

CHAPTER 1.  
DEFINITIONS AND GENERAL PROVISIONS.

**Drafting note: Separate articles have been created for definitions and for the sections of a general nature. Definitions of terms used throughout the title have been collected in one location. However, in those instances where a chapter, article, or section defines a terms in a unique manner, that definition is retained for use in that chapter, article, or section. The provisions relocated to the proposed General Provisions article generally come from the existing Wills chapter and are moved due to a particular section's general applicability to other instruments in addition to wills.**

Article 1.  
Definitions.

§ ~~64.1-01~~ ~~64.2-100.~~ Definition of "bona fide purchaser." Definitions.

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

"~~bona~~ 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.

**Drafting note: The definition of "personal representative" is based on the definition in § 1-234. The definition of fiduciary is based on the definition in § 8.01-2. The definition of "will" has been relocated from existing § 64.1-45. There are also technical changes.**

~~§ 64.1-71.1~~ 64.2-101. Construction of generic terms.

In the interpretation of wills and trusts, adopted persons and persons born out of wedlock are included in class gift terminology or terms of relationship in accordance with rules for determining relationships for purposes of intestate succession unless a contrary intent ~~shall appear~~ appears on the face of the will or trust. In determining the intent of a testator or settlor, adopted persons are presumptively included in such terms as "children," "issue," "kindred," "heirs," "relatives," "descendents" or similar words of classification and are presumptively excluded by such terms as "natural children," "issue of the body," "blood kindred," "heirs of the body," "blood relatives," "descendents of the body" or similar words of classification. In the event that a fiduciary makes payment to members of a class to the exclusion of persons born out of wedlock of whose claim of paternity or maternity the fiduciary has no knowledge, the fiduciary shall not be held liable to such persons for payments made prior to knowledge of such claim. This section shall apply to all inter vivos trusts executed after July 1, 1978, and to all wills of decedents dying after July 1, 1978, regardless of when executed.

**Drafting note: Technical changes.**

## Article 2.

### General Provisions.

~~§ 64.1-5.1~~ 64.2-102. Meaning of child and related terms.

If, for purposes of this title or for determining rights in and to property pursuant to any deed, will, trust or other instrument, a relationship of parent and child must be established to determine succession or a taking by, through, or from a person:

1. An adopted person is the child of an adopting parent and not of the biological parents, except that adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent.

2. The parentage of a child resulting from assisted conception ~~shall be~~ is determined as provided in Chapter 9 (§ 20-156 et seq.) of Title 20.

3. ~~In cases not covered~~ Except as otherwise provided by subdivision 1 or 2 ~~hereof~~, a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

a. The biological parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage was prohibited by law, deemed null or void, or dissolved by a court; or

b. ~~The paternity~~ Paternity is established by clear and convincing evidence, including scientifically reliable genetic testing, as set forth in § ~~64.1-5.2~~ 64.2-103; however, paternity ~~establishment~~ established pursuant to this subdivision ~~shall be~~ is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

4. No claim of succession based upon the relationship between a child born out of wedlock and a deceased parent of such child shall be recognized unless, within one year of the date of the death of such parent (i) an affidavit by such child or by someone acting for such child alleging such parenthood has been filed ~~within one year of the date of the death of such parent~~ in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located, and (ii) an action seeking adjudication of parenthood is filed in an appropriate circuit court ~~within said time. However, such~~ The one-year limitation period ~~shall run~~ runs notwithstanding the minority of such child. ~~The limitation period of the preceding sentence shall, however it does~~ not apply in those cases where the relationship between the child born out of wedlock and the parent in question is ~~(i)~~ established by (a) a birth record prepared upon information given by or at the request of such parent; ~~or (ii) by (b)~~ admission by such parent of parenthood before any court or in writing under oath; ~~or (iii) by (c)~~ a previously ~~concluded proceeding entered judgment establishing such parent's paternity by a court having jurisdiction~~ to determine ~~parentage pursuant to the provisions of former § 20-61.1 or Chapter 3.1 (§ 20-49.1 et seq.) of Title 20~~ his paternity.

5. Unless otherwise specifically provided therein, an order terminating residual parental rights under § 16.1-283 ~~shall terminate~~ terminates the rights of the parent to take from or through the child in question but the order ~~shall~~ does not otherwise affect the rights of the child, the

child's kindred, or the parent's kindred to take from or through the parent or the rights of the parent's kindred to take from or through the child.

