

## 1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 64.2-745.1, 64.2-745.2, and 64.2-1065 of the Code of Virginia, relating to*  
 3 *qualified self-settled spendthrift trusts; disbursements; powers of trustee.*

4 [H 1513]

5 Approved

6 **Be it enacted by the General Assembly of Virginia:**7 **1. That §§ 64.2-745.1, 64.2-745.2, and 64.2-1065 of the Code of Virginia are amended and reenacted as**  
8 **follows:**9 **§ 64.2-745.1. Self-settled spendthrift trusts.**10 A. ~~A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in that trust a~~  
11 ~~qualified interest, and, except~~ *Except* as otherwise provided in this article, § 64.2-747 shall not apply to ~~such~~  
12 *a qualified interest in a qualified self-settled spendthrift trust.*13 B. Section 64.2-747 shall continue to apply with respect to any interest held by a settlor in a qualified  
14 self-settled spendthrift trust, other than a qualified interest.15 C. A settlor's transfer to a qualified self-settled spendthrift trust shall not, to the extent of the settlor's  
16 qualified interest, be deemed to have been made with intent to delay, hinder, or defraud creditors, for  
17 purposes of § 55.1-400, merely because it is made to a trust with respect to which the settlor retains a  
18 qualified interest and merely because it is made without consideration. A settlor's transfer to a qualified  
19 self-settled spendthrift trust may, however, be set aside under § 55.1-400 or 55.1-401 on other bases, such as  
20 if the transfer renders the settlor insolvent.21 D. A settlor's creditor may bring an action under § 55.1-402 to avoid a transfer to a qualified self-settled  
22 spendthrift trust or otherwise to enforce a claim that existed on the date of the settlor's transfer to such trust  
23 within five years after the date of the settlor's transfer to such trust to which such claim relates.24 E. A creditor shall have only such rights with respect to a settlor's transfer to a qualified self-settled  
25 spendthrift trust as are provided in this section. No creditor and no other person shall have any claim or cause  
26 of action against any trustee, trust adviser, trust director, or any person involved in the counseling, drafting,  
27 preparation, or execution of, or transfers to a qualified self-settled spendthrift trust.28 F. If a settlor makes more than one transfer to the same qualified self-settled spendthrift trust, the  
29 following rules shall apply:30 1. The settlor's making of a subsequent transfer shall be disregarded in determining whether a creditor's  
31 claim with respect to a prior transfer is valid under this section;32 2. With respect to each subsequent transfer by the settlor, the five-year limitations period provided in  
33 subsection D, with respect to actions brought under Chapter 4 (§ 55.1-400 et seq.) of Title 55.1 with respect  
34 to the subsequent transfer, commences on the date of such subsequent transfer; and

35 3. Any distribution to a beneficiary is deemed to have been made from the latest such transfer.

36 G. The movement to the Commonwealth of the administration of an existing trust, which, after such  
37 movement to the Commonwealth, meets for the first time all of the requirements of a qualified self-settled  
38 spendthrift trust, shall be treated, for purposes of this section, as a transfer to this trust by the settlor on the  
39 date of such movement of all of the assets previously transferred to the trust by the settlor.40 **§ 64.2-745.2. Definitions; right to withdraw.**

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

42 "Independent qualified trustee" means a qualified trustee who is not, and whose actions are not, subject to  
43 direction by:

44 1. The settlor;

45 2. Any natural person who is not a resident of the Commonwealth;

46 3. Any entity that is not authorized under Title 6.2 to engage in trust business within the Commonwealth;

47 4. The settlor's spouse;

48 5. A parent of the settlor;

49 6. Any issue of the settlor;

50 7. A sibling of the settlor;

51 8. An employee of the settlor;

52 9. A business entity in which the settlor's holdings represent at least 30 percent of the total voting power  
53 of all interests entitled to vote;

54 10. A subordinate employee of the settlor; or

55 11. A subordinate employee of a business entity in which the settlor is an executive.

56 "Qualified interest" means a settlor's interest in a qualified self-settled spendthrift trust, to the extent that

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

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

- 62 1. The trust is irrevocable;
- 63 2. The trust is created during the settlor's lifetime;
- 64 3. There is, at all times when distributions could be made to the settlor pursuant to the settlor's qualified  
 65 interest, at least one beneficiary other than the settlor (i) to whom income may be distributed, if the settlor's  
 66 qualified interest relates to trust income, (ii) to whom principal may be distributed, if the settlor's qualified  
 67 interest relates to trust principal, or (iii) to whom both income and principal may be distributed, if the settlor's  
 68 qualified interest relates to both trust income and principal;
- 69 4. The trust has at all times *when distributions could be made to the settlor pursuant to the settlor's*  
 70 *qualified interest* at least one qualified trustee, who may be, but need not be, an independent qualified trustee;
- 71 5. The trust instrument expressly incorporates the laws of the Commonwealth to govern the validity,  
 72 construction, and administration of the trust; *and*

73 6. The trust instrument includes a spendthrift provision, as defined in § 64.2-743, that restrains both  
 74 voluntary and involuntary transfer of the settlor's qualified interest; ~~and~~

75 ~~7. The settlor does not have the right to disapprove distributions from the trust.~~

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

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

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

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

91 3. By a person eligible to be a qualified trustee and who is appointed by the court pursuant to  
 92 §§ 64.2-1405 and 64.2-1406 or pursuant to § 64.2-712.

