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SENATE BILL NO. 1052

Offered January 9, 2013

Prefiled January 8, 2013

A *BILL to amend and reenact §§ 64.2-432 and 64.2-747 of the Code of Virginia, relating to revising and recodifying the laws pertaining to wills, trusts, and fiduciaries.*

Patron—McDougle

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-432 and 64.2-747 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-432. Certain formula clauses to be construed to refer to federal estate and generation-skipping transfer tax laws applicable to estates of decedents dying after December 31, 2009, and before January 1, 2011.

A. A will ~~or~~, trust, or other instrument of a decedent who dies after December 31, 2009, and before January 1, 2011, that contains a formula referring to the "unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST exemption," "marital deduction," "maximum marital deduction," "unlimited marital deduction," "inclusion ratio," "applicable fraction," or any section of the Internal Revenue Code relating to the federal estate tax or generation-skipping transfer tax, or that measures a share of an estate or trust based on the amount that can pass free of federal estate taxes or the amount that can pass free of federal generation-skipping transfer taxes, or that is otherwise based on a similar provision of federal estate tax or generation-skipping transfer tax law, shall be deemed to refer to the federal estate tax and generation-skipping transfer tax laws as they ~~applied~~ apply with respect to estates of decedents dying ~~on December 31, 2009~~ in 2010 regardless of whether the decedent's personal representative or other fiduciary elects not to have the estate tax apply with respect to the estate. This provision shall not apply with respect to a will ~~or~~, trust, or other instrument that is executed or amended after December 31, 2009, or that manifests an intent that a contrary rule shall apply if the decedent dies on a date on which there is no then-applicable federal estate or generation-skipping transfer tax. If the federal estate or generation-skipping transfer tax becomes effective before that date, the reference to January 1, 2011, in this subsection shall refer instead to the first date on which such tax becomes legally effective.

B. The personal representative, trustee, other fiduciary, or any affected beneficiary under the will, trust, or other instrument may bring a proceeding to determine whether the decedent intended that the formulae under subsection A will, trust, or other instrument be construed with respect to the law as it existed after December 31, 2009. Such a in a manner other than as provided in subsection A. A proceeding under this section shall be commenced within 12 months following the death of the testator or grantor prior to January 1, 2012. In such a proceeding, the court may consider extrinsic evidence that contradicts the plain meaning of the will, trust, or other instrument. The court shall have the power to modify a provision of a will, trust, or other instrument that refers to the federal estate tax or generation-skipping transfer tax laws as described in subsection A to (i) conform the terms to the decedent's intention or (ii) achieve the decedent's tax objectives in a manner that is not contrary to the decedent's probable intention. The court may provide that its decision, including any decision to modify a provision of a will, trust, or other instrument, shall be effective as of the date of the decedent's death. A person who commences a proceeding under this section has the burdens of proof, by clear and convincing evidence, and persuasion in establishing the decedent's intention that the will, trust, or other instrument be construed in a manner other than as provided in subsection A.

C. For purposes of this section, interested persons may enter into a binding agreement to determine whether the decedent intended that the will, trust, or other instrument shall be construed in a manner other than as provided in subsection A, and to conform the terms of the will, trust, or other instrument to the decedent's intention without court approval as provided in subsection B. Any interested person may petition the court to approve the agreement or to determine whether all interested persons are parties to the agreement, either in person or by adequate representation where permitted by law, and whether the agreement contains terms the court could have properly approved. In the case of a trust, the agreement may be by nonjudicial settlement agreement pursuant to § 55-541.11. "Interested person" means any person whose consent is required in order to achieve a binding settlement were the settlement to be approved by the court.

§ 64.2-747. Creditor's claim against settlor.

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SB1052

59 A. Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

60 1. During the lifetime of the settlor, the property of a revocable trust is subject to claims of the
61 settlor's creditors.

62 2. With respect to an irrevocable trust, except to the extent otherwise provided in §§ 64.2-745.1 and
63 64.2-745.2, a creditor or assignee of the settlor may reach the maximum amount that can be distributed
64 to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of
65 a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable
66 to that settlor's contribution. A trustee's discretionary authority to pay directly or to reimburse the settlor
67 for any tax on trust income or principal that is payable by the settlor shall not be considered to be an
68 amount that can be distributed to or for the settlor's benefit, and a creditor or assignee of the settlor
69 shall not be entitled to reach any amount solely by reason of this discretionary authority.

70 3. After the death of a settlor, and subject to the settlor's right to direct the source from which
71 liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to
72 claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's
73 funeral and disposal of remains, and statutory allowances to a surviving spouse and children including
74 the family allowance, the right to exempt property, and the homestead allowance to the extent the
75 settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances. This section
76 shall not apply to life insurance proceeds under § 38.2-3122. No proceeding to subject a trustee, trust
77 assets, or distributees of such assets to such claims, costs, and expenses shall be commenced unless the
78 personal representative of the settlor has received a written demand by a surviving spouse, a creditor, or
79 one acting for a minor or dependent child of the settlor, and no proceeding shall be commenced later
80 than two years following the death of the settlor. This section shall not affect the right of a trustee to
81 make distributions required or permitted by the terms of the trust prior to being served with process in a
82 proceeding brought by the personal representative.

83 B. For purposes of this section:

84 1. During the period the power may be exercised, the holder of a power of withdrawal is treated in
85 the same manner as the settlor of a revocable trust to the extent of the property subject to the power;
86 and

87 2. Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust
88 only to the extent the value of the property affected by the lapse, release, or waiver exceeds the ~~greater~~
89 *greatest* of (i) the amount specified in § 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986,
90 ~~or~~ (ii) *the amount specified in § 2503(b) of the Internal Revenue Code of 1986, or* (iii) *two times the*
91 *amount specified in § 2503(b) of the Internal Revenue Code of 1986 if the donor was married at the*
92 *time of the transfer to which the power of withdrawal applies.*

93 3. *The assets in a trust that are attributable to a contribution to an inter vivos marital deduction*
94 *trust described in either § 2523(e) or (f) of the Internal Revenue Code of 1986, after the death of the*
95 *spouse of the settlor of the inter vivos marital deduction trust shall be deemed to have been contributed*
96 *by the settlor's spouse and not by the settlor.*

97 2. **That the provisions of this act shall be effective retroactively to October 1, 2012.**

98 3. **That an emergency exists and this act is in force from its passage.**