**Drafting note: Technical changes. See the Drafting note for proposed § 64.2-103 for the reason for the change in clause (c) of subdivision 4.**

§ ~~64.1-5.2~~ 64.2-103. Evidence of paternity.

A. For the purposes of this title, ~~evidence that a man is the father~~ paternity of a child born out of wedlock shall be established by clear and convincing evidence, and such evidence may include, ~~but shall not be limited to~~, the following:

1. That he cohabited openly with the mother during all of the ~~ten~~ 10 months immediately prior to the time the child was born;

2. That he gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record that his name be used as the father of the child upon the birth ~~records~~ record of the child;

3. That he allowed by a general course of conduct the common use of his surname by the child;

4. That he claimed the child as his child on any statement, tax return, or other document filed and signed by him with any local, state, or federal government or any agency thereof;

5. That he admitted before any court having jurisdiction to ~~try and dispose of the same~~ determine his paternity that he is the father of the child;

6. That he voluntarily admitted paternity in writing; under oath;

7. The results of scientifically reliable genetic tests, including DNA tests, weighted with all the evidence; or

8. Other medical, scientific, or anthropological evidence relating to the alleged parentage of the child based on tests performed by experts.

~~If a proceeding to determine parentage has been initiated and concluded pursuant to former § 20-61.1 or Chapter 3.1 (§ 20-49.1 et seq.) of Title 20, and the court enters a judgment against a man for the support, maintenance and education of a child as if the child were born in lawful wedlock to the man, that judgment shall be~~ B. A judgment establishing a father's paternity made by a court having jurisdiction to determine his paternity is sufficient evidence of paternity for the purposes of this section.

**Drafting note: The revisions to the last paragraph, which is now proposed subsection B, are substantive and provide that any paternity judgment from a court of competent jurisdiction constitutes sufficient evidence of paternity. This would have the effect of including judgments from other states which are entitled to full faith and credit in Virginia. Currently, the language limits the application of the section to Virginia paternity judgments. There are also technical changes.**

§ ~~64.1-45.2~~ 64.2-104. Incorporation by reference; ~~letter of instruction or memorandum~~ into a will, power of attorney, or trust instrument.

A. The following original documents may be incorporated by reference into a will, power of attorney, or trust instrument:

1. A letter or memorandum to the fiduciary or agent as to the interpretation of discretionary powers of distribution where the will, power of attorney, or trust instrument ~~provides~~ grants the fiduciary or agent the power to make distributions to beneficiaries in the discretion of the fiduciary or agent; and

2. A letter or memorandum stating the views or directions of the maker of the will, power of attorney, or trust instrument as to the exercise of discretion by the fiduciary or agent in making health care decisions for the maker.

B. No provision in the original document sought to be incorporated by reference under this section is enforceable if it contradicts or is inconsistent with a provision of the incorporating will, power of attorney, or trust instrument, including if it alters the possession or enjoyment of trust property or the income therefrom as directed in the trust instrument.

C. This section shall not prevent the incorporation by reference of any writing into any other writing that would otherwise be effective under § ~~64.1-45.1~~ 64.2-400 or under any other law of incorporation by reference.

D. The maker shall sign and have notarized the documents referenced in subsection A and may prepare the documents before or after the execution of the will, power of attorney, or trust instrument.

**Drafting note: Technical changes.**

§ ~~64.1-57~~ 64.2-105. Incorporation by reference of certain powers of fiduciaries into will or trust instrument.

A. For purposes of this section:

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

"Estate" includes all interests in the real or personal property of a decedent passing by will or by intestate succession.

"Fiduciary" includes one or more individuals or corporations having trust powers, and includes the fiduciary of the estate of a decedent and the trustee of an inter vivos or testamentary trust. Any substitute, added, or successor fiduciary shall have all of the powers hereby provided for the fiduciary named in the will or trust instrument.

"Hazardous substances" means any substances defined as hazardous or toxic or otherwise regulated by any environmental law.

