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SENATE BILL NO. 1423

Offered January 20, 2011

A BILL to amend and reenact § 64.1-62.4 of the Code of Virginia, relating to wills and trusts; formula clauses referring to federal estate tax and generation-skipping transfer tax laws; application.

Patron—Edwards

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That § 64.1-62.4 of the Code of Virginia is amended and reenacted as follows:**

§ 64.1-62.4. Certain formula clauses to be construed to refer to federal estate and generation-skipping transfer tax laws applicable to estates of decedents dying in 2010.

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 proceeding 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.

2. That an emergency exists and this act is in force from its passage.

INTRODUCED

SB1423