**A** **BILL**

TO AMEND SECTION 62‑2‑207, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DETERMINATION OF AN ELECTIVE SHARE OF A SPOUSE, SO AS TO CLARIFY THAT AN INTEREST AS A BENEFICIARY IN A TESTAMENTARY TRUST OR IN PROPERTY PASSING TO AN INTER VIVOS TRUST THROUGH THE DECEDENT’S WILL IS A BENEFICIAL INTEREST CHARGEABLE TO THE ELECTIVE SHARE; AND TO AMEND SECTION 62‑7‑401, AS AMENDED, RELATING TO CREATION OF A TRUST, SO AS TO PROVIDE FOR THE INCLUSION OF A SURVIVING SPOUSE’S BENEFICIAL INTERESTS IN TRUST PROPERTY IN CALCULATING THE ELECTIVE SHARE.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 62‑2‑207 of the 1976 Code, as last amended by Act 521 of 1990, is further amended to read:

“Section 62‑2‑207. (a) In the proceeding for an elective share, all property, ~~(~~including beneficial ~~interests)~~ interest, which passes or has passed to the surviving spouse under the decedent’s will or by intestacy, by ~~any~~ a homestead allowance, and by Section 62‑2‑401, or which would have passed to the spouse but was renounced, is applied first to satisfy the elective share and to reduce ~~any~~ contributions due from other recipients of transfers included in the probate estate. A beneficial interest that passes or has passed to a surviving spouse under the decedent’s will includes an interest as a beneficiary in a trust created by the decedent’s will or an interest as a beneficiary in property passing under the decedent’s will to an inter vivos trust created by the decedent. For purposes of this subsection, the value of the electing spouse’s beneficial interest in ~~any~~ property which ~~would qualify~~ qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, ~~shall~~ must be computed at the full value of ~~any such~~ the qualifying property. ~~(~~Qualifying for these purposes ~~to~~ must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property~~)~~.

(b) Remaining property of the probate estate is ~~so~~ applied so that liability for the balance of the elective share of the surviving spouse ~~shall be~~ is satisfied from the probate estate with devises abating in accordance with Section 62‑3‑902.”

SECTION 2. Section 62‑7‑401(c) of the 1976 Code, as last amended by Act 66 of 2005, is further amended to read:

“(c) A revocable inter vivos trust may be created either by declaration of trust or by a transfer of property and is not rendered invalid because the settler retains substantial control over the trust including, but not limited to, ~~(1)~~(i) a right of revocation, ~~(2)~~(ii) substantial beneficial interests in the trust, or ~~(3)~~(iii) the power to control investments or reinvestments. ~~Nothing herein, however, shall~~ This subsection does not prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse’s elective share rights ~~under Section 62‑2‑201 et seq~~ pursuant to Article 2, Title 62. A finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse’s elective share rights ~~under Section 62‑2‑201 et seq. shall~~ pursuant to Article 2, Title 62 does not render that revocable inter vivos trust invalid, but ~~would allow~~ allows inclusion of the trust assets as part of the probate estate of the settlor only for the purpose of calculating the elective share. In that event, the trust property that passes or has passed to the surviving spouse, including a beneficial interest of the surviving spouse in that trust property, must be applied first to satisfy the elective share and to reduce contributions due from other recipient of transfers including the probate estate, and ~~would make available~~ the trust assets are available for satisfaction of the elective share only to ~~the~~ any remaining extent necessary ~~under~~ pursuant to Section 62‑2‑207.”

SECTION 3. This act takes effect upon approval by the Governor.

‑‑‑‑XX‑‑‑‑