~~(A)~~B. The following powers, in addition to all other powers granted by law, may be incorporated in whole or in part in any will or trust instrument by reference to this section:

~~(a)~~1. To keep and retain any or all investments and property, real, personal or mixed, including stock in the fiduciary ~~institution~~, if the ~~same be~~ fiduciary is a corporation, in the same form as they ~~may be~~ are at the time ~~they the investments and property~~ come into the custody of ~~said the~~ the fiduciary, regardless of the character of ~~same or the investments and property~~, whether they are such as then would be authorized by law for investment by fiduciaries, or whether a disproportionately large part of the trust or estate remains invested in one or more types of property, for such time as the fiduciary ~~shall deem~~ deems best, and to dispose of such property by sale, exchange, or otherwise as and when such fiduciary ~~shall deem~~ deems advisable.

~~(a)~~2. At the discretion of the fiduciary, to receive additions to the estate from any source, in cash or in kind, and to hold, administer, and distribute such additions as a part of and under the same terms and conditions as the estate then currently held.

~~(b)~~3. To sell, assign, exchange, transfer and convey, or otherwise dispose of, any or all of the investments and property, ~~either~~ real, personal or mixed, ~~which may be that are~~ included in, or may at any time become part of the trust or estate upon such terms and conditions as the fiduciary, in his absolute discretion, ~~may deem~~ deems advisable, at either public or private sale, either for cash or deferred payments or other consideration, as ~~sueh the~~ the fiduciary ~~may determine; and for determines. For~~ the purpose of selling, assigning, exchanging, transferring, or conveying ~~the same such investments and property, the fiduciary has the power~~ to make, execute,

acknowledge, and deliver any and all instruments of conveyance, deeds of trust, or assignments in such form and with warranties and covenants as ~~such the~~ fiduciary ~~may deem~~ deems expedient and proper; and in the event of any sale, conveyance, exchange, or other disposition of any of the trust or estate, the purchaser shall not be obligated in any way to see to the application of the purchase money or other consideration passing in connection therewith.

~~(b1)4.~~ To grant, sell, transfer, exchange, purchase, or acquire options of any kind on property held by such trust or estate or acquired or to be acquired by such trust or estate or held or owned by any other person.

~~(c), (c1) [Repealed.]~~

~~(d)5.~~ To lease any or all of the real estate, ~~which may be that is~~ included in or may at any time become a part of the trust or estate, upon such terms and conditions as ~~said the~~ fiduciary, in his sole judgment and discretion, ~~may deem~~ deems advisable, ~~and any.~~ Any lease ~~or leases~~ made by ~~such the~~ fiduciary may extend beyond the term of the trust or administration of the estate and, for the purpose of leasing ~~said such~~ real estate, the fiduciary has the power to make, execute, acknowledge, and deliver any and all instruments, in such form and with such covenants and warranties as ~~such the~~ fiduciary ~~may deem~~ deems expedient and proper.

~~(e)6.~~ To vote any stocks, bonds, or other securities held by ~~such the~~ fiduciary at any meeting of stockholders, bondholders, or other security holders, and to delegate the power to so vote to attorneys-in-fact or proxies under power of attorney, restricted or unrestricted.

~~(f)7.~~ To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as to ~~such the~~ fiduciary ~~shall seem~~ seems advisable, including the power to borrow from the fiduciary, if the fiduciary ~~be is~~ a bank, for the purpose of paying (i) debts, taxes, or other charges against the trust or estate or any part thereof, and (ii) with prior approval of the court for any proper purpose of the trust or estate, ~~and.~~ The fiduciary has the power to mortgage or pledge such portion of the trust or estate as may be required to secure such ~~loan or~~ loans; and, as maker or endorser, to renew existing loans.

~~(f1)8.~~ To make loans or advancements to the executor or other representative of the grantor's estate in case such executor or other representative is in need of cash with which to pay taxes, claims, or other indebtedness of the grantor's estate; but no assets acquired from a qualified retirement benefit plan under § 2039 (c) of the Internal Revenue Code shall be ~~so~~ used to make such loans or advancements, and such assets shall be segregated and held separately

until all claims against the estate for debts of the decedent or claims of administration have been satisfied. Such loans or advancements may be secured or unsecured, and the trustee ~~shall is~~ is not ~~be~~ liable in any way for any loss resulting to the trust or estate by reason of the exercise of this authority.

~~(g)~~9. To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims; in favor of or against the trust or estate as the fiduciary ~~shall deem~~ deems best, and his decision ~~shall be is~~ is conclusive.

