

# VIRGINIA ACTS OF ASSEMBLY -- 2018 SESSION

## CHAPTER 44

*An Act to amend and reenact §§ 64.2-412, 64.2-415, 64.2-416, and 64.2-418 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 64.2-404.1, relating to wills and revocable trusts; eliminating certain inconsistencies.*

[H 746]

Approved February 26, 2018

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

**1. That §§ 64.2-412, 64.2-415, 64.2-416, and 64.2-418 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 64.2-404.1 as follows:**

**§ 64.2-404.1. Reformation of will to correct mistakes or achieve decedent's tax objectives.**

*A. The court may reform the terms of a decedent's will, or any codicil thereto, even if unambiguous, to conform the terms to the decedent's intention if it is proved by clear and convincing evidence that both the decedent's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.*

*B. If shown by clear and convincing evidence, the court may modify the terms of a decedent's will to achieve the decedent's tax objectives in a manner that is not contrary to the decedent's probable intention.*

*C. Notice must be given and a person may represent and bind another person in proceedings under this section to the same extent that a person may represent and bind another person in proceedings brought under § 64.2-733 or 64.2-734 relating to trusts.*

*D. The remedies granted by this section are available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.*

*E. This section applies to all wills and codicils regardless of the date of their execution and all judicial proceedings regardless of when commenced, except that this section shall not apply to any judicial proceeding commenced before July 1, 2018, if the court finds that its application would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of the parties.*

**§ 64.2-412. Revocation by divorce or annulment; revival upon remarriage; no revocation by other change.**

*A. For the purposes of this section, the terms "revocable," "settlor," "trust instrument," and "trustee" have the same meanings as provided in § 64.2-701.*

*B. If, after making a will, the testator is divorced from the bond of matrimony or his marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse. Unless the will expressly provides otherwise, any provision conferring a general or special power of appointment on the former spouse or nominating the former spouse as executor, trustee, conservator, or guardian is also revoked.*

~~B.~~ *C. Property prevented from passing to a former spouse because of revocation pursuant to this section subsection B shall pass as if the former spouse failed to survive the testator. Provisions of a will conferring a power or office on the former spouse shall be interpreted as if the former spouse failed to survive the testator.*

~~C.~~ *D. Unless the trust instrument expressly provides otherwise, if a settlor creates a revocable trust and if, after such creation:*

*1. The settlor is divorced from the bond of matrimony or the settlor's marriage is annulled and the trust was revocable immediately before the divorce or annulment, then a provision of such revocable trust transferring property to or conferring any beneficial interest on the settlor's former spouse is revoked upon the divorce or the annulment of the settlor's marriage, and such property or beneficial interest shall be administered as if the former spouse failed to survive the divorce or annulment; or*

*2. An action is filed (i) for the divorce or annulment of the settlor's marriage to the settlor's spouse or for their legal separation or (ii) by either the settlor or the settlor's spouse for separate maintenance from the other, and the trust was revocable at the time of the filing, then a provision of such revocable trust conferring a power, including a power of appointment, on the spouse or nominating or appointing the spouse as a fiduciary, including trustee, trust director, conservator, or guardian, is revoked upon the filing, and such provision shall be interpreted as if the former spouse failed to survive the filing.*

*E. If the provisions of the will or revocable trust instrument are revoked solely pursuant to this section, and there is no subsequent will, trust revocation, other than under this section, or inconsistent codicil or amendment, the provisions shall be revived upon the testator's or settlor's remarriage to the*

former spouse. *Nothing in this section shall prevent a testator or settlor from transferring property to, conferring any beneficial interest on, conferring a power on, or nominating or appointing as a fiduciary a spouse or former spouse subsequent to a revocation under this section.*

*D. F. Except as provided in this section, no change of circumstances shall be deemed to revoke a will or trust instrument.*

*G. This section applies to trusts and trust provisions only to the extent the event causing the revocation under subsection D occurs on or after July 1, 2018.*

**§ 64.2-415. How certain trust provisions, bequests, and devises to be construed; nonademption in certain cases.**

A. As used in this section:

"Incapacitated" means impairment by reason of mental illness, intellectual disability, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

"Revocable," "settlor," "trust instrument," and "trustee" have the same meanings as provided in § 64.2-701.

B. Unless a contrary intention appears in the will or trust instrument:

1. A bequest or trust provision requiring distribution by reason of the settlor's death of specific securities, whether or not expressed in number of shares, shall include as much of the ~~bequeathed~~ securities as is part of the estate at the time or is or becomes part of the trust by reason of the testator's or settlor's death, any additional or other securities of the same entity owned by the testator or trustee by reason of action initiated by the entity, excluding any securities acquired by the exercise of purchase options, and any securities of another entity acquired with respect to the specific securities mentioned in the bequest or trust provision as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity;

2. A bequest ~~or~~, devise, or trust provision requiring distribution by reason of the settlor's death of specific property shall include the amount of any condemnation award for the taking of the property ~~which~~ that remains unpaid at death and any proceeds unpaid at death on fire and casualty insurance on the property; and

3. A bequest or devise of specific property shall, in addition to such property that remains part of the estate of the testator, be deemed to be a bequest of a pecuniary amount if such specific property, during the life of the testator and while he is under a disability, was sold by a conservator, guardian, or committee for the testator, or if proceeds of fire or casualty insurance as to such property are paid to the conservator, guardian, or committee for the testator. For purposes of this subdivision, the pecuniary amount shall be the net sale price or insurance proceeds, reduced by the sums received under subdivision 2. This subdivision shall not apply if, after the sale or casualty, it is adjudicated that the disability of the testator had ceased and the testator survived the adjudication by one year.

