "Trust instrument" means a record executed by the settlor to create a trust or by any person to create
119 a second trust that contains some or all of the terms of the trust, including any amendments.

120 "Trustee" includes an original, additional, and successor trustee and a cotrustee.

§ 64.2-779.5. Notice; exercise of decanting power.

A. In this section, a notice period begins on the day notice is given under subsection C and ends 59 days after the day notice is given.

B. Except as otherwise provided in this article, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

C. Except as otherwise provided in subsection F, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to (i) each settlor of the first trust, if living or then in existence; (ii) each qualified beneficiary of the first trust; (iii) each holder of a presently exercisable power of appointment over any part or all of the first trust; (iv) each person that currently has the right to remove or replace the authorized fiduciary; (v) each other fiduciary of the first trust; (vi) each fiduciary of the second trust; (vii) each person acting as an advisor or protector of the first trust; (viii) each person holding an adverse interest who has the power to consent to the revocation of the first trust; and (ix) the Attorney General, if subsection B of § 64.2-779.11 applies.

D. An authorized fiduciary is not required to give notice under subsection C to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

E. A notice under subsection C shall (i) specify the manner in which the authorized fiduciary intends to exercise the decanting power, (ii) specify the proposed effective date for exercise of the power, (iii) include a copy of the first-trust instrument, and (iv) include a copy of all second-trust instruments.

F. The decanting power may be exercised before expiration of the notice period under subsection A if all persons entitled to receive notice waive the period in a signed record.

G. The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under § 64.2-779.6 asserting that (i) an attempted exercise of the decanting power is ineffective because it did not comply with this article or was an abuse of discretion or breach of fiduciary duty or (ii) § 64.2-779.19 applies to the exercise of the decanting power.

H. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection C if the authorized fiduciary acted with reasonable care to comply with subsection C.

I. The decanting power under this article may be exercised by a majority of the authorized fiduciaries. If no trustee is an authorized fiduciary or upon request of any of the trustees, the court may appoint a special fiduciary pursuant to § 64.2-779.6 with authority to exercise the decanting power under this article.

2. That the provisions of this act apply to any trust created before, on, or after the effective date of this act.

3. That no provision of this act shall affect any valid exercise of decanting power under a trust by an authorized fiduciary prior to the effective date of this act, and such exercise shall be governed by the laws in force at the time the decanting power was exercised by the authorized fiduciary.

4. That an emergency exists and this act is in force from its passage.