

# VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

## CHAPTER 768

*An Act to amend and reenact §§ 64.2-701, 64.2-703, 64.2-706, 64.2-752, and 64.2-756 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 7 of Title 64.2 an article numbered 8.2, consisting of sections numbered 64.2-779.26 through 64.2-779.38; and to repeal § 64.2-770 of the Code of Virginia, relating to the Uniform Directed Trust Act.*

[H 1380]

Approved April 7, 2020

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 64.2-701, 64.2-703, 64.2-706, 64.2-752, and 64.2-756 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 7 of Title 64.2 an article numbered 8.2, consisting of sections numbered 64.2-779.26 through 64.2-779.38, 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.

*"Directed trustee" means a trustee that is subject to a trust director's power of direction.*

"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.

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

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

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

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

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

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

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

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

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

*"Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in subsection A of § 64.2-779.28.*

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

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

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

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

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

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

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

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

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

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

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

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

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

"Terms of a trust" means:

1. *Except as otherwise provided in subdivision 2*, the manifestation of the settlor's intent regarding a

trust's provisions as (i) expressed in the trust instrument or as ~~may be~~ (ii) established by (i) other evidence that would be admissible in a judicial proceeding; or

2. The trust's provisions as established, determined, or amended by (i) a trustee or trust director in accordance with applicable law, (ii) court order, or (iii) a nonjudicial settlement agreement under § 64.2-709.

"Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

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

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

**§ 64.2-703. Default and mandatory rules.**

A. Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

B. The terms of a trust prevail over any provision of this chapter except:

1. The requirements for creating a trust;

2. ~~The~~ Subject to subsection I of § 64.2-756 and §§ 64.2-779.32 and 64.2-779.34, the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

3. The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

4. The power of the court to modify or terminate a trust under §§ 64.2-728 through 64.2-734;

5. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 (§ 64.2-742 et seq.);

6. The power of the court under § 64.2-755 to require, dispense with, or modify or terminate a bond;

7. The power of the court under subsection B of § 64.2-761 to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;

8. The effect of an exculpatory term under § 64.2-799;

9. The rights under §§ 64.2-801 through 64.2-804 of a person other than a trustee or beneficiary;

10. Periods of limitation for commencing a judicial proceeding; and

11. The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

**§ 64.2-706. Principal place of administration.**

A. Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of an inter vivos trust designating the principal place of administration are valid and controlling if:

1. A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; ~~or~~

2. A trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction; or

3. All or part of the administration occurs in the designated jurisdiction.

B. Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee of an inter vivos trust may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States that is appropriate to the trust's purposes, its administration, and the interests of the beneficiaries.

C. When the proposed transfer of a trust's principal place of administration is to another state or to a jurisdiction outside of the United States, the trustee shall notify the qualified beneficiaries of the proposed transfer not less than 60 days before initiating the transfer. A corporate trustee that maintains a place of business in the Commonwealth where one or more trust officers are available on a regular basis for personal contact with trust customers and beneficiaries shall not be deemed to have transferred its principal place of administration if all or significant portions of the administration of the trust are performed outside the Commonwealth. The notice of proposed transfer shall include:

1. The name of the jurisdiction to which the principal place of administration is to be transferred;

2. The address and telephone number at the new location at which the trustee can be contacted;

3. An explanation of the reasons for the proposed transfer;

4. The date on which the proposed transfer is anticipated to occur; and

5. The date, not less than 60 days after the giving of the notice, by which the qualified beneficiary shall notify the trustee of an objection to the proposed transfer.

D. The authority of a trustee under this section to transfer a trust's principal place of administration to another state or to a jurisdiction outside of the United States terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

E. In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or

appointed pursuant to § 64.2-757.

F. The court, for good cause shown, may transfer the principal place of administration of a testamentary trust to another state or to a jurisdiction outside of the United States upon such conditions, if any, as it may deem appropriate.

**§ 64.2-752. Settlor's powers; powers of withdrawal.**

A. While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

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

C. During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

**§ 64.2-756. Cotrustees.**

A. Cotrustees who are unable to reach a unanimous decision may act by majority decision.

B. If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

C. *A Subject to subsection I, a cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or the cotrustee has properly delegated the performance of the function to another trustee.*

D. If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

E. A trustee may delegate to a cotrustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

F. Except as otherwise provided in subsection G, a trustee who does not join in an action of another trustee is not liable for the action.

G. ~~Each~~ *Subject to subsection I, each* trustee shall exercise reasonable care to:

1. Prevent a cotrustee from committing a serious breach of trust; and

2. Compel a cotrustee to redress a serious breach of trust.

H. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

I. *The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under §§ 64.2-779.32, 64.2-779.33, and 64.2-779.34.*

Article 8.2.

Uniform Directed Trust Act.

**§ 64.2-779.26. Definitions.**

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

"Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that trust director or trustee by the terms of the trust, this article, or law of the Commonwealth other than this article pertaining to trusts.

"Directed trust" means a trust for which the terms of the trust grant a power of direction.

