

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

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

4 [S 1052]

5 Approved

6 **Be it enacted by the General Assembly of Virginia:**7 **1. That §§ 64.2-432 and 64.2-747 of the Code of Virginia are amended and reenacted as follows:**8 **§ 64.2-432. Certain formula clauses to be construed to refer to federal estate and**
 9 **generation-skipping transfer tax laws applicable to estates of decedents dying after December 31,**
 10 **2009, and before January 1, 2011.**

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

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

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

54 **§ 64.2-747. Creditor's claim against settlor.**

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

56 1. During the lifetime of the settlor, the property of a revocable trust is subject to claims of the

57 settlor's creditors.

58 2. With respect to an irrevocable trust, except to the extent otherwise provided in §§ 64.2-745.1 and
59 64.2-745.2, a creditor or assignee of the settlor may reach the maximum amount that can be distributed
60 to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of
61 a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable
62 to that settlor's contribution. A trustee's discretionary authority to pay directly or to reimburse the settlor
63 for any tax on trust income or principal that is payable by the settlor shall not be considered to be an
64 amount that can be distributed to or for the settlor's benefit, and a creditor or assignee of the settlor
65 shall not be entitled to reach any amount solely by reason of this discretionary authority.

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

79 B. For purposes of this section:

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

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

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

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

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