~~(h)~~10. To make distributions in cash or in kind or partly in each at valuations to be determined by the fiduciary, whose decision as to values shall be conclusive.

~~(i), (i1)~~ [Repealed.]

~~(j)~~11. To repair, alter, improve, renovate, reconstruct ~~and, or~~ or demolish any of the buildings on the real estate held by ~~such the~~ the fiduciary and to construct such buildings and improvements thereon as ~~such the~~ the fiduciary ~~may,~~ may, in his discretion, ~~deem deems~~ deems advisable.

~~(k)~~12. To employ and compensate, out of the principal or ~~the~~ the income, or both as to the fiduciary ~~shall seem~~ seems proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real estate brokers, licensed salesmen, and other assistants and advisors deemed by the fiduciary to be needful for the proper administration of the trust or estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

~~(l)~~13. To rely upon any affidavit, certificate, letter, notice, telegram, or other paper or upon any telephone conversation believed by ~~such the~~ the fiduciary to be genuine and upon any other evidence believed by ~~such the~~ the fiduciary to be sufficient, and to be protected and ~~saved held~~ held harmless ~~in for~~ for all payments or distributions required to be made hereunder if made in good faith and without actual notice or knowledge of the changed condition or status of any person receiving payments or other distributions upon a condition.

~~(m)~~14. To retain any interest held by ~~such the~~ the fiduciary in any business, whether as a stockholder or security holder of a corporation, a partner, a sole proprietor, or otherwise, for any length of time, without limitations, solely at the risk of the trust or estate and without liability on the part of the fiduciary for any losses resulting therefrom; including the power to (i) participate in the conduct of such business and take or delegate to others discretionary power to take any action with respect to its management and affairs ~~which that~~ that an individual could take as the



owner of such business, including the voting of stock, and the determination of any or all questions of policy; ~~to (ii)~~ participate in any incorporation, reorganization, merger, consolidation, recapitalization, or liquidation ~~thereof of the business;~~ ~~to (iii)~~ invest additional capital in, subscribe to additional stock or securities of, and loan money or credit with or without security to, such business out of the trust or estate property; ~~to (iv)~~ elect or employ as directors, officers, employees, or agents of such business, and compensate, any persons, including the fiduciary or a director, officer, or agent of the fiduciary; ~~to (v)~~ accept as correct financial or other statements rendered by the business from time to time as to ~~his its~~ conditions and operations except when having actual notice to the contrary; ~~to (vi)~~ regard the business as an entity separate from the trust or estate with no duty to account to any court as to ~~his its~~ operations; ~~to (vii)~~ deal with and act for the business in any capacity, including any banking or trust capacity and the loaning of money out of the fiduciary's own funds, and to be compensated therefor; and ~~to (viii)~~ sell or liquidate such interest or any part thereof at any time. If any business shall be unincorporated, contractual and tort liabilities arising out of such business shall be satisfied, first, out of the business, and second, out of the trust or estate; but ~~it is intended that~~ in no event shall there be a liability of the fiduciary, and if the fiduciary ~~shall be is~~ held liable, ~~such the~~ fiduciary ~~shall be is~~ entitled to indemnification from, first, the business, and second, the trust or estate ~~in the order named.~~ ~~Such The~~ fiduciary ~~shall be is~~ entitled to such additional compensation as is commensurate with the time, effort, and responsibility involved in his performance of services with respect to such business. Such compensation for services rendered to the business may be paid by ~~such the~~ fiduciary from the business or from other assets or from both as the fiduciary, in his discretion, ~~may determine determines~~ to be advisable; however, the amount of such additional compensation, ~~however, shall be is~~ subject to the final approval of the court.

~~(n)~~15. To do all other acts and things not inconsistent with the provisions of the will or trust in which these powers are incorporated ~~which such that the~~ fiduciary ~~may deem deems~~ necessary or desirable for the proper management of the trusts herein created, in the same manner and to the same extent as an individual ~~might or~~ could do with respect to his own property.

~~(o)~~16. To hold property in his the fiduciary's name or in the name of nominees.