C. Unless a contrary intention appears in a testator's will or durable power of attorney, a bequest or devise of specific property shall, in addition to such property that remains part of the estate of the testator, be deemed to be a bequest of a pecuniary amount if such specific property, during the life of the testator and while he is incapacitated, was sold by an agent acting within the authority of a durable power of attorney for the testator, or if proceeds of fire or casualty insurance as to such property are paid to the agent. For purposes of this subsection, (i) the pecuniary amount shall be the net sale price or insurance proceeds, reduced by the sums received under subdivision B 2, (ii) no adjudication of the testator's incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator. This subsection shall not apply (a) if the agent's sale of the specific property or receipt of the insurance proceeds is thereafter ratified by the testator or (b) to a power of attorney limited to one or more specific purposes.

D. Unless a contrary intention appears in the will, a devise that would describe a leasehold estate, if the testator had no freehold estate that could be described by the devise, shall be construed to include such a leasehold estate.

E. Unless a contrary intention appears in the trust instrument, a provision requiring distribution of specific property by reason of the death of the settlor shall, in addition to such property that is or becomes part of the trust by reason of the settlor's death, be deemed to be a distribution of a pecuniary amount if, while the settlor was incapacitated, (i) such specific property was sold by the trustee or (ii) the proceeds of fire or casualty insurance as to such property were paid to the trustee. For purposes of this subsection, the pecuniary amount shall be the net sale price or insurance proceeds, reduced by the sums received under subdivision B 2. For purposes of this subsection, no adjudication of the settlor's incapacity before death is necessary. This subsection shall not apply if the trustee's sale of the specific property or receipt of the insurance proceeds is thereafter ratified by the settlor.

F. This section applies to trusts and trust provisions only to the extent the trust instrument or provision is revocable immediately before the settlor's death on or after July 1, 2018, and the distribution occurs by reason of the settlor's death and is of property that is or becomes part of the trust by reason of the settlor's death.

**§ 64.2-416. Devises, bequests, and distributions that fail; how to pass.**

A. *For the purposes of this section, the terms "revocable," "settlor," "trust instrument," and "trustee" have the same meanings as provided in § 64.2-701.*

B. Unless a contrary intention appears in the will or trust instrument, and except as provided in § 64.2-418:

1. If a devise ~~or~~, bequest, or distribution other than a residuary devise ~~or~~, bequest, or distribution fails for any reason, it shall become a part of the residue; and

2. If the residue is devised ~~or~~, bequeathed, or otherwise required to be distributed to two or more persons and the share of one fails for any reason, such share shall pass to the other residuary devisees ~~or~~, legatees, or beneficiaries in proportion to their interests in the residue.

~~B.~~ C. Notwithstanding the provisions of §§ 64.2-2604 and 64.2-2605 and unless a contrary intention appears in the will, if a testator makes a bequest, not exceeding the value of \$100, to a legatee and such legatee refuses to take possession of such bequest, then the bequest shall fail and becomes a part of the residue of the testator's estate.

D. *Subsection B applies to trusts and trust provisions only to the extent the trust instrument or provision is revocable immediately before the settlor's death on or after July 1, 2018, and the devise, bequest, or distribution occurs by reason of the settlor's death.*

**§ 64.2-418. When children or descendants of beneficiary to take estate or trust.**

A. *For the purposes of this section, the terms "revocable," "settlor," "trust instrument," and "trustee" have the same meanings as provided in § 64.2-701.*

B. Unless a contrary intention appears in the will or trust instrument, if a ~~devisee or legatee~~ beneficiary, including a ~~devisee or legatee~~ beneficiary under a class gift, is (i) a grandparent or a descendant of a grandparent of the testator or settlor and (ii) dead at the time of execution of the will or trust instrument or dead at the time of the testator's or settlor's death, the ~~children and the~~ descendants of the deceased ~~children of the deceased~~ ~~devisee or legatee~~ beneficiary who survive the testator or settlor take in the place of the deceased ~~devisee or legatee~~ beneficiary. The portion of the testator's estate or the trust that the deceased ~~devisee or legatee~~ beneficiary was to take shall be divided into as many equal shares as there are (a) surviving descendants in the closest degree of kinship to the deceased ~~devisee or legatee~~ beneficiary and (b) deceased descendants, if any, in the same degree of kinship to the deceased ~~devisee or legatee~~ beneficiary who left descendants surviving at the time of the testator's or settlor's death. One share shall pass to each such surviving descendant and one share shall pass per stirpes to such descendants of deceased descendants.

C. *This section applies to trusts and trust provisions only to the extent the trust instrument or provision is revocable immediately before the settlor's death on or after July 1, 2018, and the beneficiary would have taken by reason of the settlor's death if the beneficiary survived the settlor.*