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**HOUSE BILL NO. 754**

Offered January 10, 2018

Prefiled January 9, 2018

*A BILL to amend and reenact §§ 64.2-308.9 and 64.2-308.10 of the Code of Virginia, relating to elective share claim; calculation of the augmented estate.*

Patron—Leftwich

Referred to Committee for Courts of Justice

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

**1. That §§ 64.2-308.9 and 64.2-308.10 of the Code of Virginia are amended and reenacted as follows:**

**§ 64.2-308.9. Exclusions, valuation, and overlapping application.**

A. The value of any property is excluded from the decedent's non-probate transfers to others:

1. To the extent *that* the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or

2. If the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

B. 1. The value of any property otherwise included under § 64.2-308.5 ~~or~~, 64.2-308.6, *or* 64.2-308.7, and its income or proceeds, is excluded from the decedent's net probate estate ~~and~~, *decedent's* non-probate transfers to others, *and decedent's non-probate transfers to the surviving spouse* to the extent *that* such property was transferred to or for the benefit of the decedent, before or during the marriage to the surviving spouse, by gift, will, transfer in trust, intestate succession, or any other method or form of transfer to the extent *that* it was (i) transferred without full consideration in money or money's worth from a person other than the surviving spouse and (ii) maintained by the decedent as separate property.

2. The value of any property otherwise included under § 64.2-308.8, and its income or proceeds, is excluded from the surviving spouse's property and non-probate transfers to others to the extent *that* such property was transferred to or for the benefit of the surviving spouse, before or during the marriage to the decedent, by gift, will, transfer in trust, intestate succession, or any other method or form of transfer to the extent *that* it was (i) transferred without full consideration in money or money's worth from a person other than the decedent and (ii) maintained by the surviving spouse as separate property.

C. 1. The value of property:

1. Included in the augmented estate under § 64.2-308.5, 64.2-308.6, 64.2-308.7, or 64.2-308.8 is reduced in each category by enforceable claims against the included property; and

2. Includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system. Except as provided herein for interests passing to a surviving spouse, life estates and remainder interests are valued in the manner prescribed in Article 2 (§ 55- 269.1 et seq.) of Chapter 15 of Title 55 and deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1. In valuing partial and contingent interests passing to the surviving spouse, and beneficial interests in trust, the following special rules apply:

a. The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and if the terms of the trust meet the following requirements:

(1) During the lifetime of the surviving spouse, the trust is controlled by the surviving spouse or one or more trustees who are non-adverse parties;

(2) The trustee shall distribute to or for the benefit of the surviving spouse the entire net income of the trust at least annually;

(3) The trustee is permitted to distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines for the health, maintenance, and support of the surviving spouse; and

(4) In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.

b. To the extent that the partial or contingent interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation

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59 by reference to the mortality and annuity tables set forth in §§ 55-271 through 55-277, the contingency  
60 will be conclusively presumed to result in the lowest possible value passing to the surviving spouse.

61 c. To the extent that the valuation of a partial or contingent interest is dependent upon the life  
62 expectancy of the surviving spouse, that life expectancy shall be conclusively presumed to be no less  
63 than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death.

64 D. In case of overlapping application to the same property of the subsections or subdivisions of  
65 § 64.2-308.6, 64.2-308.7, or 64.2-308.8, the property is included in the augmented estate under the  
66 provision yielding the greatest value, and under only one overlapping provision if they all yield the  
67 same value.

68 **§ 64.2-308.10. Sources from which elective share payable.**

69 A. In a proceeding for an elective share, the following are applied first to satisfy the elective-share  
70 amount and to reduce or eliminate any contributions due from the decedent's probate estate and  
71 recipients of the decedent's non-probate transfers to others:

72 1. ~~The value of property~~ Amounts excluded from the augmented estate under ~~subsection A~~  
73 ~~subdivision B 1 of § 64.2-308.9; which passes or has that~~ passed to the surviving spouse *and amounts*  
74 *that passed to the surviving spouse at the decedent's death pursuant to the decedent's exercise of a*  
75 *power of appointment over property not included in the augmented estate;*

76 2. Amounts included in the augmented estate under § 64.2-308.5 that pass or have passed to the  
77 surviving spouse by testate or intestate succession and amounts included in the augmented estate under  
78 § 64.2-308.7; and

79 3. The marital property portion of amounts included in the augmented estate under § 64.2-308.8.

80 B. The marital property portion under subdivision A 3 is computed by multiplying the value of the  
81 amounts included in the augmented estate under § 64.2-308.8 by the percentage of the augmented estate  
82 set forth in the schedule in subsection B of § 64.2-308.4 appropriate to the length of time the spouse  
83 and the decedent were married to each other.

84 C. If, after the application of subsection A, the elective share amount is not fully satisfied, amounts  
85 included in the decedent's net probate estate, other than assets passing to the surviving spouse by testate  
86 or intestate succession, and in the decedent's non-probate transfers to others under subdivisions 1, 2, and  
87 3 b of § 64.2-308.6 are applied first to satisfy the unsatisfied balance of the elective share amount. The  
88 decedent's net probate estate and that portion of the decedent's non-probate transfers to others are so  
89 applied that liability for the unsatisfied balance of the elective share amount is apportioned among the  
90 recipients of the decedent's net probate estate and of that portion of the decedent's non-probate transfers  
91 to others in proportion to the value of their interests therein.

92 D. If, after the application of subsections A and C, the elective share amount is not fully satisfied,  
93 the remaining portion of the decedent's non-probate transfers to others is so applied that liability for the  
94 unsatisfied balance of the elective share amount is apportioned among the recipients of the remaining  
95 portion of the decedent's non-probate transfers to others in proportion to the value of their interests  
96 therein.

97 E. The unsatisfied balance of the elective share amount as determined under subsection C or D is  
98 treated as a general pecuniary bequest.