~~(p)~~17. During the minority, incapacity, or the disability of any beneficiary, ~~the fiduciary~~ may, and in his the sole discretion of the fiduciary, to distribute income and principal to ~~such the~~

beneficiary in any ~~one~~ of the following ways: ~~(1)~~ (i) directly to ~~said the~~ beneficiary; ~~(2)~~ (ii) to a relative, friend, guardian, conservator, or committee, to be expended by such person for the education, maintenance, support, or benefit of ~~said the~~ beneficiary; ~~(3)~~ (iii) by ~~himself the~~ fiduciary expending the same for the education, maintenance, support, or benefit of ~~said the~~ beneficiary; ~~(4)~~ (iv) to an adult person or bank authorized to exercise trust powers as custodian for a minor beneficiary under the Uniform Transfers to Minors Act (§ ~~31-37~~ 64.2-1900 et seq.) to be held by such custodian under the terms of such act; or ~~(5)~~ (v) to an adult person or bank authorized to exercise trust powers as custodial trustee for a beneficiary who is incapacitated as defined in § ~~55-34.1~~ 64.2-900, under the Uniform Custodial Trust Act (§ ~~55-34.1~~ 64.2-900 et seq.) to be held as custodial trustee under the terms of such act.

~~(q)~~ 18. To continue and carry on any farming operation transferred to ~~him the~~ fiduciary and to operate such farms and any other farm which may be acquired ~~and, in so doing, by way of illustration and not in limitation of his powers, to including the power to~~ (i) operate the farm with hired labor, tenants, or sharecroppers; ~~to~~ (ii) hire a farm manager or a professional farm management service to supervise the farming operations; ~~to~~ (iii) lease or rent the farm for cash or for a share of the crops; ~~to~~ (iv) purchase or otherwise acquire farm machinery ~~and~~ equipment, and livestock; ~~to~~ (v) construct, repair, and improve farm buildings of all sorts ~~needed~~ necessary, in ~~its the~~ the fiduciary's judgment, for the operation of the farm; ~~to~~ (vi) make loans or advances or to obtain ~~such loans or advances~~ from any source, including the fiduciary at the prevailing rate ~~or rates~~ of interest for farm purposes ~~such as including~~ for production, harvesting, or marketing, ~~or~~ for the construction, repair, or improvement of farm buildings, or for the purchase of farm machinery ~~or~~ equipment, or livestock; ~~to~~ (vii) employ approved soil conservation practices in order to conserve, improve, and maintain the fertility and productivity of the soil; ~~to~~ (viii) protect, manage, and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate or trust; ~~to~~ (ix) ditch and drain damp or wet fields and areas of the farm when ~~and where~~ needed; ~~to~~ (x) engage in livestock production, if it is deemed advisable, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on ~~such~~ a livestock program; ~~to~~ (xi) execute contracts, notes, and chattel mortgages relating to agriculture with the Commodity Credit Corporation, the United States Secretary of Agriculture, or any other officer or agency of the federal or state governments, to enter into acreage reduction agreements, to make soil conservation

commitments, and to do all acts necessary to cooperate with any governmental agricultural program; and (xii) in general, ~~to~~ employ the methods of carrying on the farming operation that are in common use by the community in which the farm is located, ~~inasmuch as.~~ As the duties that the fiduciary is requested to assume with respect to farming operations may considerably enlarge and increase ~~his the fiduciary's~~ usual responsibility and work as fiduciary, ~~it is agreed that~~ the fiduciary ~~shall be~~ is entitled to such additional reasonable compensation as is commensurate with the time, effort, and responsibility involved in his performance of such services.

~~(+)~~19. To purchase and hold ~~policies of~~ life insurance policies on the life of any beneficiary, or any person in whom the beneficiary has an insurable interest, and pay the premiums thereon out of income or principal as ~~he~~ the fiduciary deems appropriate; provided, however, that the decision of the beneficiary of any trust otherwise meeting the requirements of § 2056-(b)-(5) of the Internal Revenue Code of 1954, as amended, shall control in respect to the purchase or holding of a ~~policy of~~ life insurance policy by the trustee of such trust.