**§ 64.2-779.27. Application.**

A. Except as otherwise provided in subsection B and § 64.2-779.28, this article applies to a trust that has its principal place of administration in the Commonwealth and that:

1. Is created on or after July 1, 2020;

2. Is amended by a settlor on or after July 1, 2020;

3. Is amended or modified on or after July 1, 2020, by a nonjudicial settlement agreement under § 64.2-709, by a second-trust instrument under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.), or by the court; or

4. In the case of any trust not described in subdivision A 1, A 2, or A 3, was made subject to subsection E of § 64.2-770, as it existed prior to the effective date of this article, by specific reference in the trust instrument.

B. In the case of a trust described in subdivision A 2 or A 3, this article applies only to a decision or action on or after the date of the first such amendment or modification.

C. Any trust, decision, or action to which this article does not apply shall be governed by the following rules:

1. If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, 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.

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

3. 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.

**§ 64.2-779.28. Exclusions.**

A. This article does not apply to a:

1. Power of appointment;
2. Power to appoint or remove a trustee or trust director;
3. Power of a settlor over a trust to the extent the settlor has a power to revoke the trust;
4. Power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

a. The beneficiary; or

b. Another beneficiary represented by the beneficiary under Article 3 (§ 64.2-714 et seq.) with respect to the exercise or nonexercise of the power;

5. Power over a trust if:

a. The terms of the trust provide that the power is held in a nonfiduciary capacity; and

b. The power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code; or

6. Power over a trust if the terms of the trust provide that the Uniform Directed Trust Act does not apply to the trust.

B. Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

**§ 64.2-779.29. Powers of trust director.**

A. Subject to § 64.2-779.30, the terms of a trust may grant a power of direction to a trust director.

B. Unless the terms of a trust provide otherwise:

1. A trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under subsection A; and
2. Trust directors with joint powers must act by majority decision.

**§ 64.2-779.30. Limitations on trust director.**

A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power under subdivision B 1 of § 64.2-779.29 regarding:

1. A payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law in § 1917 of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(A), as amended; and

2. A charitable interest in the trust, including notice regarding the interest to the Attorney General.

**§ 64.2-779.31. Duty and liability of trust director.**

A. Subject to subsection B, with respect to a power of direction or further power under subdivision B 1 of § 64.2-779.29:

1. A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

a. If the power is held individually, as a sole trustee in a like position and under similar circumstances; or

b. If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

2. The terms of the trust may vary the trust director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

B. Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this article to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity, the trust director has no duty or liability under this article.

C. The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities imposed under this section.

**§ 64.2-779.32. Duty and liability of directed trustee.**

A. Subject to subsection B, a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under subdivision B 1 of § 64.2-779.29, and the trustee is not liable for the action.

B. A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under subdivision B 1 of § 64.2-779.29 to the extent that by complying the trustee would engage in willful misconduct.

C. An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

1. The breach involved the trustee's or other trust director's willful misconduct;
  2. The release was induced by improper conduct of the trustee or other trust director in procuring that release; or
  3. At the time of the release, the trust director did not know the material facts relating to the breach.
- D. A directed trustee that has reasonable doubt about its duty under this section may petition the court for instructions.

E. The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

**§ 64.2-779.33. Duty to provide information to trust director or trustee.**

A. Subject to § 64.2-779.34, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

1. The powers or duties of the trustee; and
2. The powers or duties of the trust director.

B. Subject to § 64.2-779.34, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

1. The powers or duties of the trust director; and
2. The powers or duties of the trustee or other trust director.

C. A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

D. A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

**§ 64.2-779.34. No duty to monitor, inform, or advise.**

A. Unless the terms of a trust provide otherwise:

1. A trustee does not have a duty to:
  - a. Monitor a trust director; or
  - b. Inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director; and
2. By taking an action described in subdivision 1, a trustee does not assume the duty excluded by subdivision 1.

B. Unless the terms of a trust provide otherwise:

1. A trust director does not have a duty to:
  - a. Monitor a trustee or another trust director; or
  - b. Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than a trustee or another trust director; and
2. By taking an action described in subdivision 1, a trust director does not assume the duty excluded by subdivision 1.

**§ 64.2-779.35. Limitation of action against trust director.**

A. An action against a trust director for breach of trust must be commenced within the same limitation period as under § 64.2-796 for an action for breach of trust against a trustee in a like position and under similar circumstances.

B. A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have under § 64.2-796 in an action for breach of trust against a trustee in a like position and under similar circumstances.

**§ 64.2-779.36. Defenses in action against trust director.**

In an action against a trust director for breach of trust, the trust director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

**§ 64.2-779.37. Jurisdiction over trust director.**

A. By accepting appointment as a trust director of a trust subject to this article, the trust director submits to personal jurisdiction of the courts of the Commonwealth regarding any matter related to a power or duty of the trust director.

B. This section does not preclude other methods of obtaining jurisdiction over a trust director.

**§ 64.2-779.38. Office of trust director.**

Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:

1. Acceptance under § 64.2-754;
2. Giving of bond to secure performance under § 64.2-755;
3. Reasonable compensation under § 64.2-761;
4. Resignation under § 64.2-758;

5. *Removal under § 64.2-759; and*
6. *Vacancy and appointment of successor under § 64.2-757.*
2. **That § 64.2-770 of the Code of Virginia is repealed.**