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

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

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

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

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

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

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

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

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

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

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

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

118 8. The settlor's potential or actual receipt or use of a qualified annuity interest (within the meaning of §

119 2702 of the Internal Revenue Code);

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

124 10. A settlor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes  
125 due on trust income, or the direct payment of such taxes to the applicable tax authorities, pursuant to a  
126 provision in the trust pursuant to subsection C of § 64.2-1065 or any comparable provision of the governing  
127 instrument that expressly provides for the direct payment of such taxes or the reimbursement of the settlor for  
128 such tax payments.

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

132 **§ 64.2-1065. Disbursement from principal.**

133 A. Subject to § 64.2-1068, and except as otherwise provided in subdivision C 2 of § 64.2-1071, a  
134 fiduciary shall disburse from principal:

135 1. The balance of the disbursements described in subdivisions 1 and 3 of § 64.2-1064, after application of  
136 subdivision 2 of § 64.2-1064;

137 2. The fiduciary's compensation calculated on principal as a fee for acceptance, distribution, or  
138 termination;

139 3. A payment of an expense to prepare for or execute a sale or other disposition of property;

140 4. A payment on the principal of a trust debt;

141 5. A payment of an expense of an accounting, judicial or nonjudicial proceeding, or other matter that  
142 involves primarily principal, including a proceeding to construe the terms of the trust or protect property;

143 6. A payment of a premium for insurance, including title insurance, not described in subdivision 4 of  
144 § 64.2-1064, of which the fiduciary is the owner and beneficiary;

145 7. A payment of an estate or inheritance tax or other tax imposed because of the death of a decedent,  
146 including penalties, apportioned to the trust; and

147 8. A payment:

148 a. Related to environmental matters, including:

149 (1) Reclamation;

150 (2) Assessing environmental conditions;

151 (3) Remedying and removing environmental contamination;

152 (4) Monitoring remedial activities and the release of substances;

153 (5) Preventing future releases of substances;

154 (6) Collecting amounts from persons liable or potentially liable for the costs of activities described in  
155 subdivisions (1) through (5);

156 (7) Penalties imposed under environmental laws or regulations;

157 (8) Other actions to comply with environmental laws or regulations;

158 (9) Statutory or common law claims by third parties; and

159 (10) Defending claims based on environmental matters; and

160 b. For a premium for insurance for matters described in subdivision a.

161 B. If a principal asset is encumbered with an obligation that requires income from the asset to be paid  
162 directly to a creditor, the fiduciary shall transfer from principal to income an amount equal to the income paid  
163 to the creditor in reduction of the principal balance of the obligation.

164 C. Notwithstanding any other provision of law and ~~unless except as~~ the terms of the trust provide to the  
165 contrary, a trustee, *in the trustee's sole discretion*, may ~~pay~~ reimburse the settlor from the income or principal  
166 of the trust ~~from time to time (i) the federal or state income taxes, or both, imposed upon the settlor on~~  
167 ~~income of the trust that is not distributed to the settlor or (ii) such amounts that are required to reimburse the~~  
168 ~~settlor for any amount of the settlor's personal federal or, state, or any other income taxes, or both, imposed~~  
169 ~~on tax liability that is attributable to the treatment of the settlor on income as the owner of all or any part of~~  
170 ~~the trust that is not distributed to the settlor in accordance with the provisions of Subpart E of Part I of~~  
171 ~~Subchapter J of Chapter 1 of Subtitle A of the Internal Revenue Code. The trustee shall not have the power to~~  
172 ~~make payments pursuant to this subsection with respect to any trust where a charitable income, estate, or gift~~  
173 ~~tax deduction has been allowed, in whole or in part, for the contributions to such trust if the exercise of such~~  
174 ~~power would limit or reduce the amount of such deduction. When making such reimbursement, the trustee~~  
175 ~~may, in his sole discretion, pay such amount either to the settlor directly or the appropriate tax authority on~~  
176 ~~behalf of the settlor.~~

177 D. *Unless the terms of a trust expressly provide to the contrary, the trustee shall not have the power to*  
178 *make such a reimbursement pursuant to subsection C if (i) in a case where the trust is not a revocable trust,*  
179 *the trustee is related or subordinate to the settlor under § 672(c) of the Internal Revenue Code or (ii) such*  
180 *reimbursement would prevent a contribution to the trust from qualifying for a federal tax benefit or would*

**181** *reduce the federal tax benefit that was originally claimed or that could have been claimed for such*  
**182** *contribution, including any (a) exclusion under §§ 2503(b) or 2503(c) of the Internal Revenue Code, (b)*  
**183** *marital deduction under §§ 2056, 2056A, or 2522(a) of the Internal Revenue Code, (c) charitable deduction*  
**184** *under §§ 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code, and (d) classification as a direct*  
**185** *skip under § 2642(c) of the Internal Revenue Code.*