~~(+)~~20. To make any election, including any election permitted by statutes enacted after the date of execution of the will or trust instrument, authorized under any law requiring, or relating to the requirement for, payment of any taxes or assessments on assets or income of the estate or in connection with any fiduciary capacity, regardless of whether any property or income is received by or is under the control of the fiduciary, including, ~~but not limited to,~~ elections concerning the timing of payment of any such tax or assessment, the valuation of any property subject to any such tax or assessment, and the alternative use of items of deduction in computing any tax or assessment ~~and including specifically elections permitted by statutes enacted after the date of execution of the will or trust instrument.~~

~~(+)~~21. To comply with environmental law:

1a. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to a change in, or any actual or threatened violation of, any environmental law affecting property held by the fiduciary;

2b. To take, on behalf of the estate or trust, any action necessary to respond to a change in, or prevent, abate, or otherwise remedy any actual or threatened violation of, any

environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

~~3c.~~ To refuse to accept property in trust if the fiduciary determines that any property to be transferred to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving any hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

~~4d.~~ To disclaim any power granted by any document, statute, or rule of law ~~which that~~, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law; ~~and~~

~~5e.~~ To charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate;

~~6. For purposes of this subdivision, "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health and "hazardous substances" means any substances defined as hazardous or toxic or otherwise regulated by any environmental law.~~

~~(u)22.~~ To resign as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between ~~it him~~ in ~~its his~~ fiduciary capacity and in ~~its his~~ individual capacity because of potential claims or liabilities which may be asserted against ~~it him~~ on behalf of the trust or estate because of the type or condition of assets held therein.

~~(2) As used in the section, the term "fiduciary" shall mean and include one or more individuals or corporations having trust powers and the use of the male gender shall include the female; and any substitute, added or successor fiduciary shall have all of the powers hereby provided for the fiduciary named in the will or trust instrument. The provisions of this section may by reference hereto be made applicable to a fiduciary of the estate of a decedent as well as to the trustee of an inter vivos or testamentary trust.~~

~~(3)C.~~ For the purposes of this section, unless the will or trust instrument expresses a contrary intention, the incorporation by reference of powers enumerated by this statute shall refer to those powers existing at the time of death and reference to powers under the Uniform Gifts to Minors Act in an instrument executed prior to July 1, 1989, shall be construed to refer to the Uniform Transfers to Minors Act (§~~31-37~~ 64.2-1900 et seq.).

~~(4)D.~~ This section ~~is not intended and~~ shall not be construed to affect the application of the standard of judgment and care as set forth in ~~Article 2 the Uniform Prudent Investor Act~~ (§ ~~26-45.3 64.2-780~~ et seq.) ~~of Chapter 3 of Title 26.~~

~~(5)E.~~ In the event that the will or trust instrument ~~shall contain~~ contains a provision in favor of a surviving spouse of the testator or grantor, the powers ~~above~~ enumerated in this section shall ~~in no way not~~ be construed or interpreted ~~in any fashion which might to~~ cause the bequest to fail to qualify for the marital deduction permitted under the federal estate tax law, unless the will or trust instrument shall specifically provide to the contrary. A fiduciary acting under a construction or interpretation of a power, ~~which where such~~ action is otherwise reasonable under the circumstances, shall incur no responsibility for acts taken in good faith ~~which that~~ are otherwise thereafter contended to ~~be in a fashion which might~~ cause disqualification for the marital deduction. ~~The provision of this This~~ subsection ~~shall apply~~ applies without regard to ~~the time when~~ the will or trust was executed or probated or when the testator died in relation to the effective date of this section or amendments thereto.

~~(6) For the purposes of this section, the term "estate" shall include all interests in the real or personal property of a decedent passing by will or by intestacy. This subsection is declarative of existing law.~~

**Drafting note: Technical changes primarily designed to modernize language.**

§ ~~64.1-57.1 64.2-106.~~ Grant of ~~such certain~~ powers to personal representative or trustee by circuit court.

A. Upon the motion of a personal representative or trustee, a circuit court may grant to the ~~sole~~ personal representative or trustee, ~~if there is only one, or to all the personal representatives or trustees, if there is more than one,~~ all or a part of ~~such the~~ powers ~~as that~~ may be incorporated by reference pursuant to § ~~64.1-57 64.2-105.~~ ~~As used in this section, the terms "personal representative" or "trustee" shall include the plural of such terms unless the context requires otherwise and the former term shall encompass within its meaning the administrator of an intestate decedent's estate.~~ If there is more than one personal representative or trustee, the court may specify as to whether the consent of all personal representatives or trustees or a majority thereof shall be required to act, and in absence of such specification, the consent of all such personal representatives or trustees to ~~such~~ act shall be required.

