Virginia Enacts Protective Law for Estate Tax "Formula" Provisions

Virginia's new law is designed to prevent unintended consequences of a person dying in 2010, while the federal estate tax law is in a one-year hiatus, with a Will or revocable trust premised on federal estate tax principles being applicable. If this happens, the decedent's Will and trust formula provisions are deemed to refer to the 2009 federal estate and GST law as they would have applied to a person dying on December 31, 2009. For example, if a Will provides for funding a Family Trust (aka credit shelter trust) under a formula provision referring to the maximum amount that can pass free of federal estate taxes, such clause would be interpreted as if the 2009 federal estate tax law were in effect. In general, this means that the funding of the Family Trust is limited to the $3.5 million estate tax exemption available in 2009, rather than being 100% of the estate in the absence of the federal estate tax being in effect.

For the new law to apply, the Will or trust must have a formula provision, and that provision must refer to one of certain words such as "estate tax exemption," "GST exemption," "marital deduction," or refer a section of the federal estate tax or GST law, or measure a share of the estate that can pass free of estate or GST tax. The new law does not apply if the Will or trust is modified after December 31, 2009, or if the Will or trust contemplates the possibility that the estate tax may not be in effect. Also, the executor or any interested beneficiary has 12 months to bring a court action to determine the decedent's intent regarding such formula.

> ***Most estate tax attorneys never envisioned that the federal estate tax would actually be repealed and prepared Wills and trusts accordingly. This new Virginia law attempts to fill in the gap now that the unexpected has occurred. Maryland and the District of Columbia are working on similar legislation.***

Virginia Governor McDonnell signed House Bill 755 into effect on April 7, 2010. It applies to Virginia residents dying between December 31, 2009 and January 1, 2011. If the federal law changes, then this bill is effective between December 31, 2009 and the effective date of the new federal rules.

Our recommendation is that clients review their estate plan for changes that may be needed and opportunities available based on the 2010 tax laws. While the new Virginia law may be helpful in some situations, it may be insufficient or detrimental in others.

Should you have any questions regarding any of the above, please do not hesitate to contact us.

VIRGINIA A. MCARTHUR
vmcarthur@mcarthurlaw.com

KATE M.H. KILBERG
kkilberg@mcarthurlaw.com

RICHARD S. FRANKLIN
rfranklin@mcarthurlaw.com

LUCY P. WEAVER
lweaver@mcarthurlaw.com