B. Such motion shall be filed in the circuit court in which the personal representative or trustee qualified, or if there was no qualification, the circuit court for the jurisdiction in which the grantor resides or resided at the time of his death, a trustee resides, or a corporate trustee has an office. Such motion may be ex parte; however, the court, in its discretion, may require such notice to and the convening of interested parties as it may deem proper in each case. Notwithstanding the granting of or the failure to grant such powers, the court shall have continuing jurisdiction to confer powers in addition to those previously granted or to revoke any or all such powers previously granted by the court. Such additional grant or revocation may also be ex parte.

C. The court may, in granting or withholding such powers, ~~take into consideration~~ consider (i) whether the personal representative or trustee was nominated by the decedent, the grantor, or the beneficiaries; (ii) the number and capacity of the beneficiaries and their ability or inability to consent to the acts of the personal representative or trustee which are otherwise within the scope of § ~~64.1-57~~ 64.2-105; (iii) the relationship of the personal representative or trustee to the beneficiaries; (iv) the character of the estate to be administered, including any real estate which would be within the scope of the powers granted by the provisions of § ~~64.1-57~~ 64.2-106; and (v) the capacity of the personal representative or trustee to perform under the powers conferred and to answer for any acts for which he might be held accountable under his bond.

The court, in its discretion, may attach further conditions to such grant of power in any manner which it shall deem necessary and proper.

D. In no case shall a court grant any ~~power or~~ powers ~~be granted hereunder by any court,~~ if the grant of such ~~power or~~ powers would be contrary to the intention of the testator or grantor as implied from or as expressed in the will or trust instrument, or would otherwise be inconsistent with the disposition ~~therein~~ made in the will or trust instrument.

~~As used in this section, the word "trustee" shall refer to a trustee under a probated will or an inter vivos trust instrument.~~

**Drafting note: Technical changes.**

§ ~~64.1-57.2~~ 64.2-107. Power granted to personal representatives to make election regarding marital deduction as to certain qualifying terminable interest property; binding effect of election.

A. For purposes of this section, "personal representative" includes the trustee of a qualified terminable interest property trust if there has been no qualification of a personal representative for the estate of the decedent who created the trust.

B. Personal representatives, whether heretofore or hereafter qualified, are hereby granted the power to make the election on the return of their decedents as required pursuant to § 2056-(b) (7) of the ~~United States~~ Internal Revenue Code of 1954, as amended, ~~or renumbered, or successive provision,~~ to obtain the marital deduction for bequests or devises of qualifying terminable interest property in favor of the surviving spouse created under a will or inter vivos trust of the decedent.

C. If the personal representative determines in good faith to make or not to make such an election and does not act imprudently in making such decision, the decision shall be final and binding upon all of the beneficiaries of the estate.

~~As used in this section, the term "personal representative" shall include the trustee of a qualified terminable interest property trust if there has been no qualification of a personal representative for the estate of the decedent who created the trust.~~

**Drafting note: Technical changes.**

§ ~~64.1-57.3~~ 64.2-108. Power granted to personal representatives and trustees to donate conservation or open-space easements.

Personal representatives and trustees, whether heretofore or hereafter qualified or appointed, are hereby granted the power to donate a conservation easement as provided in the Virginia Conservation Easement Act (§ 10.1-1009 et seq.) or an open-space easement as provided in the Open-Space Land Act (§ 10.1-1700 et seq.) on any real property of their decedents and settlors, in order to obtain the benefit of the estate tax exclusion allowed under § 2031(c) of the ~~United States~~ Internal Revenue Code of 1986, as amended, provided they have the written consent of all of the heirs, beneficiaries, and devisees whose interests are affected thereby. Upon petition of the personal representative or trustee, the circuit court may give consent on behalf of any unborn, unascertained, or incapacitated heirs, beneficiaries, or devisees whose interests are affected thereby after determining that (i) the donation of the conservation easement will not adversely affect such heirs, beneficiaries, or devisees, or (ii) it is more likely than not that such heirs, beneficiaries, or devisees would consent if they were before the court

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and capable of giving consent. A guardian ad litem shall be appointed to represent the interests  
| of any unborn, unascertained, or incapacitated persons.

**Drafting note: Technical changes.**